
MARITAL RAPE AND THE MYTH OF IMPLIED CONSENT: A LEGAL ANALYSIS IN THE INDIAN CONTEXT

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ABSTRACT

Marital rape is a criminal but legally unreceived crime in India, as the doctrine of implied consent is yet to protect husbands from being prosecuted. The law under Section 63 of the Bharatiya Nyaya Sanhita states that sexual intercourse by a husband with his wife, unless she happens to be a minor below the age of 18 years, is not considered rape. Such an exception on the basis of colonial legislation and patriarchal attitudes towards marriage is a violation of a woman's right to bodily dignity, autonomy, and equality. Even while the Supreme Court and other High Courts have traded arguments over the constitutional legitimacy of this exception, parliamentary intervention remains frozen, a function of the tension between old social institutions and new legal values. The current paper examines the legal, constitutional, and human rights dimensions of marital rape in India.

It criticizes the doctrine of implied consent based on feminist legal theory and judicial constructs, arguing that such a presumption is an insult to individual agency and consent and the idea of marriage equalling unequivocal consent is archaic. A comparative study of criminalizing marital rape jurisdictions like the United Kingdom, the United States, and South Africa illustrates how legal reforms can balance individual rights with public interests. This research also examines international conventions like CEDAW that mandate the legal recognition of marital rape as a violation of human rights. Through the deconstruction of social and legal justification for the exception of marital rape, the current paper invokes urgency in demanding reform. The current paper proposes revisions to the Bharatiya Nyaya Sanhita as well as larger measures in terms of awareness drives, support networks for victims, and gender-insensitive judge training. Marital rape has to be criminalized to ensure equality, freedom, and dignity as constitutional principles and to harmonize Indian law with international human rights norms.

Keywords: Law, marital rape, gender justice, feminist jurisprudence, individual agency, consent, criminal law reform.

I: INTRODUCTION

Rape in marriage, as it is a sexual act by a husband against his will on his wife, is the worst and most underreported of all the sexual offenses in the world. In India, it is compounded by an explicit legal gap—Exception 2 to Section 63 of the BNS, 2024—whereby husbands are legally allowed not to be prosecuted by the wives that they rape. This legal exception traces its roots back to an ancient and patriarchal view that marriage is irrevocable consent to sexual intercourse and hence excludes the need for ongoing, overt consent in a marriage relationship. This article examines the socio-legal implications of this exception and argues that a suitable legal reaction would be to uphold the sexual autonomy and bodily integrity of all women, married or unmarried.

The basis of the exception of marital rape is a pre-17th century rule of common law that English common lawyer Sir Matthew Hale invoked to say that by marriage, a woman grants enduring consent to sex with her husband, and cannot to be withdrawn.¹ The ancient rule that still pervades contemporary legal reasoning in India through the BNS. Section 63 of the BNS defines rape in explicit terms but has an exception to the extent that sexual intercourse by a man with his wife, wife not being below eighteen years of age, is not rape².

This court immunity not only trivializes the lived experience of millions of women but also legalizes an imbalance of power relation in marriage. Indian Constitutional Law mandatorily guarantees the right of equality under Article 14 and the right to life and personal liberty of the individual under Article 21.³ These rights encompass personal dignity, privacy, and over one's own body. But when the authority of married women is eroded by a piece of legislation making coerced intercourse within marriage incapable of prosecution, the message it sends is backwards: the female body is the husband's property upon marriage. The social consequences of this policy approach are very menacing.

Marital rape in most of India is normalized or relegated as an individual affair of no law-abiding significance. Cultural religious myth usually establishes marriage purity to be greater than self-will and maintains the doctrine that flight from sexual defilement is an affair of a woman's duty or fate. All this produces toxic silence on the issue. NFHS-5 results indicate that ever-married women aged 18-49, about 6.6% have been sexually assaulted by their husbands⁴. Even though

¹ Matthew Hale, *The History of the Pleas of the Crown* (1736)

² Bharatiya Nyaya Sanhita § 63, Exception 2 (2024).

³ India Const. arts. 14, 21.

⁴ Ministry of Health & Family Welfare, *National Family Health Survey (NFHS-5), 2019–21*, Gov't of India.

the number is significant, it would probably be a low estimate of the prevalence of the problem due to underreporting, stigma, and lack of knowledge of legal entitlements. Although India is a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and is requested by it to eliminate all violence against women in general and domestic violence in marriage in specific, India is not entirely compliant with its obligations.⁵

The United Nations and other human rights bodies have at all times pushed India to criminalize marital rape, indicating that the absence of such laws is contrary to the ideals of gender equality and human dignity.⁶ There have been some efforts by the Indian courts towards challenging the legal correctness of the marital rape exemption.

Risk of abuse also comes to all legislation and provisions and cannot be the ground for depriving justice to actual victims. Law against domestic violence, dowry, and sexual harassment at workplaces is also vulnerable to abuse by false allegations, but they are non-negotiable on their requirement. Furthermore, protecting the sanctity of marriage is no excuse for the habitual desecration of a woman's bodily autonomy. Marriage must never be used as a cover-up for abuse. It is also argued that the Protection of Women from Domestic Violence Act, 2005 adequately protects victims of marital rape. But the aforementioned law only offers civil protection in terms of protection orders, rights of residence, and maintenance.⁷

The aforementioned act does not criminalize the crime of sex without consent in marriage. There is thus a grave lacuna in India's criminal justice system.

Internationally, over 100 countries have made marital rape a crime.⁸ These legislative efforts have been combined primarily with social campaigns to bring about attitude changes in gender relationships and consent. Combined efforts—an amalgamation of legal reform, public education, and institution-level sensitization—will also need to be launched in India in order to curb this deeply embedded phenomenon.

II. HISTORICAL ORIGINS OF THE MARITAL RAPE EXEMPTION

The marital exception to rape has its roots in 18th-century English common law in Sir Matthew

⁵ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

⁶ G.A. Res. 48/104, *Declaration on the Elimination of Violence Against Women* (Dec. 20, 1993).

⁷ The Protection of Women from Domestic Violence Act, No. 43 of 2005, India Code (2005).

⁸ U.N. Women, *Global Database on Violence Against Women* (2024), <https://evaw-global-database.unwomen.org>.

Hale, who famously codified that "the husband cannot be guilty of a rape committed by himself upon his lawful wife."⁹ It was based on the legal fiction that when entering into the State of marriage, a woman irrevocably and irretrievably consented to sexual intercourse with her husband. Under such a regime, consent was once and for all, offered on the altar, and irreversible to boot. The upshot of this was merciless and in effect disastrous, literally putting a wife's body into a husband's hands, unseizable for desecration, abuse, or assault.

In India, this doctrine of implicit and irretrievable consent found its home in the colonial code and continues to influence Indian jurisprudence. The Indian Penal Code of 1860 was authored by Lord Macaulay and his Law Commission, chaired by him, under the British Raj. In accordance with Victorian values and the law of England during that time, the IPC had a Section 375 definition of rape and, more significantly, removed an exception to marital rape in Exception 2.¹⁰ The provision is particular to hold sexual intercourse by a man with his wife, the wife not being of some age prescribed, as not being rape. While courts have increased the age of such intercourse over time, the very basis of immunity provided to husbands has nonetheless remained untouched to this day. Even in the light of BNS and the amendments done, especially after rising awareness and activism against sexual assault, marital rape exception remains intact.

India has witnessed robust legal changes, particularly post-Mathura rape case (Tukaram v. State of Maharashtra), Nirbhaya gang rape in 2012, and the subsequent suggestion given by the Justice Verma Committee. All these cases have witnessed reinterpretation of rape and increased punishments for sexual crimes. But glaringly lacking in these changes is the repealing of Exception 2.¹¹ The legislative loophole passes over the root causes of the patriarchal attitude in Indian culture and law. Constitutionally, the marital rape exception is thin.

Article 14 of the Indian Constitution inscribes equality before the law and equal protection under the law. Article 15 prohibits discrimination based on grounds of sex, etc., and Article 21 protects the right to life and personal liberty of the individual whose right of dignity and control over one's own body is an integral part.¹² The exception provided under Exception 2 of Section 63 creates a discriminatory and irrational distinction between unmarried women and married women and denies married women equal protection of the law against sexual assault. Judicial

⁹ Hale, *supra* note 1.

¹⁰ Indian Penal Code § 375, Exception 2 (1860).

¹¹ Justice Verma Committee Report, Government of India (2013).

¹² India Const. arts. 14, 15 & 21.

immunity of husbands constitutes a violence exerted by the State and a written breach constitutional value of justice.

In *Independent Thought v. Union of India*, the Supreme Court of India gave a narrow construction to the exception to cover minor wives, and decided sexual intercourse with a wife less than 18 years of age to be rape.¹³ While the ruling was progressive, it did not resolve the question of marital rape of major women.

The court did, however, recognize the tension between the spousal rape exception and constitutional values of equality and dignity and thus challenge by future courts is possible. Practical and cultural grounds are the reasons most widely have against criminalizing spousal rape. Their basis is that criminalizing spousal rape would destabilize marriage and expose it to law abuse.

This sort of reasoning prioritises the sanctity of marriage over rights and dignity. Marriage in a new constitutional democracy can and ought not to be used as an instrument of criminality. The latent potential for mischief in any enforcement is to be met by procedural protection and not withhold legal sanction at any price. One of them is that remedies are already present under the Protection of Women from Domestic Violence Act, 2005 (PWDVA). Though the PWDVA specifies sexual abuse as domestic violence, it is maintenance and protection law and not criminalization of rape within marriage.¹⁴

The criminal irresponsibility of marital rape underestimates the gravity of the offense and not only just to survivors but also to others. The globe has witnessed more than 100 countries enacting laws on criminalization and legalization of marital rape, even in religiously and culturally diverse countries like South Africa, the United Kingdom, and Nepal. All these nations have understood that marriage cannot be taken as the basis of presumption of consent, and sexual violence is always a crime regardless of the relationship between the perpetrator and victim.

This inaction from India is not due to technicalities of the law but due to insensitivity and political unwillingness.¹⁵ Legal sanctioning of marital rape is not a hollow symbolic approval; it's a practical statement of repetition of women's agency, dignity, and freedom from violence. Legal reform must come before and after efforts are made at sensitizing the machinery of law

¹³ *Independent Thought v. Union of India*, (2017) 10 S.C.C. 800 (India).

¹⁴ The Protection of Women from Domestic Violence Act *supra* 7.

¹⁵ U.N. Women, *supra* note 8.

enforcement, the judiciary, doctors, and society at large. Educational programs, gender-sensitive sensitization training, and survivor protection are all part of a consolidated strategy against sexual violence in marriage. India's marital rape exception is generally a misplaced regime of colonial patriarchy and traditional assumption of morality.

To continue perpetuating exception 2 of Section 63 is to refuse even the bare minimum protection of law to married women and to make violence legal within one of society's most intimate relationships. There needs to be a sense on the part of the parliament that this injustice needs to be acted upon and for it to move at lightning pace to repeal the marital rape exception. It is only then that India can begin to do justice to its constitutional and moral duty of imparting justice, equality, and dignity to all.

III. THE DOCTRINE OF IMPLIED CONSENT IN MARRIAGE

The implied consent law of marriage has classically relied upon law as well as cultural tradition. Assumed to be behind the belief is that by being placed into the marital status, the woman has given permanently and irreversibly her consent to sexual relations through union. The doctrine, despite its well-rooted establishment in traditional as well as ancient culture, is actually violative of the law of autonomy. In contemporary law and morality, consent is possible only on demand, sense, and willingly. The marriage argument, necessarily entailing consent, degrades the doctrines of autonomy of personality and mastery over one's body. It is a reminder from the past that still stands even in all legal systems, the Indian legal system not excluded, where Section 63 exception to marital rape remains valid. This one-way assumption of consent remains oblivious to the sexual diversity of sex in marriage and the variance with which pressure, manipulation, and power differential may be used in them.

Marriages are not necessarily symmetrical transactions of mutual understanding and respect; most frequently, they are replete with differential relations of power, emotional domination, and even outright physical brutality. The presence of domestic violence laws in most nations, including India, is a testament to the reality that fewer marital relationships are grounded in consent and respect. Legal fiction of implied consent also works to maintain the contention that sexual refusal by a wife is abnormal or something on which the husband's pressure is greater. This fallacy overlooks women's lives as being full of physical and emotional tension and also supports gender inequality in marriage. Arguably, the most profound impact of this fiction of law is its influence on society's understanding of consent to marriage.

In leading to the conclusion that a wife cannot but deny sex to her husband, the law is

transmitting a profoundly misguided message: a woman's control over her own body falls second to an expectation of being a wife. It contradicts the world's human right to bodily integrity both under the Universal Declaration of Human Rights and the laws of the majority of countries, including India. Article 21 of the Indian Constitution ensures every individual their life and liberty, including the right to live with dignity and the right to choose what one does with one's body. The marital rape exception, nevertheless, continues to give husbands immunity from prosecution for marital sexual assault and thereby denies wives full protection under such constitutional provisions. Second, the presumption of consent places victims of marital rape in a situation where they feel that they are unable to say no.

For most women, the idea that they cannot say no to sex within marriage is ingrained in them since early childhood. Society and culture both tend to think that the institution of marriage is holy, so they put the responsibility of a woman towards her husband above her will and rights. Such forced nature of marriage in sexuality is legalized by the law because the law does not look at the violence in the situation where one of the husbands, typically the husband, puts his power over the other. Therefore, then, the majority of women hardly term what they endure as rape. This lack of criminalization of marital rape by the law thus makes it even more complex with victims not receiving any relief and being stuck in the web of violence. Marital rape usually happens as a result of prolonged years of physical and mental torture under which the victim is not secure enough to complain or withhold herself because either she is too scared or under mental control.

The wife can be stuck behind marriage walls, upon which one cannot jump because she is financially dependent, socially threatened by rejection, or scared of children. The power asymmetry of most marriages, particularly in patriarchal societies, will most likely compel women to submit sexually even without their consent. The doctrine of implied consent *per se* does not pay attention to these realities and has the misleading impression that marital sex will always be consensual regardless of circumstances. Human rights activists and attorneys have condemned the ground of implied consent since it does not consider such power relationships.

The theory of consent, as it exists today in juridical structures, must be capable of being withdrawn at any time, regardless of what type of relationship between parties it is. Consent can never be one-and-done; it is constantly on the move, changing every two seconds, which requires ongoing communication and respect. This awareness of consent is at the heart of safeguarding women's rights in marriage and is an issue to be investigated by law. Marital rape

exception is not an esoteric legal issue but an issue of domestic concern to millions of women who silently bear it. India's marital rape debate still reflects the conflict between old ideas of marriage and new ideas of individual rights.

Law rather than protecting women ends up supporting women's subordination by giving perpetrators of marital rape a free hand to act. Legal fiction of implied consent also promotes a culture of impunity.¹⁶ When a woman's right to withhold her sex in marriage is not recognised in the law, it is not just the women who are affected—it is society.

Unless marital rape is criminalized, what is being said is that it is acceptable for there to be sex violence in the home, women's bodies are owned by another person, and a wife's sexuality is owned by the husband. This creates a culture of silence that is defined by shame and victim-blaming, where women feel they must endure abuse in an attempt to salvage their marriages and families. Perpetuation of the exception of marital rape within the BNS is a sign of a deeply entrenched perception of men's property rights over women's bodies even in marriage and patriarchal control. The conclusions of this fiction extend far beyond the bounds of high-end weddings. It has implications in the larger cultural and societal perception of gender equality and women's rights.

This understanding of women as inferior to men, particularly within marriage, permeates every sector of society, from school to work to politics. This is a culture where gender violence is the rule and where women remain mute when they are being battered.

Finally, the assumption of implied consent to wed is an extremely dissatisfying legal fiction that does not address the reality of coercive and abusive marriage relationships. In upholding the marital rape exemption, the law serves to legitimize sexual assault in marriage, to empower gender subordination, and to negate consent.

The exemption must be revoked so that married and single women will be capable of owning their bodies and being masters of their own sexual lives. Only then can we begin to dismantle the legal and cultural frameworks which recreate sexual violence and create a society where women's rights are upheld.

IV. CONSTITUTIONAL AND HUMAN RIGHTS PERSPECTIVE

The Indian Constitution provides citizens with a bundle of fundamental rights, with great

¹⁶ Ministry of Health & Family Welfare, *National Family Health Survey (NFHS-5), 2019–21*, Gov't of India.

importance given to equality, non-discrimination, and freedom of the people. The guarantees are located in Articles 14, 15, and 21, all of which are important in protecting the rights of the people against arbitrary action by the state and social injustice. Article 14 grants the right of equality, treating all persons equally in the eyes of the law, whereas Article 15 forbids discrimination on the grounds of religion, race, caste, sex, or place of birth. Article 21, safeguarding the right to life and liberty, is perhaps the most exhaustive provision in the Indian Constitution that safeguards the personal freedom of the individual. In marital rape, the continued existence of the exception of marital rape in Section 63 of the Bharatiya Nyaya Sanhita (BNS) is a flagrant denial of these constitutional rights, particularly of a woman's bodily dignity and autonomy.¹⁷

The exception of marital rape discriminates on the ground of marriage between wedded women and unmarried women by exempting the husbands from criminal sanctions for rape. This exception draws a difference in treatment of sexual offences depending on whether the victim was or was not married and thereby offends the policy of equality under Article 14. In India, although an unmarried woman rape victim can file a case, a married woman cannot be accorded equal security even if she consented or did not consent. This discriminatory inequality, in addition to offending the promises of equality in the Constitution, also conveys the negative message that a wife's consent is inferior to the obligations and duties of matrimony. The very foundation of equality before the law is destroyed by the ancient juristic fiction that a woman's consent, once given in marriage, is presumed to be irrevocable, even if given in violation or under coercion.¹⁸

Further, the marital rape exception is an obvious violation of the right to personal liberty of a woman under Article 21 of the Indian Constitution. Personal freedom encompasses a wide range of rights, ranging from the right to live with dignity to the right over one's own body and the right to safeguard oneself from harm, all of which are infringed on by the marital rape exception. The Indian Supreme Court has interpreted Article 21 in a chain of landmark cases in a liberal manner and has established the right of individuals to choose their private and personal lives without interference from others or the state. But by denying the married woman's right to withdraw consent to sexual intercourse within marriage, the law de facto

¹⁷ Indian Const. *supra* note 12.

¹⁸ Bharatiya Nyaya Sanhita *supra* note 2.

sanctions desecration of a woman's body by her husband and thus violation of her right of personal liberty.

In *Suchita Srivastava v. Chandigarh Administration*, the Supreme Court established the significance of reproductive rights as part of individual freedom under Article 21. The court was considering a woman's right to decide regarding her pregnancy, i.e., make a choice whether to or not to undergo an abortion, even without the consent of her husband. The court held that upholding a woman's freedom to make independent choices on her body proves that the most fundamental principle is that individual freedom comprises a woman's sovereignty over her body, including reproductive and sexual options. If one grants a woman the right of choice over whether or not to bear an infant to the time of its birth, then, under reason, one is compelled to grant the woman control over her sexuality as well, including the right to withhold marital sex. Denial of such a right to the institution of marriage is not only a violation of personal freedom, but an unconstitutional denial of dignity and equality.¹⁹

The autonomy and dignity of the body have been well established by Indian courts as a component of the right to life under Article 21. In *K.S. Puttaswamy v. Union of India*, privacy was well described to be a Constitutional Fundamental Right by the Supreme Court, observing that decisions regarding one's life and body are protected by this right. The Court elucidated that the body is the core of human dignity and any law and practice which profanes this body eliminates the very basis for freedom of an individual. Withholding sex from married women implies that the law is in consensus with imposing patriarchal construction upon marriage in such a manner as the wife's body belongs to the husband. This denial of autonomy is inconsistent with the doctrine of equality and dignity on which constitutional protection to citizens must be based.²⁰

India is a party to several conventions and treaties all over the world, upholding the principles of equality and non-discrimination, i.e., gender-based violence. The most significant of these is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), to which India became a signatory in 1993. CEDAW requires state parties to eradicate all forms of discrimination against women, even within the family and marital relationship. Article 16 of the Convention is equality of women and men in marriage and in family life, which requests states to guarantee equal rights and duties of both spouses in

¹⁹ *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 S.C.C. 1 (India).

²⁰ *K.S. Puttaswamy v. Union of India*, (2017) 10 S.C.C. 1 (India).

marriage. The right encompasses freedom to give consent freely to sexual intercourse, a right withheld by the exclusion of marital rape from Indian law. CEDAW's broad and general mandate to eliminate discrimination encompasses the case of marital rape, and India's failure to update its laws so that marital rape can be criminalized violates its international obligation under the treaty.²¹

CEDAW also highlights protection from gender-based violence recognized to include marital rape. The Committee on Elimination of Discrimination Against Women, responsible for monitoring states' compliance with CEDAW, has been systematically calling upon the states to address sexual violence by husbands as an act of discrimination and human rights violation against women. India is thus in denial of its obligations under CEDAW to eradicate violence against women in the family and guarantee women's full application of equal rights and bodily choice by failing to criminalize rape within marriage. This disintegration of legally protected sexual assault of wedded women in marriage is not a local failing but an international human rights failing that stains India's commitment to gender equality.⁷

Further, India is also obligated by the United Nations General Assembly Declaration on the Convention on the Elimination of All Forms of Discrimination Against Women Elimination of Violence against Women (1993), requesting all member states to make efforts to eradicate all forms of violence against women, including sexual violence within marriage. According to the Declaration, violence against women constitutes a violation of women's human rights and the prevention and punishment of it lies with the state. India's failure to enact law criminalizing marital rape is a real negation of such international covenants because it is looking the other way at the cultural acceptance of marital rape and denying all international attempts at stopping domestic violence.⁸

India's ongoing retention of the marital rape exception is also indicative of its overall failure to take women's rights seriously in policy and law. While there has been a significant growth in women's education, employment, and politics, India still falls behind when it comes to addressing gender violence in a full-fledged capacity. The presence of the marital rape exception, for example, is proof of how deeply patriarchal ideas have seeped into legal codes, even those of new democracies. This failure to restructure Section 63 of the BNS is indicative of a wider social failure to put these deep-seated assumptions about where women are supposed

²¹ Convention on the Elimination of All Forms of Discrimination Against Women *supra* note 5.

to be in society and marriage, and sexual agency in general.²²

V. COMPARATIVE JURISPRUDENCE

The view that marriage ipso facto constitutes an implied consent to intercourse has steadily been debunked as societies and legal cultures grow more modern. Many years ago, most systems of law, such as the United Kingdom, the United States, South Africa, Canada, and Australia, were under an illusion that it was not possible for a way in which the husband could ever be prosecuted for raping his wife. This was partly founded on prehistoric common law principles, such as those by Sir Matthew Hale, which had the effect of making marriage an implied consent to intercourse. Gargantuan legal reform everywhere in the past few decades has taken place since there was a trend towards acknowledgment of the truth that marriage doesn't always translate into an irreversible or perpetual consent. These law reforms have been historic in confirming the sexual autonomy, bodily integrity, and sexual violence-free status of women even under the institution of marriage. Marital rape has been criminalized by various states, and reform of the law along this axis has helped to demonstrate to the world at large the capacity of the law to adapt to tolerating changes so as to ensure protection of more human rights and understand what is consent.

5.1. United Kingdom: The Landmark Case *R v. R*

The English landmark case of *R v. R* (1991) was a landmark step towards increased legal consciousness regarding marital rape. According to previous English common law, it was established that a husband could not be prosecuted for raping his wife. The basis of this provision was that a woman, in marrying a man, had necessarily granted implied consent to sexual intercourse with him during the marriage. This assumption had been based on deeply ingrained patriarchal notions regarding the character of marriage relationship and the entitlement of ownership of a husband to his wife's body. In *R v. R*, the House of Lords refused to believe that a husband could never be convicted of raping his wife. The court held that the marriage was not ongoing consent and hence that a husband could be charged with raping his wife as anyone else could be charged with rape. The de facto ruling of the court eliminated the marital rape exception and set the precedent of freely given and revocable consent at all times. The case of *R v. R* was a pioneering case in the context of defining women's autonomy within marriage and redefining the legal understanding of marital rights.²³ It was a milestone in the

²² The Protection of Women from Domestic Violence Act *supra* note 7.

²³ *R v. R*, [1991] 1 A.C. 599 (H.L.) (Eng.).

centuries-long battle to gain women's rights and gender equality, where marriage could no longer be invoked as a defense to conceal sexual violence.

5.2. United States: Marital Rape Legally Authorized Nationally

In the United States, criminalization of marital rape roughly paralleled that of the United Kingdom. Under American law, where the law had traditionally been based on common law principles for several decades, husbands were exempted from prosecution for raping wives. The exception was based on the assumed fact that marriage constituted an implied consent to intercourse. However, the feminist movement, attorneys, and pressure groups started challenging this in the 1970s. They advocated that marital rape was a crime in good faith and must be dealt with as such by the law. Marital rape was made a criminal offence for the first time in the state of Nebraska in 1976, and it resulted in a legal reform wave across the country. Marital rape had been criminalized in all the 50 states in the 1990s, even though there was varying legal tradition in this crime.²⁴ Some states removed defences commonly used by husbands, including excuses for wife's sexual past or wife's "duty" to have sex that justified rape. In other states, the offense of marital rape was first established but with fewer victim-protection statutes. Today, all 50 states in the United States acknowledge marital rape, and the legal reforms have shielded more victims. Although there is still some state-to-state variation in the punishment for marital rape, criminalizing marital rape in the United States is part of a larger cultural acceptance of sexual autonomy and human rights that recognizes that consent is not necessarily given in marriage and can be withdrawn at any time.

5.3. South Africa: Legal Reform in the Post-Apartheid Era

In South Africa, criminalization of marital rape was a new legal change after the fall of the apartheid state and commencement of democratic rule in 1994. In apartheid, the South African law, similar to most nations, had the exemption of marital rape under which husbands were free to engage in sex with wives without placing themselves at risk of criminal prosecution even if the wife resisted.

With the shift of the nation towards democracy in its governance, however, South Africa launched an agenda of legal reform to provide protection for gender-based violence as well as for women's rights. The South African government enacted the Domestic Violence Act in 1993, and among the provisions enacted thereunder was one that criminalized marriage rape

²⁴ Nebraska v. State, 1976.

specifically.²⁵ The legislation acknowledged that sexual violence within marriage was just as bad as sexual violence outside of marriage and that women were entitled to their bodies and to saying no to sex. The reform was one among many other reforms being instituted by the South African government with a view to fighting for the rights of women and bringing violence in all forms to an end. Marital rape criminalization in South Africa was a historic step toward equality between the genders and women's rights being implemented within marriage. It was also a case of a worldwide trend toward increased awareness of the right of sexual autonomy as a human right independent of marital status.

5.4. Canada: Abolition of the Marital Rape Exception

Another nation that took a significant step toward the abolition of the marital rape exception in the latter decades of the 20th century was Canada. Canada, like its pre-1983 law, also followed the age-old common law rule of excluding conviction of the husband for raping his wife.

But this exception was increasingly challenged by feminist activists and women's rights organizations, who argued that any such legal principle was outdated, discriminatory, and invaded the inherent rights of women. In 1983, the Canadian Criminal Code was revised to render marital rape legally criminalized, and the exception was removed from law.²⁶ The revision firmly stated that consent will be freely given in all sexuality, either marriages or otherwise. The restructuring of legislation was a result of public awareness of marital rape and demand for legal reforms to safeguard women against sexual abuses in marriage. Eliminating the marital rape exception in Canada was a light of hope for women's rights and gender equality. It assisted in providing legal protection for married women as equivalent to that afforded unmarried women and in restating the maxim that marriage does not mean there is a built-in right to sex.

5.5. Australia: State-Level Reform and the Abolition of Marital Rape

In Australia, incremental abolition of the marital rape exception was a statewide process, with states and territories passing to criminalize marital rape at varying points in time. New South Wales led the criminalization of marital rape, making it a crime in 1981. The other states and territories gradually followed in the subsequent two decades, the final state being Western Australia, which removed the exemption in 1992.²⁷ Removal of the exemption for marital rape

²⁵ Domestic Violence Act 116 of 1993 (S. Afr.).

²⁶ Criminal Code, R.S.C. 1985, c. C-46 (Can.).

²⁷ Sexual Offences Act, 1991 (Australia).

was part of a worldwide trend in law and society towards the acceptance of women's rights and sexual violence in all its forms.

As in other nations, Australian change was a result of feminist activism and increasing general awareness that sexual assault on a wife was a serious crime that ought to be so characterized in law.

Legal change formed part of a global movement toward a campaign of defense of women's sexual autonomy and to have marital rape prosecuted on the same footing as other forms of rape. Australia's legal reforms in this respect have served to entrench the principle that a woman's consent forms a part of any sexual encounter and that marriage cannot preclude a woman's right to say no to sex. Conclusion: Evolution of Legal Systems Criminalization of marital rape within the United Kingdom, the United States, South Africa, Canada, and Australia is a broad pattern of legal evolution throughout the world, that marriage does not imply consent to sexual intercourse. These developments have been pivotal to promoting gender equality and safeguarding women's sexual and bodily autonomy.

They also refer to the ability of legal systems to evolve with changing social norms and awareness of human rights.

As these examples reveal, legal systems can and must change to accommodate contemporary understanding of consent and sexual violence. The movement of international reform towards the abolition of marital rape exceptions to criminal law is a foundation of further advancement in the promotion of women's rights and affirmation of their dignity and autonomy within marriage.

VI. SOCIO-LEGAL IMPLICATIONS IN INDIA

Criminalisation of marital rape in India is a controversial and complex issue with deep cultural origins stemming from the social expectation, conventional culture, and the ancient sanctity conventionally given to marriage. India's criminal legislation continues to retain an exception for prosecuting husband-rapists on Exception 2 of Section 63 of the Bharatiya Nyaya Sanhita, 2024. The fact-based exception for assuming marriage carries with it the notion of ever-perpetual consent and fact-based patriarchal ideology assuming that impossibility to establish the husband having raped the wife were anchored on centuries-old patriarchal orders. But recent courtroom trials and sex scandals brought the issue on public agendas, and, campaigners started calling for criminalization of marital rape to be enacted in the law. Calls for legal change

have been most rigorously fought by hard-line elements within society who dread that criminalizing marital rape will weaken the family, shame the marriage institution, and lead to a flood of false allegations. While such concerns are valid, they must be weighed against inherent women's human rights to protection against violence, coercion, and abuse and maintain their dignity, personal security, and bodily integrity.

Some also criticized criminalization of marital rape on the basis that marriage should not be violated and legal acceptance of marital rape would replace the institution of marriage as the foundation of the family. Such a defense is premised on the old assumptions regarding women's roles in marriage and the family in which wives are supposed to submit themselves to the authority of their husbands and provide domestic and sexual services. Sex within marriage in this perspective is an incommutable privacy, not to be disclosed to public scrutiny or legal intrusion. Its supporters also fear that criminalization of rape in marriage would result in greater numbers of wives falsely accusing husbands, thereby bringing discredit to the family and causing husbands irreparable damage, especially where the accusations are made in the heat of argument or during the time of divorce. This argument leans on the presumption that aggrieved spouses can use anti-marital rape law as a means of reprisal, making domestic legal cases more difficult. These arguments, as far as they are not so entirely unsubstantiated, do not see the bigger picture and disregard the severe implications of legalising sexual violence inside marriage.

It must be observed, of course, that both these issues—issues about destroying the family and regarding revenge—depend upon myth and misunderstanding of the consequences of sexual violence. To begin with, the implication that formal legal affirmation of marital rape would destroy the very foundations of marriage completely misinterprets the nature of marital relationships. Marriage, being any kind of relationship at all, must have its foundation in respect, trust, and consent. By recognizing sexual freedom as a universal human right, legal definition of marital rape would strengthen the marriage union by defining the rights of both partners. Far from weakening marriage, such a legislative change would help to keep it intact by promoting good, respectful, and equal relationships. Consent is the basis of all relationships, including marriage, and in its absence, abuse, coercion, and betrayal of trust.

Additionally, the claims of marital rape false accusations ought to be approached with utmost care and in the open glare of society's common experience. Even though false allegations in any court proceeding must be treated seriously and with gravity, evidence shows that the

prevalence of false allegations in rape cases of sexual violence is extremely uncommon. Facts and research have consistently shown that sexual violence, particularly in marriage, is still vastly underreported. In fact, based on research, a significant percentage of Indian married women have reported experiencing forced sex, typically as part of broader patterns of violence within the home. In an unsuccessful effort to seek some thought, as per the National Family Health Survey (NFHS-5), enormous percentages of women throughout India acknowledge sexual or physical abuse by their husbands, yet an extremely minuscule portion ever report incidents to official or legal agencies. Underreporting creates social stigma, economic dependency, and insufficient support systems. Marital rape should be criminalized as a step towards providing women a legal remedy, enabling women to report such incidences and achieve justice. The law would then act as a deterrent and provide legal remedy for women victims of abusive marriage. Indian public sentiment also trivializes marital rape and considers it to be a matter of privacy and not a crime.

Attitudes drive marital sexual violence and the cycle of violence. Legalizing rape within marriage would have the effect of reversing very deeply ingrained patriarchal assumptions to support violence against women. Law reforms would make a very powerful statement that women's bodies are theirs, and that no one—whether married or not—is owed any sort of control of their agency. Making marital rape a crime would be legislating into existence that women are entitled to refuse sex, and any sex without consent would be a violation of their basic human rights. It would do a great deal for gender equality and impunity for rape coming to an end in India. In addition, criminalizing marital rape would place India on a level with international standards of universal human rights, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), whereby state parties are obligated to make every effort to eliminate discrimination against women in all spheres of life everywhere in the world, including in the family and in marriage.

India's continued refusal to criminalize marital rape is not only denial of women's rights under its own Constitution—namely, right to equality, life, and liberty under Articles 14, 15, and 21—but also of its international obligations. Law reform must close the gap between India's human rights obligations and Indian women's lives. This legalisation of marital rape would also strengthen the notion of sexual violence in a better way, with greater focus on the fact that rape is not just physical violence but an act in which one is violated against his/her will to the same degree as one's own personal freedom, one's right of self-determination and one's dignity are concerned.

This will also be a step towards de-commodification of violence against women because gender violence is inherently founded on social/cultural norms through which women have come to be perceived as less than men. Criminalization of marital rape will help eradicate such derogatory cultural norms and will also foster a more equitable society, wherein the rights of women are respected and protected. Alongside legal recognition, public consciousness and support systems for the victims, all these will have to be put in practice.

Legal change alone is insufficient to change habitual social attitudes and provide proper care to victims. Continuous efforts in the form of education, sensitization, formulation of victim care groups will have to be adopted to empower women to provide testimonies without the fear of attack or ostracism. Training of the police officers dealing with the cases of marital rape in the right and sensitive manner and providing legal assistance and counselling centres to the victims would be the need of the hour as well. Lastly, criminalization of marital rape in India is not law reform but a move towards women's dignity, body autonomy, and marital equality.

Arguments against resistance to ensuring family stability and vulnerability to false reporting are sound; however, such arguments need to be presented keeping in mind the necessity of freeing women from sex violence and violent sex within marriage. Marital rape would not only make India true to its international and constitutional obligations, but would also make women empowered to exercise their rights and seek justice. This transformation would be a part of the larger fight for sexual equality and human rights to a more just and humane world in which the rights of all people—whether male or female, married or unmarried—are guaranteed.

VII. RECOMMENDATIONS FOR LEGAL REFORM

The issue of marital rape in India is one that is very deep-seated in legal and social settings. In spite of growing awareness and demands for law reform, marital rape continues to be an underreported and underrated sexual assault in India. Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita (BNS), granting immunity to husbands in cases of marital rape, is one such controversial matter. Repeal of this section and other ancillary reforms is the most significant means of achieving substantive change. This article shall talk about a couple of the recommendations for law changes, e.g., overturning Exception 2 to Section 63, introduction of the whole definition of consent, judicial officer and other staff sensitization, creation of survivor support systems, and mass media campaigns so people can understand about marital rape and consent.

Rape is dealt under the Bharatiya Nyaya Sanhita (BNS) under Section 63 and defines conditions of sexual intercourse against will. Exception 2 of Section 63 is an exception to definition due to the exclusion of husbands because it is detailed that a man cannot be tried for raping his wife unless she is under 18 years old. This is only one of the patriarchal presuppositions about marriage, where the woman belonged to her husband in the past and, on marriage, her sexual autonomy disregarded. Revocation of Exception 2 is the barest legislative change necessary to address the issue of marital rape.

The perpetuation of this exception to the basic rights of women like the right of equality under Article 14 of the Constitution, the right of non-discrimination under Article 15, and the right of life and liberty under Article 21²⁸. Implementation of this act promotes gendered violence by giving husbands full autonomy to compel their wives to go through sexual intercourse by force unwillingly with no room for law. Repealing Exception 2, law will be made to conform to constitutional provision and international human rights norms, especially those articulated in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Repeal of the exception would also constitute a strong reaffirmation of India's commitment to ending gender-based violence against women and strengthening women's dignity and agency. Explicit definition of consent besides the repeal of Exception 2 to Section 63 of the BNS, what is required is that the legal definition of consent be reworded so as to make it inclusive, positive, and continuous.

The definition of consent in Section 63 of the BNS is restrictive in nature. It only considers if the consent was "given voluntarily" irrespective of other critical parameters such as if the consent was given voluntarily, whether it is revocable at any point in time, or whether it was expressed clearly and unambiguously.²⁹ The narrow definition does not acknowledge the type of human relationships and under what circumstances consent can be forced, manipulated, or taken away. A more accurate definition would involve a positive, ongoing, and revocable concept of consent.

This would involve that consent is to be expressed positively, may be withdrawn at any moment throughout the sex, and may not be assumed from silence or absence of resistance. This has been the trend elsewhere, including in the United Kingdom and Canada, where law clearly

²⁸ Indian Const. *supra* note 12.

²⁹ Bharatiya Nyaya Sanhita *supra* note 2.

enunciates that the consent has to be voluntary and ongoing during the sex act³⁰. In taking a more modern and victim-centred definition of consent, India would be bringing its law abreast of the modern understanding of sexual autonomy and human rights. Sensitisation and Training of Judicial Officers, Police and Medical Personnel.

Among the main impediments to enforcing anti-marital rape law are ignorance and insensitivity on the part of the main players such as judges, police, and health workers. Up to now, they have gone on, most often mistakenly, thinking that marital rape doesn't or isn't as serious as other rapes. These strongly held assumptions allow underreporting of marital rape and victimization of its victims.

There should be sophisticated and mandatory sensitization and training of judges, police officers, and health workers to ensure that this becomes a reality.

Judges, police, and doctors should be made aware of how to comprehend the phenomenon of marital rape, the psychological and emotional trauma the victim will experience, as well as the legal and medical consequences of handling such cases. Judicial officers must be educated to try cases of marital rape free from cultural bias and assumption. Policemen and policewomen must be trained to handle complaints of marital rape effectively, dealing with the survivors with dignity and sensitivity. Doctors and medical professionals must be educated in documentation and evidence collection of sexual violence and equipped to offer trauma-informed services to the survivors. Support System for Survivors in addition to legal changes, support systems for survivors of marital rape also need to be established and reinforced.

The majority of victims of rape within marriage experience tremendous difficulties such as economic reliance on the perpetrators, fear of revenge, and stigma in reporting sexual violence in marriage.

In a bid to help the survivors overcome all these, there is a need to come up with a range of support services that range from legal aid, counselling, refuge, and other kinds of assistance. Legal aid needs to be offered so that legal representation can be obtained by the victims of marital rape and navigate the usually complicated and intimidating legal system. There need to be specially designated safe houses and shelters to give temporary shelter to women fleeing the savagery of their homes, with security and safety amenities.

³⁰ Criminal Code, R.S.C. 1985, c. C-46, § 273.1 (Can.); R v. R [1992] 1 A.C. 599 (H.L.) (appeal taken from Eng.)

Second, there needs to be counselling services to empower survivors to overcome the trauma of marital rape and reconstruct their lives. These support systems need to be embedded in a national policy with well-stated guidelines for implementation and funds to make them functional. Public Awareness Campaigns Altering the social attitudes towards sexual violence, consent, and marriage is one of the most important factors in preventing marital rape. In most societies, in general, there is a perception that within marriage, sex is a husband's privilege and that it is the wife's duty to sexually satisfy her husband.³¹ This is the social opinion that makes marital rape invisible and creates the impression also that a woman cannot refuse sex within marriage.

Public education campaigns are central to the de-mystification of such perilous myths and to the instilling of a culture of respect and consent in all forms of relationships.

These campaigns ought to give members of the general public information regarding the prevalence of marital rape, the significance of consent, and the meaning of sexual violence in marriage as per the law.

The mass media, schools, nongovernmental organizations, and religious institutions can be effective in passing these messages. By targeting both women and men, the campaigns will be able to help alter attitudes towards a more balanced definition of relationships and sexual independence. Secondly, the campaigns will be required to help convince the survivors to report instances of marital rape. Shame and stigma also discourage the majority of survivors from reporting, and public campaigns can serve to remove such a barrier to render the prevailing atmosphere friendly and encourage survivors to report.

Education to the public on what legal remedy a survivor may seek and also what assistance a survivor may obtain is also essential in making a survivor feel comfortable to seek justice and healing. Conclusion Legalization of marital rape and shattering the institutional and cultural barriers behind it is a lengthy and long process of change. Revoking Exception 2 to Section 63 BNS, recasting consent, sensitizing the major stakeholders, strengthening support systems, and launching public awareness campaigns are steps that need to be taken in imparting justice to victims of marital rape.

³¹ Breakthrough India, *Bell Bajao! Campaign*, <https://inbreakthrough.org/campaigns/bell-bajao/> (last visited Apr. 22, 2025).

These changes not only bring Indian laws in consonance with global human rights standards but also project a strong message that gender violence in any of its forms is no longer acceptable.

In the process, India can construct a legal and social space wherein women are empowered to enjoy sexual autonomy and live free from coercion and violence.

VIII. CONCLUSION

The continued legal immunity for marital rape in India perpetuates a deeply ingrained cultural and legal myth: that marriage implicitly grants consent to sexual intercourse. This myth undermines the fundamental human rights of married women, including their autonomy, dignity, and bodily integrity. By shielding husbands from prosecution under Section 63 of the Bharatiya Nyaya Sanhita (BNS), the law effectively denies married women the right to refuse sex, regardless of the circumstances. The idea that marriage itself implies consent ignores the complexities of individual consent and the right of every person, regardless of their marital status, to make decisions about their body. It disregards the fact that sexual activity, whether within marriage or outside it, should be based on mutual agreement and respect.

Legal immunity for marital rape also contravenes the principles of equality and justice enshrined in the Indian Constitution. Articles 14 and 15 guarantee equality before the law and prohibit discrimination on the grounds of sex, among other factors. By treating married women as second-class citizens who do not have the same rights as unmarried women in terms of sexual autonomy, the Indian legal system perpetuates a form of institutionalized gender inequality. Further, Article 21, which guarantees the right to life and personal liberty, extends to the right of individuals to live with dignity and free from violence. Denying married women the legal protection against rape is a violation of this right, as it forces them to endure sexual violence under the guise of marital duty. The presence of this exemption in the BNS reflects an outdated and patriarchal worldview, where women are often treated as property or subordinates within marriage, their rights over their own bodies secondary to the perceived rights of their husbands.

Contrary to the argument put forth by opponents of reform, criminalizing marital rape would not destabilize the institution of marriage. On the contrary, it would enhance the institution by ensuring that it is built on mutual respect, trust, and understanding. Marriage should not be a context where one partner has the unquestioned right to violate the other's bodily autonomy. Rather, it should be a partnership where both individuals are free to express their desires and

limits, with their consent being central to any sexual encounter. Recognizing marital rape as a crime would strengthen marriage by ensuring that both partners are held to the same legal and moral standards, promoting equality within the relationship.

Legal reform to criminalize marital rape is, therefore, not an attack on marriage but a necessary step towards making marriage a more equitable and humane institution. Such a reform would send a strong message that the law respects the sexual autonomy of all individuals, regardless of their marital status. It would also serve as a powerful tool for shifting societal attitudes, ensuring that women are no longer seen as passive objects whose consent is presumed but must instead be treated as active agents with the right to make choices about their own bodies. The path to such reform is essential for advancing gender equality in India and creating a legal framework that protects the dignity and autonomy of all individuals, especially women.