

---

## THE MYTH OF IMPLIED CONSENT: MARRIAGE AND RIGHT TO REFUSE

---

Zalak Chande, KES Shri Jayantilal H Patel Law College, India

### ABSTRACT

The current paper discusses the controversial clause called the "marital rape exception" in the Indian legislation. Although there has been remarkable progress achieved across the world regarding the issue of sexual rights, it is important to mention that India remains one of 36 countries not to have made marital rape a crime in full. In the context of this paper, the issue discussed is the critique of the outdated notion of "implied consent," according to which marriage equals lifelong sexual permission. This work analyses how the mentioned exception to section 375, subsection 2 of the Indian Penal Code (IPC) and Bharatiya Nyaya Sanhita (BNS) causes the violation of constitutional norms, inflicts immense psychological damage, and destroys marital trust. It focuses on the analysis of the key landmark decisions such as *Independent Thought v. Union of India* and other controversial court decisions. Finally, the paper aims to propose legal measures that can help cope with systemic violence in marital rape.

**Keywords:** Marital Rape, Consent, Section 375, Bodily Autonomy, Constitutional Rights, Gender Violence, India.

## I. INTRODUCTION

Marriage is often described as a sacred bond which is built on trust, companionship, respect and love. In India marriage is no less than a festival, people literally spend fifty percent of their net worth on marriage and promise to stand with each other in joy and hardship. Yet behind the Walls of many houses lies darkness, pain which is either denied, ignored or silenced in the name of love. When a person marries another person, they expect them to be their safe spaces but this is not always true. For many people the reality is far different from expectations, for countless women, marriage does not become a space of safety and affection, but a place where their bodily autonomy, dignity, and consent are repeatedly violated.

Marital rape is one of the hidden forms of violence not because it is rare but because it occurs in that institution of society which is considered to be private and untouchable. Patriarchy has made everyone believe that it is the moral responsibility of a wife to submit to their husbands irrespective of her consent. It is deeply rooted in traditions for centuries. It is so normalised that the victims of such a heinous crime are either told to ignore what happened to them or more often claimed as husbands right.

The silence around this crime doesn't exist because of absence of the crime but because of the social stigma society has created. Often when such crimes are committed and are out in public. The first that happens is "Victim Blaming". And the judgement doesn't start from the world outside but the judgement begins from home. The actual number of marital rapes will never come out because half of them won't be reported due to these judgements.

Daughters are often said to stay silent on these matters and reconcile with their husbands and that is how exactly the number of these incidents increases not because an action can't be taken but because the crime which has been committed is denied.

What exactly marital rape is? Marital rape is the act of sexual intercourse between the spouses where the consent of one spouse is absent and the other is expected to submit forcefully because apparently marriage gave the free will for the forced intercourse.

Since time immemorial, the sacrosanctity of marriage has been considered a form of protection of the private family free from governmental intrusion. However, when the cloak of the institution of marriage is turned into a shield under which violence takes place, the law

should come into effect. Under many systems, the idea of "marital rape" was seen to be an oxymoron under the doctrine of "coverture," according to which the legal existence of a woman became identical to her husband after marriage. As described by Sir Matthew Hale in the 18th century, the doctrine stated that "by this contract the wife hath given up herself in this kind unto her husband, which she cannot retract" (Hale, 1736).

It is worth noting that by 2026, the entire world legal scenario will have undergone an entirely new transformation. There will be recognition in most countries around the globe that the concept of consent in relation to physical and sexual autonomy does not necessarily end in marriage. However, India will remain one of the few exceptions. According to global sources of legal information, there will be 36 countries where legal exceptions exist in relation to marital rape. One such country is India, which allows that any sexual intercourse with a man's wife above the age of fifteen (eighteen through judicial intervention) is not rape world outside but the judgements begin from home. The actual number of marital rapes will never come out because half of them won't be reported due to these judgements.

## **II. THE MYTH OF ENDLESS CONSENT: BODILY AUTONOMY VS. MARRIAGE**

The justification for the marital rape exception generally revolves around the need to uphold the "sanctity of marriage." Opponents claim that outlawing marital rape would ruin the family structure and result in the government's intrusion into the bedroom. But this stance fails to take into account the cardinal rule that marriage does not automatically negate the right to consent. Consent is not an event that is agreed upon only once at the point of marriage but rather a process that should always remain an ongoing choice.

### **ACTIVE CONSENT AS AN ESSENTIAL RIGHT**

According to the constitution in the contemporary era, the right to refuse is inherently tied to Article 21 of the Constitution of India that grants citizens their rights to life and liberty. As per the decision taken by the Supreme Court, this includes the right to privacy and autonomy of one's body. If a woman is made to have intercourse by her own husband, it would constitute a gross violation of her dignity in the same way it would, had the offender been a stranger. In making this differentiation, the law breaches Article 14 of equality.

### **THE EROSION OF TRUST AND DIGNITY**

A healthy marriage is rooted in the principles of respect and trust. The occurrence of rape in a marriage is more than just a physical violation; it is an egregious violation of trust. Victims often speak of a "quiet violence" that continues due to the government's unwillingness to accept their plight (Lacuna Magazine, 2024). Such neglect by the government only serves to further isolate the victim, implying that her right to her own body takes second place to her marital role.

NFHS-5 Findings: According to statistics up to 2021, an estimated 18% of married women in India stated that they were unable to refuse their husbands. In addition, there was a high incidence of sexual violence committed by either the husband or the former husband (NFHS5, 2021; Record of Law).

According to NFHS-5 survey data, sexual violence in marriage is common, much more common than society recognizes. Around 82% of sexual violence survivors mentioned that they had been sexually abused by either their current or former husband (Equality Now, 2024). The statistics contradict the idea that the family unit is a "safe place" that needs to be protected by criminal law.

### **III. INDIAN LEGAL CONTEXT: SECTION 375 AND 36-COUNTRY MINORITY**

India is part of an ever-decreasing minority of nations that hold on to the exemption clause for marital rape. Over 150 nations around the world recognize marital rape in some way or another. Still, India finds itself among 36 countries wherein marital rape can be considered legal under certain conditions (ScienceDirect, 2025; The Leaflet, 2024).

#### **1. Section 375, Exception 2**

Under Section 375 of the Indian Penal Code 1860, rape is defined. Several scenarios are included where sexual intercourse can be categorized as rape, including when done against the woman's will and without her consent. There is an important exclusion clause, however:

Exception 2. Rape committed through sexual intercourse or sexual acts committed by a husband with his own wife, the wife not being less than fifteen years old, does not constitute rape."

In the case of *Independent Thought v. Union of India* (2017), the Supreme Court interpreted

"fifteen years" as "eighteen years" to shield minor wives, but the primary exception of "adult wives" stands as it is. This anomaly ensures that while every other man in the world cannot commit rape against this woman, her husband can.

## **2. Global Status and the Chart of Criminalization**

Below is a representation of the global criminalization status of marital rape. It highlights the need for reform, especially when some nations still retain exceptions.

Figure 1: Global Criminalization Status of Marital Rape (2024-2026 Data Analysis). Legend: India is among the few countries in the non-criminalized list.

The fact that this statute still stands in India is explained by the Indian government through the pretext of "cultural values." As has been noted in various petitions filed recently, "no cultural value overrides the basic right of a person's life with dignity and bodily autonomy" (Harvard Law School Journals, 2019).

## **IV. JUDICIAL DISCOURSE: MAJOR CASE LAWS**

There have been several judicial attacks on Exception 2 in India. These two particular cases illustrate the attempt to make Exception 2 unconstitutional.

### **Case Study 1: Independent Thought v. Union of India (2017)**

The Ruling: In this case, the Supreme Court of India took up the inconsistency in which there is an age of consent of 18 for sexual intercourse, while Exception 2 permits having sexual intercourse with the child bride who is between 15 and 18 years old. The Court ruled that the exception discriminated against the girl child and violated her rights. Essentially, Exception 2 was amended to include 18 years of age (Delhi Law Academy, 2025).

Significance: The Supreme Court gave a significant ruling by deciding that marriage did not deprive the child of her right against being raped. This is what made it possible to build a case for women not being deprived of their rights when married.

### **Case Study 2: RIT Foundation v. Union of India (2022 - Delhi HC Split Verdict)**

Background: This case dealt directly with the constitutionality of Exception 2 for adult

women. It resulted in a split verdict from the Delhi High Court.

Rajiv Shukla J.: Claimed that the exception was unconstitutional as "withdrawal of consent at any point in time is an essential component of woman's right to life and liberty." It also violated Article 14, 15, and 21.

C. Hari Shankar J.: Disagreed with Justice Rajiv and contended that "criminalizing marital rape should ideally be the responsibility of the legislature." He stated that "sexual expectation" was inherent in a marriage. He was concerned about creating a new offense which was beyond the court's purview.

The division of opinion in the RIT Foundation case clearly demonstrates the ideological differences in the Indian legal system. It is currently sub judice in the Supreme Court, which will determine whether or not the marital rape exception comes to an end (SC Observer, 2026).

## **V. EFFECTS OF MARITAL RAPE ON THE MARITAL RELATIONSHIP**

In contrast to the idea that the criminalization of the phenomenon will lead to destruction of marriages, the marital rape in itself is the cause of destruction. In some cases, the traumatic effect of spousal sexual abuse may be more severe and last longer than that of stranger rape due to constant presence of an aggressor.

### **1. Psychological Disorders Including PTSD**

Sufferers often develop PTSD, depression, and anxiety problems. The sensation of being "caged" inside a marriage when one does not have control over one's own body results in a serious loss of self-respect. According to scientific research, victims of marital rape get insufficient support from the authorities and medical professionals since the phenomenon is culturally acceptable (Intech Open, 2024).

### **2. Inability to Maintain Dignity and Independence**

The concept of "quiet violence" refers to the fact that marital rape denies women any personal freedom or independence. It leads to the idea that the law does not offer any help to the victims and only supports patriarchy, implying that women must remain submissive wives in their

relationships. Such an approach violates one of the main principles of modern relationships between partners.

### **3. Physical Aftermaths**

Marital rape may cause not only psychological damage but also health complications such as physical injuries, problems related to fertility, and the development of sexually transmitted diseases. The constant presence of an offender near the victim allows for the high frequency of acts of violence in comparison with other cases of rape (vamnet, 2024).

## **VI. PREVENTIVE MEASURES: LEGAL AND SOCIAL CHANGE.**

Marital rape needs to be addressed through an integrated response involving far more than legislation.

### **1.Legislation: Removing Exception 2**

First, it needs to ensure the complete criminalization of marital rape by removing Exception 2 from Section 375 of the IPC (or its equivalent section in BNS). The criminalization sends a clear message about the intolerance of the government towards violence that occurs within marriage (Verdicly, 2026).

### **2.Gender Sensitization and Education**

Legislation alone will not do; there needs to be societal change as well. Gender sensitization workshops need to be organized among the police force, the judiciary, as well as among doctors and other healthcare professionals. Such measures need to target misconceptions regarding consent within marriage. In addition, education about consent as well as active consent needs to be taught in schools and colleges regarding consent within marriage. In addition, education about consent as well as active consent needs to be taught in schools and colleges (PMC, 2024).

### **3.Social Control**

A community-oriented strategy involving social control could prove useful here. It involves making it difficult for people to engage in domestic violence when there are other people

around, especially their family members. Encouraging bystander intervention or establishing guardians of consent among communities can help achieve the purpose (PMC, 2024).

## **VII. BREAKING FREE FROM THE CRISIS: ASSISTANCE AND RECONCILIATION**

The process of rehabilitation becomes challenging due to social prejudices and mental obstacles for the affected individuals. Building a well-structured system of assistance will help victims recover from the ordeal of marital rape.

### **1. Rape Crisis Centre's (RCCs)**

These institutions create a conducive atmosphere in which victims have access to counseling, legal advice, and medical treatment. Empirical research suggests that survivors regard RCCs as the most efficient means of overcoming the trauma associated with sexual abuse (CDC, 2024). In India, there should be more of these facilities dedicated to helping spousal victims.

### **2. Psychological Assistance and Rehabilitation**

It is imperative to develop individualized and tailored therapies to meet the unique psychological requirements of marital rape survivors. In contrast to stranger rapes, spousal rapes involve the victim's intimate partner. Therefore, therapy should concentrate on rebuilding the survivor's self-respect and trust in others (Matec Conferences, 2021).

3. Economic independence is essential for women to break away from their husbands' abuse. It should be incorporated into strategies that aim at overcoming marital rape. Women who receive vocational education and financial assistance can leave their abusive relationships without worrying about poverty.

## **VIII. CONCLUSION**

Exception 2 in Section 375 of the Indian Penal Code gives a free pass to men whose actions would otherwise be criminal – and that cannot stand in today's modern world. The idea that the relationship between a married man and woman is a "permanent license" for sex flies in the face of the basic principles of human dignity and human rights which should govern any country seeking true democracy. Being on the list of countries with this exception as one of

just 36 others does not make us special – it makes us backwards.

As seen from the information presented in this article , marital rape is an extremely violent form of abuse which tears at the very core of the institution it claims to support. True marital "sanctity" is impossible where spouses are regarded as unequal members of the union without the absolute freedom to consent to or reject sexual relations. The right to choose whether or not one engages in intercourse is crucial to a functional relationship. To move forward, India needs to unite behind a common cause and take the necessary steps in changing society.

## REFERENCES

- CDC. (2024). Sexual Violence Prevention Resource for Action. Centers for Disease Control and Prevention. Retrieved from [https://www.cdc.gov/violenceprevention/media/pdf/resources-for-action/SV-Prevention-Resource\\_508.pdf](https://www.cdc.gov/violenceprevention/media/pdf/resources-for-action/SV-Prevention-Resource_508.pdf)
- Delhi Law Academy. (2025). Supreme Court on Marital Rape Exception: Key Ruling in Independent Thought. Retrieved from <https://www.delhilawacademy.com/sc-marital-rape/>
- Equality Now. (2024). A ruling on marital rape in India is coming up: Why the world is watching. Retrieved from <https://equalitynow.org/news/news-and-insights/a-rulingonmaritalrape-in-india-is-coming-up-heres-why-you-should-be-watching-closely/>
- Harvard Law School Journals. (2019). Marital Rape: A Non-criminalized Crime in India. Harvard Human Rights Journal. Retrieved from <https://journals.law.harvard.edu/hrj/2019/01/marital-rape-a-non-criminalized-crime-in-india/>
- Hale, M. (1736). *The History of the Pleas of the Crown*. (Original work published 1736).
- Independent Thought v. Union of India, (2017) 10 SCC 800.
- IntechOpen. (2024). Legislative, Cultural, and Individual Impacts on Marital Rape Survivors. Retrieved from <https://www.intechopen.com/chapters/1204565>
- Lacuna Magazine. (2024). The women facing India's marital rape crisis. Retrieved from <https://lacuna.org.uk/justice/indias-marital-rape-crisis/>
- Matec Conferences. (2021). Psychosocial implications of marital rape. SIMPRO 2021. Retrieved from [https://www.matec-conferences.org/articles/matecconf/pdf/2021/11/matecconf\\_simpro21\\_10004.pdf](https://www.matec-conferences.org/articles/matecconf/pdf/2021/11/matecconf_simpro21_10004.pdf)
- NFHS-5. (2021). National Family Health Survey (NFHS-5) 2019-21: India Report.
- International Institute for Population Sciences (IIPS).
- PMC. (2024). Guardians of consent: enhancing rape prevention through social control.

PubMed Central. Retrieved from <https://pmc.ncbi.nlm.nih.gov/articles/PMC11672103/>

Record of Law. (2026). Marital Rape in India: A Legal and Social Crisis. Retrieved from <https://recordoflaw.in/martial-rape-in-india-a-legal-and-a-social-crisis/>

RIT Foundation v. Union of India, W.P.(C) 284/2015 (Delhi High Court).

SC Observer. (2026). Challenge to the Marital Rape Exception: Hrishikesh Sahoo v. State of Karnataka. Retrieved from <https://www.scobserver.in/cases/challenge-to-the-marital-rapeexception-hrishikesh-sahoo-v-state-of-karnataka/>

ScienceDirect. (2025). A scoping review on exploring the urgency of criminalising marital rape within the Indian context. Retrieved from

<https://www.sciencedirect.com/science/article/pii/S259029112500422X>

The Leaflet. (2024). Only 36 Countries Have Not Criminalised Marital Rape, India Is One of Them. Retrieved from <https://theleaflet.in/analysis/only-36-countries-have-not-criminalisedmarital-rape-india-is-one-of-them>

VAWnet. (2024). Marital Rape: New Research and Directions. Retrieved from <https://vawnet.org/material/marital-rape-new-research-and-directions>

Verdicly. (2026). Marital Rape in India: The Exception that Defies Equality. Retrieved from <https://www.verdicly.com/articles/marital-rape-exception-defies-equality-2026>