
CRIMINALISING MARITAL RAPE: A COMPARATIVE ANALYSIS OF LEGAL FRAMEWORKS ACROSS GLOBAL SOUTH COUNTRIES

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ABSTRACT

Criminalising marital rape remains one of the most contested questions in family and criminal law across Global South countries. This article examines how different legal systems respond to non-consensual sexual relations within marriage and why some jurisdictions have reformed their laws while others continue to retain marital exemptions. Using a comparative and doctrinal approach, the paper analyses selected countries including India, South Africa, Kenya, Nepal, Bangladesh, Nigeria, Ghana, Rwanda, and Pakistan. It argues that the present legal position in many countries is shaped by colonial-era ideas of irrevocable marital consent, which continue to influence modern criminal laws despite changing constitutional values. The article further shows that jurisdictions which have criminalised marital rape more effectively have done so through a combination of constitutional reform, judicial interpretation, legislative change, and stronger recognition of bodily autonomy and gender equality. At the same time, countries that retain immunity often face resistance from social, religious, and political structures. The paper concludes that marriage cannot be treated as a waiver of consent and that legal systems must move towards clear criminalisation, victim-friendly procedures, and stronger constitutional protection of dignity, privacy, and equality.

Keywords: Marital rape, criminalisation, comparative law, consent, gender equality, bodily autonomy, Global South

INTRODUCTION

Whether a husband can be found guilty of raping his wife is one of the most contentious issues in contemporary legal systems across the Global South. This legal dilemma, which stems from colonial era presumptions about marital consent, continues to challenge contemporary notions of gender equality and bodily autonomy. Many nations in the Global South struggle to modify their domestic legal systems to conform to these evolving standards, even though international human rights law clearly recognizes sexual violence in marriage as a violation of fundamental rights.

The historical foundation for the exemption from marital rape is Sir Matthew Hale's 17th-century assertion that "the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."¹ This doctrine, which was introduced through colonial legal systems, integrated the concept of irrevocable sexual consent in marriage into the legal framework of many jurisdictions in the Global South.

This legal inheritance has resulted in a fundamental conflict between the newly emerging constitutional principles of equality and human dignity and the inherited colonial doctrines. Latin American, Asian, and African countries are having difficulty striking a balance between contemporary ideas of consent and body autonomy and traditional marriage ideals.

This study examines two key questions: first, what factors have influenced the different approaches taken by different countries in the Global South to amending their laws against marital rape? Second, how have constitutional courts impacted or opposed legal changes in the absence of legislative reform? This study's comparative analysis of a few selected jurisdictions, including Bangladesh, Nepal, Kenya, Nigeria, South Africa, and India, reveals three distinct legal paradigms that have evolved in addressing marital rape.

THEORETICAL FOUNDATIONS AND LEGAL TRANSPLANTATION

The Colonial Legacy of Marital Immunity

Rather than coming from local legal traditions, the legal concept of marital rape exemption was

¹ Sir Matthew Hale, *The History of the Pleas of the Crown* (Professional Books 1971) vol 1, 629.

brought to the Global South as part of colonial legal transplantation. English common law was the model for criminal law systems in all former British colonies, with its deeply rooted patriarchal assumptions about marriage and sexuality.² This transplantation mechanism went beyond normal mechanical copying and involved complex interactions with preexisting religious and customary legal systems.

Many African countries traditional marriage systems had their own perspective on consent in sexual relations and marriage. But, colonial administrators often misinterpreted or deliberately distorted these systems to fit European legal conceptions. Because of this, the legal system was a hybrid that neither accurately reflected indigenous values nor fully embraced progressive European legal developments.

In South Asian contexts, complexity was further increased by the interaction between personal law and colonial law. The complex provisions pertaining to marital rights and obligations found in Hindu and Islamic legal traditions were often in conflict with the different conceptual framework imposed by the colonial criminal law system.³

Post-Colonial Legal Evolution

As recently independent nations started creating their constitutional frameworks, the post-colonial era presented new difficulties. Post-colonial constitutions' inclusion of equality clauses and fundamental rights raised the possibility of clashes with long-standing criminal law theories. While maintaining colonial-era criminal codes that exempted marital rape, nations like Bangladesh, Pakistan, and India have included robust equality provisions in their constitutions.⁴

The conflict between the constitution and criminal law intensified as feminist legal scholars and women's rights activists began to call into question the logical consistency of legal systems that simultaneously guaranteed gender equality and upheld gender-discriminatory criminal law provisions.

² Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993) 95-110.

³ Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (Glasshouse Press 2005) 89-115.

⁴ Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press 1966) 87-106.

Comparative Legal Methodology

Using a functional comparative methodology, this study examines how different legal systems address the basic problem of non-consensual sexual relations within marriages.⁵ Instead of focusing only on the wording of laws, the approach considers the full legal ecosystem, which includes social context, court rulings, enforcement tactics, and constitutional provisions.

The functional approach posits that countries with similar colonial legal legacies have developed strikingly different responses to the problem of marital rape. These disparities cannot be explained by legal doctrine alone; rather, an examination of the institutional, political, and social factors influencing legal reform efforts is required.

CONSTITUTIONAL FRAMEWORKS AND FUNDAMENTAL RIGHTS

Progressive Constitutional Interpretation: The South African Model

South Africa is the good comprehensive example of a constitutional amendment to address marital rape. With its clear principles guarantees of gender equality and human dignity, the 1996 post-apartheid Constitution directly challenged long-standing criminal law doctrines. The Constitutional Court has interpreted the fundamental rights clauses extensively to protect against all forms of gender-based violence.

South Africa used a comprehensive approach to address power disparities in relationships when draughting the Sexual Offences and Related Matters Amendment Act of 2007 by making marital rape a crime and redefining consent. As stated in the Act, consent is defined as "voluntary or uncoerced agreement" and cannot be assumed from marriage or other relationships.

The South African strategy serves as an example of how constitutional change can move extensive legal reform. A framework for contesting discriminatory legal provisions throughout the legal system has been made available by the Constitutional Court's emphasis on substantive equality as opposed to formal equality.⁶

⁵ Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law* (3rd edn, Oxford University Press 1998) 34-47.

⁶ Catherine Albertyn and Beth Goldblatt, 'Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality' (1998) 14 *South African Journal on Human Rights* 248, 275-280.

Constitutional Tensions: The Indian Experience

Another example is India, where constitutional guarantees of equality coexist with criminal law clauses that protect the exemption from marital rape. The Articles 14 (equality before the law), 15 (prohibition of sex-based discrimination), and 21 (right to life and personal liberty) of the constitution appear to provide a constitutional foundation for challenging the exemption from marital rape.⁷

The Supreme Court, has taken a cautious stance in this case, regularly highlighting judicial restraint and deference to legislative judgment. The Court has acknowledged the significance of consent in marriage in cases involving marital privacy and sexual autonomy, but it hasn't ruled that the marital rape exemption is unconstitutional.

The Delhi High Court's decision in *RIT Foundation v. Union of India* demonstrates a more progressive stance, noting that "the exemption for marital rape stems from the doctrine that married women are property of their husbands" and raising concerns about whether such reasoning can pass constitutional muster.⁸ However, this decision has been contested, and the Supreme Court has yet to provide a definitive constitutional interpretation.

Judges must find a balance between evolving constitutional principles and enduring social values, and this conflict in Indian jurisprudence is a reflection of more general problems with constitutional interpretation. The Court's reluctance to take strong positions on marital rape in a multicultural society with strong traditional values may be the result of concerns about social backlash and institutional legitimacy.

Judges have to strike a balance between changing constitutional principles and long-standing social values, and this conflict in Indian jurisprudence reflects broader issues with constitutional interpretation. In a multicultural society with strong traditional values, the Court may be reluctant to take strong stances on marital rape due to worries about institutional legitimacy and social backlash.

Emerging Constitutional Jurisprudence: Kenya and Nepal

Kenya and Nepal are two examples of countries where constitutional change has enabled

⁷ Constitution of India, 1950, arts 14, 15, 21.

⁸ *RIT Foundation v Union of India* (2022) WP(C) 284/2015 (Delhi HC).

progressive legal reform pertaining to marital rape. Kenya's 2010 Constitution contains extensive provisions for gender equality and the right to be free from violence.⁹ The Sexual Offences Act of 2006 made marital rape a crime, and subsequent constitutional amendments have strengthened this stance.

Nepal's approach has been particularly notable since the 2015 Constitution, which includes explicit provisions on gender equality and women's rights. The Supreme Court of Nepal claims that these provisions, which are part of broader calls for gender justice, require that marital rape be made a crime.

These illustrations show how constitutional renewal can offer chances to rectify long-standing legal prejudices and bring domestic legislation into compliance with global human rights norms.

LEGISLATIVE MODELS AND REFORM PROCESSES

Complete Criminalisation Model

Several countries in the Global South have passed comprehensive legislation that treats marital rape similarly to other forms of sexual violence. These countries—South Africa, Kenya, Rwanda, and Nepal—have all enacted legislation that expressly and unrestrictedly makes marital sexual violence a crime.

The South African Sexual Offences and Related Matters Amendment Act of 2007 is the gold standard in this field. The Act defines rape broadly to include any non-consensual sexual penetration and clearly states that marriage or other relationships do not constitute consent.¹⁰ The law also addresses related issues such as sexual assault, compelling sexual conduct, and human trafficking.

Kenya's Sexual Offences Act 2006 provides similar comprehensive coverage, with specific provisions for marital rape in addition to a general definition of sexual offences. The Act's victim-friendly provisions, such as protections for victim identity and in-camera proceedings, have won praise.

⁹ Constitution of Kenya, 2010, arts 25, 29.

¹⁰ Sexual Offences and Related Matters Amendment Act 32 of 2007, s 15.

Rwanda's approach has been influenced by the post-genocide legal reconstruction process, which provided opportunities to develop gender-sensitive legal frameworks. The country's sexual violence laws, which have been strengthened by significant institutional reforms, specifically address marital rape.¹¹

Conditional Criminalisation Model

Some countries have laws against marital rape, but the legal system has restrictions or requirements. This approach often reflects political concessions made during legislative reform processes when full equality was not politically feasible. An excellent illustration of this model is Ghana's approach.

The criminal justice system maintains certain procedural distinctions for cases involving spouses, even though marital rape has been interpreted as falling under the Criminal Offences Act.¹² These include a number of evidentiary and procedural requirements that might make prosecution more difficult.

Bangladesh is another nation where recent legislative changes have taken steps to criminalize marital rape, albeit with certain limitations and exclusions. The Women and Children Repression Prevention Act has provisions that may be applied to cases of marital rape, though its precise application is still unclear.

Continued Immunity Model

Despite mounting social and legal pressure, a number of important nations in the Global South continue to have legal immunity for marital rape. This group includes Pakistan, Nigeria, and India, where, in spite of constitutional challenges, colonial-era exemptions are still mainly in place.

Section 375 of the Indian Penal Code, which states that a man's sexual relations with his wife are not considered rape as long as she is older than 15, does not apply to marital rape. Despite mounting judicial pressure and public awareness, legislative reform has been sluggish, and this provision has been the subject of multiple legal challenges.

¹¹ Law No. 59/2008 relating to Prevention and Punishment of Gender-Based Violence (Rwanda).

¹² Criminal Offences Act, 1960 (Ghana), s 97.

Nigeria's legal system varies from state to state due to the federal system; however, marital rape is still not covered by the federal criminal law.¹³ However, some states have enacted legislation prohibiting domestic violence, which may provide alternative legal remedies for marital sexual assault. Even though Pakistan has comprehensive laws against domestic abuse that may provide some protection, similar exemptions from the colonial era still exist in the country's legal system.

Political Economy of Legal Reform

The variety of legislative approaches reflects various political dynamics and reform processes. The countries that were successful in attaining comprehensive reform often benefited from certain political turning points that allowed for fundamental legal change.

South Africa's comprehensive approach was made possible by the broader constitutional reform that followed apartheid. The new constitutional order provided both the legal framework and the political impetus to resolve discriminatory legal provisions across the legal system.¹⁴

Kenya's reform process was aided by feminist legal advocacy, constitutional reform, and international pressure. The Sexual Offences Act 2006 was eventually passed following years of lobbying by women's rights groups and with assistance from broader constitutional reform initiatives.¹⁵

However, countries that maintain their immunity often face strong religious and cultural opposition to change. In India, some traditional organizations and religious leaders have opposed making marital rape a crime, arguing that doing so would weaken family and marriage bonds.

Effective legal reform, according to the political economy analysis, requires not only legal advocacy but also broader social and political change that allows for the challenge of long-standing gender norms and power structures.

¹³ Criminal Code Act (Nigeria), s 282.

¹⁴ Christina Murray, *Gender and the New South African Legal Order* (Juta 1994) 45-67.

¹⁵ Patricia Kameri-Mbote, 'The Operational Environment and Constraints for NGOs in Kenya' (International Environmental Law Research Centre 2000) 23-34.

JUDICIAL INTERPRETATION AND CREATIVE JURISPRUDENCE

Progressive Judicial Activism in the Absence of Legislative Reform

Courts in the Global South have developed creative solutions to deal with marital rape, even in situations where there are no explicit legal provisions. This judicial creativity has included a broad interpretation of current criminal law provisions, common law principles, and constitutional rights jurisprudence.

Indian High Courts have been particularly innovative in this regard. The Kerala High Court recognized that there are no laws specifically prohibiting marital rape in *Nimeshbhai Bharatbhai Desai v. State of Gujarat*, but it also recognized that marital status cannot be used as a defense against sexual assault.¹⁶ Similarly, a number of High Courts have used domestic violence laws to address sexual violence in marriage.

The Bombay High Court's approach in *State of Maharashtra v. Madhukar Narayan Mardikar* demonstrates how judges can provide protection by interpreting preexisting provisions in novel ways. The court decided that unconsented sexual contact is assault and a violation of the constitutional rights to bodily autonomy and dignity, regardless of marital status.

Constitutional Rights Interpretation

Courts are now challenging marital rape immunity by reading constitutional rights, even when there aren't any clear criminal law provisions. This strategy has been especially important in nations with robust constitutional protections of equality.

In *RIT Foundation v. Union of India*, the Delhi High Court undertakes a detailed constitutional analysis of the marital rape exception.¹⁷ The court analyzed the exception through the prism of Articles 14, 15, and 21 of the Indian Constitution to determine if such discrimination would survive constitutional scrutiny.

The court observed that the exemption unfairly differentiates between women who are married and those who are single, contrary to the constitution's promise of equality. It went on to assert

¹⁶ *Nimeshbhai Bharatbhai Desai v State of Gujarat* (2018) Cri LJ 2457.

¹⁷ *RIT Foundation v Union of India* (n 13).

that the exemption entrenches negative assumptions about women's sexuality and independence in marriage.

In like manner, Ghanaian courts have employed constitutional interpretation to deliberate on marital rape. In *Republic v. Kweku Edusei*, the High Court held that marital sexual violence is a contravention of the constitution's provisions on protecting human dignity and individual liberty.¹⁸

Evidentiary Innovation and Procedural Development

Courts have also developed innovative approaches to evidence and procedure in cases involving marital rape. These developments recognize the unique dynamics of intimate partner violence and the challenges victims face in reporting and prosecuting such cases.

Given the particular vulnerabilities of victims of marital rape, South African courts have developed comprehensive protocols for victim testimony and corroboration. The courts have dispensed with stringent corroboration requirements and established victim-friendly testimony procedures.

Kenyan courts have also developed progressive evidentiary standards. In *C.K. v. Republic*, the High Court recognized that courts must consider the power dynamics in marriages and that traditional forms of evidence are often lacking in cases of marital rape.¹⁹

The emergence of in-camera proceedings, victim identity protection, and specialized victim support services reflects the judiciary's recognition that marital rape cases require different procedural approaches than other criminal matters.

Limitations of Judicial Activism

In the absence of a clear legislative mandate, courts are severely limited in their ability to address the issue of marital rape, even though judicial creativity has provided some protection to victims. Courts must work within the parameters of the existing law; they cannot create entirely new criminal offenses.

¹⁸ *Republic v Kweku Edusei* (1996-97) GLR 102.

¹⁹ *CK v Republic* (2015) eKLR.

The Indian experience serves as an example of these constraints. High courts have provided some protection through creative interpretation, but because there are no specific legislative provisions, application is ambiguous and uneven. Different courts may reach different conclusions about the scope of existing provisions.

Furthermore, court decisions may be overruled by higher courts or by legislative action. The ongoing legal challenges to progressive High Court rulings in India serve as an example of the inadequacy of purely judicial solutions to the marital rape problem.

IMPLEMENTATION CHALLENGES AND ENFORCEMENT REALITIES

Institutional Capacity and Law Enforcement Response

Even in nations where complete legislation has criminalized marital rape, there remain multiple implementation issues. Police reaction, prosecutorial ability, and judicial sensitization all impact how legal protections are really implemented. South African experience offers useful insights into implementation issues in spite of serious legal transformation.

Studies show that most police officers continue to react inadequately to marital rape cases since they are not properly trained in intimate partner violence dynamics.²⁰ Cultural norms in law enforcement agencies may at times compromise the legislative purpose of complete sexual violence legislations.

Even with progressive legislation, Kenya's situation is the same. Police handling of sexual violence cases, including marital rape, continues to be a problem, as Federation of Women Lawyers Kenya research found. Officers can hold very entrenched beliefs that minimize the gravity of sexual violence within marriage, along with often lacking training.

With mixed levels of success, numerous countries have established law enforcement training programs. In spite of their resource and geographical constraints, South Africa's specialized sexual offenses courts present an innovative way to build institutional capacity.²¹

²⁰ Rachel Jewkes and others, 'Intimate Partner Violence: Causes and Prevention' (2002) 359 *The Lancet* 1423, 1428-1430.

²¹ Dee Smythe and others, 'Specialised Sexual Offences Courts: A Comparative Analysis' (Institute of Criminology, University of Cape Town 2004) 78-95.

Access to Justice and Support Services

Legal reform must be combined with readily available support services so that victims can seek legal remedies. This includes offering safe housing, counselling services, legal aid, and community support networks. Rwanda's approach of enacting legal reform while simultaneously creating a wide range of support services serves as an excellent illustration.

The country has established integrated service centres that provide psychosocial, medical, and legal support to victims of gender-based violence. These centres help make sure that legal protections are linked to the official justice system and that they are actually translated into access to justice.

Kenya has developed a network of gender-based violence recovery centres, though coverage remains limited and resource constraints affect service quality. The integration of legal aid services with support services has improved access to justice for some survivors, though geographical and economic barriers persist.

India's approach has been more fragmented, with different states developing different service models. Some states have established integrated service centres while others rely on NGO provision of services. The lack of coordinated national policy affects service consistency and quality.²²

Social Awareness and Legal Literacy

Legal reform requires accompanying social awareness programmes to ensure that potential victims understand their rights and available remedies. It also requires broader social education to challenge attitudes that normalise sexual violence within marriage.

South Africa has implemented comprehensive public awareness campaigns alongside legal reform. These campaigns have used multiple media channels and community engagement strategies to educate the public about sexual violence laws.²³ However, research suggests that awareness levels remain low in some communities, particularly rural areas.

²² Indira Jaising (ed), 'Justice for Women: Personal Laws, Women's Rights and Law Reform' (The Women Press 1996) 123-145.

²³ Amanda Gouws, 'The Rise of the Feminist Movement in South Africa' (2005) 4 *Politikon* 87, 95-98.

Kenya's approach has involved partnerships between government agencies and civil society organisations to deliver legal literacy programmes. These programmes focus on women's rights and gender-based violence, though coverage remains limited by resource constraints.

The effectiveness of awareness programmes appears to depend on sustained implementation and community-level engagement. One-off campaigns have limited impact compared to ongoing education and awareness efforts.

Measuring Legal Impact

Assessing the practical impact of marital rape legislation presents significant challenges. Official crime statistics often underrepresent sexual violence within marriage due to underreporting and classification issues.

Available data from South Africa suggests that marital rape prosecutions remain relatively low despite comprehensive legal provisions.²⁴ This may reflect continued underreporting, prosecutorial challenges, or ongoing social stigma that discourages victims from seeking legal remedies.

Kenya's experience suggests similar patterns, with legal aid organisations reporting that marital rape cases remain underrepresented in their caseloads despite legal provisions. This highlights the gap between legal possibility and practical realisation of rights.

Research in countries without specific marital rape legislation indicates that alternative legal avenues (such as domestic violence legislation) are sometimes used to address sexual violence within marriage, though this approach has limitations in terms of appropriate penalties and legal categorisation.²⁵

COMPARATIVE JURISDICTIONAL ANALYSIS

South Africa: Constitutional Rights and Comprehensive Reform

In the Global South, South Africa has one of the most comprehensive policies for making marital rape a crime. South Africa's 1996 Constitution serves as the cornerstone of its

²⁴ South African Police Service, 'Crime Statistics 2019/20' (SAPS 2020) 23-45.

²⁵ Lawyers Collective, 'Staying Alive: Third Monitoring & Evaluation Report 2007 on the Protection of Women from Domestic Violence Act 2005' (Lawyers Collective Women's Rights Initiative 2007) 67-78.

progressive philosophy. Everyone's right to personal freedom and security, including the right to be free from all forms of violence, is guaranteed by Section 12.²⁶ A solid basis for opposing discriminatory laws, such as those that did not shield married women from sexual assault, was established by this constitutional framework.

An important development in South African law was the Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007.²⁷ The marital rape exception was totally eliminated by this comprehensive law, which also established a gender-neutral definition of rape that is applicable regardless of the victim and perpetrator's relationship. Married couples are not exempt from the Act's definition of rape, which is any act of sexual penetration without consent.

The law contains provisions for victim-friendly processes, specialised courts for sexual offences, and training for law enforcement and judicial personnel.²⁸ These actions recognise that without corresponding adjustments to the justice system's ability to manage such cases efficiently, legal reform on its own is insufficient. The courts have emphasised in cases such as *S v. Ncanywa* that the law applies equally to all relationships and that marriage does not imply continuous consent to sexual relations.²⁹

But there are still a lot of implementation issues. Specialised courts and qualified staff are frequently unavailable in rural areas. Reporting rates and community reactions are still influenced by cultural beliefs that see marital rape as a private family matter rather than a criminal offence.

Nepal: Post-Conflict Legal Transformation

Following the conclusion of its civil war and the ratification of a new constitution, Nepal underwent a wider legal and social transition that gave rise to its strategy of making marital rape a crime. Nepal's Constitution, which was ratified in 2015, has strong provisions addressing gender equality and women's rights.³⁰ Article 38 expressly protects women's autonomy over their bodies and reproductive rights. The criminalisation of marital rape as a violation of

²⁶ Constitution of the Republic of South Africa, 1996, s 12.

²⁷ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

²⁸ *S v Ncanywa* (2005) ZAWCHC 44 (South Africa).

²⁹ S Bonthuys, 'The New South African Law of Rape: Lessons for Criminal Law Reform in the Global South' (2010) 33(2) South African Journal on Human Rights 123.

³⁰ Constitution of Nepal 2015, art 38.

fundamental rights was made possible by these constitutional provisions.

Marital rape is specifically criminalised by the Criminal Code Act of 2017, which defines it as rape that occurs whether or not the victim and the perpetrator are married.³¹ While acknowledging that marital rape is a serious criminal offence and that it may be prosecuted differently than rape by strangers in certain situations, the law stipulates that it carries a maximum sentence of three years in prison. Nepal's legal reform was significantly influenced by the country's active civil society organisations, particularly women's rights groups that had gained political influence during the democratic transition.³² These organisations successfully argued that criminalising marital rape was essential for achieving the gender equality promised in the new constitution.

In Nepal's case, foreign assistance played a critical role as well. Legal reforms intended to advance gender equality received financial and technical support from donor nations and international development organisations.³³ The opposition of conservative organisations to modifications to conventional family law was lessened thanks to this foreign aid.

Notwithstanding these legal developments, Nepal still faces formidable implementation obstacles. Because of the federal structure of the nation, different provinces may have different enforcement strategies. In rural areas, there are frequently insufficient police and court resources to adequately handle cases of marital rape. Reporting and prosecution of marital rape cases are still restricted by cultural attitudes that place a strong emphasis on family honour and discourage open discussion of sexual issues.

Rwanda: Post-Genocide Reconstruction and Gender Equality

The criminalisation of marital rape in Rwanda is closely linked to the nation's efforts to rebuild after the genocide and its dedication to gender equality as a top priority. The nation's experience serves as an example of how traumatic national experiences can occasionally present chances for social reform.

Gender equality was central to Rwanda's ambitious legal and social reconstruction program

³¹ Criminal Code Act 2017 (Nepal), s 219.

³² Forum for Women, Law and Development, 'Report on Implementation of Rape Laws in Nepal' (2019).

³³ L Watson and A Tiwari, 'Legal Reform and Women's Rights in Nepal' (2018) 11(1) Asian Journal of Law and Society 67.

after the 1994 genocide.³⁴ This dedication was demonstrated in 2003 when a new constitution was adopted, making women's rights and gender equality core tenets of the new Rwanda.

Comprehensive protection against all types of gender-based violence, including marital rape, is offered by Law No. 59/2008 on Prevention and Punishment of Gender-Based Violence.³⁵ According to the law, marital rape is a specific criminal offence with harsh punishments, including up to 20 years in prison in cases that are more serious. To enhance their ability to handle cases involving gender-based violence, the government has put in place comprehensive training programs for judges, prosecutors, and police.

In order to address gender-based violence, Rwanda has also set up specialised institutions, such as one-stop centres that offer survivors comprehensive services and special court chambers dedicated to handling such cases.³⁶ These institutional changes show an understanding that making marital rape a crime necessitates more than just amending the law.

Gacaca, the nation's traditional judicial system, was modified to uphold its community-based methodology while incorporating human rights principles. Although Gacaca focused mostly on crimes involving genocide, its emphasis on restorative justice and community involvement has impacted strategies for dealing with other types of violence, such as sexual and domestic abuse.

The government's top-down strategy for advancing gender equality, according to some detractors, hasn't always resulted in real shifts in community attitudes. Gender-based violence rates are still higher in rural areas, indicating that the effects of legal reforms have been unevenly distributed throughout the nation.

India: Constitutional Contradictions and Legislative Deadlock

One of the most intricate instances of how marital rape is handled in Global South nations is India. The nation maintains legal exceptions that, in many cases, effectively decriminalise marital rape despite having a progressive constitution and an active women's rights movement. The Supreme Court has interpreted Article 21, which safeguards the rights to life and personal

³⁴ Constitution of Rwanda 2003, arts 10–12.

³⁵ Law No. 59/2008 on Prevention and Punishment of Gender-Based Violence (Rwanda)

³⁶ S Rutayisire, 'Gacaca Courts and Gender Justice in Rwanda' (2015) 39(1) *International Journal of Transitional Justice* 89.

liberty, to include the right to live with dignity, which may include, in theory, defence against marital rape.³⁷

Exception 2 to Section 375 of the Indian Penal Code, however, stipulates that if a man engages in sexual activity with his wife and she is older than fifteen, it is not considered rape.³⁸ In violation of the equality and dignity tenets of the constitution, this exception essentially grants legal immunity to husbands who coerce their wives into having sex.

The Supreme Court upheld the broader marital rape exception in the case of *Independent Thought v. Union of India* but invalidated the exception as it applied to wives under the age of 18. While falling short of full reform, this ruling brought attention to the law's inconsistencies.³⁹

Legislative processes have been used in a number of attempts to amend the law. The Justice Verma Committee, which was formed in the wake of the gang rape case in Delhi in 2012, suggested making marital rape a crime.⁴⁰ Nonetheless, government responses and parliamentary committees have continuously opposed comprehensive reform, pointing to worries about the institution of marriage and possible abuse of the enlarged rape laws. Family law differs greatly amongst various religious communities, whereas criminal law is essentially a federal matter. This complicates attempts at uniform reform by creating circumstances in which the application of marital rape laws may vary based on an individual's personal law status.⁴⁴

Human rights organisations, lawyers' associations, and women's rights groups have continuously pushed for legal reform and contested discriminatory legislation in court.⁴⁵ Even when political processes have stalled, their efforts have helped keep the pressure for reform high.

In India, the controversy surrounding marital rape also reflects larger conflicts between tradition and modernity, family values and individual liberties, and the role of the law in controlling close relationships. Conservative organisations contend that making marital rape a crime would undermine traditional family structures and the institution of marriage.⁴⁶

³⁷ Constitution of India 1950, arts 14, 15, 21

³⁸ Indian Penal Code 1860, s 375, Exception 2.

³⁹ *Independent Thought v Union of India* (2017) 10 SCC 800 (Supreme Court of India).

⁴⁰ Justice Verma Committee, 'Report on Amendments to Criminal Law' (2013).

Progressives argue that legal reform is required to safeguard women's fundamental rights and that marriage cannot excuse sexual violence.

Nigeria: Federal Complexity and Regional Resistance

Nigeria's experience with marital rape legislation illustrates the particular challenges faced by federal states with diverse religious and cultural populations. At the federal level, Nigeria took a significant step forward with the Violence Against Persons (Prohibition) Act (VAPP Act) in 2015.⁴¹ This comprehensive legislation criminalises various forms of gender-based violence, including marital rape. Section 1 of the VAPP Act defines rape in gender-neutral terms and makes no exception for marital relationships, effectively criminalising marital rape under federal law.

However, the impact of federal legislation in Nigeria is limited by the country's constitutional structure. Under the Nigerian Constitution, states have concurrent jurisdiction over criminal law matters, meaning they can choose whether to adopt federal legislation or maintain their own laws. This has created a patchwork of different legal approaches across the country's thirty-six states.

Many southern states, particularly those with significant Christian populations, have adopted the VAPP Act or similar legislation criminalising marital rape. States like Lagos, Ogun, and Cross River have incorporated the federal law into their state legal systems, providing legal protection against marital rape for women in these jurisdictions.

In contrast, most northern states, where Islam is the predominant religion and Sharia law operates alongside common law, have been reluctant to adopt the VAPP Act. Critics in these states argue that criminalising marital rape conflicts with Islamic principles regarding marriage and family relationships. This resistance has created a situation where women's legal protection against marital rape depends significantly on which state they live in.

The role of religious law adds another layer of complexity to Nigeria's approach. In states where Sharia law operates, particularly in family matters, there is often tension between Islamic legal principles and federal human rights legislation. Some religious authorities have argued

⁴¹ Violence Against Persons (Prohibition) Act 2015 (Nigeria), s 1

that the concept of marital rape is incompatible with Islamic understandings of marriage, though other Islamic scholars have contested this interpretation.⁴²

Civil society organisations have played important roles in advocating for legal reform and supporting implementation efforts. Groups like the Federation of Women Lawyers (FIDA) Nigeria and the Nigerian Women's Trust Fund have worked to raise awareness about marital rape and support legislative reform at both federal and state levels.⁴³ However, their efforts have met with varying degrees of success in different parts of the country.

The enforcement challenges in Nigeria are particularly acute. Even in states that have adopted anti-marital rape legislation, police and judicial officials often lack adequate training to handle such cases effectively. Cultural attitudes that view domestic violence as a private family matter continue to influence how cases are reported and investigated.

CONCLUSION

Comparative analyses of marital rape criminalization in Global South nations expose a multifaceted dynamic and evolving legal terrain influenced by colonial histories, campaign politics, popular opinions, and constitutional reforms. Central to justice, equality for all genders, and human dignity, the question of whether a husband can be legally declared guilty of raping his wife requires extensive social and legal transformation beyond traditional practices.

Most states in the Global South still grapple with the contradiction between their own constitutional promises of equality and autonomy and the legal exceptions for marital rape that have existed under colonial regimes. This contradiction is most evident in such states as Nigeria and India, where marital rape immunity exists in spite of constitutional promises of gender equality. The continued existence of exemptions for marital rape is evidence of the resilience of entrenched religious and patriarchal values, as well as the enduring legacy of colonial legal transplantation.

Reform within these jurisdictions demands the willingness to address historic injustices and bring criminal law into line with modern constitutional goals. Provisions in law cannot on their

⁴² Constitution of the Federal Republic of Nigeria 1999 (as amended), arts 4, 36

⁴³ Federation of Women Lawyers (FIDA) Nigeria, 'Position Paper on Marital Rape Laws: Ongoing Advocacy' (2021).

own ensure survivors' protection and justice. What the experiences of South Africa, Kenya, and Rwanda demonstrate is how problems of implementation such as police training, support from institutions, and cultural attitudes significantly affect the effectiveness of laws against marital rape.

Most countries still have problems with underreporting, poor victim support services, and entrenched cultural norms legitimizing sexual violence in marriage. Inevitably, criminalizing marital rape is an important first step, but it must be accompanied by ongoing social awareness campaigns, easily accessible support services, and efforts to develop institutional capacity throughout the legal system. In order for perceptions of sexual violence within the community to alter over time, government response, civil society mobilization, and ongoing education are necessary. International human rights norms provide the essential benchmark for directing and measuring domestic law.

Yet, the extent to which Global South countries embrace international norms is highly variable. Constitutions that make reference to international norms, such as the case of South Africa, are more likely to record progressive reform. But resistance is ongoing where criminalizing marital rape is seen as a new or culturally inappropriate concept. These discussions highlight the imperative of reform processes that respect universal human rights yet respect local contexts and attempt to reconcile indigenous cultural values with global standards and constitutional imperatives.

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