

CONSENT AND COERCION: THE LEGAL AND CULTURAL LANDSCAPE OF MARITAL RAPE IN INDIA

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ABSTRACT

This article analyses the legal and social aspects of marital rape in India, focusing on the inconsistencies in the laws that exclude husbands from prosecution. It discusses the implications of such legal frameworks on women's autonomy over their bodies and human rights, calling for reform. Through a study of global viewpoints and court precedents, the paper urges criminalizing marital rape, codifying clear consent definitions, and increasing victim support systems. It finally demands a change in culture towards understanding consent as core to the very essence of society, striving to build a safer and more just society for women in India

INTRODUCTION

Humanity comprises two essential halves—man and woman. Neither can achieve their highest potential without the cooperation and mutual respect of the other. Historically, women have often been glorified as the 'mother of mankind', and placed on a symbolic pedestal. However, this reverence has starkly contrasted to the systemic and often brutal injustices inflicted upon them. Even in the modern era, women's status continues to be shaped by long-standing social prejudices and deeply entrenched gender biases. Despite constitutional guarantees and global advocacy for equality, women still face discrimination and violence, simply by virtue of their gender.

One of the gravest manifestations of this inequality is sexual violence, defined as any sexual act or behaviour inflicted upon someone without their consent. It spans a broad spectrum, from inappropriate touching to the heinous crime of rape. While both men and women can be victims, women represent the vast majority. Among the various forms of sexual violence, marital rape remains one of the most overlooked and under-reported, due in

part to cultural norms and legal loopholes that perpetuate male dominance within marriage.

Marital rape refers to non-consensual sexual intercourse forced upon one spouse by the other—most commonly, a husband forcing himself upon his wife. For centuries, marital rape was not even recognized as a crime, rooted in the belief that a wife is obligated to fulfill her husband's sexual desires. This ideology is deeply influenced by patriarchal traditions, religious interpretations, and social constructs that portray women as subservient to their

The objective of this paper is to critically examine the medical, social, and legal dimensions of marital rape, with a particular focus on its status in India, while drawing comparisons with global practices. It aims to explore the historical context, the current legal frameworks, and the cultural obstacles that hinder justice for victims. Furthermore, the paper will suggest measures for prevention, increased awareness, and policy reforms needed to combat this form of violence.

Though legal reforms and feminist movements have challenged the norms that allowed such violence to persist unchecked, the battle is far from over. In countries like India, ancient texts

such as the Manusmriti historically defined women's roles strictly in terms of servitude—first to their fathers and then to their husbands. This patriarchal legacy has long normalized the idea of a woman being sexually available to her husband at all times. Despite significant progress, including post-independence reforms and the active participation of women in India's freedom struggle, deep-rooted gender biases continue to influence societal attitudes and legal responses.

RAPE AS A CRIME IN INDIA

Rape is considered a grievous crime with harsh punishments in India and is clearly defined as such in the Bharatiya Nyaya Sanhita. However, the country has seen numerous rape cases in recent years, contributing to its reputation as one of the world's most unsafe for women, despite ongoing efforts to strengthen laws.

SECTION 63 – DEFINITION OF RAPE (BNS 2023)

A man is said to commit rape if he penetrates his penis, inserts any object or body part (other than the penis), manipulates a woman's body to cause such penetration, or applies his mouth to her private parts without her consent or against her will. Rape also includes cases where permission is obtained by fear, deception, intoxication, mental incapacity, or when the woman is under 18 or unable to communicate consent. Consent must be explicit, voluntary, and affirmative—lack of resistance does not imply consent. Medical procedures and consensual acts with one's wife (if over 18) are exceptions.

SECTION 64 – PUNISHMENT FOR RAPE

The punishment for rape is rigorous imprisonment of **not less than 10 years**, extendable to **life imprisonment**, along with a fine. Enhanced punishment applies in cases involving police officers, public servants, armed forces, jail or hospital staff, guardians, and teachers, or when rape is committed during communal violence, on pregnant women, mentally or physically disabled women, or when

the act results in grievous harm or repeated offences. Life imprisonment can mean jail for the remainder of the offender's natural life.

MARITAL RAPE AS AN EXCEPTION

Despite being the world's largest democracy, India continues to uphold an archaic legal provision that excludes marital rape from its definition of rape. Under **Section 375** of the **Indian Penal Code (IPC)** and its updated equivalent in the Bharatiya Nyaya Sanhita (2023), non-consensual sexual intercourse by a husband with his wife—provided she is over 18—is not considered rape. This exception flagrantly violates **Articles 14 and 21** of the **Indian Constitution**, creating an unreasonable and discriminatory classification between married and unmarried women. It undermines a woman's bodily autonomy and dignity within the institution of marriage.

The **Justice Verma Committee** and international conventions like **CEDAW** have unequivocally recommended the criminalization of marital rape. In **Bodhisattwa Gautam v. Subhra Chakraborty (1996)**, the Supreme Court emphasized that rape is an assault on a woman's dignity. Similarly, in **Independent Thought v. Union of India (2017)**, the Court criminalized sexual intercourse with a minor wife, exposing the inconsistency in the marital rape exception.

Rooted in colonial-era patriarchal ideologies like the doctrine of coverture, this immunity lacks constitutional justification. Though courts have acknowledged its discriminatory nature, the judiciary and legislature remain hesitant to strike it down, highlighting a pressing need for transformative legal reform.

CONSENT: A TERM WRONGFULLY CONCEIVED

In the Bharatiya Nyaya Sanhita (BNS), consent is defined as an **unequivocal voluntary agreement**, meaning a clear and freely given willingness to participate in a specific act. This agreement can be communicated through words, gestures, or any other form of verbal or non-verbal communication. However, the mere

absence of physical resistance is not considered consent.

The consent of a married woman is often ignored or overlooked by the common man or the courts due to the misconceived notion that whatever happens after marriage is considered to be consensual, rather marriage gives an automatic consent to the man.

Hence women are often pressured to not file a report against their husbands in cases of marital rape leading to half of the cases of marital rape go unreported.

HISTORY OF MARITAL RAPE

LEGAL THEORIES APPROACHING MARITAL RAPE IN VARIOUS CULTURES:

The laws defining marital rape differs from country to country based on culture, religion, and tradition. While some countries fully recognize marital rape and even criminalize it, others only partially acknowledge it, offering some legal leeway for husbands. The following is a summary of how various legal systems approach marital rape:

1. Countries where marital rape is fully acknowledged as a crime

These nations have jurisdictions that acknowledge marriage which does not eliminate one's right to consent. Thus, they uphold the principle of consent, asserting that sexual relations within marriage should also be consensual.

DEVELOPED NATIONS AND WESTERN COUNTRIES:

- **UNITED STATES:** All 50 states accept marital rape as a crime; however, some states face challenges in prosecution due to legal loopholes.
- **CANADA:** Marital rape was exempted in the Canadian laws till 1983, post which it became legal.
- **UNITED KINGDOM:** R v. R 1991 judge legalized marital rape.
- **AUSTRALIA:** Legalized in the late 1970s and early 1990s in different states.

- **EUROPEAN UNION:** Sweden is one of the first countries to legalize marital rape in 1965. Almost all EU nations follow suit.

SOME OTHER ASIAN AND AFRICAN COUNTRIES

- **SOUTH AFRICA:** Included as a crime in the Sexual Offences Act of 2007.
- **NEPAL:** Imposed strict penalties for marital rape in 2006.
- **BANGLADESH:** The acknowledgment of marital rape falls under criminal law within Bangladesh and was recognized in 2022.

20TH CENTURY: CHANGE BEGINS

Feminist movements and the wider discussion of women's rights helped bring about a change in attitude. During the 1970s, second-wave feminists helped challenge the view that marriage must involve automatic consent. Sweden in 1965 was the first country to criminalize marital rape, with some others in the West following soon after.

Most UN human rights statements, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), urged the acknowledgment of marital rape as a violation of human rights.

LATE 20TH–21ST CENTURY: GLOBAL LEGAL REFORMS

By the 1990s, most Western countries completely criminalized marital rape, acknowledging it as a violation of bodily autonomy. In the Global South, such as in Asia and Africa, the transformation was slower as a result of religious and cultural resistance.

Now, although more than 100 nations outlaw marital rape, some of them such as India, China, and many Middle Eastern countries still don't treat it as a crime.

Conclusion

The historical background of marital rape demonstrates how entrenched patriarchal values are in influencing laws and attitudes about consent within marriage. While most societies have made progress toward recognizing the right to bodily autonomy and

consent, others remain challenged by legal and cultural opposition to prosecuting marital rape.

INTERNATIONAL PERSPECTIVE

LEGAL THEORIES APPROACHING MARITAL RAPE IN VARIOUS CULTURES:

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COUNTRIES WITH PARTIAL RECOGNITION OF MARITAL RAPE

Some states recognize the crime of marital rape only if a couple is divorced, separated, or if the woman is underage.

- **INDIA:** Marital rape is not criminalized unless the wife is under 18 years of age but this debate is in legal contention.
- **SINGAPORE:** It was criminalized in 2019, although only if the couple is separated or if violence is a component of the offense.
- **THAILAND:** Marital rape is a recognized crime, but the sentences for said crime tend to be more lenient than those for non-marital rape.
- **JAPAN:** They acknowledge that marital rape exists: however, prosecution can only be pursued if there is indisputable evidence of extreme violence.

COUNTRIES WHERE THERE IS NO RECOGNITION OF MARITAL RAPE AS A CRIME

These are the countries that still consider there to be legal loopholes of sorts for husbands which ensures no wife has any shred of possibility to charge her spouse for rape.

- **CHINA:** Marital rape isn't an offense and courts do not take a spouse's violence as sexual abuse at all.
- **SAUDI ARABIA:** There is no legal basis for marital rape but there are laws governing domestic violence.
- **PAKISTAN:** No specific law making marital rape an offense is provided, although some laws addressing domestic violence may apply.
- **AFGHANISTAN:** These laws do not recognize marital rape as a crime and they place heavy emphasis on the wife's obligation to submit to the sexual demands of her husband.

GROUPS WHICH SUPPORT CRIMINALIZATION OF MARITAL RAPE

- **UNITED NATIONS (UN):** Condemns marital rape as a human rights abuse and appeals to all governments to criminalize it.
- **CEDAW (CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN):** Suggests governments change laws supporting marital rape.
- **WHO (WORLD HEALTH ORGANIZATION):** Identifies marital rape as gender-based violence with serious physical and psychological damage.

Conclusion

Although more than 100 countries have criminalized marital rape, they still grant legal immunity to husbands in many cases. The arguments go on in some countries where cultural, religious, and legal practices block reforms. Nonetheless, the worldwide trend is moving in the direction of acknowledging marital rape as an abuse of women's rights and implementing laws to guarantee body autonomy and consent within marriage.

MARITAL RAPE: A GREY AREA OR A TOPIC OF PRIME IMPORTANCE?

Marital Rape: A Grey Area or a Topic of Prime Importance? The discussion surrounding marital rape raises the question of whether it should be treated as a critical legal issue or if it should remain in a grey area, influenced by cultural, religious, or legal factors. Some people argue that making marital rape a crime is crucial for protecting bodily autonomy and ensuring consent, while others believe it could undermine the institution of marriage and potentially lead to the misuse of such laws.

Now we would understand the reasons or arguments for or against criminalising Marital rape

VIOLATION OF ARTICLE 14

The 375 IPC exception 2 also infringes Article 14 by not extending equal protection to married

women in cases of rape. Like in Budhan Choudhary v. State of Bihar, it fails to 'bear the rational nexus' justifying its existence. To uphold equality, autonomy, and justice in contemporary India, it is imperative that marital rape be recognized as a crime.

Here are the pros and cons from a legal standpoint:

ARGUMENTS IN FAVOUR OF CRIMINALIZING MARITAL RAPE

1. PROTECTION OF BODILY AUTONOMY & CONSENT

Legal Principle: Right to bodily autonomy as stated in Article 21 (Right to Life) of the Indian Constitution, CEDAW, and UNHDR.

Argument: A marriage contract cannot invalidate an individual's right to consent. For a marriage to be civilized, there has to only be a reasonable and justifiable consideration to rape laws. Hence, barring an exception to violence in sexual nature will render unjustifiable consequences.

2. EQUALITY BEFORE THE LAW AND NON DISCRIMINATION

Legal Principle: Article 14 (right to equality) of the Indian Constitution.

Argument: The law stipulates: No person shall be discriminated against on grounds only of religion, race, caste, sex, or place of birth. Allowing husbands free reign to marital rape exempting husbands from rape laws, makes mockery of this equality dictate.

3. VIOLATION OF HUMAN RIGHTS

Legal Principle: Article 7 of the ICCPR (International Covenant of Civil and Political Rights) torture and inhumane treatment is prohibited.

Argument: More than a century of laws against marriage rape exist as over a hundred nations have adopted such laws, acknowledging rape as an act of sexual violence rather than an affair to be settled privately behind closed doors. Rape in marriage is widely viewed within human rights bodies, which include the United Nations as a violation of a person's right.

4. IMPACT ON VICTIMS (LACK OF JUSTICE)

Legal Principle: Doctrine of Harm

Argument: In India, marital rape affects between 2 to 56% of women. Although there is ample evidence connecting marital rape to depression (7 out of 8 studies), PTSD, and suicidality, it remains legally unacknowledged. Only 10% of victims come forward, and normalization leads to further violence. Crime recognition is necessary to safeguard women's self-governance, mental well-being, and basic rights.

5. MISUSE OF MARRIAGE AS A DEFENCE

Legal Principle: Doctrine of legal exceptions

6. ABUSE OF MARRIAGE AS A DEFENSE

Legal Principle: Doctrine of Legal Exception – Exception 2 under Section 375 IPC (India) that shields husbands from charges of rape.

Argument: The marital rape exception serves as a legal protection for abusers, depriving victims of justice and perpetuating patriarchal dominance over women's bodies.

ARGUMENTS AGAINST CRIMINALIZING MARITAL RAPE

Legal Principle: Doctrine of Misuse – Fear that laws intended to protect can be used to make false accusations.

Argument: It is argued that criminalizing marital rape can result in false charges being made in the course of marital disputes, divorces, or dowry cases (analogous to fears expressed about Section 498A IPC, which addresses cruelty to wives).

1. EFFECT ON INSTITUTION OF MARRIAGE

Legal Principle: Doctrine of Implied Consent – The traditional concept that marriage connotes continuous consent to sexual intercourse.

Argument: Criminalizing marital rape can endanger marital relationships since criminalizing it can instill fear and lack of trust among the spouses and make marriages more litigating in nature.

2. AVAILABLE LEGAL REMEDIES FOR WOMEN

Legal Principle: Section 498A IPC (Husband's Cruelty), Domestic Violence Act (2005).

Argument: The critics argue that women have available legal remedies in domestic violence legislation, which include protection from physical violence, rape, and harassment. Thus, a new marital rape law is unnecessary.

3. CHALLENGES IN PROSECUTION & EVIDENTIARY PROBLEMS

Legal Principle: Burden of Proof (Criminal Law requires proof beyond a reasonable doubt).

Argument: Proving lack of consent in marital relationships is not easy, resulting in complex legal proceedings. False charges may serve as a means of bargaining during divorce or in property cases.

4. RELIGIOUS & CULTURAL SENSITIVITIES

Legal Principle: Article 25 (Freedom of Religion) vs. Article 21 (Right to Life & Dignity).

Argument: Certain religious and cultural communities maintain that marriage entails sexual duties, and criminalising marital rape interferes with religious beliefs and personal laws.

Although understanding the criminalization of marital rape as crucial in maintaining human rights and achieving parity in law is important, equally important is handling valid apprehensions about misuse potential and evidence difficulties.

RECOMMENDED LEGAL REFORMS

- **MODIFY SECTION 63 OF THE BHARATIYA NYAYA SANHITA (BNSS):** Broaden the definition of sexual offences to include sexual acts under coercion within wedlock, having explicit provisions deterring false reports through procedural controls.
- **ADOPT THE AFFIRMATIVE CONSENT FRAMEWORK:** Make explicit and continuous consent mandatory in all sexual encounters, as well as within marriage, as a consensus with globally accepted legal standards.
- **IMPROVE VICTIM SUPPORT MECHANISMS:** Redirect some of the legal emphasis towards more comprehensive support—

providing access to psychological counselling, legal advice, safety shelters, and overall rehabilitation services for victims.

These Legal Reforms shall be implemented for the betterment of women and children and reduce the increase in marital rapes in the society

Conclusion

Spousal rape cannot be allowed to be a matter of legal ambiguity—it is a serious violation of a person's bodily autonomy and consent. Still, any legal reform through legislation should be tightly calibrated to ensure the rights of survivors are maintained while providing enough legal safeguards against abuse, so justice prevails for all concerned stakeholders

The prosecution of marital rape is hampered by severe legal, social, and evidentiary difficulties. Most states do not criminalize it, or the law is such that conviction becomes improbable. The following is an examination of the main difficulties and potential legal remedies to overcome them.

CHALLENGES IN PROSECUTING MARITAL RAPE

1. LEGAL LOOPHOLES & MARITAL RAPE EXEMPTIONS

Issue: In most nations (e.g., India, Pakistan, China), marital rape is not clearly criminalized because husbands are given legal immunity under rape laws.

Example: Section 375 IPC (India) Exception 2 provides that sexual intercourse by a man with his wife (if she is over 18 years) is not rape, essentially providing legal immunity to husbands.

Impact: Courts are unable to prosecute marital rape even if non-consent is established by the victim, rendering justice impossible.

2. DIFFICULTY IN ESTABLISHING LACK OF CONSENT

Problem: In criminal law, rape must be established by force, coercion, or absence of consent. In a marriage situation, establishing non-consent is difficult since courts presume

marriage equates to consent (Doctrine of Implied Consent).

Example: In certain jurisdictions, even when a wife gives evidence that sex was forced, the absence of external injuries or witness evidence makes prosecution hard.

Impact: Most cases do not reach trial because they lack evidence.

3. SOCIAL STIGMA & CULTURAL BARRIERS

Issue: In most cultures, marital sex is a personal affair, keeping women from complaining about marital rape.

Example: In most cultures in Asia and the Middle East, a woman's responsibility for satisfying her husband is deeply seated, causing blame on the victim.

Impact: Women are kept quiet by family and community pressures, making it uncommon to prosecute.

4. MISUSE & FALSE ALLEGATIONS CONCERNS

Problem: Critics believe criminalizing marital rape would result in false cases of marital rape at the time of divorce, dowry disputes, or custody issues.

Example: The same concerns were expressed when Section 498A IPC (anti-dowry law) was introduced, with allegations of abuse in the case of divorces.

Consequence: The fear generates resistance to legal reform, and movement toward criminalizing marital rape slows down.

5. LACK OF JUDICIAL PRECEDENTS & AWARENESS

Issue: In many countries, no clear legal precedents exist for marital rape cases, making it harder for courts to set strong legal principles.

Example: In India, various High Courts have given conflicting judgments, reflecting judicial hesitation in addressing the issue.

Impact: Without clear legal guidelines, courts may hesitate to convict husbands even if evidence exists.

POTENTIAL LEGAL REFORMS TO OVERCOME THESE OBSTACLES

1. REFORM RAPE LAWS TO ELIMINATE MARITAL EXCEPTIONS

Solution: Reverse provisions in law that exclude husbands from being charged with rape (e.g., Exception 2 of Section 375 IPC in India).

International Example: The UK abolished the marital rape exception in 1991 (R v R case), creating a legal precedent for accepting spousal consent.

Effect: Confirms that consent needs to be given in marriage, as it does in marriage.

2. ENACT A CLEAR DEFINITION OF CONSENT

Solution: Establish positive consent in rape statutes, mandating clear, willing, and continued consent to sexual activity, even in marriage.

Example: Marital rape was legalized in Canada in 1983, and courts decreed that historical consent (marriage) does not mean future consent.

Impact: Facilitates it for courts to decide when sex without consent happens.

3. ENHANCE EVIDENCE COLLECTION & LEGAL PROCEDURES

Solution: Courts can permit medical, psychological, and circumstantial evidence to prove non-consent rather than physical injuries.

Example: Victim testimony, psychological reports, and abuse patterns can be accepted as evidence instead of physical force.

Impact: Increases successful prosecution.

4. ENACT STRONGER DOMESTIC VIOLENCE LAWS & MARITAL RAPE

Solution: Strengthen domestic violence laws to specifically acknowledge sexual violence in marriage and include protection orders.

Example: South Africa's Domestic Violence Act (1998) acknowledges sexual abuse in marriage. India's Protection of Women from Domestic Violence Act (2005) permits wives to file

protection against sexual abuse, but not marital rape.

Impact: Permits victims to obtain legal protection and restraining orders even when criminal prosecution is not feasible.

5. SET UP SPECIAL COURTS & FAST-TRACK CASES

Solution: Establish fast-track courts and special legal assistance for survivors of marital rape.

Example: Most rape cases in India are referred to Fast-Track Special Courts (FTSCs), minimizing delays.

Impact: Provides an incentive to victims to come forward, understanding that their cases will be heard quickly and sympathetically.

6. PUBLIC AWARENESS & JUDICIAL TRAINING

Solution: Organize awareness campaigns to sensitise society and train judges, police officers, and doctors to handle cases of marital rape.

Example: In the US, legal reforms were joined by education of the population on consent, transforming public attitudes towards marital rape.

Impact: Less stigma, more reporting, and guarantees judges interpret legislation equitably.

EMERGING LEGAL PERSPECTIVES ON MARITAL RAPE IN INDIA

The judiciary has made notable strides in protecting women's rights, affirming their right to equality and dignity as outlined in Articles 14 and 21 of the Indian Constitution. In the case of *Jaideep Bhanushankar v. Union of India*, the Gujarat High Court boldly stated that "Marital rape should be recognized as a crime rather than merely a concept." Justice Pardiwala stressed that "It is high time to discard the idea of 'implied consent' in marriage. The law must respect the bodily autonomy of all women, regardless of their marital status."

In a groundbreaking decision in *Independent Thought vs. Union of India*, the Supreme Court ruled that women have equal rights to men, and

no law should infringe upon these rights. If any law tries to do so, it should be considered null and void. This case sought to address the ongoing debate about the constitutionality of Exception 2 of Section 375, which allows for marital rape under certain conditions. The central government defended this exception by referencing socio-cultural and religious norms, but the court dismissed this argument, viewing it as an arbitrary protection of the spouse that effectively condones silent sexual assault. Section 375 of the IPC, being secular, takes precedence over personal laws like the Muslim Marriage Act of 1939 and the Hindu Marriage Act of 1955. The court pointed out that the confusion stemming from various child marriage laws has been worsened by Exception 2 of Section 375, which has essentially legalized the sexual exploitation of minors. The ruling underscored that:

Non-consensual sexual intercourse within child marriage is considered rape.

Both child marriage and marital rape are violations of constitutional and human rights.

There is an urgent need for the government to enforce and strengthen laws against child marriage.

The judgment clarified ambiguities in the legal framework. Tradition cannot be used as an excuse for child marriage or rape.

In *Bishnu Dayal v. State of Bihar*, the court continued to address these **pressing issues**.

CONCLUSION

The analysis of marital rape under Indian law exposes a multifaceted interplay of historical, cultural, and legal forces perpetuating gender subordination and disempowering women. In spite of great progress toward acknowledging women's autonomy and dignity, Indian law still excludes marital rape from criminalization, a reflection of very deeply ingrained patriarchal assumptions that conceive marriage as a contract that by definition involves consent. This legal anomaly not only contravenes

constitutional principles of equality and justice but also reinforces a culture of stigma and silence around sexual violence in marriage.

The international approach to marital rape shows an increasing awareness of the necessity for legal reform, with most countries having successfully criminalized this violence and upholding the principle that consent is key, irrespective of marital status. The proposals to reform laws in India, the amendment of present laws, formulating explicit consent definitions, and strengthening mechanisms of support to the victims are very crucial steps for bringing Indian law into harmony with international human rights norms.

Additionally, the judiciary's shift in attitude, as seen from precedent-setting decisions, highlights the possibility of revolutionary change in the legal framework of marital rape. By rejecting the concept of implied consent and acknowledging the rights of women to autonomy over their bodies, courts can lead to a more just society.

Finally, stopping marital rape is not just a legal matter but a social necessity that demands joint efforts from lawmakers, the judiciary, and civil society. It is essential to create a climate where women are enabled to seek justice without stigma and retribution. As India progresses, the promise to preserve the rights of all people, irrespective of gender, has to be kept at the centre of legal and social debate. Only through thorough legal reforms, awareness among the public, and a cultural transformation towards understanding the significance of consent can we expect to eliminate the evil of marital rape and achieve a safer, more equitable society for everyone.

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