

## REFORMING MARITAL RAPE LAWS IN INDIA

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### Abstract

In India, the institution of marriage has long been rooted in religious and patriarchal traditions, often placing women in subservient roles that prioritize domesticity and obedience. This cultural framework, reinforced by legal doctrines inherited from colonial jurisprudence, continues to shield perpetrators of marital rape which exempts husbands from prosecution for non-consensual sex with their wives. This legal exception, grounded in outdated notions of implied consent within marriage, denies married women the protection and autonomy afforded to others under rape laws, perpetuating cycles of abuse, silence, and systemic inequality. Despite global human rights obligations and landmark constitutional judgments emphasizing dignity, privacy, and consent, India has resisted criminalizing marital rape—citing concerns of false accusations and threats to the sanctity of marriage. This paper explores the socio-cultural, legal, and constitutional implications of the marital rape exception, drawing on comparative legal frameworks from the United Kingdom, United States, Canada, and South Africa. These jurisdictions demonstrate that recognizing marital rape as a crime strengthens, rather than undermines, the institution of marriage by embedding consent and mutual respect as its foundation. The paper ultimately argues that India stands at a legal and ethical crossroads and must choose between perpetuating patriarchal silence or advancing justice for all its citizens, regardless of marital status.

### Reforming Marital Rape laws in India.

Indian marriage has, in the past, been thought of not as a social bond alone, but as a religious one. For some Indian women, particularly those born into illiterate or semi-literate families, marriage is considered the pinnacle of their life goal. Girls from a very young age are inculcated to accept the role of household duties and live the life of a good wife and mother. The idea that a husband brings security, status, and affection has taken deep root. The deeply ingrained belief that a man gives love and protection makes many unable to recognize or leave abuse in a relationship of this sort. The scarcity of education also prevents women from critically thinking about their situations or setting

boundaries. Rape or forced sex, is a violation of dignity and control of the body. It is not sex or an act of passion— it's an act of violence. Rape survivors are left lasting trauma, often going back over their experience in a quest for justice. Marital rape has been in the past overlooked because women were previously the property of husbands, and the legal system was not interested in intruding into the home life of marriage.

This assumption, codified in Exception 2 to Section 63<sup>347</sup> of the *Bhartiya Nyaya Sanhita* lawfully shields a husband from rape accusations by virtue of marital status alone. Therefore, millions of Indian women are left

<sup>347</sup> *Bhartiya Nyaya Sanhita*, 2023 (Act 45 of 2023), s. 63, Exception 2.

vulnerable to one of the most serious desecrations of their personhood.

The colonial jurisprudence is the historical basis of this legal exception. In 1736, Sir Matthew Hale<sup>348</sup> expressed the infamous principle that a husband cannot be culpable for raping his legitimate wife. This had derived from the notion that marriage was tantamount to irrevocable sexual consent. The colonial powers solidified this notion in Indian law and established patriarchal assumptions that still linger even after India gained independence. Modern India, despite its many legal advancements, still clings to this outdated and discriminatory provision.

The effect of this exemption is legal as well as cultural. Legally, it establishes a class of women who are excluded from the protections afforded to others. Culturally, the exemption continues to perpetuate the myth of sexual access to a woman's body through marriage as unlimited. It promotes silence on spousal violence and discourages reporting. According to NFHS, 29.3%<sup>349</sup> of married women between the ages of 18–49 experience spousal violence, which not explicitly but includes sexual violence. The Law commission of India has had various discussions, going in depth on the topic of criminalization of marital rape in India. However, they have never concluded on the affirmative. The government has also rejected the Justice Verma Report<sup>350</sup>, which explains in detail why the right to be protected from sexual harassment and sexual assault is, therefore, guaranteed by the Constitution, and is one of the pillars on which the very construct of gender justice stands.

India's inability to criminalize marital rape places it at variance with global human rights norms. India signed the Convention on the

Elimination of All Forms of Discrimination Against Women (CEDAW) in 1993<sup>351</sup> but made a reservation on Article 16<sup>352</sup>, which addresses equality in marriage and family life. The reservation, grounded on the argument that Indian personal laws differ by religion, allows patriarchal practices to persist. However, international instruments such as the UDHR<sup>353</sup>, ICCPR<sup>354</sup>, and the Beijing Declaration<sup>355</sup> categorically assert that no religious or cultural practice can be invoked to perpetuate violence against women. The United Nations' Sustainable Development Goals<sup>356</sup>, to which India has pledged itself, also call for an end to all forms of violence against women—public and private.

Legal scholars and feminist campaigners have long pointed out that consent remains the foundation of sexual autonomy. The 2017 Supreme Court of India landmark decision in *Puttaswamy*<sup>357</sup> set out privacy as an essential right and the primacy of consent and dignity of the individual. In *Joseph Shine v. Union of India*<sup>358</sup> (2018), the Court further eroded patriarchal legal doctrine by criminalizing adultery and abandoning the doctrine of women as property. These judgments collectively set out that the marriage relationship does not override individual rights. Yet, the marital rape exception continues to resist these judicial advances.

There have been calls from various quarters to revisit this stance. The Justice Verma Committee Report (2013)<sup>359</sup>, set up in the wake of the Nirbhaya case, vehemently recommended criminalizing marital rape. It

<sup>348</sup> Matthew Hale, *The History of the Pleas of the Crown* 629 (Professional Books Ltd., London, 1971).

<sup>349</sup> National Family Health Survey (NFHS-5), Government of India, "State Fact Sheets and National Report" (2020-21), available at: <https://main.mohfw.gov.in/> (last visited on Apr. 27, 2025).

<sup>350</sup> Justice J.S. Verma Committee Report, *Report of the Committee on Amendments to Criminal Law* (23 January 2013), Ministry of Home Affairs, Government of India.

<sup>351</sup> Convention on the Elimination of All Forms of Discrimination Against Women, 1979, United Nations General Assembly.

<sup>352</sup> Convention on the Elimination of All Forms of Discrimination Against Women, 1979, art. 16.

<sup>353</sup> Universal Declaration of Human Rights, 1948, United Nations General Assembly, art. 5.

<sup>354</sup> International Covenant on Civil and Political Rights, 1966, United Nations General Assembly, art. 7.

<sup>355</sup> Beijing Declaration and Platform for Action, Fourth World Conference on Women, 1995, United Nations.

<sup>356</sup> UN General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development*, UN Doc. A/RES/70/1.

<sup>357</sup> *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.

<sup>358</sup> *Joseph Shine v. Union of India*, (2019) 3 SCC 39.

<sup>359</sup> Justice J.S. Verma Committee Report, *Report of the Committee on Amendments to Criminal Law* (23 January 2013), Ministry of Home Affairs, Government of India.

brought attention to the point that the right to bodily integrity and sexual autonomy cannot be denied on the basis of marriage. The government rejected these recommendations, on the pretext of fear of abuse and destabilization of the institution of marriage.

This fear is, however, not premised on empirical evidence of nations that have criminalized marital rape. South Africa, for example, has a socio-cultural context not very dissimilar from India. It legalized marital rape, recognizing the extreme harm inflicted by such violence on women and society. Other countries, including Canada and the United Kingdom, have adopted hybrid approaches—via court decisions or constitutional amendments—modifying procedural protections with legal recognition of marital rape as a crime.

The grounds for criminalization being resisted are generally based upon concerns of false allegations, establishing absence of consent, and disrupting domestic harmony. These are not marital rape-specific but for rape cases in general. Consent and credibility are already determined in other cases of rape by the courts. Why should wives be specially excluded from legal protection that is granted to others?

Additionally, the availability of "restitution of conjugal rights" under Indian personal laws aggravates the issue. It enables courts to order the resumption of marital cohabitation, in effect compelling a woman to cohabit with her abuser under the guise of maintaining marriage. This not only erodes a woman's right over her body but also creates a cycle of violence and powerlessness. It raises important questions regarding whose rights are given precedence under Indian law—the institution's or the individual's.

From a health perspective, marital rape is very damaging. Studies link it with severe mental outcomes, such as depression, PTSD, and suicide thoughts. The victims suffer quietly, carrying the psychological burden yet without being seen, supported, or just given justice.

Criminalizing marital rape in India is not an argument about the law—it's about what our society values. It compels a rethinking of the institutions of marriage, gender roles, and what consent means. It presents the uncomfortable fact that sexual violence is not necessarily perpetrated by strangers in dark places, but sometimes by known partners in bedrooms. It asks if India, as a democratic republic dedicated to the principles of liberty, equality, and dignity, can afford to turn a blind eye to the pain of its married women.

India has established that legal change is not only possible but also successful. The Hindu Succession (Amendment) Act, 2005<sup>360</sup> and its reaffirmation in *Vineeta Sharma v. Rakesh Sharma* (2020)<sup>361</sup> proved the ability of the law to redress past injustices and ensure gender equality. Similarly, an evolution is now necessary in sexual rights under marriage.

The way forward is to face cultural taboos, to challenge ingrained assumptions, and to respect the autonomy of women—not in theory, but in reality. As international and national momentum builds toward affirming the rights of all people within marriage, India is at a legal and ethical crossroads. The question is: will it opt for silence or justice?

While several countries have criminalized marital rape, the extent and effectiveness of such legal frameworks vary. India, in particular, still has an exception to marital rape in Section 63 of the *Bhartiya Nyaya Sanhita*<sup>362</sup> which states that sexual intercourse by a man with his wife—if she is above eighteen years—is not rape. This exception was brought into India by British colonial forces and has been followed in India ever since. Even as courts have begun to chip away at this exception, e.g., in *Independent Thought v. Union of India* (2017)<sup>363</sup> where the Supreme Court read down the exception for minor wives for marital rape, thoroughgoing reform continues to be out of reach. The Delhi

<sup>360</sup> Hindu Succession (Amendment) Act, 2005 (Act 39 of 2005).

<sup>361</sup> *Vineeta Sharma v. Rakesh Sharma*, (2020) 9 SCC 1.

<sup>362</sup> *Bhartiya Nyaya Sanhita*, 2023 (Act 45 of 2023), s. 63, Exception 2.

<sup>363</sup> *Independent Thought v. Union of India*, (2017) 10 SCC 800.

High Court is now entertaining a constitutional challenge to this exception in *RIT Foundation v. Union of India*<sup>364</sup>, which signals increasing judicial examination. Yet the Indian government remains opposed to reform, pointing to the possibility of abuse and possible interference with the institution of marriage.

The United Kingdom has gone a long way towards criminalizing marital rape. Traditionally, English common law adhered to the 17th-century teaching of Sir Matthew Hale<sup>365</sup>, which stated that a husband could not be culpable of raping his wife since marriage entailed irrevocable consent. This stance was authoritatively overruled by the House of Lords in the celebrated case of *R v. R (1991)*<sup>366</sup>, which asserted that the exemption of marital rape was an anachronistic one and irreconcilable with contemporary norms of individual freedom and dignity. The UK's change reflects the need for judicial activism in breaking down patriarchal legal paradigms and establishes that marriage has to be founded on mutual respect and agreement.

The legal response to marital rape in the United States is more intricate. The exemption of marital rape has now been technically abolished in all fifty states, but legislation varies from region to region. There are states that have more stringent standards of evidence or the victim's obligation to report within a shorter period of time if the spouse is the perpetrator. Other jurisdictions such as New York and California have completely criminalized marital rape indiscriminately, but some others maintain procedural hurdles. The development of U.S. policy has been greatly shaped by the women's rights movement and growing public sensitivity to domestic violence. Despite the fragmented character of American law, the general trend is toward more recognition that all cases of unwanted sex—both within and outside

marriage—are going to have to be addressed as criminal behavior.

Canada provides a more stable and promising corpus of law. In 1983, the Canadian Parliament eliminated the marital rape exception and defined sexual assault in gender-neutral and consent-oriented terms within its Criminal Code. Section 273.1 of the Code<sup>367</sup> reiterates that consent is voluntary agreement to perform the sexual act in issue. In Canada, the law is also enforced irrespective of whether the accused is a relative of the complainant or not, thus not rendering the sanctity of marriage to preclude the freedom of people.

South Africa also made strong law reforms in anticipation of its constitutional pledge to equality and human dignity. The Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007<sup>368</sup> criminalizes all non-consensual sex acts, including sex within marriage. Section 3 of the Act gives a wide definition of rape that includes any act involving sexual penetration with or without consent regardless of gender or marital status. The South African stance demonstrates that cultural or customary justifications cannot override constitutional rights and that actual equality requires the safeguarding of all persons against sexual violence, even within the marital relationship.

Together, these jurisdictions offer a diverse wealth of comparative material and outline several dominant themes. First, the presumption of implied consent to marriage has consistently been renounced by those jurisdictions that have reformulated their statutes. Second, the direction toward consent-based and gender-neutral formulations of sexual offences signals an expansion of conception regarding personal autonomy and human rights. Lastly, such legal frameworks show that criminalizing marital rape is not undermining the institution of marriage but, rather, strengthening that

<sup>364</sup> Government of India's affidavit in *RIT Foundation v. Union of India*, 2017.

<sup>365</sup> Matthew Hale, *The History of the Pleas of the Crown* 629 (Professional Books Ltd., London, 1971).

<sup>366</sup> *R v. R* [1991] 1 AC 599 (House of Lords)

<sup>367</sup> Canadian Criminal Code, RSC 1985, c. C-46, s. 273.1, amended by S.C. 1983, c. 125.

<sup>368</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (South Africa).

marriage is a relationship of consent and respect. With these advancements, India's persistent hold on the marital rape exception more and more seems to be anachronistic as well as contrary to its constitutional promise of gender equality and human dignity. India can learn much from the experiences of the United Kingdom, the United States, Canada, and South Africa as it formulates a legal code that ensures the rights of all citizens, whether or not they are married.

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