



# Bridging Legal Gaps: The Case For Criminalizing Marital Rape In India

Author: Archita<sup>1</sup>

<sup>1</sup> Archita, student, BBA. LLB. 3<sup>rd</sup> yr, Christ (Deemed to Be University) Lavasa campus, Pune

## Abstract

The paper highlights the grim reality faced by Indian women, who are often unable to refuse sexual intercourse with their husbands due to the societal normalization of marital rape. It asserts that this decriminalized offense severely impacts women's psychology and mental health, subjecting them to ongoing trauma. The author critiques Section 63 of the *Bhartiya Nyaya Sanhita*<sup>2</sup>, which defines rape but includes an exception stating that sexual intercourse with a wife is not considered rape. The article analyzes legal provisions and case law to argue that this exception is unconstitutional, asserting that marriage does not imply consent for sexual intercourse. Marital rape violates constitutional rights to bodily autonomy, dignity, and equality, aligning with protections in Article 21<sup>3</sup> (right to life) and CEDAW. The paper advocates for marital rape to be recognized as a crime, aligning India's laws with international standards and providing justice to married women who face sexual violence within marriage. The paper examines the evolution of rape laws in India, tracing their development from the Indian Penal Code of 1860<sup>4</sup> to present-day amendments. While key issues such as the role of consent and the age of consent have been clarified over time, the contentious issue of marital rape remains unresolved. Despite public protests and reforms aimed at harsher punishments for sexual violence, incidents of sexual assault continue to spark outrage. The paper reviews various amendments made to address these concerns, highlights the loopholes such as exemption of marital rape from the BNS, inadequate protection of married women, violation of constitutional rights, no remedy in civil law, psychological impact and social stigma, and emphasizes the need for further reforms to ensure comprehensive legal protection against sexual violence in India.

## 1. Introduction

“Rape” originates from a Latin word *rapio*<sup>5</sup>, which means “to seize”. In the earlier times, rape signified forcible seizure, it was considered to be deeply violent and non-consensual in nature. It was an act of ravishing a woman against her will, without her consent or through any consent that is taken from her through coercion, fear or by any deceitful mean. Rape also involves any kind of carnal knowledge achieved by force, violating the autonomy and dignity of the individual.

Section 63 of *Bhartiya Nyaya Sanhita* (BNS) defines rape. There is no *mens rea* required in the case of rape. There are many amendments that are made in this section of BNS, making it broader than the previous section 375 of Indian penal code (IPC). The 7 circumstances that are mentioned in section 63 of BNS<sup>6</sup> gives more clear grounds on the basis of what certain activities can be considered to be rape. Section 63 of *Bhartiya Nyaya Sanhita*<sup>7</sup> delineates the gravity and criminality of acts that violate a woman's autonomy and bodily integrity. This provision underscores the imperative to

<sup>1</sup> Archita, student, BBA. LLB. 3<sup>rd</sup> yr, Christ (Deemed to Be University) Lavasa campus, Pune

<sup>2</sup> *Bhartiya Nyaya Sanhita*, § 63 (2023)

<sup>3</sup> INDIA CONST. art. 21.

<sup>4</sup> The Indian Penal Code, No. 45 of 1860, § 375 (India)

<sup>5</sup> Dr. Satish Kumar Mishra et al., Exploring Concerns Associated with Marital Rape in India: An In-Depth Legal Analysis, EUR. CHEM. BULL 4705, 4705-12 (2023).

<sup>6</sup> *Bhartiya Nyaya Sanhita*, § 63 (2023)

<sup>7</sup> *Ibid*

protect individuals from sexual violence, emphasizing that any act of forcible carnal knowledge, whether through physical force, coercion, or deceit, constitutes a severe breach of personal rights and dignity. The legal framework thereby seeks to ensure stringent accountability and justice for such egregious offenses.

Section 64 of Bhartiya Nyaya Sanhita<sup>8</sup>, talks about the punishment for rape, any person who commits rape except section 64(2) of Bhartiya Nyaya Sanhita<sup>9</sup>, shall be punished with rigorous imprisonment of either description for a term which shall not be less than 10 years, which may extend to life imprisonment for life, and shall also be liable to fine.

## 2. Literature review

Literature focused on marital rape in India revolves primarily around the intersection of legal, social, and psychological frameworks. Scholars emphasize the growing issue of marital rape, suggesting that though the public is increasingly aware of this, it has not garnered legal recognition due to social protests. There have been several studies that have criticized Section 63 of the Bhartiya Nyaya Sanhita (BNS), which excludes marital rape as an exception to criminalization. Such studies hold that it violates the fundamental rights of the constitution, like bodily autonomy and equality. According to legal scholars, this provision goes against the spirit behind the constitutional protections under Article 21 of the Indian Constitution, which guarantees life and dignity. International instruments, such as CEDAW, also provide a comparative perspective, with various scholars arguing that the domestic law of India must be brought in line with international standards.

Psychological Impact Research on the psychological implications of marital rape clearly indicates serious negative impact on mental health, such as trauma, depression, and long-term psychological damage. In tracing the developments of India's rape laws, scholars follow the trajectory from the Indian Penal Code enacted in 1860 to the amended provisions of contemporary times, underlining gaps in marital rape laws. While there have been reforms aimed at further increasing the severity of punishment for sexual violence, available literature still reveals that marital rape is almost ignored. This body of work underscores the urgency for comprehensive legal reforms to ensure justice for married women facing sexual violence.

## 3. Research methodology

Descriptive research design is applied in various fields and can be made up of multiple methods of research, such as surveys, observation, and case studies. Generally, the major type of data is quantitative, and qualitative data can also be added as well.

## 4. Challenging the Norms: Unmasking the Reality of Marital Rape

Marital rape occurs when husband forces her wife into intercourse without her consent, using threats, physical violence, or mental torture, leaving her unable to freely give her consent. This egregious act is a severe form of sexual and physical abuse, a perversion of marital trust. Statistics reveal that every six hours, a young married woman in India is burned, beaten to death or driven to suicide due to emotional and physical abuse from her husband. These statistics highlight the urgent need to address and combat marital rape. Exception two of section 63 of Bhartiya Nyaya<sup>10</sup> Sanhita rules out forced sexual intercourse by a man with his wife, aged over 18 years, as rape.

Marital rape stands as one of the most morally and physically abhorrent violations in human society. It tramples upon the fundamental rights guaranteed to victims under Article 21 of the Indian constitution<sup>11</sup>. The judiciary must approach to these cases with utmost seriousness and decisiveness. Sexual violence is not only corruptive in nature but it is also an illicit invasion of a woman's privacy and purity, delivering a severe blow to her self-worth and dignity. It degrades and demoralizes, leaving a devastating, lasting impact. This act is not only a crime against an individual but a grievous offense against society as whole. It violates the core essence of human rights and breaches the fundamental principles enshrined in the Indian constitution. The urgent need to address and eliminate marital rape is paramount to safeguarding the dignity and human rights of women, and by extension, upholding the integrity of our society.<sup>12</sup>

<sup>8</sup> Bhartiya Nyaya Sanhita, § 64 (2023)

<sup>9</sup> Bhartiya Nyaya Sanhita, § 64(2) (2023)

<sup>10</sup> Ibid

<sup>11</sup> INDIA CONST. art. 21.

<sup>12</sup> Dr. Satish Kumar Mishra et al., Exploring Concerns Associated with Marital Rape in India: An In-Depth Legal Analysis, EUR. CHEM. BULL. 4705, 4705-12 (2023).

## 5. Rewriting the Law: India's Battle Against Marital Rape

Marital rape is not considered as an offence in our country. The exception in our country given in section 63 of Bhartiya Nyaya Sanhita,<sup>13</sup> clearly states that sexual intercourse by a man with his own wife is not considered to be rape. This is referred to as 'spousal exemption', according to which a husband can't be prosecuted for such an act, even if the intercourse was without her consent or against her will. This is a violation of rights of a married woman human right. She is not only expected by the society but also the legal system to give up on her rights and be at the mercy of her husband's sexual advances.

Now, when we see look into section 67 of the Bhartiya Nyaya Sanhita, this section basically talks about criminalizing the rape of a wife, during the period when the married couple has been separated by a judicial decree or otherwise, without her consent, shall be punished.

If any person commits this offence, then the person shall be punished with imprisonment of either description which shall not be less than two years but which may extend to 7 years, and shall also be liable to fine.

The term sexual offences shall mean any of the acts mentioned under clauses(a) to (d) of section 63 of Bhartiya Nyaya Sanhita.<sup>14</sup>

This has been incorporated by the Criminal Law Amendment Act, 1983<sup>15</sup> as a step towards the aim of women protection from sexual assault, and indeed such legislation is highly beneficial for married women. However, the fact that such amendment was brought in order to protect sexual respectability of only wives who are under therapy remains mysterious. Judicial separation and not to punish the rape of married women in general is reflective of the social mindset that wives cannot deny their husbands the fulfillment of their sexual urges if they are cohabiting and will remain a blight on the intention of the legislature, casting a shadow on the conviction of the law-making body to protect the married women of India.

Under section 85 and 86 of Bhartiya Nyaya Sanhita<sup>16</sup>, criminalizes the act of subjecting a woman to cruelty by her husband or relatives of husband. The cruelty should subject the woman to commit suicide or to cause grave injury or danger to her life, limb or health. The wife can seek divorce under this section, but this section does not explicitly talk about marital rape in its scope of application. The punishment includes imprisonment for a term exceeding up to 3 years and shall also be liable to fine.

Marital rape during cohabitation is not a ground divorce, section 13 of Hindu Marriage Act 1955<sup>17</sup>, section 27 of the Special Marriage Act 1954<sup>18</sup> and section 10 of the Indian divorce act 1869<sup>19</sup> lay down the grounds based on which the wife the wife can present a petition for divorce in the relevant court of law, cruelty being one of them. It is true that marital can come under the scope of cruelty if it has been done with physical abuse, but if the case involved rape by the husband wherein the consent was obtained by the threat of hurt, which in a non- marital relationship has been held to be commission of rape, then the wife cannot seek divorce.

We don't see any such cases that are directly related to marital rape in India, examination of Supreme Court and High Court rulings on rape will contribute to ascertaining the judicial approach to this grave offense and its infringement upon a woman's right to sexual privacy.<sup>20</sup>

In the landmark case of *Vikram Singh v. State of Haryana*,<sup>21</sup> which involved gang rape where the husband was also a perpetrator, the Punjab & Haryana High Court sentenced the husband to life imprisonment and imposed a fine of Rs. 5000. The court emphasized that a rapist violates not only the privacy of the victim but also her personal integrity, stating that such individuals do not deserve any sympathy from law or society. It elucidated that protection of a woman's honour is must.

In *Bodhisattwa Gautam v. Subhra Chakraborty*,<sup>22</sup> the Supreme Court held that rape violates the right to life of a woman, which includes her right to live with human dignity. The court ratified that every woman has a right to sexual privacy,

---

<sup>13</sup> Ibid

<sup>14</sup> Bhartiya Nyaya Sanhita, § 63 (2023)

<sup>15</sup> Criminal Law (Amendment) Act, 1983, No. 43, Acts of Parliament, 1983

<sup>16</sup> Bhartiya Nyaya Sanhita, § 85-86 (2023)

<sup>17</sup> Hindu Marriage Act, 1955, § 13

<sup>18</sup> Special Marriage Act, 1954, § 27

<sup>19</sup> Indian Divorce Act, 1869, § 10

<sup>20</sup> Manan Legal Service India e-Journal, Whether the Exception II of sec. 375 of IPC, 1860 Constitutionally Valid or not, (2024)

<sup>21</sup> *Vikram Singh v. State of Haryana*, 2000 (5) Bom. C.R. 148

<sup>22</sup> *Bodhisattwa Gautam v. Subhra Chakraborty*, (1996) 1 SCC 490.

and it is not within anyone's discretion to violate her privacy at their will. The spousal exemption from the offense of rape upholds male superiority and transforms marriage into an unchecked domain where the state cannot intervene to ensure equality and justice.

Similarly, in *Rafiq v. State of Uttar Pradesh*,<sup>23</sup> the court said that if a woman is raped, it not only causes physical injuries but deeply and permanently leaves an impression of shame. These judgments have expressed that legal bias in the judicial response to human rights cannot even be a little dulled.

## 6. Marital Rape: Shattering Women's Constitutional Rights

Marital rape is one of the most heinous and brutal violations in society, abridging the most fundamental rights which are within Article 21 of the Indian Constitution. It is imperative that the judiciary takes these issues very seriously and delivers judgments with great decisiveness.

Sexual violation is not only morally corrupt but also grossly violating a woman's privacy and purity. It strikes a very severe blow to the woman's self-esteem, dignity, and respect; often it results in long-lasting devastating effects. Such an act seals the profound damage the person causes, not only to one's body but most importantly to one's soul, tarnishing the dignity, reputation, and innocence of a woman.

Marital rape is not a crime against an individual but against women and society as a whole. It violates the very essence of human rights and breaches the fundamental rights guaranteed by the Indian Constitution. It is the responsibility of the judiciary to identify the seriousness of marital rape and assure justice to the victims in terms of meeting their constitutional rights and dignity.

One provision of the IPC states that "sexual intercourse or sexual acts by a man with his wife, when the wife is not eighteen years of age, is not rape." This provision brings an uninfluenced and arbitrary distinction between a married underage girl and an unmarried one, which trespasses on the fundamental principles enshrined in Articles 14, 15, and 21 of the Indian Constitution<sup>24</sup>.

### Article 14: Equality before the law<sup>25</sup>

Article 14 ensures that no one is discriminated upon and all are treated equally before the eyes of the law and are given equal protection of the laws. It further aims to eliminate discrimination in any way and ensure fairness while providing justice. This provision of the IPC by distinguishing between married and unmarried girls under aged violates the very essence of Article 14, as the legal protection against rape afforded to unmarried girls is denied to the married underage girls.

### Article 15: Prohibition of Discrimination<sup>26</sup>

Article 15 prohibits discrimination on various grounds such as sex. Article 15 therefore provides the guideline that establishes the need for treating everybody alike, no matter the personal circumstances. The marital rape exemption under IPC discriminates against underage married girls, for it, in effect, condones sexual violence against them just because they are married. This is a direct infringement of article 15, which aims at eliminating gender-based discrimination.

### Article 21: Protection of Life and Personal Liberty<sup>27</sup>

Article 21 guarantees the right of every citizen to life and personal liberty. Such liberty essentially consists of the right to live with dignity. The right to protection for physical and mental well-being also falls under this category. By denying marital rape a status as a crime, IPC takes away the dignity and personal liberty of underage married girls, making the intrusion in their bodies and personal integrity without any legal prevention and redressal mechanism under this article.

<sup>23</sup> *Rafiq v. State of Uttar Pradesh*, (1980) 4 SCC 262

<sup>24</sup> India Const. art. 14, 15 & 21.

<sup>25</sup> India Const. art. 14

<sup>26</sup> India Const. art. 15

<sup>27</sup> India Const. art. 21

## 7. Marital Rape: Unravelling India's Legal Maze

In India, the existing legal position regarding marital rape starkly juxtaposes with the said principles of many laws specially created for the regulation of sexual activities and marriage and for the protection of minors. For example, Juvenile Justice (Care and Protection of Children) Act, 2015;<sup>28</sup> Protection of Women from Domestic Violence Act (PWDVA), 2005<sup>29</sup>; Protection of Children from Sexual Offences (POCSO) Act, 2012<sup>30</sup>; and Prohibition of Child Marriage Act, 2006<sup>31</sup> hold them to the fact that it causes utmost bodily as well as mental hurt to those sexual minors who have been subjected to any kind of forced sexual acts. Despite these protections, the exemption of marital rape for underage girls undermines the spirit of these laws, leaving a significant gap in safeguarding their rights and well-being.

Under the other laws outside the IPC, that is, the POCSO Act, it is clearly stated that a girl under 18 years cannot give a valid consent to sexual activities. The POCSO Act defines penetrative assault and incorporates aggravated penetrative sexual assault including those within a marital context. However, that is not well illuminated by a glaring contradiction in Section 375 of the IPC.<sup>32</sup> The section indicates that a husband would not be held guilty of rape if his wife is between the ages of 15 to 18 years, even though he would be guilty of aggravated penetrative sexual assault under the POCSO Act. This inconsistency sets up a disturbing legal paradox between the exploitation and abuse of underage married girls and the seeming protection offered to their abusers.

Although "rape" under the IPC and "penetrative sexual assault" under the POCSO Act differ with regard to their definitions, the definition of "rape" under the IPC does not exist for all jurisdictions, whereas both offenses share the same consequences. This lacuna presents the inconsistencies in the legal structure, where such differences have been asserted regarding the legislation to minors and married girls under two different Acts. Despite their similarity in seriousness, the violation arises from the non-uniformity of definition and interpretation, which creates confusion and avenues for loopholes in enforcing justice.

The law turns cloudy when it presumes the consent of the legally incapacitated girls and, on the other hand, disregards the lack of consent of legally competent women. The Criminal Law (Amendment Act) of 2013<sup>33</sup> states that consent will be a clear, explicit agreement to specific sexual activities and cannot presume the consent of subsequent acts or sexual relations with different people. Therefore, marriage cannot be a license for unregulated sexual activity.

Further, the PWDVA defines domestic abuse, which includes sexual abuse, described as any act that humiliates or degrades women. Clearly, non-consensual sexual contact falls under this definition and affects all women in marital or marital-like relationships-not only child brides. This legal conundrum speaks to the immediate necessity of reconciling contradictions to secure the rights and dignity of all women.

The inconsistency within the IPC is starkly highlighted by its exemption for marital rape. Least serious sexual offences like outraging a woman's modesty or sexual harassment are punishable if committed by a husband against his wife, but marital rape is not considered a crime. Such glaring contradiction makes child marriages visibly legitimate as it excludes forced sexual activities within such marriages from the definition of "rape." In this way, the unfortunate consequences of child marriage continue to deviate such a good article from affecting not only the young girls but also their future children and the public at large. This legal gap buttresses some harmful societal norms and denies justice to vulnerable women and girls.

In India, the age of 18 has come to be universally recognized as the legal threshold for entry into contracts, the right to vote, and consent to sexual relations. However, the judgment of the Supreme Court in *Independent Thought v. Union of India*<sup>34</sup> criminalising sexual relations with a spouse aged less than 18 years leaves many significant lacunae in the legal framework. It fails to address scenarios where both partners are minors, raising concerns about the rights of young boys involved in such relationships. Moreover, the ruling does not extend protection to women over 18, leaving adult women vulnerable to coercive sexual relations within marriage.

The judicial logic that made Exception 2 of Section 375 IPC<sup>35</sup> unconstitutional for the grounds of infringing fundamental rights may also be applied and indeed should be applied to the adult women. That speaks for the real urgency of having

<sup>28</sup> Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2 of 2016, Acts of Parliament (India).

<sup>29</sup> Protection of Women from Domestic Violence Act, 2005, No. 43 of 2005, Acts of Parliament (India)

<sup>30</sup> Protection of Children from Sexual Offences (POCSO) Act, 2012, No. 32 of 2012, Acts of Parliament (India)

<sup>31</sup> Prohibition of Child Marriage Act, 2006, No. 6 of 2007, Acts of Parliament (India)

<sup>32</sup> Ibid

<sup>33</sup> The Criminal Law (Amendment) Act, 2013, No. 13 of 2013, Acts of Parliament (India)

<sup>34</sup> *Independent Thought v. Union of India*, (2017) 10 SCC 800.

<sup>35</sup> Indian Penal Code, § 375, Exception 2 (1860) (India)

gender-neutral legal provisions that guarantee equality, dignity, and protection to all individuals regardless of age or marital status.

The IPC thus violates the bodily integrity of adult women by depriving them of a fundamental right to refuse consent to sexual activity with their spouses on account of marriage alone. It breaches Article 21 of the Indian Constitution<sup>36</sup> by directly taking away the right to life and personal liberty-in this case, the right to live life with dignity.

Some have even argued that the present legal age of sexual consent is too high since the young women under the age of 18 find themselves being charged with statutory rape for exercising independent sexual choices.

## 8. Unravelling the Myths: Consent and Marital Rape

Since her consent is implicit her “NO” is unimportant, even when the marriage is voidable, the husband and still use the exception and assault her till the marriage is considered invalid by the court.

In the context of rape, consent refers to a clear, conscious agreement to engage in sexual activity through words, signals, or any other form of verbal or non-verbal communication. In rape cases involving an accusation of assault, consent should be given with actual intent and must come after a woman has had the opportunity to decline or resist. This makes a significant distinction between an actual form of consent and coerced or forced compliance.

The absence of injury on the person of either the attacker or the victim in a case does not necessarily determine the issue of the presence or absence of consent. This issue must be addressed by considering all available evidence, as the lack of injuries alone cannot conclusively resolve the question of consent. The context and the circumstances surrounding that incident are therefore crucial in ascertaining whether it involved free consent from the victim or was it due to coercion and fear. The IPC Section 375,<sup>37</sup> which defines rape, has underlined the fact that consent must be real and voluntary. A mere demonstration of passive submission, more so under such unavoidable coercion or when the mind of the victim is clouded by fear cannot be accepted as valid. Consent made under threats, intimidation, or even the fear of death or grave harm cannot be considered. According to law, true consent must, by definition be an act of free will and cannot be induced by any form of external compulsion or threat.

The issue of consent becomes an even more complex matter in marital rape cases. The traditional thinking that has placed at its forefront the perception that marriage implies blanket consent for sexual activity is incorrect in that it tries to ignore the fundamental rights of people inside a marriage. Every individual, married or otherwise, has a right to bodily autonomy as well as the right and freedom to choose whether or not to engage in sexual activity. The prima facie defeat of a woman's right to personal liberty and dignity while married has been achieved through this assumption: that marriage nullifies the need for consent.

The Indian Evidence Act, especially Section 114A,<sup>38</sup> assumes a lack of consent on the part of the female victim in favor of the female victim during rape trials. This legal provision shifts the burden of proof onto the defence, requiring them to demonstrate that the victim had given her consent. This assumption is crucial in eliminating the power imbalances and societal prejudices that often end up working against the justice of rape victims. When the law presumes a lack of consent, it would correctly recognize that victims of rape face great difficulties in proving their non-consent and, thus, make justice more victim-friendly.

However, this assumption alone is insufficient for addressing the issues with the understanding of consent in marital rape cases. More important, there is a need for a more subtle understanding and interpretation of consent that takes into account the specific dynamics of marital relationships. Marital rape not only involves a violation of a woman's bodily autonomy but also her dignity and human rights. It perpetuates gender inequalities and reinforces problematic societal norms that stereotype women as the property of their husbands.

Recognition of marital rape as a crime will remain incomplete without explicit legal reforms. The law will have to convincingly ensure that it not only acts as a protection giant for married women but also erodes existing loopholes such as the marital rape exemption under Section 375 of the IPC. According to it, sexual intercourse by a man with his

<sup>36</sup> India Const. art. 21

<sup>37</sup> Indian Penal Code, § 375, Exception 2 (1860) (India)

<sup>38</sup> Indian Evidence Act, 1872, § 114A

wife, if she is above 15 years, does not amount to rape. This provision, therefore, is in outright violation of the principles of equality and non-discrimination as enshrined in the Indian Constitution.

Such programs of education and sensitization will create an environment against the societal attitude that tolerates marital rapes. Orienting both men and women to the necessity of consent and the right to body autonomy in the marriage relationship can be done. Misconceptions and myths related to marital rape would be appropriately portrayed, as that marriage is no guarantee of automatic sexual access.

Strengthening the support services for victims of marital rape must be strengthened, along with access to justice and rehabilitation. These also include legal aid, counselling, and medical assistance for such victims. Similarly, law enforcement agencies and the judiciary need to become sensitized to marital rape, so that the cases are handled seriously and sensitively as well.

Besides legal reforms and awareness programs, there is a requirement for further research on the prevalence and impact of marital rape in India. Comprehensive data on marital rape is required in order to formulate policy decisions and ensure that the legal system is responsive to the needs of the victimized women. Research should also probe into socio-cultural factors that lead to the persistence of marital rape and identify effective strategies to address these factors.

The issue of consent in marital rape cases is exceedingly complex and multilateral. This requires not only legal reforms but also education and awareness programs, support services for victims, and comprehensive research. By taking this serious issue of marital rape seriously, we can work towards a society where the bodily autonomy and dignity of every individual would be respected, regardless of their marital status. This piece of legislation must, therefore, evolve with the fundamental principles of equality and justice to protect individuals-married or otherwise-from sexual violence and coercion.

The IPC of 1860 does not precisely define the term 'consent.' Section 90 of the IPC<sup>39</sup> describes what does not constitute consent, which means that consent is invalid when given under the influence of fear, misconception, or due to unsoundness of mind or intoxication. Hence, a true consent is thought to be given freely, willingly, and without any coercion, fear, or deception. For consent to hold good in this section, it has to be an enlightened and mature appreciation of the nature and consequences of the sexual activity. Explanation 2 to Section 375 of the IPC indicates that such consent must be given freely, and the participation in the sexual act must be of a willing nature.

Of course, consent is fundamentally "an act of reason, accompanied with deliberation, the mind of weighing, as in a balance, the good and evil on each side." This means that, technically speaking, a person must make a rational choice for him or herself, free from any pressure from without. Societal norms and stereotypes often keep this perspective at bay, especially when talking of the institution of marriage.

One of the biggest misconceptions is that men interpret 'no' for a woman as a 'yes,' thinking she is asking them to persuade or convince her into doing otherwise. Such attitudes were based on some vague classifications of expecting women to be shy and hesitant, wherein men felt they had to coax a reluctant agreement. This form of bias complicates consent because it is often blurred over marital premises.

Other concerns that further thwarted the criminalization of marital rape include the fear that angry spouses might use false allegations of rape as a means to exert power, force, or humiliate their partners. These intimate and private relationships often meant that any allegations came down to "her word against his" with minimal to no witnesses on either side. This lack of evidence is compounded even further in that medical examinations are typically unhelpful in proving non-consensual sex in a marital context unless accompanied by evidence of physical cruelty.

Denying women the right to refuse sexual activity within marriage reeks of paternalism, where the voices and choices of certain groups of people, particularly women, are deemed irrelevant. This paternalistic attitude not only undermines women's autonomy but also perpetuates a culture where their rights and agency are subordinated to the whims of their husbands.

For example, if women are forced into sexual intercourse by husbands, then there is no contradiction in the fact that there is no outward display of physical trauma, for psychological trauma and its effects long after may be just as devastating. Legal recognition of marital rape would affirm the rights of dignity of women not to be treated as mere objects of their husband's whims and fancies.

<sup>39</sup> Indian Penal Code § 90 (1860)

The cultural expectation placed on women to be passive and not make waves in their sexual life is further complicated by this issue. Negative stereotypes must be addressed and altered and subsequently contribute toward unconsented sex becoming a normalized practice within marriage. Strategies for education and public-awareness campaigns should take place to assist people in better understanding consent and, in general, clearly emphasize that it should be active, enthusiastic, and ongoing.

Moreover, the apprehension of wrongful accusations should not stand in the way of penalizing marital rape. The legal apparatus is capable of processing frivolous charges through proper investigation and evidence-based prosecution. The spectre of abuse of process should not cloud the fundamental freedoms of women to control their bodies and their dignity.

Legal reform: The marital rape exception to the IPC needs to be done away with. This would bring the law in consonance with the letter of the Indian Constitution in so far as that it speaks of equality and non-discrimination. The legal definition of consent also needs to be broadened so that it speaks of free and voluntary agreement and not a thing obtained by any form of coercion, pressure, etc.

Support systems for victims of marital rape need to be strengthened so they can seek justice and be provided with adequate support. This means legal aid, counselling, and medical assistance. Law enforcement agencies and the judiciary should be educated to handle such matters seriously and with sensitivity.

Perhaps more importantly, societal attitudes toward marital rape need to shift. Public awareness campaigns should focus on educating the populace about the essential requirements of consent and the damaging effects that take place when sex occurs without such consent within marriage. These would have to cast a question over the long-held cultural presumptions that marriage automatically includes the consent to have sex with one another.

Consent in cases of marital rape remains very complex and therefore multifaceted. It requires legal reform, education and awareness programs, victim support services, and general research. By dealing with the marital rape issue seriously, we can work towards a society where even every citizen's right over his body and dignity is respected despite the fact that it is marital or not. The law must evolve

with the fundamental principles of equality and justice, so that married women are not subjected to such heinous acts of sexual violence and coercion.<sup>40</sup>

## 9. Marital rape: comparison between India and other countries

When we talk about marital rape it comes under the scope of rape. Marital is also known as spousal rape, it is said that when the couple are tied up in the institution of marriage there is an implied consent which is given to the husband. It is considered as an unwilling sexual intercourse between husband and wife in marital relations. Countries such as England, Canada, Poland, Australia, USA, including many more countries had criminalized marital rape in their respective countries. Among many other countries India is one of them to not criminalize marital rape.

When we talk about India, there is a notion that talks about how marital contract gave the husband the consent to have sexual intercourse with his wife, whenever he wants to, but it is not possible to have sexual intercourse all the time. Consent being an essential part needs to be there. Rape is rape irrespective of any relationship between the couple.

### 9.1. Status of marital rape in England

India borrowed the Penal Code from England; however, marital rape is still un-criminalized in India. Marital rape under the UK law is classified as sexual assault under the Sexual Offences Act, 2003. Until 1992, the rights of spouses had no recognition in English law and husbands had claim of their conjugal rights on the wives without any consent. This all changed in the landmark case of *R v. R* in 1991<sup>41</sup>, when the House of Lords were forced to rule on whether a man could be found to commit rape against his wife. The appellant married on August 11, 1984. He got separated from his wife due to matrimonial disputes and started living with his wife at her parents' place on October 21, 1989, on her statement of intention to seek divorce in a letter. He also did that in subsequent conversations. It was on November 12, 1989, when the appellant entered his wife's residence and, attempting to commit sexual intercourse against her will, physically assaulted her when she resisted. Presented before the court for decision was a critical question: "Can a husband rape his own wife? Does marriage imply consent to sexual intercourse without further consent?"

<sup>40</sup> Kaushik, Nandini & Vyas, Shantanu, How to Define Consent in Marital Rape, 59 J. Indian L. Inst. 101 (2017)

<sup>41</sup> *R v. R*, [1991] 3 WLR 767 (HL).

The House of Lords decided that the common law fiction on marital rape had never been considered in English law. So, he was found guilty of raping his wife. He was given three years for attempted rape and another eighteen months for sexual assault.

The decision in this appeal was considered a revolutionary judgment in the development of the common law system. So, it showed impact on social, cultural, and economic changes. Before such decree, a husband could treat his wife as a sexual slave, as if a prostitute. The recognition of marital rape as a crime was an important step towards recognizing women's independence and rights under marriage. Currently, an offender who commits marital rape in the UK is sentenced up to nineteen years in prison, depending on the circumstances of the case. A life sentence is another possible punishment.

The R v. R<sup>42</sup> case stands as a pivotal moment in the progression of legal and societal standards regarding marital rape, illustrating the importance of evolving legal frameworks to protect individual rights and dignity within marriage.

### 9.1. Marital rape status in Canada

In Canada, marital rape became a crime in 1983—a necessary change in legal and social thinking. At the time of the change, a man could legally rape his wife and was under no obligation to deal with any criminal charges arising from his actions. The reforms made in 1983 to the Criminal Code changed this political and legal landscape. These amendments replaced the term "rape" with "sexual assault," thereby broadening the scope of sexual offenses to include any form of non-consensual sexual conduct. This allowed marital rape to be explicitly recognized and criminalized, affirming the rights of women to freedom from violence and acknowledging them as full citizens under the law.

The critical difference between rape and marital rape is that the latter has a unique emotional and psychological impact on the victim. The wife in such cases may feel extreme isolation, betrayal, and a loss of trust. She may also be made to feel degraded. This may be compared to prostitution or engaging in commercial sex work. It is imperative that legislation against rape should not be restricted but rather extended universally because in making exceptions would render the state and judiciary impotent and an ally in these acts of violence. The amendments of 1983 stressed that in cases of marital rape, consent needs to be construed and enforced very clearly in order to protect the rights of women.

The Criminalizing of marital rape was further spurred with the enactment of the Canadian Charter of Rights and Freedoms in 1982<sup>43</sup> that brought forth the necessity of protecting individual rights and freedoms. Under the new legal order, crimes of sexual assault attract heavy punishment; rape marital attracts up to 10 years in prison; assaulting a person with an offensive weapon or causing bodily harm attracts 14 years in prison, while sexual assault that causes actual bodily harm or serious disfigurement leads to life imprisonment.

This legal move categorically declared that marriage will not and cannot serve as a shroud for sexual assault. Women received a definitive right to revoke consent anytime during the course of marriage, thus redefining their entity as independent beings with independent identities. The declaration of marital rape as a crime indicated the intent to protect women's rights and safeguard them from the horrors of violence within marriage.

## 10. Recognizing Marginalized Women in Marital Rape Discussions

It is important to recognize marginalized women in discussions on marital rape for a holistic understanding of the problem and in the development of inclusive and effective legal and social interventions. Marital rape, although it constitutes a serious violation of a woman's autonomy and dignity, impacts specific groups of women differently and in complex ways. Such experiences are therefore structured by intersecting considerations such as race, ethnicity, socioeconomic status, disability, sexual orientation, and immigration status. Hence, an intersectional approach must be adopted to count and redress the multiple vulnerabilities and barriers experienced by marginalized women in the context of marital rape.

To begin with, women belonging to the marginalized communities suffer from compound forms of discrimination and violence, which increase their vulnerability to marital rape. For example, women belong to low socioeconomic strata are destined to be economically dependent on the spouses, thereby limiting their ability to leave vicious marriages. This economic dependency can be a major block to assistance or redress. Moreover, women from some cultural or ethnic groups may also experience further social compulsion to uphold family honour or suffer stigma if they report

<sup>42</sup> Ibid

<sup>43</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.)

marital rape. All these cultural factors contribute to underreporting of marital rape and a general lack of advocacy for its victims in their community.

Women with disabilities are another group which, due to several other factors, is increasingly at risk of suffering marital rape. Moreover, due to dependency on their spouses for physical care, they may find it challenging to flee abusive marriages. Furthermore, there is extreme inequality in the availability of support services for disabled women with regard to a wide variety of issues, which is what makes women with disabilities even more isolated and vulnerable. The system often fails to provide sufficient protection or support accommodation to women with disabilities who are survivors of marital rape.

Immigrant women and refugees also represent a particularly vulnerable group in the context of marital rape. Language barriers, fear of deportation, and lack of knowledge about their rights can prevent these women from seeking help. Moreover, immigrant women may face additional threats from their spouses related to their immigration status, which can be used as a tool of coercion and control. The intersection of immigration status and marital rape plays a complex dynamic where women are less likely to report the abuse out of fear of being arrested or separated from their children.

LGBTQ+ women also have the pressures of marital rape, especially for those who are in same-sex marriages or relationships. The stigmatization and discrimination against LGBTQ+ in society could increase the trauma experienced during the act of marital rape and present further barriers to finding support. Marital rape within same-sex relationships might not be recognized or understood as much, neither by law nor by society, thus making the protections for the LGBTQ+ victims mostly lacking and inadequate.

It is also essential to recognize the impact of marital rape on older women. Older women may have been in long-term marriages where abuse has been normalized over time. They may face age-related barriers such as physical frailty, financial dependence, and social isolation, making it difficult to leave abusive situations. The intersection of ageism and gender-based violence requires tailored approaches to support older survivors of marital rape.

To effectively address the issue of marital rape, an intersectional approach must recognize and address the specific needs and challenges of the marginalized women. Legal reforms must ensure the definition of marital rape is inclusive and acknowledges the diversity of experiences by all women; thus, the law has adequate protections for women with disabilities, immigrant women, LGBTQ+ women, and older women. Therefore, support services such as shelters, counselling, and legal aid become accessible and culturally sensitive when reaching out to this group of marginalized women.

Education and awareness campaigns should be carried out in a manner that reaches diverse communities with the specific obstacles they face. There should be training undertaken in community leadership, service provider, as well as law enforcement levels to know what people in the marginalized women require differently for them to open up. This may help build trust and ensure that the survivor receives support and justice accordingly.

Working with grassroots organizations and local community groups is also critical to reaching and supporting the most marginalized women. These groups usually have an organic understanding of the specific issues one's community faces and provide culturally competent support and advocacy. Policymakers and service providers have a clear way out of developing effective, participatory strategies against marital rape by partnering with these organizations.

In addition to legal and social interventions, more research is required to better understand the experiences of marginalized women specifically in the context of marital rape. The collection of data with analyses broken down by race, ethnicity, disability, and immigration status would help identify gaps and inform targeted interventions. This research can facilitate better evidence-based policies and programs that address the specific needs of marginalized women.

## 11. Conclusion and Suggestions

The paper gives a vivid illumination of the harrowing reality that Indian women face in a society where marital rape is normalized socially as well as legally. Decriminalizing the offense does not only take away the bodily autonomy of women but also inflicts deep psychological and emotional trauma. The definition of rape and the immunity of non-consensual sexual intercourse within marriage, under Section 63 of *Bhartiya Nyaya Sanhita*<sup>44</sup>, illustrates the failure of the legal system to protect women's rights. Based on the critical analysis of legal provisions and case law, it persuasively argues that this exception is unconstitutional as it holds that marriage cannot and need not be read as implied consent for sexual intercourse.

<sup>44</sup> *Bhartiya Nyaya Sanhita* § 63 (2023)

It not only grossly violates constitutional rights to bodily integrity, dignity, and equality but also runs grossly against Article 21 of the Indian Constitution<sup>45</sup>, which guarantees a right to life and personal liberty. Moreover, it violates the principles as incorporated in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>46</sup> to which India is a signatory. It clearly advocates for marital rape being criminalized and for an attempt by India to realign its domestic law with standards around the world. Such recognition is critical not only in upholding justice but also in giving legal avenues to married women against sexual violence perpetrated within marriage.

Trace the development of rape laws in India from the Indian Penal Code of 1860<sup>47</sup> to current amendments. Discuss the lack of resolution on marital rape despite extensive reform in other directions. The increased penalties through public protests and legal amendment for sexual violence cases with marital rape not exempted under the BNS, insufficient protection of married women, abuse of rights of the constitution, remedies unavailable in civil law, and severe psychological impact and social stigma on the part of the survivors-all these are significant gaps in legal protection that require urgent attention. The paper concludes with the need for further reforms for comprehensive legal protection against sexual violence and thus safeguard the rights and dignity of all women in India.



<sup>45</sup> India Const. art. 21.

<sup>46</sup> Convention on the Elimination of All Forms of Discrimination Against Women, adopted Dec. 18, 1979, G.A. Res. 34/180, U.N. Doc. A/RES/34/180.

<sup>47</sup> Indian Penal Code (1860).