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# CHALLENGING THE SILENCE: MARITAL RAPE, GENDER JUSTICE, AND HUMAN RIGHTS

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## ABSTRACT

Marital rape, the non-consensual intercourse by a spouse, remains a pressing issue at the intersection of gender justice and human rights. This research paper explores the pervasive yet often overlooked crime of marital rape, emphasizing its profound implications for the rights and dignity of individuals, particularly women. Despite advancements in women's rights globally, marital rape persists due to entrenched cultural norms, legal inadequacies, and societal apathy. The paper argues for recognizing and addressing marital rape as a violation of human rights and a critical barrier to achieving gender justice.

Beginning with a historical overview, the paper traces marital rape's roots to patriarchal structures that have subjugated women and rendered their autonomy secondary to male dominance. It examines legal frameworks across various countries, exposing inconsistencies and gaps that allow marital rape to go unpunished. While some nations have criminalized marital rape, others continue to exempt it under marital privilege or conjugal rights. The paper critiques these legal shortcomings and underscores the need for comprehensive legislation to criminalize marital rape, affirming individuals' rights within marriage.

The research advocates for a multi-faceted approach encompassing legal reform, education, and societal change. Public awareness campaigns are crucial to challenging norms that perpetuate marital rape. Education fosters a culture of respect and equality within marriages. The role of international organizations and agreements is examined, particularly how aligning national policies with international human rights standards can drive progress. The Sustainable Development Goals, especially Goal 5: Gender Equality, are highlighted as a framework for action. Specifically, it aligns with Target 5.2, which aims to eliminate all forms of violence against women and girls, including marital rape, in public and private spheres.

In conclusion, the paper calls for concerted efforts from governments, civil

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society, and international bodies to address marital rape with the urgency and seriousness it warrants, aiming to create a world where marriage is based on mutual respect and equality.

**Keywords:** Marital Rape, Gender Justice, Human Rights, Legal Reforms, Sustainable Development Goal 5.

## 1. Introduction

### Overview of Marital Rape

Marital rape, or spousal rape, occurs when one spouse forces to engage the other in sexual intercourse without their consent. This form of violence is particularly pernicious because it happens within the confines of a marriage, a relationship that is typically presumed to be built on trust, love, and mutual respect. The societal taboo surrounding marital rape has led to its underreporting, under-acknowledgment, and, in many cases, complete denial of its existence.

Historically, “many legal systems around the world have been slow to recognize marital rape as a crime. The notion that marriage implies irrevocable consent to sexual relations has been deeply ingrained in many cultures, leading to a lack of legal protections for victims.”<sup>2</sup> However, with the rising awareness about human rights and gender equality, there has been significant recognition of the urgency to criminalize marital rape and provide justice to survivors.

### Significance of the Issue

The criminalization of marital rape is not only a legal issue but a fundamental human rights concern. At its basic, marital rape “violates the right to bodily autonomy, a principle enshrined in numerous international human rights conventions.”<sup>3</sup> Furthermore, it immortalizes “gender inequality by reinforcing the notion that woman (and, in some cases, men) does not have the right to control their own bodies within the context of marriage.”<sup>4</sup>

The silence surrounding marital rape is maintained through a well-knitted web of cultural norms, legal frameworks, and societal attitudes that prioritize the sanctity of marriage over the

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<sup>2</sup> Protecting Women from Violence, *World Bank Group*, <http://wbi.worldbank.org/data/exploretopics/protecting-women-from-violence> (last visited Aug 2, 2024)

<sup>3</sup> Marital Rape in India: An International Human Rights Law Violation, *Berkeley Journal of International Law* (Sept. 4, 2021), <https://www.berkeleyjournalofinternationallaw.com/post/marital-rape-in-india-an-international-human-rights-law-violation>.

<sup>4</sup> Lana Stermac, Gianetta Del Bove & Mary Addison, Violence, Injury, and Presentation Patterns in Spousal Sexual Assaults, 7 *Violence Against Women* 1218, 1218 (2001)

rights of individuals. This silence has catastrophic outcomes, trapping victims in abusive relationships with no hope of legal recourse or societal support. Challenging this silence is vital for the advanced gender justice and to ensure that all individuals, regardless of their marital status, have the right to live free from violence.

## **2. Historical Context and Legal Framework**

### **Evolution of the Concept of Marital Rape**

The concept of marital rape has changed dramatically over time, prejudiced by changing societal attitudes towards marriage, gender roles, and individual rights. In many ancient legal systems, marriage was viewed as a contract in which women were considered the property of their husbands. The ownership model in these legal system indicated that husbands had the legal right to demand sexual intercourse, and any refusal by the wife was a violation of husband's marital rights.

For centuries, the legal doctrine of "coverture" reinforced this notion. Under the doctrine of coverture, "a married woman's legal rights and obligations were subsumed under those of her husband, effectively erasing her legal existence. This doctrine was prevalent in English common law and influenced legal systems in many other countries, including the United States."<sup>5</sup> As a result, the perception of marital rape was preposterous within this framework, as a wife had no legal standing to refuse her husband's sexual advances.

However, with rising feminist movements in the 19th and 20th centuries these deeply entrenched notions were challenged. "Feminists argued that marriage should be a partnership of equals, rather than a hierarchical relationship in which one spouse held power over the other. They advocated for women's rights to bodily autonomy and sexual self-determination, which included the right to refuse sex within marriage."<sup>6</sup>

### **Legal Status Globally**

The legal recognition of marital rape varies widely across the globe. "In many countries, marital rape is still not criminalized, and even where it is, the laws are often weak or poorly

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<sup>5</sup> Marital Rape in India: Criminal Justice Reform, *Tiwari & Sibal Chambers of Law* (Mar. 20, 2023), <https://www.tscl.com/marital-rape-india-criminal-justice-reform>

<sup>6</sup> How 19th Century Women Wrote About Marital Rape, *FlaglerLive* (Aug. 12, 2021), <https://flaglerlive.com/how-19th-century-women-wrote-about-marital-rape/>

enforced.”<sup>7</sup>

- **Western Countries:** In the United States, marital rape became illegal in all 50 states in 1993, though the laws and penalties for marital rape still differ significantly from those for non-marital rape. In the United Kingdom, “marital rape was first recognized as a crime in 1991 following the landmark case of *R v. R*, where the House of Lords ruled that a husband's immunity from prosecution for raping his wife was outdated and unacceptable.”<sup>8</sup>
- **Africa and the Middle East:** In many African and Middle Eastern countries, marital rape still remains legal or is not explicitly criminal offence. In some cases, cultural and religious norms strongly discourage the recognition of marital rape, viewing it as a private matter within the family. For example, “in many Islamic countries, the interpretation of Sharia law often upholds the husband's right to sexual relations, making the criminalization of marital rape challenging.”<sup>9</sup>
- **Asia:** In Asia, the legal status of marital rape has a significant variation. India, for example, has long resisted calls to criminalize marital rape, despite growing activism and awareness. “The Indian Penal Code exempts husbands from being charged with raping their wives, provided the wife is over the age of 18.”<sup>10</sup> This legal immunity has been criticized by human rights organizations as a violation of women's rights. In contrast, countries like South Korea and Japan have criminalized marital rape, recognizing the need to protect the rights of married women.
- **Latin America:** Many Latin American countries have made strides in recognizing marital rape as a crime, but enforcement remains inconsistent. “In countries like Brazil and Argentina, marital rape is recognized as a serious offense, but cultural attitudes that view domestic violence as a private matter often hinder the effective prosecution of

<sup>7</sup> Rachel Jewkes, *Sexual Violence Research Initiative, Rape Perpetration: A Review* 6 (2012), <http://www.svri.org/RapePerpetration.pdf>.

<sup>8</sup> *R v R* (rape: marital exemption) [1991] 4 All ER 481

<sup>9</sup> Middle East: Roll Back Repeal of Marry-the-Rapist Laws, *Human Rights Watch* (Aug. 24, 2017), <https://www.hrw.org/news/2017/08/24/middle-east-roll-repeal-marry-rapist> laws#:~:text=The%20bad%20news%20is%20that,of%20article%20353%20in%202016.

<sup>10</sup> Why Exception II of Section 375 of the Indian Penal Code Needs to Be Declared Unconstitutional, *Manupatra* (Aug. 10, 2021), <https://articles.manupatra.com/article-details/WHY-EXCEPTION-II-OF-SECTION-375-OF-THE-INDIAN-PENAL-CODE-NEEDS-TO-BE-DECLARED-UNCONSTITUTIONAL>.

such cases.”<sup>11</sup>

### Case Studies Highlighting Legal Challenges

To illustrate the complexities and challenges of addressing marital rape legally, it is useful to examine specific case studies from different regions.

- **Case Study 1: India:** In India, the case of *Independent Thought v. Union of India* (2017) highlighted the “contradictions in the legal system concerning marital rape. While the Supreme Court ruled that sex with a minor wife (under the age of 18) is rape, the broader issue of marital rape remains unaddressed. This case underscores the legal challenges in a country where cultural norms and outdated laws continue to protect marital rape.”<sup>12</sup>
- **Case Study 2: United States:** The U.S. has seen a gradual evolution in the legal treatment of marital rape. In the landmark case of *People v. Liberta* (1984), “the New York Court of Appeals ruled that marital rape is a crime, setting a precedent for other states. However, despite full legal recognition, marital rape remains underreported, and victims often face significant hurdles in seeking justice.”<sup>13</sup>
- **Case Study 3: United Kingdom:** The *R v. R* (1991) case in the UK was pivotal in recognizing marital rape as a crime. “The House of Lords’ decision to criminalize marital rape was seen as a significant step forward in protecting women’s rights. However, challenges remain in ensuring that victims feel safe and supported when reporting marital rape and cultural stigma still plays a role in the underreporting of such cases.”<sup>14</sup>

These cases reflect on the diverse legal framework regarding marital rape and underline the need for an extensive legal reform that are in line with human rights principles and gender

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<sup>11</sup> Technical Note: Violence Against Women in Latin America and the Caribbean, *Organization of American States* (2020), <https://www.oas.org/en/mesecvi/docs/technicalnote-vawinlac-en.pdf>.

<sup>12</sup> *Independent Thought v. Union of India: A Critical Comment*, *Delhi Journal of Contemporary Law*, Vol. I, 120–22 (n.d.), <https://lc2.du.ac.in/DATA/19.pdf>

<sup>13</sup> *People v. Liberta*, *Cornell Legal Information Institute* (n.d.), [https://www.law.cornell.edu/women-and-justice/resource/people\\_v\\_liberta#:~:text=People%20v.-,Liberta,convicted%20of%20raping%20his%20wife](https://www.law.cornell.edu/women-and-justice/resource/people_v_liberta#:~:text=People%20v.-,Liberta,convicted%20of%20raping%20his%20wife)

<sup>14</sup> N. Agarwal, S. M. Abdalla & G. H. Cohen, Marital Rape and Its Impact on the Mental Health of Women in India: A Systematic Review, *PLOS Global Public Health*, vol. 2, no. 6, e0000601 (2022), <https://doi.org/10.1371/journal.pgph.0000601>

justice.

### 3. Marital Rape as a Human Rights Violation

#### Intersection of Marital Rape with Human Rights Law

Marital rape is not only a criminal offense but a profound violation of human rights. At the heart of human rights law is the principle of dignity and the recognition of every individual's autonomy over their body. Such fundamental rights are infringed by marital rape, stripping individuals of their agency and subjecting them to coercion and violence within what should be a safe, respectful, and consensual relationship.

“The Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly in 1948, enshrines the right to life, liberty, and security of person”<sup>15</sup> and “the right to be free from torture and cruel, inhuman, or degrading treatment or punishment.”<sup>16</sup> These rights are violated by marital rape, subjecting the victim to physical and psychological harm. The denial of these rights within a marital set up reflects the notion that once married a person gives up on their individual rights and is subject of spousal control.

#### International Conventions and Marital Rape

Several international human rights instruments explicitly or implicitly address the issue of marital rape, urging member states to criminalize it and protect the victims. Key among them are:

- **Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW):** Described as an international bill of rights of women, CEDAW was adopted in 1979 by the United Nations General Assembly. Article 16 of CEDAW “calls for the elimination of discrimination against women in all matters relating to marriage and family relations.”<sup>17</sup> General Recommendation 19, “issued by the CEDAW Committee in 1992 explicitly includes gender-based violence, including marital rape,

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<sup>15</sup> Universal Declaration of Human Rights art. 3, *United Nations* (Dec. 10, 1948), <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

<sup>16</sup> Universal Declaration of Human Rights art. 5, *United Nations* (Dec. 10, 1948), <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

<sup>17</sup> Convention on the Elimination of All Forms of Discrimination Against Women art. 16, *United Nations* (Dec. 18, 1979)

as a form of discrimination against women.”<sup>18</sup>

- **The Istanbul Convention:** The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, commonly known as the Istanbul Convention, is a landmark treaty in the fight against gender-based violence. “Adopted in 2011, it is the first legally binding instrument in Europe that specifically addresses marital rape. Article 36 of the convention explicitly criminalizes all forms of non-consensual sexual acts, including within marriage.”<sup>19</sup>
- **The Beijing Declaration and Platform for Action:** Adopted at the Fourth World Conference on Women in 1995, “the Beijing Platform for Action calls on governments to take measures to prevent and punish violence against women, including marital rape. It emphasizes the need for legal reforms, public awareness campaigns, and support services for victims.”<sup>20</sup>

Notwithstanding these international undertakings, the enforcement of laws against marital rape remains incoherent, with many countries failing to synchronize their domestic laws with these international standards.

### The Role of the United Nations and Other Bodies

The United Nations and other international human rights bodies have played a significant role in promoting for identification of marital rape as a human rights violation. Through its various committees and special reports, the UN has persistently called on member states to annihilate legal provisions that allow marital rape to go unpunished.

- **UN Special Reports on Violence Against Women:** The mandate of the UN Special Reports on violence against women, its causes, and consequences has included a focus on marital rape. “The Special Reports has highlighted the need for legal reforms and has condemned the failure of states to protect victims of marital rape as a violation of

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<sup>18</sup> Convention on the Elimination of All Forms of Discrimination Against Women art. 19, *United Nations* (Dec. 18, 1979)

<sup>19</sup> The Istanbul Convention: A Tool to Tackle Violence Against Women and Girls, *European Parliament* (2018), [https://www.europarl.europa.eu/RegData/etudes/ATAG/2018/630297/EPRS\\_ATA\(2018\)630297\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2018/630297/EPRS_ATA(2018)630297_EN.pdf)

<sup>20</sup> Beijing Declaration and Platform for Action, *United Nations* (Sept. 15, 1995), <https://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf>.

their human rights.”<sup>21</sup>

- **Human Rights Council:** The UN Human Rights Council has also addressed “the issue of marital rape in its Universal Periodic Reviews (UPRs) of member states. These reviews assess the human rights situation in each country, and the Council has frequently recommended that states criminalize marital rape and provide adequate support to victims.”<sup>22</sup>
- **Regional Human Rights Bodies:** Regional bodies, such as the Inter-American Commission on Human Rights and the African Commission on Human and Peoples' Rights, “have also recognized marital rape as a human rights issue. They have urged member states to align their domestic laws with international human rights standards and to take concrete steps to protect victims of marital rape.”<sup>23</sup>

However, even with these efforts, considerable gaps remain in the global response to marital rape. In many countries, societal customs, legal gaps, and insufficient enforcement systems continue to deter victims from securing justice. The political indifference towards addressing marital rape as a human rights issue further exacerbates the problem, leaving numerous victims without the much needed protection and support.

### Challenges in Addressing Marital Rape as a Human Rights Issue

One of the significant challenges in addressing marital rape as a human rights issue is the pervasive cultural and societal attitudes that normalize or trivialize the crime. “In many societies, the concept of marital rape is dismissed as an oxymoron, with the belief that a marriage contract implies ongoing consent to sexual relations. These attitudes are often deeply rooted in patriarchal norms that view women as the property of their husbands and see sexual access as a marital right.”<sup>24</sup>

Additionally, legal frameworks in many countries are still determined by these social beliefs,

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<sup>21</sup> Special Rapporteur on Violence Against Women, *Office of the High Commissioner for Human Rights* (n.d.), <https://www.ohchr.org/en/special-procedures/sr-violence-against-women>.

<sup>22</sup> Report of the Secretary-General on the Implementation of the Beijing Declaration and Platform for Action, *United Nations* (2021), <https://documents.un.org/doc/undoc/gen/g21/089/99/pdf/g2108999.pdf>.

<sup>23</sup> Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences: Rape and Sexual Violence in the Americas Region, *Office of the High Commissioner for Human Rights* (2021)

<sup>24</sup> Kristin Bumiller, Feminist Collaboration with the State in Response to Sexual Violence, in *Gender, Violence, and Human Security: Critical Feminist Perspectives* 191 (Aili Mari Tripp et al. eds., 2013)

with laws that either precisely exempts husbands from being charged for raping their wives or provide forbearing penalties for such offenses. In few cases, spousal rape is treated as a lesser crime in comparison with non-spousal rape, further consolidating the idea that sexual violence within marriage is benign.

Another dilemma is the prejudice and shame associated with being a marital rape victim. In many cultures, women who openly report marital rape often face social expulsion, victim-shaming, and even retaliation from their communities or kin. The apprehension of social backlash often deters victims from seeking help or reporting the crime which in turns allows the cycle of violence to continue unregulated.

#### **4. Gender Justice and Social Implications**

##### **The Concept of Gender Justice**

Gender justice refers to the equality in treatment with regard to all genders, ensuring that nobody is discriminated or being disadvantaged on the basis of their gender. “It is a concept rooted in the belief that both men and women should have equal access to rights, resources, opportunities, and protection under the law. Gender justice aims to dismantle the structural inequalities and power imbalances that perpetuate gender-based violence, including marital rape.”<sup>25</sup>

Marital rape is a glaring example of gender injustice. It exhibits and consolidates the power dynamics within marriage that often suppress women denying them autonomy of their bodies. The failure to criminalize marital rape or lacks of effective legal system to address marital rape is a prominent barrier to achieving gender justice.

##### **Cultural and Societal Barriers to Addressing Marital Rape**

Cultural norms and societal attitudes play a significant role in perpetuating the silence around marital rape. “In many cultures, marriage is considered a sacred institution, and any issues within a marriage are viewed as private matters that should not be exposed to public scrutiny. This belief is often coupled with the idea that a wife must submit to her husband's sexual demands as part of her marital duties, making it difficult for victims of marital rape to seek

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<sup>25</sup> Jennifer Koshan, The Legal Treatment of Marital Rape and Women’s Equality: An Analysis of the Canadian Experience, *Equality Effect*, Sept. 2010.

help or to be taken seriously.”<sup>26</sup>

In patriarchal societies, the concept of marital rape is often seen as conflicting or even preposterous. “The deeply ingrained belief that a wife is the property of her husband, or that marriage gives a husband the right to sexual access, makes it difficult to recognize marital rape as a crime. These attitudes are further reinforced by legal systems that fail to protect victims or that explicitly exempt marital rape from prosecution.”<sup>27</sup>

The stigma attached with a marital rape victim also acts as a powerful deterrent to reporting the crime. Victims are under a constant fear of being blamed for the violence, of being shunned by their families, or even subjected to aggravated violence if they come forward.

### Strategies for Promoting Gender Justice

To effectively address marital rape and promote gender justice, a multi-dimensional approach is needed. This includes legal reforms, public education, and the empowerment of women to assert their rights.

- **Legal Reforms:** Legal reforms are crucial to ensuring that marital rape is recognized and prosecuted as a crime. “These reforms should eliminate any legal exemptions or protections for marital rape, ensure that victims have access to justice, and impose appropriate penalties for offenders. Legal reforms should also include provisions for victim support, such as access to counseling, legal aid, and protection orders.”<sup>28</sup>
- **Public Education:** Public education initiatives are vital for changing societal attitudes toward marital rape. These initiatives should test the myths and misconceptions surrounding marital rape and promote the idea that all individuals, irrespective of their marital status, have control over their bodily autonomy. Public education efforts should focused on teaching about consent, healthy relationships, and gender equality.

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<sup>26</sup> Exploring Concerns Associated With Marital Rape In India: An In-Depth Legal Analysis, *ResearchGate* (2024), [https://www.researchgate.net/publication/374418837\\_Exploring\\_Concerns\\_Associated\\_With\\_Marital\\_Rape\\_In\\_India\\_An\\_In-Depth\\_Legal\\_Analysis\\_Section\\_A-Research\\_paper\\_Eur](https://www.researchgate.net/publication/374418837_Exploring_Concerns_Associated_With_Marital_Rape_In_India_An_In-Depth_Legal_Analysis_Section_A-Research_paper_Eur).

<sup>27</sup> SIR MATTHEW HALE, *Historia Placitorum Coronae: The History of the Pleas of the Crown* (P.R. Glazebrook ed., Professional Books Limited 1971)

<sup>28</sup> Marital Rape and Gender Inequality: Inter-Sectionality and Feminist Perspectives, *Legal Service India* (n.d.), <https://www.legalserviceindia.com/legal/article-10708-marital-rape-and-gender-inequality-inter-sectionality-and-feminist-perspectives.html>

- **Empowerment of Women:** Empowering women to assert their rights is a critical component of promoting gender justice. This encompasses women with the education and provisions they need to perceive and exercise their rights, as well as creating a supporting atmosphere where women are safe to speak out against violence. Empowerment also involves addressing the economic and social inequalities that often trap women in abusive marriages.
- **Engagement of Men and Boys:** Promoting gender justice and addressing marital rape also requires the involvement of men and boys. Endeavors to protest patriarchal norms and to promote gender equality must involve men as supporters in the fight against gender-based violence. Educational schemes that teach boys about respect, consent, and healthy relationships can a vital role in transforming societal attitudes and preventing future violence.

## 5. Legal and Policy Recommendations

### Legal Framework in India on Marital Rape

India presents an intricate case when it comes to marital rape. Meanwhile the Indian legal system has made a remarkable advancement in addressing various forms of violence against women; there still remains an ambiguous situation with regard to marital rape. Indian law doesn't fully recognize marital rape as a criminal offense, mirroring a firmly rooted patriarchal mindset persisting in society.

### Section 375 of the Indian Penal Code (IPC)

"Section 375 of the Indian Penal Code defines rape and outlines the circumstances under which an individual can be prosecuted for the crime."<sup>29</sup> However, it contains an exception clause that

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<sup>29</sup> Section 375, IPC, 1860 which defines rape as "sexual intercourse with a woman against her will, without her consent, by coercion, misrepresentation or fraud or at a time when she has been intoxicated or duped, or is of unsound mental health and in any case if she is under 18 years of age."

It's rape if it falls under following categories:

- Against her will.
- Without her consent.
- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.
- With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
- With her consent, when, at the time of giving such a consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or

explicitly exempts a husband from being prosecuted for raping his wife if she is over the age of 15:

"Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape."

"This exception effectively decriminalizes marital rape in India, perpetuating the notion that marriage grants a husband unconditional sexual access to his wife. Although the age of consent was raised to 18 in other contexts, this exception remains a glaring contradiction in the law."<sup>30</sup>

### **The Protection of Women from Domestic Violence Act, 2005**

The Protection of Women from Domestic Violence Act (PWDVA) of 2005 was a landmark law aimed at providing protection and relief to women from domestic violence. "While the Act covers physical, emotional, sexual, and economic abuse, it does not explicitly criminalize marital rape. It allows for civil remedies such as protection orders, residence orders, and monetary relief, but does not provide for criminal prosecution of marital rape."<sup>31</sup>

This Act does give recognition to sexual abuse within marriage, which includes marital rape, but the remedies provided under the PWDVA are civil in nature and is inadequate to the criminalization of the act.

### **The Criminal Law (Amendment) Act, 2013**

The Criminal Law (Amendment) Act, 2013, also known as the "Nirbhaya Act," was introduced following the 2012 Delhi gang-rape case, "which led to widespread public outrage and demands for stricter laws on sexual violence. The Act brought significant changes to the IPC, including broader definitions of rape and enhanced penalties for offenders."<sup>32</sup> However, it did

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unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

- With or without her consent, when she is under sixteen years of age. Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

<sup>30</sup> Siddaruda Karna v. State of Karnataka, *LiveLaw* (Feb. 22, 2023), [https://www.livelaw.in/pdf\\_upload/170-siddaruda-karna-vs-state-of-karnataka-22-feb-2023-462417.pdf](https://www.livelaw.in/pdf_upload/170-siddaruda-karna-vs-state-of-karnataka-22-feb-2023-462417.pdf)

<sup>31</sup> Law on Domestic Violence: Protection of Women from Domestic Violence Act, 2005, *SCC Online* (July 27, 2020), <https://www.scconline.com/blog/post/2020/07/27/law-on-domestic-violence-protection-of-women-from-domestic-violence-act-2005/>

<sup>32</sup> The Criminal Law (Amendment) Act, 2013, *Cornell Legal Information Institute* (n.d.), [https://www.law.cornell.edu/women-and-justice/resource/the\\_criminal\\_law\\_\(amendment\)\\_act\\_2013#:~:text=The%20Criminal%20Law%20\(Amendment](https://www.law.cornell.edu/women-and-justice/resource/the_criminal_law_(amendment)_act_2013#:~:text=The%20Criminal%20Law%20(Amendment)

not change the marital rape exception in Sec. 375, IPC, despite strong recommendations from the Committee.

The Justice Verma Committee, in its report, had precisely called for the omission of the marital rape exception, stating that a marital relationship should not be a defense against the charges of rape. The Committee asserted that consent is the foundation of sexual autonomy and should be notwithstanding the marital status.

### **Bharatiya Nyaya Sanhita (BNS) and the Exclusion of Marital Rape**

India's newly proposed criminal code, The Bharatiya Nyaya Sanhita intended to replace the Indian Penal Code, represents a notable overhaul of the country's legal system. Nonetheless, it has drawn criticism for continuing the exclusion of marital rape from the definition of rape which might have substantial repercussions on the human rights of women and prolongs gender inequality within India's legal framework.

Similar to Section 375 of the IPC, the BNS maintains an exception for marital rape. According to this proposed code, "non-consensual intercourse between a husband and wife is not considered rape, thereby upholding the legal immunity for husbands from prosecution for sexual violence against their wives."<sup>33</sup> This highlights a persisted compliance to the outdated notion that marriage implicates irrevocable consent to sexual intercourse, effectively conferring men the right to control their wives' bodies.

### **Implications for Human Rights**

The elimination of marital rape from the Bharatiya Nyaya Sanhita (BNS) severely contradicts with international human rights standards, which identifies marital rape as a violation of women's fundamental rights, including bodily autonomy, dignity, and freedom from violence. By non-criminalization of marital rape, the BNS outrightly denies crucial legal protection of women and infringes upon their human rights. Most certainly, the right to bodily autonomy, a fundamental human right which is compromised as the BNS's expulsion of marital rape denies married women legal recourse against potential sexual violence.

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)%20Act%2C%202013%20was%20passed%20in,and%20the%20Criminal%20Procedure%20Code

<sup>33</sup> National Crime Records Bureau Report 2024 Section 63, *Ministry of Home Affairs* (Apr. 1, 2024), [https://www.mha.gov.in/sites/default/files/250883\\_english\\_01042024.pdf](https://www.mha.gov.in/sites/default/files/250883_english_01042024.pdf)

Moreover, this omission endures gender discrimination by treating married women differently from unmarried ones, thwarting the principle of gender equality enshrined in the Indian Constitution. The right to dignity is also compromised, as marital rape assaults an individual's dignity, and the BNS's failure to discern it as a crime erodes this right. Also, the right to life and personal liberty, guaranteed under Article 21 of the Indian Constitution, is threatened by sexual violence within marriage, with the BNS's omission of marital rape failing to protect this fundamental right.

### **Impact on Gender Inequality**

The preclusion of marital rape from the BNS aggravates gender inequality in several ways, primarily by prolonging patriarchal norms, granting legal immunity from sexual violence, weakening women's empowerment, and negatively impacting public perception. Omission of marital rape as a criminal offence in the BNS reinstates the patriarchal notion that marriage gives husbands unbridled power over their wives' bodies, bolstering gender based power imbalances.

Also, the BNS's elimination of marital rape sends a message that the state does not fully upholds women's rights to bodily autonomy and equality within marriage, hampering the efforts to achieve gender justice and women empowerment. Additionally, by exemption of marital rape from its provision, the BNS builds societal attitudes in a way that fortifies the harmful perception that sexual violence within marriage is permissible, thereby continuing gender inequality and stalling efforts to change societal views on gender-based violence.

### **Landmark Cases on Marital Rape in India**

Recently, the Supreme Court sought the Centre's position on a petition challenging the marital rape exception under new criminal laws. "A bench led by Chief Justice D Y Chandrachud issued notice on the petition by the All India Democratic Women's Association (AIDWA) and stated it would be heard in July alongside other petitions aiming to criminalize marital rape."<sup>34</sup> "This is a constitutional issue and will remain relevant even after the new code," remarked the bench, which also included Justice J B Pardiwala and Justice Manoj Misra. On January 16, 2023, the top court had asked for the Centre's response to petitions challenging the Indian Penal

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<sup>34</sup> ALL INDIA DEMOCRATIC WOMENS ASSOCIATION (AIDWA) vs. UNION OF INDIA - Supreme Court Case Details. (n.d.). <https://mercury.lawyer/viewcase/65aa2486f6830613f3ca9fe7>

Code (IPC) provision that shields a husband from prosecution for forcible sexual intercourse with his adult wife. “According to Section 375 of the IPC, sexual acts by a man with his wife, provided she is not a minor, do not constitute rape.”<sup>35</sup> Similarly, “the new law—Bharatiya Nyaya Sanhita (BNS)—in exception 2 to section 63 (rape), clarifies that sexual acts by a man with his wife, if she is not under eighteen, do not amount to rape. The new laws—Bharatiya Nyaya Sanhita, Bharatiya Nagarik Suraksha Sanhita (BNSS), and Bharatiya Sakshya Act—aiming to revamp the criminal justice system, will be effective from July 1.”<sup>36</sup>

Besides the BNS exception, AIDWA has contested in the Supreme Court the constitutionality of section 67 of the BNS, which prescribes a two to seven-year imprisonment for men who rape their separated wives. “The plea, filed by lawyer Ruchira Goel, criticized this provision for imposing a lighter penalty compared to the mandatory minimum ten-year sentence in other rape cases.”<sup>37</sup> It also challenged section 221 of BNSS for establishing a “lenient regime” under section 67 by requiring a court to be “prima facie satisfied” of the facts before taking cognizance of the offence upon a wife's complaint. “The petitioner argued that the marital rape exception violates Articles 14 and 15 of the Constitution as it disregards a married woman's consent and perpetuates stereotypes about women's subordination.”<sup>38</sup> The petition claimed that the provisions are arbitrary, unjustly depriving married women of the right to complain about rape under Section 63 of the BNS.

“The petition further argued that the protection of marriage as a rationale for the exception is unjust and that it violates Articles 19(1) (a) and 21 of the Constitution by infringing on married women's rights to bodily integrity, autonomy, and dignity.”<sup>39</sup> The plea urged the Court to address the matter, noting that it is already handling similar issues under the IPC and CrPC. One pending plea in the Supreme Court relates to the Delhi High Court's split verdict on May 11, 2022. “This appeal, filed by a woman who was a petitioner before the Delhi High Court, involves significant legal questions needing the Supreme Court's decision. AIDWA was also a

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<sup>35</sup> Supra Note 29

<sup>36</sup> Trend, L. (2024, May 17). Supreme Court Seeks Centre's Stand on Plea Against Marital Rape Exception in New Criminal Law. Law Trend. <https://lawtrend.in/supreme-court-seeks-centres-stand-on-plea-against-marital-rape-exception-in-new-criminal-law/>

<sup>37</sup> *Bodhisathwa Gautam v. Subhra Chakraborty*, 1996 A.I.R. 922, 1996 S.C.C. (1) 490 (India)

<sup>38</sup> Pti. (2020, December 15). SC seeks Centre's stand on plea against marital rape exception in new criminal law. The Week. <https://www.theweek.in/wire-updates/national/2024/05/17/lgd21-sc-marital-rape.html>

<sup>39</sup> Mishra, S., Mishra, S., & Verdictum. (2024, May 17). Verdictum. Verdictum. <https://www.verdictum.in/court-updates/supreme-court/supreme-court-issues-notice-in-pil-by-aidwa-challenging-marital-rape-exception-in-bharatiyanayasanhita20231535966#:~:text=The%20Petition%20highlights%20that%20AIDWA,Court%20via%20Civil%20Appeal%20No.>

petitioner in the high court case.”<sup>40</sup> Justice Rajiv Shakti, heading the division bench, deemed “the marital rape exception “unconstitutional” and lamented that it would be “tragic if a married woman’s call for justice is not heard after 162 years” since the IPC’s enactment.”<sup>41</sup> However, Justice C Hari Shankar found the exception constitutional, based on “an intelligible differentia.”

Another plea involves a man contesting a Karnataka High Court decision allowing his prosecution for allegedly raping his wife. “On March 23, 2022, the Karnataka High Court ruled that exempting a husband from rape and unnatural sex allegations with his wife contradicts Article 14 (equality before law) of the Constitution.”<sup>42</sup>

Thus, the ongoing legal challenges and debates surrounding the marital rape exception in India highlight a significant constitutional and human rights issue that the judiciary is actively addressing. “The Supreme Court’s willingness to examine the Centre’s stance and the constitutional implications of the marital rape exception reflects a critical step towards potential legal reform. The involvement of various high courts and the divergence in judicial opinions underscore the complexity and urgency of this matter.”<sup>43</sup> As India progresses towards a more equitable legal framework, the ultimate resolution of these petitions will have profound implications for the rights and dignity of married women, setting a crucial precedent for addressing marital rape and advancing gender justice.

## **6. Harnessing Legal Innovation for Sustainable Futures: Navigating the Path of Social Transformation**

### **Legal Innovation as a Catalyst for Social Change**

The dynamic process of rethinking and reforming legal norms, structures, and practices to better address the evolving needs of society is referred to as legal innovation. “In the context of marital rape, legal innovation is essential for reimagining the relationship between law, society, and individual rights. By challenging and reforming legal norms that perpetuate

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<sup>40</sup> *Ibid.*

<sup>41</sup> *Supra* Note 29

<sup>42</sup> Ashish Tripathi, DHNS, Ashish Tripathi, & DHNS. (2022, July 24). SC stays Karnataka HC order on marital rape. Deccan Herald. <https://www.deccanherald.com/india/sc-stays-karnataka-hc-order-on-marital-rape-1129622.html>

<sup>43</sup> Plumber, M., & Law, L. (2022, March 23). Live law. Live Law. <https://www.livelaw.in/top-stories/marital-rape-exception-regressive-violates-article-14-husband-not-ruler-of-wifes-body-mind-karnataka-high-court-194834>

gender-based violence, societies can pave the way for more inclusive and equitable futures.”<sup>44</sup>

### **Legal Innovation and Sustainable Development**

Sustainable development entails social, economic, and legal dimensions that are interdependent. “Gender equality and the elimination of violence against women are central to achieving the United Nations' Sustainable Development Goals (SDGs), particularly SDG 5.”<sup>45</sup>

Legal innovation plays a pivotal role by providing the framework to protect women's rights and ensure their full participation in society.

### **Navigating the Path of Social Transformation**

Social metamorphosis requires a transition in social attitudes and values, with law providing as a powerful weapon to steer this transition. In case of marital rape, navigating the path of social metamorphosis includes legal innovation and extensive efforts to mould public perceptions and societal norms regarding gender and marriage.

### **The Imperative for Legal Reform in India**

India has the potential to channelize legal innovation to create a more just and sustainable future. The prolonged exclusion of marital rape from the criminal code is a glaring barrier to achieve gender justice and must be addressed as a matter of legal urgency. Legal reform in this domain is not only a legal necessity but also a moral obligation that reflects the nation's adherence to uphold the rights and dignity of its entire citizen.

## **7. Conclusion**

Marital rape stands as a severe infringement of human rights and gender equality, significantly harming both the physical and mental health of victims while reinforcing entrenched gender disparities. This research paper has focused on the ongoing issues within the Indian legal framework, specially the obliteration provided by Section 375 of the Indian Penal Code, which allowed this heinous offence to persist without proper legal obligation. The operational legal

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<sup>44</sup> Law on Marital Rape: A Much-Needed Reform in Our Legal System, *Mondaq* (Aug. 29, 2018), <https://www.mondaq.com/india/crime/691482/law-on-marital-rape-a-much-needed-reform-in-our-legal-system>.

<sup>45</sup> Goal 5: Achieving Gender Equality and Empowering Women and Girls – SDG 5: Missing Something? *United Nations Chronicle* (n.d.), <https://www.un.org/en/chronicle/article/goal-5-achieving-gender-equality-and-empowering-women-and-girls-sdg-5-missing-something>

system not only fails to provide protection for women but also reinforced harmful social norms that use marriage as a defense against the repercussions of sexual violence.

The main aim of this paper is to underline the desperate need for legal reforms that would criminalize marital rape, focusing the pivotal role such changes play in advocating gender equality and safeguarding human rights. It calls for a comprehensive approach that combines legislative amendments, public awareness, and cultural shifts to fight and eradicate the societal acceptance of marital rape.

The theme of the conference, "Harnessing Legal Innovation for Sustainable Futures: Navigating the Path of Social Transformation," highlights the need for legal reform as a catalyst for universal social change. Legal innovation, in this matter, includes more than just modifying laws; it entails reshaping societal values and norms to ensure that legal protections are extended to all individuals, irrespective of gender or marital status. Establishing a sustainable future requires a legal system that embodies true justice and equality, paving the way for a society devoid of violence and coercion.

This research paper thus caters to the need for an action from all relevant parties – government bodies, civil society, and individuals – to confront and challenge the silence surrounding marital rape. It urges an exit from outdated patriarchal norms and a dedication to create a society where every person can enjoy dignity, autonomy, and freedom from violence. By criminalizing marital rape and encompassing legal innovation, India can set a precedent for a future where gender justice is not merely an ideal but a tangible reality for everyone.