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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

MARITAL RAPE IN INDIA: A LONG OVERDUE REFORM

AUTHORED BY - SHIVANG MEHADUDIA

1) Introduction:

Marital rape, the act of sexual intercourse by a husband with his wife without her consent, is a form of sexual violence that challenges the autonomy, dignity, and rights of women within marriage. While many countries have recognized the criminality of this act, India, even after introducing a newly prepared criminal code for its citizens, exempts husbands from being prosecuted for rape within marriage under 'Exception-2' of Section 63 of the Bharatiya Nyaya Sanhita (2023). This exemption, often justified by archaic notions of "implied consent" in marriage, continues to deny women the fundamental right to bodily autonomy and consent.

In contemporary Indian society, this legal anomaly has sparked significant debate. As societal attitudes towards women's rights and gender equality evolve, the status of marital rape remains a contentious issue. The absence of legal recognition of marital rape not only reflects deep-rooted patriarchal norms but also poses a serious challenge to the protection of women's rights in India. Given the rising awareness around gender-based violence, the non-criminalization of marital rape stands in stark contrast to global human rights standards and raises questions about India's commitment to upholding women's rights. This paper seeks to critically examine the legal frameworks that exempt marital rape from prosecution, assess India's position in relation to international human rights standards, explore judicial interpretations and legal reforms, and propose necessary changes. By addressing these key aspects, the paper aims to contribute to the ongoing discourse on marital rape and advocate for legal reforms that align Indian law with international norms, ensuring the protection and dignity of married women.

2) Research Problem:

2.1) Despite international standards on human rights, Indian law continues to exempt marital rape from the definition of rape. This research seeks to examine the implications of this legal exception on the protection of women's rights in marriage."

3) Legal Framework in relation to Marital Rape in India:

3.1) Section 375 of The Indian Penal Code (1860) and Section 63 of the Bharatiya Nyaya Sanhita (2023)

Section 375 of the Indian Penal Code (IPC) defines the offense of rape, detailing circumstances where sexual intercourse without consent constitutes rape. However, under Exception 2 of this section, it explicitly exempts sexual intercourse between a husband and his wife from being classified as rape, provided the wife is not below 18 years of age. This marital exemption is grounded in the archaic belief that a wife gives “implied consent” to sexual intercourse by virtue of marriage, essentially stripping her of the right to refuse or consent. The provision states: *“Sexual intercourse by a man with his own wife, the wife not being under eighteen years of age, is not rape.”*¹ This exemption has allowed marital rape to persist without legal consequence, leaving women vulnerable to sexual violence within the institution of marriage.

3.2) Legal Rationale for the Exemption

The marital rape exemption is historically based on the doctrine of “implied consent,” a concept originating from 18th-century British common law. The idea, famously articulated by Sir Matthew Hale in 1736, was that once a woman married, she irrevocably consented to sexual intercourse with her husband.² This notion stemmed from patriarchal views of marriage, where wives were seen as the property of their husbands, and the rights of the husband were considered superior to the bodily autonomy of the wife.³ In India, these colonial legal influences were inherited and codified into the IPC, a product of British rule. The exemption was further justified by arguments that recognizing marital rape would interfere with the sanctity of marriage and that criminalizing it would be impractical, potentially leading to the misuse of legal provisions.⁴ Such reasoning has led to the continued exclusion of marital rape from legal accountability, even as societal views on gender equality have evolved. The legal exemption for marital rape has deep roots in India’s colonial history. When the IPC was drafted by Thomas Macaulay in the 19th century, it was modelled on British laws that themselves reflected patriarchal norms. The “implied consent” doctrine, entrenched in British common

¹ Exception-2, Section 69, Bharatiya Nyaya Sanhita, **Ministry of Home Affairs, Government of India, Report on Internal Security** (Apr. 1, 2024), https://www.mha.gov.in/sites/default/files/250883_english_01042024.pdf.

² A brief history: The Marital Rape Exemption, Noble Solicitors, A Guide to Marital Rape (last visited on 22ND September 2024), <https://www.noblesolicitors.co.uk/about/a-guide-to-marital-rape.html>.

³ Id

⁴ Social Constraints, Aastha Singh, **The Unconstitutionality of the Marital Rape Exemption in India**, OXFORD HUMAN RIGHTS HUB (last visited on Sept. 2024), <https://www.ohrh.law.ox.ac.uk/wp-content/uploads/2021/04/U-of-OxHRH-J-The-Unconstitutionality-of-the-Marital-Rape-Exemption-in-India-1.pdf>.

law, became the foundation for the marital rape exemption in Indian law.

3.3) Relevant Legislations- Protection of Women from Domestic Violence Act, 2005 (PWDVA)

While the IPC's marital rape exemption remains in place, other laws such as the *Protection of Women from Domestic Violence Act, 2005 (PWDVA)* offer some relief, albeit inadequately.

The *Protection of Women from Domestic Violence Act, 2005 (PWDVA)* represents a significant legislative step in addressing domestic violence, including various forms of abuse—physical, emotional, sexual, verbal, and economic—against women within the family.⁵ While the Act provides comprehensive civil remedies for women facing domestic violence, its ability to directly curb marital rape in India is limited. The PWDVA defines domestic violence broadly to include not only physical violence but also sexual abuse. Sexual abuse is defined as “any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of a woman.”⁶ Under this definition, marital rape can be interpreted as a form of sexual abuse. Women can seek protection orders, monetary compensation, custody of children, and residence orders to protect themselves from abusive spouses. The Act also allows women to access shelters and receive medical assistance.

However, despite offering civil remedies, the PWDVA does not explicitly criminalize marital rape. The Act provides only protection and compensation, not criminal sanctions, for sexual abuse within marriage. This means that while a woman can seek civil relief and protection from her abusive husband, the legal system does not treat marital rape as a criminal offense under the PWDVA.⁷ There is no provision for the arrest or prosecution of a husband solely for marital rape. In practice, this limits the Act's efficacy in curbing marital rape. A victim of marital rape may secure a protection order against her husband, but without a criminal offense attached to the act of rape itself, there is no punitive consequence for the offender. This gap highlights the broader issue in Indian law: while the PWDVA acknowledges the existence of sexual violence within marriage, it stops short of addressing it as a serious crime.

⁵ **Protection of Women from Domestic Violence Act, 2005**, No. 43 of 2005, https://www.indiacode.nic.in/bitstream/123456789/15436/1/protection_of_women_from_domestic_violence_act%2C_2005.pdf.

⁶ Id

⁷ Niharika Singh, **Women's Rights in the Balance as India Weighs Criminalizing Marital Rape**, DIPLOMAT (Nov. 2023), <https://thediplomat.com/2023/11/womens-rights-in-the-balance-as-india-weighs-criminalizing-marital-rape/>.

4) International Standards and Comparative Analysis:

4.1) International Human Rights Framework

International human rights law strongly condemns sexual violence in all forms, including within marriage. The *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, adopted by the United Nations in 1979, serves as a cornerstone for international efforts to protect women from violence, including marital rape. India ratified CEDAW in 1993, committing to eliminating discrimination against women in all areas of life, including their right to equality and protection from gender-based violence.⁸

CEDAW's Article 1 defines discrimination against women as any distinction, exclusion, or restriction made based on sex that impairs or nullifies women's rights in political, social, cultural, civil, or any other field. Article 16 specifically calls for the elimination of discrimination in marriage and family relations, stressing that women should have equal rights to freely choose their partners and consent to marriage.⁹ By extension, this implies the necessity for marital consent in all aspects, including sexual relations.

The *UN Declaration on the Elimination of Violence Against Women* (1993) further expands on this, emphasizing that violence against women includes physical, sexual, and psychological violence occurring within the family, which explicitly includes marital rape.¹⁰ Additionally, General Recommendation No. 19, issued by the CEDAW Committee, explicitly identifies violence against women as a form of discrimination, urging countries to enact laws that criminalize all forms of domestic and sexual violence, including marital rape.

Despite these international commitments, India's laws remain out of step with CEDAW's expectations. While marital rape is criminalized in several countries, India's legal framework continues to exempt husbands from prosecution under Section 63 of the Bharatiya Nyaya Sanhita, undermining the rights and dignity of married women as recognized by international human rights standards.

⁸ Committee on the Elimination of Discrimination against Women, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, <https://www.ohchr.org/en/treaty-bodies/cedaw> (last visited on 23rd September, 2024).

⁹ Council of Europe, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), <https://www.coe.int/en/web/gender-matters/convention-on-the-elimination-of-all-forms-of-discrimination-against-women-cedaw>.

4.2) Comparative Analysis with Other Countries

Many countries have recognized the criminality of marital rape and have reformed their legal frameworks to ensure the protection of women's rights. A comparison with countries like the UK, USA, and South Africa highlights key differences in the legal recognition of marital rape. Marital rape was criminalized in the UK in 1991 through the landmark case *R v R*. The House of Lords ruled that the “implied consent” theory in marriage was an outdated and unacceptable notion. The judgment explicitly stated that a husband's immunity from prosecution for raping his wife no longer applied in English law, marking a significant shift towards recognizing the individual rights of women, regardless of marital status¹¹. The UK’s reform reflects a clear alignment with CEDAW’s principles, where marital status does not diminish a woman’s autonomy or her ability to withhold consent to sexual relations.

In the United States, marital rape laws vary by state, but since the 1970s, there has been a movement toward its criminalization. By 1993, marital rape became a criminal offense in all 50 states, although penalties and recognition of the crime differ from state to state.¹² The evolution of American law on marital rape mirrors broader shifts in gender equality and the recognition that marriage does not imply perpetual consent. While legal protections for victims of marital rape exist across the country, enforcement and penalties remain inconsistent, reflecting some ongoing challenges.

South Africa criminalized marital rape in 1993 under the *Prevention of Family Violence Act*. This legislation explicitly recognizes sexual violence within marriage as a crime and provides mechanisms for the protection of victims. The South African judiciary has further reinforced that marital rape is no different from any other form of rape, underscoring that consent must be present in all sexual relations, regardless of marital status.¹³ South Africa’s legal framework provides for both criminal sanctions and protective measures, signalling strong legal recognition of women’s rights within marriage.¹⁴

¹¹ *R v. R*, [1992] 1 A.C. 599 (H.L.), <https://www.lawteacher.net/cases/r-v-r-1992.php>.

¹² **Marital Rape**, WIKIPEDIA, https://en.wikipedia.org/wiki/Marital_rape (last visited on 23rd September 2024).

¹³ **Sanghvi, V., Marital Rape: A Comparative Perspective**, in *Rethinking Rape Law: International and Comparative Perspectives* 97 (Elizabeth A. Sheehy ed., 2018), <https://academic.oup.com/book/26404/chapter-abstract/194771066?redirectedFrom=fulltext&login=false>.

¹⁴ **Prevention of Family Violence Act**, No. 133 of 1993 (South Africa), <https://www.gov.za/documents/prevention-family-violence-act> (last visited on 23rd September 2024).

4.3) Key Differences in Legal Recognition and Protection of Women's Rights

One of the most significant differences between India and countries like the UK, USA, and South Africa lies in the recognition of consent within marriage. In countries where marital rape is criminalized, the notion of “implied consent” has been rejected, affirming that marriage does not automatically grant a husband sexual access to his wife without her consent. These countries acknowledge that a woman's bodily autonomy and her right to consent are not extinguished upon entering marriage. While other countries have aligned their laws with international conventions such as CEDAW, India's exemption reflects a divergence from the global movement toward gender equality and protection against violence in intimate relationships.

5) Judicial Stances and Legal Reforms in India:

5.1) Judicial Interpretation

Indian courts have historically upheld the marital rape exemption under Section 375 of the Indian Penal Code (IPC), often citing traditional values and the sanctity of marriage. However, over time, there have been cases where the judiciary has been confronted with the issue of marital rape, resulting in varied judicial responses.

The case of **Empress v. Hari Mohan Maiti (1886 ILR 8 All 622)** involved the tragic death of a ten-year-old girl named Phulmoni Dasi, who died from excessive bleeding caused by sexual intercourse with her husband, who was in his mid-thirties.¹⁵ This case led to significant legal reforms. Despite the autopsy revealing that the cause of death was an injured vagina, the husband was convicted under Section 338 of the Indian Penal Code for “causing grievous hurt by act endangering life or personal safety of others.”¹⁶ At that time, an exception in Section 375 of the Indian Penal Code, introduced in 1860, stated that sex with one's wife was not considered rape. In response to this case, the **Viceroy of India, Lord Lansdowne**, introduced the “Age of Consent” bill to the Council of India, led by Andrew Scoble, on January 9, 1891. Previously, the age of consent had been set at 10 years in 1860. The bill, passed on March 29, 1891, amended Section 376 to classify sex with a girl under 12 years old, even if she was the

¹⁵ A REFLECTION ON THE HISTORY OF MARITAL RAPE LAWS IN INDIA, **The Legal Gauge** (Sept. 2021), NMIMS Navi Mumbai, https://www.nmimsnavimumbai.org/docs/The%20Legal%20Gauge_September%202021.pdf.

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¹⁶ **Phulmoni Dasi Rape Case**, WIKIPEDIA, https://en.wikipedia.org/wiki/Phulmoni_Dasi_rape_case (last visited on 23rd September 2024).

wife of the perpetrator, as rape.¹⁷

One of the most notable cases is *Sree Kumar v. Pearly Karun (1999)*, where the Kerala High Court held that sexual intercourse between a man and his wife, even if it is against her will, does not amount to rape under Indian law. The court reaffirmed the exemption in Section 375, stating that the legal provision allowed for non-consensual intercourse within marriage. This decision reinforced the legal stance that marriage involves "implied consent" for sexual relations, even in situations where the wife refuses.¹⁸ In *Phul Singh v. State of Haryana (1979)*, the Supreme Court of India, while addressing issues of sexual violence, remarked that sexual intercourse between married partners should not be criminalized, as it could lead to a breakdown of the institution of marriage. This judicial stance reflected a widespread belief in India that criminalizing marital rape would destabilize family structures.¹⁹

However, in more recent years, the judiciary has begun to adopt a more progressive stance. In the landmark *Independent Thought v. Union of India (2017)* case, the Supreme Court partially addressed the issue of marital rape by criminalizing non-consensual sex with minor wives between the ages of 15 and 18.²⁰ The court ruled that sex with a wife below the age of 18 amounts to rape, even if the marriage is valid, closing a legal loophole that allowed child marriage to escape prosecution under statutory rape laws. This ruling was seen as a step towards recognizing the importance of consent, even within marriage, although it stopped short of criminalizing marital rape for adult women.

5.2) Role of the Law Commission of India

The Law Commission of India has examined the issue of marital rape on multiple occasions, recommending legal reforms but facing significant resistance due to prevailing social and cultural norms. In its 172nd Report (2000), the Law Commission acknowledged the concerns surrounding marital rape but refrained from explicitly recommending the criminalization of marital rape. Instead, the report focused on broader reforms related to sexual violence, such as expanding the definition of rape and improving procedures for handling sexual assault cases²¹.

¹⁷ N. Shubham, *Age of Consent Act, 1891*, iPleaders, <https://blog.ipleaders.in/age-of-consent-act-1891/> (last visited on 23rd September 2024).

¹⁸ Supra at 15

¹⁹ *Phul Singh Vs. State of Haryana* [1979] INSC 175 (10 September 1979)

²⁰ Latika Vashisht, *Independent Thought v. UOI: Critical Comment*, DELHI JOURNAL ON CONTEMPORARY LAW (VOL.1) (last visited on 23rd September 2024)

²¹ PRS Legislative Research, *Justice Verma Committee Report Summary*, (Jan. 2013), <https://prsindia.org/policy/report-summaries/justice-verma-committee-report-summary>.

In recent years, the *Justice J.S. Verma Committee*—constituted after the 2012 Nirbhaya gang-rape case to recommend amendments to criminal law—delved into the issue of marital rape. The Committee strongly recommended that marital rape be criminalized, emphasizing that marriage should not grant a man any special rights over his wife's body. The Committee argued that the law must recognize the autonomy and bodily integrity of all women, including those who are married, in line with international human rights standards.²²

Despite the Verma Committee's recommendations, the *Criminal Law (Amendment) Act, 2013*, which was enacted in response to the Committee's report, did not criminalize marital rape. The government cited concerns that criminalizing marital rape could destabilize family structures and lead to false accusations.

Conclusion:

6) Summary of Findings

This paper has examined the legal framework of marital rape in India, highlighting the exemption clause in Section 375 IPC and its detrimental impact on women's rights. Through a comparison with international standards and the legal frameworks of other countries, it is evident that India lags in recognizing the human rights of married women. Judicial stances, although slowly evolving, continue to reflect the challenges posed by cultural and social norms, which hinder progressive legal reforms. The analysis demonstrates a clear need for legal reforms and social change to address marital rape effectively.

6.1) Call for Legal and Social Change

To protect the rights of married women and uphold India's international human rights obligations, it is crucial to eliminate the marital exemption in rape laws. Legal reforms, such as amending Section 63 of the BNS and strengthening related legislation, will ensure that married women are afforded the same protections as unmarried women. However, legal change alone is insufficient. A concerted effort to shift societal attitudes towards consent, marriage, and gender equality is necessary. By fostering a culture that respects women's autonomy and bodily integrity, India can take meaningful steps towards addressing marital rape and promoting gender justice.

²² Id