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MARITAL RAPE EXCEPTION IN INDIA: A CONSTITUTIONAL AND CRIMINAL LAW DEBATE

AUTHORED BY - AKSHITA NAGPAL

BA LLB 2024–2029

Gitarattan International Business School

Abstract

The marital rape exception in Indian criminal law continues to generate intense constitutional and socio-legal debate. While rape is recognised as a serious violation of bodily autonomy and dignity, the law paradoxically exempts husbands from liability for non-consensual sexual intercourse with their wives. This paper critically examines the constitutional validity of the marital rape exception under Exception 2 to Section 375 of the Indian Penal Code, 1860, in light of Articles 14, 19, and 21 of the Constitution of India.

The paper analyses the historical origins of the exception, its persistence through successive legislative reforms, significant judicial developments at the High Court and Supreme Court levels, and comparative legal frameworks from common law jurisdictions. It incorporates statistical data from the National Family Health Survey and reports of international bodies, while examining India's obligations under international human rights conventions.

The paper argues that the exception is arbitrary, discriminatory, and fundamentally incompatible with modern constitutional morality as articulated by the Supreme Court of India. It concludes that the continued existence of the exception undermines the fundamental rights of married women and calls for urgent legislative and judicial reform.

Keywords: Marital Rape; Exception 2, Section 375 IPC; Bodily Autonomy; Article 21; Constitutional Morality; Bharatiya Nyaya Sanhita.

1. Introduction

Marriage in India has traditionally been regarded as a sacred and socially significant institution, embedded within layers of religious, cultural, and familial obligation. However, the legal understanding of marriage has evolved significantly with the rise of constitutionalism and human rights jurisprudence. The recognition of individual dignity, autonomy, and equality has challenged long-standing assumptions about marital relationships, particularly in the context of sexual consent.

The marital rape exception represents a glaring inconsistency within Indian criminal law. Under Exception 2 to Section 375 of the Indian Penal Code, 1860, sexual intercourse by a husband with his wife — provided she is not under fifteen years of age — is excluded from the definition of rape. This means that the same act which constitutes rape when committed by a stranger is entirely exempted from criminal liability when committed within the bonds of matrimony. The fundamental constitutional question this raises is stark: can the institution of marriage negate an individual's right to bodily autonomy and personal dignity?

The Supreme Court of India has repeatedly emphasised that fundamental rights are not suspended at the threshold of the home. In *Justice K.S. Puttaswamy v. Union of India*, the Court held that privacy, dignity, and autonomy are inextricable components of the right to life under Article 21, and that these rights are not diminished by one's status as a spouse.¹ The marital rape exception must, therefore, be subjected to rigorous constitutional scrutiny rather than sheltered by appeals to tradition or marital sanctity.

This paper proceeds in thirteen sections. It traces the historical origin of the exception in English common law, examines its incorporation into Indian law, and analyses its constitutional validity under Articles 14, 19, and 21. It surveys judicial developments at the High Court and Supreme Court levels, considers comparative law from foreign jurisdictions, and examines India's international obligations. The paper ultimately argues that the marital rape exception is constitutionally indefensible and must be abolished through legislative action or judicial intervention.

¹*Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1, per Chandrachud J.

2. Historical Background

The marital rape exception finds its roots in English common law, particularly in the writings of Sir Matthew Hale, Lord Chief Justice of England, who in his posthumously published *History of the Pleas of the Crown* (1736) asserted that a husband cannot be guilty of rape committed by himself upon his lawful wife.² Hale's rationale rested on the doctrine of matrimonial consent: by contracting marriage, a wife was deemed to have given irrevocable consent to sexual intercourse, a consent she could not thereafter retract. This was premised on the broader legal fiction of coverture — inherited from feudal law — under which a woman's legal identity merged entirely into her husband's upon marriage; she could not own property, enter contracts, or testify against him. In such a framework, a wife being raped by her husband was not merely unenforced as a wrong; it was legally inconceivable, since the wife had no separate legal personality capable of withholding consent.

This principle entered Indian law during the colonial period through the Indian Penal Code, 1860, drafted by the First Law Commission under Lord Macaulay, whose Exception to Section 375 followed Hale's formulation almost verbatim. Despite the transformative changes brought by the Constitution of India in 1950 — which enshrined equality, liberty, and dignity as fundamental values — the colonial exception survived successive amendments, including the Criminal Law (Amendment) Act, 2013, enacted after the Nirbhaya case. Strikingly, the Justice Verma Committee, constituted to recommend those very reforms, explicitly recommended that the marital rape exception be removed; Parliament declined to follow that recommendation, a decision widely criticised by jurists and women's rights advocates as a failure to align the law with constitutional guarantees.

The historical record thus reveals that the marital rape exception is not an organic product of Indian legal tradition, but a colonial inheritance grounded in doctrines of marital subordination wholly inconsistent with the constitutional order established in 1950.

3. Concept and Nature of Marital Rape

Marital rape refers to non-consensual sexual intercourse by a husband with his wife, accomplished through force, coercion, intimidation, or when the wife is incapable of giving consent. The defining element of rape — absence of free and voluntary consent — applies with

²Sir Matthew Hale, *Historia Placitorum Coronae* (History of the Pleas of the Crown), Vol. 1 (1736), p. 629.

equal force irrespective of the relationship between perpetrator and victim; the identity of the perpetrator as a spouse does not transform a non-consensual act into a consensual one.

Consent must be understood as continuous, voluntary, and revocable — not a status conferred once and perpetually available thereafter. A person who consented on one occasion retains the full right to withhold consent on any subsequent occasion, regardless of their relationship with the other party. The notion that marriage constitutes a permanent, irrevocable grant of consent is not merely a legal fiction; it is a logical impossibility, since consent that cannot be withdrawn is not consent at all — it is submission.

The psychological and physical consequences of marital rape are well-documented: survivors frequently report higher rates of post-traumatic stress disorder, depression, and long-term disruption of sexual functioning than survivors of stranger rape, partly because the violation occurs within a relationship of trust and intimacy, and because it often forms part of a broader pattern of domestic violence accompanied by physical injury and sustained coercive control. Marital rape thus constitutes a violation of bodily integrity, a denial of personal liberty, and a form of domestic violence that, left unaddressed by the criminal law, signals that the dignity of a married woman is of lesser value than that of an unmarried one — a message that is constitutionally impermissible.

4. Legal Framework in India

The primary statutory provision governing rape in India is Section 375 of the Indian Penal Code, 1860 (as amended by the Criminal Law (Amendment) Act, 2013). The section defines rape with reference to specific acts committed by a man against a woman without her consent, or in circumstances where consent is vitiated by fear, fraud, or incapacity. Exception 2 to Section 375 provides: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape."

The 2013 amendments, which were introduced in response to widespread public outcry following the December 2012 Delhi gang rape, substantially broadened the definition of rape, increased the age of consent from sixteen to eighteen years, and enhanced penalties. However, the amendments expressly retained the marital rape exception, though the age threshold for the exception was raised from thirteen to fifteen years. Following the Supreme Court's decision in *Independent Thought v. Union of India* (2017), the age threshold was effectively raised to

eighteen, but the exception for adult wives was left intact.³

The protection afforded to married women under alternative statutory provisions is inadequate as a substitute for criminalisation. Section 498A of the IPC penalises cruelty by a husband or his relatives towards a wife, but the provision is civil in character and does not treat non-consensual sex as a discrete offence. The Protection of Women from Domestic Violence Act, 2005 ("PWDVA") provides civil remedies including protection orders, residence orders, and maintenance, and explicitly includes "sexual abuse" within its definition of domestic violence. However, the PWDVA does not create any criminal offence, and its remedies — while valuable — do not carry the symbolic, deterrent, and punitive weight of criminal prosecution for rape. The result is a statutory framework that paradoxically offers a wife fewer legal protections against sexual violence perpetrated by her husband than against identical conduct perpetrated by a stranger. This asymmetry is constitutionally difficult to justify and practically harmful, since it signals to survivors that the criminal justice system does not recognise the full gravity of what has been done to them. It is worth noting that the Bharatiya Nyaya Sanhita, 2023, which replaced the Indian Penal Code with effect from 1 July 2024, has reproduced the exception in near-identical terms under Exception 2 to Section 63, so the constitutional infirmities identified in this paper apply with equal force to the current statutory regime.

5. Constitutional Analysis

5.1 Article 14 — *Equality Before the Law*

Article 14 of the Constitution of India guarantees that the State shall not deny to any person equality before the law or equal protection of the laws within the territory of India. The provision prohibits not only direct discrimination but also arbitrary state action. In *E.P. Royappa v. State of Tamil Nadu*, the Supreme Court established that arbitrariness and equality are mutually exclusive — where law is arbitrary, it necessarily violates Article 14.⁴

The marital rape exception creates a classification between married and unmarried women for the purpose of protection from non-consensual sexual intercourse. A married woman who is raped by her husband has no recourse under Section 375, while an unmarried woman subjected to identical conduct has full access to the protection of the penal law. The classification is not based on any intelligible differentia that bears a rational nexus to the object of the provision.

³*Independent Thought v. Union of India*, (2017) 10 SCC 800.

⁴*E.P. Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3.

The legislative object of Section 375 — the protection of individuals from non-consensual sexual intercourse — is equally applicable whether the perpetrator is a stranger or a spouse. There is no rational basis for treating the same act differently solely because of the marital relationship between the parties. The exception is therefore arbitrary and violates Article 14.

5.2 Article 21 — Right to Life and Personal Liberty

Article 21 provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. The Supreme Court has, through a long line of decisions, interpreted this provision expansively to encompass the right to dignity, the right to health, the right to privacy, and the right to bodily autonomy. In *Justice K.S. Puttaswamy v. Union of India*, a nine-judge bench of the Supreme Court unanimously recognised the right to privacy as a fundamental right under Article 21, holding that privacy includes "decisional autonomy" — the right of individuals to make choices about intimate matters, including decisions relating to one's body and sexuality.⁵ The Court further held that the right to privacy is not extinguished by marriage, and that a person does not surrender their fundamental rights upon entering into a matrimonial relationship.

The marital rape exception directly violates Article 21 by permitting the State to deprive a married woman of her bodily autonomy without any constitutionally valid justification. By exempting the husband from criminal liability, the law effectively denies the wife a remedy for a violation of her most intimate rights. This is not merely a gap in the law; it is an affirmative legislative act that withdraws legal protection from a defined class of persons on account of their marital status, in violation of Article 21.

5.3 Article 19 — Freedom of Expression and Personal Choice

Although Article 19 is not typically invoked in the context of sexual violence, the right to make intimate personal choices — including the choice to refuse sexual intercourse — has been recognised by the Supreme Court as an aspect of personal liberty protected under Article 19(1)(a), read with Article 21. In *Navtej Singh Johar v. Union of India*, the Court held that sexual autonomy is a facet of individual liberty and dignity that the Constitution protects.⁶ The marital rape exception, by denying a wife the legal capacity to refuse sexual intercourse with her husband, abridges this dimension of constitutionally protected autonomy.

⁶*Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

6. Judicial Developments

The Indian judiciary has progressively expanded the constitutional understanding of bodily autonomy, dignity, and consent within the marital context, even as a definitive ruling on the exception's constitutionality remains pending. In *Suchita Srivastava v. Chandigarh Administration*, the Supreme Court recognised reproductive autonomy as integral to personal liberty under Article 21, holding that a woman's right to decide about her own body cannot be overridden without compelling justification⁷ — reasoning directly applicable even though the case did not concern marital rape.

The most significant development came in *Independent Thought v. Union of India*, where the Supreme Court read down Exception 2 to Section 375 to exclude sexual intercourse with a minor wife (under eighteen) from its protection, holding the exception unconstitutional to that extent.⁸ The Court held that marriage cannot override a minor wife's right to bodily integrity; the decision stopped short of addressing adult wives, but its reasoning has clear implications for that question.

At the High Court level, the Karnataka High Court in 2022 held that the exception was prima facie violative of Articles 14 and 21 and warranted examination by a constitutional bench.⁹ The Delhi High Court delivered a split verdict in May 2022 — one judge holding the exception unconstitutional, another upholding it — referring the matter to the Supreme Court.¹⁰ The Supreme Court has admitted the matter and hearings continued through 2024 and 2025; it remains sub judice as of 2026, one of the most consequential pending constitutional questions in Indian law, with the Court's trajectory on dignity, privacy, and equality suggesting a direction toward striking the exception down.

7. Arguments Supporting Criminalisation

The case for criminalising marital rape rests on several independent and mutually reinforcing grounds, each of which is grounded in constitutional principle, comparative law, and the empirical evidence on the harms of sexual violence.

⁷*Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1.

⁹*Hrishikesh Sahoo v. State of Karnataka*, Criminal Petition No. 5184 of 2021 (Karnataka High Court, 23 March 2022).

¹⁰*RIT Foundation v. Union of India*, W.P.(C) 284/2015 (Delhi High Court, May 2022).

First, and most fundamentally, criminalisation is required by the principle of constitutional morality. The Supreme Court in *Navtej Singh Johar v. Union of India* drew a sharp distinction between constitutional morality — the values of dignity, liberty, and equality enshrined in the Constitution — and popular morality, which may reflect majoritarian prejudice or social conservatism.¹¹ The Court held that constitutional morality must prevail over popular morality when the two conflict. The marital rape exception reflects a form of popular morality rooted in patriarchal assumptions about the subservience of wives. Constitutional morality demands its abolition.

Second, criminalisation is necessary to give effect to the principle of continuous consent. The law of rape, as reformed by the Criminal Law (Amendment) Act, 2013, is premised on the understanding that consent must be present at the time of each sexual act and that it may be withdrawn at any time. The marital rape exception is logically inconsistent with this understanding. It treats marriage as conferring a kind of perpetual consent that is immune to withdrawal, which is precisely the conception of consent that the 2013 amendments were designed to repudiate.

Third, the argument that criminalisation would result in widespread misuse of the law does not withstand scrutiny. The criminal law already contains robust procedural safeguards against false complaints, including the requirement of corroboration, the right of the accused to cross-examine witnesses, and the standard of proof beyond reasonable doubt. These safeguards apply equally to all offences and there is no principled reason why they would be less effective in cases of marital rape. Moreover, the Supreme Court has repeatedly held that the possibility of misuse is not a valid ground for denying a legal remedy to those who genuinely need it.

Fourth, the absence of criminalisation perpetuates a culture of impunity within the domestic sphere, sending a message to survivors that the law does not take their suffering seriously. This has a chilling effect on reporting: survivors who know that the law does not recognise the conduct as a crime are significantly less likely to seek help, report the offence, or access support services. Criminalisation is therefore essential not only for justice in individual cases but for the broader goal of eradicating sexual violence within marriage.

8. Arguments Against Criminalisation

The arguments advanced against criminalisation fall into three broad categories — the sanctity and privacy of marriage, evidentiary difficulty, and the risk of misuse — each of which deserves engagement, though, as the next section argues, none ultimately justifies retaining the exception.

The first holds that marriage is a private institution the criminal law should not intrude upon, and that criminal liability would destabilise the matrimonial relationship — a position the Government of India expressly took before the Delhi High Court. This conflates the privacy of the marital relationship with the husband's immunity from consequences for criminal conduct: the right to privacy is a right to make autonomous choices, not a right to commit wrongs without accountability. Criminalising non-consensual conduct protects the private sphere of the individual wife rather than intruding upon it.

The second concerns evidentiary difficulty: proof of non-consent is said to be hard to establish where parties share a domestic life and history of consensual intercourse. This challenge, while real, is not unique to marital rape — Indian courts already possess well-developed jurisprudence on assessing a complainant's testimony in single-witness cases, and there is no principled reason it cannot extend to marital rape.

The third is the risk of misuse — that criminalisation would enable false allegations as leverage in matrimonial disputes. Studies from jurisdictions that have criminalised marital rape, including the United Kingdom, Australia, and Canada, show no pattern of widespread false allegations, and the speculative possibility of misuse cannot justify categorically denying protection to women who genuinely experience sexual violence within marriage. As the Supreme Court observed in *Independent Thought*, the argument of misuse is really an argument that the rights of one class should be sacrificed to prevent the imagined misconduct of another.

9. Critical Analysis

The marital rape exception is not a technical anomaly but an expression of a deeper assumption that a wife's sexual autonomy is subordinate to her husband's entitlement — an assumption incompatible with the constitutional order elaborated by the Supreme Court. The arguments for retention are, on analysis, either circular or grounded in values the Constitution has

expressly rejected: the appeal to marital sanctity prioritises the formal institution of marriage over the physical and psychological integrity of the persons within it; the appeal to evidentiary difficulty is an argument for impunity rather than innocence; and the appeal to potential misuse applies, if at all, to every category of criminal offence and has never elsewhere been treated as sufficient reason to exempt an entire class of conduct from liability.

No empirical evidence supports the claim that criminalisation destabilises marriage or produces widespread misuse — the experience of the United Kingdom since *R v R* suggests the opposite. The exception also produces a form of gender inequality that is particularly invidious because it is state-enforced: rather than merely failing to protect married women, the law affirmatively withdraws protection extended to every other woman. As demonstrated in Section 5, the exception fails the tests of both Articles 14 and 21, creating an arbitrary classification without rational basis and depriving a defined class of women of bodily autonomy and dignity without constitutionally valid justification — rendering it void under Article 13 to that extent.

10. Comparative Perspective

The criminalisation of marital rape is now the dominant position in international law and in the domestic law of most democratic jurisdictions. A comparative survey reveals that India's retention of the marital rape exception places it in a small and shrinking minority of countries that decline to extend the protection of rape law to married women.

In the United Kingdom, the marital rape exception was abolished by the House of Lords in *R v R* [1991] UKHL 12, where it was held that the common law rule stated by Hale was "a fiction which the common law was no longer obliged to maintain."¹² The decision was subsequently confirmed by the European Court of Human Rights in *C.R. v. United Kingdom* (1995), which held that applying rape law to marital rape did not violate Article 7 of the European Convention on Human Rights, since the development of the law was consistent with the Convention's fundamental objectives.

South Africa's Sexual Offences and Related Matters Amendment Act, 2007 expressly provides that no exemption based on a marital or cohabiting relationship applies to any sexual offence, reflecting the country's constitutional commitment to equality and dignity. Canada removed its

¹²*R v R* [1991] UKHL 12; [1992] 1 AC 599.

marital rape exemption from the Criminal Code in 1983, with courts subsequently holding that consent must be assessed at the time of each act regardless of any prior relationship. Every Australian state and territory has abolished the exception, the last — New South Wales — doing so in 1994, with courts consistently holding that marriage confers no special immunity from criminal liability for sexual offences.

Closer to home, Nepal criminalised marital rape under its Civil Code 2017 as a matter of constitutional gender equality; Sri Lanka has narrowed the exception through judicial interpretation without full criminalisation; and Bangladesh retains an exception similar to India's, though its constitutionality has been challenged before the High Court Division. The trajectory of comparative law is clear: criminalisation of marital rape is an international norm, not an exceptional position, and the exception in Indian law is a colonial anachronism abandoned by the very jurisdiction — England — from which it was inherited.

11. Statistical Data and Reports

The National Family Health Survey — 5 (NFHS-5), conducted by the Ministry of Health and Family Welfare for 2019–21, found that approximately 29.3% of ever-married women in India aged 18–49 reported spousal physical, sexual, or emotional violence, of whom approximately 6.8% reported sexual violence specifically by their husbands.¹³ Given the well-documented tendency to underreport marital violence — attributable to social stigma, economic dependence, fear of retaliation, and the absence of a criminal remedy — these figures likely understate true prevalence. The National Crime Records Bureau does not separately enumerate marital rape, since it is not criminalised under Section 375; this statistical invisibility is itself a consequence of the exception, producing a self-reinforcing cycle in which the absence of criminalisation produces the absence of data, which is then invoked as evidence that the problem does not exist.

The World Health Organisation's multi-country study on women's health and domestic violence found that between 10% and 50% of women across surveyed countries, including India, reported having been physically forced into intercourse by an intimate partner.¹⁴ The UN

¹³International Institute for Population Sciences (IIPS) and ICF, National Family Health Survey (NFHS-5) 2019–21: India Report (Mumbai: IIPS, 2022).

¹⁴World Health Organization, Multi-Country Study on Women's Health and Domestic Violence against Women (WHO, 2005).

Special Rapporteur on Violence against Women has, in successive reports, called upon India to criminalise marital rape, observing that the exception is inconsistent with India's obligations under CEDAW and reflects discriminatory attitudes about the relationship between marriage and consent.¹⁵ Taken together, the data establishes both that sexual violence within marriage is significant and prevalent in India, and that the current legal framework systematically fails to address it.

12. International Conventions and Obligations

India is a party to several international human rights instruments that impose obligations directly relevant to marital rape, so its non-criminalisation is not merely a domestic constitutional failing but also a breach of international commitments.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), to which India acceded in 1993, requires State parties to eliminate discrimination against women in matters relating to marriage and family relations and to ensure equal rights and responsibilities within marriage.¹⁶ The CEDAW Committee's General Recommendation No. 35 (2017) clarified that gender-based violence against women, including sexual violence within marriage, constitutes discrimination within the meaning of CEDAW, and called on State parties to ensure marital rape is criminalised and effectively prosecuted.

The International Covenant on Civil and Political Rights, ratified by India in 1979, guarantees the right to liberty and security of the person (Article 9) and equal protection without discrimination (Article 26).¹⁷ The Human Rights Committee has held these provisions require effective legal remedies, including criminal prosecution, for persons who experience sexual violence within marriage. The Universal Declaration of Human Rights, while not binding, reflects customary international law on dignity, equal protection, and freedom from violence¹⁸ and, together with Article 51 of the Constitution, informs the interpretation of fundamental rights domestically. The retention of the exception is difficult to reconcile with these commitments and exposes India to continued criticism before international bodies, including

¹⁵Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, UN Doc. A/HRC/47/26 (2021).

¹⁶Convention on the Elimination of All Forms of Discrimination Against Women, adopted 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

¹⁷International Covenant on Civil and Political Rights, adopted 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

¹⁸Universal Declaration of Human Rights, GA Res. 217A (III), UN Doc. A/810 (10 December 1948).

the Universal Periodic Review mechanism of the UN Human Rights Council.

13. Conclusion

The marital rape exception in Exception 2 to Section 375 of the Indian Penal Code, 1860 is constitutionally indefensible, empirically harmful, and internationally anomalous. This paper has sought to demonstrate, through constitutional doctrine, judicial developments, comparative law, statistical evidence, and international obligations, that the exception cannot survive scrutiny under the tests the Supreme Court has developed for legislation under Articles 14 and 21.

The exception is arbitrary: it creates a classification between married and unmarried women bearing no rational nexus to any legitimate object, since the purpose of Section 375 — protecting persons from non-consensual intercourse — applies equally whether the perpetrator is a stranger or a spouse. It also deprives married women of rights protected by Article 21 — bodily autonomy, dignity, and decisional privacy — which, as Puttaswamy holds, are not diminished by marriage. A framework permitting a husband to compel his wife to intercourse without criminal consequence treats her as a means rather than an end.

The arguments for retention — marital sanctity, evidentiary difficulty, risk of misuse — have been examined and found wanting: circular, speculative, or grounded in patriarchal values the Constitution has repudiated. The experience of the United Kingdom, Canada, Australia, South Africa, and Nepal demonstrates that criminalisation does not destabilise marriage or produce a flood of false complaints; it provides a meaningful remedy to survivors previously without recourse.

The path forward requires action on two fronts. Legislatively, Parliament must amend Exception 2 to Section 375 of the IPC — and the corresponding provision in the Bharatiya Nyaya Sanhita, 2023 — to remove the husband's immunity. Judicially, the Supreme Court must apply its own jurisprudence on dignity, privacy, and equality to hold the exception unconstitutional. Either route, or both together, would bring Indian law into conformity with its own constitutional commitments and the international norms to which India has subscribed. The dignity of married women is not a lesser form of dignity. Their bodily autonomy is not a lesser form of autonomy. The Constitution — which opens with a commitment to justice, liberty, equality, and fraternity — does not permit the law to treat them as if it were.