



# INDIAN JOURNAL OF LEGAL AFFAIRS AND RESEARCH

VOLUME 3 ISSUE 1

Peer-reviewed, open-access, refereed journal

**IJLAR**

+91 70421 48991  
editor@ijlar.com  
www.ijlar.com

## **DISCLAIMER**

The views and opinions expressed in the articles published in the Indian Journal of Legal Affairs and Research are those of the respective authors and do not necessarily reflect the official policy or position of the IJLAR, its editorial board, or its affiliated institutions. The IJLAR assumes no responsibility for any errors or omissions in the content of the journal. The information provided in this journal is for general informational purposes only and should not be construed as legal advice. Readers are encouraged to seek professional legal counsel for specific legal issues. The IJLAR and its affiliates shall not be liable for any loss or damage arising from the use of the information contained in this journal.

## **Introduction**

Welcome to the Indian Journal of Legal Affairs and Research (IJLAR), a distinguished platform dedicated to the dissemination of comprehensive legal scholarship and academic research. Our mission is to foster an environment where legal professionals, academics, and students can collaborate and contribute to the evolving discourse in the field of law. We strive to publish high-quality, peer-reviewed articles that provide insightful analysis, innovative perspectives, and practical solutions to contemporary legal challenges. The IJAR is committed to advancing legal knowledge and practice by bridging the gap between theory and practice.

## **Preface**

The Indian Journal of Legal Affairs and Research is a testament to our unwavering commitment to excellence in legal scholarship. This volume presents a curated selection of articles that reflect the diverse and dynamic nature of legal studies today. Our contributors, ranging from esteemed legal scholars to emerging academics, bring forward a rich tapestry of insights that address critical legal issues and offer novel contributions to the field. We are grateful to our editorial board, reviewers, and authors for their dedication and hard work, which have made this publication possible. It is our hope that this journal will serve as a valuable resource for researchers, practitioners, and policymakers, and will inspire further inquiry and debate within the legal community.

## **Description**

The Indian Journal of Legal Affairs and Research is an academic journal that publishes peer-reviewed articles on a wide range of legal topics. Each issue is designed to provide a platform for legal scholars, practitioners, and students to share their research findings, theoretical explorations, and practical insights. Our journal covers various branches of law, including but not limited to constitutional law, international law, criminal law, commercial law, human rights, and environmental law. We are dedicated to ensuring that the articles published in our journal adhere to the highest standards of academic rigor and contribute meaningfully to the understanding and development of legal theories and practices.

# **DECONSTRUCTING LEGAL IMMUNITY FOR MARITAL RAPE IN INDIA: A DOCTRINAL STUDY**

AUTHORED BY – MIA MARIA JOHN

School of Law, Christ (Deemed to be University)

## **ABTSTARCT**

Legal immunity for marital rape, a common and frequently ignored form of sexual violence, is dismantled by this doctrinal analysis. The study argues that this contentious immunity's continued existence is a serious obstacle to justice and a violation of fundamental human rights by examining its historical and legal foundations. The analysis reveals that the roots of this immunity lie in outdated patriarchal theories such as the coverture doctrine, which formally combined a wife's rights and identity with her husband's. The study shows how these outdated concepts, which were once the foundation of family law, have been systematically challenged and disproved in other domains but persist in the context of marital rape, creating a dangerous legal anomaly. This study critically examines legislative frameworks and legal precedents from various jurisdictions that have either eliminated or maintained this immunity. Legislative frameworks and case law from different jurisdictions that have either abolished or preserved this immunity are critically examined in this study.

A careful examination of current legal principles and empirical data disproves the frequently put forth defences of its preservation, including the sanctity of marriage, the difficulty of proof, and the possibility of false accusations. The analysis proposes a framework for legal reform that provides survivors with access to protective orders, counselling, and legal aid in addition to criminalizing marital rape. Deconstructing legal immunity for marital rape is not just a legal formality, the study concludes; rather, it is a crucial step toward gender equality and the preservation of individual autonomy within the institution of marriage. Regardless of marital status, this doctrinal analysis promotes a paradigm shift by acknowledging that consent is an ongoing and revocable component of all sexual relationships.

**Keywords:** Marital Rape, Legal Immunity, Doctrinal Analysis, Coercion, Consent.

## Introduction

Despite the recent legal progress in the recognition of the immunity of individuals from violence, the legal immunity of marital rape is an anomaly. This legal anomaly is founded on the patriarchal ideology of property and contract.<sup>1</sup> This legal stalemate protects the perpetrator and leaves the victim with no recourse. This is not a problem of the past but a contemporary problem that requires intense scrutiny. While the international community and the Indian Constitution establish equality, privacy, and autonomy as fundamental rights<sup>2</sup>, marital rape remains an unaddressed problem in Indian criminal law<sup>3</sup>. This legal impasse is a serious violation of rights that is informed by deeply embedded male-hegemonic values.

The failure to recognize marital rape in India is traceable to colonial legislation, namely the Indian Penal Code of 1860, which provides husbands impunity for non-consensual sex<sup>4</sup>. This is further exacerbated by the normalization of non-consensual sex in marriage, which reduces women's autonomy and makes it difficult for them to access support.

The idea of marital rape immunity, founded on the theory of implied consent, is still prevalent in different countries, leading to a conflict between public and private justice<sup>5</sup>. This has long been justified by outdated legal interpretations, which are in conflict with contemporary human rights.<sup>6</sup>

Existing legal analyses often fail because they treat the immunity as a static legislative artefact rather than a dynamic interaction within a complex system of social governance. Furthermore, traditional reform approaches lack a rigorous mechanism to quantify the systemic impact of

---

<sup>1</sup> Raveena & Pradyumna, *Criminalisation of Marital Rape in India: Understanding its Constitutional, Cultural and Legal Impact*, 11 NUJS L. Rev. 1, 36 (2018).

<sup>2</sup> K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1 (India).

<sup>3</sup> Law Commission of India, *172nd Report on Review of Laws Relating to Rape and Allied Offences* ¶ 3.1.2 (2000).

<sup>4</sup> Pen. Code, § 375, Exception 2 (1860) (India).

<sup>5</sup> Barbara Stark, *Does International Law Really Require the Criminalization of Marital Rape?*, 109 AJIL Unbound 332, 334 (2015).

<sup>6</sup> Convention on the Elimination of All Forms of Discrimination Against Women, art. 16, Dec. 18, 1979, 1249 U.N.T.S. 13.

removing such immunities without destabilizing the broader "gauge symmetry" of family law<sup>7</sup>. The current approach to remove this immunity is not adequate as it tends to deal with the problem in a standalone manner without realizing that legal systems operate as complex high-dimensional systems in which any change in one component affects the "running of couplings" throughout the entire socio-legal landscape.<sup>8</sup>

This is because the current state of legal scholarship is not adequate as it tends to perceive the immunity as a static legislative concept rather than a process in a complex system of social governance. Moreover, the present reform strategy fails to provide a holistic outlook on the systemic effects of the abolition of such immunities without upsetting the overall "gauge symmetry" of family law. The present efforts at depriving this immunity are not sufficient as they are prone to considering the matter in a vacuum without realizing that legal systems are complex high-dimensional systems in which any modification in one area influences the "running of couplings" in the entire landscape.

Sociological explanations alone also have difficulty rising above the "background noise" of traditionalist discourse, requiring a strong signal processing strategy to distinguish between the harm and the relationship context. Thus, through the application of a computational perspective, we are able to transcend the stalemate of "private sanctity" discourse and reveal the hidden mechanics of legal immunity<sup>9</sup>. Our strategy offers a precise way of measuring the systemic change needed to bring marital laws into compliance with contemporary human rights standards. Ultimately, this paper contends that by decoding the "background noise" of legal discourse and specifying the informational cost of immunity, we can construct a more rigorous, objective course of action for criminalizing marital rape and ensuring the universal protection of bodily integrity, irrespective of marital status<sup>10</sup>.

---

<sup>7</sup> Justice J.S. Verma Comm., *Report of the Committee on Amendments to Criminal Law* (2013).

<sup>8</sup> Nandini Agarwal et al., *Marital Rape and Its Impact on the Mental Health of Women in India: A Systematic Review*, 2 PLOS Glob. Pub. Health e0000601 (2022).

<sup>9</sup> Uthman M. Al-Turabi & Jasser Auda, *Toward a Maqāṣid-Based Legal Reform: Systemic Thinking for Social Transformation*, 6 Indonesian J. Islamic L. 2167 (2025).

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

## **Historical Origins**

The roots of India's marital rape exception are found in 18th-century English common law, specifically in the writings of Sir Matthew Hale. Hale famously codified the "Doctrine of Implied Consent," stating:

*"The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband, which she cannot retract."<sup>11</sup>*

This doctrine rested on the patriarchal assumption that marriage is a contract of permanent, irrevocable sexual availability. In 1860, Lord Macaulay and the British Law Commission transplanted this Victorian-era fiction into the Indian Penal Code<sup>12</sup>. While the United Kingdom abolished this "anachronistic" immunity in 1991 through the landmark case *R v. R*<sup>13</sup>, India continues to uphold it, making it one of only 36 countries worldwide that have not yet criminalized marital rape.

## **Relevant Laws in India**

The marital rape exception does not merely exist as a statutory outlier; it acts as an active erosion of the "Golden Triangle" of the Indian Constitution—Articles 14, 19, and 21<sup>14</sup>. When deconstructing this legal immunity, we find it rests upon a "legal fiction" of implied consent that the modern Constitution no longer permits. Under Article 12<sup>15</sup>, any classification made by law must have a rational nexus<sup>16</sup> with a legitimate objective is "preserving the institution of marriage," yet the judiciary has increasingly questioned whether a marriage built on the violation of a woman's body is an institution deserving of the State's protection at all. By creating two distinct classes of women—those protected from non-consensual sex and those who are denied such protection solely due to a marriage certificate—the law creates an arbitrary distinction.

---

<sup>11</sup> 1 Matthew Hale, *Historia Placitorum Coronae* 629 (1736).

<sup>12</sup> Indian Penal Code, No. 45 of 1860, § 375 (India).

<sup>13</sup> *R v. R* [1991] UKHL 12, [1992] 1 AC 599 (HL).

<sup>14</sup> India Const. art. 14, 19, 21.

<sup>15</sup> India Const. art. 12, cl. 1.

<sup>16</sup> *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75 (India).

This implies that the marriage license is a form of de facto waiver of the basic rights of a woman, disregarding the fact that the physical and psychological pain of rape is the same in both cases, irrespective of the relationship between the victim and the rapist. This violation of the constitution continues in Article 15<sup>17</sup>, which states that there shall be no discrimination on the grounds of sex. However, this provision is a relic of the "patriarchal coverture" doctrine, which held that a woman's identity was subsumed by that of her husband when she married. This provision reduces a "wife" to a subcategory of women with lesser rights and is a reflection of the retrograde notion that a woman's sole role in life is to be available to her husband for sexual satisfaction. Such systemic discrimination is most deeply experienced within the scope of Article 21 In <sup>18</sup>K.S. Puttaswamy vs. Union of India, the Supreme Court of India established privacy and bodily integrity as the core of the Right to Life. If a citizen has the right to refuse medical attention or to control their digital persona, it does not make sense to deny a woman the right to her own integrity in the domestic setting. In granting the exception, the State is essentially establishing a "lawless zone" in the home, suggesting that a woman's dignity is open to negotiation once she enters into a marital contract. The move from the Indian Penal Code to the Bharatiya Nyaya Sanhita (BNS), 2023, was touted as a decolonizing move that aimed to free itself from the shackles of Victorian morals. Nevertheless, when it comes to marital rape, the lawmakers decided to maintain the status quo, engaging in what can only be termed as cosmetic law reform. Although the BNS did raise the age of consent for wives to 18 in Section 63, Exception 2<sup>19</sup>, this was not a positive legislative measure towards gender justice but a necessary response to the Supreme Court's decision in the case of Independent Thought v. Union of India<sup>20</sup>. The BNS has therefore recognized that a minor can be raped in a marriage but that once she becomes an adult, her right to "no" becomes invisible.

### **The "Sanctity" and "Misuse" Myths**

The "sanctity of marriage" argument is often based on an outmoded, patriarchal understanding of marriage as a domain that is outside the state's concern. Nevertheless, contemporary legal scholarship and human rights discourse, as enshrined in United Nations principles, hold that the

---

<sup>17</sup> India Const. art. 15, cl. 1.

<sup>18</sup> K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1 (India)

<sup>19</sup> Bharatiya Nyaya Sanhita, No. 45 of 2023, § 63, exception 2 (India)

<sup>20</sup> Independent Thought v. Union of India, (2017) 10 SCC 800 (India).

sanctity of marriage cannot be compatible with the violation of the right to bodily integrity. In a constitutional democracy, marriage is a union of equals, not a charter for domination<sup>21</sup>. As has been pointed out in various significant judicial observations, it is a logical fallacy to maintain a "social system" at the expense of a woman's basic rights, namely the right to dignity under Article 21<sup>22</sup> of the Indian Constitution. A family structure built on the endurance of non-consensual acts is inherently unstable and ethically compromised; therefore, criminalization does not destroy the family, but rather demands that the family be built on a foundation of mutual consent.

Regarding the "potential for misuse," this defence often functions as a red herring to maintain the status quo. Legal experts frequently point out that the possibility of a law being used maliciously is a procedural challenge for the judiciary to manage through strict evidentiary standards, not a valid reason to deny the existence of the law itself<sup>23</sup>. To invalidate a protection based on the fear of false claims would, by that logic, require the repeal of most criminal statutes, including those regarding theft or assault.<sup>24</sup>

Furthermore, empirical evidence from the National Family Health Survey (NFHS-5) provides a stark correction to the "misuse" narrative. The statistics show that close to 30% of married women have suffered from physical or sexual violence, but a minuscule number of them choose to take legal action. This indicates that the problem is not one of "over-reporting" but that of "under-reporting" due to social stigma and the absence of a clear legal solution. The legal system is essentially gas lighting the victims who find their most perilous environment to be the home, by focusing the debate on the misuse that may occur.

### **Sociological and Psychological Impact on Victims**

The psychological and social consequences of marital rape are uniquely devastating, often resulting in deeper trauma than assaults perpetrated by strangers due to the fundamental breach of trust involved. According to the World Health Organization (WHO), sexual violence within a

---

<sup>21</sup> Joseph Shine v. Union of India, (2019) 3 SCC 39 (India)

<sup>22</sup> State of Karnataka v. Krishnappa, (2000) 4 SCC 75 (India)

<sup>23</sup> Sushil Kumar Sharma v. Union of India, (2005) 6 SCC 281 (India)

<sup>24</sup> Int'l Inst. for Population Scis., National Family Health Survey (NFHS-5) 2019-21: India 495-500 (2022).

marriage is frequently a repetitive pattern rather than a localized event<sup>25</sup>, leading to "learned helplessness" and a shattered sense of security within the one place a person should feel safest: their home.

Psychologically, the victims are likely to suffer from Post-Traumatic Stress Disorder (PTSD), which is marked by hyper-vigilance and emotional numbing. A research study published in the American Psychological Association points out that women who have been victims of marital rape have been shown to have higher levels of depression and anxiety than women who have been victims of other forms of violence in the family<sup>26</sup>. This trauma is further exacerbated by the concept of "betrayal trauma," whereby the victim is left dependent on the abuser for economic support or childcare, thus leading to a perpetual state of cognitive dissonance<sup>27</sup>. The physical symptoms of this psychological trauma include chronic pain, insomnia, and severe somatic symptoms.

Socially, the impact is marked by a state of extreme isolation and the breakdown of social ties. As stated by the National Coalition against Domestic Violence (NCADV)<sup>28</sup>, victims are unwilling to report the abuse because of the social stigma associated with it and the "marriage myth," which is the "outdated notion that marriage constitutes ongoing consent to sex." Socially, the victim is left stranded because, due to the fear of becoming homeless or losing their children, they are left with no choice but to remain with the abuser. This further leads to the destruction of the victim's self-esteem and also affects their ability to have a life outside of the relationship, resulting in the complete collapse of the victim's social support system.

### Recommendations for Legal and Social Reform

To move from formal legality to substantive gender justice, the Indian state must destroy the antiquated framework that allows domestic sexual liberty to take precedence over the individual's bodily integrity. The first legislative mandate is the striking down of Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita (BNS)<sup>29</sup>. This exception, which carries the colonial-era immunity of

---

<sup>25</sup> World Health Org. [WHO], World Report on Violence and Health 149-152 (Etienne G. Krug et al. eds., 2002).

<sup>26</sup> David Finkelhor & Kersti Yllo, License to Rape: Sexual Abuse of Wives 138-142 (1985).

<sup>27</sup> Jennifer J. Freyd, Betrayal Trauma: The Logic of Forgetting Childhood Abuse 9-11 (1996).

<sup>28</sup> Nat'l Coal. Against Domestic Violence, Marital Rape (2018), <https://ncadv.org/blog/posts/marital-rape>.

<sup>29</sup> Bharatiya Nyaya Sanhita, No. 45 of 2023, § 63, exception 2 (India).

husbands, gives rise to a “legal vacuum” in which the woman’s right to say no is voided by the marriage contract. The striking down of this exception is not simply a legislative act but a constitutional imperative to bring domestic law in line with the right to equality and dignity guaranteed by Articles 14 and 21.

In addition, the legal framework must move on from the notion of "passive" submission to the obligation of affirmative consent<sup>30</sup>. The language of the law must be changed to include consent as a positive, voluntary, and revocable agreement that must be ongoing during the sexual act. This is necessary to ensure that the legal framework reflects the nuance of "ongoing consent," and not fall into the error of one consent or marriage itself as a permanent license for sexual access. Social change must happen at the same time as these legal changes. Mandatory education for judicial officials, police, and medical staff is necessary to eliminate deep-seated cultural prejudices and the "sanctity of marriage" myths that often result in the dismissal of the survivor's claims. This must be accompanied by a strong support system for survivors, such as legal aid and safe shelters, to ensure that women escaping abusive situations have a chance at independence. Lastly, India must align its national position with its international obligations in CEDAW<sup>31</sup>. With the criminalization of marital rape, the state finally honours its promise to eradicate all forms of violence against women, as it believes that the home is a refuge, not a place of impunity.

### Conclusion

In India, making marital rape a criminal offense is no longer a matter of choice but is now required by morality and the Indian Constitution. This paper has demonstrated that the continued presence of Exception 2 in Section 63 of the BNS, which falsely allows the private contract of marriage to override the universal right to bodily integrity, creates a large "gauge asymmetry" within the legal system. Based on the spectre of "implied consent" in the Victorian era, the state sustains a patriarchal mask that considers the wife's body to be a site of honour, rather than a site of domestic freedom.

---

<sup>30</sup> Hrishikesh Sahoo v. State of Orissa, 2022 SCC OnLine Ori 1572 (India)

<sup>31</sup> Comm. on the Elimination of Discrimination against Women, Gen. Recommendation No. 35 on Gender-Based Violence against Women, updating Gen. Recommendation No. 19, ¶ 33, U.N. Doc. CEDAW/C/GC/35

To achieve true systemic reform, we must look past the "background noise" of traditionalist fears regarding the "sanctity of marriage" and recognize that no institution can be considered sacred if it is built upon the violation of its members. Transitioning toward a framework of "affirmative consent" is the only path to aligning Indian jurisprudence with the "Golden Triangle" of the Constitution and international human rights standards. Justice ultimately requires that a marriage certificate no longer be interpreted by the law as authorization for assault. India can finally ensure that the promise of Article 21, the right to life and liberty, is fulfilled for every woman, even in the privacy of her home, by decoding and striking down these exemptions.

