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Beyond the Marital Rape Exception: Structural Inequality, Consent, and Legal Empowerment in Indian Criminal Law

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ABSTRACT

*This article examines the marital rape exception in Indian criminal law and argues that its persistence reflects structural inequality rather than mere doctrinal oversight. Situating the exception within the lived socio-economic realities of poor women, it contends that the presumption of irrevocable marital consent operates as a mechanism of exclusion that is most burdensome for those least able to resist it. Drawing on the framework of legal empowerment of the poor, and using international humanitarian and human rights norms on sexual violence as a comparative benchmark, the article analyses the statutory framework under the former Section 375 Exception 2 of the Indian Penal Code and Section 63 Exception 2 of the Bharatiya Nyaya Sanhita, 2023, related provisions under the Protection of Women from Domestic Violence Act, 2005 and the Medical Termination of Pregnancy laws, and the evolving judicial discourse, including *Independent Thought v. Union of India*, the split verdict in *RIT Foundation v. Union of India*, and *X v. Principal Secretary, Health and Family Welfare Department*. It concludes that criminalisation alone is insufficient and that meaningful reform requires complementary structural interventions, including accessible legal aid, income and housing support, decentralised healthcare and community-based legal awareness, so that the constitutional promises of dignity, equality and bodily autonomy become realisable for poor women.*

Keywords: *marital rape, marital rape exception, consent, bodily autonomy, legal empowerment, structural inequality, reproductive coercion, poverty, Bharatiya Nyaya Sanhita, Indian criminal law*

I. INTRODUCTION

Marital rape, also referred to as conjugal rape, is defined as non-consensual sexual intercourse perpetrated by a husband against his wife. The Merriam-Webster dictionary defines rape as an unlawful sexual act, typically involving sexual intercourse performed forcibly, against the

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victim's will, or with individuals who are underage, mentally incapacitated, intoxicated, unconscious, or deceived. This definition underscores that any non-consensual intercourse constitutes rape, irrespective of whether the perpetrator is the husband or a stranger. However, both the Indian Penal Code and the Bharatiya Nyaya Sanhita include spousal intercourse as an exception, thereby excluding it from the legal definition of rape.

The marital exemption originates from the views of the English jurist Matthew Hale, who asserted, without legal precedent or authority, that a woman, by consenting to marriage, irrevocably transfers certain rights to her husband. This perspective implies perpetual consent within marriage, rendering the concept of marital rape legally impossible. The analogy equates marital rape to the theft of one's own property, based on the assumption that a wife is the husband's property. In *Commonwealth v. Fogerty*,¹ Hale's position was established as precedent, thereby institutionalising the marital rape exception.

International humanitarian law and international criminal law unequivocally classify rape as a serious violation. Sexual violence by an intimate partner is recognised as a grave infringement of bodily integrity, dignity, and reproductive autonomy, particularly in conflict and post-conflict contexts.² Against this backdrop, the continued criminal immunity for marital rape in domestic law during peacetime reveals a significant normative inconsistency: conduct deemed a severe violation in armed conflict is rendered legally permissible and invisible within marriage.³ This contradiction prompts critical questions regarding the integration of international gender-justice norms into domestic criminal law.

This article does not equate marital rape with crimes committed during armed conflict; rather, it uses the international humanitarian law framework on sexual violence as a benchmark to expose inconsistencies within peacetime domestic criminal law.⁴ The existence of the marital rape exception in Indian criminal law is attributable to legislative inaction, institutional reluctance, and doctrinal constraints within the judiciary. The primary challenge lies not in recognising marital rape as a crime, but in reconciling criminal responsibility with the socio-legal realities of marriage. This exception reflects deeper structural limitations within the criminal justice system, particularly its inadequacy in addressing sexual violence within intimate relationships.

¹ *Commonwealth v. Fogerty*, 8 Gray 489 (Mass. 1857).

² WORLD HEALTH ORGANIZATION, *Violence against Women Prevalence Estimates 2018* (WHO 2021).

³ CATHARINE A. MACKINNON, *ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES* (Harvard University Press 2006); RATNA KAPUR AND BRENDA COSSMAN, *SUBVERSIVE SITES: FEMINIST ENGAGEMENTS WITH LAW IN INDIA* (Sage Publications 1996).

⁴ MacKinnon, *supra* note 3.

Criminal law is traditionally oriented toward addressing societal wrongs that are overtly disruptive. In contrast, marriage has historically been regarded as a private domain, largely insulated from state intervention under the principle of family autonomy. Consequently, sexual violence within marriage is often treated as a personal issue rather than a matter warranting state intervention and punishment. This legal silence perpetuates the misconception that principles of bodily autonomy and sexual self-determination are inapplicable within the confines of marriage.⁵

It is not accurate to say that this exception was simply an accidental importation into the law, because marriage has been considered a central site where the patriarchal social order can be replicated, and hence the criminal law respects its sanctity. The exception does not operate as a legal anomaly; it is more a manifestation of an institutional discomfort of criminal law in regulating sexuality within the family. The foundation of criminal rape law is the notion of consent, which is legitimate only when it is voluntary, informed and revocable. Modern jurisprudence also considers it a concession made at the moment of a specific action, which cannot be implied from a relationship formed before that moment. In marriage, however, consent is assumed to be continuing and irrevocable, based only on the fact of the marriage and not on the current will of the woman. Such a limited definition of consent cannot be considered sufficient to capture the coercive aspects of marital sexual violence. Another major problem with effective criminal liability in marital rape cases is the limitation of evidence. The offence of rape requires proof beyond reasonable doubt to convict; marital rape normally occurs within the confines of the home, where no one else is present and there are often no injuries, presenting a challenge to the woman who, although a victim, does not obtain justice. In addition, the threat of retaliation and economic deprivation further discourages the woman from pursuing legal avenues.⁶ These justifications stand in the way of successful criminal responsibility for the perpetrators of marital rape and generate a rift between the theoretical idea of criminalisation and its actual implementation.

A. Poverty and Legal Vulnerability

The constraints of criminal liability in cases of marital rape become significantly more pronounced when viewed through the lens of poverty. For women living in conditions of economic insecurity, the decision to pursue legal action is rarely guided solely by principles of

⁵ UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* (Oxford University Press 2014); DIANA E.H. RUSSELL, *RAPE IN MARRIAGE* (Macmillan 1982).

⁶ AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (Oxford University Press 1999); WORLD HEALTH ORGANIZATION, *supra* note 2.

justice; instead, it is often shaped by immediate concerns of survival.⁷ When access to food, shelter, and financial stability is uncertain, seeking accountability for abuse may appear less viable than preserving the material conditions necessary for daily life. Economic dependency on the husband for housing, subsistence and childbearing converts sexual coercion into a structurally entrenched harm, where refusal carries consequences far beyond the act itself.⁸ Poverty creates many barriers to legal agency. This structural vulnerability mirrors concerns in international humanitarian and human rights law, where economic dependency and coercion are recognised as factors that negate genuine consent in contexts of sexual violence.⁹ First, it limits access to information and hence legal literacy, rendering criminal remedies distant and incomprehensible. Secondly, owing to legal illiteracy and false notions about remedies, there is greater dependency upon informal dispute resolution mechanisms, such as the interference of family elders, community leaders or religious authorities, all of which place more reliance on the protection of the marital institution than on individual autonomy.¹⁰ Thirdly, it creates the risk of retaliation, homelessness and loss of maintenance. Thus the threat of imprisonment of the primary breadwinner without state support creates a difficult position for poor women: whether to pursue criminal justice at the cost of economic survival, or to endure sexual violence to preserve material security. This paradox also reveals the classed nature of criminal law remedies, which presuppose access to resources, institutional support and exit options that are clearly lacking for poor women. In fact, poor women view the law as a site of risk rather than protection.¹¹ Analysing marital rape within the bounds of poverty and legal vulnerability reveals that the women who most need protection are often unable to access it.¹²

B. Informality of Family and Dispute Resolution

Criminal law relies on the presumption that an individual will approach formal state authorities in the event of a dispute. However, when it comes to a marriage, an approach is usually made towards informal resolution, such as taking the matter before family elders or community heads, leading to a decision inclined more towards the maintenance of the marital relationship than individual rights. These informal settings more often than not treat sexual violence within a

⁷ EVAN STARK, *COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE* (Oxford University Press 2007).

⁸ CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (Harvard University Press 1989); Russell, *supra* note 5.

⁹ Declaration on the Elimination of Violence against Women, UNGA Res 48/104 (20 December 1993).

¹⁰ Kapur and Cossman, *supra* note 3.

¹¹ Baxi, *supra* note 5.

¹² Naila Kabeer, *Resources, Agency, Achievements: Reflections on the Measurement of Women's Empowerment*, (1999) 30 DEVELOPMENT AND CHANGE 435.

marriage as a normal and private issue, rarely giving it the status of a legal wrong. Furthermore, it is regarded as a failure on the part of the woman to fulfil her conjugal duties.

Unfortunately, for poor women these informal dispute resolution mechanisms are more often than not the only accessible forums, owing to the distance to the police, the judiciary and legal aid authorities, the cost associated with formal dispute resolution forums, and the air of intimidation associated with formal legal institutions. These informal forums do not have procedural safeguards, are highly dominated by men, and operate more on social pressure than on rights-based reasoning. Women raising their voice against sexual violence within their marriage are morally condemned, accused of disrupting family honour, or coerced into returning to abusive marital homes. Even if a woman is aware of her legal rights, these informal pressures, economic dependency, fear of abandonment, concern for children and social stigma force her to withdraw the complaint or not file a report in the first place. The dependency on informal dispute resolution clearly exposes the fact that legal reform without institutional and social transformation risks remaining largely symbolic. Therefore, as long as families and communities function as the primary arbitrators in marital disputes, criminalisation alone will not serve the purpose. There is thus a need for a broader strategy, including legal empowerment that recognises and responds to the realities of informality under which women are living.

C. Structural Barriers to Accessing Justice

These are what are known as systemic impediments in the social, economic and institutional structure that limit the individual exercise of legal rights. Structural barriers are long-standing, internalised and replicated in the day-to-day operations of institutions. They are circumstances that unfairly impede poor, marginalised or socially disadvantaged groups from accessing justice on the same footing as the rest. In the context of marital rape, these barriers operate on a cumulative basis: economic dependency, low levels of legal literacy, institutional delays, social stigma and procedural complexity. Economic inaccessibility is one of the greatest obstacles. The prohibitive financial burden of court fees, lawyers' fees, travelling long distances to far-away courts and appearing in court on numerous occasions can overwhelm poor women and their families, resulting in a scenario where most survivors have to make hard choices between economic survival and taking legal action.

Although free legal assistance is available under the Legal Services Authorities Act, 1987, it remains heavily reliant on awareness, infrastructure and reach, which are unequally spread, particularly in rural regions. Even in the age of digitalisation, poor women still considerably lack legal literacy regarding their rights, the remedies available to them, and the filing of

complaints. Language is also among the structural barriers, because when court proceedings are conducted in English this creates another layer of marginalisation for illiterate women and those whose native language is not English. One of the foremost requirements of effective access to justice is linguistic accessibility.

II. CONCEPTUAL ANALYSIS OF LEGAL EMPOWERMENT OF THE POOR

Legal empowerment is essentially the process by which a person or a community acquires the knowledge, the ability and the institutional access to further, protect and realise their legal rights. It posits that the establishment of rights is insufficient; what matters is the ability to establish, execute and give effect to them. The use of legal empowerment in relation to poverty aims at enabling poor people to take control of their lives, claim independence and question unfair systems of authority. Accordingly, it requires a reallocation of power not only between the state and citizens but also within homes, communities and institutions. It resides not only in the rights possessed on the statute books, but also in whether people know those rights and can invoke them without disproportionate cost or undue retaliation. It reflects three main dimensions: consciousness of rights and remedies, access to institutions that can enforce those rights, and the ability to organise the law, collectively and individually, to check power. The goal of legal empowerment is at once a development agenda, a methodology and a transformational political undertaking.

A. Poverty as Structural Constraint and Legal Vulnerability

Poverty determines, first, the ability of a person to act, that is, whether the risk of retaliation, instability and social stigma can be managed; secondly, whether one is aware of what constitutes a violation of rights; thirdly, the availability of material access to take action and obtain relief; fourthly, social legitimacy, that is, whether communities will accept or repress a complaint; and fifthly, whether the outcome of the relief is sustainable, and if not, whether litigation may be pursued further, keeping all these factors in mind. Legal empowerment therefore requires not the mere presence of a legal mechanism but also the specific conditions necessary to reduce the structural disadvantages affecting the poor. It demands structural equality, which means fairness rather than surveillance, and protection rather than coercion and punishment. It considers law not only as a solution to injustices already experienced, but also as the ability to avoid future harm and to influence the way the government conducts its affairs.

Poverty is not merely income deprivation; it is also a structural condition that deprives a person of bargaining power, independence and social status. Poverty not only impedes the use of the law but also shapes the meaning of legal decision-making. The mere identification of rights,

whether constitutionally or through a statute, does not automatically mean that one is able to exercise those rights. Legal empowerment as a concept thus focuses on the idea that the worth of a right lies in its capacity to bring about some change in lived experience. Within the framework of marital rape, the truth is that mere criminalisation in name is not sufficient to counteract structural dependence or the absence of alternative housing, earning, or social support; therefore, solutions must be practicable as well as accessible.

Legal empowerment essentially changes the allocation of interpretive and decision-making power, which may take the following forms: interpretive power, that is, the authority to define what a right means in practice; agenda-setting power, that is, defining what harms should be recognised as rights; accountability power, that is, making institutions answerable to rights-holders; and collective power, that is, converting individual grievances into systematic claims.

B. Legal Consciousness and Transformative Agency

The perception of law by a person determines whether he or she will invoke, ignore, resist or fear it. For example, for many marginalised groups the invocation of law is experienced as humiliation at state offices, forceful policing or previous experiences of neglect, thus leading to legal quietism, a disposition to endure harm rather than to mobilise the law, since doing so seems either fruitless or hazardous.

Transformative legal empowerment cultivates legal consciousness by fostering positive contacts with the law, such as the successful grant of a welfare scheme, land titling, protection orders or labour claims. The presence of a legal aid mechanism can certainly resolve the current conflict, but it cannot alter the circumstances that predispose the poor to future harm. Legal empowerment, by contrast, is concerned with capacity and autonomy. Moreover, legal assistance comes after the conflict and deals with individual cases rather than addressing structural obstacles. It can find solutions but does not alter the circumstances that produce the harm. In this sense, legal empowerment follows on from legal aid by enabling people and communities to approach institutions without depending on unequal bargaining power, and to overcome patterns of exclusion.

C. Community Participation as Legal Strategy

Communities are not just social entities but sites of bargaining, opposition and sustenance. Mobilisation in groups comprising women, community paralegals, trade unions, or Dalit and Adivasi rights networks allows individuals to exert pressure on institutions and thereby to counteract structural power. In line with the capabilities approach articulated by Amartya Sen, legal empowerment increases the capability of a poor individual to access justice and also

shapes the terms on which justice can be realised, that is, by influencing local institutions, seeking accountability and acquiring the resources required to make rights meaningful.

Legal empowerment repositions marginalised people as legal actors who are able to influence the consequences that affect their lives, particularly the poor, and in particular poor women confronting intimate and structural violence. This renders it not merely an idealistic aspiration but a condition of worthy citizenship.

III. MARITAL RAPE IN INDIA: LEGAL FRAMEWORK AND SOCIO-ECONOMIC REALITIES

Marital rape is sexual intercourse against the will of the wife, forced upon her by her husband. Essentially, it is rape in which the perpetrator is the spouse and the absence of consent is the salient factor. The right to bodily autonomy or control over one's sexuality is in no way nullified within a marital relationship.¹³ In most jurisdictions around the world, rape is already treated as a crime independent of the marital relationship of the parties involved, since consent is personal, revocable and linked to autonomy rather than contract. In India, however, this understanding is yet to be formally realised, because the criminal law still retains a particular exception for sexual violence within marriage. The issue of marital rape reveals a misalignment between the official rules of law, which promote equality and autonomy, and the material experiences of women, whereby the body, movement and action are once again delimited by family, caste and class. Hence, to comprehend marital rape requires a critical analysis of the legal system in India as well as the socio-economic circumstances that impede access to justice, especially for poor and marginalised women.

A. The Legal Framework

Section 375 of the Indian Penal Code defines the general meaning of rape as non-consensual intercourse with a woman, with criminal consequences. This section, however, was annexed with Exception 2, which created an exemption whereby sexual intercourse by a man with his own wife, as long as the wife is above 18 years of age, is not regarded as the offence of rape. This is more commonly referred to as the marital rape exception, which renders sexual intercourse without consent in marriage not a crime, thereby exempting the husband from liability for conduct that would otherwise be heavily punished in any other setting. The recognition of consent is core to the offence of rape, but the concomitant presumption of consent within marriage, which precludes criminal prosecution despite the absence of consent, forms an

¹³ JONATHAN HERRING, *CRIMINAL LAW: TEXT, CASES AND MATERIALS* (Oxford University Press 2007); MacKinnon, *supra* note 3.

anomaly in the doctrine. Such statutory immunity stands in stark contrast to international legal systems that do not treat marital or relational status as a defence to sexual violence, and thus reveals a disjunction between India's international obligations and its national criminal law.

This exemption, which is not of Indian origin, has persisted within the Indian criminal justice system. Its origin goes as far back as the 1700s and the English jurist Matthew Hale, who established the position that, by marriage, a woman irrevocably offers herself to her husband and that there exists a continuing consent to sexual relations between them, which the woman cannot withdraw so long as she remains within the confines of marriage.¹⁴

It is not the case that, even in the 21st century, no voices have been raised for the deletion of this exception. The Justice Verma Committee (2013) recommended the removal of the marital rape exception on the ground that it goes against constitutional protections of equality and bodily autonomy. Nevertheless, despite these recommendations, the position of the criminal law in this respect remains unchanged. Even the recently adopted Bharatiya Nyaya Sanhita made no change to the rape law and retained it as it was in the Indian Penal Code. In *Justice K.S. Puttaswamy v. Union of India*, the Hon'ble Supreme Court of India recognised decisional autonomy over intimate matters as one of the fundamental constitutional values, thereby unsettling the assumption of marital consent in the context of sexual intercourse within marriage.¹⁵

B. Limited Criminalisation

The Indian Penal Code (Section 376B) and the Bharatiya Nyaya Sanhita (Section 67) criminalise non-consensual sex by a husband with his wife who is living separately under a decree of judicial separation. This implies that the law takes the question of consent into account once the marriage has already broken down. The very existence of this provision admits that marriage does not presuppose undying assent. In reality, many women in India lack the financial means, social support and even legal awareness to bring a separation case, and so this criminal protection is unavailable to them.

C. The Protection of Women from Domestic Violence Act, 2005

The Act, which came into force in 2005, played a pivotal role in addressing sexual abuse in marriage. Section 3 of the Act defines domestic violence and specifically incorporates sexual abuse, offering a spectrum of civil remedies in the form of protection orders, residence orders,

¹⁴ MATTHEW HALE, *HISTORIA PLACITORUM CORONAE* (1736; reprint, Professional Books 1971).

¹⁵ *Justice K.S. Puttaswamy v. Union of India* (2017) 10 SCC 1.

monetary relief, compensation and custody orders.¹⁶ Nevertheless, it does not deter, because of its civil nature. Under this Act, just as under Section 376B, sexual violence in marriage is recognised as a wrong but does not count as the offence of rape. Besides, the Act is heavily reliant on the implementation of its provisions by protection officers, shelters, legal aid and responsive magistrates, among others.¹⁷ The Protection of Women from Domestic Violence Act, 2005 cannot therefore be accepted as a substitute for substantive criminal recognition of marital rape.

D. Medical Termination of Pregnancy Act and Rules

The Medical Termination of Pregnancy Act, 1971 (MTP Act) and the Medical Termination of Pregnancy Rules, as revamped in 2021, take on particular relevance to the problem of marital rape when viewed through the prism of reproductive rights.¹⁸ The acknowledgement of pregnancy resulting from 'rape', including marital rape, under the Medical Termination of Pregnancy Rules is a significant, albeit limited, statutory acceptance of sexual violence in marriage. The main goal of enacting this Act was to minimise maternal deaths from unsafe abortions and to allow women to abort under a defined set of circumstances. What was first seen as a doctor-centric issue has now undergone a paradigm shift with the Medical Termination of Pregnancy (Amendment) Act, 2021, which extended the permissible gestation period from 20 to 24 weeks for a specified group of women and enhanced the provisions of confidentiality, reflecting a growing understanding of reproductive autonomy as a form of personal freedom under Article 21 of the Constitution of India.¹⁹

As per the Medical Termination of Pregnancy Rules, 2003, as amended in 2021, Rule 3B enumerates the categories of women who qualify for termination of pregnancy up to 24 weeks, and clause (a) of the Rule expressly incorporates the termination of pregnancy of survivors of rape, construed to include marital rape as well. This may be regarded as the earliest statutory acknowledgement of marital rape in Indian law, although it is highly restricted to the abortion scenario alone.²⁰

It is also important to note that international humanitarian law treats forced pregnancy and reproductive coercion as significant breaches of bodily autonomy, which appears to reflect the paradox of a domestic law that recognises the reproductive outcomes of forced sexual activity

¹⁶ Protection of Women from Domestic Violence Act, 2005, s 3.

¹⁷ Indira Jaising, *Domestic Violence and the Law in India*, (2005) 40 ECONOMIC AND POLITICAL WEEKLY 3673.

¹⁸ Medical Termination of Pregnancy Act, 1971; Medical Termination of Pregnancy Rules, 2003.

¹⁹ Medical Termination of Pregnancy (Amendment) Act, 2021.

²⁰ Rebecca J. Cook and Bernard M. Dickens, *Human Rights Dynamics of Abortion Law Reform*, (2003) 25 HUMAN RIGHTS QUARTERLY 1.

but not the sexual violence itself.²¹ Such inclusion is made in light of the fact that sexual violence may take place within a marriage and that this violence may lead to unwanted pregnancies. *X v. Principal Secretary, Health and Family Welfare Department* was the landmark judgment in this regard, in which the Hon'ble Supreme Court of India adopted a purposive interpretation of the Medical Termination of Pregnancy Act and Rules and held that the language of Rule 3B concerning rape encompasses marital rape, and that refusing to provide an abortion to married women would amount to an infringement of the constitutional guarantees of equality and dignity.²² The Court also noted, in express terms, that even a woman's consent to marriage cannot be equated with consent to sexual relations, further supporting the position that consent must be specific, informed and revocable.

Sexual obedience is often seen as a marital duty rather than a consensual act, whereby women who do not yield to a sexual advance in marriage are subjected to domestic violence, abandonment or even social ostracism. This can cause extreme physical and mental effects, such as unwanted pregnancies, repeated childbirth, unsafe abortions, depression and post-traumatic stress disorder. The acknowledgement of marital rape under the Medical Termination of Pregnancy framework is an implicit recognition of these harms, and yet the law addresses only the result of the violence rather than the violence itself.

The co-existence of criminal immunity for marital rape under both the Indian Penal Code and the Bharatiya Nyaya Sanhita, alongside the statutory recognition of marital rape under the Medical Termination of Pregnancy laws, produces an incoherent juristic response. On the one hand, the law allows a pregnancy to be terminated where it results from marital rape; on the other, it fails to acknowledge the act as a crime. This inconsistency compromises constitutional morality and dilutes the transformative potential of reproductive rights jurisprudence.

The Convention on the Elimination of All Forms of Discrimination against Women²³ requires states to end violence against women, including within marriage. Following this approach, a number of jurisdictions, such as the United Kingdom, South Africa and Nepal, among others, have criminalised marital rape, thereby acknowledging consent as central to sexual relationships

²¹ Kirsten Campbell, *The Gender of Transitional Justice: Law, Sexual Violence and the ICTY*, (2002) 1 INTERNATIONAL JOURNAL OF TRANSITIONAL JUSTICE 411.

²² *X v. Principal Secretary, Health and Family Welfare Department*, 2022 SCC OnLine SC 1321.

²³ Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981).

regardless of whether one is married.²⁴ In this regard, India's partial recognition through abortion law places it at variance with its international obligations.²⁵

IV. JUDICIAL DISCOURSE ON MARITAL RAPE

Indian judicial thinking on the subject of marital rape has developed in the light of an increasingly constitutionalised dialogue on sexual autonomy, equality and the meaning of consent within marriage.²⁶ The foundation of this discussion is a traditional statutory immunity, commonly referred to as the marital rape exception, which by legal fiction excludes non-consensual sex between a husband and his adult wife from the definition of rape. Indian courts have slowly amassed a jurisprudential body of law, notwithstanding legislative inaction, in response to the active interaction between the official language of criminal law and a continually shifting constitutional promise. Judicial reasoning increasingly foregrounds bodily integrity and decisional autonomy, indicating that these values cannot simply be suspended because a marriage exists between the parties.²⁷

Exception 2 to Section 375 of the Indian Penal Code long shielded husbands from prosecution for the rape of their wives above a given age, effectively entrenching the concept of presumed consent in marriage. The decision of the Supreme Court in *Independent Thought v. Union of India*²⁸ was significant, although it shifted the focus to the legality of child marriage rather than marital rape as a whole. The Court read the exception so as to bring rape law into conformity with child protection laws and constitutional rights, holding that sexual intercourse with a wife below the age of eighteen years would be considered rape. This decision is important not only for fixing the age threshold; it also clarified that marriage cannot be used as a constitutional defence in cases of sexual violence against minors. Further, the Court treated the marital rape exception not as a technical matter but as a site where competing rights meet, especially the right to dignity, bodily integrity, and protection against harm. In doing so, the case opened the door to the doctrinal question of whether the exception itself remains subject to constitutional examination, demonstrating that it can be subjected to constitutional review rather than being immune from it. Meanwhile, although courts have often turned to constitutional morality and international human rights norms in considering questions of consent and personal autonomy, international humanitarian law has not been actively engaged. This reluctance reflects a wider

²⁴ *R v. R* [1991] UKHL 12.

²⁵ Jennifer Temkin and Barbara Krahé, *SEXUAL ASSAULT AND THE JUSTICE GAP: A QUESTION OF ATTITUDE* (Hart Publishing 2008).

²⁶ Upendra Baxi, *Human Rights in a Posthuman World*, (2006) 7 HUMAN RIGHTS LAW REVIEW 1.

²⁷ Elizabeth S. Anderson, *Is Women's Labor a Commodity?*, (1990) 19 PHILOSOPHY & PUBLIC AFFAIRS 71.

²⁸ *Independent Thought v. Union of India* (2017) 10 SCC 800.

judicial tendency to pick and choose among international frameworks, even where those frameworks provide well-developed norms on sexual violence. This selective engagement may signify a larger judicial reluctance to apply international gender-justice standards to domestic criminal responsibility within marriage.²⁹

A. Labelling the Crime

In 2022, when the Karnataka High Court was considering a case involving charges including rape against a husband, the court made a widely cited observation that marriage cannot ethically justify non-consensual sex. According to the court, a sexual assault on a wife against her will cannot but be described as brutal, and the psychological effects of such violence are obvious. The case gained prominence because it placed marital rape on the same moral plane as non-marital rape and called upon legislators to act.³⁰

B. The Delhi High Court Split Verdict (2022)

In *RIT Foundation v. Union of India*³¹, the Delhi High Court delivered a split decision in what remains the most significant judicial engagement with the marital rape exception. Justice Rajiv Shakdher held the exception to be unconstitutional, while Justice C. Hari Shankar held it to be constitutional. This division is the most important marker in the contemporary Indian judicial debate on marital rape, since it reflects two competing constitutional theories of marriage, consent and the judicial role. The marital rape exception, as argued by Justice Shakdher, denies equal protection and bodily rights to married women. His approach is founded on equality, dignity, and the recognition of real rape within marriage itself. It rests on three main premises: sexual autonomy can never be extinguished by marriage; consent is an ongoing, revocable decision; and a marital union cannot establish a blanket sexual claim. The exemption creates a legal terrain on which a woman is denied safeguards against rape on the basis of marital status, raising questions under Article 14.³² The exception conveys the expressive message that forced sex within marriage is not real rape, thereby negating the normative force of rape law. This line of argument is specifically constitutional, in that it applies directly to the law of rape, rather than approaching the matter through a family law lens that treats marriage as a non-criminal space to be left alone. By contrast, the dissenting opinion of Justice Hari Shankar is grounded in institutional and doctrinal restraint. His argument relies largely on the view that removing the exception would create a new crime, which is the prerogative of the legislature and into which

²⁹ Cook and Dickens, *supra* note 20; Temkin and Krahé, *supra* note 25.

³⁰ *Hrishikesh Sahoo v. State of Karnataka* 2022 LiveLaw (Kar) 89 (Karnataka HC, 23 March 2022).

³¹ *RIT Foundation v. Union of India* 2022 SCC OnLine Del 1404.

³² Kapur and Cossman, *supra* note 3.

the court should not intervene. This dissent anticipates practical and institutional concerns, that is, whether criminalisation would disrupt marital relations, generate possibilities of abuse, or necessitate a complete rearrangement of the legal fields pertaining to evidence, matrimonial disputes and family privacy. Although the divided opinion of the Delhi High Court has left the legal status of the exception unresolved, it has nonetheless influenced subsequent judicial cases, legal commentary and policy discourse, and anticipates that the Supreme Court will one day need to answer whether constitutional equality can co-exist with marital immunity.

C. The Medical Termination of Pregnancy Law: The Reproductive-Rights Path to the Supreme Court

In *X v. Principal Secretary, Health and Family Welfare Department* (2022), the Hon'ble Supreme Court interpreted the Medical Termination of Pregnancy framework to conclude that the term 'rape' should be read to include marital rape for the purposes of the Medical Termination of Pregnancy Act and Rules. Emphasising that it was acting as an interpretive rather than a legislative body, the Court also held that Exception 2 to the rape provision is a legal fiction, which excludes marital rape from rape under the penal law, but that interpreting 'rape' within the Medical Termination of Pregnancy regime to include marital rape does not by itself invalidate the penal exception. Such a ruling brings the marital rape discussion within the ambit of Article 21 reproductive autonomy, further constitutionalising the meaning of consent and harm within marriage. It reflects, first, judicial recognition: the Court understood well that forced sexual conduct in marriage is a reality capable of resulting in forced pregnancy and trauma. Secondly, it reflects a framework of autonomy: the decision reinforced the reproductive autonomy discourse, since refusing an abortion arising from an assault within marriage would compel the woman to continue a pregnancy in conditions of violation.

D. Legislative Continuity and Judicial Dissonance

One of the most telling developments for understanding judicial discourse is the legislature's decision to substantially retain the marital rape exception in the new criminal code. Section 63 of the Bharatiya Nyaya Sanhita, 2023 retains the marital rape exception in a manner that effectively sustains the underlying immunity. As a result, a noticeable disconnect emerges between judicial discourse and statutory design: courts increasingly articulate principles grounded in autonomy and meaningful consent, whereas the legislative framework continues to rest on the assumption of ongoing consent within marriage.

Across these cases and judicial observations, Indian judicial discourse on marital rape can be organised into recurring themes.

Consent as continuous and revocable. The strongest rights-based reasoning treats consent not as a marital incident but as a continuous, context-specific choice. This aligns with privacy and autonomy jurisprudence and directly challenges the logic of the marital exception.³³

Marriage as institution versus marriage as relationship. There exists a split between courts viewing marriage as a special institution demanding legal exceptions, and viewing marriage as a relationship in which constitutional rights remain fully operative.

The expressive function of criminal law. Several judicial positions implicitly recognise that rape law does not only punish conduct but also expresses society's condemnation of sexual violence. When forced sex in marriage is excluded, the law's expressive message becomes unequal, suggesting that harm differs according to marital status.³⁴

V. SOCIO-ECONOMIC REALITIES OF POOR WOMEN AND THE CRIMINAL JUSTICE SYSTEM

Socio-economic deprivation has a tremendous influence on women's capacity to report crimes, to seek remedies, and ultimately on the outcomes of legal processes.³⁵ For poor women, especially in developing states such as India, the criminal justice system often becomes an arena of exclusion, threat and structural violence.³⁶ The marital rape exception under Indian criminal law provides a telling illustration of how legal doctrine can become entangled with existing social hierarchies and material privilege.³⁷ Even though the principle of consent lies at the core of rape jurisprudence, marriage remains an environment in which a woman's consent is often presumed rather than ascertained.³⁸ In this context, consent may be treated as implicit, non-negotiable or legally irrelevant once the marital connection is invoked.³⁹

Financial hardship also makes the meaning of consent within marriage harder to discern. For most poor women, marriage is not a relationship negotiated between partners but rather a system closely tied to their source of livelihood. In such situations, the refusal of sexual intercourse can have far-reaching consequences, such as violence, desertion, or the withdrawal of economic support.⁴⁰ In the crime statistics published by the National Crime Records Bureau, one of the

³³ MacKinnon, *supra* note 3.

³⁴ Anderson, *supra* note 27.

³⁵ Sen, *supra* note 6; Stark, *supra* note 7.

³⁶ Baxi, *supra* note 5; Kapur and Cossman, *supra* note 3.

³⁷ FLAVIA AGNES, *LAW AND GENDER INEQUALITY: THE POLITICS OF WOMEN'S RIGHTS IN INDIA* (Oxford University Press 1999).

³⁸ NIVEDITA MENON, *RECOVERING SUBVERSION: FEMINIST POLITICS BEYOND THE LAW* (Permanent Black 2004).

³⁹ Agnes, *supra* note 37.

⁴⁰ Anita Raj and Jay G. Silverman, *Violence against Women in India: The Role of Gender Inequality*, (2002) 34 INTERNATIONAL JOURNAL OF GYNECOLOGY & OBSTETRICS 221.

most commonly reported offences against women is cruelty by husbands or their relatives, registered under Section 498A of the Indian Penal Code, and now under Section 85 of the Bharatiya Nyaya Sanhita, 2023. However, sexual violence in marriage does not appear as a distinct statistical category, because the law does not acknowledge it as a crime. The absence of statistics does not indicate the absence of harm; rather, it signals the weakness of the legal system itself. This stands in complete contrast to a number of international legal systems, where sexual violence within marriage is not only systematically documented but also prosecuted, indicating that domestic silence is neither inevitable nor value-neutral. The legal premise that marriage entails continuing consent fails to take into account the forms of socio-economic coercion that tend to shape marital relations.⁴¹ By refusing to acknowledge such pressures, the criminal justice system risks normalising, and thereby increasing, women's exposure to sexual harm within marriage.

The data of the National Crime Records Bureau gives an indication of how gendered harm is both documented and obscured by the criminal justice system. Although there are constant reports of extreme domestic brutality and physical assault, marital rape is not listed under any official category. It is this statistical discrepancy that creates a disturbing paradox: the injury can be suffered but not officially acknowledged, because it is neither named nor measured. The failure to criminalise also increases the discretionary power of the police, which is sometimes exercised by devising unofficial settlements that safeguard the continuation of families at the expense of women. Women from poorer backgrounds are especially disadvantaged in this respect, since less or no legal knowledge, a lack of resources, and weaker social networks make them less able to challenge these practices.

The legal system is often beyond the practical reach of poor women because of material insecurity. Instituting an action takes time, mobility, emotional resilience and resources, which are not evenly distributed. Even though legal aid is constitutionally conceived as a safeguard, its provision is often uneven and inaccessible. Women are likely to encounter overstretched advice, insufficient privacy, and little time for consultation. Societal attitudes also make the quest for justice more complex. Women who report sexual abuse within marriage may be accused of impropriety or of weakening the family unit. The fear of abandonment, of losing a place to live, or of being separated from their children may deter formal grievances. Without proper witness protection and rehabilitation, pursuing redress before the court may appear personally dangerous.

⁴¹ Kapur and Cossman, *supra* note 3.

A. Reproductive Coercion and Health Effects

Reproductive coercion is a widely recognised but under-explained aspect of gender-based violence in intimate relationships.⁴² It includes behaviours that compromise a woman's control over her reproductive choices and is more likely to be experienced by economically marginalised women. It is defined as any behaviour that disrupts a woman's autonomy in matters concerning reproduction, such as forced pregnancy, denial of contraception, contraceptive sabotage, coercive control over abortion decisions, and threats or violence linked to reproductive outcomes.⁴³ Poor women often experience reproductive coercion not in isolation but embedded in a chain of marital control, normalised by social norms, economic insecurity and legal invisibility, such that consent to sex and procreation is often assumed to follow from marriage, rendering the autonomy of the female body morally and legally irrelevant.⁴⁴ Economic reliance on husbands or marital families also limits women's ability to negotiate the use of contraceptives or to access reproductive healthcare on their own. Early marriage, low levels of education, and limited access to sexual and reproductive information further reduce women's ability to perceive coercive practices as rights violations.⁴⁵

The criminal justice system, operating on the same patriarchal presumptions, often reinterprets reproductive harm in marriage as a family issue rather than a form of violence to be penalised. Reproductive coercion has far-reaching consequences that go beyond immediate physical damage and should be understood within a wider health perspective.⁴⁶ Forced or poorly timed pregnancies are linked to an increased risk of maternal morbidity and mortality, especially among women already affected by anaemia, poor nutrition, and a lack of access to postnatal care, which remains disproportionately prevalent among economically disadvantaged women in India. Reproductive coercion is also associated with the incidence of unsafe abortion. Women who expect hostility from their spouses or who fear domestic punishment may delay medical treatment or resort to unqualified practitioners, thereby exposing themselves to severe complications.⁴⁷ Although abortion law in India has been gradually expanded to become more accessible, legal reform has not yet been fully translated into reproductive choice.

⁴² Elizabeth Miller and others, *Reproductive Coercion: Connecting the Dots Between Partner Violence and Unintended Pregnancy*, (2010) 81 CONTRACEPTION 457.

⁴³ UNITED NATIONS POPULATION FUND, *State of World Population 2020* (UNFPA 2020).

⁴⁴ Miller and others, *supra* note 42; Stark, *supra* note 7.

⁴⁵ INTERNATIONAL INSTITUTE FOR POPULATION SCIENCES (IIPS) and ICF, *National Family Health Survey (NFHS-5) 2019-21* (2021).

⁴⁶ Michele Decker and others, *Intimate Partner Violence and Reproductive Health*, (2014) 30 JOURNAL OF WOMEN'S HEALTH 123.

⁴⁷ Bela Ganatra and others, *Global, Regional, and Subregional Classification of Abortions*, (2017) 390 THE LANCET 2372.

Women's choices are usually further shaped by social expectations within marriage, as well as by the discretionary practices of healthcare providers.⁴⁸ These constraints have the greatest impact on those with less financial or social support, who find it especially hard to exercise reproductive autonomy. Several mental health outcomes, which society usually overlooks, are also highly debilitating. A 2017 report on intimate partner violence and mental health outcomes found that women who are victims of reproductive coercion report high rates of anxiety, depression, trauma, and a loss of the ability to determine bodily autonomy. This harm is exacerbated by the absence of legal recognition of marital rape and reproductive coercion, which leaves women without avenues of recognition, remedy and psychosocial support. Reproductive coercion should be understood as a form of structural violence, sustained by the silence of the law.

The failure of the criminal justice system to identify coerced reproduction as a rights violation further entrenches the illusion of consent in marriage. This legal invisibility falls disproportionately on poor married women, for whom marriage is in most cases not only a means of survival but also the site where the vulnerable body is perpetually located. Although constitutional jurisprudence increasingly affirms bodily autonomy, dignity and reproductive choice as inseparable parts of individual freedom, these assurances remain largely on paper for poor women, who must struggle to navigate repressive marital and socio-economic conditions.

VI. CONCLUSION

The marital rape exception in Indian criminal law is not a doctrinal aberration but a structural mechanism through which the law has sought to preserve an ancient marital hierarchy, the gendered control of women's bodies, and economic dependence. Placing marital rape within the socio-economic context of poor women shows that the presumption of irrevocable consent operates against them as an exclusionary mechanism, systematically disenfranchising bodily autonomy for those least prepared to counteract it. The continuation of the marital rape exception can be read as a deeper reluctance of the criminal justice system to intervene in the relationships of power that operate within the family. The courts have repeatedly stressed that consent must be specific, that it must be revocable, and that it is strongly connected with the safeguarding of dignity and personal freedom. Judicial reasoning has also helped to clarify that marriage cannot in itself invalidate an individual's decisional autonomy. Even with these developments, the immunity of husbands persists, revealing a striking contradiction in the

⁴⁸ Shireen Jejeebhoy and Rebecca J. Cook, *State Accountability for Women's Health*, (1997) 19 STUDIES IN FAMILY PLANNING 203.

development of the legal order. The result is a system in which marital status appears to determine whether sexual violence is recognised at all.

For a large proportion of poor women, marriage is not a partnership based on choice but a framework tied to subsistence. In this context, sexual acquiescence may be obtained through financial reliance, social pressure, or fear of poverty. Criminal law remedies, which usually assume independence, mobility, and access to institutions, may therefore be largely inaccessible. Rather than being seen as a source of protection worth its weight, the legal system may be perceived as carrying its own set of risks, such as social exposure, economic insecurity, and even the destabilisation of already precarious livelihoods.

A review of reproductive coercion and its health outcomes also demonstrates the shortcomings of a legal response that focuses on the outcome rather than the conduct itself. Reproductive rights jurisprudence has recognised the harms of a forced pregnancy, but the unwillingness to criminalise the violence that precedes it creates an unequal hierarchy of injury, in which bodily harm is addressed only once autonomy has already been violated.

These issues point to a more comprehensive understanding of legal empowerment, one that considers the subject not in terms of the formal statement of rights but in terms of the conditions under which they can be exercised. Although eliminating the marital rape exception would be a significant step, a reform limited to statutory modification is unlikely to be adequate. Complementary structural interventions are needed to make any meaningful progress, such as the provision of adequately funded legal aid; the right to secure housing and income support; decentralised healthcare; community-based legal awareness programmes; and institutional protection capable of reducing the risk of retaliation.

From a global perspective, the fact that marital rape remains unpunished raises questions about the integrity of India's commitments under the international human rights frameworks that urge states to combat violence against women in all contexts, including marriage. The lack of criminal recognition makes the goals of substantive equality hard to achieve and undermines bodily security. Strengthening domestic criminal law so as to be more consistent with these assurances is not only a matter of international obligation but also a form of constitutional fidelity to dignity and equal protection.

Marital rape in India cannot be resolved simply by making minor adjustments to doctrine. It demands a re-evaluation of the understanding of consent, marriage and criminal responsibility in the light of the material realities that poor women face. A long-term response would bring together criminal law reform, reproductive justice, and legal empowerment strategies. The

criminal justice system can evolve to protect women's autonomy as a significant constitutional principle only by addressing both the legal exemption and the socio-economic systems that sustain it.
