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Marital Rape and Criminal Law Reform in India: A Constitutional Perspective

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ABSTRACT

Marriage has traditionally been regarded in India as a sacred institution founded on trust, respect and companionship. The assumption that marriage imports an irrevocable consent to sexual intercourse has nonetheless been a long-standing feature of Indian criminal law. Although the law of sexual offences has undergone extensive reform, the marital rape exception still excludes non-consensual sexual intercourse by a husband with his adult wife from the definition of rape. This position raises pressing constitutional and human rights questions concerning the bodily integrity, dignity, equality and personal liberty of women, and its continuance is difficult to reconcile with Articles 14, 15 and 21 of the Constitution of India. This paper critically analyses the constitutionality of the marital rape exception in the light of judicial developments, constitutional principle and international human rights standards. It examines the evolution of the law of rape in India, the significance of the Bharatiya Nyaya Sanhita, 2023, and the exclusion of non-consensual sexual acts within marriage from criminal liability. The paper discusses the leading decisions, including Independent Thought v. Union of India, Justice K.S. Puttaswamy (Retd.) v. Union of India, Joseph Shine v. Union of India and RIT Foundation v. Union of India. A comparison with the approaches taken in the United Kingdom, Canada, South Africa and Australia highlights reforms of possible relevance to India. The paper concludes that the marital rape exception, as retained, is inconsistent with the constitutional principles of equality, dignity and bodily autonomy, and argues for reform of the criminal law accompanied by proper procedural safeguards, so that marriage is not treated as a defence to sexual violence. Reform of this kind would strengthen constitutional guarantees and advance gender justice in India.

Keywords: *marital rape, criminal law reform, Constitution of India, bodily autonomy, women's rights, Bharatiya Nyaya Sanhita, gender justice*

I. INTRODUCTION

Marriage is conventionally regarded as a sacred institution founded on trust, respect and shared companionship. It cannot, however, be assumed that marriage carries with it a permanent or

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unconditional consent to sexual intercourse. In contemporary constitutional democracies, consent is acknowledged as the core of any sexual relationship, irrespective of the marital status of the parties. In India, although criminal law has undergone extensive reform, non-consensual sexual intercourse by a husband with his adult wife remains outside the offence of rape. This exemption has generated considerable controversy over whether it can be reconciled with the constitutional values of equality, dignity, privacy and bodily autonomy.¹

The marital rape exception originated in English common law, under which marriage was deemed to import an irrevocable consent on the part of the wife. Although the doctrine has since been abolished in many countries by legislative or judicial action, it continues to be reflected in Indian criminal law. The exception has been preserved in Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita, 2023, and has revived the debate on the need for criminal law reform and gender justice.²

Over the past few years, the Supreme Court of India has broadened the content of fundamental rights, holding that privacy, dignity and personal autonomy are essential elements of the right to life under Article 21 of the Constitution. It has increasingly been argued that a married woman ought to enjoy the same protection of the law against sexual violence as an unmarried woman. The continued omission of marital rape from the definition of rape therefore raises significant constitutional questions of equality before the law, non-discrimination and bodily integrity.³

This article critically examines the constitutionality of the marital rape exception in India. It analyses the existing legal framework, the significant judicial trends, comparative practice in other jurisdictions, and the case for legislative change. The paper contends that the recognition of consent within marriage is vital to safeguarding the basic rights of women, and that criminal law must be framed so as to reflect the constitutional principles of equality, dignity and justice.⁴

II. CONCEPT OF MARITAL RAPE

Marital rape may be described as sexual intercourse, or any other sexual act, performed by a husband upon his wife without her free and voluntary consent. It is a form of sexual violence that infringes a woman's bodily autonomy and dignity and her right to take decisions about her

¹ INDIA CONST. arts. 14, 21; *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 S.C.C. 1.

² Bharatiya Nyaya Sanhita, No. 45 of 2023, § 63, Exception 2 (India).

³ INDIA CONST. arts. 14, 15 & 21; *Joseph Shine v. Union of India*, (2019) 3 S.C.C. 39; *Independent Thought v. Union of India*, (2017) 10 S.C.C. 800.

⁴ *RIT Found. v. Union of India*, 2022 SCC OnLine Del 1404; Convention on the Elimination of All Forms of Discrimination against Women art. 2, Dec. 18, 1979, 1249 U.N.T.S. 13.

own body. The gravamen of the offence is the absence of consent, irrespective of whether the parties are in a marital relationship.⁵

Historically, marriage was understood to imply a perpetual agreement to sexual intercourse, on the assumption that a wife had no right to refuse her husband. That understanding has since been abandoned in most jurisdictions, and courts and legislatures now accept that marriage does not extinguish an individual's right to refuse sexual intercourse. Consent must be free, informed and voluntary at all times, and a spouse must be able to withdraw it at any point.⁶

In India, however, the law continues to exempt non-consensual sexual intercourse by a husband with his adult wife from the offence of rape. Consequently, a married woman subjected to forced sexual intercourse by her husband has few remedies under criminal law. It is strongly argued, as a matter of constitutional and legal principle, that this exception is inconsistent with the values of equality, dignity, privacy and bodily autonomy guaranteed by the Constitution.⁷

Marital rape is not merely a question of criminal liability; it is also a question of human rights and gender justice. It calls for a reflection on the balance between the sanctity of marriage and individual rights, so as to ensure that marriage is not invoked to justify sexual violence.⁸

III. LEGAL FRAMEWORK GOVERNING MARITAL RAPE IN INDIA

The legal framework relating to marital rape in India has been the subject of intense discussion. Although rape has long been recognised as a grave offence in Indian criminal law, non-consensual sexual intercourse between a husband and his adult wife has not been treated as rape. That position has been carried forward into the Bharatiya Nyaya Sanhita, 2023, notwithstanding sustained debate on criminal justice and the rights of women.⁹

Under the Indian Penal Code, 1860, which was repealed with effect from 1 July 2024, Exception 2 to Section 375 provided that sexual intercourse by a man with his own wife, the wife not being below the prescribed age, did not amount to rape. The Criminal Law (Amendment) Act, 2013, widened the definition of rape and enhanced the punishment for sexual offences, but did not remove the marital rape exemption. The exemption has now been re-enacted as Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita, 2023, which provides that sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not

⁵ WORLD HEALTH ORG., *Understanding and Addressing Violence Against Women: Sexual Violence* 2–4 (2012).

⁶ MATTHEW HALE, *HISTORIA PLACITORUM CORONÆ: THE HISTORY OF THE PLEAS OF THE CROWN* 629 (Sollom Emlyn ed., 1736); *R v. R*, [1992] 1 A.C. 599 (H.L.) (U.K.).

⁷ Bharatiya Nyaya Sanhita, No. 45 of 2023, § 63, Exception 2 (India); INDIA CONST. arts. 14, 21.

⁸ Convention on the Elimination of All Forms of Discrimination against Women art. 2, Dec. 18, 1979, 1249 U.N.T.S. 13; JUSTICE J.S. VERMA COMM., *Report of the Committee on Amendments to Criminal Law* 72–74 (2013).

⁹ Bharatiya Nyaya Sanhita, No. 45 of 2023 (India).

rape. The legal distinction between a married and an unmarried woman in cases of sexual violence is thus maintained.¹⁰

Indian law does, however, offer certain remedies to married women who suffer sexual abuse. The Protection of Women from Domestic Violence Act, 2005 recognises sexual abuse as a form of domestic violence and permits an aggrieved woman to seek protection orders, residence rights, monetary relief and compensation. Similarly, a wife may seek divorce or judicial separation on the ground of cruelty under the personal laws, forced sexual intercourse being capable of amounting to physical or mental cruelty.¹¹

The existing framework has been criticised for failing to protect married women against sexual violence on an equal footing. Critics contend that the marital rape exception undermines the constitutional principles of equality, dignity and bodily autonomy by treating consent within marriage differently. Calls for legislative change have accordingly grown, so that the law may protect all women equally, whatever their marital status.¹²

IV. CONSTITUTIONAL PERSPECTIVE ON MARITAL RAPE

The marital rape exception must be tested against the fundamental rights guaranteed by the Constitution of India. The Constitution secures equality before the law, prohibits discrimination on the ground of sex, and protects the right to life and personal liberty. These rights extend to married and unmarried women alike, and it is therefore necessary to consider whether the marital rape exception can stand consistently with them.¹³

The right to equality under Article 14 requires that every person enjoy the equal protection of the laws. By affording a married woman a lesser measure of legal protection against rape than an unmarried woman, the marital rape exception draws a distinction resting on the bare fact of marriage. That differential treatment has been criticised as arbitrary and out of harmony with the principle of equality.¹⁴

Article 15 forbids discrimination on the ground of sex and enables the State to make special provision for women. The rape laws have nevertheless continued to exclude married women, which is said to reinforce gender stereotypes and perpetuate discrimination. Critics argue that

¹⁰ Indian Penal Code, No. 45 of 1860, § 375, Exception 2 (India) (repealed 2023, w.e.f. 1 July 2024); Criminal Law (Amendment) Act, No. 13 of 2013 (India); Bharatiya Nyaya Sanhita, No. 45 of 2023, § 63, Exception 2 (India).

¹¹ Protection of Women from Domestic Violence Act, No. 43 of 2005, §§ 3, 18–22 (India); Hindu Marriage Act, No. 25 of 1955, § 13(1)(ia) (India).

¹² INDIA CONST. arts. 14, 15 & 21; JUSTICE J.S. VERMA COMM., *Report of the Committee on Amendments to Criminal Law* 72–74 (2013).

¹³ INDIA CONST. arts. 14, 15 & 21.

¹⁴ *State of W.B. v. Anwar Ali Sarkar*, A.I.R. 1952 S.C. 75.

the law ought to protect all women against sexual assault, irrespective of whether they are married.¹⁵

The Supreme Court has interpreted the right to life and personal liberty under Article 21 to encompass dignity, privacy, bodily integrity and personal autonomy. These rights proceed from the premise that every person has sovereignty over his or her own body and the right to take decisions about sexual relations. Non-consensual sexual intercourse within marriage therefore raises a serious question of the violation of a woman's dignity and of her right to regard her body as her own.¹⁶

In recent years these constitutional values have been affirmed on the footing that marriage in no way diminishes the fundamental rights of an individual. The recognition of the constitutional rights to privacy, autonomy and dignity has sharpened the debate on the legitimacy of the marital rape exception. Several legal scholars and women's rights advocates accordingly argue for criminal law reform, so that constitutional protection may be extended to all women irrespective of marital status.¹⁷

V. JUDICIAL APPROACH TOWARDS MARITAL RAPE

The Indian courts have played a significant role in expanding the constitutional rights to dignity, privacy and bodily autonomy. Although the Supreme Court has not held the marital rape exception unconstitutional, a number of decisions have strengthened the legal foundation for recognising a married woman's right to bodily integrity and consent.¹⁸

In *Independent Thought v. Union of India* (2017), the Supreme Court held that sexual intercourse with a wife below the age of eighteen amounts to rape, and thus read down the marital rape exception, which until then had applied to wives aged fifteen and above. The Court observed that marriage furnishes no reason to subject a child to sexual violence, and emphasised the need to safeguard the rights of girls.¹⁹

In *Justice K.S. Puttaswamy (Retd.) v. Union of India* (2017), the Supreme Court recognised the right to privacy as a fundamental right under Article 21 of the Constitution. The decision confirmed that privacy encompasses bodily autonomy, dignity and freedom of personal choice.

¹⁵ INDIA CONST. art. 15; *Anuj Garg v. Hotel Ass'n of India*, (2008) 3 S.C.C. 1.

¹⁶ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 S.C.C. 1; *Suchita Srivastava v. Chandigarh Admin.*, (2009) 9 S.C.C. 1.

¹⁷ *Joseph Shine v. Union of India*, (2019) 3 S.C.C. 39; *RIT Found. v. Union of India*, 2022 SCC OnLine Del 1404.

¹⁸ INDIA CONST. art. 21.

¹⁹ *Independent Thought v. Union of India*, (2017) 10 S.C.C. 800.

These principles have strengthened the argument that a married woman must be able to refuse sexual intercourse to which she does not consent.²⁰

In *Joseph Shine v. Union of India* (2018), although the case concerned the offence of adultery, which the Supreme Court struck down, the Court held that marriage does not deprive a woman of her individuality or of her constitutional rights. The Court emphasised that women are equal partners in matrimony and are not the property of their husbands.²¹

A significant development came in *RIT Foundation v. Union of India* (2022), decided by the Delhi High Court. The Court delivered a split verdict on the constitutionality of the marital rape exception. Shikdher J held that the exception infringed the constitutional rights of married women, while Shankar J took the view that any change in the law was for Parliament to make. The Karnataka High Court in *Hrishikesh Sahoo v. State of Karnataka* (2022) took a different course and declined to quash a rape charge framed against a husband. The resulting appeals and connected petitions remain pending before the Supreme Court, and no decision had been rendered as at July 2026.²²

These decisions evidence a growing appreciation of the constitutional rights of women, and have given fresh impetus to the argument for reform of Indian criminal law. Although the marital rape exception remains on the statute book, it has been suggested that judicial thinking is moving gradually towards recognising consent, dignity and bodily autonomy within marriage.²³

VI. COMPARATIVE PERSPECTIVE

The legal status of marital rape has undergone substantial change across jurisdictions. Many countries no longer retain a marital rape exception, having accepted that marriage does not import a perpetual or inalienable consent to sexual intercourse. These reforms rest on the principles of equality, bodily autonomy and human dignity.²⁴

In *R v. R* (1991), the House of Lords abolished the marital rape exemption, so that in the United Kingdom a husband may be criminally liable for raping his wife. The House held that the

²⁰ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 S.C.C. 1.

²¹ *Joseph Shine v. Union of India*, (2019) 3 S.C.C. 39.

²² *RIT Found. v. Union of India*, 2022 SCC OnLine Del 1404 (split verdict, Shikdher & C. Hari Shankar, JJ.); *Hrishikesh Sahoo v. State of Karnataka* (Kar. H.C. 2022), stayed and pending before the Supreme Court on special leave (interim order of July 19, 2022).

²³ *Independent Thought v. Union of India*, (2017) 10 S.C.C. 800; *Joseph Shine v. Union of India*, (2019) 3 S.C.C. 39.

²⁴ Convention on the Elimination of All Forms of Discrimination against Women art. 2, Dec. 18, 1979, 1249 U.N.T.S. 13.

common law doctrine of implied consent arising from marriage was obsolete and could not be accommodated within contemporary legal principle.²⁵

In Canada, Parliament removed the marital rape exemption in 1983. Sexual offences committed within marriage are treated by Canadian criminal law in the same manner as those committed outside it, and consent remains fundamental to the determination of criminal liability.²⁶

Statutory reform and judicial decisions have likewise criminalised marital rape in South Africa and Australia. These jurisdictions recognise that every person has a right to bodily integrity and that marriage is no defence to a charge of sexual violence.²⁷

India, by contrast, retains the marital rape exception in its criminal law. Although married women may obtain relief under civil legislation such as the Protection of Women from Domestic Violence Act, 2005, they are denied the protection that the law of rape affords. Legal scholars, human rights organisations and women's rights advocates have criticised this distinction as difficult to reconcile with constitutional values and with international human rights law.²⁸

A comparative survey shows that many democratic States have reformed their criminal law so as to extend equal protection to all women, whether married or not. These reforms offer instructive guidance for India in reconsidering its legal position and in adopting changes that advance the ideals of equality, dignity and justice.²⁹

VII. CHALLENGES IN CRIMINALISING MARITAL RAPE

The criminalisation of marital rape is among the most contested questions in criminal law reform in India. While many regard criminalisation as an essential measure for safeguarding the rights of women, others raise concerns about its practical application and the possibility of misuse. It is largely these concerns that have sustained the marital rape exception.

One of the principal objections is that criminalising marital rape would affect the institution of marriage and lead to a rise in matrimonial conflict. Opponents contend that imposing criminal liability within marriage would result in abuse of the law and in false accusations. The same argument, however, has been advanced in relation to other offences, and the possibility of misuse cannot by itself be a sufficient reason to withhold legal protection from genuine victims.

²⁵ *R v. R*, [1992] 1 A.C. 599 (H.L.) (U.K.).

²⁶ Criminal Code, R.S.C. 1985, c. C-46, § 278 (Can.).

²⁷ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (S. Afr.); Crimes Act 1958 (Vic) (Austl.).

²⁸ Protection of Women from Domestic Violence Act, No. 43 of 2005, § 3 (India); INDIA CONST. arts. 14 & 21.

²⁹ *R v. R*, [1992] 1 A.C. 599 (H.L.) (U.K.); Criminal Code, R.S.C. 1985, c. C-46, § 278 (Can.).

A second difficulty lies in proving the absence of consent within a matrimonial relationship. Evidence may be hard to gather, since most such incidents occur in private. Yet the law relating to other sexual offences also rests on medical evidence, testimony and surrounding circumstances in order to establish guilt. Evidentiary difficulty should not therefore operate as a bar to the recognition of the offence.³⁰

Social and cultural attitudes present a further challenge. In many parts of India, prevailing attitudes are said to treat marriage as conferring on the husband an unqualified entitlement to sexual relations with his wife. Such attitudes are widely regarded as deterring women from reporting sexual violence, and many are unable to seek legal redress on account of social stigma, family pressure and economic dependence.³¹

A further difficulty is the absence of a comprehensive legislative framework addressing marital rape specifically. Although statutes such as the Protection of Women from Domestic Violence Act, 2005 provide civil remedies, they do not criminalise non-consensual sexual intercourse within marriage. This leaves a gap in the legal protection available to married women.³²

Resolving these difficulties calls for a balanced approach that has regard both to the rights of victims and to the rights of the accused to a fair investigation and trial. Misuse can be guarded against, without undermining the constitutional rights of married women, through appropriate procedural safeguards, awareness programmes and sound implementation mechanisms. Reform along these lines would advance gender justice and ensure that marriage is not treated as a defence to sexual violence.³³

VIII. RECOMMENDATIONS

The growing recognition of women's rights and constitutional values underlines the need to reform the Indian legal framework governing marital rape. Any measure adopted must balance the protection of victims of sexual violence against fairness in the criminal justice process.

First, the marital rape exception in the Bharatiya Nyaya Sanhita, 2023 should be reconsidered so that married and unmarried women enjoy equal protection under the criminal law. The law must acknowledge that consent is required in all sexual relations, irrespective of marital status.

³⁰ Indian Evidence Act, No. 1 of 1872 (India) (repealed); Bharatiya Sakshya Adhiniyam, No. 47 of 2023 (India).

³¹ Convention on the Elimination of All Forms of Discrimination against Women art. 5, Dec. 18, 1979, 1249 U.N.T.S. 13.

³² Protection of Women from Domestic Violence Act, No. 43 of 2005, §§ 3, 18–22 (India).

³³ INDIA CONST. arts. 14, 15 & 21; JUSTICE J.S. VERMA COMM., *Report of the Committee on Amendments to Criminal Law* 72–75 (2013).

Secondly, express procedural safeguards should be introduced to ensure a fair investigation and to prevent abuse of the law. Clear guidelines for the registration, investigation and prosecution of cases would protect the rights of the complainant and of the accused without compromising the integrity of the criminal justice system.

Thirdly, awareness campaigns should be undertaken to educate society on the importance of consent, gender equality and respect within marital life. A shift in social attitudes will be necessary to reduce stigma and to encourage victims to seek legal assistance.

Fourthly, police officers, prosecutors, medical practitioners and court personnel should receive specialised training in handling cases of sexual violence within marriage sensitively and objectively. Such training would improve the quality of investigations and support a victim-centred delivery of justice.

Lastly, the Government may focus on strengthening support systems for survivors by providing legal aid, counselling, medical care and rehabilitation services. A well-developed support system would help victims to obtain justice notwithstanding fear and social pressure.

These measures would bring Indian criminal law into closer alignment with the constitutional standards of equality, dignity and personal liberty, and would place the institution of marriage on a footing of mutual respect and free choice rather than legal immunity.

IX. CONCLUSION

Marital rape presents one of the more difficult problems in the Indian criminal justice system. Although the law has been amended to accommodate the requirement of consent and to protect women better against sexual violence, the survival of the marital rape exception maintains a distinction between married and unmarried women. That distinction raises significant constitutional questions of equality, dignity, privacy and bodily autonomy.

Recent judicial pronouncements have reiterated that marriage does not diminish the fundamental rights of an individual. The constitutional values reflected in Articles 14, 15 and 21 emphasise that every person is entitled to equality, personal liberty and control over his or her own body. The same rights must be secured to married women, and marriage ought not to be treated as a legal defence to sexual violence.

A survey of comparable jurisdictions shows that most democratic States have abolished the marital rape exception and have recognised that consent remains necessary within marriage. These reforms reflect a wider acceptance of gender equality and human rights as central to

modern criminal law. They may guide India in framing reforms suited to its own constitutional and social setting.

While concerns about misuse and about the effect of criminalisation on the institution of marriage are serious, they ought not to displace the interest of women in being protected against sexual violence. Such concerns can be properly addressed through appropriate procedural safeguards and sound investigative mechanisms that do not deny justice to genuine victims.

In sum, the development of criminal law should keep pace with constitutional values and with changing social conditions. Recognising marital rape as an offence would not weaken the institution of marriage; it would reinforce the values of respect, consent, dignity and equality on which a healthy marital relationship rests. Legislative change to this end would go a long way towards achieving meaningful gender justice and towards strengthening the fundamental rights of women in India.
