THE MARITAL RAPE EXCEPTION IN INDIA: A CONSTITUTIONAL AND CRIMINAL LAW ANALYSIS

Anirudh Singh Chauhan, B.A.LL.B. (Hons.),
Himachal Pradesh National Law University, Shimla

ABSTRACT

Sexual abuse, whether occurring within or outside marriage, has been widely recognised as a serious violation of women's dignity and bodily autonomy. In legal terms, rape refers to non-consensual sexual intercourse or sexual activity carried out against the will or without valid consent, and is recognised as one of the gravest forms of gender-based violence. The repercussions of such crimes usually come in various forms, such as physical harm, psychological suffering and social alienation. The dignity of a woman in most societies is still related directly to the concept of family honour, and this fact does not help in encouraging women to report sexual offences; thus, it is one of the reasons why a culture of silence regarding sexual crime remains perpetuated. Among sexual offences, marital rape remains one of the least reported and most legally complex forms of sexual violence. Historically, the spousal exception has been an acknowledged exception under rape law in various jurisdictions, such as India, which is mainly based on traditional assumptions of irrevocable consent in marriage. This paper discusses the constitutional, legislative and social consequences of the marital rape exception and the ways it is inconsistent with the modern values of equality, dignity and individual autonomy. The paper further analyses global legal developments relating to the criminalisation of marital rape and proposes a rights-based framework aimed at balancing institutional concerns of marriage with the protection of individual constitutional rights.

Keywords: Marital Rape, Consent, Constitutional Law, Article 14, Bodily Autonomy.

I. Introduction

Marriage has always been considered a socially accepted institution that governs intimacy and sexuality between spouses. Conventionally, marriage has been regarded as a personal matter by the law, which has mostly been shielded against direct criminal investigation, especially in issues related to sexual relations in marriage[1]. This has, however, been questioned by evolving constitutional values and prevailing social realities, particularly in areas where questions of consent, bodily autonomy and individual dignity are involved in marital relationships. In contemporary legal discourse, the extent to which marriage can justify immunity from criminal liability for non-consensual sexual acts has become a subject of growing debate.

Marital rape (and other terms such as non-consensual sexual intercourse or sexual activity) is the act of one spouse sexually interacting with another against his/her will or without his/her proper consent[2]. It is a complicated and delicate form of sexual violence. Marital rape is a serious crime; yet its reporting and legal recognition remain far less than that of sexual offences that may take place in the public space. This is largely due to its non-public nature, socio-cultural views about marital duties, as well as the fact that the dignity of women and the honour of the family is still linked to the female gender and are therefore the main cause of underreporting such crimes to a large magnitude[3].

In India, rape is established as a criminal offence, but rape still has a spousal exception retained in the law on abuse of criminal law on rape[4]. This exception has brought about a lot of constitutional and legal controversy, especially given the development of the understanding of basic rights including equality, dignity, privacy and personal autonomy[5]. This further survival of the marital rape exception poses significant challenges to the issue of institutional protection of marriage and the protection of individual constitutional rights, and thus justifies a greater constitutional and statutory scrutiny.

II. EVOLUTION OF RAPE LAW AND MARITAL EXCEPTION IN INDIA

The marital rape exception of the Indian criminal law dates back to the seventeenth-century

[1]Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* (1736); 1 William Blackstone, *Commentaries on the Laws of England* (1765).
[2] Indian Penal Code, No. 45 of 1860, § 375, INDIA CODE (1860).
[3] Prahlad Rathore, *Marital Rape: The Unheard Agony of Sexual Violence Against Married Woman in India*, 4 Indian J.L. & Legal Rsch. 6, 6–7 (2022).
[4] Bharatiya Nyaya Sanhita, No. 45 of 2023, § 63, exception 2, INDIA CODE (2023).
[5] INDIA CONST. arts. 14, 15, 21; *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 S.C.C. 1 (India).

English common law. Historically, a husband could not be held guilty of raping his wife on the basis of the doctrine expressed by Sir Matthew Hale in History of the Pleas of the Crown, who asserted that matrimonial consent was a presumed irrevocable consent to sexual intercourse as long as marriage existed. The principle was strengthened by the theory of unity of person used by William Blackstone[6] that conceptualised marriage as a legal union where the legal identity of the wife was subjected to that of the husband. These teachings were indicative of an extreme patriarchal interpretation of marriage, where the husband commanded legal authority and the independence of the wife was restricted in the law. The implication of taking marital relations to be beyond the jurisdiction of criminal regulation was to protect husbands in case of non-consensual sexual intercourse and influenced later colonial statutory regimes, such as the Indian Penal Code, 1860[7].

In the IPC, rape was defined under Section 375[8], including the lack of consent, coercion, misrepresentation, incapacity, or minority. This was also subject to interpretative and legislative refinement over the years, but one provision in it remained unaffected by that refinement; the provision continued to exclude sexual intercourse by a man with his own wife from the definition of rape, despite the age of the wife. This exception reflected the historical assumption that marriage constituted continuing and irrevocable consent to sexual intercourse[9]. The statutory order thus upheld a distinction between married and unmarried women, making an implicit preference for marriage status over individual sexual autonomy. This sort of distinction reflected patriarchal presumptions of the legal order of the nineteenth century, in which conjugal rights were put above the independent bodily integrity of a wife.

The amendment to the Criminal Law (Amendment) Act, 2013[10] brought a drastic change in rape law jurisprudence in India. The amendment was enacted following pressure to reform rape laws by expanding the definition of rape to include various forms of sexual penetration, the definition of consent, and protection to survivors. The legislative focus was on recognition of bodily autonomy and voluntary agreement as the main principles of sexual relations. In spite of these reforms, the marital rape exception was retained. Though there have been judicial developments, such as the reading down of the age threshold in *Independent thought v.Union*

[6] Blackstone, *supra* note 1.
[7] Indian Penal Code, No. 45 of 1860, INDIA CODE (1860).
[8] *Id.* § 375.
[9] Salesh & C.P. Sheoran, *An Analysis of Marital Rape Under the Bharatiya Nyaya Sanhita: Legal, Social, and Cultural Implications*, 7 Int'l J. Legal Sci. & Innovation 382 (2025).
[10] Criminal Law (Amendment) Act, No. 13 of 2013, INDIA CODE (2013).

of India[11]Some of the discrepancies were resolved, the core immunity granted to husbands under the exception remained substantially intact, thus perpetuating unequal treatment in the context of marriage.

Following the reorganisation of criminal law in 2023, the Bharatiya Nyaya Sanhita (BNS)[12] Substituted the IPC. In Section 63[13]The definition of rape was restated, building on the framework that was introduced in 2013 and reiterating the centrality of voluntary consent. The provision lists various types of penetration and situations that nullify consent, and it indicates clearly that the lack of physical resistance does not mean consent. Exception 2 of Section 63[14] However, does not remove the marital rape exemption, as sexual intercourse or sexual acts by a man with his own wife, provided the wife is not under eighteen years of age, shall not constitute rape. So, even with the structural reform and linguistic modernisation, the substantive position relating to spousal immunity does not change significantly.

The fact that the historical continuum between the doctrines of common law and the modern statutory system shows that the conceptualisation of consent has changed, but the law of marriage under the rape concept still reflects inherited beliefs regarding the conjugal powers and gender subordination.

III. CONSTITUTIONAL CHALLENGES TO THE MARITAL RAPE EXCEPTION

A. The Marital Rape Exception and the Right to Equality under Article 14

The exemption of marital rape creates a statutory difference between married and unmarried females in the criminal protection against sexual violence. The rape law is supposed to safeguard bodily integrity and personal dignity; however, the exception deprives married women of criminal relief, solely on the basis of marital status. Such categorisation in effect disenfranchises a victim group within the criminal justice system[15].

Under Article 14 of the Constitution[16] According to the twin tests of intelligible differentia and

[11] *Independent Thought v. Union of India*, (2017) 10 S.C.C. 800 (India).
[12] Bharatiya Nyaya Sanhita, No. 45 of 2023, INDIA CODE (2023).
[13] *Id.* § 63.
[14] *Id.* § 63, exception 2.
[15] Avika Vats & Paras Yadav, *The Persistence of Patriarchy: A Critical Analysis of the Marital Rape Exception in Section 63 of the BNS*, 7 Indian J.L. & Legal Rsch. 6004, 6004–05 (2025).
[16] INDIA CONST. art. 14.

rational nexus set out in *State of West Bengal v Anwar Ali Sarkar*[17], a legislative classification must meet these two criteria. The distinction made by the marital rape exception is based solely on marital status and not on a factor that pertains to the nature of the harm or presence of consent. Marriage does not reduce the intensity of physical or psychological damage caused by non-consensual sexual intercourse, nor does it deny violation of body integrity.

Also, the Supreme Court in *E.P. Royappa v State of Tamil Nadu*[18] clarified that arbitrariness was the opposite of equality by expanding Article 14 beyond formal classification towards substantive fairness. Similarly, in *Maneka Gandhi v Union of India*[19] court held that state action should not be arbitrary, unreasonable or unfair. Considering these values, a statutory rule immunising non-consensual sexual intercourse in marriage does not have a reasonable nexus with the rape law or with protecting personal autonomy, personal dignity, and physical safety. The need to protect marital privacy or safeguard the institution of marriage cannot constitute a constitutionally valid justification for denying married women the protection of criminal law. This kind of differentiation is historically patriarchal in nature regarding conjugal relations and does not conform to the constitutional requirement of equality.

B. The Marital Rape Exception and Non-Discrimination under Article 15

Article 15[20] prohibits discrimination on the ground of sex, but the State is allowed to make special provisions to promote the development of women. Despite the relationship-based conceptualisation of the marital rape exception, it disproportionately affects married women by denying them protection against sexual violence within marriage. The exception is therefore indirect sex-based discrimination by reinforcing structural inequalities rooted in gendered marital roles[21].

Article 15(3)[22] does not forbid protective laws geared towards ameliorating historical disadvantage, but it does not authorise laws that make women more susceptible to harm. In *C.B. Muthamma v Union of India*[23], the Supreme Court invalidated the service regulations that discriminated against married women on the ground that marital status should not be used as a

[17] *State of West Bengal v. Anwar Ali Sarkar*, A.I.R. 1952 S.C. 75 (India).
[18] *E.P. Royappa v. State of Tamil Nadu*, (1974) 4 S.C.C. 3 (India).
[19] *Maneka Gandhi v. Union of India*, (1978) 1 S.C.C. 248 (India).
[20] INDIA CONST. art. 15.
[21] Vats & Yadav, *supra* note 16, at 6006–07.
[22] INDIA CONST. art. 15, cl. 3.
[23] *C.B. Muthamma v. Union of India*, (1979) 4 S.C.C. 260 (India).

justification for hiring them unequally. This reasoning supports the view that legal provisions based on marital status must be tested against constitutional guarantees, particularly where they interfere with fundamental rights.

Similarly, in *Vishaka v. State of Rajasthan*[24]The Court recognised gender based violence as a contravention of Articles 14, 15 and 21, and held that the State was obligated to ensure that women are not subjected to practices that demean them. The marital rape exception, in this case, is used to deprive married women of any substantial legal protection against sexual violence and thus invalidate decisional autonomy in intimate relationships. This statutory exclusion reinforces systemic inequalities within marriage, which cannot be reconciled with the constitutional guarantee against sex-based discrimination.

C. The Marital Rape Exception and Bodily Autonomy under Article 21

Article 21[25] affirms the right to life and personal liberty that has been judicially construed to include privacy, bodily integrity and decisional autonomy. The Supreme Court acknowledged privacy as a basic right in *Justice K.S. Puttaswamy (Retd.) v. Union of India*[26] and associated it with personal autonomy and bodily integrity. Similarly, in *Suchita Srivastava v. Chandigarh Administration*[27] Court held that reproductive and sexual autonomy form an integral part of the right to life and personal liberty.

The marital rape exception contravenes these assurances because it assumes a perpetual acceptance of sexual intercourse upon marriage, thus depriving a married woman of her right to refuse sexual intercourse. Sexual relation consent is a present and revocable state of mind, and cannot be permanently surrendered through a prior social or legal institution such as marriage. The exception limits the ability of a wife to make a meaningful personal choice and is inconsistent with constitutional jurisprudence that acknowledges autonomy in intimate decision-making by treating the consent of a wife as irrelevant to marital intercourse[28].

Even though maintenance of the marital institution could be one of the valid state interests, there is no need to immunise a whole group of non-consensual sexual behaviour against

[24] *Vishaka v. State of Rajasthan*, (1997) 6 S.C.C. 241 (India).
[25] INDIA CONST. art. 21.
[26] *Puttaswamy*, (2017) 10 S.C.C. 1.
[27] *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 S.C.C. 1 (India).
[28] Vats & Yadav, *supra* note 16, at 6007–08.

criminal prosecution, and such immunity is not proportionate to that objective. The operation of a statutory regime that removes remedies for acts involving severe bodily and psychological harm undermines the enforceability of constitutional protections in Article 21, which presents colossal challenges with regard to the compatibility of criminal legislation with the constitutional commitment to dignity and individual liberty.

D. Constitutional Morality and the Limits of State Deference to the Marital Sphere

The mere fact that the marital rape exception survives raises broader concerns regarding the relationship between constitutional morality and the traditional privacy in which the sphere of marriage is shrouded. Traditionally, the institution of marriage was regarded as a private sphere that was not subject to government intervention, especially when it comes to intimate relations between the spouses. This approach was based on the belief that marital relations belonged to the private sphere and therefore should remain beyond criminal regulation, but constitutional jurisprudence has come to appreciate that the private sphere cannot remain beyond constitutional scrutiny where fundamental rights are implicated.

The constitutional morality doctrine demands that social institutions and practices be assessed in the light of constitutional values, as opposed to past practice and societal standards. In *Navtej Singh Johar v. Union of India*[29]The Supreme Court observed that constitutional morality must prevail over social morality in cases where individual dignity and autonomy are at stake. Similarly, in *Joseph Shine v. Union of India*[30], The Court denied the idea that marriage could be used to justify legal provisions that put the individual autonomy to the fore; and held that constitutional rights do not cease upon entering into a marital relationship.

The marital rape exception is a legal dilemma between upholding marriage as a social institution and upholding individual rights within the social institution. Although maintenance of the marital institution can be a valid state interest, it can not be pursued at the expense of individual liberty, physical integrity and autonomy. The institution of marriage is not viewed through the constitutional framework as a place where basic rights could be restricted or limited.

This means that deference to marital privacy by the state should give way where the practice

[29] *Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C. 1 (India).
[30] *Joseph Shine v. Union of India*, (2019) 3 S.C.C. 39 (India).

of marital privacy involves infringement of constitutional guarantees. The conception of conjugal authority that marriage implies unconditional consent to sexual intercourse is an obsolete one, which is not compatible with the constitutional commitment to dignity and equality. A constitutional order that is grounded on rights demands that the autonomy of individuals should be safeguarded in all spheres of life, including intimate relations, and thus restricts the ability of the institution of marriage to excuse criminal liability.

IV. Recommendation of the Justice Verma Committee

After the Delhi gang rape case of 2012, there was widespread social apprehension as to whether the criminal law system in India was sufficient, which led to the constitution of the Justice J.S. Verma Committee[31], which advised on changes to be made in connection with sexual offences. The Committee conducted an extensive review of the statutory provisions on sexual violence in its Report on Amendments to Criminal Law in 2013, and found that there were significant deficiencies in the statutory provisions, especially where it comes to the legal provisions on non-consensual sexual acts in marriage[32].

The Committee referred to empirical evidence that a significant percentage of the sexual violence experienced by women occurs within intimate relationships, including marriage, and that such violence remains highly underreported. It noted that the prevailing social attitude tends to undermine or even accept non-consensual sexual intercourse within marriage, which narrows access to effective legal redress for married women who are victims of sexual violence.

In light of these findings, the Committee indicated in clear terms the recommendation to criminalise marital rape by repealing the exception to rape under Section 375 of the Indian Penal Code[33]. It also suggested that the existence of a marital or intimate relationship between the accused and the complainant must not be considered a valid defence or any form of mitigating circumstances that will either influence consent or sentencing.

Even though several recommendations were included in the Criminal Law (Amendment) Act, 2013, with reference to the broadening definition of rape and acknowledgement of consent, Parliament refused to endorse the suggestion to abolish the marital rape exception. Later, under

[31] Justice J.S. Verma Comm., *Report of the Committee on Amendments to Criminal Law* (2013) (India).
[32] Rathore, *supra* note 3, at 6–7.
[33] Indian Penal Code, No. 45 of 1860, § 375, INDIA CODE (1860).

the Bharatiya Nyaya Sanhita, 2023, Section 63[34] kept the content of the marital rape exemption, and in the process, kept non-consensual sexual intercourse within marriage out of the definition of rape.

V. Comparative Legal Position and International Human Rights Standards.

By keeping the marital rape exception, India puts its criminal law system in conflict with the emerging international human rights practices and comparative law. International mechanisms of combating gender-based violence are increasingly appreciating the fact that non-consensual sexual intercourse in marriage constitutes a serious violation of women's dignity, bodily integrity, and equality.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) commits State parties at the international level to eliminate discrimination against women, and address social practices that reinforce gender-based inequality, including the denial of legal protection against marital rape. rape[35].

Comparative jurisprudence also reveals a big change in the abandonment of the traditional doctrine of irrevocable consent in marriage. The case *R v R* by the House of Lords in the United Kingdom marked a historical development in the criminal law of England, by stating that the principle of a woman being irrevocably consenting to sexual intercourse through marriage is a legal fiction that is an outdated and untenable notion[36].

Some jurisdictions in the world have since abolished the marital rape exemption by enacting laws. The criminalisation of non-consensual sexual intercourse (in marriage) has been explicitly criminalised by countries like Nepal and South Africa, as the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007. Its rationale is that the existence of a marriage relationship cannot be used to justify the absence of free and voluntary consent.

Global studies on violence against women also show that a significant number of cases of sexual violence are practised within intimate relationships, thereby necessitating the need to have legal systems that offer viable solutions in such situations in conformity with international

[34] Bharatiya Nyaya Sanhita, No. 45 of 2023, § 63, INDIA CODE (2023).
[35] Convention on the Elimination of All Forms of Discrimination Against Women art. 1, Dec. 18, 1979, 1249 U.N.T.S. 13.
[36] *R v. R*, [1992] 1 A.C. 599 (H.L.) (appeal taken from Eng.).

human rights standards[37].

In this regard, the persistence of the marital rape exception in India is a threat to align its criminal justice system with global trends in the contemporary world, where consent is seen as a key issue in all sexual relations, including marriage. International human rights commitments would be reflected by aligning the domestic law with these emerging principles and also enhance constitutional guarantees of dignity, equality and bodily autonomy of women[38].

VI. CONCLUSION AND RECOMMENDATIONS

The fact that the marital rape exception was retained, nonetheless, under Section 63 of the Bharatiya Nyaya Sanhita,2023, depicts the fact that there has been an unresolved battle between the inherited legal beliefs and the modern constitutional beliefs. The legal justification of the exception that excludes non-consensual sexual intercourse between a husband and his wife as rape, where the wife is above the age of eighteen years, is directly inconsistent with the constitutional provision of equality, non-discrimination and personal liberty in Articles 14, 15 and 21 of the Constitution of India[39]. The real-world impact of such a law is that most survivors of conjugal violence have lacked any meaningful criminal solutions. The omission of marital rape in the domain of criminal law is also one that does not serve the greater purpose of equal protection that other laws addressing domestic violence, such as the Protection of Women from Domestic Violence Act, 2005[40], which acknowledges the harm that the victim experiences as a result of sexual abuse as a kind of violence. Meaningful reform must therefore be both doctrinal and institutional.

To begin with, the legislative exception that considers marital status as a defence to criminal liability ought to be eliminated. Specifically, the definition of sexual offences under Section 63 of the Bharatiya Nyaya Sanhita, exception 2[41], must be repealed or narrowed down to ensure that non-consensual sexual intercourse in marriage is treated as a criminal act irrespective of the relationship between the parties.

Second, a decisive constitutional statement of the Supreme Court would be of vital importance

[37] World Health Org., *Global and Regional Estimates of Violence Against Women: Prevalence and Health Effects of Intimate Partner Violence and Non-Partner Sexual Violence* (2013).
[38] Vats & Yadav, *supra* note 16, at 6008–09.
[39] INDIA CONST. arts. 14, 15, 21.
[40] Protection of Women from Domestic Violence Act, No. 43 of 2005, INDIA CODE (2005).
[41] Bharatiya Nyaya Sanhita, No. 45 of 2023, § 63, exception 2, INDIA CODE (2023).

to eliminate the current legislative ambiguity and create a consistent guideline to be followed by the courts and enforcement agencies. This clarification would put criminal law in line with constitutional principles of dignity, autonomy and substantive equality, which are increasingly becoming prominent in Indian jurisprudence.

Third, the reform of the criminal justice system should be supported by reforms in the criminal justice institutions. Specialised training should be given to the police officers, prosecutors and judges in order to achieve survivor-centred investigation and adjudication of sexual offences. Access to medical services, forensic support, legal assistance and psychological support is also imperative to make sure that the victims of sexual violence in intimate relationships have an opportunity to seek remedies without being confronted with prohibitive measures.

Lastly, there is a need to have wider social and educational programs to overcome the deeply ingrained belief that a marriage implies unconditional consent to sexual intercourse. The societal perception of consent and marriage dynamics can be restructured through the assistance of public sensitisation and involvement of the community. Reinstating viable means of legal recourse to situations involving non-consensual sexual intercourse in the context of marriage is hence not just an issue of criminal law reform, but also a constitutional requirement. Unless the law acknowledges the fact that bodily autonomy and dignity continue to exist within the institution of marriage, the promises of equality and liberty of the Constitution will remain incomplete.