MARITAL RAPE IN INDIA: A CONSTITUTIONAL, HUMAN RIGHTS AND LEGAL PERSPECTIVE

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ABSTRACT

Marital rape remains one of the most contested questions in Indian criminal and constitutional law because the marital rape exception places the legal status of marriage in tension with a spouse' s bodily autonomy, dignity, privacy and sexual agency. This manuscript examines the historical, statutory and constitutional dimensions of the issue in India, with particular attention to the former Indian Penal Code and the corresponding provision under the Bharatiya Nyaya Sanhita. It analyses the constitutional concerns arising under Articles 14, 15 and 21 and considers competing judicial approaches, including RIT Foundation v. Union of India and authorities concerning privacy, dignity, reproductive autonomy and equality. The paper also considers selected historical texts, including the Manusmriti and Vatsyayana' s Kamasutra, as contextual material rather than modern legal authorities. Finally, it examines the continuing Supreme Court proceedings concerning the marital rape exception and argues for a legal framework that recognises consent and bodily autonomy within marriage while carefully addressing legislative policy, evidentiary standards and safeguards against misuse.

1. Introduction

Marriage in India has long been regarded as a sacrosanct social institution, embedded deeply in religious, cultural, and familial traditions. However, the legal structure governing marriage evolved during a period when women were not recognised as autonomous rights-bearing individuals but rather as dependents within a patriarchal framework. One of the most controversial remnants of this historical legacy is the marital rape exception— a rule that denies married women the same protection from sexual assault that unmarried women receive under criminal law. In a constitutional democracy committed to dignity, equality, and personal liberty, this exception presents a profound contradiction. The issue of marital rape is no longer confined to questions of morality, culture, or family values; it has emerged as a matter of constitutional law, criminal justice policy, and international human rights compliance.

2. Understanding Marital Rape

Marital rape refers to non-consensual sexual intercourse or sexual acts by a husband against his wife. The defining element of rape in modern criminal jurisprudence is the absence of free and voluntary consent. Historically, many legal systems operated under the doctrine of marital unity, where a wife' s legal identity merged with that of her husband. This gave rise to the presumption that a wife gave irrevocable consent to sexual relations upon marriage. Modern constitutional and human rights jurisprudence has rejected this notion, recognising that marriage does not extinguish bodily autonomy. Consent must be ongoing, specific, and revocable at any time. Indian criminal law, however, continues to treat consent differently within marriage, thereby creating a legal fiction that stands in tension with contemporary constitutional values.

3. Historical and Cultural Perspectives on Marital Consent

3.1 The Manusmriti

The Manusmriti contains provisions concerning sexual offences and the protection of women. Manusmriti 8.364 addresses the violation of an unwilling maiden and prescribes severe punishment in the circumstances stated in the verse. This should not be presented as a modern statutory equivalent of marital rape; its meaning must be understood within the social and legal framework of the text and its historical period. [1]

3.2 The Kamasutra

Vatsyayana' s Kamasutra discusses sexual conduct and the circumstances in which intimacy is to be approached, including attention to the woman' s willingness, preference and comfort. In this paper, the text is used only as historical material relevant to the discussion of consent and intimate relations, not as a modern legal rule. The historical value of this material lies in showing that ancient discussions of sexual relations were not necessarily limited to a single model of entitlement. It therefore provides comparative context for examining the modern proposition that marriage should not be treated as an irrevocable grant of sexual consent. [2]

3.3 Scriptural and Epic Context

Ancient discussions of sexual relations across texts like the Brihadaranyaka Upanishad, Valmiki Ramayana, and Vyasa's Mahabharata show a complex narrative landscape concerning forced intimacy and conjugal expectations, confirming that the model of permanent irrevocable entitlement was not universally absolute. [3]

4. The Legal Position in India

4.1 The Marital Rape Exception

Section375 of the Indian Penal Code historically included Exception 2, stating that sexual intercourse by a man with his own wife, provided she is above a specified age, does not constitute rape. The Bharatiya Nyaya Sanhita, 2023 retains this exception in substance, thereby continuing legal immunity for husbands in cases of non-consensual sex with adult wives. The Supreme Court made a limited intervention in Independent Thought v. Union of India, where it read down the exception to hold that sexual intercourse with a wife below eighteen years of age amounts to rape. While this judgment protected minor wives, it left intact the broader immunity in relation to adult married women. [4]

4.2 Alternative Legal Remedies

Although marital rape is not recognised as rape under criminal law, certain indirect remedies exist. The Protection of Women from Domestic Violence Act, 2005 recognises sexual abuse as a form of domestic violence and provides civil relief such as protection orders and residence rights. Section 498A IPC and corresponding provisions under the new criminal laws may apply where sexual violence amounts to cruelty. Non-consensual sexual acts may also constitute

grounds for divorce under personal laws. However, these remedies do not treat the act as rape and lack the symbolic and punitive force of criminal law. The absence of rape recognition effectively conveys that sexual violence within marriage is less serious than sexual violence outside it.

5. Constitutional Concerns

5.1 Article 14: Equality Before the Law

Article 14 guarantees equal protection of laws. The marital rape exception creates an artificial classification between married and unmarried women. An unmarried woman subjected to non-consensual sex can invoke rape law; a married woman cannot. This distinction is based solely on marital status and bears no rational nexus to the object of rape law, which is to punish non-consensual sexual acts.

5.2 Article 21: Right to Life, Privacy, and Bodily Autonomy

Article 21 has been expansively interpreted to include the right to live with dignity, privacy, and bodily integrity. In Justice K.S. Puttaswamy v. Union of India, the Court recognised privacy as a fundamental right encompassing decisional and bodily autonomy. Forcing a woman into sexual intercourse without consent directly violates these principles. Similarly, in Suchita Srivastava v. Chandigarh Administration, the Court affirmed a woman' s right to make reproductive choices aspart of personal liberty. [5]

5.3 Article 15: Non-Discrimination on the Grounds of Sex

The exception disproportionately affects women and is rooted in gendered assumptions that wives owe sexual access to husbands. In Joseph Shine v. Union of India, the Supreme Court struck down the adultery law for treating women as property and emphasised equality within marriage. The reasoning in that case directly undermines the rationale of the marital rape exception. [6]

6. Judicial Developments

6.1 High Court Split Verdict

In RIT Foundation v. Union of India, the Delhi High Court delivered a split verdict on the

constitutional validity of the marital rape exception. Justice Rajiv Shakdher considered the exception inconsistent with constitutional guarantees of equality, dignity and bodily autonomy, while Justice C. Hari Shankar took a different view and emphasised the legislative and policy dimensions of the issue. The split verdict left the constitutional question unresolved at the High Court level. The case is significant because it places the conflict between marital status and individual sexual autonomy within constitutional adjudication. [7]

6.2 Recent Supreme Court Proceedings (2026)

The constitutional validity of the marital rape exception is presently pending before the Supreme Court of India. In September 2026, a three-judge Bench led by Chief Justice Surya Kant began hearing a batch of petitions challenging the validity of the marital rape exception contained in the criminal law. The core question is whether a husband can be prosecuted for rape while the statutory exception continues to exempt sexual intercourse with an adult wife from the offence of rape. As of September 2026, the Supreme Court is hearing a batch of petitions challenging the marital rape exception under the former IPC and the corresponding BNS provision. A three-judge Bench headed by Chief Justice Surya Kant has begun hearing the matter and has questioned whether a husband can be prosecuted for an act that the existing statutory exception presently excludes from the offence of rape. The Bench has also considered the relationship between the exception, individual autonomy and the constitutional challenge to the provision. The Supreme Court has not delivered a final constitutional judgment on the validity of the marital rape exception as of the date of this manuscript. These are pending proceedings, not a decided Supreme Court case. [8]

7. International Perspective

Most jurisdictions worldwide have criminalised marital rape, recognising that marriage does not extinguish consent. International human rights bodies consistently regard marital rape as a form of gender-based violence. India, as a signatory to CEDAW, carries obligations to eliminate discrimination and violence against women, including within marriage.

8. Arguments Against Criminalisation and the Urgent Need for Reform

Opponents argue that criminalisation would destabilise marriage, lead to misuse of law, or that civil remedies are sufficient. However, the law cannot prioritise preserving marriage over

protecting bodily integrity. Misuse concerns exist in many criminal laws and are addressed through procedural safeguards, not by denying protection. Civil remedies cannot substitute for criminal accountability in cases of sexual assault. The marital rape exception reinforces the harmful belief that consent is irrelevant within marriage. It leaves survivors without meaningful criminal recourse and signals that sexual violence in marriage is a private matter rather than a public wrong. Criminalisation would affirm that consent is essential in all sexual relationships, ensure equal protection for married women, and align criminal law with constitutional values.

9. Societal Impact and Legal Recognition

The continued existence of the marital rape exception has consequences that extend far beyond the courtroom. Law performs not only a punitive function but also an expressive one; it communicates social values and sets standards of acceptable behaviour. When the legal system refuses to recognise non-consensual sex within marriage as rape, it reinforces harmful stereotypes that marriage implies permanent consent and that a wife' s bodily autonomy is secondary to conjugal expectations. Such messaging deepens structural inequalities and normalises silence around abuse that occurs in private spaces. Empirical studies and survivor testimonies from various jurisdictions demonstrate that sexual violence within marriage often occurs alongside other forms of domestic abuse, including emotional manipulation, economic control, and physical violence. The absence of criminal recognition makes it harder for women to name their experience as sexual assault, seek institutional support, or access trauma-informed care. It also affects data collection, as incidents remain hidden within broader categories of domestic violence, thereby obscuring the scale and nature of the harm. Concerns are sometimes raised about evidentiary difficulties in prosecuting marital rape. However, challenges of proof exist in many sexual offence cases, including those outside marriage. The criminal justice system addresses these concerns through procedural safeguards such as the presumption of innocence, the requirement of proof beyond reasonable doubt, and protections against false implication. The possibility of misuse cannot justify a blanket denial of protection to an entire class of survivors. Instead, careful investigation, judicial sensitivity, and adherence to due process offer more balanced solutions.

Recognising marital rape would also strengthen the coherence of Indian criminal law. The law already acknowledges that consent can be withdrawn in various intimate contexts and that relationships of trust may aggravate, rather than excuse, abuse. Exempting husbands from rape

liability creates a contradiction within the broader framework of sexual offence law, which otherwise centres on autonomy and voluntariness. Removing the exception would harmonise the law with its own underlying principles. Legal reform must also be accompanied by institutional and social measures. Police training, medical protocols, legal aid services, and public awareness campaigns are essential to ensure that criminalisation translates into meaningful access to justice.

Community engagement can help challenge myths surrounding marital rights and promote the understanding that mutual respect and consent are foundational to healthy relationships. In this sense, criminalisation is not merely punitive but transformative, signalling a shift toward relationships based on equality rather than entitlement. Ultimately, the debate is not about undermining marriage but about redefining it in constitutional terms. A legal order that values dignity and liberty cannot permit any relationship to override an individual' s control over their own body. Affirming this principle within marriage would mark a significant step toward fulfilling the promise of substantive equality envisioned by the Constitution. Comparative experiences show that criminalisation, when paired with safeguards and support systems, does not erode family structures but instead promotes accountability and healthier marital relationships. Legal recognition encourages reporting, improves institutional responses, and signals unequivocally that violence, even within intimate bonds, will not be tolerated in a democracy.

10. Conclusion

The marital rape exception reflects a clash between patriarchal legal history and constitutional modernity. The Constitution envisions individuals— not institutions— as the primary bearers of rights. Marriage cannot operate as a shield against accountability for sexual violence. Recognising marital rape as a criminal offence is not an attack on marriage; it is an affirmation that marriage must be grounded in consent, equality, and dignity.

Footnotes / Citations (Bluebook 21st Edition Format)

[1] MANUSMRITIch.8, v.364 (Ganganath Jha trans., 1920).

[2] VATSYAYANA, KAMASUTRAbk.III,ch.2.

[3] See Brihadaranyaka Upanishad 6.4.7; Valmiki, Ramayana; Vyasa, Mahabharata.

[4] Independent Thought v. Union of India, (2017) 10 SCC 800 (India).

[5] Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1 (India); Suchita Srivastava v. Chandigarh Administration, (2009) 9 SCC1 (India)

[6] Joseph Shine v. Union of India, (2019) 3 SCC 39(India).

[7] RIT Foundation v. Union of India, 2022 SCC OnLine Del 1406 (Del. HC) (India).

[8] Supreme Court of India, pending marital rape exception proceedings, September 2026 (Led by Surya Kant, C.J.).