THE MARITAL RAPE EXEMPTION: A CONSTITUTIONAL CONFLICT

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ABSTRACT

"Marriage cannot be a constitutional license to violate dignity."

Despite rape being considered a serious criminal offence under Indian law, the continued legal immunity granted to marital rape exposes a troubling paradox within India's constitutional framework. While the Constitution guarantees equality, dignity, and personal liberty to every individual, the exemption contained under Section 63 of the Bharatiya Nyay Sanhita, 2023, carried forward from the Indian Penal Code, 1860, places married women beyond the protection of criminal law. This article analyses the constitutionality of the marital rape exemption and questions whether the preservation of marriage as a legal institution can justify the denial of women's bodily autonomy and fundamental rights. Through a doctrinal and comparative analysis of constitutional provisions, judicial precedents, and international legal standards, the study highlights how this exemption conflicts with Articles 14, 19, and 21 of the Constitution. It argues that the continued retention of the marital rape exemption reflects the persistence of colonial and patriarchal assumptions within India's criminal justice system. The article ultimately contends that criminalising marital rape is not merely a legislative reform but a constitutional necessity to ensure that marriage does not operate as a shield for violence, and that constitutional promises of justice and dignity are meaningfully realised for all women.

INTRODUCTION

In India, the law upholds the institution of marriage, but when the sacred bond becomes a shield for violence, the silence around marital rape reveals a stark betrayal of justice and human dignity. The word "rape" was derived from the Latin *rapere,* meaning "to steal, seize, or carry away"[1]. Historically perceived in Roman law as a property offence of abduction (raptus), the concept of rape has evolved over time to recognise sexual violence as a violation of bodily autonomy and consent. Rape refers to non-consensual sexual intercourse carried out through force, coercion, deception, or with a person legally incapable of giving valid consent.[2] It is often perceived as a crime committed by a stranger; however, when the same violence occurs within marriage, it manifests as marital rape, a form of sexual violence marked by the absence of consent despite the marital relationship. The crucial element that defines this act as a rape within a marriage is the lack of consent[3].

In the Indian criminal legal system, rape is recognized as a crime. Earlier, it was defined under Section 375 of the Indian Penal Code,1860. However, this definition has now been listed in the new criminal law Bharatiya Nyay Sanhita, 2023 under Section 63. Then Section 375 and now Section 63 both have two exceptions in it. The exceptions are:

(1) "A medical procedure or intervention shall not constitute rape.

(2) Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not a rape".[4]

The unfortunate aspect of this section is that marital rape was not criminalized in the past, it remains uncriminalized under the current law as well.

The central concern addressed in this article is "**whether the continued legal exemption of marital rape from criminal prosecution is compatible with the constitutional principles of equality, dignity, and fairness?"** By denying married women legal protection against non-consensual sexual acts by their husbands, the exemption results in differential treatment that undermines basic human rights guaranteed under the Constitution. This study argues that

[1] Polly Poskin, A Brief History of the Anti-Rape Movement, Resource Sharing Project (Oct, 2006), https://resourcesharingproject.org/resources/a-brief-history-of-the-anti-rape-movement/
[2] *Rape,* Merriam-Webster's Dictionary of Law. (1st Indian ed. 2005)
[3] Bhagyashikha Saptarshi, Marital Rape and Law, Manupatra Articles, Apr 9th 2024
[4] Bharatiya Nyay Sanhita,2023, § 63

criminalising marital rape is essential to ensure that the criminal justice system does not legitimise violence within marriage and that constitutional protections apply equally, irrespective of marital status.

This study examines the legal exemption of marital rape from criminal prosecution under Indian law and analyses its conflict with constitutional principles of equality, justice and dignity. It evaluates the existing statutory framework governing rape, with particular emphasis on the marital rape exception, and assesses its compatibility with the Golden Triangle of the Constitution of India. Adopting a doctrinal and comparative methodology, the study draws upon statutes, judicial precedents, scholarly writings, and international legal frameworks to critically analyse the constitutional validity of the exemption. The article further examines key judicial developments relating to marital rape and proposes the need for legal reform to ensure meaningful protection of women's rights within the criminal justice system.

CONSTITUTIONAL CONFLICT AND LEGAL FRAMEWORK OF MARITAL RAPE

The Constitution of India is anchored in the principle of the rule of law, which mandates that all persons and authorities are equally subject to legal accountability. This principle reflected in the Preamble through the ideals of justice, liberty, equality, and fraternity, finds concrete expression in the Fundamental Rights guaranteed under Part III of the Constitution.[5] The historical roots of equality and fairness can be traced to instruments such as the Magna Cata in 1251,[6] which articulated limitations on absolute power and laid the foundation for the modern conception of natural justice. These principles were consciously incorporated into the Indian constitutional framework, rejecting doctrines such as "The King can do no wrong" and affirming constitutional supremacy over all forms of authority[7].

The fundamental rights are not merely formal guaranteed but constitute the normative framework through which individual dignity, liberty, and equally are protected against arbitrary state action. Articles 14,19 and 21 operate collectively to ensure substantive fairness, procedural reasonableness, and personal autonomy. Rooted in principles of natural justice, these rights guide both legislative action and judicial interpretation. The Supreme Court has

[5] Sumeet Malik, Landmarks in Indian Legal and Constitutional History, Pg no. 497, EBC (12thEd, 2019)
[6] Sakshibeniwal, The Cornerstone of Fairness: Principles of Natural Justice, Legal Service India E-Journal, https://www.legalserviceindia.com/legal/article-14692-the-cornerstones-of-fairness-principles-of-natural-justice.
[7] Sumeet Malik, Landmark in Indian Legal and Constitutional History, Pg no. 498, EBC (12th Ed, 2019)

consistently adopted an expansive and purposive approach to Fundamental Rights, recognising their evolving character in response to changing social realities. This interpretative evolution becomes particularly relevant in contexts involving bodily autonomy and personal dignity, as demonstrated in landmark decisions such as ***Maneka Gandhi v. Union of India, State of West Bengal v. Anwar Ali Sarkar and Justice K.S. Puttaswamy v. Union of India.***

The decision in Maneka Gandhi case marked a transformative moment in Indian constitutional jurisprudence by fundamentally redefining the scope of Article 21. The case rose from the arbitrary impounding of the petitioner's passport under the Passport Act, 1967 without providing reasons or an opportunity to be heard. **The apex court held that the expression "procedure established by law" under Article 21 does not merely denote any enacted procedure, but one that is just, fair, and reasonable.** In doing so, the Court rejected the narrow interpretation adopted in A.K. Gopalan and established that Articles 14,19 and 21 are not mutually exclusive but form an interconnected framework popularly known as the 'Golden Triangle' against which any law depriving personal liberty under Article 21 must also pass the tests of Articles 14 and 19.[8] This explains that a law can be enacted, yet still be unconstitutional if it is unfair or arbitrary. The judgment embedded principles of natural justice, including audi alteram partem, within Article 21 and expanded the understanding of personal liberty to include autonomy, dignity, and freedom from arbitrary state action. This doctrinal shift laid the constitutional foundation for scrutinising laws that legitimise coercion or deny individual consent, even when such laws operate within socially sanctioned institutions.

While Maneka Gandhi established that any law affecting personal liberty must be just, fair, and reasonable, Article 14 provides the constitutional standard against which legislative classifications are assessed. In the Anwar Ali Sarkar judgement, the apex court clarified that Article 14 does not prohibit classification per se, but forbids class legislation that is arbitrary or unreasonable. The court laid down the "**doctrine of reasonable classification",** holding that any legislative distinction must satisfy a two-fold test:

1. The classification must be founded on an **intelligible differentia** that distinguishes persons or things grouped together from those left out, and

2. Such **differentia must have a rational nexus with the object** sought to be achieved by the

[8] Shreya Bhattacharya, *Maneka Gandhi vs Union of India*, 3 Jus Corpus L.J. 76 (December 2022).

law.

Where a classification is based on an unreasonable or artificial distinction, or bears no logical connection to the legislative purpose, it would violate the guarantee of equality under Article 14. This doctrine has since served as a foundational tool for examining whether differential treatment under law is constitutionally permissible. [9]

Building upon the equality framework under Article 14, the Supreme Court in Justice K.S. Puttaswamy judgement gave substantive depth to the concepts of dignity, autonomy, and personal liberty under Article 21. The court unanimously **recognised the "right to privacy as a fundamental right"**, intrinsic to life and personal liberty under Article 21, and inseparably linked to human dignity and individual choice. It was held that any State action infringing personal autonomy **must satisfy the "four-fold proportionality test of legality, legitimate aim, necessity, and proportionality",** and must also withstand scrutiny under Articles 14 and 19.[10] Importantly, the court clarified that constitutional rights do not cease to operate within private spaces such as the family or marriage, and that dignity cannot be compromised by social or institutional arrangements. Thus, this judgment reinforces that laws affecting intimate decisions must be non-arbitrary, proportionate, and respectful of individual dignity, thereby strengthening the constitutional protection against discriminatory legal classification.[11] Read together, Maneka Gandhi, Anwar Ali Sarkar, and Puttaswamy establish that any law affecting bodily autonomy must be non-arbitrary, reasonably classified, and respectful of dignity standards that the marital rape exemption fails to satisfy.

APPLICATION OF TESTS TO MARITAL RAPE EXEMPTION:

I. Article 14 – Equality & Reasonable Classification

This Article permits a reasonable classification which must a direct nexus with the object of the law as was laid down in the above-mentioned precedent.[12] The marital rape exemption creates a classification between married and unmarried women, excluding the former from protection of rape and solely on the basis of

[9] Ipsita Tiwari, Article 14: The Protector of Equality in India, 2 Legal Lock J. 40 (2023).
[10] Justice K S Puttaswamy (Retd) v. Union of India, (2019)1 SCC 1
[11] Jamila, Supreme Court's Verdict on Privacy - Analysis of the Puttaswamy Case, 1 Jus Corpus L.J. 430 (March 2021).
[12] The State of West Bengal v. Anwar Ali Sarkarhabib Mohamed 1952 AIR 75

their marital status. The classification fails as the test of intelligible differentia, as marital status has no rationale nexus with the object of rape laws, which is to punish the non-consensual sexual acts and protect bodily integrity. Both married and unmarried women are equally capable of experiencing sexual violence, and the harm suffered is identical in nature. Thus, the exemption amounts to arbitrary and discriminatory treatment, violating the guarantee of equality under Article 14.

II. Article 21 – Just Fair, and Reasonable Procedure

As held in Maneka Gandhi case, any law depriving personal liberty must prescribe a procedure that is just, fair and reasonable. By excluding marital rape from criminal prosecution, the law denies married women any legal remedy against non-consensual sexual acts, thereby legitimising coercion within marriage. Such denial of protection is inherently arbitrary, unreasonable and unfair, as it places married women outside the ambit of criminal law solely due to their marital status. Consequently, the exemption therefore fails the substantive due process requirement under Article 21.

III. Article 21 – Dignity, Privacy & Bodily Autonomy

In the Puttaswamy judgment, the apex court recognised privacy, bodily integrity, and decisional autonomy as intrinsic to dignity under Article 21. Forced sexual intercourse within marriage constitutes a grave violation of bodily autonomy and decisional privacy.[13] The marital rape exemption neither serves a legitimate state aim nor satisfies the test of necessity or proportionality, as it sacrifices women's dignity to preserve a patriarchal conception of marriage. The exemption thus infringes the right to privacy and dignity of married women.

The continued exemption of marital rape from criminal prosecution is constitutionally untenable. When tested against the doctrines laid down in these landmark judgements, the exemption fails to meet the requirements of equality, fairness, dignity, and bodily autonomy. By creating an arbitrary classification between married and unmarried women, denying

[13] Akansha Rajput, A Critical Analysis of Marital Rape in India, 4 Issue 4 Indian J.L. & Legal Rsch. 1, Pg no. 4-5 (2022).

procedural fairness, and legitimising violations of personal autonomy within marriage, the exemption infringes Articles 14 and 21. Marriage cannot be a shield for sexual violence, nor can social institutions override constitutional guarantees. Therefore, to align the criminal law with the constitutional mandate of justice, equality, and dignity, it is imperative that the exemption be removed and non-consensual sexual acts within marriage be criminalised under the BNS.

The marital rape exemption results in a clear constitutional inconsistency by creating an unreasonable distinction between married and unmarried women in the application of rape laws. While Section 376 of the IPC prescribes stringent punishment of rape, the exclusion of non-consensual sexual acts within marriage effectively denies married women equal protection of the law, thereby violating Article 14. The classification, based solely on marital status, bears no rational nexus to the object of rape laws, which is to punish sexual violence and protect bodily integrity. Further, by denying married women legal recourse against forced sexual intercourse, the exemption infringes the right to life and personal liberty under Article 21, particularly the rights to dignity, bodily autonomy, and sexual privacy. As recognised in the judgements privacy and bodily integrity are intrinsic human dignity and cannot be curtailed by social or institutional constructs such as marriage. Consequently, the continued non-criminalisation of this exemption permits arbitrary state inaction in the face of grave rights violence, rendering the exemption constitutionally impermissible and inconsistent with the foundational principles of equality, dignity, and justice.

SOCIO-CULTURAL PERSPECTIVES AND INTERNATIONAL COMPARISONS ON MARITAL RAPE

The concept of exemption from marital rape was traceable to Sir Matthew Hale an English jurist. He presented that "***the husband cannot be guilty of a rape committed by himself upon his lawful wife, for their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."***[14] The origin of this exemption holds its roots in the doctrine of Coverture. Wherein, according to it the woman loses her identity as soon as she gets married[15]. The framing of this exemption was based on

[14] Dr. P.K Chaturvedi, A Legal History of Marital Rape: The Erosion of Anachronism, 1 Indian J.L. & Just. 122, Pg no. 122-124 (2010)
[15] Neves Jujevaz Dsouza, A Comparative Analysis of the Legal Status of Marital Rape, 5 Issue 1 Indian J.L. & Legal Rsch., Pg no. 3,1 (2023)

this doctrine as the framer of the Indian Penal Code,1860 Lord Macauley had this view that such a doctrine should be applied even in India because that was what back in England too. Hence, till now there have been suggestions to remove this exemption but were rejected leading to this horrendous exception to be still alive in this modern era.

While the constitutional framework reveals critical legal shortcomings in protecting married women from marital rape, these issues are deeply rooted in societal norms that influence both the legal practice and public perception. Since time immemorial Indian society laid down the prime duties of a woman which were to uphold her husband as 'her god' and obey all his commands whether such commands were of good or evil in thought and nature. According to Manchandia, women in the ancient Indian family considered her as a 'liability' since her birth and because of this families always preferred a son over a daughter in their family. Daughters and generally perceived as the property of their fathers and are married off when they are deemed old enough. Society recognized that once a girl is married off then she becomes the property of her husband and now it is the right of the husband to enjoy his property. Indian society's patriarchy is the result of a 'system of social structures and practices in which men dominate, oppress and exploit women'[16].

The instances of domestic violence which includes marital rape in it arise because of the male dominance in society which is bolstered by the superior power and authority which the men claim to possess. All this creates the problem of gender inequality in society and in turn, aids the act of domestic violence. Most Indians are likely to say that there is a lot of discrimination against women than discrimination among religious groups or lower caste. India is among the 32 countries that have still not criminalised marital rape. According to NCRB's 2020, data approx. 95% of rape offenders are someone who is known to the victim[17]. According to the NHFS-4 (2015-16) 83% of the women claimed that the perpetrators were their husbands. Recently, NFHS published data in 2022 which observed that 29% of women between the age group of 18-49 face domestic and sexual violence[18]. As far as we compare the criminalization of marital rape in India and that of other countries then around 150 countries in 2019

[16] Kim Deborah, Marital Rape Immunity in India: Historical Anomaly or Cultural Defence? Volume 69, pages 91–107, (2018)
[17] Ishita Roy, Marital Rape Statistics in India: The Alarming Reality According to Recent NFHS Data, womensweb.in, Mar 2023, https://www.womensweb.in/2023/03/recent-nfhs-data-on-marital-rape-in-india-mar23wk3sr
[18] Rahul Trivedi, Will India Criminalize Marital Rape? , sputnik.in, Feb 2023, https://sputniknews.in/20230215/will-india-criminalize-marital-rape-889253.html

criminalized marital rape and sadly India is not one of them. Russia was the first one to criminalize it later on among the first-world countries that made marital rape a punishable offence is the UK, the USA, Australia, Canada, Sweden, Norway, Denmark, France, Germany etc.

United Nations recognizes marital rape as a violation of basic human rights. According to "UN Women: Progress of World's Women 2019-2020: Families in a Changing World report observed that globally 1 in 5 every partnered woman between the age group of 15-49 has been subjected to sexual violence in the previous 12 months". United Nations urges member countries to criminalize the act of marital rape and close the loopholes so as to protect women's human rights. By not criminalizing the act of sexual violence in a marital sphere the State is violating Articles 1,3,5 and 7 of UDHR which emphasise equality, dignity, security and freedom from violence, all of which are violated by the Legislature by not criminalizing it. Abiding by the suggestions of the United Nations and various international norms the Indian laws must also be aligned with them and bring in some amendments, and changes to the provisions of the Constitution to abolish the loopholes and contrast between the supreme law of the land Constitution and the special law of crimes.

Although India's laws on marital rape are still influenced by the traditional view, there is an increasing discussion to address gender inequality and bring in changes and reforms in the laws related to marital rape in India. Efforts were made in the past to bring in a reform but were rejected. However, the subsequent judicial interpretations and recent petitions were filed by people to strike down this exception clause to bring justice and fairness to every woman who suffered from marital rape.

PATHWAYS TO REFORM AND RECENT DEVELOPMENTS

The Indian Penal Code was drafted and came into force in 1862. In it, the laws relating to rape have not been changed until the heinous Mathura custodial rape case. Another brutal rape case wherein 2-3 drunk policemen raped a 16-year-old tribal girl in this case there were no injuries on the victim's body because of which the policemen were acquitted. This set the whole country on edge and protests broke out with the demand to amend the rape laws. Hence, the government brought the "**Criminal Law (Second Amendment) Act of 1983",** which added **Section 114A**

of the Indian Evidence Act of 1872.[19] Later on, there was again the need to change the provisions of rape because of the **Nirbhaya Rape Case** in 2012 it was such a brutal case and was never seen by the country[20].

To bring in the amendments in the criminal laws, the government formed the **Justice Verma Committee** to recommend amendments in the criminal justice system. According to this committee's suggestion **The Criminal Law (Amendment) Act, 2013** was passed. This amendment increased the jail period and harsher punishments for the rapist and the death penalty for those rapists, wherein the victim was dead or was in a vegetative state. Although there have been many reforms concerning the crime of rape, the government still not criminalised the act of marital rape. The **Justice Verma Committee** indeed recommended the removal of the **exception under the old criminal law**, because there was no logic in giving immunity to the husband for raping his own wife, and this exception proves that the wife is the property of the husband[21].This suggestion was rejected by the **"Parliamentary Standing Committee on Home Affairs** in its **167th** report"[22]. It was rejected on the grounds that if it is removed, then the marriage institution would collapse. Subsequently, in the landmark judgement of "**Independent Thought v. Union of India"[23]** the apex court held that forceful sexual intercourse with a wife who is under the age of 18 years will be considered rape. It increased the age of consent within marriage but did not address the issue of marital rape.

As of the latest, a significant judicial development in the discourse on marital rape emerged from the split verdict of the Delhi High Court***[24],*** delivered by a Division Bench comprising Justice Rajiv Shakdher and Justice C. Hari Shankar. The core issue before the court was the **constitutional validity of the exception,** which mentions about marital rape. Justice Rajiv Shakdher held that the marital rape exception was manifestly arbitrary and unconstitutional, as it granted impunity to offenders solely on the basis of marital status. Applying Article 14, he found that the distinction between married and unmarried women lacked any rational nexus with the object of rape laws, which is to punish sexual violence and protect bodily integrity. He further held that forced sexual intercourse within marriage violates a woman's **rights to dignity, autonomy, and privacy** under Articles 21 and 19(1)(a). Justice Shakdher rejected

[19] Indian Evidence Act, 1872 § 114A
[20] Naman Yadav, Analytical Approach to Marital Rape, 2 Jus Corpus L.J. 451(2021)
[21] Ibid
[22] Ibid
[23] Independent Thought v. Union of India 2017 SCC OnLine SC 122
[24] RIT Foundation v. Union of India 2022 SCC OnLine Del 1404

arguments based on marital privacy and evidentiary difficulty, observing that marriage cannot operate as a shield for sexual violence, and consequently struck down this exception along with related provisions.

In contrast, Justice C. Hari Shankar upheld the constitutional validity of the exception, emphasising the **distinct nature of marriage as a social institution**. Applying the intelligible differentia test, he held that the marital relationship constituted a reasonable classification having a rational nexus with legislative intent. He cautioned against judicial overreach, observing that criminalising non-consensual sex within marriage was a matter of legislative policy rather than judicial determination. Given the divergent constitutional interpretations, the matter was referred to the Hon'ble Supreme Court, with both judges granting a certificate of leave to appeal under Article 134A. The split verdict highlights the continuing constitutional uncertainty surrounding the marital rape exemption and underscores the need for authoritative judicial or legislative resolution.

In light of the constitutional infirmities identified above, it becomes necessary to examine viable pathways for legal and institutional reform. First, the most immediate and necessary reform is the **legislative removal of the marital rape exception**. The exception under the new criminal law should be expressly repealed to ensure that non-consensual sexual acts within marriage are treated on par with other instances of rape. Criminal law must focus on the absence of consent, rather than the marital relationship between the parties.[25] Second, any reform must be accompanied by **procedural safeguards to address concerns** relating to misuse and evidentiary difficulties. These may include mandatory preliminary inquiry, in-camera trials, protection of the identity of the complainant, and sensitised investigation by trained officers. Such safeguards would ensure that the rights of the accused are protected without denying justice to victims. Third, judicial interpretation should continue to **apply constitutional standards of equality, dignity, and autonomy** when assessing offences within the private sphere of marriage.[26] Courts must recognise that constitutional rights do not dissolve within marital relationships and that personal liberty and bodily integrity remain inviolable.

Finally, legal reform must be supported by **institutional and societal measures**, including awareness programmes, judicial training, and access to support services for survivors.

[25] Aditi Singh, *Marital Rape in India: An Atrocious Offense*, 4 Jus Corpus L.J. 277 (December 2023 - February 2024).
[26] Sanya Agarwal, *Marital Rape in India and Its Impact*, 3 Jus Corpus L.J. 747 (December 2022).

Addressing marital rape requires not only penal consequences but also a shift in societal understanding of consent and marriage as a partnership of equals.

CONCLUSION

The marital rape exemption represents a fundamental constitutional contradiction within India's criminal justice system. While the Constitution guarantees equality, dignity, and personal liberty to every individual, the continued legal immunity granted to husbands for non-consensual sexual acts within marriage denies married women the protection of these guarantees. As demonstrated through the application of the tests laid down in the above-discussed landmark judgments, the exemption fails on multiple constitutional grounds. It creates an arbitrary classification based solely on marital status, lacks a rational nexus with the object of rape laws, and legitimises violations of bodily autonomy and decisional privacy.

The persistence of this exemption reflects the survival of colonial and patriarchal assumptions that treat marriage as a space beyond constitutional scrutiny. However, constitutional rights do not dissolve at the threshold of marriage, nor can social institutions override the guarantees of dignity and equality. Comparative international practice and evolving human rights norms further reinforce that criminalising marital rape is neither radical nor destructive to the institution of marriage, but rather essential to its reformulation as a relationship grounded in mutual respect and consent.

Therefore, the retention of the marital rape exemption under Section 63 of the BNS, 2023, is constitutionally untenable. Its removal is not merely a matter of legislative policy, but a constitutional imperative to ensure that marriage does not operate as a shield for sexual violence. Criminalising marital rape is necessary to align criminal law with constitutional morality and to ensure that the promises of equality, dignity, and justice are meaningfully realised for all women.