
DECONSTRUCTING MARITAL RAPE IMMUNITY IN INDIA

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ABSTRACT

“Sexual violence is an unlawful violation of a woman’s dignity, autonomy, and bodily integrity.” Yet, marital rape in India continues to remain outside the scope of criminal law, protected by long-standing legal and social assumptions. While non-consensual sex outside marriage is recognized as rape, the same act within marriage is exempted on the presumption of implied consent.

This paper examines whether marriage can be interpreted as irrevocable consent and questions the validity of the marital rape exception. It highlights the contradictions within existing legal provisions relating to consent, child marriage, and unequal protection of women. The study further explores how such exemptions reflect a patriarchal framework that undermines women’s rights within marriage.

By analysing legal provisions and judicial developments, the paper argues for the recognition of a married woman’s right to consent and emphasizes the need for reform to align the law with constitutional principles of equality, dignity, and personal liberty.

INTRODUCTION

“The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract.”

-Sir Matthew Hale¹

India remains one of the few jurisdictions where non-consensual sexual intercourse within marriage is not recognized as rape under criminal law. Traditionally, marriage has been viewed as a sacred institution, embodying a permanent, enduring, and socially significant union that imposes both personal and societal obligations upon spouses. This perception has historically influenced legal approaches towards marital relationships and the rights and duties arising from them.

In contemporary society, however, the institution of marriage is undergoing significant transformation. While marriage continues to be widely accepted and practiced, increasing numbers of individuals are opting for alternative forms of companionship, such as live-in relationships, reflecting evolving social attitudes towards personal autonomy and intimate relationships. Nevertheless, for a substantial section of Indian society, marriage remains deeply embedded in cultural and familial expectations. Recognizing its social importance, the law has developed a comprehensive framework aimed at protecting the rights and interests of married individuals, particularly women.

Despite these legal safeguards, a notable inconsistency exists in the treatment of sexual violence against married women. Acts of sexual assault committed by strangers are punishable under criminal law; however, when similar acts are perpetrated by a husband against his wife, the law provides an exception that effectively excludes such conduct from the definition of rape. This distinction has generated considerable criticism for perpetuating historical notions of marital entitlement and for undermining the constitutional principles of equality, dignity, and bodily autonomy. Critics argue that such an approach reinforces patriarchal assumptions and denies married women the same legal protection afforded to other victims of sexual

¹ Sir Matthew Hale, *History of the Pleas of the Crown* 629 (1736); see, s. Fredman, *Women and the Law* 55-57 (1997)

violence.

The enactment of the Bharatiya Nyaya Sanhita, 2023 (BNS), has reignited this debate. Section 63 of the BNS retains the marital rape exception by excluding non-consensual sexual intercourse between spouses from the ambit of rape. The issue has attracted renewed judicial and academic attention, particularly following the split verdict of the Delhi High Court in *RIT Foundation v. Union of India*², which highlighted the constitutional and societal complexities surrounding the criminalization of marital rape. This controversy raises a fundamental question: whether the continued recognition of the marital rape exception serves to preserve the institution of marriage or whether it, in fact, undermines the values of mutual respect, consent, and equality that are essential to a healthy marital relationship.

CONCEPTUALIZING MARITAL RAPE: LEGAL MEANING AND THEORETICAL FOUNDATIONS

Rape is a serious form of sexual violence involving sexual intercourse without the free and voluntary consent of a person. It may occur through force, coercion, threats, deception, or when the victim is incapable of giving consent. It violates a person's dignity, bodily integrity, and fundamental rights.

Marital rape refers to non-consensual sexual acts by a husband against his wife. It occurs when a wife is forced or coerced into sexual relations without her consent. Modern legal and human rights perspectives reject the old notion that marriage implies permanent consent, emphasizing that consent is required for every sexual act, even within marriage.

Although widely recognized as a form of domestic and sexual violence, marital rape remains controversial in many countries. In India, the law still provides a marital exception under the Bharatiya Nyaya Sanhita, 2023, which excludes certain acts between husband and wife from being classified as rape if the wife is above the prescribed age.

This exception has been heavily criticized for violating women's rights to equality, dignity, and personal autonomy. The debate continues, with increasing demands to criminalize marital rape and ensure equal legal protection for married women.

² RIT Foundation v. UOI 2022 SCC OnLine Del 1404

HISTORICAL EVOLUTION OF MARITAL RAPE IMMUNITY: ORIGIN AND DOCTRINAL DEVELOPMENT

The marital rape exemption has deep historical roots, extending back to the early development of the institution of marriage itself. In common law, this exemption is commonly traced to the views of Sir Matthew Hale, a seventeenth-century English jurist and former Chief Justice of the Court of King's Bench. Hale argued that a husband could not be held criminally liable for raping his lawful wife because marriage was understood to involve the wife's irrevocable consent to sexual relations. According to this reasoning, the mutual consent embodied in the marital contract permanently transferred such consent to the husband and could not subsequently be withdrawn by the wife³. A notable weakness in Sir Matthew Hale's formulation of the marital rape exemption is that he provided neither legal reasoning nor supporting judicial authority for his claim, while also failing to address existing legal opinions that may have contradicted his position. Although the doctrine of marital immunity from rape was widely recognized at the time, its conceptual foundation appears to have been largely Hale's own construction. The doctrine can be traced to the medieval theological and ecclesiastical concept of the "conjugal debt," which originated from biblical interpretations of marriage and imposed a reciprocal obligation on spouses to engage in sexual relations upon request.

Nevertheless, scholars have observed that Hale's assertion seems to reflect a personal opinion rather than an established legal principle, as it was unsupported by precedent or judicial decisions. Instead, it was derived from contractual notions of marriage, making it both innovative and, according to critics, fundamentally flawed in its reasoning. Marriage-based immunity from rape prosecution was supported not only by the theory of implied consent but also by two additional legal doctrines that courts historically recognized⁴. First, the exemption was rooted in the historical conception of rape as a property offence rather than an offence against personal autonomy or bodily integrity. Under early legal systems, women were regarded as the property of their fathers or husbands, and rape laws were primarily designed to safeguard male proprietary interests in women's sexuality rather than to protect women from sexual violence. Closely linked to this understanding was the doctrine of coverture, articulated by William Blackstone⁵, under which a married woman's separate legal identity was subsumed into that of her husband. Upon marriage, husband and wife were treated as a single legal entity,

³ SIR MATTHEW HALE, *HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN* (Professional Books Limited, P.R. Glazebrook ed., 1971)

⁴ David Lanham, Hale, Misogyny and Rape, 7 CRIM. L.J. 148, 155 (1983)

⁵ Lisa Dawgert Waggoner, New Mexico Joins the Twentieth Century: The Repeal of the Marital Rape Exemption, 22 N.M.L. REV. 551, 553 (1992)

represented by the husband. Consequently, a third rationale emerged: because the spouses were considered one person in law, it was deemed legally impossible for a husband to rape his wife, as such an act would amount to a person violating himself.

These doctrines collectively formed the historical foundation of the marital rape exemption in common law jurisdictions. Another traditional justification for the marital rape exemption was derived from religious and historical interpretations of the concept of “unlawful carnal knowledge.”⁶ Under this view, sexual intercourse occurring outside marriage was considered unlawful, whereas sexual relations within marriage were presumed lawful by definition. Consequently, forced sexual intercourse by a husband against his wife was not regarded as a criminal act, as it fell within the scope of the marital relationship. Such social and legal assumptions significantly influenced the development of common law principles that legitimized non-consensual sexual intercourse within marriage. The widespread acceptance of the marital rape exemption was further reinforced by the influential views of Sir Matthew Hale, whose seventeenth-century formulation received both judicial and legislative endorsement across numerous jurisdictions. In countries such as the United States, Australia, Canada, and Ireland, husbands were historically shielded from criminal liability for raping their wives⁷.

In the United States, the Supreme Judicial Court of Massachusetts was among the first courts to expressly recognize the spousal rape exemption, relying principally on Hale’s assertion that marriage constituted a complete defence to a charge of rape⁸. Beyond judicial acceptance, several American states also incorporated this principle into statutory law. Similarly, in England⁹, Scotland¹⁰, and the Republic of Ireland¹¹, Hale’s proposition attained legal authority through its repeated affirmation in judicial decisions over many generations.

The eventual decline of these outdated legal presumptions resulted from the gradual recognition and expansion of women’s individual rights and legal autonomy. As concepts of equality, bodily integrity, and personal freedom gained prominence, the traditional foundations of the marital rape exemption increasingly came under scrutiny and were progressively

⁶ DIANA E.H. RUSSELL, *supra* note 2, at 2-5

⁷ See Katherine O’Donovan, *Consent to Marital Rape: Common Law Oxymoron*, 2 *CARDOZO WOMEN’S L.J.* 91, 92 (1995)

⁸ See *Commonwealth v. Fogerty*, 74 Mass. 489 (1857). This case, however, did not directly involve spousal rape and the Court based on Hale’s reasoning only enunciated the common law rule that marriage was a defense to a charge for rape.

⁹ For a discussion on the legal history of marital rape in England, see generally Melisa J. Anderson, *Lawful Wife, Unlawful Sex—examining the Effect of the Criminalization of Marital Rape in England and the Republic of Ireland*, 27 *GA. J. INTL & COMP.L.* 139.

¹⁰ See generally Daniel Kelly, *The Reassessment of Rape in Marriage*, 35 *J.L. SOC. SCOTLAND* 3 (1990)

¹¹ Pracher, *The Marital Rape Exemption: A Violation of a Woman’s Right of Privacy*, 11, *GOLDEN GATE U.L. REV.* 717 (1981)

dismantled.

LEGAL FRAMEWORK AND REDRESSAL MECHANISMS FOR MARITAL RAPE VICTIMS IN INDIA

Although marital rape continues to fall outside the ambit of the offence of rape under the Bharatiya Nyaya Sanhita, 2023 (BNS), several statutory provisions and judicial interpretations provide limited remedies to women subjected to non-consensual sexual intercourse within marriage.

1. Section 85 of the Bharatiya Nyaya Sanhita, 2023: Cruelty by Husband or Relatives

Section 85 of the BNS criminalizes cruelty inflicted by a husband or his relatives upon a married woman and prescribes punishment of imprisonment extending up to three years along with a fine. The offence is cognisable, non-bailable, and non-compoundable. The provision defines cruelty broadly to include conduct likely to drive a woman to commit suicide or cause grave injury to her life, limb, or physical and mental health. Judicial interpretations have recognised that forced sexual intercourse within marriage may constitute a form of cruelty, thereby enabling victims of marital rape to seek legal recourse under this provision.

2. Section 74 of the Bharatiya Nyaya Sanhita, 2023: Outraging the Modesty of a Woman

Section 74 penalises any person who assaults or uses criminal force against a woman with the intention of outraging, or with the knowledge that such conduct is likely to outrage, her modesty. The punishment ranges from one to five years of imprisonment, in addition to a fine. The judicial understanding of “modesty” has evolved through case law. In *Raju Pandurang Mahale v. State of Maharashtra (2013)*¹², the Supreme Court observed that the essence of a woman’s modesty is intrinsically connected to her sex and that acts involving sexual aggression may amount to an outrage of modesty. Furthermore, in *Nimeshbhai Bharatbhai Desai v. State of Gujarat*¹³, the court held that a husband who subjected his wife to forced sexual intercourse could be prosecuted for outraging her modesty under the corresponding provision of the Indian Penal Code. This interpretation provides an alternative legal avenue for victims of marital rape.

3. Section 13(1)(ia) of the Hindu Marriage Act, 1955

Section 13(1)(ia) of the Hindu Marriage Act permits either spouse to seek dissolution of

¹² Raju Pandurang Mahale vs State of Maharashtra 8 (2004) 4 SCC 37

¹³ Nimeshbhai Bharat Bhai Desai vs. State of Gujarat, 2018, Guj 732

marriage on the ground of cruelty. Courts have consistently recognised that non-consensual sexual acts committed by a husband against his wife may amount to matrimonial cruelty. Consequently, marital rape can constitute a valid ground for divorce under this provision, even though it is not expressly recognized as rape under criminal law.

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

The Protection of Women from Domestic Violence Act, 2005 (PWDVA) provides civil remedies to women subjected to domestic violence. Section 3 defines domestic violence broadly to include physical, sexual, verbal, emotional, and economic abuse. Although the Act does not criminalise marital rape, it recognises forced sexual conduct within marriage as a form of sexual abuse. Victims may therefore seek protection orders, residence orders, monetary relief, and judicial separation under the Act.

Limitations of Existing Legal Remedies

While these statutory provisions offer certain forms of relief, they do not directly criminalize marital rape. The available remedies largely depend upon judicial interpretation and have evolved through case-by-case adjudication. As a result, considerable judicial discretion exists in determining the extent of protection available to victims. Furthermore, the absence of explicit legislative recognition of marital rape creates a significant disparity between the treatment of non-consensual sexual intercourse within marriage and rape committed outside marriage, particularly with respect to punishment and legal consequences.

LAW COMMISSION REPORTS AND EXPERT COMMITTEE

RECOMMENDATION

i. The 42nd Law Commission Report¹⁴

The 42nd Law Commission Report is significant for understanding the Commission's approach towards marital rape. The Report made two notable recommendations. First, it suggested that the marital rape exception should not apply where the spouses are living separately pursuant to a decree of judicial separation. The Commission reasoned that although the marital relationship technically subsists in such circumstances, non-consensual sexual intercourse by the husband should not remain exempt from criminal liability. Secondly, the Report recommended that non-

¹⁴ Law Commission of India, Indian Penal Code, Report No. 42 (June 1971), available at <http://lawcommissionofindia.nic.in/1-50/report42.pdf>

consensual sexual intercourse with a wife between the ages of twelve and fifteen should be addressed through a separate penal provision rather than being classified as rape.

The Report thus reflected the prevailing assumption that consent is implied within a subsisting marital relationship where spouses cohabit. At the same time, it distinguished marital rape from other forms of rape by treating it as a less serious offence. However, it did not advocate the complete removal of the marital rape exception.

ii. The 172nd Law Commission Report on Rape

The 172nd Law Commission Report proposed comprehensive reforms to India's sexual offence laws. Its principal recommendations included:

1. Replacing the term "rape" with the broader expression "sexual assault".
2. Expanding the definition of sexual intercourse to include all forms of penetration, including penile-vaginal, penile-oral, digital-vaginal, digital-anal, and object penetration.
3. Recognising sexual assault on any part of the body as constituting rape, consistent with the reasoning adopted in *Sakshi v. Union of India*¹⁵.
4. Making rape laws gender-neutral in order to address sexual offences against male victims, particularly in custodial settings.
5. Enhancing the punishment under provisions dealing with insults to the modesty of women where the conduct is committed with sexual intent.
6. Deleting the marital rape exception and recognising forced sexual intercourse by a husband against his wife as an offence equivalent in seriousness to other forms of sexual violence and domestic abuse.
7. Strengthening evidentiary protections by recommending that where a victim asserts the absence of consent, courts should adopt a presumption supportive of the victim's testimony in specified circumstances.

The Report unequivocally recommended the abolition of the marital rape exception and

¹⁵ *Sakshi vs Union of India and Others*, 2004 (5) SCC 518

emphasized that marriage should not operate as a defence to non-consensual sexual intercourse.

COMPARATIVE LEGAL POSITION ON MARITAL RAPE: GLOBAL JURISDICTIONS

A. England

The traditional English law on marital rape was based on Sir Matthew Hale's doctrine, which stated that a husband could not be guilty of raping his wife because marriage implied irrevocable consent to sexual intercourse. However, this doctrine gradually weakened through judicial decisions such as *R v Clarke*¹⁶, where the court recognized that a husband could be held liable for raping his wife following a decree of judicial separation. The position changed significantly in *R v R*¹⁷, where the House of Lords abolished the marital rape exemption and held that a husband could be guilty of raping his wife. The Court rejected the concept of irrevocable marital consent, emphasizing that marriage does not deprive a woman of her right to bodily autonomy and sexual consent. It further affirmed that non-consensual sexual intercourse within marriage constitutes rape, regardless of the relationship between the parties.

B. United States

Historically, marital rape was exempt from prosecution in most states of the United States under the common law doctrine that marriage implied a wife's permanent consent to sexual intercourse. However, beginning in the 1970s, women's rights movements and legal reforms challenged this doctrine. Nebraska became the first state to criminalize marital rape in 1976, and by 1993 all fifty states had recognized marital rape as a criminal offence¹⁸. Today, marital rape is generally treated as rape irrespective of the marital relationship between the parties. The legal reforms in the United States reflect the principle that marriage does not extinguish an individual's right to bodily autonomy, dignity, and consent.

c. Nepal

Nepal has recognized marital rape as a criminal offence and provides robust legal protection to married women against sexual violence by their husbands. While the initial steps toward

¹⁶ *R v. Clarke*, [1949] 2 All ER 448

¹⁷ *R v R* [1991] UKHL 12 <https://www.bailii.org/uk/cases/UKHL/1991/12.html>

¹⁸ See *People v. Liberta*, 64 N.Y.2d 152 (1984) (for US constitutional evolution across states).

criminalization were taken through amendments to the earlier Country Code (*Muluki Ain*) in 2002, these provisions have since been significantly strengthened. Under the current legal framework, specifically the **National Penal (Code) Act, 2074 (2017)**, a husband can be prosecuted for engaging in sexual intercourse with his wife without her consent¹⁹. By enshrining this in its modern penal code, Nepal acknowledges that marriage does not imply permanent or irrevocable consent, and that every individual possesses the right to bodily autonomy, dignity, and sexual integrity, irrespective of their marital status.

D. Australia

Australia recognizes marital rape as a criminal offense and does not provide any exemption for husbands. Traditionally, the common law doctrine assumed that marriage implied a wife's continuous consent to sexual intercourse. However, this view was gradually abolished through judicial decisions and legislative reforms across Australian states and territories. This legislative shift culminated in the landmark decision of the High Court of Australia in *R v L* (1991)²⁰, where the apex court formally rejected the common law marital immunity doctrine. By the early 1990s, all Australian jurisdictions had completely criminalized marital rape²¹. Under current law, sexual intercourse without consent constitutes rape regardless of the marital relationship between the parties. Australia's legal framework emphasizes the principles of consent, equality, bodily autonomy, and protection from sexual violence within marriage.

E. South Africa

South Africa has adopted a progressive approach towards marital rape. Under common law, a husband could not be held liable for raping his wife due to the presumption of continuous consent within marriage. However, this exemption was abolished through legal reforms, and marital rape is now recognized as a criminal offence²². A husband can be prosecuted for engaging in sexual intercourse with his wife without her consent. The law is based on the principles of equality, human dignity, bodily integrity, and freedom from violence, recognizing that marriage does not imply irrevocable consent.

¹⁹ The National Penal (Code) Act, 2074 (2017), Section 219 (Nepal) (consolidating and superseding previous amendments to the *Muluki Ain* of 2002 regarding spousal sexual violence).

²⁰ *R v L* [1991] HCA 48; (1991) 174 CLR 379 (3 December 1991)

²¹ Criminal Law Consolidation (Rape) Amendment Act 1976 (South Australia)

²² Prevention of Family Violence Act 133 of 1993 (South Africa).

F. Canada

Prior to 1983, marital rape was not recognized as a criminal offence in Canada due to the marital rape exemption. However, growing feminist movements during the 1970s and 1980s demanded stronger legal protection for victims of sexual violence and the abolition of marital immunity. In response, Parliament enacted Bill C-127 in 1983, which removed the marital rape exemption from the Criminal Code and recognized sexual assault within marriage as a criminal offence. Under the present law, a spouse can be prosecuted for sexual assault in the same manner as any other offender. Canada's legal framework is based on the principles of consent, equality, bodily autonomy, and human dignity, recognizing that marriage does not imply permanent or irrevocable consent to sexual intercourse.

G. India

In India, the issue of marital rape remains one of the most debated aspects of criminal law. Section 63 of the Bharatiya Nyaya Sanhita, 2023 (formerly Exception 2 to Section 375 of the Indian Penal Code) provides an exception for sexual intercourse by a husband with his wife, thereby excluding such acts from the ambit of rape²³. This exception has been widely criticized for being inconsistent with the constitutional principles of equality, dignity, privacy, and bodily autonomy.

In *Independent Thought v. Union of India* (2017), the Supreme Court held that sexual intercourse with a wife below eighteen years of age amounts to rape, thereby restricting the scope of the marital rape exception²⁴. In *RIT Foundation v. Union of India* (2022), the Delhi High Court examined the constitutional validity of the marital rape exception and delivered a split verdict²⁵. While one judge held that the exception violated the fundamental rights of married women, the other upheld its validity, leaving the issue unresolved and underscoring the need for a final determination by the Supreme Court. Unlike several countries such as England, Canada, and South Africa, India continues to retain the marital rape exception, making it a subject of ongoing legal reform and discussion.

Marital rape has been explicitly criminalised in numerous jurisdictions worldwide. It is

²³ Bharatiya Nyaya Sanhita, 2023, section 63 (Exception 2)

²⁴ *Independent Thought v. Union of India* (AIR 2017 SC 4904)

²⁵ *RIT Foundation v. UOI* 2022 SCC OnLine Del 1404

recognised as an offence in all states of the United States, several Australian states, and countries such as New Zealand, Canada, Israel, France, Sweden, Denmark, and Norway. Notably, the United Kingdom abolished the marital rape exemption in 1991, marking a significant shift in common law traditions.

Globally, while a substantial number of countries have criminalised marital rape either explicitly or under general sexual offence provisions, some nations continue to provide immunity, reflecting the ongoing divergence in legal approaches

ARGUMENTS SURROUNDING CRIMINALIZATION OF MARITAL RAPE

Arguments in Favor of criminalization

1. Violation of Bodily Autonomy and Consent

Criminalizing marital rape is essential to uphold the fundamental principle that every individual has the right to bodily autonomy and sexual consent, irrespective of marital status. Marriage cannot be construed as irrevocable consent to sexual relations.

2. Judicial Recognition of Sexual Autonomy

The Supreme Court, in *Navtej Singh Johar v. Union of India* (2018)²⁶, affirmed the importance of sexual autonomy as a facet of personal liberty. This recognition logically extends to marital relationships, where consent must remain central.

3. Recognition in Case Law

In *Independent Thought v. Union of India* (2017)²⁷, the Supreme Court acknowledged marital rape in the context of minor wives, thereby reinforcing the principle that marriage does not override the necessity of consent.

4. Equality Before Law

The marital rape exception creates an unreasonable classification by granting immunity to husbands, thereby violating Articles 14, 15, and 21 of the Constitution. Criminalisation would

²⁶ AIR 2018 SC (CRI) 1169

²⁷ INDEPENDENT THOUGHT. Vs. UNION OF INDIA AND ANR. (AIR 2017 SC 4904)

ensure equal protection of law for married and unmarried women alike.

5. Consistency with Child Protection Laws

Laws such as the Protection of Children from Sexual Offences (POCSO) Act criminalise non-consensual sexual acts irrespective of marital status in the case of minors. Extending similar protection to adult married women would ensure legal consistency.

6. Addressing Legal Inconsistencies

Despite progressive reforms such as the decriminalization of homosexuality, the retention of marital rape immunity under the Bharatiya Nyaya Sanhita (BNS) reflects a contradiction within the legal framework.

Arguments Against criminalization

1. Potential Impact on Marital Stability

Critics argue that criminalizing marital rape may adversely affect the institution of marriage by increasing litigation and potentially destabilising familial relationships.

2. Adequacy of Existing Legal Framework

It is contended that existing laws, such as those addressing domestic violence and cruelty, already provide remedies against sexual abuse within marriage, making separate criminalisation unnecessary.

3. Risk of Misuse

Concerns have been raised regarding the possible misuse of such provisions, particularly in the context of matrimonial disputes, divorce proceedings, or custody battles.

4. Socio-Cultural Considerations

In many societies, marriage is traditionally perceived as encompassing sexual relations, making the legal recognition of marital rape a complex and sensitive issue.

5. Legislative Prerogative

The government has maintained that the issue falls within the domain of the legislature rather than the judiciary, emphasizing the need for democratic deliberation before enacting such reforms.

INDIAN JUDICIARY AND THE EMERGING DISCOURSE ON MARITAL RAPE

(i) **RIT Foundation v. Union of India (2022)**: This case marked an important development in the debate on marital rape. Justice Rajiv Shakdher held that the marital rape exception violates Articles 14, 15, 19(1)(a), and 21 of the Constitution as it denies married women equal protection and bodily autonomy. However, Justice C. Hari Shankar disagreed and upheld the validity of the exception, resulting in a split verdict. The case highlighted the continuing constitutional debate surrounding marital rape²⁸.

(ii) **X v. Principal Secretary, Health and Family Welfare Department, Government of NCT of Delhi (2022)**: In this path-breaking judgment, the Supreme Court transcended the institution of marriage as a source of rights and held that unmarried or single women are equally entitled to safe abortion services up to 24 weeks. Crucially, the Court also ruled that for the purpose of the MTP Act, the term "sexual assault or rape" under Rule 3B (a) must include a husband's act of sexual assault or rape committed on his wife.²⁹ By doing so, the apex court legally recognized the existence of marital rape within the reproductive autonomy framework, ensuring that both married and unmarried survivors face no discrimination

(iii) **Nimeshbhai Bharatbhai Desai v. State of Gujarat (2018)**: Nimeshbhai Bharatbhai Desai V State of Gujarat the court states that the married women can't proceed against his lawful husband for the offence of rape. Still, here the court stressed that now we need to throw the concept of "implied consent" into the concept of marriage, the law must uphold the status of bodily autonomy and integrity of every women irrespective of her marital status³⁰.

(iv) **State of Maharashtra v. Madhukar Narayanb Mardikar (1991)**: The Supreme Court held that every woman, irrespective of her character or social status, has a right to privacy and

²⁸ RIT Foundation v. UOI 2022 SCC OnLine Del 1404

²⁹ X v. Principal Secretary, Health and Family Welfare Department, Government of NCT of Delhi, (2023) 9 SCC 433 : 2022 SCC OnLine SC 1321.

³⁰ Nimeshbhai Bharat Bhai Desai vs. State of Gujarat, 2018, Guj 732

bodily integrity. The Court recognized a woman's right to refuse sexual relations and affirmed that her consent remains an essential consideration under the law.

Statutory and Legislative Position on Marital Rape

Apart from judicial developments, legislative efforts have also been made towards the criminalization of marital rape. In 2018, Member of Parliament Shashi Tharoor introduced the *Women's Sexual, Reproductive and Menstrual Rights Bill, 2018*. The Bill proposed the removal of the marital rape exception and sought to strengthen the concept of consent in sexual offences. It further clarified that factors such as a woman's religion, caste, profession, clothing, social background, personal opinions, or past sexual conduct should not be used to presume consent. Although the Bill was not enacted, it contributed significantly to the ongoing discussion on recognizing marital rape as a criminal offence in India.

LEGAL GAPS IN INDIAN LAW ON MARITAL RAPE

Despite significant developments in the protection of women's rights, Indian criminal law continues to exhibit substantial structural gaps in addressing marital rape. The marital rape exception, retained under Section 63 of the Bharatiya Nyaya Sanhita (BNS), 2023 (formerly Exception 2 to Section 375 of the Indian Penal Code), excludes non-consensual sexual intercourse by a husband with his adult wife from the ambit of rape. The marital rape exception has been the subject of significant legal and constitutional scrutiny, as it appears to conflict with the fundamental rights of equality, dignity, privacy, and bodily autonomy guaranteed to women.

Although the Protection of Women from Domestic Violence Act, 2005 provides civil remedies to women facing domestic abuse, it does not specifically criminalize marital rape. Consequently, married women subjected to non-consensual sexual intercourse lack an effective criminal remedy equivalent to that available to unmarried women, rendering civil protections inadequate to address substantive penal offenses.

Several law reform bodies have consistently recommended the removal of this exemption. The 172nd Report of the Law Commission of India recommended that the marital relationship should not serve as a statutory defense against charges of sexual violence³¹. Similarly, the

³¹ Law Commission of India, 172nd Report on Review of Rape Laws, (March, 2000)

Justice J.S. Verma Committee (2013), constituted in the wake of the 2012 Delhi gang rape case, strongly recommended the criminalization of marital rape, emphasizing that marriage cannot be legally regarded as an irrevocable or perpetual consent to sexual intercourse.³²

Another significant statutory contradiction previously existed regarding the age of consent. While modern protective legislations—such as the Prohibition of Child Marriage Act, 2006, the Protection of Children from Sexual Offences Act, 2012 (POCSO), and the Juvenile Justice Act, 2015—uniformly define a child as any person below eighteen years of age, the penal exception historically permitted sexual intercourse with a married minor above fifteen years of age. This contradiction was judicially confronted in *Independent Thought v. Union of India* (2017), where the Supreme Court read down the exception and held that sexual intercourse with a married minor below eighteen years of age constitutes rape³³.

Judicial developments have further highlighted the inadequacies of the existing legal framework. In *Hrishikesh Sahoo v. State of Karnataka* (2022), the Karnataka High Court observed that the marital rape exception cannot be interpreted as an absolute license to commit sexual violence within marriage. The Court remarked that “rape is rape,” irrespective of the relationship between the parties. Although the operation of the judgment was subsequently stayed, the decision significantly contributed to the ongoing debate on marital rape.³⁴

Therefore, the continued existence of the marital rape exception creates a clear gap in Indian criminal law. While constitutional principles, judicial observations, and expert committee recommendations increasingly support recognition of marital rape, legislative reform in this area remains pending.

CONCLUSION

The marital rape exception in Indian law continues to create a serious gap in the protection of women’s rights. By presuming consent within marriage, the law fails to acknowledge a woman’s autonomy and control over her own body. This distinction between married and unmarried women results in unequal legal protection and conflicts with constitutional

³² Government of India, Report of the Committee on Amendments to Criminal Law (Justice J.S. Verma Committee), (January 23, 2013)

³³ *Independent Thought v. Union of India* (AIR 2017 SC 4904)

³⁴ *Hrishikesh Sahoo v. State of Karnataka* (2022), SLP(Cr.) 4063-4064 of 2022

principles of equality, dignity, and personal liberty.

Judicial observations and expert recommendations have repeatedly affirmed that marriage cannot be treated as irrevocable consent to sexual relations. Despite this, legislative inaction reflects the persistence of deeply rooted patriarchal norms within the legal framework.

Revisiting and removing the marital rape exception is essential to ensure that consent remains central to all relationships. Recognizing marital rape as a criminal offence is necessary to uphold justice, protect fundamental rights, and promote genuine gender equality in India.