MARITAL RAPE IN INDIA: A SOCIO-LEGAL ANALYSIS OF THE MARITAL RAPE EXCEPTION AND CONSTITUTIONAL DEBATE

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ABSTRACT

Marital rape refers to sexual intercourse or sexual acts imposed by one spouse upon the other without consent. In India, this issue remains an important subject of legal and constitutional debate because the Bharatiya Nyaya Sanhita, 2023 (BNS) retains an exception to the offence of rape for sexual acts committed by a man with his own wife, provided that the wife is not below eighteen years of age. This raises important questions about women's bodily autonomy, dignity, equality and the right to personal liberty. This research paper examines the legal position of marital rape in India, the historical development of the marital rape exception and the limitations of the existing legal remedies. It analyses the relevant provisions of the BNS, the Protection of Women from Domestic Violence Act, 2005, and other applicable laws. It also examines important judicial decisions, including *Independent Thought v. Union of India and RIT Foundation v. Union of India,* to understand the judicial approach towards the marital rape exception and its constitutional implications.

The study also considers the psychological and social consequences of marital rape, the difficulties survivors face when reporting abuse and the legal approaches adopted by countries that have criminalised marital rape. Particular attention is given to the constitutional principles of equality under Article 14 and life and personal liberty under Article 21 of the Constitution of India. The paper adopts a doctrinal research methodology based on legislation, judicial decisions, committee reports, research articles and other secondary sources. It emphasises the need to critically reconsider the marital rape exception, strengthen existing legal remedies, improve survivor support systems and promote awareness about consent within marriage. In conclusion, this paper aims to highlight that marital status should not prevent meaningful consideration of a person's right to bodily autonomy, dignity and legal protection.

Keywords: Marital rape, consent, Bharatiya Nyaya Sanhita, Article 14, Article 21, bodily autonomy, domestic violence, constitutional rights

1.INTRODUCTION

Marriage is both a legal relationship and an important social institution. However, being married does not take away the individual identity of either spouse. This becomes particularly important when the issue of sexual consent arises within marriage. Marital rape, also referred to as spousal rape, generally means sexual intercourse or another sexual act between spouses without the consent of one spouse. The central issue is therefore consent. Although marriage establishes a legal relationship between two people, it also raises a broader question: "Should marriage itself change the legal meaning of consent?"

Indian criminal law has historically treated sexual intercourse within marriage differently from sexual intercourse outside marriage. The definition of rape codified in Section 375 of Indian Penal Code includes all forms of sexual assault involving nonconsensual intercourse with a woman. However, Exception 2 to Section 375 exempts unwilling sexual intercourse between a husband and a wife over fifteen years of age from Section 375's definition of "rape" and thus immunizes such acts from prosecution. As per current law, a wife is presumed to deliver perpetual consent to have sex with her husband after entering into marital relations. While unwilling sexual contact between a husband and a wife is recognized as a criminal offense in almost every country of the world, India is one of the thirty-six countries that still have not criminalized marital rape. Under the present criminal law, Exception 2 of Section 63 of the Bharatiya Nyaya Sanhita, 2023 creates an exception for sexual intercourse or sexual acts by a man with his own wife where the wife is not under eighteen years of age. Therefore, the marital relationship continues to affect the application of the general offence of rape.

2. RESEARCH PROBLEM

Indian criminal law recognises the importance of consent in determining whether sexual intercourse amounts to rape. However, Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita, 2023, excludes sexual intercourse or sexual acts by a man with his own wife from the definition of rape when the wife is eighteen years of age or older. Although married women may seek remedies under laws relating to domestic violence, cruelty and matrimonial disputes, these remedies do not generally recognise non-consensual intercourse by an adult husband living with his wife as rape under the ordinary rape provision.

This creates confusion and raises an important question: should marital status determine the

criminal-law consequences of non-consensual sexual intercourse? The issue also raises concerns regarding equality before the law under Article 14 and personal liberty and dignity under Article 21 of the Constitution. Therefore, this research examines the legal basis of the marital rape exception, the adequacy of existing remedies and the constitutional arguments for and against its removal.

3. OBJECTIVES OF THE STUDY

The objectives of this research are:

1. To understand the meaning and historical development of marital rape.
2. To trace the development of the marital rape exception in Indian criminal law.
3. To examine the present legal position under the Bharatiya Nyaya Sanhita, 2023.
4. To examine constitutional questions involving equality, dignity, privacy and bodily autonomy.

4. RESEARCH METHODOLOGY

This research follows a "doctrinal legal research methodology". The study primarily relies upon legislation, judicial decisions, government reports and academic literature. The main legal sources include the Constitution of India, the Bharatiya Nyaya Sanhita, 2023, the Protection of Women from Domestic Violence Act, 2005 and relevant judicial decisions. Important cases examined includes *Independent Thought v. Union of India* (2017), *RIT Foundation v. Union of India* and *R v. R*. The study also considers the Justice J.S. Verma Committee Report and the Law Commission of India's 172nd Report. Secondary sources include academic articles and scholarly discussions relating to marital rape, consent, bodily autonomy, domestic violence and constitutional rights. Health-related research concerning the effects of marital sexual violence is also considered. The research is primarily "descriptive and analytical". It examines the development of the law and the arguments surrounding the marital rape exception. It does not involve interviews, surveys or other empirical fieldwork.

5. LITERATURE REVIEW

Agarwal, Abdalla and Cohen (2022), in their study *"Marital Rape and Its Impact on the Mental*

Health of Women in India: A Systematic Review," examined eleven studies and found associations between marital rape and adverse mental-health outcomes, including depression and post-traumatic stress disorder. The authors highlighted the need for further research and better support systems for survivors. The 172nd Report of the Law Commission of India (2000) examined the law relating to rape but did not recommend removing the marital rape exception. In contrast, the Justice J.S. Verma Committee Report (2013) recommended removing the exception, emphasising the importance of consent irrespective of the relationship between the parties.

In *Independent Thought v. Union of India* (2017), the Supreme Court read down the marital rape exception concerning wives below eighteen years of age. However, the judgment did not remove the exception for adult wives. In *RIT Foundation v. Union of India* (2022), the Delhi High Court delivered a split verdict on the constitutionality of the marital rape exception. Justice Rajiv Shakdher considered it unconstitutional, while Justice C. Hari Shankar upheld it, highlighting the continuing constitutional debate surrounding the issue.

The literature indicates that marital rape involves legal, constitutional, psychological and social concerns. However, the continuing exclusion of non-consensual sexual acts within marriage from the general rape provision for adult wives raises questions about equality, bodily autonomy and the adequacy of existing remedies. This research therefore examines the present legal framework, judicial approaches and possible reforms in India.

6. HISTORICAL BACKGROUND OF MARITAL RAPE

The historical development of the marital rape exception is commonly associated with the common-law doctrine of *coverture* and the writings of Sir Matthew Hale. In his work *History of the Pleas of the Crown* (1736), Hale expressed the view that a husband could not be guilty of raping his lawful wife because marriage was treated as a form of continuing consent that the wife could not withdraw. This reflected the legal and social conditions of that period, when married women had limited independent legal rights. The doctrine of coverture similarly reflected the traditional understanding that a wife's legal identity and rights were substantially absorbed into those of her husband. Another historical justification for marital rape immunity is associated with William Blackstone, who discussed the legal consequences of marriage under the common law. These traditional views treated the marital relationship as a legal basis for exempting a husband from prosecution for rape against his wife. However, such reasoning

came under scrutiny as legal systems increasingly recognised individual rights, bodily autonomy and the importance of consent.

A major development took place in England in *R v. R* (1991), when the House of Lords rejected the proposition that marriage created irrevocable consent to sexual intercourse. The Court recognised that a husband could be held criminally responsible for raping or attempting to rape his wife. This decision marked an important shift towards recognising that marriage does not take away an individuals right to refuse sexual intercourse and that consent may be withdrawn at any time. It also reflected the changing understanding of marriage as a relationship between equal partners rather than one in which a wife was legally subordinate to her husband. The historical development of the marital rape exception is relevant to India because the Indian Penal Code, 1860, also contained an exception excluding certain acts of sexual intercourse by a husband with his wife from the definition of rape. Although the IPC has been replaced by the Bharatiya Nyaya Sanhita, 2023, the marital rape exception continues in modified form under Exception 2 to Section 63, where the wife is eighteen years of age or older. Thus, despite changes in the law and the growing recognition of consent and bodily autonomy, the general criminal-law treatment of marital rape remains a subject of legal and constitutional debate in India.

7. EVOLUTION OF THE MARITAL RAPE EXCEPTION IN INDIA

1. Origin under the Indian Penal Code, 1860

The marital rape exception originated under the colonial-era Indian Penal Code (IPC), 1860. Section 375 defined rape but provided an exception for sexual intercourse by a man with his own wife, provided she was above the prescribed age. This exception was based on the historical assumption that marriage implied consent to sexual intercourse. As a result, non-consensual sexual intercourse within marriage was treated differently from similar conduct outside marriage.

2. Law Commission of India, 172nd Report (2000)

The Law Commission of India examined rape-law reforms in its 172nd Report, *Review of Rape Laws* (2000). However, it did not recommend the complete removal of the marital rape exception. This reflected the continuing disagreement over whether non-consensual sexual

intercourse within marriage should be treated in the same manner as rape outside marriage.

3. Justice J.S. Verma Committee, 2013

Following the 2012 Delhi gang rape, the Justice J.S. Verma Committee was constituted to recommend reforms to criminal law relating to sexual violence. In its report dated 23 January 2013, the Committee recommended removing the marital rape exception. It emphasised that marriage should not be considered irrevocable consent to sexual activity and that the relationship between the accused and the complainant should not determine whether consent existed. However, this recommendation was not incorporated into the law.

4. Criminal Law (Amendment) Act, 2013

The Criminal Law (Amendment) Act, 2013 significantly amended the law relating to sexual offences, including the definition of rape under Section 375 IPC. Nevertheless, the Act retained the marital rape exception for adult wives, although the age threshold within the exception was raised from thirteen to fifteen years. Consequently, the broader distinction between married and unmarried women continued.

5. Independent Thought v. Union of India (2017)

In *Independent Thought v. Union of India*, (2017) 10 SCC 800, the Supreme Court read down Exception 2 to Section 375 IPC insofar as it applied to wives below eighteen years of age. The Court held that the exception could not protect sexual intercourse with a wife below eighteen merely because she was married. This was an important development in protecting minor wives. However, the Court did not abolish the exception for adult wives, and the question of criminalising marital rape involving adult women remained unresolved.

6. Jaya Jaitly-led Task Force, 2020

In 2020, a task force led by Jaya Jaitly was constituted to examine matters relating to the age of marriage of women and their connection with women's health, education, nutrition and empowerment. It recommended raising the minimum age of marriage for women from eighteen to twenty-one years. However, this task force did not directly recommend criminalising marital rape or removing the marital rape exception. Its relevance is therefore contextual, relating to the wider discussion of women's rights and equality, rather than being a direct stage in the legal

evolution of the exception.

7. RIT Foundation v. Union of India (2022)

In *RIT Foundation v. Union of India*, 2022:DHC:1825-DB, the Delhi High Court considered constitutional challenges to the marital rape exception. On 11 May 2022, the Court delivered a split verdict. Justice Rajiv Shakdher held the exception unconstitutional, whereas Justice C. Hari Shankar upheld its constitutionality. As the judges disagreed, the decision did not strike down the exception. The case brought questions under Articles 14 and 21, including equality, dignity and bodily autonomy, into sharper focus.

8. Bharatiya Nyaya Sanhita, 2023

The Bharatiya Nyaya Sanhita (BNS), 2023 replaced the IPC with effect from 1 July 2024. Section 63 defines rape, while Exception 2 continues to exclude sexual intercourse or sexual acts by a man with his own wife, where the wife is not under eighteen years of age, from the definition of rape. Thus, the BNS retained the marital rape exception for adult wives, while setting the age threshold at eighteen. The retention of the exception has continued the debate over equal protection, consent and bodily autonomy within marriage.

9. Continuing Constitutional Debate

The marital rape exception remains a subject of constitutional and legal debate. Those who are in favour in its removal argue that marriage should not amount to permanent consent and that married women should receive equal protection against non-consensual sexual intercourse. Those opposing its removal have raised concerns about the possible misuse of criminal law, evidentiary difficulties and the consequences for marriage and family relationships. The central question still remains that is whether these concerns justify treating nonconsensual sexual intercourse within marriage differently from such conduct outside marriage.

8. PRESENT LEGAL POSITION IN INDIA

Section 63 of the BNS defines rape and identifies circumstances in which sexual penetration constitutes rape, including acts committed without a woman's consent. Exception 2 provides that sexual intercourse or sexual acts by a man with his own wife, where the wife is not under eighteen years of age, do not constitute rape. Therefore, the marital relationship continues to

have a specific effect upon the general offence of rape. However, this does not mean that all sexual misconduct within marriage is outside criminal law. Section 67 of the BNS deals with "sexual intercourse by a husband upon his wife during separation". It applies where a husband has sexual intercourse with his wife, who is living separately, without her consent. The offence carries imprisonment of not less than two years, which may extend to seven years, along with fine.

Section 67 is significant because it shows that marital status does not remove all criminal consequences of non-consensual sexual intercourse. However, it applies only to the circumstances specified in the provision and does not remove Exception 2 to Section 63. The present position is therefore more complicated than saying either that marital rape is completely legal or that it is fully criminalised. The general rape provision contains a marital exception for an adult wife, while Section 67 creates a separate offence in cases involving separation.

In September 2026, a three-judge Bench headed by Chief Justice Surya Kant and comprising Justice Joymalya Bagchi and Justice V. Mohana considered the petitions challenging the marital rape exception. The Court directed that the matters be taken up for final hearing after three weeks. During the proceedings, questions were raised about prosecution of a husband for rape while the statutory exception remains in force. The proceedings have also involved questions of individual autonomy within marriage and the extent of judicial intervention in criminal law. The Union Government has maintained that criminalisation of marital rape is a matter for the legislature. As of 29 September 2026, the Supreme Court has not delivered a final judgment striking down the adult marital rape exception. Exception 2 to Section 63 of the BNS therefore continues to operate. The issue remains one of continuing constitutional and legislative debate rather than completed legal reform.

9. STATISTICAL DATA ON SPOUSAL VIOLENCE AND SEXUAL VIOLENCE IN INDIA

The National Family Health Survey-5 (NFHS-5), conducted between 2019 and 2021, reported that approximately 29.3% of ever-married women aged 18–49 in India had experienced spousal violence. This figure highlights the continuing prevalence of violence within marriage, although it includes physical and emotional violence as well as sexual violence. The survey further reported that approximately 82% of evermarried women aged 18–49 who had experienced sexual violence identified their current husband as one of the perpetrators. These

findings demonstrate the importance of examining violence within marriage and the adequacy of legal protection available to married women. More recent figures reported from the National Family Health Survey-6 indicate that 22.3% of ever-married women aged 18–49 had experienced spousal violence. Although this figure is lower than the NFHS-5 estimate, it still indicates that a substantial proportion of married women experience violence from their spouses. However, these figures should not be interpreted as the prevalence of marital rape alone, since spousal violence covers a broader category of abuse.

The problem becomes further more complicated due to underreporting of sexual violence. In *RIT Foundation v. Union of India* (2022), Justice Rajiv Shakdher referred to the issue of underreporting and observed that approximately 9.9 out of 10 cases of sexual assault went unreported. This figure should be understood as an observation made in the judgment, rather than as a direct statistical finding of NFHS-5. Underreporting makes it difficult to determine the full extent of sexual violence through official complaints and reported cases alone. These statistics provide important context for the debate surrounding the marital rape exception under Section 63, Exception 2 of the Bharatiya Nyaya Sanhita, 2023. Although the law provides other remedies for certain forms of abuse within marriage, non-consensual sexual intercourse by a husband with his adult wife generally remains excluded from the definition of rape under this exception. The data therefore raises an important question about whether the existing legal framework provides adequate protection against sexual violence within marriage and whether marital status should determine the scope of criminal-law protection.

10. EXISTING LEGAL REMEDIES AVAILABLE TO MARRIED WOMEN

The marital rape exception does not mean that married women have no legal remedies against sexual or domestic violence.

10.1 Protection of Women from Domestic Violence Act, 2005

The Protection of Women from Domestic Violence Act, 2005 recognises different forms of domestic violence, including “sexual abuse”. An aggrieved woman may seek protection orders, residence-related relief, monetary relief and other orders available under the Act. The legislation is important because it recognises that violence within a domestic relationship is a legal issue and not merely a private family matter. However, the Act has a different purpose and structure from the offence of rape. A protection order or monetary relief does not necessarily mean that the sexual act itself has been classified as rape.

10.2 Other Criminal Remedies

Depending upon the facts, other criminal provisions may apply to conduct occurring within marriage. For example, cruelty by a husband or his relatives may attract the relevant BNS provisions. Assault, causing hurt, intimidation and other offences may also apply where their legal ingredients are satisfied. The applicability of these provisions depends upon the precise facts and ingredients of each offence.

10.3 Matrimonial Remedies

Matrimonial law may provide remedies where the conduct of a spouse amounts to cruelty or otherwise satisfies the requirements of the applicable personal law. These remedies are separate from prosecution for rape.

11. WHY EXISTING LEGAL REMEDIES DO NOT COMPLETELY RESOLVE THE DEBATE

The existence of alternative remedies is an important part of the marital rape debate. A married woman may have access to domestic violence remedies, matrimonial relief and, depending upon the circumstances, other criminal provisions. However, these remedies address different legal wrongs and operate under different requirements .A domestic violence proceeding may result in a protection order or monetary relief. A matrimonial proceeding may address cruelty or breakdown of the marriage. A separate criminal provision may punish conduct that satisfies its own ingredients. None of these necessarily answers the narrower question of whether non-consensual sexual intercourse by an adult husband with his wife should itself be classified as rape. Therefore, the argument concerning existing remedies is not that they are useless or that married women have no protection. The question is whether those remedies provide a sufficiently specific response to nonconsensual sexual intercourse within marriage. At the same time, the existence of such remedies is relevant to arguments against criminalisation because it demonstrates that the law already provides several ways of addressing abuse within marriage.

12. ARGUMENTS AGAINST CRIMINALISING MARITAL RAPE IN INDIA

1. Protection of Marriage and the Possibility of Increased Matrimonial Litigation

One of the principal arguments against criminalising marital rape is that it may increase criminal litigation between spouses and further complicate matrimonial disputes. Opponents

argue that disagreements concerning sexual relations may arise due to disputes relating to divorce, maintenance, custody of children and separation. Introducing a separate criminal offence could expose spouses to lengthy criminal proceedings in addition to existing matrimonial litigation. This may result into increase in financial burdens, emotional stress and conflict within the family. The argument is that the law should carefully distinguish between situations requiring criminal prosecution and those that may be appropriately addressed through matrimonial remedies or counselling.

This argument may be discussed in connection with *Harvinder Kaur v. Harmander Singh Choudhry*, AIR 1984 Del 66, in which the Delhi High Court considered Section 9 of the Hindu Marriage Act, 1955, concerning restitution of conjugal rights and the preservation of marriage. The Delhi High Court held that the Constitution of India could not intervene in household matters as it would destroy the institution of marriage. The court also stated, "in the privacy of the home and married life neither Article 21 nor Article 14 of the Indian Constitution have any role to play". However, the case did not directly decide whether marital rape should be criminalised. Therefore, it should be used only to explain the broader legal discussion concerning marriage and matrimonial relationships, not as authority against criminalising marital rape.

2. Possibility of False Allegations and Damage to Reputation

Another argument raised by the individuals who are in opposition of this matter is that, the possibility that allegations of marital rape may be made falsely or used strategically during matrimonial disputes. For example, an allegation might arise during proceedings concerning divorce, maintenance or child custody, leading to concerns that criminal proceedings could be used to put pressure on the other spouse. A criminal accusation might negatively affect an individual social status employment and family relationship even before the allegation are judicially examined. Opponents therefore argue that any law addressing marital rape must contain adequate safeguards to prevent arbitrary action and ensure a fair investigation however the possibility of false allegations must be distinguished from the existence of genuine complaints the argument cannot establish that marital rape allegation are generally false nor can it justify denying legal protection to victims the appropriate concern is how to ensure that every complaint is investigated fairly that the accused receives due process and that knowingly false allegations are dealt with under applicable law.

3. Evidentiary Challenges in Establishing Non-Consent

A further argument concerns the difficulty of proving the circumstances of an alleged offence that may occur within the privacy of a marriage. Opponents contend that sexual acts between spouses may take place without independent witnesses, making the complainant's testimony and surrounding evidence particularly important. Questions may arise regarding the circumstances of the incident, the existence or absence of consent, delays in reporting, medical findings and electronic communications. These concerns lead opponents to argue that clear evidentiary standards and appropriate investigative procedures would be necessary if marital rape were criminalised .In Gorakhnath Sharma v. State of Chhattisgarh (CRA No. 891/2019, decided on 10 February 2025), the Chhattisgarh High Court set aside the accused's convictions under Sections 376, 377 and 304 IPC and acquitted him. The case is relevant to the extent that it deals with the operation of the marital rape exception in the prosecution of sexual offences within marriage. However, it was a case-specific decision under the IPC, not a ruling on the constitutional validity of the current BNS exception.

4. Availability of Existing Legal Remedies

Opponents argue that Indian law already provides several remedies for women experiencing violence, cruelty, sexual abuse or harassment within marriage. For instance, the Protection of Women from Domestic Violence Act, 2005, recognises sexual abuse within the statutory definition of domestic violence and provides remedies such as protection orders, residence orders, monetary relief and compensation, subject to the requirements of the Act. Sections 85 and 86 of the Bharatiya Nyaya Sanhita, 2023 (BNS), address cruelty by a husband or his relatives. Under the earlier Indian Penal Code, 1860 (IPC), cruelty by a husband or his relatives was addressed under Section 498A. In addition, Section 67 of the BNS criminalises certain non-consensual sexual intercourse by a husband with his wife when they are living separately.

Matrimonial remedies are also available under personal laws. For example, Section 13(1)(ia) of the Hindu Marriage Act, 1955, recognises cruelty as a ground for divorce, while Sections 24 and 25 provide for maintenance in specified circumstances. On this basis, opponents argue that existing laws should be implemented effectively and that additional criminal provisions may not be necessary. Nevertheless, these remedies have different purposes and legal consequences. They do not generally classify non-consensual sexual intercourse by an adult husband living with his wife as rape under Section 63 of the BNS. This distinction is important: the existence

of remedies for domestic violence or cruelty does not necessarily answer whether the law should separately criminalise non-consensual sexual intercourse within marriage.

5. Separation of Powers: The Role of Parliament in Criminal-Law Reform

Another argument is that the criminalisation of marital rape requires a comprehensive legislative framework and should primarily be addressed by Parliament. Opponents argue that Parliament can consult legal experts, women's organisations, medical professionals and other stakeholders before deciding the scope of the offence, the applicable safeguards and the consequences of prosecution. They argue that such a complex change should take account of the practical realities of investigation, evidence, criminal procedure and existing matrimonial laws.

This issue arose in *RIT Foundation v. Union of India*, W.P. (C) No. 284/2015 and connected matters, decided by the Delhi High Court on 11 May 2022. The Division Bench delivered a split verdict. Justice C. Hari Shankar upheld the marital rape exception, while Justice Rajiv Shakdher held that it was unconstitutional. The opinions differed on the constitutional validity of the exception and the role of the legislature. The case therefore illustrates the legal disagreement surrounding the issue; it must not be described as a unanimous ruling that marital rape should remain exempt from criminal law .Although the legislature has an important role in framing criminal offences, the separation of powers argument does not prevent courts from reviewing legislation for constitutional validity. The issue is therefore not simply whether Parliament or the judiciary should act, but how legislative reform and constitutional review should operate within their respective roles.

6. Financial Dependence, Social Pressure and the Risk of Retaliation

Opponents of criminalisation also point to the practical difficulties women may face when they depend financially on their husbands or live in families where social pressure plays a significant role. A woman who reports sexual abuse may face threats, pressure to withdraw her complaint, loss of financial support, difficulties in finding housing, or social stigma. In some cases, reporting the abuse may even expose her to further violence. These risks are particularly serious for women who have limited access to legal assistance or cannot afford alternative accommodation.

Some opponents argue that criminalising marital rape without providing adequate support systems could make matters more difficult for women who want to report abuse but fear the consequences of initiating legal proceedings. These concerns are valid and should not be overlooked. However, they should not be used as a reason to deny women legal protection. Instead, they highlight the need for effective safeguards, including legal aid, protection against retaliation, safe accommodation, financial assistance and proper investigation of complaints. The risk of retaliation must be addressed through appropriate support mechanisms rather than treated as a justification for withholding criminal-law protection.

7. Cultural Relativism and Traditional Understandings of Marriage

Another argument against criminalisation is based on the traditional social and cultural significance of marriage in India. Some opponents argue that marriage is not simply a private relationship between two individuals but a social institution shaped by mutual responsibilities, family expectations and, in certain communities, religious customs. From this perspective, changes to the legal treatment of sexual relations within marriage should take these social realities into account and be introduced only after considering their wider implications.

This argument is closely linked to cultural relativism, which emphasises the importance of understanding social practices within their cultural context. However, Indian society is diverse, and different communities have different understandings of marriage. There is no single cultural view that represents the experiences and beliefs of all married couples. Moreover, cultural traditions are not fixed and can change over time.

Therefore, while cultural considerations may be relevant when framing and implementing legislation, they cannot, on their own, justify denying a person the right to refuse sexual intercourse within marriage. The issue must also be considered in light of constitutional principles, particularly equality**,** dignity and personal liberty. Respect for cultural traditions should not come at the expense of an individual's fundamental rights.

8. The Argument That Marriage Implies Consent

A traditional justification for the marital rape exception is that marriage involves an expectation of sexual intimacy between spouses. According to this view, the marital relationship is different from a relationship between strangers, and the law should recognise the expectations associated

with married life. Historically, this reasoning was used to treat marriage as a form of continuing consent to sexual intercourse .However, this argument is controversial because consent to marriage is not necessarily consent to every sexual act. Marriage does not automatically establish consent on every occasion, and the existence of a marital relationship does not mean that a spouse cannot refuse sexual intercourse. The English decision in *R v. R* [1991] UKHL 12 rejected the historical rule that a husband could not be guilty of raping his wife merely because they were married. Although this is a decision from another jurisdiction, it demonstrates how the traditional impliedconsent argument has been challenged in the development of rape law. Consequently, the implied-consent argument may be included as a historical and legal justification offered by opponents of criminalisation, but it should not be stated as a settled principle that marriage amounts to permanent consent.

9. Concerns About Implementation and Overlap with Existing Offences

Opponents further argue that introducing a specific offence of marital rape would require careful coordination with existing provisions concerning domestic violence, cruelty, hurt, criminal intimidation and other forms of abuse. A single course of conduct may give rise to allegations under several provisions, creating questions about the framing of charges, investigation, evidence and the relationship between overlapping offences. Without clear drafting, opponents contend, investigators and courts could face uncertainty about which provisions apply and how proceedings should be conducted. However, overlap between offences is not unique to marital rape. The possibility of overlap does not, by itself, establish that an offence should not be recognised; it instead raises questions about how the law should be drafted and administered.

13. ARGUMENTS IN FAVOUR OF CRIMINALISING MARITAL RAPE IN INDIA

1. Marriage Does Not Mean Permanent Consent: Bodily Autonomy

Marriage is a relationship between two individuals and does not give a husband ownership over his wife's body. Consent to marriage cannot be treated as permanent consent to sexual intercourse, and a woman retains the right to refuse sexual activity even after marriage. Section 63, Exception 2, of the Bharatiya Nyaya Sanhita, 2023 (BNS), excludes sexual intercourse or sexual acts by a man with his wife, where she is not under eighteen years of age, from the definition of rape. The argument for criminalisation is that marital status should not override a

woman's bodily autonomy. In *Nimeshbhai Bharatbhai Desai v. State of Gujarat* (2018) SCC Online Gujarat 732 (Gujarat High Court), the Court discussed marital rape and criticised the assumption that marriage gives a husband unrestricted sexual rights over his wife. Similarly, the Justice J.S. Verma Committee Report (2013) recommended removing the marital rape exception and rejected the idea that marriage amounts to irrevocable consent. These authorities support the principle that consent must remain central to sexual relationships, although neither the Gujarat High Court judgment nor the Committee report itself abolished the exception.

2. Violation of Article 14: Right to Equality

Article 14 guarantees equality before the law and equal protection of the laws. The marital rape exception creates a distinction between married and unmarried women because non-consensual sexual intercourse may be treated differently depending on the marital relationship between the parties. The physical and psychological consequences of sexual violence do not become less serious because the victim is married to the accused. In, *RIT Foundation v. Union of India*, 2022:DHC:1825-DB (Delhi High Court), Justice Rajiv Shakdher held the marital rape exception unconstitutional, while Justice C. Hari Shankar disagreed, resulting in a split verdict. Justice Shakdher's opinion directly supports the argument that the exception discriminates against married women; however, the split verdict did not strike down the exception.

3. Violation of Article 21: Right to Life, Personal Liberty and Dignity

Article 21 protects life and personal liberty, which the Supreme Court has interpreted to include dignity, privacy and bodily integrity. Forced sexual intercourse may violate a woman's control over her body and cause physical injury, humiliation and psychological suffering. In *State of Karnataka v. Krishnappa*, (2000) 4 SCC 75, the Supreme Court described sexual violence as a dehumanising act and an unlawful intrusion into a woman's privacy and bodily integrity. In *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1, a nine-judge Bench recognised privacy as a fundamental right, including decisional autonomy in intimate matters. These principles support the argument that a married woman does not surrender her fundamental rights upon marriage. Although neither judgment directly invalidated the marital rape exception, both provide constitutional support for the argument that forced sexual intercourse within marriage should be examined through the principles of dignity, privacy and personal liberty. In *State of Maharashtra v. Madhukar Narayan Mardikar*, (1991) 1 SCC 57, the Supreme Court recognised that every woman is entitled to privacy and that her character or

personal circumstances do not deprive her of this right. The judgment supports the broader principle that a woman's dignity and privacy must be respected. Applied to the marital rape debate, this principle strengthens the argument that marriage should not automatically deprive a woman of bodily autonomy or protection against non-consensual sexual acts. However, the case did not directly decide the constitutionality of the marital rape exception. In *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, the Supreme Court recognised that sexual autonomy, privacy, dignity and personal choice are integral to the fundamental rights protected under Article 21 of the Constitution. Although the case concerned consensual same-sex relations and did not directly address marital rape, its recognition of individual sexual autonomy supports the argument that intimate sexual decisions should respect the free choice of every individual. Applied to the marital rape debate, this principle raises the question of whether marriage should diminish a woman's right to bodily autonomy and protection against non-consensual sexual acts. However, the judgment did not strike down the marital rape exception.

4. Protection from Domestic and Sexual Abuse

Sexual abuse within marriage may occur alongside physical violence, threats, coercion and other forms of domestic abuse. A woman may find it difficult to report such conduct because she lives with the accused, depends on him financially or fears retaliation and social stigma. Although the Protection of Women from Domestic Violence Act, 2005 recognises sexual abuse as a form of domestic violence and provides civil remedies, it does not itself criminalise every instance of marital rape under the ordinary rape provision. In *Hrishikesh Sahoo v. State of Karnataka*, W.P. No. 48367 of 2018 and connected matter, decided on 23 March 2022 (Karnataka High Court), the Court refused to quash rape proceedings against a husband merely by relying on the marital rape exception. The Supreme Court subsequently stayed the High Court's judgment in *Hrishikesh Sahoo v. State of Karnataka*, SLP (Crl.) Nos. 4063–4064 of 2022, order dated 19 July 2022. The High Court decision therefore supports the argument that allegations of sexual violence within marriage deserve judicial consideration, but it must not be presented as a final Supreme Court ruling. Criminalisation would recognise forced sexual intercourse as a serious offence rather than leaving victims to rely only on remedies for domestic violence or cruelty.

5. Mental Trauma and Psychological Harm

Marital rape can cause fear, anxiety, humiliation, loss of self-esteem and lasting psychological

distress. Repeated sexual coercion may also make a woman feel unsafe in her own home. The absence of visible physical injuries does not necessarily mean that sexual violence has not occurred or that the victim has suffered no harm. In *Bodhisattwa Gautam v. Subhra Chakraborty*, (1996) 1 SCC 490; AIR 1996 SC 922, the Supreme Court recognised rape as a violation of fundamental human rights and a serious infringement of a woman's right to life and dignity. The Court also recognised the relevance of compensation for victims of rape. This case supports the broader argument that rape affects more than physical safety and can violate a woman's dignity and fundamental rights. Although it did not decide the marital rape exception, its reasoning is relevant to the argument that the harm caused by non-consensual sexual intercourse should not be disregarded merely because the parties are married.

6. Unwanted Pregnancy and Reproductive Autonomy

Forced sexual intercourse may result in an unwanted pregnancy, which can create physical health risks, emotional distress and difficult reproductive decisions. A woman should retain the right to make decisions about her body and reproductive life after marriage. In *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1; AIR 2010 SC 235, the Supreme Court recognised reproductive choice as an aspect of personal liberty under Article 21 and emphasised a woman's bodily integrity and autonomy. Similarly, *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1, recognised decisional privacy in intimate matters, including sexuality and procreation. These cases do not directly decide whether marital rape should be criminalised, but their principles support the argument that marriage should not deprive a woman of control over intimate and reproductive decisions. Criminalisation would recognise the seriousness of sexual coercion and its possible consequences, including unwanted pregnancy.

7. The Marital Rape Exception Requires Constitutional Reconsideration

The history of the marital rape exception demonstrates that the law has gradually moved away from treating marriage as a sufficient reason to deny women protection against sexual offences. In *Independent Thought v. Union of India*, (2017) 10 SCC 800; AIR 2017 SC 4904, the Supreme Court read down Exception 2 to Section 375 of the IPC so that sexual intercourse by a man with his wife, where she was below eighteen years of age, would constitute rape. The Court recognised that the distinction between married and unmarried girls below eighteen lacked a constitutionally acceptable justification. However, the Court expressly did not decide

the question of marital rape involving adult wives. The decision is relevant because it demonstrates that the marital relationship cannot automatically override legal protection against sexual violence. Supporters of criminalisation argue that the constitutional reasoning should also prompt reconsideration of the exception applicable to adult wives. The Justice J.S. Verma Committee Report (2013) similarly recommended removing the exception, emphasising that marriage should not be treated as irrevocable consent to sexual intercourse.

8. Misuse Concerns Can Be Addressed Through Legal Safeguards

One argument against criminalisation is that allegations may be misused during matrimonial disputes or may damage the reputation of an innocent person. However, the possibility of misuse does not, by itself, justify excluding an entire category of victims from the protection of criminal law. If marital rape is criminalised, allegations would still have to be investigated and adjudicated according to the applicable rules of criminal procedure and evidence, and guilt would have to be established beyond reasonable doubt. Courts can scrutinise the credibility of evidence and distinguish genuine allegations from deliberately false ones where the evidence establishes this. The argument in favour of criminalisation is therefore not that misuse is impossible, but that it should be addressed through fair investigation, judicial scrutiny and appropriate legal safeguards rather than blanket immunity for husbands. This is a general criminal-law argument, not a proposition established by any one of the above marital rape judgments.

9. Marriage Should Not Place Anyone Above the Law

The marital rape exception gives husbands special treatment in relation to certain non-consensual sexual acts against their adult wives. Removing the exception would reinforce the principle that consent, rather than marital status, should determine the legal treatment of sexual intercourse. In *State of Karnataka v. Krishnappa*, (2000) 4 SCC 75, the Supreme Court emphasised the serious nature of sexual violence and its impact on a woman's privacy and bodily integrity. In *RIT Foundation v. Union of India*, 2022:DHC:1825-DB, Justice Rajiv Shakdher's opinion held the marital rape exception unconstitutional, while Justice C. Hari Shankar upheld it. The split verdict reflects the continuing disagreement over whether marriage provides a sufficient justification for treating non-consensual sexual intercourse differently under criminal law. Supporters of criminalisation argue that both spouses retain independent legal identities and fundamental rights after marriage and that the law should protect married

women from sexual violence on an equal basis.

14. CONSEQUENCES OF MARITAL RAPE

1. Psychological and Emotional Effects

Marital rape may result in depression, anxiety, fear, emotional distress, loss of self-confidence and diminished self-esteem. Survivors may experience feelings of helplessness, shame, isolation and difficulty trusting others. Repeated sexual violence may also be associated with post-traumatic stress disorder (PTSD), sleep disturbances and suicidal thoughts. Agarwal, Abdalla and Cohen, in their 2022 systematic review, *Marital Rape and Its Impact on the Mental Health of Women in India*, found that several of the studies reviewed reported associations between spousal sexual abuse and depression. However, the authors noted that the available evidence was limited and that further research was necessary to understand the full extent of these effects.

2. Physical and Sexual Health Consequences

Forced or non-consensual sexual acts may cause physical injuries, pain, genital trauma and other health complications. Survivors may also face risks of sexually transmitted infections and other sexual health problems. The possibility of repeated abuse can further affect physical well-being and may discourage survivors from seeking medical assistance. The World Health Organization recognises that intimate partner violence and sexual violence can adversely affect women's physical, sexual and reproductive health. The nature and severity of these consequences differ between individuals and should not be assumed to be identical in every case.

3. Reproductive Health and Unwanted Pregnancy

Marital rape may deprive a woman of meaningful control over decisions concerning sexual intercourse, contraception and pregnancy. Non-consensual intercourse may result in an unwanted pregnancy and can create additional physical and emotional difficulties. Where a survivor is pregnant, the consequences may include anxiety about childbirth, uncertainty regarding the future and difficulty accessing appropriate support. These concerns are closely connected with reproductive autonomy and the right to make informed decisions about one's body.

4. Impact on Relationships and Social Life

Marital rape may undermine trust, emotional security and the sense of safety that a person expects within an intimate relationship. Survivors may withdraw from family members and friends because of fear, stigma, social pressure or concern about not being believed. In some cases, financial dependence, concern for children or pressure to preserve the marriage may make it difficult to leave an abusive environment or seek assistance. These circumstances can increase isolation and make recovery more difficult.

5. Barriers to Reporting and Seeking Assistance

Reporting marital rape may be particularly difficult where sexual violence within marriage is normalised or treated as a private family matter. Survivors may fear social judgment, family rejection, economic insecurity or further violence. The systematic review by Agarwal and colleagues also highlighted underreporting and limited research on the mental health consequences of marital rape in India. Consequently, the absence of a complaint cannot automatically be taken to mean that abuse did not occur. Greater awareness, accessible support services, sensitive medical care and effective legal assistance are important for enabling survivors to seek help.

15. Recommendations

1. Removal of the Marital Rape Exception

The legislature should reconsider Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita, 2023, which excludes sexual acts by a husband with his adult wife from the general definition of rape, even where consent is absent. Marriage should not be treated as automatic or permanent consent to sexual relations. Removing this exception would help provide married women with legal protection against non-consensual sexual acts.

2. Clear Recognition of Consent

The law should clearly recognise the distinction between consent and coercion. Consent must be voluntary and should not be presumed merely because the parties are married. A woman's silence, fear, or inability to resist should not automatically be interpreted as consent. Legal and public awareness programmes should explain the importance of consent within marriage.

3. Recognition under Personal Laws

Parliament and the relevant law-making authorities should consider expressly recognising sexual violence within marriage as a ground for matrimonial relief under applicable personal laws. This would help ensure that survivors have meaningful options to seek separation or divorce where appropriate.

4. Support Services for Survivors

Survivors should have access to confidential helplines, legal aid, counselling, medical assistance and temporary shelters. Friends and family members can also provide emotional support, provided that they respect the survivor's decisions and safety. Support groups and community organisations may help survivors understand their options and reduce isolation.

5. Awareness and Prevention Programmes

Educational institutions, community organisations and public authorities should conduct awareness programmes on consent, gender equality, healthy relationships and domestic violence. These programmes should challenge the misconception that marriage gives either spouse unrestricted rights over the other's body.

Public awareness may also encourage survivors to seek help without fear of stigma.

6. Appropriate Counselling and Mental-Health Support

Survivors should have access to trauma-informed psychological and psychiatric support when needed. Counselling may assist survivors in addressing distress and recovering from the effects of abuse. Any counselling or treatment offered to an alleged perpetrator should be handled appropriately and must not replace legal accountability or be imposed on survivors as a condition for obtaining justice.

7. Learning from International Legal Developments

India may study the legal approaches adopted by countries such as the United Kingdom, Canada and Australia. Comparative analysis can help identify possible approaches to criminalisation, investigation, victim protection and support services. However, any reform should be developed in accordance with India's constitutional framework and legal system.

16. CONCLUSION

Marital rape remains a serious legal and social concern in India because the law continues to exclude certain non-consensual sexual acts within marriage from the general definition of rape. Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita, 2023, raises important questions regarding the constitutional guarantees of equality under Article 14 and life and personal liberty under Article 21. By retaining this exception for adult wives, the law raises concerns about whether married women receive equal protection of their dignity, bodily autonomy and sexual consent. Although existing laws provide certain remedies against domestic violence and cruelty, these remedies do not fully resolve the gap in criminal law.

The international experience of countries such as the United Kingdom, the United States, Canada, Australia and New Zealand demonstrates that marriage need not provide immunity from prosecution for non-consensual sexual acts. In *R v. R* (1991), the United Kingdom rejected the common-law marital rape exemption, while New Zealand expressly recognises that a person may be convicted of sexually violating their spouse. These developments show how legal systems can move away from the assumption that marriage implies permanent consent.

India must therefore seriously reconsider the marital rape exception in light of constitutional values, individual dignity and changing understandings of consent. Legislative reform, effective legal remedies, survivor support and public awareness are essential to addressing this issue. Ultimately, marriage should be a relationship of mutual respect, not a surrender of bodily autonomy. A woman's fundamental rights do not cease to exist when she becomes a wife, and consent must remain meaningful within marriage as well as outside it.

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