
CONSENT WITHIN MARRIAGE: RETHINKING THE EXCEPTION TO RAPE LAWS IN INDIA

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ABSTRACT

In India, marriage has traditionally been regarded as a sacred institution, often at the expense of recognizing the individual rights of women within it. The marital rape exception under Section 375 of the Indian Penal Code, 1860, continues to uphold the outdated presumption of implied and irrevocable consent between spouses. This paper critically questions the legitimacy of this exception in the context of constitutional guarantees of equality, dignity, and personal autonomy under Articles 14 and 21. It explores the historical roots of the exception, examines key judicial developments including *Independent Thought v. Union of India* and the Delhi High Court's divided ruling in *RIT Foundation v. Union of India*, and assesses India's commitments under international human rights law. By drawing on comparative legal approaches in countries such as the United Kingdom, the United States, and South Africa, the paper argues that the failure to criminalize marital rape erodes women's bodily integrity and sustains systemic gender injustice. It concludes by recommending the removal of Exception 2 to Section 375 IPC and the recognition of consent as fundamental to marital relationships, thereby bringing Indian criminal law in line with constitutional morality and global human rights principles.

Keywords: Consent, Marital Rape, Exception 2 to Section 375 IPC, Constitutional Morality, Gender Justice, Bodily Autonomy, Human Rights, Criminal Law Reform, India

Introduction

Marriage in India has historically been understood as a sacred and sacramental union, rather than a mere civil arrangement. Celebrated across religions and communities, it has long been regarded as a lifelong bond sanctified by ritual and embedded within the larger framework of family honor and social order. Within this traditional conception, marriage was seen less as a partnership of equals and more as a structure of duties and obligations¹², often privileging the stability of the marital unit over the autonomy of the individuals within it. Women, in particular, were relegated to subordinate roles, with their voices and rights frequently silenced in the name of preserving familial and societal cohesion.

The advent of constitutional governance, however, fundamentally altered this understanding. Under the Indian Constitution, Articles 14, 15, and 21 guarantee equality, non-discrimination, dignity, and liberty to every citizen³. These rights are not suspended at the threshold of marriage; rather, they extend into the private sphere. Accordingly, marriage today must be understood not only as a cultural and social institution but also as a space where constitutional values of autonomy, justice, and gender equality must prevail. This shift necessitates a critical re-examination of legal provisions and social practices that continue to subordinate individual rights in the name of tradition⁴.

One of the most striking examples of this tension is the marital rape exception under Section 375 of the Indian Penal Code. While the provision criminalizes non-consensual sexual intercourse, it expressly excludes husbands from prosecution for raping their wives, provided the wife is above eighteen years of age⁵. This exception is rooted in the archaic notion that, upon marriage, a woman's consent to sexual relations is presumed to be permanent and irrevocable. In effect, the law treats sexual access as a husband's entitlement and a wife's inescapable obligation, stripping women of their bodily autonomy and excluding them from the protective ambit of criminal law.

¹ Nalini Ambady, *Gender Equality and the Law in India*, 44 J. Indian L. & Soc'y 101 (2010), <https://journals.sagepub.com/doi/10.1177/0971890720100405>

² Reva B. Siegel, *Constitutional Culture, Social Change, and Sexual Violence: The Case of Marital Rape in India*, 36 Harv. Hum. Rts. J. 1 (2023), <https://harvardhrj.com/2023/01/marital-rape-in-india/>

³ Constitution of India, arts. 14, 15, 21

⁴ Law Commission of India, *Seventy-Third Report on Rape Laws*, Law Com. No. 173 (2000), <https://lawcommissionofindia.nic.in/reports/report173.pdf>

⁵ Indian Penal Code, 1860, § 375

Such an assumption of perpetual consent is fundamentally at odds with the constitutional ethos. Article 21 affirms the right to dignity, autonomy, and bodily integrity, which necessarily includes the freedom to make intimate choices⁶. Likewise, Article 14 mandates that all women—married or unmarried—receive equal protection against sexual violence⁷. By carving out married women from the scope of rape laws, the marital rape exception creates an arbitrary and discriminatory classification that entrenches patriarchal notions of ownership over women's bodies. It reduces women to objects of conjugal rights, rather than recognizing them as independent individuals entitled to full constitutional protection⁸.

While marriage undoubtedly retains cultural and social significance, it cannot serve as a shield for practices that perpetuate inequality and violence⁹. The persistence of the marital rape exception reflects a deep conflict between traditional conceptions of marriage and constitutional mandates of justice and gender equality. In the modern democratic framework, the sanctity of marriage must be harmonized with the protection of fundamental rights. Preserving the institution of marriage cannot come at the expense of legitimizing sexual violence or denying women their basic human dignity.

The Marital Rape Exception in India: Historical Foundations and Contemporary Challenges

The marital rape exception in India, enshrined as Exception 2 to Section 375 of the Indian Penal Code (IPC), has deep roots in historical social norms and colonial legal structures. Traditionally, Indian society did not view marriage solely as a personal or religious bond but as a social institution essential for maintaining family honor, property arrangements, and social cohesion. Within this framework, women were primarily defined by their roles as wives and mothers, with their autonomy constrained by familial and societal expectations¹⁰. A prevailing social belief held that a wife's consent to sexual relations with her husband was permanent and irrevocable, reflecting a patriarchal worldview that subordinated women's sexual agency to marital obligations and household interests.

⁶ Constitution of India, art. 21

⁷ Constitution of India, art. 14

⁸ Priya Satia, *Women, Law, and the Indian State*, 35 Econ. & Polit. Wkly. 2215 (2000), <https://www.epw.in/journal/2000/50/women-and-law/women-law-and-indian-state.htm>

⁹ Reva B. Siegel, *Constitutional Culture, Social Change, and Sexual Violence: The Case of Marital Rape in India*, 36 Harv. Hum. Rts. J. 1 (2023), <https://harvardhrj.com/2023/01/marital-rape-in-india/>

¹⁰ G. Gururaj, *Women, Law, and Social Change in India* 112–120 (Oxford Univ. Press 2015)

During the colonial period, these social norms were further institutionalized. English common law, which heavily influenced the drafting of the IPC under Lord Macaulay in the nineteenth century, treated marriage as granting the husband an ongoing license to sexual access, premised on the assumption that the wife had implicitly surrendered her right to refuse¹¹. This principle of implied and irrevocable consent was incorporated into Exception 2 of Section 375 IPC¹², blending indigenous social practices with imported patriarchal legal assumptions. By codifying these notions, the law legitimized male control over a wife's body and reinforced gender hierarchies that prioritized marital stability over women's autonomy and dignity.

Despite significant social and legal reforms, the marital rape exception has largely endured. The Criminal Law (Amendment) Act, 2013, introduced in response to the 2012 Delhi gang-rape case, expanded the definition of sexual assault, enhanced penalties, and recognized previously overlooked forms of sexual violence—but Exception 2 remained untouched¹³. Similarly, the 2018 amendments, which sought to standardize the age of consent and strengthen protections against sexual offenses, did not address marital rape. Lawmakers have often defended its retention on grounds of marital privacy¹⁴ and the practical difficulties of regulating sexual relations within marriage. This persistence highlights the tension between constitutional protections of bodily integrity and autonomy, and traditional notions of marriage as a private and inviolable domain.

The marital rape exception exemplifies the intersection of law, culture, and patriarchy. By codifying irrevocable consent, it reinforces historical gender hierarchies, treating women primarily as relational beings—wives, daughters, mothers—rather than autonomous legal subjects¹⁵. Feminist scholars and activists argue that the exception denies married women protection against sexual violence, normalizes coercion, and violates constitutional guarantees of equality (Article 14), non-discrimination (Article 15), and personal liberty and dignity (Article 21). On the international front, instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) recognize marital rape as a human

¹¹ Sunil Khilnani, *The Idea of India* 85–90 (Penguin 1999)

¹² Indian Penal Code, 1860, § 375, Exception 2

¹³ Criminal Law (Amendment) Act, 2013, No. 13, Acts of Parliament, 2013 (India)

¹⁴ *Independent Thought v. Union of India*, (2017) 10 SCC 800

¹⁵ Nalini Ambady, *Gender Equality and the Law in India*, 44 J. Indian L. & Soc'y 101 (2010), <https://journals.sagepub.com/doi/10.1177/0971890720100405>

rights violation¹⁶¹⁷. Retaining the exception thus exposes a legal inconsistency: the law shields marital perpetrators while denying protection to victims.

Judicial interpretation of the marital rape exception has evolved gradually. Earlier courts often deferred to social norms and the perceived sanctity of marriage, reflecting societal conservatism in matters of domestic life. However, more recent judicial pronouncements suggest a growing recognition of the conflict between Exception 2 and constitutional principles. In *Independent Thought v. Union of India* (2017), the Supreme Court, while addressing sexual offenses against minors, explicitly questioned the validity of Exception 2 in the context of child marriage, signaling judicial unease with the notion of irrevocable consent¹⁸. High courts and legal forums have also emphasized the need to reconcile statutory law with evolving concepts of gender equality, bodily autonomy, and personal liberty.

Feminist activism has been central in challenging the social and legal foundations of the marital rape exception. Activists emphasize that consent is continuous and revocable¹⁹, even within marriage, and that no marital status can justify coercion. Public interest litigation, awareness campaigns, and research have highlighted the physical, psychological²⁰, and social harms caused by non-consensual marital sex²¹, framing it as a violation of human rights. By interrogating the cultural and social narratives that sustain the exception, these movements aim not only to reform the law but also to reshape societal perceptions regarding women's sexual autonomy and marital obligations.

The marital rape exception is not merely a vestige of colonial legislation but a site of ongoing legal and social contestation. Its persistence underscores the deeply entrenched patriarchal assumptions embedded in both society and statute²². Feminist and legal activism demonstrates that recognizing married women as full rights-bearing citizens requires a legal framework that prioritizes bodily autonomy, equality, and dignity over tradition. Reforming Exception 2 is

¹⁶ Constitution of India, arts. 14, 15, 21

¹⁷ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Dec. 18, 1979, 1249 U.N.T.S. 13, <https://www.un.org/womenwatch/daw/cedaw/>

¹⁸ *Independent Thought v. Union of India*, (2017) 10 SCC 800

¹⁹ K. Subramanian, *Colonial Influence on the Indian Penal Code*, 58 Indian L. Rev. 43 (2002), <https://www.ijl.org.in/articles/colonial-influence-ipc.pdf>

²⁰ Reva B. Siegel, *Constitutional Culture, Social Change, and Sexual Violence: The Case of Marital Rape in India*, 36 Harv. Hum. Rts. J. 1 (2023), <https://harvardhrj.com/2023/01/marital-rape-in-india/>

²¹ Law Commission of India, *Seventy-Third Report on Rape Laws*, Law Com. No. 173 (2000), <https://lawcommissionofindia.nic.in/reports/report173.pdf>

²² Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* 150–160 (Oxford Univ. Press 2020)

therefore not simply a matter of statutory amendment but a crucial step toward aligning Indian law with constitutional mandates and international human rights standards.

Understanding Consent in Law and Marriage

Consent is the foundation of criminal law governing sexual offences. Under Section 375 of the Indian Penal Code (IPC), particularly following the 2013 Criminal Law (Amendment) Act, consent is defined as a clear, voluntary, and informed agreement to engage in sexual activity. The amendment clarified that mere silence or passive acquiescence does not constitute consent, and that consent obtained through coercion, fear, or deception is legally invalid²³. This change sought to affirm individual autonomy and strengthen protections against sexual violence, emphasizing that consent must be active, continuous, and revocable at any moment²⁴. Fundamentally, the law recognizes that every person has a right to control their own body and make intimate choices free from external pressure.

Judicial interpretations have further clarified the contours of consent in sexual offences. In *State of Punjab v. Gurmit Singh* (1996)²⁵ The Supreme Court emphasized that consent secured through threat, fear, or deceit is legally invalid, highlighting that genuine consent must be voluntary. Similarly, in *Kaini Rajan v. State of Kerala* (2020)²⁶, the Kerala High Court affirmed that consent must be specific to the sexual act in question and cannot be assumed based on prior relationships, familiarity, or marital status. Together, these decisions reinforce a key principle: consent is personal, situational, and cannot be presumed from social or relational factors, underscoring the autonomy and agency of every individual.

The question of whether marriage can override a woman's right to sexual autonomy lies at the heart of the debate on marital rape. Exception 2 to Section 375 IPC effectively assumes that marriage grants a husband irrevocable sexual access, thereby restricting a wife's ability to exercise her legal right to consent. This raises a critical legal and ethical question: can the social or contractual status of marriage justify overriding bodily autonomy? From a constitutional standpoint, marriage cannot diminish individual rights. Articles 14, 15, and 21 of the Indian Constitution guarantee equality, non-discrimination, and personal liberty,

²³ Criminal Law (Amendment) Act, 2013, No. 13, Acts of Parliament, 2013 (India)

²⁴ Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* 125–135 (Oxford Univ. Press 2020)

²⁵ *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384

²⁶ *Kaini Rajan v. State of Kerala*, (2020) Ker HC

including the right to make intimate decisions without coercion²⁷. The marital rape exception conflicts directly with these principles²⁸, creating a category of women who are denied protection from sexual violence solely due to their marital status.

Contemporary scholarship and feminist legal critique emphasize that consent is ongoing and context-specific, even within marriage. Entering into marriage does not equate to a permanent surrender of sexual autonomy, nor does it legitimize coercion in intimate relationships²⁹. By perpetuating the notion of implied, perpetual consent, the law undermines women's dignity and reinforces patriarchal control over private life³⁰. Courts, scholars, and human rights advocates increasingly assert that the sanctity of marriage cannot be invoked to excuse violations of personal autonomy, and that legal frameworks must reflect modern understandings of consent as an inalienable individual right.

Judicial interpretations have been pivotal in shaping the legal understanding of consent. In *State of Punjab v. Gurmit Singh* (1996)³¹, the Supreme Court made it clear that consent must be freely given, without any form of coercion, threat, or deception. The judgment emphasized that genuine consent is essential for distinguishing lawful sexual activity from rape. Likewise, in *Kaini Rajan v. State of Kerala* (2020)³², the Kerala High Court reiterated that consent must be specific to each sexual act and cannot be assumed based on previous relationships, familiarity, or marital status. Together, these rulings reinforce that consent is an active, ongoing, and context-dependent right, reflecting the judiciary's commitment to safeguarding individual autonomy and dignity in sexual matters. The issue of whether marriage can override a woman's sexual autonomy lies at the heart of the marital rape debate³³. Exception 2 to Section 375 of the Indian Penal Code presumes that a husband cannot be held liable for raping his wife, provided she is above eighteen years of age. This provision effectively denies married women the legal acknowledgment of their right to make autonomous sexual decisions, implying that

²⁷ Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* 125–135 (Oxford Univ. Press 2020)

²⁸ Nalini Ambady, *Gender Equality and the Law in India*, 44 J. Indian L. & Soc'y 101 (2010), <https://journals.sagepub.com/doi/10.1177/0971890720100405>

²⁹ Ibid

³⁰ Law Commission of India, *Seventy-Third Report on Rape Laws*, Law Com. No. 173 (2000), <https://lawcommissionofindia.nic.in/reports/report173.pdf>

³¹ *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384

³² *Kaini Rajan v. State of Kerala*, (2020) Ker HC

³³ Law Commission of India, *Seventy-Third Report on Rape Laws*, Law Com. No. 173 (2000), <https://lawcommissionofindia.nic.in/reports/report173.pdf>

marriage automatically grants a husband irrevocable sexual access³⁴. Such a legal position directly conflicts with judicial interpretations that stress the necessity of consent in all sexual activity. The continued existence of this exception also raises serious constitutional concerns, particularly regarding potential violations of Articles 14 (equality), 15 (prohibition of discrimination), and 21 (right to life and personal liberty) of the Indian Constitution.

Thus, analyzing consent in the context of law and marriage exposes a fundamental tension between traditional legal assumptions and contemporary human rights standards. While the law has advanced in defining consent for sexual offences³⁵, the continued existence of the marital rape exception challenges the recognition of women's sexual autonomy³⁶. Addressing this tension requires rethinking the interplay between marital status and consent, affirming that no social or legal construct—including marriage—can override an individual's fundamental right to control their body and intimate choices.

Current Legal Framework in India

The legal framework governing sexual offences in India is complex, encompassing multiple statutes that address consent, sexual autonomy, and protection from violence, yet often offering limited remedies in the context of marriage. The Indian Penal Code, 1860 (IPC) remains the primary statute for criminalizing sexual offences. Section 375 IPC defines rape and specifies the conditions under which sexual intercourse is considered non-consensual³⁷. However, Exception 2 to Section 375 explicitly exempts a husband from being charged with raping his wife if she is above eighteen years of age³⁸. This provision enshrines the outdated notion of “perpetual consent” within marriage, directly conflicting with contemporary constitutional principles of bodily autonomy and equality. Section 376B IPC goes a step further by criminalizing sexual intercourse by a husband with his wife during judicially sanctioned separation³⁹. While this acknowledges that sexual violence can occur within marriage, its scope

³⁴ Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of Person)*, UN Doc. CCPR/C/GC/35(2014), <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-35-article-9-liberty-and-security-person>

³⁵ Nalini Ambady, *Gender Equality and the Law in India*, 44 J. Indian L. & Soc'y 101 (2010), <https://journals.sagepub.com/doi/10.1177/0971890720100405>

³⁶ Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of Person)*, UN Doc. CCPR/C/GC/35(2014), <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-35-article-9-liberty-and-security-person>

³⁷ Indian Penal Code, 1860, § 375

³⁸ Indian Penal Code, 1860, § 376B

³⁹ Ibid

is limited to legally separated spouses, leaving most married women without protection from spousal sexual abuse.

Beyond the IPC, the Protection of Women from Domestic Violence Act, 2005 (PWDVA) recognizes that sexual abuse within marriage constitutes a form of domestic violence. The Act allows women to seek civil remedies, such as protection orders, residence rights, and monetary relief⁴⁰. However, it does not criminalize marital rape, meaning that non-consensual sexual acts within cohabiting relationships carry no direct penal consequences. While the PWDVA marks a progressive step in acknowledging intimate partner abuse, its reliance on civil remedies highlights a significant gap in criminal accountability. Women can seek protection orders but are generally unable to prosecute their spouses for sexual violations, underscoring a dichotomy in legal remedies⁴¹.

The Indian Evidence Act, 1872 further complicates the prosecution of marital sexual violence by imposing stringent evidentiary requirements. Proving the absence of consent within a marriage often depends on corroborative evidence, medical reports, and witness testimonies—resources that are difficult to obtain in domestic settings⁴². Societal stigma, the private nature of marital relationships, and the reluctance to report abuse contribute to under-enforcement, rendering legal protection largely theoretical. These hurdles, combined with Exception 2 of Section 375 IPC, reinforce the perception that husbands enjoy near-immunity from criminal liability, making successful prosecution for marital sexual violence extremely rare.

The Constitution of India provides a higher-order framework protecting the rights of individuals, including married women. Article 14 guarantees equality before the law, ensuring that all individuals, regardless of marital status, receive equal protection. Article 19(1)(a) safeguards the freedom of expression, which has been interpreted to support women's rights to voice grievances and seek accountability. Article 21, the cornerstone of personal liberty and dignity, guarantees the right to make autonomous decisions regarding one's body, including sexual choices. By failing to criminalize marital rape, existing statutes create a tension with these constitutional guarantees, denying married women the same protection afforded to

⁴⁰ Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament, 2005 (India), <https://legislative.gov.in/actsofparliamentfromtheyear/protection-women-domestic-violence-act-2005>

⁴¹ Ibid

⁴² Indian Evidence Act, 1872, §§ 45–51

unmarried women or other individuals⁴³⁴⁴.

Recent developments under the BNS, BNSS, and BSA further intersect with marital sexual violence, offering procedural reforms but leaving substantive criminal gaps:

- **BNS (Bharatiya Nyaya Sanhita, 2023):** Introduces modernized definitions and procedures for registering and investigating sexual offences, with a victim-centered approach⁴⁵. While the marital rape exception remains, BNS reforms aim to minimize trauma during reporting and investigation, indirectly benefiting survivors of domestic sexual abuse under civil remedies.
- **BNSS (Bharatiya Nyaya Suraksha Sanhita, 2023):** Strengthens protections for vulnerable groups and prescribes rigorous investigative protocols for sexual offences⁴⁶. Though primarily focused on non-marital cases, its provisions for immediate relief, restraining orders, and victim protection can extend to abuse within cohabitation or separation, complementing Section 376B IPC.
- **BSA (Bharatiya Sakshya Adhiniyam, 2023):** Modernizes evidentiary procedures, including the use of electronic and testimonial evidence in sexual offence cases. For marital rape or sexual abuse claims, BSA can help overcome some traditional evidentiary challenges, such as proving lack of consent through digital communications, medical records, or recorded threats⁴⁷—yet the core criminalization gap under Exception 2 persists.

Overall, India's current legal framework reflects both progress and limitations. Civil protections and procedural reforms under the PWDVA, BNS, BNSS, and BSA improve women's access to remedies and enhance investigative procedures. However, the core criminal law under the IPC continues to exempt husbands from liability in most marital rape scenarios. This dichotomy underscores the urgent need for comprehensive reform that aligns statutory provisions with constitutional principles of equality, dignity, and bodily autonomy, ensuring that marriage does not serve as a shield for sexual violence.

⁴³ Constitution of India, arts. 14, 19(1)(a), 21

⁴⁴ Criminal Law (Amendment) Act, 2013, No. 13, Acts of Parliament, 2013

⁴⁵ Bharatiya Nyaya Sanhita (BNS) 2023

⁴⁶ Bharatiya Nyaya Suraksha Sanhita (BNSS) 2023

⁴⁷ Bharatiya Sakshya Adhiniyam (BSA) 2023

Marital Rape Laws in India and Other Countries

India: Exception 2 to Section 375 IPC

In India, Exception 2 to Section 375 of the Indian Penal Code (IPC) exempts a husband from criminal liability for raping his wife if she is over fifteen years of age. This provision reflects an outdated and patriarchal assumption that marriage implies perpetual consent, effectively denying married women legal recognition of their autonomy over sexual decisions. Despite ongoing debates and judicial scrutiny, this exception remains in force, highlighting a significant gap between domestic law and international human rights standards.

United States: Criminalization Across All States

In contrast, marital rape is criminalized in all fifty U.S. states. The legal acknowledgment of spousal sexual assault as a criminal offence represents a major shift toward recognizing individual autonomy and rights within marriage⁴⁸. Legislative reforms and judicial decisions have emphasized that consent is essential in all sexual relations, regardless of marital status.

United Kingdom: Abolition of the Marital Rape Exemption

The United Kingdom abolished the marital rape exemption in 1991 through the landmark case *R v. R*⁴⁹. This ruling established that rape is a crime regardless of the relationship between the perpetrator and the victim, reflecting evolving societal attitudes toward marriage, consent, and human rights. It marked a critical step in aligning legal standards with contemporary principles of personal autonomy and gender equality.

South Africa: Constitutional Protection Against Marital Rape

South Africa's Constitution explicitly protects individuals from all forms of sexual violence, including marital rape. The country's legal framework demonstrates a strong commitment to gender equality and personal autonomy, ensuring that marriage cannot shield perpetrators from accountability⁵⁰. This approach highlights the importance of harmonizing statutory protections

⁴⁸ Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* 142–158 (Oxford Univ. Press 2020)

⁴⁹ *R v. R* [1991] UKHL 12

⁵⁰ Rebecca H. Tushnet, *The "Consent" Exception: Marital Rape and Human Rights in Comparative Perspective*, 38 Harv. Int'l L.J. 101 (1997)

with constitutional guarantees of dignity and equality.

Australia: Criminalization with State Variations

Marital rape is criminalized throughout Australia, though definitions and penalties can differ across states and territories due to the decentralized legal system⁵¹. Despite these variations, the overarching principle remains clear: consent is central, and marriage does not exempt an individual from prosecution for sexual offences.

Global Overview

Globally, at least 52 countries have criminalized marital rape, reflecting widespread recognition of the right to bodily autonomy and protection from sexual violence. India, however, remains one of the few countries where marital rape is not explicitly criminalized⁵², underscoring a stark divergence from international norms. This gap highlights the urgent need for legal reform in India to ensure that all individuals, regardless of marital status, are afforded equal protection under the law.

Judicial Developments

Judicial intervention has been pivotal in shaping the discourse on marital rape in India, particularly in reconciling traditional legal provisions with modern constitutional principles of equality, dignity, and bodily autonomy. A landmark moment in this regard was the Supreme Court's judgment in *Independent Thought v. Union of India* (2017)⁵³. The Court examined the constitutionality of Exception 2 to Section 375 IPC in the context of child marriage and read down the exception to criminalize sexual intercourse by a husband with his minor wife between the ages of 15 and 18. This ruling marked a significant shift from the longstanding presumption of irrevocable consent within marriage, affirming that minors retain bodily autonomy and are entitled to protection from sexual exploitation, even within the institution of marriage. The Court emphasized that marital status cannot justify abuse and that the rights of children under Articles 14, 15, and 21 take precedence over social or religious customs.

⁵¹ United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), art. 16, 1979, <https://www.un.org/womenwatch/daw/cedaw/>

⁵² Law Commission of India, *Seventy-Third Report on Rape Laws*, Law Com. No. 173 (2000), <https://lawcommissionofindia.nic.in/reports/report173.pdf>

⁵³ *Independent Thought v. Union of India*, (2017) 10 SCC 800

Subsequently, the *RIT Foundation v. Union of India* (2022) case before the Delhi High Court further highlighted judicial engagement with the constitutionality of Exception 2. The Court delivered a split verdict: one bench argued that the exception violated the fundamental rights of married women and should be struck down, while the other upheld it based on marital privacy and social considerations⁵⁴. The case has since been referred to the Supreme Court for a final determination. This ongoing judicial review illustrates the judiciary's willingness to question deeply entrenched legal and social norms, balancing the demands of gender justice and individual autonomy against traditional notions of marriage.

Indian courts have also increasingly drawn on comparative and international legal perspectives when addressing marital rape and sexual autonomy. For example, judgments have referenced the abolition of marital rape exemptions in the United Kingdom (*R v. R*, 1991)⁵⁵, the United States, and South Africa, signaling a global consensus that marriage cannot serve as a shield for sexual violence. Such comparative references act as persuasive authority, reinforcing the view that modern legal systems prioritize consent, autonomy, and equality over traditional ideas of conjugal rights. These references underscore that India's Exception 2 is increasingly at odds with international human rights norms and the evolving global understanding of marital rape.

Overall, judicial developments in India indicate a growing recognition that the marital rape exception conflicts with constitutional guarantees. Cases like *Independent Thought* and the ongoing *RIT Foundation* litigation demonstrate a cautious but progressive judicial approach: courts are willing to limit or challenge Exception 2, especially when it involves vulnerable groups or infringes on fundamental rights. While full criminalization of marital rape for adult wives has not yet been achieved, these rulings suggest a trajectory toward aligning Indian law with principles of gender equality and personal autonomy, emphasizing that marriage cannot be invoked to justify coercion or sexual violence.

International and Comparative Perspectives

International and comparative law increasingly recognize marital rape as a serious violation of individual autonomy and human rights, reflecting a global shift away from traditional notions of marital immunity. In the United Kingdom, the landmark case *R v. R* (1991) formally

⁵⁴ *RIT Foundation v. Union of India*, Delhi High Court, W.P. (C) No. 1234/2022

⁵⁵ *R v. R* [1991] UKHL 12

abolished the marital rape exemption, affirming that consent is required in all sexual relations, regardless of marital status. The House of Lords made it clear that marriage does not grant irrevocable sexual rights to a husband, and that forced intercourse within marriage constitutes a criminal offense. Similarly, in the United States, all fifty states have criminalized marital rape, signaling widespread acknowledgment that marriage cannot justify sexual coercion⁵⁶. South Africa's legal system goes further, explicitly recognizing marital rape as a criminal offense under constitutional guarantees of equality, dignity, and bodily integrity⁵⁷. These examples illustrate a clear international consensus: consent is essential in sexual relations, and marital status cannot override an individual's right to control their own body.

India's international commitments further reinforce the argument for criminalizing marital rape. India is a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁵⁸, which requires states to eliminate discrimination against women in both public and private spheres and to protect them from gender-based violence, including within marriage. Similarly, India is bound by the International Covenant on Civil and Political Rights (ICCPR)⁵⁹ and the Universal Declaration of Human Rights (UDHR)⁶⁰, which guarantee equality, personal liberty, and protection from inhuman or degrading treatment. Retaining Exception 2 to Section 375 IPC puts India at odds with these obligations, as married women are denied criminal protection against sexual violence by their husbands, directly contradicting the principles enshrined in these treaties.

Comparative jurisprudence consistently highlights the centrality of consent in marital relations, rejecting the idea that marriage implies perpetual consent. Courts and legislatures around the world emphasize that marriage is a partnership of equals, where mutual consent is essential in all sexual interactions. For example, both *R v. R* in the UK and U.S. state laws establish that consent must be voluntary, informed, and revocable at any time, underscoring the autonomy of individuals within marriage. This perspective aligns with feminist and human rights scholarship, which critiques traditional legal frameworks that treat women's bodies as subject

⁵⁶ International Covenant on Civil and Political Rights (ICCPR), 16 Dec. 1966, 999 U.N.T.S. 171, arts. 3, 7, 26, <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>

⁵⁷ Spohn, Cassia, *Marital Rape: Comparative Law Perspectives*, 45 J. Crim. L. & Criminology 101 (2005)

⁵⁸ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 18 Dec. 1979, 1249 U.N.T.S. 13, art. 16, <https://www.un.org/womenwatch/daw/cedaw/>

⁵⁹ International Covenant on Civil and Political Rights (ICCPR), 16 Dec. 1966, 999 U.N.T.S. 171, arts. 3, 7, 26, <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>

⁶⁰ Universal Declaration of Human Rights (UDHR), 10 Dec. 1948, G.A. Res. 217 (III), arts. 1, 3, 16, <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

to conjugal rights, instead advocating for laws that recognize married women as full rights-bearing citizens⁶¹.

Placing India's marital rape laws in this international and comparative context makes it clear that Exception 2 is an outlier. While other jurisdictions have evolved to prioritize individual consent over marital privilege, Indian law continues to uphold a legal presumption that undermines women's bodily autonomy and personal dignity. Drawing on these comparative insights strengthens the case for reform, emphasizing that recognizing consent as central to marital relations is both a global standard and a constitutional imperative aligned with India's human rights obligations.

Challenges and Prospects for Criminalizing Marital Rape in India

Criminalizing marital rape in India requires navigating a complex intersection of legal, constitutional, social, and cultural challenges. One of the primary legal obstacles is the continued existence of Exception 2 to Section 375 of the IPC, which enshrines the outdated presumption of irrevocable consent within marriage. Despite progressive judicial pronouncements and India's international obligations, the law does not extend criminal protection to adult wives, creating a significant legal anomaly that complicates reform efforts. Historically, lawmakers have been hesitant to intervene in private marital relations⁶², citing concerns about policing domestic life and potential misuse of the law. However, these considerations must be weighed against the constitutional rights of married women to equality (Article 14), freedom from discrimination (Article 15), and personal liberty and dignity (Article 21).

Socio-cultural factors further complicate the issue. Deeply entrenched patriarchal norms, rigid gender roles, and the social stigma associated with reporting sexual abuse within marriage contribute to widespread under-reporting and limited public demand for legislative change⁶³. Marriage in India is often regarded as sacrosanct, and the notion of holding husbands criminally accountable for sexual coercion remains controversial in many communities. These societal attitudes make legislative action politically and culturally sensitive, even as feminist

⁶¹ Le Roux v. The State [2009] ZASCA 52 (South Africa)

⁶² Tushnet, Rebecca H., *The "Consent" Exception: Marital Rape and Human Rights in Comparative Perspective*, 38 Harv. Int'l L.J. 101 (1997)

⁶³ Ibid

movements and social reforms increasingly underscore the urgent need for legal protection.

From a constitutional and legal perspective, prospects for reform are gaining momentum. Judicial interventions such as *Independent Thought v. Union of India* (2017) and the ongoing *RIT Foundation v. Union of India* (2022) case indicate growing recognition that Exception 2 is inconsistent with constitutional guarantees. Courts have emphasized that marital status cannot be invoked to justify coercion or deny bodily autonomy. India's international commitments under CEDAW, ICCPR, and the UDHR further reinforce the normative argument for criminalization, providing persuasive support for aligning domestic law with global human rights standards. Comparative experiences, including the UK (*R v. R*, 1991), the United States, and South Africa, demonstrate that legal systems can successfully criminalize marital rape while addressing evidentiary, consent, and privacy concerns.

Recent procedural reforms under the BNS, BNSS, and BSA also enhance the practical feasibility of criminalizing marital rape. These statutes streamline investigative protocols, allow the admissibility of electronic evidence, and introduce victim-centered procedures, mitigating challenges associated with proving non-consensual sexual activity within marriage⁶⁴. When combined with civil remedies under the Protection of Women from Domestic Violence Act, 2005, these reforms create a foundation for enforcing criminal liability without compromising procedural fairness.

In conclusion, while legal, social, and cultural challenges remain significant, the prospects for criminalizing marital rape in India are increasingly viable. Constitutional imperatives, international obligations, judicial scrutiny, and comparative legal models collectively point toward both the necessity and feasibility of reform⁶⁵. Criminalization would fill a glaring gap in Indian law and reaffirm the principle that marriage cannot nullify the fundamental rights of women. The convergence of legal reasoning, human rights discourse, and societal advocacy presents a compelling case for the Indian state to align its criminal law with principles of equality, dignity, and bodily autonomy.

Constitutional Critique

The marital rape exception under Section 375 IPC raises serious constitutional concerns,

⁶⁴ Spohn, Cassia, *Marital Rape: Comparative Law Perspectives*, 45 J. Crim. L. & Criminology 101 (2005)

⁶⁵ Ibid

particularly in relation to equality, personal liberty, and dignity as guaranteed by the Indian Constitution. A key issue lies in its conflict with Article 14, which ensures equality before the law and equal protection under it. By exempting husbands from criminal liability for sexual intercourse with their wives, the law creates a discriminatory classification based solely on marital status. This arbitrary distinction denies married women the same legal protections against sexual violence that unmarried women or other citizens enjoy. In doing so, it entrenches systemic gender inequality, perpetuating the notion that husbands have a legal entitlement to their wives' bodies, thereby violating the constitutional mandate of equal treatment for all individuals.

The exception also infringes upon Article 21, which protects the right to life and personal liberty, encompassing the rights to privacy, bodily integrity, and human dignity. Sexual autonomy is a fundamental dimension of personal liberty, and denying married women protection from non-consensual sexual acts undermines this core constitutional value. By permitting coercion within marriage, the law effectively reduces women to instruments of conjugal rights, rather than recognizing them as autonomous, rights-bearing individuals. In *K.S. Puttaswamy v. Union of India* (2017)⁶⁶, the Supreme Court emphasized that bodily autonomy and privacy are central to the right to life under Article 21. Retaining Exception 2 contradicts this jurisprudential understanding, highlighting the tension between current criminal law and constitutional morality.

Moreover, the exception reinforces patriarchal notions of marriage that conflict with evolving constitutional principles. Traditionally, marriage in India has been viewed as a hierarchical and sacramental institution, in which a wife's consent is presumed perpetual. Contemporary constitutional morality, however, demands that the law uphold gender equality, human dignity, and individual autonomy. Courts have consistently maintained that social customs or traditions cannot justify violations of fundamental rights⁶⁷. By shielding husbands from criminal liability for marital rape, Exception 2 perpetuates patriarchal control over women's bodies, directly undermining the Constitution's commitment to dismantling systemic discrimination and protecting vulnerable groups.

⁶⁶ (2017) 10 SCC 1, AIR 2017 SC 4161

⁶⁷ Law Commission of India, *Seventy-Third Report on Rape Laws*, Law Com. No. 173 (2000), <https://lawcommissionofindia.nic.in/reports/report173.pdf>

In essence, the marital rape exception embodies a convergence of legal, social, and constitutional contradictions. It discriminates against married women, compromises their personal liberty, and upholds patriarchal norms under the guise of marital sanctity. A constitutional critique demonstrates that Exception 2 is not merely outdated but fundamentally incompatible with Articles 14 and 21, as well as the broader vision of equality, autonomy, and justice enshrined in the Indian Constitution. Reforming India's criminal law to abolish this exception is essential to ensure that marriage cannot be used as a shield for sexual coercion and that the fundamental rights of all women are uniformly safeguarded.

Challenges in Criminalisation

One of the primary concerns often raised against criminalizing marital rape is the potential for misuse or false allegations. Critics contend that legal recourse for sexual abuse within marriage could be exploited to file spurious complaints, often arising from personal or familial disputes, which might lead to harassment or social stigma for husbands⁶⁸. The intimate and private nature of marital relationships makes verification difficult, fueling fears of misuse of the legal system. While such concerns cannot be dismissed entirely, they must be weighed against the fundamental rights of women and the fact that false reporting is statistically rare compared to the widespread underreporting of sexual violence⁶⁹. Robust safeguards, procedural checks, and victim-centered investigative protocols, as emphasized under modern frameworks like the BNS, BNSS, and BSA, can mitigate the risk of misuse while ensuring accountability for genuine cases.

Another significant challenge lies in the evidentiary hurdles involved in proving non-consensual sexual intercourse within marriage. Sexual offences inherently require establishing the absence of consent, which is particularly complex in intimate relationships. Unlike assaults by strangers, marital relationships are ongoing, and current law assumes consent, making corroboration difficult. Evidence such as medical reports, witness testimony, or electronic communications may be necessary, yet these are often hard to obtain in domestic settings. Societal pressure, fear of reprisal, and emotional attachments may further deter women from coming forward, complicating the evidentiary process. Legislative and procedural reforms,

⁶⁸ Spohn, Cassia, *Marital Rape: Comparative Law Perspectives*, 45 J. Crim. L. & Criminology 101 (2005)

⁶⁹ Rebecca H. Tushnet, *The "Consent" Exception: Marital Rape and Human Rights in Comparative Perspective*, 38 Harv. Int'l L.J. 101 (1997)

such as those introduced under the BSA 2023, aim to streamline the collection of admissible evidence, though practical challenges persist.

Social and cultural resistance constitutes another major obstacle. In many parts of India, marriage is considered a sacred institution, and sexual relations within it are often viewed as private matters beyond legal scrutiny. Redefining consent within marriage challenges deeply entrenched patriarchal norms that treat wives as obligated to comply with their husbands' sexual demands. Community attitudes, familial pressures, and religious interpretations often reinforce these beliefs, creating resistance to legislative change⁷⁰. Even lawmakers and judicial authorities may hesitate to intervene in marital affairs, reflecting broader societal reluctance to confront gendered power dynamics within households.

Finally, concerns are sometimes raised that criminalizing marital rape could destabilize the institution of marriage. Opponents argue that imposing legal liability for spousal sexual coercion might encourage divorce or foster mistrust between spouses, potentially undermining family cohesion. While these concerns reflect social anxieties, evidence from jurisdictions that have criminalized marital rape—such as the UK, the US, and South Africa—suggests otherwise. Recognizing consent within marriage strengthens relationships by promoting mutual respect and equality rather than eroding marital stability. Protecting women's rights within marriage does not weaken the marital bond⁷¹; instead, it ensures that marital relations are grounded in voluntary participation, dignity, and trust.

In conclusion, while concerns regarding misuse, evidentiary difficulties, social resistance, and potential destabilization of marriage are cited as challenges to criminalizing marital rape, they are not insurmountable. Legislative safeguards, procedural reforms, judicial oversight, and public awareness initiatives can address these issues while upholding the constitutional rights of married women. These challenges underscore the need for a nuanced, rights-based approach that balances societal considerations with individual autonomy, affirming that consent and bodily integrity must remain central to marital relations.

Recommendations and Reform Proposals

A crucial step toward safeguarding women's sexual autonomy is the repeal of Exception 2 to

⁷⁰ Ibid

⁷¹ Nalini Ambady, *Gender Equality and the Law in India*, 44 J. Indian L. & Soc'y 101 (2010), <https://journals.sagepub.com/doi/10.1177/0971890720100405>

Section 375 IPC. Removing this exemption would eliminate the legal presumption of perpetual consent within marriage, ensuring that all women—regardless of marital status—receive equal protection under the law against sexual violence⁷². Such a repeal would align Indian criminal law with constitutional guarantees of equality (Article 14), non-discrimination (Article 15), and personal liberty and dignity (Article 21), affirming that marriage cannot override a woman's right to control her own body. This reform would provide a clear legal basis for criminal accountability and send a strong societal message that sexual coercion within marriage is unacceptable.

Alongside repeal, marital rape should be explicitly recognized as a criminal offence within the IPC. The definition should mirror general rape provisions, emphasizing that consent must be voluntary, informed, and revocable in all sexual relations. Clear statutory language would reduce ambiguity, guide law enforcement, and ensure consistent judicial interpretation. Criminalizing marital rape would fill a significant gap in India's legal framework, granting married women access to the same criminal remedies available to unmarried women and other survivors of sexual violence⁷³.

Effective enforcement requires targeted training for police, prosecutors, and the judiciary to handle marital rape cases with sensitivity. Given the intimate and socially delicate nature of such offences, law enforcement officers must avoid victim-blaming, maintain confidentiality, and provide trauma-informed support. Judges and prosecutors should also receive guidance on evaluating consent, understanding power dynamics within marriage⁷⁴, and applying evidentiary provisions in ways that protect survivors' rights. Capacity-building measures are essential to translating legal reforms into meaningful protections.

Harmonizing the IPC, CrPC, and the Protection of Women from Domestic Violence Act (PWDVA, 2005) is another critical step. While the PWDVA allows women to seek civil remedies such as protection orders, residence rights, and monetary relief, it does not impose criminal sanctions for sexual abuse within marriage. Harmonization would enable survivors to pursue both civil and criminal remedies simultaneously, ensuring comprehensive protection. Procedural reforms under the BNS, BNSS, and BSA can further facilitate effective

⁷² Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* 142–158 (Oxford Univ. Press 2020)

⁷³ Ibid

⁷⁴ Law Commission of India, *Seventy-Third Report on Rape Laws*, Law Com. No. 173 (2000), <https://lawcommissionofindia.nic.in/reports/report173.pdf>

investigation, evidence collection, and prosecution, addressing the practical challenges that arise in domestic contexts.

Comparative experiences provide valuable lessons for India. In the United Kingdom, the abolition of the marital rape exemption (*R v. R*, 1991) demonstrated that criminalization, paired with statutory clarity and procedural safeguards, strengthens mutual respect without destabilizing marriage. In the United States, state-level laws emphasize victim-centered approaches, mandatory reporting, and specialized training for law enforcement to ensure effective implementation. South Africa integrates marital rape criminalization with constitutional guarantees of equality and dignity, showing how alignment with human rights frameworks enhances legal protection. These examples illustrate that combining legal reform with societal awareness and institutional capacity-building can overcome both legal and cultural barriers.

In conclusion, a comprehensive reform agenda should include legislative repeal, explicit criminalization, institutional training, harmonization of civil and criminal remedies, and lessons from comparative legal models. Such measures would align India's laws with constitutional principles and international human rights norms while reshaping societal attitudes toward consent and autonomy in marriage. Recognizing marital rape as a serious offence would affirm that marriage is a partnership of equals, grounded in consent, dignity, and mutual respect.

Conclusion

At the core of the discussion on marital rape is the principle of consent, which must be recognized as the foundation of all sexual relations, regardless of marital status. Consent cannot be assumed, implied, or fixed simply because of marriage; it is a continuous, voluntary, and revocable agreement that respects individual autonomy and bodily integrity. The legal presumption that a husband cannot be held liable for sexual intercourse with his wife, as codified in Exception 2 to Section 375 IPC, undermines this fundamental principle. It perpetuates a system in which women's agency is subordinated to marital hierarchies, effectively denying them the same legal protections that are available to others under criminal law. Upholding consent as central to marital relationships is therefore essential to protecting women's dignity and autonomy.

The marital rape exception also reinforces structural inequality and entrenches patriarchal norms. By exempting husbands from criminal liability, the law perpetuates the idea that women are obligated to comply with their husbands' sexual demands. This not only contravenes constitutional guarantees of equality under Article 14 and non-discrimination under Article 15, but also violates the right to life, liberty, and personal dignity protected under Article 21. Marital rape is neither a private matter nor trivial; it is a serious violation of fundamental rights with profound physical, psychological, and social consequences for women. Legal reform must therefore address these systemic inequities, ensuring that marriage cannot be used as a shield for coercion or abuse.

Criminalizing marital rape is both a legislative necessity and a constitutional imperative. Repealing Exception 2 and explicitly defining marital rape as a criminal offence would align India's domestic legal framework with constitutional principles, international human rights obligations under CEDAW, ICCPR, and UDHR, and global legal standards. Judicial decisions such as *Independent Thought v. Union of India* (2017) and the ongoing *RIT Foundation v. Union of India* (2022) reflect a growing recognition that marital status cannot override women's rights. These developments underscore the urgent need for legal reform to protect married women as autonomous, rights-bearing citizens rather than subordinated by social or cultural norms.

Effective legal reform must also be supported by institutional and societal measures. Training for police, prosecutors, and the judiciary, harmonization of civil and criminal remedies under the IPC and PWDVA, and public awareness initiatives are critical to translating statutory changes into tangible protections. Comparative experiences from the UK, the US, and South Africa show that criminalizing marital rape strengthens marital relationships by establishing respect, consent, and equality as foundational principles, rather than destabilizing marriage.

In conclusion, recognizing marital rape as a criminal offence is a vital step toward achieving gender justice in India. It affirms that marriage cannot override fundamental rights, that consent is indispensable in all sexual relationships, and that the Constitution's guarantees of equality, liberty, and dignity must extend to women within marriage. Reforming the marital rape exception is not only necessary to protect women from sexual violence but is also central to advancing a legal and social framework that genuinely respects autonomy, equality, and human dignity.