
MARITAL RAPE EXCEPTION IN INDIA: CONSTITUTIONAL VALIDITY AND LEGAL REFORM UNDER THE BHARATIYA CRIMINAL LAW FRAMEWORK

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ABSTRACT

Marital rape remains one of the most unresolved issues in criminal and constitutional law India till date. Despite significant legislative reform through the enactment of the Bharatiya Nyaya Sanhita, 2023 (BNS), the legal position of marital rape doesn't change a bit and the provisions remains unchanged. Exception 2 of Section 63 of the BNS, which substantially reproduces the earlier provision contained in Section 375 of Indian Penal Code, 1860, continues to exclude non-consensual sexual intercourse by a husband with his wife. Provided the wife is above 18 years of age, from the definition of rape. This paper critically examines the constitutional validity of the marital rape exception through the framework of Article 14, 15, and 21 of the constitution of India. It argues that the exception fails the test of reasonable classification under Article 14, creating an arbitrary distinction between married and unmarried women, reinforces gender-based discrimination prohibited under Article 15, and violates the fundamental right of dignity, privacy, bodily autonomy, and personal liberty enshrined in Article 21. The paper also analyses the judicial development relating to marital rape, including the Supreme court's decision in *Independent Thought v. Union of India* (2017) 10 SCC 800 which read down the exception in respect to wives below 18 years of age, and *Joseph Shine v. Union of India* (2019) 3 SCC 39; AIR 2018 SC 4898, which affirmed that marriage does not extinguish a women's constitutional identity, autonomy, or dignity. It also shows the continuing tension between legality and morality in the context of marital rape. The paper concludes with specific recommendations for legislative and judicial reform, including the deletion of Exception 2 to Section 63 of the BNS by Parliament, judicial intervention by the Supreme Court in the pending batch of petitions arising from the split verdict in *RIT Foundation v. Union of India* (Delhi High Court, 2022), and the implementation of awareness and sensitisation measures to ensure effective enforcement of any reform.

Introduction

Rape is recognized globally as one of the gravest human right violation. To assess the marital rape exception in Indian law, this paper first examines the legal frame work under Bharatiya Nyaya Sanhita, 2023, then analyses its constitutional validity under Article 14, 15, and 21. Although, it is an offence against human body but it affects the victim both physically and mentally to such an extent that sometimes even a whole lifetime is not enough to overcome such a trauma. Such is the severity impact of this. Marriage, historically regarded as a sacred institution, has often existed as a realm insulated from the reach of the law a sanctuary for love and familial bonds. Yet, lurking within the confines of this sanctity is a contentious issue that has long remained veiled in societal norms and legal obscurity: marital rape crime The central question that guides this research is whether criminalization of marital rape should be encompassed within the purview of the existing legal framework and subject to punitive measures under the BNS (Bharatiya Nyaya Sanhita, 2023). In section 63 defines and criminalize rape, however, provides for an exception 2 that not covered by the provisions namely that sexual intercourse or sexual act by a man with wife and the wife not being under the age of 18 is not rape. (The Bhartatiya Nyaya Sanhita,2023 retains the definition of rape exception that previously existed in section 375 of Indian Penal Code. Both provisions define the offence of rape in similar terms and retain the same marital rape exception. Therefore the legal position regarding marital rape remains unchanged under the new law framework). It simply means that forced sexual intercourse within the marriage in India is excluded from being classified rape. Section 67 of BNS addresses sexual intercourse by a husband with his wife during separation. It provides punishment where a husband has sexual intercourse with his wife without her consent while they are living separately, whether under a judicial decree or otherwise. Section 67 prescribes punishment of imprisonment ranging from two to seven years and fine.

There are numerous causes because of which marital rape persists. Our society which has always been a male-dominated society is also to blame for this crime because wife is still treated by the husband as his property over whom he exercises unrestricted control. That is why marital rape is historically not recognized as a crime as it is believed that a husband has the right to do that and wife has no right to oppose it. Further, if a women tries to oppose it no one comes out to support her, not even her own family let alone society at large. Has only persisted in India instead of decreasing. The first major reason for that is the mentality of Indian

society. In India, marital rape has never been considered as a crime rather it is believed that it is the duty of every wife to satisfy her husband in every respect even at the cost of her own rights and dignity.

Morality vs Legality

The debate on marital rape reflects the conflict between **morality and legality** in Indian society. Morality refers to principles of right and wrong, while legality refers to rules recognised and enforced by law. In the context of marital rape, what may be morally unacceptable is not always legally punishable. Traditionally, marriage was viewed as a relationship in which a wife was expected to submit to her husband's wishes, including sexual demands. This belief influenced legal systems for many years and contributed to the idea that consent within marriage was permanent and automatic. However, with changing social values, greater importance is now being given to human dignity, equality, privacy, and bodily autonomy. From a moral perspective, non-consensual sexual intercourse is wrong irrespective of the relationship between the parties. Marriage should not be interpreted as giving one spouse unrestricted control over the other's body. Every individual has the right to make decisions regarding their own body and sexual autonomy. Therefore, forced sexual relations within marriage are morally impermissible and should be recognised as a violation of human rights. The legal position in India, however, presents a different picture. Under Section 63 of the Bharatiya Nyaya Sanhita, 2023, sexual intercourse by a husband with his wife, if she is above eighteen years of age, is generally excluded from the definition of rape. This marital rape exception creates a gap between moral understanding and legal recognition. While society increasingly acknowledges the importance of consent within marriage, the law continues to provide limited protection in this area. This issue can also be examined through Natural Law theory, which suggests that law should reflect moral values and evolving standards of justice. If a legal provision contradicts principles of fairness, equality, and dignity, there is a need for legal reform. The continued existence of the marital rape exception raises concerns regarding constitutional principles such as Article 14 (Equality), Article 15 (Prohibition of Discrimination), and Article 21 (Right to Life and Personal Liberty), as well as international human rights standards. As feminist scholar Catherine MacKinnon argues, the private sphere has often protected male power rather than female privacy. This observation is relevant in the debate on marital rape, where the institution of marriage has historically been used to shield acts of sexual violence from legal scrutiny. Therefore, protecting the dignity and autonomy of

women within marriage is not only a moral responsibility but also an important legal concern.

Constitutional Validity of the Marital Rape Exception

The Constitution of India guarantees fundamental rights to all individuals, including the rights to equality, dignity, liberty, and protection from discrimination. Any law that violates these rights can be challenged on constitutional grounds. The marital rape exception has been criticised because it treats married women differently from unmarried women in matters of sexual violence. Due to this distinction, questions arise regarding whether the exception is consistent with the constitutional values of equality and justice. This paper examines exception 2 to Section 63 BNS under Article 14, 15, and 21.

A. Article 14 – Right to Equality

Article 14 of the Indian constitution guarantees “equality before law” and “equal protection of the law” to all the persons who live within the territory of India. It ensures that all the citizens of India are treated equally and prohibits any actions based on random action of the state. The Indian judiciary has consistently recognized that Article 14 does not completely rule out of classification. However, any classification must satisfy the test of “reasonable classification”. The classification must be based on an intelligible differentia and rational nexus with an objective aimed to be achieved. The marital rape exception has always been criticised on the ground that it fails this constitutional test. The exception creates a distinction between married and unmarried women. However non-consensual sexual intercourse against an unmarried-women is recognised as rape, the same act within marriage is treated differently because the women is married and the husband has the right to it because they carry a tag of being husband and wife. This classification raises constitutional concerns. The question arises whether marriage can serve as a valid reason for denying a women’s legal protection against sexual violence. Traditionally this distinction has been defended as necessary to protect the institution of marriage. However, protecting marriage cannot justify denying bodily autonomy, dignity, and equal- legal protection to married women.

The Supreme Court has expanded the scope of Article 14 beyond formal equality and has held that arbitrariness is antithetical to equality. In *E.P. Royappa v. State of Tamil Nadu*, the Supreme Court, while dismissing the petition on facts, laid down the revolutionary principle that “Equality is antithetic to arbitrariness.” The marital rape exception, by arbitrarily excluding

married women from the protection of rape law, is therefore open to challenge under this expanded understanding of Article 14.

Furthermore, by excluding married women from the protection available to other unmarried women those who are victim of sexual assault the exception creates an unequal treatment under criminal law. Such differential treatment raises serious concerns regarding the constitutional promise of equal protection. Therefore, the marital rape exception may be viewed as inconsistent with Article 14 as it creates a classification that is increasingly questioned for lacking constitutional justification in a modern democratic society

B. Article 15 – Prohibition of Discrimination

Article 15(1) of the Indian constitution prohibits the state from discriminating on the grounds of religion, race, caste, sex, or place of birth. The provision seeks to eliminate gender inequality and ensure equality between the individual. The marital rape has been criticized for creating a form of discrimination that disproportionately affects married women. While the law recognize non-consensual intercourse as a criminal offence in most circumstances, but it exclude the similar conduct if it is done within marriage then it is not seen as a rape traditionally. As a result married women as denied a legal protection that is available for unmarried women thereby creating a distinction based on marital status that primarily impact women. Marital rape is exception based on the outdated belief that a women automatically gives permanent consent to sexual intercourse after getting married. This thought doesn't align with modern constitutional values which recognize women as independent individual with their own rights, dignity, and freedom to make choices about their bodies. By treating a married women's consent differently from a unmarried women the exception promote gender stereotype and create unequal power relations within marriage.

In **Joseph Shine v. Union of India (2019) 3 SCC 39; AIR 2018 SC 4898** the Supreme Court rejected legal provisions based on the notion that a wife is subordinate to her husband and emphasised that marriage does not extinguish a women's constitutional identity. The Court expressly criticised the law for creating "a dent on the individual independent identity of a women" and for subordinating her to the husband's consent or connivance. The Court also held that a legislation should serve and promote good life, and should be fit and equitable so that it can command obedience.

Similarly, in **Anuj Garg & Ors. v. Hotel Association of India & Ors., (2008) 3 SCC 1 : AIR 2008 SC 663**, the Court held that laws founded on gender stereotypes must be subjected to strict constitutional scrutiny. These decisions support the view that legal provisions based on outdated assumptions regarding the role of women in marriage may violate Article 15.

Therefore, the marital rape exception may be viewed as inconsistent with article 15 because it denies equal legal protection of married women and perpetuates discriminatory notions regarding consent, autonomy, and gender equality.

C. Article 21 – Right to Life and Personal Liberty

Article 21 of the Indian constitution guarantees that no person shall be deprived of life or personal liberty except according to a procedure established by law. Over the time supreme court has interpreted Article 21 expansively and has held that the right to life includes the rights to dignity, privacy, bodily integrity, and personal autonomy. The concept of personal liberty means an individual authority to make decisions with his own will and this protection does not cease upon marriage. A married women retain the rights to dignity, privacy, bodily integrity, and personal autonomy. The marital rape exception has been criticized for undermining these right by assuming consent within marriage irrespective of a women's own wishes, no-consensual sexual intercourse violates a women bodily autonomy and personal liberty regardless of the marital relationship between the parties. There is an assumption in the society that marriage creates a permanent consent and now it is increasingly viewed as incompatible with contemporary constitutional values.

In **Suchita Srivastava v. Chandigarh Administration (2009) 9 SCC 1 : AIR 2010 SC 235**, the Supreme Court recognised that a women's right to make choices concerning her body is a dimension of personal liberty under Article 21. Similarly, in **Justice K.S. Puttaswamy v. Union of India (2017) 10 SCC 1 : AIR 2017 SC 4161, Writ Petition (Civil) No. 494 of 2012**, the Court affirmed that privacy includes decisional autonomy and control over intimate personal matters. These principles establish that consent remains central to personal autonomy, even within marriage.

Further, in **Joseph Shine v. Union of India [(2019) 3 SCC 39]**, the Supreme Court emphasised that marriage does not extinguish an individual's dignity, autonomy, or constitutional identity. The Court rejected legal doctrines that treat women as subordinate to their husbands

and reaffirmed the importance of individual choice and freedom within marital relationships. The broader principle established is that marriage is a legal and social relationship, but it cannot convert a woman into property or remove her decisional freedom.

Therefore, the marital rape exception is inconsistent with Article 21 because it compromises a married woman's dignity, bodily integrity, privacy, and personal liberty. By denying legal recognition to the absence of consent within marriage the exception arises a significant constitutional concerns regarding the protection of fundamental rights.

Judicial Developments: Independent Thought v. Union of India

A landmark step in the evolution of marital rape jurisprudence in India was taken in **Independent Thought v. Union of India, (2017) 10 SCC 800 : SC 4904**. Before this judgment, Exception 2 to Section 375 IPC stated that sexual intercourse by a man with his wife was not rape if the wife was not below fifteen years of age. The petitioner, Independent Thought, challenged this exception as violating Articles 14, 15, and 21 by allowing forced sex within child marriage. The Supreme Court held that the marital rape exception cannot protect intercourse with a wife below eighteen years of age. The Court read down the exception for minors, establishing that sexual intercourse with a minor wife constitutes rape. The Court relied on the girl child's rights to equality, dignity, liberty, and bodily integrity under the Constitution, and aligned the rape law with the age of consent as eighteen years under other child-protection statutes. The decision recognised that child marriage cannot validate sexual violence against a minor wife. The Court in Independent Thought also addressed the judicial role in removing outdated legal norms. Citing the House of Lords, the Court held that removing an anachronistic, offensive, and unconstitutional common law fiction does not amount to the judicial creation of a new offence, rather, the Court has a duty to act and excise such unconstitutional provisions.

RIT Foundation v. Union of India

In *RIT Foundation v. Union of India*, W.P.(C) No. 284 of 2015, Delhi High Court, the constitutional validity of Exception 2 to Section 375 of the Indian Penal Code (which is now section 63 BNS, 2023) was challenged. The petitioners argued that the marital rape exception violated Articles 14, 15, 19, and 21 of the Constitution by treating married women differently from unmarried women and restricting their rights to bodily autonomy, dignity, and privacy.

The case was decided by a Division Bench comprising Justice Rajiv Shakti and Justice C. Hari Shankar, which delivered a split verdict. Justice Shakti held that the exception was unconstitutional, emphasizing that marriage does not extinguish a woman's right to consent. In contrast, Justice Hari Shankar upheld the provision, observing that any change in the law should be made by the legislature. Due to the split verdict, the matter remains pending before the Supreme Court. The case directly tests whether Exception 2 violates Article 14, 15, and 21. The Supreme Court's eventual decision is expected to have a major impact on the future of marital rape laws in India.