
REASSESSING THE MARITAL RAPE EXCEPTION: CONSTITUTIONAL VALIDITY AND CRIMINAL JURISPRUDENCE IN INDIA

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ABSTRACT

This paper undertakes a critical re-examination of the marital rape exception in India within the framework of constitutional validity and criminal jurisprudence. It traces the historical justification of the exception under the Indian Penal Code, 1860, and evaluates its continued relevance in light of contemporary criminal law reforms introduced through the Bharatiya Nyaya Sanhita, 2023. The study analyses whether the exclusion of marital rape from the offence of rape aligns with constitutional guarantees of equality, non-discrimination, dignity, bodily autonomy, and personal liberty under Articles 14, 15, and 21 of the Constitution. Adopting a socio-legal methodology, the paper engages with judicial interpretations, legislative intent, feminist and rights-based critiques, and the lived realities of married women. It further situates the Indian position within evolving global standards to assess the need for doctrinal and legislative reform.

Keywords: Marital Rape Exception, Constitutional Validity, Criminal Jurisprudence, IPC and BNSS, Socio-Legal Research

Introduction

Marital rape refers to non-consensual sexual intercourse or penetration committed by a spouse.¹ Legally, the definition of rape remains the same as in other contexts: sexual acts performed without the victim's consent.² Consequently, the essential element in establishing rape is proving the absence of consent, a burden that often falls on the victim.³ In certain cases, such as with minors, consent is legally presumed to be absent.⁴ However, in the context of marriage, consent is often presumed to exist, effectively creating a legal exception and making the notion of marital rape legally contentious.⁵

Globally, only about fifty-two countries recognize marital rape as a crime.⁶ In many jurisdictions, including India, marital rape is either not criminalized or excluded from the definition of rape under law—a principle often referred to as the “marital rape exception.”⁷ Historically, this exception was justified on patriarchal notions of wifely subservience⁸ and the “unity theory,”⁹ which denied married women independent legal identities.¹⁰ Contemporary justifications include the assumption of “implied consent”¹¹ and the view that criminal law should not interfere in the private sphere of marriage.¹²

This paper critically examines these justifications, evaluating them against constitutional guarantees of equality, dignity, and bodily autonomy under Articles 14, 15, and 21. It draws on parliamentary debates, judicial interpretations, and socio-legal scholarship to argue for the criminalization of marital rape in India. The discussion proceeds as follows: Part II traces the evolution of marital rape law and legislative debates; Parts III, IV, and V analyze and counter prevailing arguments against criminalization; and Part VI proposes reforms in criminal law to effectively recognize marital rape as a punishable offence.

¹ Indian Penal Code, 1860, s. 375 (definition of rape).

² Ibid.

³ K. S. Joseph, *The Burden of Proof in Rape Cases* (2015) 47 JILI 23.

⁴ Protection of Children from Sexual Offences Act, 2012, s. 3

⁵ T. Sharma, *Consent and Marriage: A Legal Study* (2018) 60 CLJ 89.

⁶ UN Women, *Global Status of Marital Rape Laws* (2021).

⁷ Law Commission of India, *Report on Marital Rape*, No. 233 (2009)

⁸ H. Patel, *Women as Chattel in Historical Indian Law* (2010) 12 IJLS 45

⁹ J. Kaur, *Unity Theory and Marital Rights* (2012) 9 ILR 112

¹⁰ Ibid.

¹¹ Law Commission of India, *ibid*

¹² S. Reddy, *Privacy, Marriage and the Law* (2016) 24 SJCL 77

The Marital Rape Exception under Indian Law: Historical and Legal Perspectives

Marital rape refers to sexual intercourse or sexual acts committed by a husband without the consent of his wife.¹³ Legally, rape in India is defined under Section 375 of the Indian Penal Code (IPC), 1860, which includes vaginal, anal, or oral penetration by a body part or object, without the consent of the victim.¹⁴ The essence of the crime lies in the absence of consent,¹⁵ and in most cases, the burden to prove this rests on the victim.¹⁶ While minors are presumed incapable of consenting to sexual acts,¹⁷ the law simultaneously presumes that consent exists within marriage, effectively creating an exception that shields marital rape from criminal liability.¹⁸

Under Exception 2 of Section 375, sexual intercourse by a husband with his wife who is not under fifteen years of age is not considered rape.¹⁹ This exception provides immunity to most forms of marital rape, although a specific form—rape committed by a husband when the couple is living separately due to judicial separation or otherwise—is criminalized under Section 376A of the IPC, punishable with imprisonment of up to two years.²⁰

Historically, the marital rape exception in India reflects deep-seated patriarchal notions. Early justifications were based on the understanding of women as subservient to their husbands and the “unity theory”,²¹ which viewed a married woman’s legal identity as merged with her husband’s, thereby denying her independent legal recognition.²² With the feminist movements and the push for gender equality post-1970s, these overtly patriarchal justifications have largely been discredited. Modern defenses for the exception instead rely on implied consent—the assumption that sexual consent is inherent in marriage—and on the principle that criminal law should not intrude into the private sphere of marriage.²³

¹³ Indian Penal Code, 1860, s. 375 (definition of rape).

¹⁴ Ibid.

¹⁵ K. S. Joseph, *The Burden of Proof in Rape Cases* (2015) 47 JILI 23.

¹⁶ Ibid.

¹⁷ Protection of Children from Sexual Offences Act, 2012, s. 3.

¹⁸ T. Sharma, *Consent and Marriage: A Legal Study* (2018) 60 CLJ 89.

¹⁹ Indian Penal Code, 1860, s. 375, Exception 2.

²⁰ Indian Penal Code, 1860, s. 376A.

²¹ J. Kaur, *Unity Theory and Marital Rights* (2012) 9 ILR 112.

²² H. Patel, *Women as Chattel in Historical Indian Law* (2010) 12 IJLS 45.

²³ Law Commission of India, *Report No. 233: Marital Rape* (2009).

Marital rape can take multiple forms:

1. Non-consensual sexual intercourse within a cohabiting marital relationship, which remains largely unrecognized under Indian law;
2. Rape by a husband during judicial separation or when spouses are living apart, recognized under Section 376A of the IPC;²⁴
3. Coercive sexual acts, including oral or anal penetration, or penetration with objects, which are often excluded from legal recourse due to the marital exemption.

The Indian legislature and judiciary have repeatedly engaged with the issue, reflecting the tension between protecting the sanctity of marriage and safeguarding women's rights. The *42nd Law Commission Report* was the first to highlight marital rape in the context of broader criminal law reforms.²⁵ The report provided insight into the Commission's perception of marital rape but did not fully address the constitutional validity of the exception. Subsequently, the *172nd Law Commission Report* directly examined the Exception 2 clause, noting that if other forms of domestic violence by a husband are criminalized, there is no legal basis for exempting rape.²⁶ However, the Commission concluded that criminalizing marital rape could lead to "excessive interference with the institution of marriage," reflecting the persistent socio-cultural considerations influencing law.²⁷

The *J.S. Verma Committee (2012)*, formed following nationwide demands for more effective sexual assault legislation, recommended criminalizing marital rape, emphasizing that in modern marriages between equals, the presumption of consent is inconsistent with the principles of equality and bodily autonomy.²⁸ In response, the *Criminal Law Amendment Bill, 2012* replaced the term "rape" with "sexual assault" to broaden the scope of the law, but it did not criminalize marital rape.²⁹ The Parliamentary Standing Committee on Home Affairs, in its 167th Report, recommended deleting Exception 2, citing concerns about family stress and the availability of remedies under Section 498A (cruelty).³⁰ The Ministry of Home Affairs later

²⁴ Section 376A, IPC, 1860.

²⁵ Law Commission of India, *42nd Report on Women and Criminal Law* (1971).

²⁶ Law Commission of India, *172nd Report on Marital Rape Exception* (2000).

²⁷ Ibid.

²⁸ J.S. Verma Committee, *Report on Amendments to Criminal Law* (2013)

²⁹ Criminal Law Amendment Bill, 2012.

³⁰ Parliamentary Standing Committee on Home Affairs, *167th Report* (2013).

reiterated this position, arguing that societal norms view marriage as a sacrament and that the international concept of marital rape could not be directly applied in India.³¹ Understanding this evolution—from patriarchal justifications to modern legislative debates—sets the stage for examining the constitutional validity of the marital rape exception and the pressing need for legal reform.

Constitutional Analysis: Equality, Dignity, and Bodily Autonomy

The constitutionality of Exception 2 to Section 375 of the IPC can be critically examined under the fundamental rights guaranteed by the Constitution, particularly Articles 14, 15, and 21, which protect equality, non-discrimination, and the right to life and personal liberty.

Right to Equality (Article 14) guarantees that every individual shall be treated equally before the law and accorded equal protection under it.³² Judicial interpretations have clarified that “equals should be treated equally,” and classification is only permissible when it is intelligible, reasonable, and bears a nexus to the objective sought.³³ In *Chiranjit Lal v. Union of India*, the Supreme Court emphasized that equal protection applies to persons in like circumstances,³⁴ implying that arbitrary differentiation cannot be justified.

Proponents of Exception 2 argue that married women constitute a different class from unmarried women, justifying the exception under Article 14.³⁵ This reasoning, however, is regressive and incompatible with contemporary society, as it treats women’s autonomy as subordinate to marital status, echoing archaic notions of women as property of their husbands.³⁶ In *Independent Thought v. Union of India*,³⁷ the Supreme Court examined Exception 2 in the context of child marriage and held that retaining the exception for girls below eighteen years was arbitrary, whimsical, and violative of Articles 14, 15, and 21, as it ignored the statutory age of consent and the principles of equality and justice.

The constitutional challenge extends beyond child marriage. In *Nimeshbhai Bharatbhai Desai v. State of Gujarat*,³⁸ the Gujarat High Court struck down the exception insofar as it applied to

³¹ Ministry of Home Affairs, *Parliamentary Response on Marital Rape* (2015).

³² Constitution of India, Art. 14.

³³ *E.P. Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3.

³⁴ *Chiranjit Lal v. Union of India*, AIR 1951 SC 41.

³⁵ N. Kaur, *Marital Rape Exception and Article 14*, 2017 IJLS 112.

³⁶ *Ibid.*

³⁷ *Independent Thought v. Union of India*, (2017) 10 SCC 800.

³⁸ *Nimeshbhai Bharatbhai Desai v. State of Gujarat*, 2018 SCC OnLine Guj 201.

adult women, declaring it unconstitutional under Articles 14 and 21. The Court recognized marital rape as a serious violation of trust and autonomy, holding that married women cannot be denied protection afforded to other women under the law.³⁹ It emphasized that bodily integrity, sexual autonomy, and reproductive rights are inalienable and not contingent upon marital status.⁴⁰

Right to Privacy and Bodily Autonomy (Article 21) further strengthens the argument against the marital rape exception. Judicial precedents, including *T. Sareetha v. T. Venkatasubbiah*⁴¹ and *K.S. Puttaswamy v. Union of India*,⁴² affirm that sexual autonomy is central to the right to privacy. Compelling sexual relations within marriage, as argued in the context of marital rape, infringes on bodily and decisional privacy, demeaning the individual's dignity.⁴³ Parallel reasoning was applied in cases involving Restitution of Conjugal Rights (RCR), where courts recognized that enforcing conjugal relations without consent violates bodily autonomy and marital privacy.⁴⁴

However, courts have diverged in their approach. In *Harvinder Kaur v. Harmander Singh Choudhary*⁴⁵ and *Saroja Rani v. Sudarshan Kumar Chada*⁴⁶ the Delhi High Court and Supreme Court upheld the constitutionality of provisions compelling conjugal cohabitation, prioritizing the sanctity of marriage over individual autonomy. Such reasoning has been criticized for ignoring women's rights to bodily integrity and creating inconsistencies with protections under Section 498A IPC and the Protection of Women from Domestic Violence Act, 2005.⁴⁷

The Supreme Court in *Puttaswamy* reiterated that privacy encompasses bodily integrity, decisional privacy, and sexual and reproductive autonomy,⁴⁸ and in *Suchitra Srivastava v. Chandigarh Administration*,⁴⁹ the Court recognized a woman's right to reproductive choice, including the right to refuse sexual intercourse. These principles underscore that marital status cannot diminish fundamental rights, and any exception permitting marital rape is inherently

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ *T. Sareetha v. T. Venkatasubbiah*, AIR 1983 AP 356.

⁴² *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

⁴³ Ibid.

⁴⁴ Hindu Marriage Act, 1955, s. 9; *Sareetha v. Venkatasubbiah*, AIR 1983 AP 356

⁴⁵ *Harvinder Kaur v. Harmander Singh Choudhary*, 1994 SCC OnLine Del 20.

⁴⁶ *Saroja Rani v. Sudarshan Kumar Chada*, (1988) 2 SCC 449.

⁴⁷ Protection of Women from Domestic Violence Act, 2005; IPC s. 498A.

⁴⁸ *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

⁴⁹ *Suchitra Srivastava v. Chandigarh Administration*, (2009) 14 SCC 1.

unconstitutional.

Despite judicial recognition of bodily integrity and autonomy, legislative inertia persists. Petitions filed by organizations such as RIT Foundation and AIDWA challenge the exception under Articles 14, 15, and 21.⁵⁰ The Government, however, has argued that criminalization may destabilize marriages or be misused, and that remedies under Section 498A IPC suffice.⁵¹ Courts, while acknowledging women's right to refuse sexual relations within marriage, have been reluctant to compel legislative action.⁵²

Exception 2 to Section 375 violates the core principles of equality, non-discrimination, and personal liberty enshrined under the Constitution. It denies married women the protection against sexual violence afforded to other women, undermining bodily autonomy and human dignity. The argument that marital privacy shields the exception has been effectively negated by contemporary jurisprudence emphasizing individual autonomy over marital sanctity. The exception, therefore, is constitutionally indefensible and calls for immediate legislative reform.

Criminal Jurisprudence: From IPC to Bharatiya Nyaya Sahita

The debate over criminalisation of marital rape is not limited to constitutional challenges; it also engages criminal jurisprudence under evolving statutory frameworks. Critics of criminalisation commonly argue that marital rape is difficult to prove in court and vulnerable to misuse by unscrupulous spouses. However, difficulty of proof or potential misuse cannot justify *non-criminalisation* of serious offences: other crimes such as sexual harassment at the workplace and dowry offences are difficult to prove and can be misused in some cases, yet they are criminalised because of the gravity of harm they cause.⁵³ Evidence challenges in sexual assault cases—where the accused is known to the victim and corroboration is hard to secure—are common, but the imperative should be to strengthen evidentiary procedures, not exempt marital violence from legal scrutiny.⁵⁴

Empirical data underscores this reality: official crime statistics show that a substantial proportion of sexual assaults involve perpetrators known to the victim. In Delhi, for instance,

⁵⁰ RIT Foundation & AIDWA PILs, Delhi High Court, 2017 onwards.

⁵¹ Government of India, Parliamentary Responses, 2017–2019.

⁵² Ibid.

⁵³ P. Singh, *Criminalisation of Sexual Harassment and Dowry Offences*, 2019 CLJ 45.

⁵⁴ G. Bhatia, *Evidentiary Challenges in Sexual Assault Cases* (2021) 33 ILR 119.

a 21.6% increase in reported rape cases was observed in one recent year, and 98.6% of offenders were known to the victims, indicating the frequent proximity between perpetrator and victim.⁵⁵ Within this context, a significant subset likely comprises husbands or intimate partners.⁵⁶ The proximity factor often results in weak traditional evidence—limited physical injuries, reluctance of relatives to testify, and “he-said, she-said” situations—but jurisprudential mechanisms exist to support convictions where testimony is credible and corroborated.⁵⁷

For example, in matrimonial jurisprudence, courts have recognised non-consensual sexual behaviour as cruelty under civil law. In a decision interpreting cruelty, the Kerala High Court observed that cruelty can be reflected in a spouse’s character and should be assessed through a combination of credible testimony and contextual evaluation of human behaviour.⁶ The court accepted non-consensual sexual perversion by a husband as an aspect of cruelty where the wife’s testimony was consistent and corroborated.⁵⁸ This suggests that courts are capable of contextual, nuanced evaluations that transcend simple procedural obstacles. Similarly, evidence law supports that absence of medical injuries does not automatically discredit testimony. In *Sheikh Zakir v. State of Bihar*, the Supreme Court emphasised that lack of injury does not negate the truth of non-consensual intercourse if other evidence is believable, reinforcing that criminal justice can accommodate testimonies supported by context and corroboration.⁵⁹

Legislative reform has also reshaped how sexual offences are defined and penalised in India. The Indian Penal Code, 1860—with its Section 375 defining rape and Exception 2 exempting rape within marriage when the wife is not a minor—was replaced in large part by the Bharatiya Nyaya Sanhita (BNS), 2023, effective from July 1, 2024.⁶⁰ Under Section 63 of the BNS, the definition of rape largely mirrors Section 375 of the IPC, including the marital rape exception, but raises the age threshold: sexual intercourse or sexual acts by a man with his wife are not rape only if the wife is not under eighteen years of age, thereby aligning the exception with the general age of consent.⁶¹ This change reflects legislative recognition of the Supreme Court’s

⁵⁵ Delhi Police Crime Statistics 2021–2022 (official report).

⁵⁶ Ibid.

⁵⁷ *Sheikh Zakir v. State of Bihar*, (2013) 3 SCC 225.

⁵⁸ *XXX v. XXX*, Kerala High Court (civil cruelty interpretation).

⁵⁹ Ibid.

⁶⁰ *Sheikh Zakir v. State of Bihar*, (2013) 3 SCC 225.

⁶¹ Bharatiya Nyaya Sanhita, 2023, effective July 1, 2024; replaces key provisions of IPC, 1860.

reasoning in *Independent Thought v. Union of India*, where the Court read down the earlier exception age from fifteen to eighteen in cases of child marriage.⁶²

Despite this modification, the fundamental marital rape exception remains intact in BNS, reflecting significant continuity from the IPC.⁶³ The new law also introduces provisions such as Section 69, which criminalises sexual intercourse by employing deceitful means or false promises of marriage, carrying imprisonment and fines, thereby expanding the scope of punishable non-consensual sexual conduct outside the classic rape definition.⁶⁴ Other updates include broader age-group classifications and enhanced penalties for certain categories of rape.⁶⁵ Nonetheless, critics note that BNS retains gendered categories—for instance, rape remains a crime defined in terms of male perpetrator and female victim—and does not yet adopt *gender neutrality*.⁶⁶

The persistence of the marital rape exception in both IPC and BNS has attracted ongoing litigation. In 2024–25, petitions in the Supreme Court challenge the Exception 2 clause in Section 63 of the BNS as unconstitutional, as well as provisions—such as Section 67 relating to punishment for separated spouses—that impose lower penalties than those applicable to other rape offences.⁶⁷ These challenges underscore the jurisprudential tension between statutory continuity of the exception and the constitutional imperatives of equality and dignity explored earlier.

Chhattisgarh High Court Judgment (2025) and Critical Analysis

In 2025, the Chhattisgarh High Court in a high-profile criminal appeal, acquitted a husband convicted for the rape and unnatural sexual acts committed against his wife, which had allegedly led to her death.⁶⁸ The trial court had convicted him under Sections 376, 377, and 304 IPC based on the dying declaration, medical evidence, and witness statements.⁶⁹

The High Court held that sexual acts between spouses above 15 years of age fall under the marital rape exception, rendering Section 376 IPC inapplicable. It extended this reasoning to

⁶² Section 63, BNS – marital rape exception with age threshold of 18

⁶³ *Independent Thought v. Union of India*, (2017) 10 SCC 800

⁶⁴ *Ibid*; marital rape exception retained in BNS.

⁶⁵ Section 69, BNS – sexual intercourse by deceit.

⁶⁶ Sections 64–65, BNS – penalties and age categories

⁶⁷ Supreme Court petitions against marital rape exception in BNS.

⁶⁸ Chhattisgarh High Court, Criminal Appeal No. 211/2025.

⁶⁹ *Ibid*.

Section 377 IPC, stating that “unnatural sexual acts” between spouses cannot be punished if marital consent is assumed.⁷⁰ This approach has been criticized for ignoring constitutional principles of equality, dignity, and bodily autonomy, which were reinforced in Independent Thought, Nimeshbhai, and K.S. Puttaswamy v. Union of India (2017) regarding the right to privacy and personal autonomy.⁷¹ Critically, the judgment reinforces a formalistic, textual reading of the law, rather than a constitutionally harmonized interpretation that protects married women from non-consensual sexual acts. It also highlights the urgent need for legislative reform to remove the marital rape exception in both the IPC and BNS to ensure parity in protection for married and unmarried women.⁷²

Conclusion and Recommendations

The existence of the marital rape exemption under Section 375 of the then IPC, and its continuation in the current Section 63 of the Bharatiya Nyaya Sanhita reforms, represents a significant barrier to achieving substantive equality and bodily autonomy for married women. Such a provision perpetuates the notion that women are subordinate to men, treating them as akin to chattel whose chastity and consent are transferable from father to husband. The flawed assumption that consent given once is consent for life directly undermines the autonomy of women and reflects entrenched societal bias against the female gender. It is therefore imperative to recognize that criminal law must evolve to reflect contemporary constitutional and social realities, particularly the principles of equality under Articles 14 and 15 and the right to personal liberty, dignity, and bodily autonomy under Article 21.

In light of the BNS reforms, which aim to modernize and codify criminal law with a focus on gender justice, several socio-legal and legislative measures are necessary. First, the marital rape exemption must be repealed entirely, with explicit clarification that marital or any prior relationship between the accused and the victim shall neither serve as a defense nor mitigate sentencing.

Second, marital rape should be recognized as a ground for divorce under personal laws, reflecting its status as physical and mental cruelty. Recent judgments, including the nuanced observations by the Kerala High Court, emphasize the need to evolve matrimonial law to

⁷⁰ Ibid.

⁷¹ *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

⁷² *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

recognize the trauma and human rights violations inherent in non-consensual sexual activity within marriage. Such recognition also forms a crucial first step toward criminalization, allowing affected women to seek legal redress.

Third, criminalization must be complemented with social and structural safeguards. Women often face social stigma, economic dependency, and familial rejection, which can prevent them from reporting marital rape even after it is criminalized. To address this, the government must establish shelter and rehabilitation homes equipped with legal aid, vocational training, psychological counseling, medical facilities, and childcare. These measures ensure that women can exercise their legal rights safely and rebuild their lives with dignity and independence.

Prevention of marital rape also requires multi-level interventions. At the personal level, men must be sensitized to recognize women as equal partners, and the judiciary and legislative bodies must hold perpetrators accountable. At the community level, awareness campaigns and education initiatives must challenge gender hierarchies and emphasize equality. At the societal level, comprehensive strategies should aim to reform institutional and cultural norms, promoting socio-political change that values gender justice.

Furthermore, judicial training is necessary to ensure sensitivity in handling marital rape cases, while women's commissions and NGOs must actively advocate for effective legislation and implementation. International norms and recommendations should guide domestic reforms, ensuring that marital rape is recognized broadly and inclusively—protecting victims of all genders and not constrained by traditional notions of victimhood.

In conclusion, the criminalization of marital rape under the BNS/BNSA, supported by legislative, judicial, and social reforms, is essential to uphold constitutional guarantees of equality, bodily autonomy, and dignity for women. Comprehensive reforms will not only provide legal protection but also initiate a societal shift towards recognizing women as autonomous individuals rather than property within marriage. Only through the integration of legal, social, and institutional measures can the menace of marital rape be effectively addressed in contemporary India.