

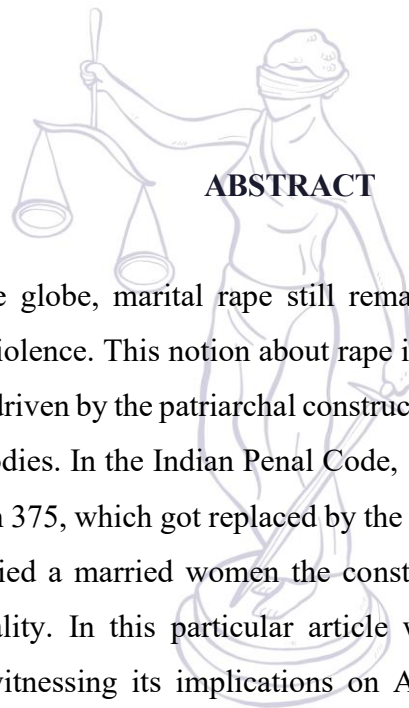
MARITAL RAPE AND WOMEN'S BODILY AUTONOMY: A CONSTITUTIONAL PERSPECTIVE

by

Anmol Mahajan

&

Syed Qifah Nazki



ABSTRACT

In legal systems across the globe, marital rape still remains one of the unaddressed and contested forms of sexual violence. This notion about rape is also deeply rooted in the Indian region which is immensely driven by the patriarchal constructs of marriage and has historically commodified a women's bodies. In the Indian Penal Code, 1860 marital rape exemption was embedded under the Section 375, which got replaced by the Section 63 of the Bhartiya Nyaya Sanhita, 2023 and still denied a married women the constitutional guarantees like dignity, bodily autonomy and equality. In this particular article we have taken up constitutional analysis of marital rape, witnessing its implications on Article 14, 15, 19 and 21 of the Constitution of India. It does not just examine but also surveys landmark judicial decisions alongside international human rights instruments and comparative jurisdictions. The article argues about how marital rape exemption is constitutionally untenable and its existence depicts a fundamental failure of the Indian state towards the women's bodily integrity, sexual autonomy and the right to life with dignity which is majorly drawn from the constitutional jurisprudence, feminist legal theory and socio legal scholarship.

KEYWORDS: Marital rape, Bodily autonomy, Article 21, Constitutional morality, Sexual violence, BNS 2023, Feminist jurisprudence, right to privacy.

I. INTRODUCTION

The notion that a woman does not have a right to say ‘no’ to sexual intercourse with her husband is not to be recently found but ages back to common law doctrine. It all starts since 1736 when Sir Matthew Hale wrote in *History of the Pleas of the Crown* that “But the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract”.¹ This observation became foundation for exemption of marital rape, immunity granted to husbands for committing rape of their wives and got embedded in the common law jurisdictions across the globe.

This exemption for marital rape found its statutory expression in India via, Exception 2 to Section 375 of the Indian Penal Code, 1860. It stated that any sexual act performed by a man with his own wife does not amount to rape, if she is above 18 years.² Despite the fact that IPC was replaced with Bharatiya Nyaya Sanhita, 2023 (with effect from 1st of July 2024) to uproot old colonial roots in our legal system, yet same exemptions were found under Section 63 of BNS, 2023. Indian as a nation and its Constitution lays on certain pillars like:

- Right to life and personal liberty.
- Right to equality before law.
- Right against discrimination.
- Right to privacy.

But a grave contradiction to these constitutional values can be observed in Criminal law, where marital rape exemptions are witnessed, which serve as nothing but violative of all these rights mentioned in India’s Constitution but surprisingly rape is exempted if committed within the institution of marriage.

¹ Sir Matthew Hale, *The History of the Pleas of the Crown* (S Emlyn ed, 1778) 629.

² Indian Penal Code 1860, s 375, Exception 2 (replaced by Bharatiya Nyaya Sanhita 2023, s 63).

Now the question stands, 'Is Marital rape merely a question of criminal law reform or a Constitutional Issue'

At its core it stands as a Constitutional issue that raises a concern regarding a breach of obligations under Indian Constitution on account of state when they still maintain exemptions for marital rape. It raises a significant question of whether the dignity and bodily autonomy cease to exist for a woman once she is not a part of her matrimonial home or does the bodily autonomy and dignity end for a woman with the establishment of relationship of husband and wife.

Constitutional morality is often witnessed as a ground to remove archaic legal provisions by the esteemed Supreme Court of India, should it extend to the realm of marriage which stands as an intimate space for a husband and a wife still remains as an unaddressed question.

This particular article will observe the issue of marital rape from the lens of Constitution in the structure given below:

PART II: Historical & Socio-legal foundations of marital rape exemption.

PART III: Analysis of Constitutional framework & how they apply to the given issue.

PART IV: Examining landmark judicial decisions that have significantly shaped the jurisprudence.

PART V: Comparison with respect to international and other comparative legal systems.

PART VI: Legal theories (Feminist) and Constitutional morality.

PART VII: Legislative position including BNS, 2023.

PART VIII: Examining constitutional responses and counterarguments.

PART IX: Suggests & recommends for reform.

II. Historical & Socio-legal foundations of the Marital Rape Exemption.

1. Hale's Doctrine & Colonial Law

The Exemptions for marital rape derived its lineage from Sir Matthew Hale via the seventeenth- century common law proposition. He stated that a husband cannot be held guilty for raping his own wife because when a woman agrees to get married, she permanently gives away the right of consent with respect to sexual intercourse. Underlying principle for the exemptions was based on coverture, which was nothing but the idea that woman's legal identity after marriage gets subsumed by husband's identity, hence she could not own property, could not enter contracts and could not refuse sex to her husband. Historically marriage was believed to be an irrevocable, lifelong license through which a husband had sexual access to his wife.

Lord Macaulay drafted Indian Penal Code and it got enacted in 1860. Under Section 375 of this act, rape was defined and certain exemptions were added which included that if a husband having sexual intercourse with his wife, who is above 15 years, will not amount to rape. This idea of rape and exemptions were exactly similar to what had been stated in the common law. Much later in 2017 a case named *Independent Thought v. Union of India* broke in-front of Supreme Court, in which the age of wife was increased to 18 years but altogether marital rape still remained as an exception.³ This English Patriarchal legal culture is so deeply rooted in the Indian law that this exemption has survived through Independence, through Constitution and even through various reforms.

2. Post- Independence Continuity & 1983 Amendments

India's Constitution was adopted in 1950 which encompassed values like dignity, equality and non- discrimination. Yet marital rape was never held unconstitutional or a violative of a woman's bodily autonomy and survived various rounds of criminal law reforms. In 1983, Criminal Law Act introduced provisions on custodial rape, which expanded the definition of rape under Section 376 of IPC, but interestingly it left exemption for marital rape as it is. In 172nd Report (2000), The Law Commission of India, addressed reforms related to rape law but vividly declined to suggest criminalization of marital rape, which cited as a grave concern related to 'the institution of marriage'.⁴

³ *Independent Thought v Union of India* (2017) 10 SCC 800.

⁴ Law Commission of India, *172nd Report on Review of Rape Laws* (2000).

Report of 2013, after the horrific gang rape in Delhi on 16th of December 2012 constituted that statute book must be free from exemptions for marital rape. The Justice J.S. Verma Committee observed that ‘The law ought to uphold the bodily integrity and dignity of each individual, irrespective of the relationship between the parties.’⁵ However, when Parliament passed the Criminal Law (Amendment) Act, 2013, this recommendation was not accepted and continuation of marital rape exemption in the statute was observed. This was not merely an oversight but a deliberate political decision. By retaining this exemption, the legislature did not just prioritize traditional views of marriage but also jeopardized the constitutional rights of a woman, which includes:

- Equality
- Dignity
- Bodily autonomy

The gravity of this deliberate legislative choice is thrown into sharp relief by the data collected under the fifth round of the National Family Health Survey (NFHS-5, 2019-21), which surveyed approximately 637,000 households across India. The survey found that over 95% of married women who experienced sexual violence identified their current or former husbands as the perpetrator, and over 90% of those victims did not seek help from anyone, with none approaching a lawyer or the courts for legal recourse.⁶ A further 5.6% of married women reported being physically forced to have sexual intercourse with their husbands, while approximately 18% stated that they were unable to say no to their husbands even when they did not wish to engage in sexual intercourse.⁷

3. Sociological Dimensions

⁵ Justice JS Verma Committee, *Report on Amendments to Criminal Law* (23 January 2013).

⁶ 'A Ruling on Marital Rape in India is Coming Up. Here's Why You Should Be Watching Closely' (Equality Now, 23 June 2025) <<https://equalitynow.org/news/news-and-insights/a-ruling-on-marital-rape-in-india-is-coming-up-heres-why-you-should-be-watching-closely/>> accessed 11 August 2026.

⁷ 'Data Story: NFHS-5 on Sexual Violence' (IAS Score, 2022) <<https://iasscore.in/data-story/data-story-nfhs-5-on-sexual-violence>> accessed 11 August 2026.

Social dynamics play a significant role in the persistence of marital rape exemption. Hence it cannot be studied in isolation as merely a legal issue. Across most existing communities in India, marriage does not just serve as a contract but carries a lot of weight religiously, culturally and economically. It is believed to be a 'union that is permanent, sacred, and hierarchically organized'. In this hierarchical set up, wives do not hold same authority as of their husbands which leaves no room of autonomous personhood for women. For a very long-time women's sexuality was seen as a resource to be regulated and managed by families and husbands.

The laws in countries that were once colonies often become a place of conflict. This conflict is between what some people call the legal order. It is based on fashioned ideas about men being in charge especially in the family. On one side you have the legal order. It is based on ideas about men being in charge. On the other side you have counter-hegemonic legality. It is about marginalized groups including women wanting their rights recognized. This idea comes from the work of Professor Upendra Baxi.

He researched law and social change. A clear example of this conflict is the Indian marital rape controversy. It shows a struggle between a social system that supports husbands controlling their wives' bodies. It also shows a constitutional framework that emphasizes rights and dignity. The Indian marital rape controversy highlights this conflict. It is about women's rights. Dignity. The dominant legal order and social system often clash with women's rights. This clash is an issue in post-colonial societies. The law is an area where this conflict plays out. It affects marginalized groups especially women.

III. CONSTITUTIONAL FRAMEWORK: ARTICLES 14, 15, 19, AND 21

3.1 Article 14 Right to equality

Article 14 is very important constitutional safeguard which guarantees every citizen the right

to equality and equal protection of laws. Supreme court has clarified that equality doesn't mean that everyone is treated equally (formal equality) instead it talks about substantive equality which means that on face a law might look equal but in reality, it's impact can be different for different group. It can create disadvantage for a particular class. Such a law can be challenged if there's no reasonable basis for it.

The exception given for marital rape doesn't fall under the test of Article 14 on various grounds: -It views married and unmarried woman differently without any reason. If unmarried woman is forced for having sexual intercourse it considered as rape but is same is happened with a married woman by her husband it is not considered rape. This differentiation is unfair and has no logic because marriage should not take away any woman's bodily autonomy, legal rights, individual identity or her right to give consent.

The exception creates another difference between the both. Unmarried woman can approach the court and seek remedy but married woman may not get the same right. As held in the *RIT Foundation v. Union of India* the classification is arbitrary and unfair and the classification has no nexus with any valid government objective. The pain, suffering, hardship caused is same in both cases.

Supreme court developed the doctrine of manifest arbitrariness in the case of *Shayara Bano v. Union of India* (2017) which stated that law can be struck down if its arbitrary, unfair, irrational or oppressive.⁸ The marital rape exception comes under this doctrine because it gives more control to the husband than to wife over her own body and her right to say yes or no.

3.2. Article 15: Prohibition of Discrimination

Article 15(1) restricts the state from discriminating any citizen against certain characteristics: religion, race, caste, sex, place of birth. The marital rape exception comes under the ground of sex. Married woman is denied the protection.

Supreme court has interpreted Article 15 broadly stating that it not only protects people from direct discrimination but also from the unfair treatment based on customs and gender stereotypes. In *Navtej Johar v. Union of India* (2018) Sec 377 IPC was struck down which

⁸ *Shayara Bano v Union of India* (2017) 9 SCC 1.

criminalized same sex relations.⁹ It was further stated that laws which are irrational or based on prejudice, stereotypes violate Constitution. Constitution forbids the state to impose stereotypical or patriarchal laws on people's personal autonomy. The marital rape exception is based on the view that after marriage women automatically consents to sex and loses control on her body. Therefore, this exception also violates constitutional principles.

In *Joseph Shine v. Union of India* (2018) supreme court stated that laws which treats wife as property of their husband's is unconstitutional.¹⁰ The case struck down Section 497 IPC which dealt with adultery. Justice D.Y Chandrachud held that these laws are invalid because they deny woman of their dignity and equality, ignore woman's independence and treat them as subordinate to men.

3.3. Article 19: Freedom of Expression and Personal Liberty

Article 19(1)(a) is considered as one of the most important constitutional provisions which guarantees every citizen the freedom of speech and expression. The word expression has been interpreted many times and it includes not only speaking or writing but also one's control over their own body, choices (with whom they want to maintain sexual relations) and autonomy over one's own body.

In *Common cause v. Union of India* (2018) it was held that personal liberty now also includes the right of person to determine what happens to their body (covers both Article 19 and 21).

The marital rape exception takes away the married woman's right of bodily autonomy, dignity, liberty.

Law assumes that she has already given consent for sexual relations even if she says no. This exception violates fundamental rights because a person cannot surrender its rights in advance. Marriage is considered sacred institution and entering it doesn't mean that person loses the rights.

3.4. Article 21: Right to Life and Personal Liberty

⁹ *Navej Singh Johar v Union of India* (2018) 10 SCC 1.

¹⁰ *Joseph Shine v Union of India* (2018) 2 SCC 189.

Article 21 of the Constitution guarantees that no one can be deprived of their life and personal liberty except according to the procedure established by law. This Article is used as a strong basis to challenge the marital rape exception. Article 21 is interpreted many times by Supreme court and now it includes the right to live with dignity, right to privacy, right to bodily autonomy and right to be free from torture and inhumane treatment.

In *Francis Coralie Mullin v. Union Territory of Delhi* (1981) it was declared that Article 21 includes the right to live with dignity.¹¹ In *Bodhisattwa Gautam v. Subhra Chakraborty* (1996) it was stated that rape is not just harm on the body of woman but it's also the harm on her self-respect, dignity and emotional well-being.¹² These views should apply to marital rape also because husband forcing wife for sexual intercourse causes the same mental and physical harm as was done by any other person. In most cases it can become severe because the act is done by person whom the woman trusts the most. Article 21 protects the liberty and dignity, therefore exclusion of husbands from rape laws becomes inconsistent with Article 21. Therefore, entering marriage does not reduce the severity of the act.

The claim that marital rape is a lesser form of harm is directly contradicted by clinical research. Studies published in peer-reviewed journals establish that victims of marital rape frequently suffer from post-traumatic stress disorder, clinical depression, elevated anxiety, and suicidal ideation, often for a significantly longer duration than survivors of rape by a stranger.¹³ Scholars including Raquel Kennedy Bergen have documented that the element of betrayal by a trusted intimate partner can intensify, rather than mitigate, the psychological impact of sexual violence, a finding that squarely undermines the legislative premise on which the marital rape exception rests.¹⁴

¹¹ *Francis Coralie Mullin v Union Territory of Delhi* (1981) 1 SCC 608.

¹² *Bodhisattwa Gautam v Subhra Chakraborty* (1996) 1 SCC 490.

¹³ Brisa Victorio, 'The Effects of Marital Rape on a Woman's Mental Health' (2023) 11(2) *Themis: Research Journal of Justice Studies and Forensic Science* <<https://scholarworks.sjsu.edu/themis/vol11/iss2/4/>> accessed 11 August 2026.

¹⁴ Ekaterina Doulatova, 'Intimate Partner Sexual Assault' *Psychology Today* (4 March 2020) <<https://www.psychologytoday.com/us/blog/the-compassion-chronicles/202003/intimate-partner-sexual-assault>> accessed 11 August 2026.

The judgment of *K S Puttaswamy (Retd.) v. Union of India* (2017) became a very crucial debate on marital rape. In this case right to privacy was recognized under Article 21.¹⁵ It also includes decisional privacy which means a person has the right to make choices regarding their own body, sexual relations, intimate decisions and personal relationships. No one can have control over other's body; consent is required even in marriage. Justice D.Y Chandrachud said that ownership over one's body is a right granted by constitution and it's the duty of state to protect that right.

Since bodily autonomy is considered as a fundamental right under Article 21 and state has an obligation to protect the same, marital rape exception which denies the married woman right over her own body violates constitutional principles. State does not only fail to protect that right but also enables the husbands to violate that right continuously.

IV. INTERNATIONAL HUMAN RIGHTS FRAMEWORK AND COMPARATIVE JURISDICTIONS

1) CEDAW and UN Declarations

International law and organizations also support in favor of marital rape exemption. One such Convention is the CEDAW (Convention on elimination of all forms of discrimination against women) It is an international treaty aimed at protecting the women from all the discrimination.¹⁶ India is a party to this convention. It obliges the state parties to adopt appropriate measures to modify or repeal existing

Laws, customs, regulations that promote

Discrimination. Two proposals have been issued by the Convention. They are as follows: -

- a) **General Recommendation No. 19 (1992):** It suggested that gender-based violence including marital rape amounts to discrimination because it violates woman's dignity,

¹⁵ *KS Puttaswamy (Retd) v Union of India* (2017) 10 SCC 1.

¹⁶ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

freedom and bodily autonomy also prevents them from enjoying equal rights.¹⁷

- b) **General Recommendation No. 35 (2017):** It was further suggested that state parties must repeal laws that allow the offenders of marital rape and other sexual violences escape the criminal liability.¹⁸

Beijing Platform for action (1995) recognized the following:

- Right of women to control their own body
- Their own choice to make sexual relations
- Control over matters related to their sexuality¹⁹
- Personal choice and consent are essential parts of women's rights.

Another Convention UN Declarations on elimination of violence against women stated that violence includes marital rape and other type of abuse within the family or relationship. It further clarified that government must work in accordance to the declaration and give punishment to offenders even if the marital rape is considered accepted by some social or cultural groups.

2) **Comparative Jurisdictions**

The marital rape exemption has been struck down in various countries following common law system. In *R. v. R.* (1992) 1 AC 599,²⁰ House of Lords in England and Wales held the following: -

¹⁷ CEDAW Committee, General Recommendation No 19 (1992) UN Doc A/47/38.

¹⁸ CEDAW Committee, General Recommendation No 35 (2017) UN Doc CEDAW/C/GC/35.

¹⁹ Beijing Declaration and Platform for Action (Fourth World Conference on Women, 1995) UN Doc A/CONF.177/20.

²⁰ *R v R* [1992] 1 AC 599 (HL).

- marriage does not mean lifelong consent of woman
- she has the same right of refusal as that of by any other person
- and husband can be prosecuted for raping his wife

This case overruled the Hale's doctrine which said that marriage automatically gives husband the right to have sexual intercourse. Because of these husbands were not held guilty of marital rape. This doctrine was described as a legal assumption, outdated in modern society and inconsistent with dignity and liberty of woman.

Lord Keith of Kinkel stated that the idea of automatic consent by wife despite her wish, objections when he enters the marriage is no longer considered acceptable in the modern world. Sexual Offences Act, 2003 of UK incorporated it into the statutory law.

By 1993 in US at least 50 states recognized marital rape as an offence. However, still in many states it is considered differently as compared to other rapes in context of penalties imposed and time period within which victim reports. The Model Penal Code was originally published in 1962 and included a marital rape exemption at that time. The American Law Institute comprehensively revised the sexual offences provisions of the Model Penal Code in 2021 to remove the exemption and treat marital rape on par with other forms of sexual assault. Marital rape was treated as a serious offence against woman's dignity by South Africa and Canada. The South African Constitution in *S.V Baloyi* held that it's the duty of state to protect woman from domestic violence including marital rape. This duty arises from constitution to protect the woman's dignity and equality. State cannot ignore violence occurring within marriage. Canada also criminalized marital rape in 1983 by amending its criminal code. Husbands are now prosecuted for the same.

European court of Human Rights supported the decision that husband can be prosecuted for marital rape and exemption was violative of human rights.

In *S.W v. United Kingdom* (1995),²¹ the decision of UK House of Lords in *R. v. R.* was supported that marriage does not mean consent to sex. Court also stated that individuals cannot rely on such a provision that was against basic human rights and dignity. It was also clarified by court that woman have dignity and freedom even after marriage, marriage does not mean that husband have now control over woman's body and marital rape exemption was outdated.

²¹ *SW v United Kingdom* (1995) 21 EHRR 363.

Therefore, International conventions and courts recognized marital rape as a violation of human rights and dignity and struck down the laws supporting the same.

V. FEMINIST LEGAL THEORY AND CONSTITUTIONAL MORALITY

1. Feminist Critiques of the Exemption

Studies and research from feminist scholars have always remain a stringent and consistent critics of marital rape exemption.

Toward a Feminist theory of state (1989), Catherine Mackinnon argued that rape laws were made my society dominated by them.²² Therefore, marital rape exemption highlights male viewpoints on sex and consent. It becomes a great example of how women have been treated by men from centuries. She highlighted that marital rape exemption is not merely a legal rule or law it shows a deep connection to patriarchy where men since ages have shown control over women and their bodies especially within marriages. Therefore, she argued that law is equal for everyone is not enough we should see whether law continues to support such a system where wives and women are controlled by their husbands and men in the society.

Professor Ratna Kapur in her book *Erotic Justice: Law and the New politics of Postcolonialism* (2005) argued that numerous laws and reforms in India concerning women are about conserving the family values, system and are influenced by traditional customs and ideas rather than promoting their individual freedom.²³ The debate around marital rape supports this problem: She argues that there are many people who oppose regarding removing the exemption because they believe it's important to protect the marriage. But this means that marriage can only survive by limiting the rights of women.

Nivedita Menon in *Seeing like a feminist* (2012) highlighted that in India laws concerning

²² Catherine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989).

²³ Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism* (Glasshouse Press 2005).

sexual relationships have always prioritized traditional customs, family values and maintaining social harmony rather than protecting individual freedom.²⁴ She further argued that feminist reforms not only should protect them from violence or discrimination but also promote self-determination, pleasure and the right to decide whether to engage in sexual activities or not.

Many opponents argue that State should not interfere in private marital relationships but Menon disagrees with it.

According to her criminalizing marital rape is not an intervention but its about making sure that state does not support it by ignoring the abuse and violence within marriage.

2. Constitutional Morality vs. Social Morality

Constitutional morality means following Constitutional values such as equality, liberty, freedom, non-discrimination. These principles override the traditional ideas, customs whenever there is a conflict. Supreme court has often relied on these principles while giving judgements like Navtej Singh Johar and Sabarimala Temple case. Dr. B.R. Ambedkar held that constitutional morality does not naturally exist people must follow customs, ideas, majority opinions. But they must also learn to uphold Constitutional values. Court said that these principles are enshrined in the Constitution and they must prevail over societal values, customs, traditions whenever there is a conflict.

The marital rape exemption is created because of social beliefs and nature of marriage, rights of husbands and role of women. These are social customs, traditional ideas and beliefs and not constitutional principles.

Under constitutional morality courts have the authority to question the old laws instead of accepting them just because they are existing since ages and any law found to be inconsistent must be struck down.

Justice D.Y Chandrachud stated that constitution does not merely reflects the norms and values but also changes or improve them towards protecting justice, equality, dignity.

²⁴ Nivedita Menon, *Seeing Like a Feminist* (Penguin Books 2012).

3. **Bodily Autonomy as a Constitutional Value**

The concept of bodily autonomy (right of individual to decide what happens to their body and control over one's body) has evolved as a core constitutional value.

Supreme court has relied on this principle in many cases. In *Common Cause v Union of India* (2018) 5 SCC 1 Supreme court held that right to die with dignity including the right to refuse the treatment comes under personal liberty and bodily autonomy under Article 21. This means that individuals have choices regarding the decisions affecting their bodies. In *Suchita Srivastava v Chandigarh Administration* (2009), Supreme Court held that women have the right to make reproductive choices like whether to have children, continue pregnancy and make choices concerning reproductive health. This was covered under personal liberty under Article 21. In *KS Puttaswamy v Union of India* (2017) supreme court declared right to privacy as a fundamental right. This includes decisions regarding one's body, relationships, and personal matters. Therefore, every individual has the right to decide what happens to their body and they exercise control over their own body.

Supreme Court judgments have highlighted bodily and sexual autonomy as a core constitutional value. Marital rape exemption violates these values as it treats women as a property of their husbands and that they have complete sexual access to their wives' body irrespective of her consent. No constitutional principle like equality, dignity, liberty supports this unequal treatment therefore the exemption is inconsistent with the fundamental rights

VI. **THE LEGISLATIVE LANDSCAPE: From IPC TO BNS 2023**

1. **IPC 1860 & the History of Amendments**

Before the 2013 amendments, section 375 of the IPC, 1860 stated that rape is a sexual intercourse against the will of a woman, i.e., without her consent acquired through the means of coercion, or a state where she was unable to give consent.

However, Exception 2 laid down that sexual intercourse by a husband with his wife, would not amount to rape if the age of wife is above 15 years.

The Criminal Law Amendment Act of 2013 after the Delhi gang rape case of 2012 came up

with certain changes that were quite major for rape laws.

- It addressed the menace of rape and expanded its definition significantly
- Included different categories of non-consensual sexual acts.
- Introduced distinct and positive definition of consent.
- Enhanced punishments for sexual offences.

Despite these reforms, the marital rape exception mentioned under exemption 2 was left untouched, merely raising the age of the wife from fifteen to eighteen years w.r.t judicial separation.

The Justice Verma Committee had recommended that the marital rape exemption must be removed but Parliamentary committee that drafted the final bill, stated that “institution of marriage” must be protected and hence rejected the recommendation. This act of retention of the exemption 2 was a deliberate political choice that has been subjected to a lot of criticism. Critics argue that this wrongly protects husbands from punishment instead of protecting the constitutional rights of a woman.

2. *Bhartiya Nyaya Sanhita, 2023*

IPC got replaced by the Bharatiya Nyaya Sanhita in the year 2023 and came into force on 1st July of 2024. It took the stature of main criminal law in India.

Section 375 of IPC and 63 of BNS, defines rape interpret rape similarly, however it still sustains marital rape as an exception but it is subjected to the age of wife.²⁵

This implies that BNS till date continues to serve an exemption for marital rape, despite of constant constitutional reforms, judicial criticism and recommendations by committees and experts. This retention is quite striking given the significant reforms in other domains like –:

²⁵ Bharatiya Nyaya Sanhita 2023, s 63.

- Corruption
- Terrorism
- Organized Crime

The deliberate discretion to retain the marital rape exemption despite the judicial advancements including the:

- *Joseph Shine v. UOI*
- *Puttaswamy v. UOI*

depicts nothing but legislative choice to privilege marital impunity over women's constitutional rights.

The Union Government's own submissions before the Supreme Court add a further constitutional dimension to this concern. In an affidavit filed by the Ministry of Home Affairs in October 2024, the Government acknowledged that a husband does not hold a 'fundamental right' to violate his wife's consent, but nevertheless argued that subjecting marital rape to the same criminal penalties as rape would be 'excessively harsh' and would carry 'far-reaching socio-legal implications' for the institution of marriage.²⁶ This position has been widely criticised as internally inconsistent, since it concedes the violation while insisting on a lesser remedy, effectively creating a two-tier system of sexual violence that cannot withstand the equal protection guarantee of Article 14.²⁷

Interesting thing to ponder upon here is that BNS introduces Section 85 & 86, which talk about punishment against husband or relatives in a case where wife is subjected to cruelty and also addresses offences related to the marriage, respectively. However, neither of the provisions cater to the gap created by the marital rape exemption, hence serving as a constitutional lacuna

²⁶Shreya Munoth, 'Rethinking Marital Rape: The RIT Foundation Case and India's Legal Dilemmas' (Vintage Legal VL, 9 February 2025) <<https://www.vintagelegalvl.com/post/rethinking-marital-rape-the-rit-foundation-case-and-india-s-legal-dilemmas>> accessed 11 August 2026.

²⁷Apurva Vishwanath, 'Resisting the Backlash: How Conservative Arguments on Marital Rape Threaten Feminist Progress' *The Leaflet* (1 April 2025) <<https://theleaflet.in/leaflet-specials/international-womens-day-2025/persistently-countering-the-defense-to-marital-rape-is-a-key-strategy-to-resist-the-backlash-against-womens-movements-in-our-courts>> accessed 11 August 2026.

that the courts will inevitably be called upon to address.

3. Protection of Women from Domestic Violence Act, 2005

Under the Protection of Women from Domestic Violence Act, 2005 (PWDVA), civil Reliefs such as:-

- a. protection order
- b. residence order
- c. monetary relief

are granted to the women who are victims of domestic violence.²⁸

As specifically provided under Section 3 of this particular act, any form of sexual abuse of the woman, which includes any sexual conduct like:- abuse, humiliation, degradation of the woman amounts to Domestic Violence. PWDVA is quite significant in terms of explicitly recognizing marital rape as a form of domestic violence and hence grants civil relief under PWDVA. In a very famous case of *Hiral P. Harsora v. Kumarpal T. Harsora* (2016), the Supreme Court gave a wide-ranging interpretation of the PWDVA, considering its nature as a remedial legislation.²⁹ But what must be noted is that PWDVA grants civil remedies and not criminal punishment in case of marital rape, reflecting the legislative compromise that acknowledges the harm while refusing to treat it as a crime. This distinction has been criticized as inadequate and constitutionally problematic.

VII. Counter arguments & Constitutional Responses

1. Marriage as a Special Institution

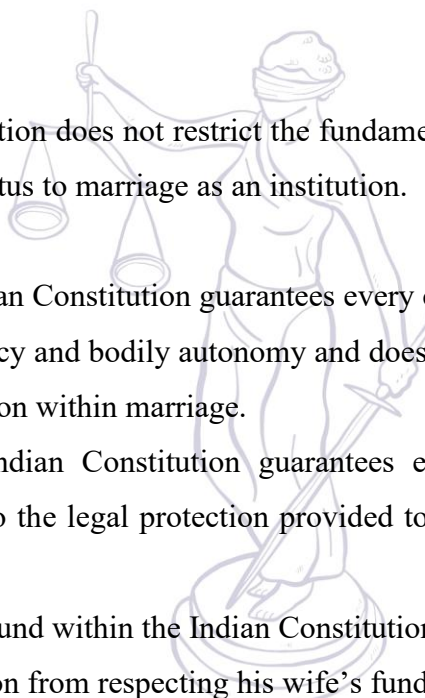
²⁸ Protection of Women from Domestic Violence Act 2005, s 3.

²⁹ *Hiral P Harsora v Kumarpal T Harsora* (2016) 10 SCC 165.

One of the most frequent arguments invoked against the criminalization of marital rape is that marriage holds the status of a special institution and hence cannot be treated under legal frameworks similar to other relationships. It is believed that marriage is based on social stability, mutual responsibilities and intimacy which in-turn justifies treating non consensual Intercourse differently from rape outside marriage.

However, this argument proposed does not stand up to the Constitutional principles for various reasons which includes: -

Firstly, The Indian Constitution does not restrict the fundamental rights of a married woman by providing any special status to marriage as an institution.

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- a) Article 21 of the Indian Constitution guarantees every citizen the right to life, personal liberty, dignity, privacy and bodily autonomy and does not lay down any clause which mentions its suspension within marriage.
 - b) Article 14 of the Indian Constitution guarantees equality before law and equal protection of laws, so the legal protection provided to married women must be as of unmarried women.
 - c) It is nowhere to be found within the Indian Constitution that a husband's marital status gives him an exception from respecting his wife's fundamental rights.

Secondly, this whole argument with respect to marital rape as an exemption rests on a false premise that protecting marriage requires one to protect husbands for projecting sexual violence against their wives. An institution that serves one spouse with legal right to rape the other with immunity is not an institution that is worthy of being protected.

In a very famous case of *RIT Foundation v. UOI*, Justice Shakti Chandra observed that “institution of marriage cannot be used as a shield for perpetrating violence against women.”

2. Privacy, Non-Interference in Marital Affairs & potential for misuse

Another strong argument against criminalizing marital rape is that State should not interfere in private affairs of married couples, especially sexual relations. But this is wrong. Right to privacy, as recognized in Puttaswamy judgment, cannot justify violence or violation of another person's bodily integrity. Justice Chandrachud pointed out that while privacy protects individuals from unnecessary State intrusion, "It cannot become an instrument to enable one person to violate another's autonomy and consent". Thus, a husband's claim to privacy in his sexual relationship with his wife cannot override her right to bodily autonomy, dignity, and freedom from sexual violence. Feminist scholars and courts have also critiqued the public-private divide for enabling domestic violence and oppression to flourish within families. The enactment of the Protection of Women from Domestic Violence Act, 2005, indicates that State recognizes that violence in private marriages needs legal intervention and remedies.

The other common argument is the fear of misuse. This holds that criminalizing marital rape could lead to false accusations by wives, destabilize marriages and overburden the criminal justice system. Often compared to misuse of Section 498 IPC and SC/ST (Prevention of Atrocities) Act. But this is a weak argument. Misuse cannot justify depriving a whole group of victims their legal protection. This argument would undercut many existing criminal laws. A more sensible counter-argument is to create procedural safeguards, evidence standards and responsible prosecutorial discretion. Instead of denying legal recognition to those who genuinely suffer. "Safeguards can be designed to check misuse of these laws but it cannot be used to deny justice," held the SC in *Arnesh Kumar v. State of Bihar* (2014).³⁰

3. **The Legislative Domain Argument**

The most jurisprudentially significant counterargument is that marital rape should be left up to Parliament, not the courts. In his dissent in RIT Foundation, Justice Hari Shankar argued that the court ought to refrain from addressing such issues as criminalizing marital rape.

³⁰ *Arnesh Kumar v State of Bihar* (2014) 8 SCC 273.

It is a sensitive policy question with wide social ramifications and one on which elected representatives are better placed to make the value judgments. This argument raises fundamental questions about the role of constitutional courts in a democracy. The Indian Supreme Court has consistently held, since the earliest days of constitutional adjudication, that the enforcement of fundamental rights is a judicial function that cannot be delegated to the legislature. As the Court held in *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225 the foundational decision on the basic structure of the Constitution the Constitution is supreme, and no branch of government, including the legislature, can act in a manner incompatible with fundamental rights.³¹ The criminalization of marital rape is not a policy question in the ordinary sense: it is a question of whether the legislature has deprived a class of citizen married women of their fundamental constitutional rights. The adjudication of This question falls squarely within the judicial domain, she said, adding that the “process of renegotiation is an inherently political one.”

VIII. THE WAY FORWARD: RECOMMENDATIONS FOR REFORM

Judicial Action

The validity of Exception 2 of Sec 63 of BNS is still under question before the Supreme Court because of the different judgements give in the RIT Foundation v Union of India. It is proposed that ongoing case should be used as a chance by the Supreme Court to rule that marital rape exception is unconstitutional because it violates article 14,15,19 and 21 of the Constitution. It is also contended that striking down the exemption is also in consistent with the recent judgements: - KS Puttaswamy, Independent Thought, Joseph Shine and Navtej Johar.

The Court should accept that constitution safeguards woman's dignity and bodily autonomy and marriage cannot be used as a reason to deny any citizen fundamental rights. The Court should look for two important principles: -

³¹ *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

- Consent should be free and genuine. Women must willingly agree to sexual intercourse. Silence does not mean consent.
- It should not be presumed that marriage means that wife is permanently consented to physical relationship.

Legislative Reform

Even if the cases are pending before Supreme Court, Parliament can still make changes in the law.

By deleting Exception 2 of Sec 63 it would show that state aims to protect woman from sexual violence and considers dignity and bodily autonomy of woman as a fundamental right.

Mere changes or making marital rape a criminal offence is not sufficient. Parliament must introduce protective measures such as: - training for police, judges, prosecutors, special courts to handle these cases, privacy measures for victims and counseling mechanisms for them.

The laws in various countries shows that merely criminalizing marital rape is not sufficient. For e.g.: - UK criminalized marital rape in 1991 still there are very less prosecution and convictions. This is because victims are still reluctant to come forward due to social stigma, fear, dependence on the husband, family pressure. In some areas it's still considered that marriage means that women has consented to sexual intercourse. Therefore, there's a need for social reform, effective implementation and support from state.

The Indian data on underreporting makes the case for comprehensive support structures even more pressing than the comparative evidence suggests. A systematic review of studies on marital rape and mental health outcomes in India found that only 24 to 26% of survivors sought help for spousal sexual violence, compared to approximately 40% in Tanzania and 61% in New Zealand, with as few as 2 to 4% approaching any form of authority in India.³² With

³²Devika Kapoor and others, 'Marital Rape and Its Impact on the Mental Health of Women in India: A Systematic Review' (2023) 15 *BMC Women's Health* 1 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10021972/>> accessed 11 August 2026.

petitions challenging the constitutionality of Exception 2 of Section 63 of the BNS now pending before the Supreme Court, the window for a comprehensive legislative and institutional response is open, and reform of the substantive law must be accompanied from the outset by robust institutional capacity to receive and process complaints, protect victims, and reduce the formidable social pressures that currently deter survivors from coming forward.³³

Awareness and Social Change

While changes in law are important but its not sufficient. The persistent problem of marital rape is because of the beliefs of society like: -

- marriage means consent to sexual intercourse
- wives owe sexual access to husbands
- violence within the marriage is normalized

These beliefs can be changed only if society changes. Civil society organizations such as legal aid groups, women's rights group should spread awareness, provide support to survivors, do campaigns. The concept of consent, dignity, bodily authority should be taught from an early age. Effective change requires both societal support and legal change.

CONCLUSION

Marital rape is not merely a matter between husband and wife instead it's a constitutional issue because marriage does not mean woman automatically loses its rights over her own body and it should not be the reason to deny her rights freedom, dignity, privacy. Exception 2 to Section 63 of BNS is an outdated rule taken from colonial era. It is based on the belief that after marriage women loses the right over her own body, dignity, freedom, privacy and that woman

³³'Challenge to the Marital Rape Exception' (Supreme Court Observer, 8 July 2025)
<<https://www.scobserver.in/cases/challenge-to-the-marital-rape-exception-hrishikesh-sahoo-v-state-of-karnataka/>>
accessed 11 August 2026.

is subordinate to her husband. Such a belief is not at par with modern constitutional values. Laws based on such beliefs should not exist in a democratic state.

Constitution of India already provides a framework through Articles 14,15,19 and 21 to declare the marital rape exemption as vague and unambiguous. The evolution of judicial decisions from KS Puttaswamy through Navtej Singh Johar to Joseph Shine highlights the expansion of rights like equality, privacy, dignity and bodily autonomy. Marital rape exemption contradicts with these rights. The split decision in *RIT Foundation v. Union of India* highlighted the urgent need for supreme court to intervene in this matter to settle the issue.

India is a party to all major international conventions (CEDAW), treaties, agreements. These conventions have already abolished the marital rape exemption and it obligates India to remove laws which deny women equal rights and bring changes. These international developments highlight the need to bring changes in the marital rape laws. The real problem is not whether exception should be removed but when it will be removed.

In the past few years Supreme Court has showed the willingness to remove the laws which violates fundamental rights even if those practices are going on since ages. This means that courts have used constitutional principles (dignity, equality, freedom, privacy and bodily autonomy) to determine whether a law or practice should exist or not. Outdated practices and traditions do not override constitutional principles. Woman does not lose its rights when she marries. Law and society should clearly accept this and remove all such laws that deny women the equal rights

BIBLIOGRAPHY AND REFERENCES

A. CONSTITUTIONAL PROVISIONS

1. Constitution of India, 1950: Articles 13, 14, 15, 19, 21, 32, 226, 51(c).

B. STATUTES AND CODES

1. Indian Penal Code, 1860: Sections 375, 376, 377, 497, 498A (repealed/replaced).
2. Bharatiya Nyaya Sanhita, 2023: Sections 63, 64, 85, 86.
3. Criminal Law (Amendment) Act, 1983.
4. Criminal Law (Amendment) Act, 2013.
5. Protection of Women from Domestic Violence Act, 2005: Sections 2(a), 3.
6. Protection of Children from Sexual Offences Act, 2012.
7. Prohibition of Child Marriage Act, 2006.
8. Sexual Offences Act 2003 (United Kingdom).
9. Criminal Code, RSC 1985 (Canada): Section 278 et seq.

C. CASE LAWS

1. *Justice K.S. Puttaswamy (Retd.) v. Union of India* (2017) 10 SCC 1 (Nine-Judge Bench)
2. *Independent Thought v. Union of India* (2017) 10 SCC 800

3. *RIT Foundation v. Union of India* (2022) Delhi High Court, W.P.(C) 284/2015
4. *Navtej Singh Johar v. Union of India* (2018) 10 SCC 1
5. *Joseph Shine v. Union of India* (2018) 2 SCC 189
6. *Shayara Bano v. Union of India* (2017) 9 SCC 1
7. *Indian Young Lawyers Association v. State of Kerala (Sabarimala)* (2018) 11 SCC 1
8. *Suchita Srivastava v. Chandigarh Administration* (2009) 9 SCC 1
9. *Common Cause (A Registered Society) v. Union of India* (2018) 5 SCC 1
10. *State of Maharashtra v. Madhukar Narayan Mardikar* (1991) 1 SCC 57
11. *Bodhisattwa Gautam v. Subhra Chakraborty* (1996) 1 SCC 490
12. *Francis Coralie Mullin v. Union Territory of Delhi* (1981) 1 SCC 608
13. *Hiral P. Harsora v. Kumarpal T. Harsora* (2016) 10 SCC 165
14. *Arnesh Kumar v. State of Bihar* (2014) 8 SCC 273
15. *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225
16. *Maneka Gandhi v. Union of India* (1978) 1 SCC 248

D. FOREIGN AND INTERNATIONAL CASES

1. *R. v. R.* (1992) 1 AC 599 (House of Lords, UK).
2. *S.W. v. United Kingdom* (1995) 21 EHRR 363 (European Court of Human Rights).
3. *S. v. Baloyi* (2000) (1) BCLR 86 (CC) (Constitutional Court, South Africa).
4. *M.C. v. Bulgaria* (2003) 40 EHRR 20 (European Court of Human Rights).

E. INTERNATIONAL COMMITMENTS

1. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979: Articles 1, 2, 5, 16.
2. CEDAW Committee, General Recommendation No. 19 (1992).
3. CEDAW Committee, General Recommendation No. 35 (2017).
4. Beijing Declaration and Platform for Action (1995).
5. UN Declaration on the Elimination of Violence Against Women, GA Res. 48/104 (1993).
6. UN General Assembly Resolution A/RES/55/2, Millennium Declaration (2000).
7. International Covenant on Civil and Political Rights (ICCPR), 1966— Article 7, 17.

F. BOOKS

1. MacKinnon, C.A., *Toward a Feminist Theory of the State* (Harvard University Press, 1989).
2. Kapur, R., *Erotic Justice: Law and the New Politics of Postcolonialism* (Glasshouse Press, 2005).

3. Menon, N., *Seeing Like a Feminist* (Penguin Books, 2012).
4. Baxi, U., *The Future of Human Rights* (Oxford University Press, 4th ed., 2022).
5. Hale, Sir Matthew, *History of the Pleas of the Crown* (1736, republished S. Emlyn, 1778).
6. Brownmiller, S., *Against Our Will: Men, Women and Rape* (Simon & Schuster, 1975).
7. Rukmini, S., *India's Women: The Battles They Face* (Juggernaut Books, 2021).
8. Dworkin, A., *Intercourse* (The Free Press, 1987).



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