

THE UNCONSTITUTIONAL EXCEPTION: MARITAL RAPE AND THE LIMITS OF BODILY AUTONOMY IN INDIA

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ABSTRACT

Section 375 of the Indian Penal Code, now re-enacted as Section 63 of the Bharatiya Nyaya Sanhita, 2023, continues to exempt non-consensual sexual intercourse by a husband with his adult wife from the offence of rape. This paper examines whether that exemption can survive constitutional scrutiny. It begins with the Supreme Court's decision in *Independent Thought v. Union of India*, which read down the exception for minor wives but left the position of adult married women unresolved, and situates that gap within the seventeenth-century common-law doctrine, traced to Sir Matthew Hale, from which the exemption originates. The paper then examines the exemption against Articles 21, 14 and 15 of the Constitution, arguing that the right to privacy and decisional autonomy recognised in *K.S. Puttaswamy v. Union of India* extends to a married woman's control over her own body, and that a classification based solely on marital status cannot justify withholding criminal protection from an entire category of victims. It considers and responds to concerns about evidentiary misuse and the stability of the institution of marriage, arguing that such concerns call for procedural safeguards rather than a blanket exclusion from the law of rape. Finally, the paper situates the argument within the ongoing 2026 challenge before the Supreme Court concerning whether the exception can shield husbands from liability even where the alleged conduct causes grievous injury or death, and concludes that the exemption should be reconsidered through the constitutional principles of dignity, equality, privacy and bodily autonomy.

Keywords: marital rape, bodily autonomy, Article 21, constitutional law, Bharatiya Nyaya Sanhita, *Independent Thought v. Union of India*.

In 2017, the Supreme Court of India confronted a stark legal contradiction. In *Independent Thought v. Union of India*, the Court read down the marital rape exception in Section 375 of the Indian Penal Code (IPC) insofar as it applied to wives between fifteen and eighteen years of age, holding that sexual intercourse between a husband and his minor wife would constitute rape.¹

Yet the judgment did not address the broader question of marital rape involving adult women. That question has since remained at the centre of constitutional litigation. The judicial intervention in *Independent Thought* therefore represented a historic but incomplete step: it rejected the idea that marriage could extinguish a minor wife's sexual autonomy, while leaving unresolved whether the same principle applies to adult married women.

The empirical dimension of the problem that this legal gap fails to address is considerable. Data from the National Family Health Survey (NFHS-5), conducted across India between 2019 and 2021, indicate that over 95 per cent of married women who experienced sexual violence identified their current or former husbands as the perpetrator, while more than 90 per cent of those affected did not seek help from any source, with none approaching a legal professional.² The same survey found that approximately 18 per cent of married women reported being unable to refuse sexual intercourse with their husbands even when unwilling, a figure that reflects not merely individual vulnerability but a structural condition actively reinforced by a law that treats the marital relationship as conferring perpetual sexual entitlement.

This unresolved distinction exposes a deeper constitutional conflict. If consent is an expression of individual autonomy, can marriage transform the legal meaning of that consent? The marital rape exception cannot be defended simply as a mechanism for preserving marriage. If constitutional rights to dignity, equality, privacy and bodily autonomy belong to individuals, they cannot disappear at the threshold of marriage. The exception must therefore be

¹*Independent Thought v. Union of India*, (2017) 10 S.C.C. 800 (India).

²Ministry of Health and Family Welfare, Government of India, National Family Health Survey-5 (NFHS-5), 2019-21: India Report (International Institute for Population Sciences 2022) ch 17, 643; see also 'Data Story: NFHS-5 on Sexual Violence' (IAS Score, 2022) <<https://iasscore.in/data-story/data-story-nfhs-5-on-sexual-violence>> accessed 9 September 2026; Equality Now, '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 9 September 2026.

reconsidered—not in spite of the institution of marriage, but to ensure that marriage remains a relationship between equal and autonomous individuals.

The historical origins of the exception make this question even more significant. The marital rape exemption has roots in seventeenth-century common-law thinking, particularly the doctrine associated with Sir Matthew Hale's assertion that a husband could not be guilty of raping his wife because marriage was understood to involve irrevocable consent. That doctrine reflected a conception of marriage in which a wife's legal and sexual autonomy was subordinated to the marital relationship. Modern constitutional law has moved decisively away from such assumptions, yet their residue remains visible in the continued statutory distinction between married and unmarried women.³

Comparative legal scholarship has consistently observed that common-law jurisdictions across the world moved to abolish the marital rape exception during the second half of the twentieth century, recognising it as a doctrine that had outlived the patriarchal assumptions from which it was derived.⁴ In India, expert bodies have reached similar conclusions: the Justice J.S. Verma Committee, constituted in 2012 to recommend criminal law reforms following the Nirbhaya gang rape case, expressly recommended that the marital rape exception be removed and that the existence of a marital relationship not be treated as constituting irrevocable consent to sexual activity.⁵ Despite those recommendations, the exception has been retained in successive legislative iterations, revealing that the resistance to reform represents a deliberate political choice rather than a principled constitutional position.

The constitutional implications are substantial. Article 21 of the Constitution has been interpreted to protect dignity, privacy and decisional autonomy. In *K.S. Puttaswamy v. Union of India*, the Supreme Court recognised privacy as a constitutionally protected right encompassing autonomy over intimate decisions and the body. A married woman does not

³Matthew Hale, *Historia Placitorum Coronae* [History of the Pleas of the Crown] 629 (1736), cited in *Independent Thought v. Union of India*, (2017) 10 S.C.C. 800, ¶ 33 (India).

⁴Equality Now, '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 9 September 2026; UOLLB, 'R v R [1991]' (University of London Online, 14 July 2024) <<https://uollb.com/blogs/uol/r-v-r-1991>> accessed 9 September 2026.

⁵PRS Legislative Research, 'Justice Verma Committee Report Summary' (PRS Legislative Research, January 2013) <<https://prsindia.org/policy/report-summaries/justice-verma-committee-report-summary>> accessed 9 September 2026.

surrender that autonomy at the altar. The decision whether to engage in sexual activity remains fundamentally personal, and the existence of a marital relationship cannot, by itself, transform consent into a permanent legal entitlement.⁶

This constitutional tension has already received serious judicial attention within India. In May 2022, a Division Bench of the Delhi High Court returned a split verdict in a group of petitions directly challenging the constitutionality of the marital rape exception: one judge found the exception unconstitutional as discriminatory and as violating bodily autonomy and equality, while the other upheld it on the ground that sexual relations within marriage carry a 'legitimate expectation' that provides the intelligible differentia required to sustain the classification under Article 14.⁷ The matter was thereafter appealed to the Supreme Court, which tagged it within the broader group of petitions now listed for final hearing in 2026, making the constitutional question one of the most consequential currently before the Court.

Article 14 presents a related difficulty. The law treats non-consensual sexual intercourse differently depending on the marital relationship between the parties. The question is therefore not merely whether the law creates a classification, but whether marital status can constitutionally justify withholding criminal protection from one category of victims. If the state's objective is to preserve marriage, it must still be demonstrated that denying a married woman protection against non-consensual sexual intercourse is a constitutionally permissible means of achieving that objective.

The legislative reluctance to resolve this constitutional tension has a documented history. The Law Commission of India, in its 172nd Report issued in 2000, reviewed the marital rape exception and declined to recommend its removal, describing the abolition of the exception for wives above a certain age as amounting to 'excessive interference with the marital relationship', thereby explicitly subordinating the constitutional claims of married women to institutional considerations of a non-constitutional character.⁸ This stance persisted despite the

⁶K.S. Puttaswamy v. Union of India, (2017) 10 S.C.C. 1 (India).

⁷'Split Verdict on Criminalisation of Marital Rape' (SCC Online Blog, 12 May 2022) <<https://www.scconline.com/blog/post/2022/05/12/split-verdict-on-criminalization-of-marital-rape-can-a-husband-be-labelled-as-a-rapist-delhi-high-court/>> accessed 9 September 2026; '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 9 September 2026.

⁸Centre for Law and Policy Research, 'The Pervasive Reluctance to Criminalise Marital Rape' (Centre for Law and Policy Research, 26 March 2022) <<https://clpr.org.in/blog/the->

Justice J.S. Verma Committee later recommending in 2013 that the exception be removed, with the government declining to incorporate that recommendation, and the classification has continued to resist meaningful review through successive rounds of criminal law reform.

The issue also engages Article 15 and the constitutional commitment to substantive equality. A legal regime that provides ordinary rape-law protection to an unmarried woman but withholds that protection from a similarly situated married woman creates a distinction based on marital status within a framework historically shaped by gender inequality. The constitutional question is consequently not only whether the law treats women differently from men, but whether it perpetuates a structure in which a wife's bodily autonomy is subordinated to the institution of marriage.

India's obligations under international human rights law reinforce this constitutional analysis. The United Nations Committee on the Elimination of Discrimination Against Women has repeatedly called upon states parties to criminalise marital rape, recognising the legal immunity of husbands from prosecution for sexual violence against their wives as a form of gender-based discrimination that entrenches structural inequality within the institution of marriage itself.⁹ India's continued maintenance of the marital rape exception places it in tension with those international standards to which it has subscribed, and that tension provides relevant context for assessing a domestic classification that international human rights consensus has consistently and explicitly condemned.

Critics of criminalising marital rape have raised serious concerns about evidentiary difficulties, false complaints, misuse of criminal law and the potential consequences for matrimonial relationships. These concerns should not be dismissed. Criminal prosecution carries severe consequences, and allegations of sexual violence within intimate relationships may present particular evidentiary challenges.

pervasive-reluctance-to-criminalize-marital-rape/> accessed 9 September 2026; Outlook India, 'Book Excerpt: Marital Rape and The Supreme Court' (Outlook India, 25 October 2024) <<https://www.outlookindia.com/national/book-excerpt-marital-rape-and-the-supreme-court>> accessed 9 September 2026.

⁹UN Women, *Progress of the World's Women 2019-2020: Families in a Changing World* (UN Women 2019) 95; see also Centre for Law and Policy Research, 'The Pervasive Reluctance to Criminalise Marital Rape' (Centre for Law and Policy Research, 26 March 2022) <<https://clpr.org.in/blog/the-pervasive-reluctance-to-criminalize-marital-rape/>> accessed 9 September 2026.

Yet the possibility of misuse cannot, by itself, justify a blanket exclusion from criminal protection. The appropriate response to concerns about false complaints must lie in fair investigation, evidentiary standards, procedural safeguards and judicial scrutiny—not in treating an entire category of alleged sexual violence as legally incapable of constituting rape. Criminal law already confronts the possibility of false allegations in numerous contexts; that possibility does not ordinarily justify denying legal recognition to the underlying harm.

Comparative experience from jurisdictions that have criminalised marital rape supports this position. The United Kingdom, Australia and Canada have each criminalised sexual violence within marriage while retaining the ordinary procedural frameworks governing sexual offence prosecutions, allowing courts to assess consent, credibility and corroborative evidence through established criminal law standards without creating a categorical immunity for one category of perpetrator.¹⁰ The experience in those jurisdictions has not produced the crisis of false prosecutions anticipated by the exception's defenders; what it has instead demonstrated is that procedural safeguards and substantive criminal liability operate effectively in parallel, and that the elimination of a blanket immunity does not require the elimination of fair procedure.

The controversy has continued to evolve in 2026. In July 2026, the Supreme Court issued notice to the Union Government on a petition concerning whether the marital-rape exception can shield husbands from prosecution where non-consensual sexual acts allegedly cause grievous bodily harm or death. The matter has been tagged for a final hearing on 9 September 2026. This development adds a particularly serious dimension to the constitutional debate. The issue is no longer confined to whether non-consensual sexual intercourse within marriage should receive the same legal recognition as sexual violence outside marriage; it also raises the question of whether marital status can justify legal protection where the alleged conduct results in grave physical consequences.¹¹

¹⁰Gauri Pillai, 'Sacrificing Woman's Sexual Autonomy to Save Marriage: Reflections on Delhi High Court's Split Verdict on the Marital Rape Exception' (Oxford Human Rights Hub, 20 February 2025) <<https://ohrh.law.ox.ac.uk/sacrificing-womans-sexual-autonomy-to-save-marriage-reflections-on-delhi-high-courts-split-verdict-on-marital-rape-exception-part-i/>> accessed 9 September 2026; Equality Now, '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 9 September 2026.

¹¹Can Marital Rape Exception Shield Husbands for Injuries or Deaths of Wives? Supreme Court to Examine, Bar & Bench (July 2026), <https://www.barandbench.com> [reporting the

The constitutional challenge to marital rape therefore sits at the intersection of several competing principles: individual autonomy, dignity, equality, privacy, the protection of marriage, criminal-law policy and institutional competence. The question cannot be answered merely by asking whether criminalisation might affect families. The more fundamental question is what kind of family the Constitution seeks to protect.

If marriage is understood as a relationship between autonomous and equal individuals, protecting marriage cannot mean protecting one spouse's power to override the other's bodily integrity. A legal framework that preserves the institution by weakening the autonomy of one of its members risks protecting the structure of marriage at the expense of the person within it.

This does not mean that criminalisation should be introduced without safeguards. Parliament can address concerns relating to evidence, investigation, false allegations and procedural fairness through carefully designed legislation. But those concerns should not be transformed into a blanket legal presumption that marriage itself changes the nature of consent.

The marital rape exception should therefore be reconsidered through the constitutional principles of dignity, equality, privacy and bodily autonomy. Parliament should seriously examine removing the exception from the BNS while developing appropriate procedural safeguards. The judiciary, meanwhile, must confront the constitutional implications of treating marital status as a basis for withholding protection against sexual violence.¹²

Ultimately, the issue is one of constitutional identity. Does marriage transform the legal meaning of consent, or does consent remain an expression of individual autonomy regardless of marital status? A constitutional democracy committed to dignity and equality should be deeply cautious about a legal rule that effectively answers the first question in the affirmative.

Marriage is not a licence for permanent consent. Nor should entering into marriage mean surrendering control over one's body. If constitutional rights belong to individuals rather than to their relationship status, bodily autonomy cannot be forfeited at the altar.

The future of India's marital rape law will therefore test whether constitutional promises of equality and dignity extend fully into the private sphere of marriage. The answer should not be that married women deserve fewer protections because they are wives. A constitutional order

Supreme Court's order issuing notice on the petition filed by the Red Dot Foundation, tagged with S.L.P. (Crl.) Nos. 4063-4064/2022, final hearing listed for Sept. 9, 2026].

¹²Bharatiya Nyaya Sanhita, 2023, § 63, Exception 2 (India) (in force from July 1, 2024).

committed to individual dignity must begin from the opposite premise: marriage may create a relationship, but it does not erase the person.



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