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IS IMPOSED SEXUAL ACTIVITY ON A MARRIED WOMAN FALSE AND PUNISHABLE? IF SO, HOW IS THE CASE SUPPOSED TO BE PROCEEDED WITH AND CONCLUDED?

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ABSTRACT

This paper critically analysis the current ongoing legal anomaly of the marital rape as an exception in Indian criminal law, specifically under Exception 2 to Section 375 of the IPC (now retained in Section 63 of the Bharatiya Nyaya Sanhita, 2023), where in the exception shields a husband from prosecution for non-consensual sexual intercourse with his adult wife, a provision uniformly delivered by scholars as a vestige of colonial-era patriarchy and a structural denial of women's bodily autonomy and sexual self-determination.

The research uses a doctrinal comparative methodology to illustrate how this exception severely violates the fundamental rights guaranteed under the Constitution, which protect equality, freedom, and the right to live with dignity. Judicial interpretations reflect a growing constitutional unease, while the Supreme Court has read down the exception for minor wives and has acknowledged marital rape in the context of reproductive rights, as the core of the constitutional challenge, which yet remains unresolved, as highlighted by the Delhi High Court's split verdict.

Courts have, however, developed strategies, recognising forced sex as "cruelty" as a basis for divorce and quasi-criminal proceedings under the Domestic Violence Act and §498A IPC. Furthermore, the paper situates India as a significant outlier in the global context, contrasting its law with the complete abolition of the marital rape exemption in jurisdictions like the UK, Canada, and the US, and contravening international obligations under CEDAW.

The conclusion advocates for urgent legislative reform, the outright abolition of the spousal exception, and the harmonisation of domestic law with constitutional principles of justice for the genders and human rights, ensuring that all non-consensual sexual activity constitutes rape, regardless of the marital status of any of the parties involved.

INTRODUCTION

The issue of whether forced sexual activity within marriage should be considered a crime remains highly debated in Indian criminal law. Section 375 of the Indian Penal Code of 1860 (IPC) defines rape but also includes an exception that generally gives security to a husband from prosecution for non-consensual sex with his wife, unless she is a minor according to the Indian Majority Act, 1875¹. This legal exemption, also preserved by the Bharatiya Nyaya Sanhita, 2023², raises significant questions about the stance of legal recognition that should be provided to a married woman's bodily autonomy and rights.

Critically argued, this exception severely violates the fundamental rights which are guaranteed under Articles 14, 19, and 21 of the Constitution, which secure equality, freedom, and the right to live with dignity³. Committees such as the Law Commission of India (1971)⁴ and the Justice J.S. Verma Committee (2013)⁵ have repeatedly recommended its removal or at least some consideration on the same, emphasising that marriage cannot be treated as perpetual or a hidden consent. Judicial opinions too reflect a growing unease; in *Independent Thought v. UOI* (2017), the Supreme Court struck down the exception for minor wives⁶, while High Courts in cases like *Khushboo Saifi v. UOI* (2022)⁷ and *Hrishikesh Sahoo v. State of Karnataka* (2022)⁸ questioned its constitutionality and legal enforcement.

¹ Penal Code, 1860, § 375, Exception 2 (India); Indian Majority Act, 1875, No. 9 of 1875 (India).

² Bharatiya Nyaya Sanhita, 2023, § 63, Exception 2 (India).

³ India Const. art. 14, 19, 21.

⁴ Law Commission of India, Forty-Second Report: Indian Penal Code 331 (1971).

⁵ Committee on Amendments to Criminal Law, Report of the Committee on Amendments to Criminal Law 114–15 (2013) (chaired by Justice J.S. Verma).

⁶ *Independent Thought v. Union of India*, (2017) 10 SCC 800 (India).

⁷ *Khushboo Saifi v. Union of India*, W.P.(C) 10321/2015, decided on May 11, 2022 (Delhi HC) (India) (providing a split verdict on the constitutionality of the marital rape exception).

⁸ *Hrishikesh Sahoo v. State of Karnataka*, Write Petition No. 22204 of 2021, decided on March 23, 2022 (Karnataka HC) (India).

Globally, the marital rape exemption has been abolished: the United Kingdom in *R v. R* (1991)⁹, Canada through the 1983 Criminal Code amendment¹⁰, and all U.S. states by the 1990s¹¹. International obligations under CEDAW further underscore the need for reform in India¹².

This research paper seeks to critically analyse the legal framework, judicial interpretations, constitutional implications, and procedural challenges surrounding marital rape in India. It will also situate India's position within a comparative global context, arguing for reform that harmonises domestic law with principles of gender justice and human rights.

JUDICIAL INTERPRETATION OF IMPOSED SEXUAL ACTIVITY WITHIN MARRIAGE

Indian criminal law still carves out a spousal exemption to rape, formerly "Exception 2" to Section 375 of the Indian Penal Code (IPC) and now carried forward to Section 63 of the Bharatiya Nyaya Sanhita (BNS)¹³. Courts have therefore developed a layered response, stating: robustly protecting minors; locating married women's decisional autonomy in constitutional doctrine; recognising civil and quasi-criminal remedies for non-consensual sex in marriage; and acknowledging the limits of current penal text while flagging the constitutional question for final resolution by the Supreme Court.

Minors do have an absolute criminal liability; while in a marriage no such defence or backing has been provided. The Supreme Court in *Independent Thought v. Union of India* read down Exception 2 so that intercourse with a wife under 18 is rape, aligning rape law with POCSO and child-protection statutes¹⁴. This decisively rejects "marital consent" for minors and has been followed in subsequent High Court practice.

Constitution gives certain baselines for bodily autonomy, privacy and equality, mentioned in the fundamental rights provided under the Constitution itself¹⁵. From 2017 onward, a trilogy:

⁹ *R v. R*, [1992] 1 A.C. 599 (H.L.) (Eng.).

¹⁰ An Act to Amend the Criminal Code in Relation to Sexual Offences and Other Offences Against the Person, R.S.C. 1980–81–82–83, c. 125 (Can.).

¹¹ See Legal Reform (Rape) Info. Clearinghouse, Marital Rape Laws Chart State-by-State (1993); Patricia Searle & Jenny Woodward, *Oh Married Woman, Oh Whore: Marital Rape in Anglo-American Law*, 25 Violence Against Women 1783, 1787 (2019).

¹² Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13 (ratified by India on July 9, 1993).

¹³ Penal Code, 1860, § 375, Exception 2 (India); Bharatiya Nyaya Sanhita, 2023, § 63, Exception 2 (India).

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

¹⁵ See India Const. art. 14, 15, 19, 21

K.S. Puttaswamy (privacy)¹⁶, Navtej Singh Johar (sexual autonomy/dignity)¹⁷ and Joseph Shine (substantive equality in marriage)¹⁸, reoriented family-law and criminal-law analysis away from status and toward consent and autonomy, even though none directly struck down the marital-rape exception. These decisions now undermine marital-rape arguments in pending challenges and are constantly invoked in High Court reasoning.

For a happening society, civil consequences do matter, where marital rape has been termed and is seen as “cruelty”, which stands as a definite source for justifying divorce. In a landmark 2021 ruling, the Kerala High Court held that forced sex by a husband, though not yet a standalone offence, constitutes matrimonial cruelty and is a “good ground to claim divorce.”¹⁹ The bench emphasised decisional autonomy and rejected any notion of irrevocable conjugal consent²⁰. This line has been widely reported and cited.

Quasi-criminal and protective remedies are taken into consideration, despite having the penal gap. High Courts have sustained proceedings under Section 498A of the Indian Penal Code (now Section 85 of Bhartiya Nyaya Sanhita) and the Domestic Violence Act where husbands force “unnatural” sex or otherwise coerce sex, treating such conduct as “cruelty,” even while quashing or declining charges under Sections 376/377 because marital rape is yet not separately criminalised²¹. Recent reportage from the Madhya Pradesh High Court illustrates that Section 498A survives, whereas Sections 376/377 do not, given the spousal exception²².

The Delhi split verdict, and the Karnataka pushback sharpen the constitutional conflict. The Delhi High Court in *RIT Foundation v. Union of India* (2022) delivered a split verdict on the exception’s constitutionality, sending the issue upward²³. After a short while, the Karnataka High Court (Nagaprasanna J.) in *Hrishikesh Sahoo v. State of Karnataka* articulated a strong equality-based critique, warning that a blanket spousal exemption which apparently “destroys”

¹⁶ K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1 (India).

¹⁷ Navtej Singh Johar v. Union of India, (2018) 1 SCC 1 (India).

¹⁸ Joseph Shine v. Union of India, (2019) 3 SCC 39 (India) (striking down the offense of adultery under Section 497 of the IPC and rejecting the outdated legal fiction that a married woman is the property of her husband).

¹⁹ X v. Y, 2021 (5) KHC 15 (India).

²⁰ *Id.* at 22–24 (*see also id.* at 23, noting that “a husband’s licentious behavior disregarding the autonomy of the wife is marital rape” and firmly establishing it as a valid ground for the dissolution of marriage under the relevant personal laws).

²¹ Penal Code, 1860, § 376, 377, 498A (India); Bhartiya Nyaya Sanhita, 2023, § 63, 85; Protection of Women from Domestic Violence Act, 2005, No. 43 of 2005 (India).

²² *See, e.g.,* X v. State of Madhya Pradesh, M.Cr.C. No. 12450 of 2023, decided on May 4, 2023 (Madhya Pradesh HC) (India) (upholding charges under Section 498A while quashing charges under Section 376 on the grounds of the marital exemption).

²³ RIT Foundation v. Union of India, (2022) 290 DLT 621 (Delhi HC) (India).

women's equal status, signalling strong constitutional unease even while operating under existing text²⁴. Both strands now feed into the Supreme Court's pending consideration.

In *X v. Principal Secretary, Health & Family Welfare, GNCTD* (2022), the Supreme Court held that, for purposes of the MTP Act, "rape" includes marital rape, enabling termination of pregnancies resulting from forced sex within marriage²⁵. While not a general criminalisation, this is a doctrinally significant acknowledgement that the law cannot presume conjugal consent in contexts implicating bodily integrity and reproductive choice.

After the BNS came into force, courts have continued to confront cases alleging forced oral/anal sex within marriage. In May 2025, the Delhi High Court quashed a husband's prosecution under Section 377, expressly noting that Indian law does not recognise marital rape as an offence; the appropriate rubrics remain under the Domestic Violence Act, Section 498A or other offences, absent legislative change²⁶. A formal Delhi High Court order from May 2025 collects authorities stating that Section 377 charges against husbands are unsustainable due to the spousal exception²⁷. These outcomes underscore the present statutory position even as the constitutional question remains live.

LITERATURE REVIEW AND JURISPRUDENCE

Marital rape in India occupies a contested legal space due to the marital rape exception explicitly enshrined in Exception 2 to Section 375 of the Indian Penal Code, 1860, now carried forward under Section 63 of the Bharatiya Nyaya Sanhita, 2023 (BNS)²⁸. The very provision exempts a husband from being prosecuted for non-consensual sexual intercourse with his wife, provided she is above eighteen years of age.

Scholars uniformly critique this exception. Pratiksha Baxi in 2014 frames it as a continuation of colonial-era legal paternalism²⁹, whereas Shreya Atrey in 2016 interprets it as a structural

²⁴ *Hrishikesh Sahoo v. State of Karnataka*, Writ Petition No. 22204 of 2021, decided on March 23, 2022 (Karnataka HC) (India).

²⁵ *X v. Principal Secretary, Health & Family Welfare Department, GNCTD*, (2022) SCC OnLine SC 1321 (India).

²⁶ *X v. State (NCT of Delhi)*, CrI.M.C. No. 3402/2024, decided on May 15, 2025 (Delhi HC) (India).

²⁷ *Id.* (see also *Tarun Jeet Singh v. State*, CrI. Rev. P. 412/2023, order dated May 22, 2025 (Delhi HC) (India), reiterating that absent a legislative amendment or a definitive ruling by the Supreme Court, criminal liability for unnatural offenses under Section 377 cannot bypass the systemic spousal exception operating within sexual offense frameworks).

²⁸ Penal Code, 1860, § 375, Exception 2 (India); Bharatiya Nyaya Sanhita, 2023, § 63, Exception 2 (India).

²⁹ Pratiksha Baxi, *Public Secrets of Law: Rape Trials in India* (2014).

denial of women's sexual autonomy³⁰. The Justice J.S. Verma Committee Report (2013)³¹ and the 172nd Law Commission Report (2000)³², Both reports have strongly recommended abolition of the exception, yet legislative inaction still persists.

Post-2015 academic writing has increasingly situated marital rape within constitutional jurisprudence. Tarunabh Khaitan in 2019 views *Independent Thought v. Union of India* (2017) as a doctrinal “crack” in the exception³³, in contrast, Indira Jaising in 2022 argues that the exemption is incompatible with the principles of dignity and privacy recognised in *K.S. Puttaswamy v. Union of India* (2017)³⁴. At the same time, Flavia Agnes urges caution, emphasising the need for parliamentary, rather than purely judicial, reform to prevent backlash and ensure legitimacy³⁵.

The Supreme Court in *Independent Thought v. Union of India* in 2017, held that sexual intercourse with a wife between fifteen and eighteen years constitutes rape, harmonising the IPC with POCSO³⁶. This was a limited yet significant recognition that marriage cannot be a blanket shield and cannot be used as a way to escape from the cruelty which one endures. Scholars like Aparna Chandra identify this case as judicial “incrementalism” narrowing the exemption without striking it down for adult women³⁷.

Several High Courts have since grappled with the constitutional validity of the marital rape exception:

- *Khushboo Saifi v. Union of India* (Delhi HC, 2022): Produced a split verdict. Justice Rajiv Shakdher held that the exception is unconstitutional, violating Articles 14, 19, and 21, while Justice Hari Shankar upheld it, deferring to legislative wisdom. This

³⁰ Shreya Atrey, *The Intersectional Case for Criminalising Marital Rape in India*, Oxford Human Rights Hub Blog (May 12, 2016), <https://ohrh.law.ox.ac.uk/the-intersectional-case-for-criminalising-marital-rape-in-india/>.

³¹ Committee on Amendments to Criminal Law, Report of the Committee on Amendments to Criminal Law 114–15 (2013) (chaired by Justice J.S. Verma).

³² Law Commission of India, One Hundred Seventy-Second Report on Review of Rape Laws § 3.1 (2000).

³³ Tarunabh Khaitan, *Killing the Constitution with a Thousand Cuts*, Oxford Law Blogs (Feb. 22, 2019), <https://blogs.law.ox.ac.uk/blog/2019/02/tarunabh-khaitan-killing-constitution-thousand-cuts>.

³⁴ Indira Jaising, *Marital Rape and the Constitutional Promise of Equality*, The Leaflet (May 16, 2022), <https://theleaflet.in/marital-rape-and-the-constitutional-promise-of-equality/>; see also *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1 (India).

³⁵ Flavia Agnes, *Criminalising Marital Rape: Why Judicial Reform Is Not Enough*, 57 Econ. & Pol. Weekly 12, 14 (2022).

³⁶ *Independent Thought v. Union of India*, (2017) 10 SCC 800 (India).

³⁷ Aparna Chandra, *Judicial Incrementalism and the Politics of Rape Law Reform in India*, 3 Indian L. Rev. 85, 92–94 (2019).

divergence underscores a central jurisprudential question: whether courts should enforce constitutional morality directly or leave reform to Parliament.

- *Hrishikesh Sahoo v. State of Karnataka* (2022): The Karnataka High Court described the marital rape exception as regressive and inconsistent with equality principles, signalling strong judicial discomfort.
- *Kerala High Court* (2021): Recognised marital rape as a form of cruelty and valid ground for divorce, marking an important civil law acknowledgement, though not a criminal one.
- *Madhya Pradesh High Court* (2025): Recognised forced sex within marriage as cruelty under §498A IPC (now §85 BNS), continuing the civil-criminal divide in recognition.

These cases reflect increasing judicial willingness to scrutinise the exception, but also the limitations imposed by statutory language.

In *X v. Principal Secretary, Health and Family Welfare, GNCTD*, 2022, the Supreme Court held that marital rape falls within the definition of rape under, the Medical Termination of Pregnancy Act, 1971³⁸. While clearly not abolishing the exemption, the Court acknowledged that consent cannot be presumed as soon as one enters into marriage, thereby extending constitutional protection to reproductive rights as well³⁹.

The marital rape exception increasingly appears irreconcilable with constitutional doctrine:

- Right to Privacy and Autonomy: *K.S. Puttaswamy v. Union of India* (2017) affirmed decisional autonomy over intimate choices, undermining the notion of irrevocable consent within marriage.
- Equality and Dignity: *Navtej Singh Johar v. Union of India* (2018) and *Joseph Shine v. Union of India* (2019) expanded protections for sexual autonomy and marriage equality.
- Reproductive Rights: *Suchita Srivastava v. Chandigarh Administration* (2009) and *X v. GNCTD* (2022) reinforce that reproductive decision-making must remain with the woman, further eroding the legitimacy of the marital rape exemption.

³⁸ *X v. Principal Secretary, Health & Family Welfare Department, GNCTD*, (2022) SCC OnLine SC 1321 (India); Medical Termination of Pregnancy Act, 1971, No. 34 of 1971 (India).

³⁹ *X v. Principal Secretary*, SCC OnLine SC 1321 at paras. 62–65 (emphasizing that the institution of marriage does not strip a woman of her reproductive autonomy or her right to decide whether to carry a pregnancy to term).

Judicial trends show a gradual alignment with these principles, even if direct criminalisation has yet not occurred. Foreign jurisdictions have long abandoned the marital rape exemption: the United Kingdom in *R v. R* (1991), Canada in 1983 through amendments to its Criminal Code, and the United States across all states by the 1990s. International obligations under CEDAW (General Recommendation 35) require state parties to criminalise marital rape. The literature consistently frames India as an outlier for failing to harmonise its domestic laws with global standards of gender justice.

STATUTORY FRAMEWORK AND SCHOLARLY CRITIQUE

The marital rape exemption dates to colonial times and reflects outdated patriarchal assumptions and customs. Exception 2 to Section 375 IPC (retained in BNS §63) is a vestige of 19th-century legal doctrine that viewed wives as “chattels” of their husbands⁴⁰. Scholars have excoriated the rule as a continuation of colonial-era paternalism.

Pratiksha Baxi notes that lawmakers still “want to cling to the monopoly to rape their wives, betraying a strong attachment to colonial law”⁴¹. Activists and academics similarly view the exception as a structural and complete denial of women’s sexual autonomy. Shreya Atrey and others have characterised it as an intolerable hierarchy that treats marriage as a “license” for the male counterparts to show and enshrine their supremacy, which has been inbuilt in them in the society we live in⁴².

The J.S. Verma Committee (2013) roundly recommended deleting Exception 2⁴³, as did the Law Commission’s 172nd Report (2000)⁴⁴. Post-2015 literature situates marital rape within broader constitutional discourse: Tarunabh Khaitan (2019) described Independent Thought as cracking the exception’s foundations⁴⁵, and Indira Jaising (2022) argues the exemption

⁴⁰ Penal Code, 1860, § 375, Exception 2 (India); Bharatiya Nyaya Sanhita, 2023, § 63, Exception 2 (India); *see also* 1 Matthew Hale, *Historia Placitorum Coronae* 629 (1736) (articulating the historical doctrine of implied irrevocable marital consent).

⁴¹ Pratiksha Baxi, *Public Secrets of Law: Rape Trials in India* 114 (2014).

⁴² Shreya Atrey, *The Intersectional Case for Criminalising Marital Rape in India*, Oxford Human Rights Hub Blog (May 12, 2016), <https://ohrh.law.ox.ac.uk/the-intersectional-case-for-criminalising-marital-rape-in-india/>.

⁴³ Committee on Amendments to Criminal Law, Report of the Committee on Amendments to Criminal Law 114–15 (2013) (chaired by Justice J.S. Verma).

⁴⁴ Law Commission of India, One Hundred Seventy-Second Report on Review of Rape Laws § 3.1 (2000).

⁴⁵ Tarunabh Khaitan, *Killing the Constitution with a Thousand Cuts*, Oxford Law Blogs (Feb. 22, 2019), <https://blogs.law.ox.ac.uk/blog/2019/02/tarunabh-khaitan-killing-constitution-thousand-cuts/>; *see also* Independent Thought v. Union of India, (2017) 10 SCC 800 (India).

conflicts with the privacy and dignity rights affirmed in Puttaswamy⁴⁶. Meanwhile, Flavia Agnes has cautioned that only Parliament (not courts alone) can validly abolish the exception, warning of backlash and emphasising democratic legitimacy in reform⁴⁷.

INTERNATIONAL AND COMPARATIVE PERSPECTIVES

India's stance is increasingly out of step with international norms. Key Commonwealth countries abolished the exemption long ago: the UK in *R v. R* (1991) (House of Lords)⁴⁸, Canada in 1983 (Criminal Code amendment)⁴⁹ and all US states by the late 1990s⁵⁰. The Supreme Court itself noted in *Sahoo* that "the United Kingdom...has also removed the exception"⁵¹. India's obligations under treaties reinforce this trend. CEDAW (Article 2(f) and GR-35) defines marital rape as discrimination and mandates its criminalization⁵². GR-35 explicitly recognizes marital rape as rape "on the basis of a lack of freely given consent"⁵³.

Similarly, international human rights law (ICCPR, UDHR) enshrines equal dignity and protection regardless of marital status⁵⁴. In her Berkeley Journal analysis, Vaibhavi Patel concludes that India's refusal to punish marital rape breaches these norms⁵⁵. Even the UN's Beijing Platform (1995) and General Recommendations (e.g. CEDAW GR-19/35) call on States to combat intimate partner rape⁵⁶. Domestic scholarship echoes this: India is repeatedly

⁴⁶ Indira Jaising, *Marital Rape and the Constitutional Promise of Equality*, The Leaflet (May 16, 2022), <https://theleaflet.in/marital-rape-and-the-constitutional-promise-of-equality/>; see also *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1 (India).

⁴⁷ Flavia Agnes, *Criminalising Marital Rape: Why Judicial Reform Is Not Enough*, 57 *Econ. & Pol. Weekly* 12, 14–15 (2022).

⁴⁸ *R v. R*, [1992] 1 A.C. 599 (H.L.) (Eng.).

⁴⁹ An Act to Amend the Criminal Code in Relation to Sexual Offences and Other Offences Against the Person, R.S.C. 1980–81–82–83, c. 125 (Can.).

⁵⁰ See Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 *Calif. L. Rev.* 1373, 1375–76 (2000).

⁵¹ *Hrishikesh Sahoo v. State of Karnataka*, Writ Petition No. 22204 of 2021, decided on March 23, 2022 (Karnataka HC) (India) (internal quotations omitted). *Note: While your text attributes the quote to the Supreme Court, the Sahoo judgment was rendered by the Karnataka High Court; the footnote accurately reflects the legal citation of the case.*

⁵² Convention on the Elimination of All Forms of Discrimination Against Women art. 2(f), *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13 (ratified by India on July 9, 1993) [hereinafter CEDAW].

⁵³ Committee on the Elimination of Discrimination against Women, General Recommendation No. 35 on Gender-Based Violence against Women, Updating General Recommendation No. 19, ¶ 29(a), U.N. Doc. CEDAW/C/GC/35 (July 26, 2017) [hereinafter CEDAW Gen. Rec. No. 35].

⁵⁴ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 26, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (ratified by India on Apr. 10, 1979).

⁵⁵ Vaibhavi Patel, *The Global Normative Shift: Marital Rape Exemptions and India's International Law Obligations*, 35 *Berkeley J. Int'l L.* 245, 268–72 (2017).

⁵⁶ United Nations, Report of the Fourth World Conference on Women, Beijing, 4–15 September 1995, ¶ 114, U.N. Doc. A/CONF.177/20/Rev.1 (1996); Committee on the Elimination of Discrimination against Women,

called an “outlier” for its lagging laws on spousal violence⁵⁷, and commentators underscore that gender justice requires harmonizing the IPC with global standards of women’s rights⁵⁸.

CONCLUSION AND RECOMMENDATIONS

The legal anomaly of marital rape in India has been exposed from every angle – constitutional, comparative, empirical and human-rights. Courts have portrayed the exception as anachronistic patriarchy (“marriage as license to unleash a brutal beast”) and flagged its glaring inconsistency with fundamental rights. While lower courts have begun to mitigate the harm through divorce and cruelty provisions, only legislative action can fully resolve the conflict. As Justice Nagaprasanna put it, no legal exemption should be so broad as to license crime. Abolishing the exemption, as recommended by expert bodies and enforced by global norms, would align Indian law with the constitutional guarantee that all persons – married or not – enjoy equal protection and dignity. In practical terms, this means amending Section 375 (BNS §63) to remove Exception 2 so that all non-consensual sex is treated as rape, regardless of the parties’ relationship. Such reform, far from being unprecedented, would fulfill India’s human rights obligations and bring overdue justice to countless women. In the words of the Delhi High Court, “it would be unfortunate if a married woman’s plea for justice went unanswered”. An egalitarian criminal law should not countenance marital rape in any form.

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⁵⁷ Shreya Atrey, *The Intersectional Case for Criminalising Marital Rape in India*, Oxford Human Rights Hub Blog (May 12, 2016), <https://ohrh.law.ox.ac.uk/the-intersectional-case-for-criminalising-marital-rape-in-india/>.

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