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MARITAL RAPE: A NON-CRIMINALIZED CRIME IN INDIA

~ Riya Kumari & Shashank Sinha

ABSTRACT

India is currently one of only 36 countries in the world that has not criminalized marital rape. This omission survives in the present criminal code through Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita, 2024, which replaced the identically worded exception under Section 375 of the Indian Penal Code, 1860. Under this provision, non-consensual sexual intercourse by a husband with his wife, provided that she is not a minor, falls outside the legal definition of rape altogether, regardless of the force, coercion, or harm involved.

This creates a striking contradiction in Indian law and policy. Over the past few decades, India has taken visible steps toward gender parity economic participation schemes, the 2023 Women's Reservation Act guaranteeing seats in the Lok Sabha, and civil remedies such as the Protection of Women from Domestic Violence Act, 2005. Yet criminal law continues to treat a married woman's consent to sexual intercourse as legally irrelevant once she enters marriage, effectively denying her bodily autonomy within the one relationship where she is statistically most vulnerable to sexual violence. This paper argues that the marital rape exception is not a neutral legislative gap but an active, patriarchal carve-out rooted in colonial-era doctrines that treated a wife's legal identity as merged with her husband's.

Drawing on constitutional provisions (Articles 14 and 21), judicial reasoning from cases such as Independent Thought v. Union of India and the split verdict in RIT Foundation v. Union of India, and the pending batch of petitions currently before the Supreme Court challenging Exception 2, this paper examines why successive governments have resisted reform, evaluates the state's argument that criminalization would destabilize the institution of marriage, and considers whether existing remedies (such as the PWDVA and Section 498A) are adequate substitutes for criminal recognition. The paper concludes by assessing possible pathways for

legal change, including legislative repeal and judicial intervention, and situates India's position within the global trend toward recognizing marital rape as a criminal offense.

Keyword: Bhartiya Nyaya Sanhita, 2024, Section 63, (Exception 2), Indian Penal Code, 1860, Consent, Fundamental rights, Patriarchy, Gender equality, Domestic violence, Criminalization, Women's rights, Family law, Article 14 (equality before law)

MARITAL RAPE: A NON-CRIMINALIZED CRIME IN INDIA

Introduction

Marital rape or spousal rape means indulging in sexual intercourse with one's spouse i.e. his wife without the consent. The absence of consent is an essential element and need not include physical violence. Marital rape is deemed to be a form of domestic violence and sexual abuse. The exception and law that protects the spouse i.e. the husband is mentioned in under the Section 63 of the Bharatiya Nyaya Sanhita (BNS), 2023 specifically mention under the Exception 2[1] that clearly states and protect the husband for having the sexual intercourse with his wife without her consent. At the same time as per the provision of the Bharatiya Nyaya Sanhita (BNS), 2023 i.e. Section 67[2] it criminalises non-consensual sexual intercourse by the husband who has been living separately, this codifies law raised certain question relating to equality, dignity, bodily consent, privacy along with the personal liberty also the what is the Constitutional status of the marriage.

In India still the question regarding the Constitutional importance because of the marital rape exception has challenged under Articles 14, 15 and 21 of the Constitution. The central level has difficultly is narrow and limit: whether the marital relationship should include the non-consensual sexual intercourse between the husband and an adult wife i.e. 18 years or above or exclude and must be criminalised in India. Also, this law in India is Still existing as this law needs to be criminalized as India is still lacking behind as it is one of the thirty-six counties who had not criminalized marital rape.[3]

The Hon'ble Supreme Court and the High Courts are continuously facing a big challenge for having this exception and currently the matter is pending before in Hon'ble Supreme Court in the case of Hrishikesh Sahoo v. State of Karnataka.

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[1] The Bharatiya Nyaya Sanhita, 2023, No. 45 of 2023, § 63, Exception 2 (India). The Act came into force on 1 July 2024.
[2] The Bharatiya Nyaya Sanhita, 2023, No. 45 of 2023, § 67 (India).
[3] Marital Rape in India: 36 countries where marital rape is not a crime, India Today, Mar. 12, 2016.

1. Conceptual Framework regarding: Consent, Marriage and Body Consent

As per the laws in India Consent is a sexual offence. Sexual consent i.e. Sexual Autonomy which states that every individual or human being has the authority to decide whether, when and with whom they need to engage into the sexual activity.

As marriage part of Custom, it creates the legal rights and duties between both the husband and wife i.e. both the spouses but it never restricted the male spouse to have the control over the body and the consent of female spouse for the body to get engage in sexual activities. The Hon'ble Supreme Court has issued the contemporary issues regarding the issue raised regarding dignity, privacy and autonomy as important aspects for every individual liberty.

The Hon'ble Supreme Court in the matter relating right to privacy recognised the decision of Consent matters relating to intimate personal choice and have authority. In the landmark case of K.S. Puttaswamy (Retd.) v. Union of India[4], the Hon'ble Supreme Court held that right to Privacy under Article 21 of the Constitution is connected with dignity, liberty along with the autonomy. In the landmark case of Navtej Singh Johar v. Union of India[5], the Hon'ble Supreme Court held that firstly it focused on constitutional morality along with the dignity and choice of consent for them to be intimate. These case laws did not automatically explain the constitutional validity of the marital rape exception given under the BNSS i.e. Exception 2 to Section 63. The main important question that arises whether the marriage can legitimately be treated on a legal basis for excluding or otherwise non-consensual sexual act from the definition of rape.

This issue is also connected with the concept of substantive equality. As per Article 14[6] it prohibits arbitrary discrimination, while Article 15[7] prohibits discrimination on the specified grounds including sex. Article 21[8] it protects life and personal liberty and it has been interpreted broadly to include dignity, privacy etc.[9] A law that concerns sexual violence within the marriage must therefore be examined not merely through the traditional conception of marriage, but also through the constitutional status of the individual spouse that needs to be changed.

2. HISTORICAL ORIGIN OF THE MARITAL RAPE EXCEPTION

[4] K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1.
[5] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.
[6] INDIA CONST. art. 14.
[7] INDIA CONST. art. 15.
[8] INDIA CONST. art. 21.
[9] INDIA CONST. arts. 14, 15, 21.

The historical foundation of marital rape exemptions was associated with the writings of Sir Matthew Hale,[10] who has expressed his proposition that a husband could not be guilty of rape committed against his wife because marriage as it was treated as creating an irrevocable marital consent during that era.

This historical approach was earlier based on procreation of children and the women after getting married to someone they do not have their choices on bodily autonomy. This development of women's legal rights and constitutional equal rights from the modern point of view and the challenges are on the sexual consent that further challenges these assumptions.

This English Legal position was changes in the case of R v R,[11] where the House of Lords rejected the exception of marital rape under the common law system. The Court also recognised the old common-law proposition was inconsistent with the contemporary understanding of marriage and criminal responsibility from the violations of the rights also of the females.

The European Court of Human Rights has subsequently considered the issue in the case of S.W. v. United Kingdom,[12] recognising the major development of the law concerning about the marital rape and confirming that the criminalisation of rape within marriage was compatible with the Convention and much needed.

This historical development is more important to the Indian debate and current ongoing issue because it demonstrates and shows that the marital rape exception is not an inevitable feature of marriage as it is a product of particular historical assumptions concerning marital rights and women's status and it needs to be changed as the society needs these kinds of changes.

3. TRACING THE CHANGES IN INDIAN LAW

In IPC, there was an exception regarding the provision of marital rape under section 375. There was a significant change regarding to the age of wife. In 172nd report of the law commission on review of the rape laws, the report was submitted in 2000.[13]

The Justice J.S Verma committee was constituted in 2012 Delhi gang rape incident, The committee recommended that the exception of the marital rape should be removed and marriage cannot be treated as the irrevocable consent to sexual activity. The committee recommended that the relationship between victim and accused cannot be treated as whether

[10] See Sir Matthew Hale, History of the Pleas of the Crown (1736), discussed in R v R, [1992] 1 AC 599 (HL).
[11] R v R, [1992] 1 AC 599 (HL).
[12] S.W. v. United Kingdom, App. No. 20166/92, 21 Eur. H.R. Rep. 363 (1995).
[13] Law Commission of India, 172nd Report on Review of Rape Laws (2000).

the activity was consensual or not but, further till now the marital rape exception is not abolished.

In BNS,2023 the exception is still mentioned under section 63 exception 2.[14]

4. PRESENT FRAMEWORK

A. Section 63 of the Bhartiya Nyaya Sanhita, 2023[15]

The section 63[16] defines the offence of Rape, the exception 2 mentioned under it defines the, "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape." In current scenario the husband has been exempted if the wife age is above 18 years of age but this does not mean that husband is exempted from every sexual offence that he has done to wife, the husband is exempted only from the offence of rape. The development of age was done from the case of Independent Thought v. Union of India, (2017)[17]

B. Section 67 of The Bhartiya Nyaya Sanhita, 2023

The Section 67[18] of the BNS,2023 provides that the any forceful sexual intercourse by husband upon wife is punishable by this provision. The punishment under this provision is for the term of not less than two years and which may extend to seven years, and fine.

Therefore, the Section 67 is an important term to determine that any statement within the ambit of the Indian criminal law completely ignores non-consensual sexual intercourse within marriage.[19]

The present provision conations the following:

Sexual intercourse with a wife below eighteen years: As discussed above, the marital exception does not protect the husband from the law of rape if the wife age is below 18 years of the age.

[14] The Bharatiya Nyaya Sanhita, 2023, § 63, Exception 2.
[15] The Bharatiya Nyaya Sanhita, 2023, No. 45 of 2023.
[16] Id. § 63.
[17] Independent Thought v. Union of India, (2017) 10 SCC 800.
[18] Id. § 67.
[19] Id. § 67.

Sexual intercourse with an adult wife who is living separately and does not consent: The provision of the section 67[20] applies if the wife does not consent to husband and they are living separately under the decree or voluntarily.

Non-consensual sexual intercourse with an adult wife who is living with her husband: Section 63 Exception 2[21] presently excludes the conduct from the offence of rape to the husband.

The third exception is debatable and in the current legal scenario of the Hrishikesh Sahoo v. State of Karnataka[22] case is actively unfolding before the honourable Supreme Court of India. It has been grouped into a highly anticipated batch of petitions testing the constitutional validity of the Marital Rape Exception (MRE).

C. Procedural Position under section 221 of the BNSS

The provision of the Section 221 Bharatiya Nagarik Suraksha Sanhita, 2023[23] ("BNSS") states that no Court shall take cognizance of an offence punishable under Section 67 of the BNS where the persons are in a marital relationship, except upon prima facie satisfaction of the facts constituting the offence upon a complaint made by the wife against the husband.

This provision was previously mentioned under Section 198B of the Code of Criminal Procedure, 1973.

The provision of 198B of the Code of Criminal Procedure, 1973, is currently mentioned under the provision of the Section 221 of the BNSS 2023.

5. THE CURRENT POSITION OF THE LAW

The Supreme Court has now taken up the topic related to the concerning the marital rape exception, including questions relating to the corresponding statutory framework under the BNS.

The recent proceedings in September 2026 demonstrate that the Court is examining both the constitutional challenge to the exception and the legal difficulty arising when prosecution is

[20] Id.
[21] Id.
[22] Hrishikesh Sahoo v. State of Karnataka, 2022 SCC OnLine Kar 371.
[23] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46 of 2023, § 221.

sought for conduct that the existing statutory exception presently excludes from rape, for the offence that is occurred by the husband to his wife.[24]

The Court has also considered the relationship between individual autonomy within marriage and the principle that criminal liability must be granted in the existing law.[25]

Accordingly, the legally accurate position is: As of the October 2026, the Supreme Court has not delivered a final constitutional judgment abolishing the marital rape exception under Section 63 of the BNS.[26] The constitutional and related criminal law questions remain of the provisions under the judicial consideration.

The decision will be taken regarding to the marital rape in the case of the Hrishikesh Sahoo v. The State of Karnataka.[27]

6. JUDICIAL DEVELOPMENT i.e. precedents

A. Bodhisattwa Gautam v. Subhra Chakraborty

In the case of Bodhisattwa Gautam v. Subhra Chakraborty[28] where the Hon'ble Supreme Court recognised the serious constitutional challenges of sexual exploitation and held that rape and sexual violence is the victim's fundamental right to life and personal liberty, but this case did not directly decide the constitutional validity of the marital rape is an exception.

Its shows the recognition of the constitutional dimension of sexual violence and the possibility of interim compensation to a victim during criminal proceedings as given under the BNSS,2023.[29]

This case therefore provides broader support for understanding sexual violence as comes under Article 21,[30] although it should not be cited as authority that the Supreme Court has already criminalised marital rape as stills its present as an exception.

B. State of Maharashtra v. Madhukar Narayan Mardikar

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[24] Supreme Court proceedings concerning marital rape in September 2026. The Court has been examining the interaction between the existing marital rape exception, constitutional challenges and prosecution arising from alleged sexual violence within marriage.
[25] Id.
[26] The Bharatiya Nyaya Sanhita, 2023, No. 45 of 2023, § 63, Exception 2 (India). The Act came into force on 1 July 2024.
[27] Hrishikesh Sahoo v. State of Karnataka, 2022 SCC OnLine Kar 371.
[28] Bodhisattwa Gautam v. Subhra Chakraborty, (1996) 1 SCC 490.
[29] The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46 of 2023, § 221.
[30] INDIA CONST. art. 21.

In the case of State of Maharashtra v. Madhukar Narayan Mardikar,[31] the Hon'ble Supreme Court rejected the idea that a woman's sexual history or social status deprives her of the protection of law and the Court recognised that even a woman of "easy virtue" is always entitled to privacy and dignity and also her sexual history does not remove her right to refuse sexual intercourse. Although this case was not about marital rape, its reasoning is relevant to the broader principle that a woman's identity or relationship status cannot by itself extinguish her entitlement to bodily dignity and legal protection along with her consent.

C. Independent Thought v. Union of India

In the Landmark case of Independent Thought v. Union of India[32] it is one of the most important Indian decisions that concerning the marital rape as an exception.

This case petition challenged the validity of Exception 2 to Section 375 IPC further as it protected sexual intercourse by a husband with his wife who was below eighteen years of age.

The Hon'ble Supreme Court harmonised the IPC with the Protection of Children from Sexual Offences Act, 2012 ("POCSO") and also held that sexual intercourse with a wife below eighteen years of age will be constituted as rape notwithstanding the marital relationship of the minor wife.[33]

The decision was significant for the two reasons.

Firstly, it recognised eighteen as the legally relevant age for protection against sexual intercourse under the criminal law framework as given under the BNSS.

Secondly, and more importantly for present research, the Court did not decide the broader issue of marital rape involving adult women as a crime.[34]

Therefore, in this case Independent Thought should not be cited as a decision that criminalised marital rape. Its ratio is limited to the legal protection of wives below eighteen years of age not for the exception removing it.

D. RIT Foundation v. Union of India

[31] State of Maharashtra v. Madhukar Narayan Mardikar, (1991) 1 SCC 57.

[32] Independent Thought v. Union of India, (2017) 10 SCC 800.

[33] Id.

[34] Id. The Supreme Court expressly confined the controversy before it to the protection of girls below eighteen years and did not adjudicate the broader question of marital rape involving adult women.

The Hon'ble Delhi High Court considered the constitutionality of the marital rape exception in the case of RIT Foundation v. Union of India.[35]

This case concerned Exception 2 to Section 375 IPC and related provisions.

On 11 May 2022, a Division Bench delivered a split judgment in this case.[36]

Justice Rajiv Shakdher took the view that the marital rape exception was constitutionally problematic and could not be sustained in its existing form. Justice C. Hari Shankar, however, took the opposite position on the principal constitutional issue and importance the limits of judicial power in creating or expanding criminal offences.

The judgment is therefore not authority for a single binding Delhi High Court position that the marital rape is an exception i.e. either wholly constitutional or wholly unconstitutional.

Its importance principle that lies in the under the constitutional debate concerning the Golden Triangle i.e. Articles 14,[37] 15[38] and 21[39], as well as the question whether removal of the exception amounts to judicial creation of a new offence or not.

The issue of whether striking down this an exception that will expand the application of an existing offence or it will create a new offence remains a major point of constitutional disagreement or agreement i.e. still ongoing debate.

E. Hrishikesh Sahoo v. State of Karnataka

In the case Hrishikesh Sahoo v. State of Karnataka,[40] the Karnataka High Court it was considered as the constitutional implications of the marital rape as an exception.

The Court had rejected the idea that marriage was necessarily gives a husband an unrestricted entitlement for having sexual intercourse with his wife. This judgment gives importance to dignity and bodily autonomy i.e. consent and permitted prosecution in the circumstances before it happened.

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[35] RIT Foundation v. Union of India, 2022 SCC OnLine Del 1404.

[36] Id.
[37] INDIA CONST. art. 14.
[38] INDIA CONST. art. 15.
[39] INDIA CONST. art. 21.
[40] Hrishikesh Sahoo v. State of Karnataka, 2022 SCC OnLine Kar 371.

The case was decided in the context of the IPC and the constitutional challenge to the marital rape is still an exception. It has subsequently become the subject of proceedings before the Hon'ble Supreme Court.[41]

The decision is important, but it should not be described through the final Supreme Court determination that marital rape has been criminalised throughout India and within India.

7. CONSTITUTIONAL ANALYSIS

A. Article 14: Equality Before Law[42]

The article 14[43] guarantees equality before the law and equal protection of the laws. In the principle constitutional argument against the marital rape exception is that it creates an unreasonable distinction between the married and unmarried women.

A woman who is sexually assaulted by a man outside marriage may invoke the offence of rape if the statutory ingredients are established. An adult married woman, however a woman who is married cannot presently invoke Section 63 of the BNS for non-consensual sexual intercourse against her husband where the marital exception applies.[44]

Therefore, the classification is based on the substantially upon the marital status.

The constitutional question arises from it that whether that classification has a rational relationship with a legitimate legislative objective and whether it satisfies the broader requirement of non-arbitrariness under the Article 14.[45]

The argument in favour of the exception is that marriage is a distinct legal and social relationship and that Parliament may legitimately establish a separate legal framework for disputes occurring within marriage. The counter argument is that the existence of marriage does not logically transform non-consensual sexual intercourse into consensual sexual intercourse and marriage cannot be treated as the consent for the whole time.

The constitutional debate arises from it that whether marital status can constitutionally justify a differential treatment or otherwise comparable non-consensual sexual conduct.

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[41] SLP (Criminal) Nos. 4063–4064 of 2022, Supreme Court of India.
[42] INDIA CONST. art. 14.
[43] INDIA CONST. art. 14.
[44] The Bharatiya Nyaya Sanhita, 2023, No. 45 of 2023, § 63, Exception 2 (India). The Act came into force on 1 July 2024.
[45] State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75; E.P. Royappa v. State of Tamil Nadu, (1974) 4 SCC 3.

B. Article 15

The article 15[46] prohibits the discrimination on specified grounds including sex.

The marital rape debate also complies within the Article 15 because the exception operates in a context historically associated with unequal gender relations.

At the same time, Article 15(3) expressly permits the State to make special provisions for women and children. The provision is intended to facilitate substantive equality rather than perpetuate stereotypes.[47]

The constitutional challenge therefore cannot simply cannot be based on the formal equality. It must examine whether the law protects women as autonomous constitutional persons or instead reinforces the assumption that marriage changes the nature of a woman's legal personality.

The Supreme Court on the issue of the gender equality jurisprudence has increasingly rejected paternalistic legal classifications that are based upon stereotypes about women.[48]

C. Article 21: Life, Liberty, Dignity and Bodily Autonomy

Article 21[49] provides that no person shall be deprived of life or personal liberty except according to procedure established by law.

The Supreme Court has interpreted Article 21 as protecting dignity, privacy and decisional autonomy.

In K.S. Puttaswamy (Retd.) v. Union of India,[50] the Court recognised privacy as encompassing decisional autonomy and intimate personal choices.

In Suchita Srivastava v. Chandigarh Administration,[51] the Court recognised reproductive autonomy as an important dimension of personal liberty.

In Navtej Singh Johar,[52] the Court connected dignity, autonomy and constitutional protection in matters of intimate personal choice.

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[46] INDIA CONST. art. 15.
[47] INDIA CONST. art. 15(3); Government of Andhra Pradesh v. P.B. Vijayakumar, (1995) 4 SCC 520.
[48] Anuj Garg v. Hotel Association of India, (2008) 3 SCC 1.
[49] INDIA CONST. art. 21.
[50] K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1.
[51] Suchita Srivastava v. Chandigarh Administration, (2009) 9 SCC 1.
[52] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

These principles were made up of the case laws that provide a strong constitutional basis for examining whether an adult married woman's right to bodily autonomy can be subordinated solely because of her marital relationship. However, these cases do not themselves decide the constitutional validity of Section 63[53] Exception 2 BNS.[54]

These cases provide the constitutional principles that may be applied to these questions.

8. JUDICIAL RESTRAINT AND THE SEPARATION OF POWERS

A significant debate arise in the case of the marital rape exception is that criminalisation is fundamentally a work of the legislative function.

The judiciary in this scenario review the position of the constitution validity. However, in ordinary case of scenario, it does prescribe the punishment as prescribed by the parliament.

This debate was raised in the case of the RIT Foundation, in this case the two judges disagreed whether striking down this exception would remove an unconstitutional, that shield the husband from the act and it will be treated as the offence to the husband under a new criminal offence.[55]

The argument that supports this judicial review are -:

Is the judicial review being that courts are constitutionally required to invalidate legislation that violates fundamental rights.

The legislative restraint is that the detailed design of a marital sexual offence regime may involve questions of evidence, procedure, punishment, limitation, investigation and safeguards that are more appropriately addressed by Parliament.

The both concerns are legitimate in the true sense.

The court may determine that whether an exception violates the fundamental rights but another question arise in relation to this is that how to design a legal framework that plays an important role in the areas of sexual offences as well as it does not destabilize the function of marital life.

9. ARGUMENTS IN FAVOUR OF THE EXCEPTION

[53] The Bharatiya Nyaya Sanhita, 2023, No. 45 of 2023, § 63, Exception 2 (India). The Act came into force on 1 July 2024.
[54] The Bharatiya Nyaya Sanhita, 2023, No. 45 of 2023, § 67 (India).
[55] RIT Foundation v. Union of India, 2022 SCC OnLine Del 1404.

A. Protection of the Institution of Marriage

The argument arise that the marriage is recognized as a social and legally relationship if the sexual intercourse between two partners is criminalized as rape it can interfere as well as ruin the marital relationship.

The supporters argue that it should not be termed as rape and the violence should differ between strangers and spouses but this argument conflicts that the marriage cannot be termed as the continuing consent.

The protection of the marriage cannot be requiring the law to treat the individual's bodily autonomy as permanent transferred to spouse.

B. Possibility of Misuse

Another reason arises that it can be misused in the matrimonial disputes. It is a legitimate concern but a law cannot be stopped to form due to misconception that the offence should not exist.

The Supreme court had recognized the possibility of the misuse, but the appropriate reason includes the procedural safeguards, investigation, judicial scrutiny and penalties for false complaints rather than denial of legal protection of genuine victims.[56]

The possibility of misuse therefore requires safeguards but cannot itself determine the constitutional validity of a statutory exception.

C. Evidentiary Difficulties

The sexual activity between spouses usually occurs in a private environment, creating evidentiary challenges regarding to the consent.

The defence in this scenario may argue that criminalization could result in allegations based upon marital disagreements that are difficult to objectively evaluate that offence has been occurred or not.

However, the evidentiary difficulty is not unique to only to the marital sexual offences. Many sexual offences occur in private faces same difficulties relation to challenge to the evidence.

[56] Sushil Kumar Sharma v. Union of India, (2005) 6 SCC 281.

The legal system in our nation already possesses mechanisms for evaluating credibility, documentary evidence, medical evidence, electronic communications, surrounding circumstances and other relevant material.

The challenge is therefore to develop the evidentiary and investigative standards rather than presume that sexual violence within marriage is inherently incapable of proof.

D. Indian Social and Cultural Context

It is sometimes argued that legal reform must accountable for Indian social conditions relation to our society, the significance of marriage and the potential impact of criminalization upon families is difficult in Indian scenario.

Nevertheless, social context cannot by itself justify to the violation of fundamental rights. Constitutional rights must remain meaningful even where social practices are deeply established.

The constitutional question arises, whether the protection of marriage can justify denying an adult married woman the same criminal law protection against non-consensual forced sexual intercourse that is available to an unmarried woman.

10. INADEQUACY OF EXISTING REMEDIES

The existing legal framework provides certain remedies for sexual abuse within marriage by the following provisions -:

Section 3 of the Protection of Women from Domestic Violence Act, 2005 expressly includes sexual abuse within the statutory definition of domestic violence.[57]

A woman may therefore seek remedies under the PWDVA, including protection orders, residence-related relief, monetary relief and other statutory remedies depending upon the facts of the case.

The criminal law may also apply through provisions concerning the offences of the assault, hurt, cruelty and other offences where their ingredients or acts satisfies the nature of the offence.

[57] The Protection of Women from Domestic Violence Act, 2005, § 3.

However, these remedies do not necessarily answer the specific question of non-consensual sexual intercourse within an ongoing marriage.

A domestic violence remedy and a rape offence serve different legal purposes.

A civil or protective remedy focuses primarily upon protection and relief from domestic violence.

A rape offence, by contrast, expresses a specific criminal law judgment concerning non-consensual sexual penetration by criminalizing the offence.

The existence of alternative remedies therefore does not necessarily make the marital rape exception constitutionally justified.

11. COMPARATIVE LEGAL PERSPECTIVE

A. United Kingdom

In United Kingdom in the case of the R v R, the House of Lords plays an important example of the rejection of the historical marital rape exemption.

In R v R,[58] the House of Lords held that a husband could be convicted of raping his wife.

The decision represented a significant change from the historical common law position.

The case demonstrates that legal systems can recognize the autonomy of married persons without treating marriage as a defence to rape.

B. United States

The several jurisdictions in the United States progressively abolished marital rape exemptions through legislation and judicial decisions.

One frequently cited decision is People v. Liberta,[59] in which the New York Court of Appeals rejected the marital exemption and held that the marriage did not justify treating a wife as having given irrevocable consent to sexual intercourse throughout the marriage.

The American experience also demonstrates that criminalization can be accompanied by statutory distinctions and evidentiary safeguards.

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[58] R v R, [1992] 1 AC 599 (HL).
[59] People v. Liberta, 64 N.Y.2d 152, 474 N.E.2d 567 (1984).

C. South Africa

The south Africa has developed a comprehensive statutory framework dealing with sexual offences. The modern South African legal framework does not recognize marriage as an automatic defence to sexual offences.

The Sexual Offences Act framework, particularly the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, reflects the principle that consent remains central to sexual-offence law.

The South Africa is therefore an important comparative example of a legal system in which marriage does not itself create a complete defence to sexual violence.

D. Nepal

Nepal has also moved towards criminal recognition of sexual violence within marriage. The Nepalese legal framework has progressively developed protections against marital sexual violence, reflecting a broader regional movement towards recognizing women's bodily autonomy within marriage.

However, comparative discussion must be based upon the precise current statutory provisions rather than simply stating that Nepal "abolished marital rape" through a single 2002 decision. The legal development has involved judicial and legislative changes over time.

Accordingly, Nepal is better used as an example of gradual legal recognition of sexual autonomy within marriage rather than as evidence of a single judicial abolition comparable in form to R v R.[60]

Comparative experience also demonstrates that the abolition of marital rape immunity is legally possible. The United Kingdom, Canada, the United States, South Africa and Nepal have all moved away from the traditional doctrine in different ways.

The constitutional challenge pending before the Supreme Court therefore presents an important question concerning the relationship between marriage and individual rights.

The ultimate question is simple but constitutionally profound: does a woman retain the right to say no to sexual relations after marriage?

[60] R v R, [1992] 1 AC 599 (HL).

A constitutional system founded upon equality, dignity, liberty and bodily autonomy should recognise that marriage does not permanently transfer one person's control over another person's body.

The removal of the marital rape exception would not criminalise marriage, undermine consensual marital relations or presume guilt against husbands. It would establish only that marriage cannot itself constitute permanent consent to sexual activity.

The law should therefore move towards a framework in which consent remains the central principle of sexual autonomy irrespective of marital status, while simultaneously ensuring fair investigation, due process and safeguards against abuse of criminal law.

The question is ultimately not whether marriage should be protected. It is whether marriage should be protected at the cost of denying equal protection to the person within it.

A constitutional democracy committed to equality and dignity must ensure that entering into marriage does not mean surrendering the right to bodily autonomy. The legal recognition of that principle would bring Indian criminal law closer to the constitutional promise that every individual is entitled to dignity, liberty and equal protection of the law.

CONCLUSION

The marital rape exception represents one of the most conflicted questions in contemporary Indian criminal and constitutional law. The present legal framework under the BNS continues to distinguish between sexual violence outside marriage and non-consensual sexual intercourse between a husband and an adult wife. Section 63 Exception 2 excludes certain sexual acts by a husband with his adult wife from the offence of rape, while Section 67 separately criminalises non-consensual sexual intercourse where the spouses are living separately.[61]

In the case of Independent Thought,[62] the Hon'ble Supreme Court gave an important decision towards protecting minor wives, but it did not resolve the issue of adult marital rape. The Delhi High Court in the case of RIT Foundation[63] and the Karnataka High Court's judgment in Hrishikesh Sahoo demonstrate the constitutional approaches to the issue.[64]

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[61] The Bharatiya Nyaya Sanhita, 2023, §§ 63, 67.
[62] Independent Thought v. Union of India, (2017) 10 SCC 800.
[63] RIT Foundation v. Union of India, 2022 SCC OnLine Del 1404.
[64] Hrishikesh Sahoo v. State of Karnataka, 2022 SCC OnLine Kar 371.

The constitutional principles of equality, dignity, privacy and bodily autonomy provide substantial grounds for questioning whether marriage can constitute an absolute defence to non-consensual sexual intercourse. At the same time, concerns concerning judicial restraint, legislative competence, evidentiary difficulties and procedural safeguards cannot simply be dismissed. The ultimate resolution requires careful consideration of both constitutional principle and institutional competence.

The fundamental proposition should nevertheless remain clear marriage does not, merely by its existence, erase the individual identity or dignity of either spouse. If Parliament or the Supreme Court ultimately determines that the existing exception cannot be constitutionally sustained, reform should be accompanied by precise statutory language, fair procedures, safeguards against misuse, gender sensitive investigation and effective support for survivors.

The objective should not be to undermine marriage as an institution. Rather, it should be to ensure that marriage remains compatible with the constitutional values of equality, dignity, liberty and individual autonomy. The future of Indian marital rape law should therefore be guided by a principle that is both constitutionally significant and legally precise for the marriage may create mutual legal and personal obligations, and should not affect the constitution of society but it should not be understood as permanently transferring one person's bodily autonomy to another.