
SILENCE AS SANCTION: A CONSTITUTIONAL CRITIQUE OF THE MARITAL RAPE EXCEPTION IN INDIA

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ABSTRACT

A significant inconsistency with the constitutional guarantee of equality and dignity is revealed by the persistence of the marital rape exception in Indian criminal law. A legal presumption of irreversible consent is established under Exception 2 to Section 375 of the Indian Penal Code¹, which is maintained under the Bharatiya Nyaya Sanhita, 2023² and excludes non-consensual sexual relations within marriage from the term of rape. This essay contends that married women are not fully protected by the fundamental rights outlined in Articles 14, 19, and 21³ because of this exclusion, which is not just a statutory gap but rather a type of constitutional silence that functions as an implicit censure.

When compared to empirical reality, this silence becomes especially unacceptable. According to data from the National Family Health Survey (NFHS-5)⁴, a considerable percentage of married women in India suffer from physical or sexual abuse at the hands of their spouses, although a large fraction of this suffering is not acknowledged by the criminal code. The legal system's systemic inability to address gendered violence in the private realm is exposed by the gap between lived reality and legal acknowledgement.

This paradox is further exacerbated by judicial developments. The Supreme Court rejected public morality as a justification for limiting fundamental rights in *Joseph Shine v. Union of India*⁵ and *Navtej Singh Johar v. Union of India*⁶, affirming autonomy, dignity, and sexual privacy as essential components of Article 21. However, the Delhi High Court's split decision in *RIT Foundation v. Union of India (2022)*⁷ shows a regression from this revolutionary vision, where judicial deference to legislative inaction coexists with acknowledgement of harm.

¹ Government of India. (1860). *Indian Penal Code* (Section 375, Exception 2). Ministry of Law and Justice.

² Government of India. (2023). *Bharatiya Nyaya Sanhita*. Ministry of Home Affairs.

³ Government of India. (1950). *Constitution of India* (Articles 14, 19, 21).

⁴ Ministry of Health and Family Welfare. (2021). *National Family Health Survey (NFHS-5)*. Government of India.

⁵ *Joseph Shine v. Union of India*, (2019) 3 SCC 39 (India).

⁶ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (India).

⁷ *RIT Foundation v. Union of India*, 2022 SCC OnLine Del 1404 (India).

The institution of marriage continues to operate as an exception to rights-based reasoning due to this discrepancy, which reveals a selective application of constitutional principles.

This tension is further highlighted by the Union Government's stance. It has raised issues with the preservation of marriage and possible legal abuse in its defence of the marital rape exception before the Supreme Court⁸. This essay critically contends that the entire basis of constitutional morality as stated in earlier jurisprudence is undermined by such reasoning, which puts institutional stability ahead of individual dignity.

In contrast, India's position is very different from advances in international law. The idea of implied marital consent has been categorically rejected by the UK's *R v. R* (1991) ruling as well as revisions in countries like South Africa⁹ and Canada¹⁰. These discoveries support a universal principle: bodily autonomy cannot be eliminated by marriage. Therefore, India's persistent adherence to the exception indicates constitutional inconsistency rather than cultural distinctiveness.

In the conclusion, this essay argues that the marital rape exemption turns fundamental rights into guarantees that are based on marital status. In this situation, the law's silence is neither neutral nor passive; rather, it actively organises and justifies inequity.

Therefore, acknowledging and resolving this silence is not just a legal reform issue; rather, it is a constitutional need that is necessary to restore the integrity of rights inside the Indian legal system.

Keywords: Marital rape exception, Irrevocable, Implied Consent, Constitutional morality, Bodily Autonomy, Transformative Constitutionalism, Judicial Deference, NFHS-5.

INTRODUCTION

The Preamble's guarantee of the "dignity of the individual" serves as the foundation for India's constitutional vision, which aims to shield citizens from both private and state persecution. However, there is still a pervasive and structural gendered silence at the nexus of domestic and criminal law. The marital rape exception, which was formerly included in Exception 2 to Section 375 of the Indian Penal Code (IPC)¹¹ and is currently largely preserved under the

⁸ Union of India. (2022). *Affidavit before the Supreme Court in marital rape matter*. Supreme Court of India.

⁹ Government of South Africa. (2007). *Criminal Law (Sexual Offences and Related Matters) Amendment Act*. Government of South Africa.

¹⁰ Department of Justice Canada. (1983). *Criminal Law Amendment Act*. Government of Canada.

¹¹ Government of India. (1860). *Indian Penal Code*, Section 375

Bharatiya Nyaya Sanhita (BNS), 2023¹², is the clearest example of this silence.

The law intentionally leaves a gap where a married woman's physical autonomy is subordinated to institutional and societal considerations by omitting non-consensual sexual activities within marriage from the definition of rape. This exclusion functions as an active, gendered legal consequence that essentially suspends married women's fundamental rights; it cannot be written off as merely legislative inaction. By elevating the alleged sanctity of marriage above personal dignity, it perpetuates inequity. As a result, a "zone of exclusion" is created inside the house, weakening constitutional protections and thus eliminating a woman's ability to reject permission.

This silence upholds the colonial-era Doctrine of Coverture¹³ in the Indian socio-legal framework, which holds that a woman's autonomous legal identity is merged into her husband's upon marriage. The Supreme Court's developing theory of transformational constitutionalism, which acknowledges autonomy, privacy, and dignity as essential elements of the Right to Life under Article 21, stands in sharp contrast to this. The marital rape exception is still an outlier in this progressive framework, notwithstanding judicial rulings in cases like *Joseph Shine v. Union of India*¹⁴ and *Navtej Singh Johar v. Union of India*¹⁵ affirming that constitutional morality must take precedence over societal morality.

Empirical data reflects the repercussions of this legal silence in the actual world. The Ministry of Health and Family Welfare's National Family Health Survey (NFHS-5, 2019–21)¹⁶ found that over 82% of married women who reported sexual abuse blamed their husbands, but just about 3% pursued legal action. This glaring discrepancy exposes not only underreporting but also a "reporting abyss" brought about by a judicial system that does not consider such actions to be illegal. By portraying these infractions as private marital matters rather than breaches of physical integrity, the law effectively delegitimises them rather than just ignoring them. As a result, the state indirectly contributes to the continuation of abuse cycles that go undetected and untreated.

¹² Government of India. (1860). *Indian Penal Code*; Government of India. (2023). *Bharatiya Nyaya Sanhita*.

¹³ Blackstone, W. (1765–1769). *Commentaries on the laws of England*.

¹⁴ *Joseph Shine v. Union of India* (2018)

¹⁵ *Navtej Singh Johar v. Union of India* (2018).

¹⁶ Ministry of Health and Family Welfare. (2021). *National Family Health Survey (NFHS-5), 2019–21*.

This ongoing exclusion is further highlighted by contrasting the IPC with the BNS, 2023. The BNS reproduces the same structural inequalities because it keeps the essence of the marital rape exception, although being adopted as a modernised criminal code meant to replace colonial legislation. Legal reform in form has not resulted in reform in content, as seen by the BNS's failure to close this crucial gap while introducing changes in terminology and organization. The state's ongoing unwillingness to challenge deeply ingrained patriarchal traditions within the institution of marriage is highlighted by the continuation of this exemption under a new statutory framework.

Therefore, the purpose of this paper is to investigate the constitutional paradox in the Union Government's continuous defence of the marital rape exception and to demolish the legal fiction of "irrevocable consent" that underpins it. The paper attempts to show how marriage continues to operate as a "lawless zone" in concerns of sexual liberty by examining the Delhi High Court's split decision in *RIT Foundation v. Union of India*¹⁷ combined with progressive Supreme Court jurisprudence. The study offers a rights-based framework for change and assesses the BNS, 2023's effects on gender justice in further detail. It contends that a relationship based on compulsion cannot claim constitutional or moral legitimacy, refuting the premise that making marital rape illegal would undermine the institution of the family.

In the end, this study makes the case that resolving this deeply ingrained silence is both a constitutional requirement and a matter of legal change. Fundamental rights should function as universal guarantees of equality, human dignity, and bodily autonomy rather than being dependent on marital status.

LITERATURE REVIEW

At the nexus of criminal law, constitutional rights, and the socio cultural construction of marriage, the issue of marital rape in India is a hotly debated and complicated area of legal studies. The corpus of extant material consistently shows that the marital rape exemption is a purposeful juridical design that reflects how the law negotiates issues of power, gender, and intimacy within the private sphere rather than just a legislative omission or oversight. This legal silence, far from being neutral or passive, functions as a type of state-sanctioned exclusion in

¹⁷ *RIT Foundation v. Union of India* (2022).

which constitutional protections are deliberately taken away from a particular group of people married women creating a hierarchy of rights inside the framework of the constitution.

Tracing the issue's colonial roots specifically, the notion of coverture¹⁸, which denied women an independent legal status upon marriage is the first step in scholarly engagement with the topic. According to this theory, a woman's legal identity was merged with her husband's, making it impossible for her to claim independence in the marriage. The Indian Penal Code, 1860's Exception 2 to Section 375¹⁹, which specifically excluded non-consensual sexual relations within marriage from the concept of rape, established this idea. This legal fiction has endured and its core is still preserved under the Bharatiya Nyaya Sanhita, 2023²⁰, despite the official shift from colonial to post-colonial government. According to recent research, this continuity is a sign of the persistence of patriarchal legal reasoning rather than the result of legislative inertia. According to this concept, marriage becomes a legal structure that protects sexual abuse from criminal prosecution by transforming consent into an irreversible, one-time contractual surrender.

The debate over the marital rape exemption has been significantly reframed thanks to feminist jurisprudence. According to legal academics in this school, the exception creates a "zone of constitutional exclusion" in which the rights to equality, freedom, and dignity guaranteed by Articles 14, 19, and 21 of the Indian Constitution are deemed inapplicable in the context of marriage. This corpus of work draws attention to a fundamental paradox at the core of the Indian constitutional order: although the Constitution guarantees universal and unalienable rights, the marital rape exception creates a kind of graded citizenship in which married women are not given the same legal recognition of sexual violence as single women. Due to the legislation's reclassification of coercion as a private marital affair outside the purview of criminal law, the outcome is not just discrimination but the institutionalisation of inequality.

Recent research has further positioned the discussion within the framework of transformative constitutionalism, which sees the Constitution as a dynamic tool for advancing substantive equality and upending long-standing social hierarchies. In instances like *Navtej Singh Johar v. Union of India*²¹ and *Joseph Shine v. Union of India*²², the Supreme Court's progressive

¹⁸ Blackstone, W. (1765–1769). *Commentaries on the laws of England*.

¹⁹ Government of India. (1860). *Indian Penal Cod*

²⁰ Government of India. (2023). *Bharatiya Nyaya Sanhita*.

²¹ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (India).

²² *Joseph Shine v. Union of India*, (2018) 2 SCC 189 (India).

jurisprudence has been widely regarded as upholding autonomy, dignity, and sexual privacy as fundamental constitutional rights. These rulings represent a change from nominal equality to a more substantive conception of rights that prioritises personal autonomy and physical integrity. Scholars point out a serious doctrinal discrepancy in the judiciary's approach, though: the marital rape exemption has not been definitively disproved despite this gradual change. This reluctance is demonstrated by the Delhi High Court's divided decision in *RIT Foundation v. Union of India*²³, which highlights a persistent conflict between institutional restraint and constitutional morality. This discrepancy has been characterised as a "selective application of transformative principles," restricting the transformative potential of constitutional jurisprudence by shielding the private realm of marriage from constitutional examination.

By emphasising the lived experiences of women, empirical scholarship offers a vital contrast to doctrinal and theoretical discussions. According to data from the National Family Health Survey (NFHS-5, 2019–21²⁴), a sizable percentage of married Indian women report being sexually abused by their spouses. However, only a small portion of survivors are pursuing legal action, and the rate of legal reporting is still startlingly low. According to academics, this discrepancy is an example of "legal invisibilization," a process in which the sense of injury is essentially erased from the legal system due to the lack of criminal identification. This research gives rise to the idea of a "reporting abyss," which describes the structural obstacles that keep survivors from describing their experiences as legal violations. By classifying marital rape as a private matter, the law actively inhibits its acknowledgement rather than just failing to punish it. As a result, the state contributes to the continuation of abusive cycles that go unreported and unchecked.

The arguments put up by the Indian Union Government to support the marital rape exception are examined severely in another significant body of research. The administration has continuously maintained that making marital rape illegal could undermine the institution of marriage and result in possible abuse of the law. Scholars contest this rationale, arguing that it reflects a highly protectionist and paternalistic mentality that puts institutional stability ahead of personal autonomy and dignity. This method has drawn a lot of criticism for viewing marriage as a goal unto itself rather than as a partnership based on equality and consent. The

²³ *RIT Foundation v. Union of India*, 2022 SCC OnLine Del 1404 (India).

²⁴ Ministry of Health and Family Welfare. (2021). *National Family Health Survey (NFHS-5), 2019–21*. Government of India. <https://nfhs.in>

state effectively legitimises coercion and undercuts the constitutional promise of dignity by giving the institution precedence over the person. The literature vehemently disputes this viewpoint, claiming that no constitutional democracy can defend the suspension of fundamental rights in the name of institutional preservation or social order.

The increasing isolation of India's stance on marital rape is further highlighted by comparative legal study. The House of Lords' historic ruling in *R v. R*²⁵ established that a woman's sexual autonomy is unaffected by marriage and represented a clear rejection of the theory of implicit marital consent. Since then, this idea has been strengthened by legislative changes in nations like South Africa and Canada, which have made marital rape a crime and brought their domestic legal systems into compliance with international human rights norms. Bodily autonomy is an unalienable right that cannot be contractually given up through marriage, according to international literature, especially under frameworks like the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). These events highlight the degree to which India's ongoing maintenance of the marital rape exception contradicts changing international standards for human rights and gender justice.

There is still a big conceptual gap regarding the marital rape exception, notwithstanding the substantial corpus of critical study. Instead than viewing the exception as a deeper constitutional failure, a large portion of the literature now in publication views it as a legislative gap or an aberration within criminal law. The notion that legal silence itself may serve as a normative act, influencing and upholding current power arrangements, has received little attention. By promoting the conceptual framework of "silence as sanction," which acknowledges legal quiet as an active endorsement of inequality rather than just its absence, this study aims to close this gap. The research attempts to show that the marital rape exception constitutes a structural contradiction within India's constitutional order, undermining the fundamental principles of equality, dignity, and autonomy, by combining constitutional doctrine, empirical data.

In conclusion, the body of research indicates that the marital rape exception is a purposeful and persistent constitutional silence rather than merely an antiquated relic that has to be changed. This silence undermines the universality of fundamental rights by turning the promise of dignity into a conditional assurance that depends on marital status. Therefore, resolving this

²⁵ *R v. R*, [1991] UKHL 12 (UK).

issue requires not only legal reform but also a fundamental imperative that calls for the restoration of individual autonomy and equality within the institution of marriage.

STATEMENT OF RESEARCH PROBLEM

The persistence of the marital rape exception in Indian criminal law is directly at odds with the constitutional guarantee of equality, dignity, and bodily autonomy. The Indian Penal Code, 1860²⁶, and the Bharatiya Nyaya Sanhita, 2023²⁷, both exclude non-consensual sexual activities within marriage from the definition of rape, so creating a protected space for violence within the institution of marriage. Government data clearly reflects this contradiction. According to the National Family Health Survey (NFHS-5)²⁸, a sizable percentage of married women in India endure physical and sexual abuse at the hands of their husbands, but the criminal justice system mainly ignores these crimes.

Although the Supreme Court upheld autonomy, privacy, and dignity as fundamental constitutional values in *Navtej Singh Johar v. Union of India*²⁹ and *Joseph Shine v. Union of India*³⁰, the continuation of the marital rape exception shows a selective application of these ideals.

The judicial split in *RIT Foundation v. Union of India*³¹ serves as more evidence of this discrepancy. In contrast, the idea of implied marital consent is categorically rejected by international jurisprudence, especially *R v. R*³² and legislative changes in nations like South Africa and Canada.

Therefore, the fundamental question of whether a constitutional democracy can support a legal system in which marriage functions as an exception to physical autonomy and in which the silence of the law effectively becomes a sanction for violence is the research problem.

RESEARCH GAP

- Although the marital rape exception is criticised in existing scholarship as a violation

²⁶ Government of India. (1860). Indian Penal Code (Sec. 375, Exception 2).

²⁷ Government of India. (2023). Bharatiya Nyaya Sanhita

²⁸ National Family Health Survey (NFHS-5), 2019–21.

²⁹ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

³⁰ *Joseph Shine v. Union of India*, (2019) 3 SCC 39.

³¹ *RIT Foundation v. Union of India*, 2022 SCC OnLine Del 1404.

³² *R v. R*, [1991] UKHL 12.

of fundamental rights, the issue is mostly addressed as a legislative absence or failure to act. Conceptualising this exception as a type of "constitutional silence" that functions as an active state sanction where the lack of criminalisation itself turns into a purposeful legal endorsement of inequality represents a substantial gap.

- The constitutionality of the marital rape exception in the Indian Penal Code, 1860³³ has been thoroughly examined by recent scholarship, but its retention under the Bharatiya Nyaya Sanhita, 2023 as a contemporary legislative framework has received little critical attention. The literature currently in publication does not examine how this shift represents "reform without transformation," in which formal legal change does not alter structural inequality.

RESEARCH METHODOLOGY

In order to investigate the constitutionality of India's marital rape exemption, this study employs a qualitative doctrinal methodology that is augmented by secondary empirical analysis and comparative legal research. The goal is to critically assess the law's normative compatibility with both lived realities and constitutional ideas, rather than just describing it.

1. Constitutional and Doctrinal Analysis

The study's foundation is doctrinal legal research, which entails closely examining statute texts, court decisions, and constitutional requirements. Articles 14, 19, and 21 of the Constitution are discussed in relation to the Indian Penal Code, 1860's³⁴ marital rape exception and its continuation in the Bharatiya Nyaya Sanhita, 2023³⁵. In cases like *Joseph Shine v. Union of India* and *Navtej Singh Johar v. Union of India*³⁶, judicial reasoning is examined to see whether the exception satisfies the requirements of autonomy, dignity, and constitutional morality.

2. Selection and Analysis of Case Law

The study conducts a selected analysis of constitutional jurisprudence, concentrating on instances that deal with marital rights, sexual autonomy, and governmental regulation of intimacy, either directly or indirectly. Particular focus is placed on: *Independent Thought v.*

³⁴ Government of India. (1860). Indian Penal Code (Section 375, Exception 2).

³⁵ Government of India. (2023). Bharatiya Nyaya Sanhita

³⁶ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (India).

Union of India³⁷ RIT Foundation v. Union of India³⁸ These cases were chosen so that the study could find doctrinal discrepancies in constitutional interpretation because they directly addressed the marital rape exception and reflected judicial disagreement.

3. Analysis of Secondary Empirical Data

The study uses secondary empirical data from the Ministry of Health and Family Welfare's National Family Health Survey (NFHS-5)³⁹ to base doctrinal ideas in lived experience. NFHS-5 is one of the most reliable datasets on domestic and sexual violence in India because of its statewide reach, standardised methodology, and governmental reputation. The incidence of spousal sexual abuse and the low reporting rates are two examples of how the data is used analytically to show the gap between legal recognition and social reality.

4. The Comparative Law Approach

India's standing in relation to other constitutional democracies is assessed using a comparative method. Because of their common law roots and rights-based legal systems, which offer a pertinent foundation for comparison, jurisdictions like the United Kingdom, Canada⁴⁰, and South Africa⁴¹ are chosen. The ruling in *R v. R*⁴² and the ensuing legislative changes in various nations are examined to demonstrate how the theory of implicit marital consent is rejected worldwide. In order to determine if India's legal stance is in line with changing international standards, this comparison is employed critically rather than descriptively.

5. Analytical Framework: “Silence as Sanction”

The research is underpinned by the conceptual framework of “silence as sanction,” which views the lack of criminalization not as an impartial stance, but as a deliberate action by the state. This framework is utilized as a lens for interpretation throughout doctrinal, empirical, and comparative analyses to illustrate how the absence of legal action can serve as a method of constitutional exclusion.

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

³⁸ *RIT Foundation v. Union of India*, 2022 SCC OnLine Del 1404 (India)

³⁹ Ministry of Health and Family Welfare. (2021). National Family Health Survey (NFHS-5), 2019–21

⁴⁰ Government of Canada. (1983). Criminal Law Amendment Act.

⁴¹ Government of South Africa. (2007). Criminal Law (Sexual Offences and Related Matters) Amendment Act.

⁴² *R v. R*, [1991] UKHL 12 (United Kingdom)

6. Scope and Limitations

The research relies solely on secondary sources and does not include any primary fieldwork. Although NFHS-5 offers comprehensive data, it might not adequately represent the level of underreported sexual violence within marriage. Furthermore, the comparative analysis is confined to a few selected jurisdictions and may not encompass all global viewpoints.

LEGAL FRAMEWORK

The intricate interplay between constitutional guarantees, legislative provisions, judicial interpretation, and practical reality is reflected in India's legal structure governing marital rape, exposing a recurring conflict between formal rights and substantive protection.

1. Constitutional Basis: Autonomy, Equality, and Dignity

Equality (Article 14), freedom (Article 19), and a dignified existence (Article 21) are all guaranteed under the Indian Constitution⁴³. These rights have been extended by judicial interpretation to encompass sexual integrity, bodily autonomy, and decisional privacy. The Supreme Court stressed that constitutional morality must take precedence over societal morality in *Navtej Singh Johar v. Union of India*⁴⁴ and *Joseph Shine v. Union of India*⁴⁵, reaffirming that autonomy and dignity cannot be compromised.

However, sexual autonomy is not equally guaranteed within the institution of marriage, where these concepts are nonetheless applied inconsistently.

2. Statutory Framework: Criminal Law Exception

The Indian Penal Code of 1860⁴⁶ defines rape as the act of a husband having non-consensual sexual relations with his wife (subject to age constraints). The *Bharatiya Nyaya Sanhita, 2023*⁴⁷, reflects continuation rather than reform in this exclusion. Furthermore, sexual assault within marriage is acknowledged by the Protection of Women from Domestic Violence Act,

⁴³ Government of India. (1950). The Constitution of India.

⁴⁴ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (India).

⁴⁵ *Joseph Shine v. Union of India*, (2019) 3 SCC 39 (India).

⁴⁶ Government of India. (1860). Indian Penal Code (Section 375, Exception 2).

⁴⁷ Government of India. (2023). *Bharatiya Nyaya Sanhita*

2005⁴⁸, which offers civil remedies rather than criminal culpability. As a result, a dual structure is created where: Although abuse is recognised, it is not prosecuted.

3. Judicial Advancements: Partial Acknowledgement

An growing but unfinished strategy is revealed by judicial reactions. The Supreme Court acknowledged the significance of consent when it read down the exception to make sexual relations with a minor wife illegal in *Independent Thought v. Union of India*⁴⁹. Judicial disagreement is highlighted by the Delhi High Court's divided decision in *RIT Foundation v. Union of India*⁵⁰: In one view, constitutional rights were given priority. Legislative policy took precedence over the other. This illustrates an unresolved conflict between institutional deference and rights-based thinking.

4. Empirical Reality: Data Verified by the Government

There is a clear disconnect between actual experience and the legislation. The National Family Health Survey (NFHS-5)⁵¹ data reveals: Approximately 29–32% of women who have ever been married have been victims of domestic abuse.[Gov.uk +1](#). Husbands are responsible for more than 95% of incidences of sexual violence.[\(IASSCORE\)](#). Just 14% of people ask for assistance. [\(Gov.uk\)](#). This suggests that although the home is a major location of gendered violence, criminal law does not appropriately address it.

5. State Opinion and Legislative Reluctance

Due to concerns about potential legal abuse and the maintenance of marital stability, the Union Government has supported the marital rape exception. This stance raises issues about the extent of constitutional protection in private partnerships and reflects a larger legislative hesitancy where institutional concerns are balanced against individual autonomy. Six. International Legal Position: Changing Agreement. A distinct worldwide change can be seen in comparative legal developments. The ruling in *R v. R*⁵² upheld the idea that sexual autonomy is unaffected by marriage and rejected the theory of implicit marital consent.

⁴⁸ Government of India. (2005). Protection of Women from Domestic Violence Act.

⁴⁹ *Independent Thought v. Union of India*, (2017) 10 SCC 800 (India).

⁵⁰ *RIT Foundation v. Union of India*, 2022 SCC OnLine Del 1404 (India).

⁵¹ Ministry of Health and Family Welfare. (2021). National Family Health Survey (NFHS-5), 2019–21.

⁵² *R v. R*, [1991] UKHL 12 (United Kingdom).

Likewise:

Canada changed its laws to make marital rape a crime⁵³. It was acknowledged by South Africa's current sexual offences legislation⁵⁴. A consistent principle is established by these developments:

Consent is ongoing and cannot be assumed through marriage.

7. The Legal Framework's Structural Tension

A layered discrepancy is revealed by the combined analysis: Constitutional law acknowledges autonomy and dignity. Rights are expanded by judicial interpretation. Widespread spousal violence is demonstrated by empirical data. Marital immunity is maintained under criminal law.

A legal framework where rights are legally protected but selectively terminated, especially in marriage, is created by this disconnect. Therefore, the legal framework raises serious concerns regarding the universality of constitutional rights by maintaining a structure in which the lack of recognition functions as a kind of legal tolerance rather than only excluding marital rape⁵⁵.

Comparative Constitutionalism: Global Rejection of Implied Marital Consent.

1. Constitutional Basis: Autonomy, Equality, and Dignity

Equality (Article 14), freedom (Article 19), and a dignified existence (Article 21) are all guaranteed under the Indian Constitution⁵⁶. According to the Supreme Court, these include sexual integrity, decisional privacy, and bodily autonomy; they bind the state and guide law interpretation. The Court rejected the basis of public morality to support restrictions on fundamental freedoms in *Navtej Singh Johar v. Union of India* (2018)⁵⁷, ruling that constitutional morality must take precedence over social morality. In a similar vein, the Court declared that dignity cannot be sacrificed to social constructions in *Joseph Shine v. Union of India* (2019)⁵⁸, striking down the adultery clause for classifying a married woman as a

⁵³ Government of Canada. (1983). Criminal Law Amendment Act.

⁵⁴ Government of South Africa. (2007). Criminal Law (Sexual Offences and Related Matters) Amendment Act.

⁵⁵ United Nations. (1979). Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

⁵⁶ Government of India. (1950). The Constitution of India.

⁵⁷ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (India).

⁵⁸ *Joseph Shine v. Union of India*, (2019) 3 SCC 39 (India).

husband's property. Despite these declarations, there is a constitutional discrepancy with the marital rape exception, which is excluded from the definition of rape under the Indian Penal Code, 1860⁵⁹ and maintained under the Bharatiya Nyaya Sanhita, 2023⁶⁰. It undercuts the very principles that the Constitution upholds by assuming that marriage eliminates the requirement for consent.

2. Legal Structure: The Domestic Violence Law and the Marital Rape Exception

A man cannot be prosecuted for having sex with his wife under Section 375 of the IPC unless she is less than 15 (now 18). The Bharatiya Nyaya Sanhita, 2023 retains this exemption in its entirety, indicating continuity rather than reform. While it does not criminalise marital rape per se, the Protection of Women from Domestic Violence Act, 2005⁶¹ (PWDVA) acknowledges sexual abuse inside marriage as a type of domestic violence and offers civil remedies like protection and residency orders. The state recognises injury but declines to make it a crime due to this dual legal system, which offers civil protection without criminal culpability. This produces a normative dilemma.

3. Empirical Reality: Government-Verified Data on Domestic Violence in India

According to India's most reliable household survey, the National Family Health Survey (NFHS-5, 2019–21)⁶², About 30% of women who have ever been married report that their spouse has abused them physically or sexually. Among these, husbands are responsible for more than 95% of sexual violence. Just 14–18% of women who have experienced abuse seek out official assistance. These numbers are quite trustworthy because they are derived from a nationally representative sample using standardised methodology (Ministry of Health and Family Welfare, 2021)⁶³. According to the research, violence in marriages is common rather than rare, yet when it involves non-consensual sexual relations, the judicial system still views it as a non-offense.

4. Judicial Reaction: Acknowledgement Without Criminalisation

The marital rape exception has received varying degrees of judicial attention. The Supreme

⁵⁹ Government of India. (1860). Indian Penal Code (Sec. 375, Exception 2).

⁶⁰ Government of India. (2023). Bharatiya Nyaya Sanhita.

⁶¹ Government of India. (2005). Protection of Women from Domestic Violence Act.

⁶² National Family Health Survey (NFHS-5), 2019–21. Government of India.

⁶³ Ministry of Health and Family Welfare. (2021).

Court invalidated the marital rape exception for minor brides in *Independent Thought v. Union of India* (2017)⁶⁴, acknowledging that consent cannot be assumed simply by virtue of marriage. This was a big step in the direction of preserving physical autonomy. The Delhi High Court, however, rendered a divided decision in *RIT Foundation v. Union of India* (2022)⁶⁵. One judge declared the exception unconstitutional for violating Articles 14 and 21, while the other judge declined to overturn it in favour of legislative action. This split is a reflection of the judiciary's continued reluctance to use constitutional principles to challenge deeply ingrained social norms. The judiciary has not yet rendered a definite decision that criminalises non-consensual sex within marriage as rape, notwithstanding broad declarations on autonomy and dignity in other circumstances.

5. Comparative Views and International Legal Standards - India's legal stance is in odds with progressive international norms. The concept of implied marital consent was eliminated when the UK House of Lords ruled in *R v. R* (1991)⁶⁶ that marriage does not indicate consent. Regardless of marital status, non-consensual sex is expressly illegal in South Africa under the Criminal Law (Sexual Offences and Related Matters) Amendment Act (2007)⁶⁷. Since extensive changes to the Criminal Code eliminated spouse immunity in the 1980s, marital rape has been illegal in Canada. States are also required by international human rights treaties like the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁶⁸ to end violence and discrimination against women in all contexts, including marriage. These analogous instances highlight a universally applicable principle: marriage does not lessen the need for affirmative and ongoing consent.

6. "Legal Silence as State Sanction" is a theoretical insight. - The original idea that the marital rape exception is a kind of legal silence that serves as state sanction is supported by this study. The exception serves as an affirmative legal decision that justifies structural inequality rather than a lack of regulation. The law implicitly normalises gendered subordination and puts the institution of marriage ahead of individual rights by exempting non-consensual sexual actions within marriage from criminal prosecution.

⁶⁴ *Independent Thought v. Union of India*, (2017) 10 SCC 800 (India).

⁶⁵ *RIT Foundation v. Union of India*, 2022 SCC OnLine Del 1404 (India)

⁶⁶ *R v. R*, [1991] UKHL 12 (United Kingdom)

⁶⁷ Government of South Africa. (2007).

Criminal Law (Sexual Offences and Related Matters) Amendment Act.

⁶⁸ United Nations. (1979). Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

7. Moving Towards Constitutional Uniformity: Reform Consequences - The exception maintains a normative gap: formal rights of equality and dignity exist on paper but lack substantive expression in areas of intimate life, according to an integrated constitutional, empirical, and comparative analysis. Therefore, legal change needs to: Acknowledge marital rape as a crime with no exceptions. Consider consent to be ongoing and reversible. Comply with international human rights norms in domestic law. In addition to addressing a historical anomaly, such change would reinforce India's dedication to a constitutional system that upholds everyone's right to personal liberty.

CONCLUSION

The persistence of the marital rape exception in Indian criminal law reveals a deeper structural conflict inside the constitutional framework rather than just a statutory restriction. Although Articles 14, 19, and 21 of the Constitution guarantee equality, dignity, and personal liberty, judicial interpretation has continuously extended these rights to include sexual integrity, bodily autonomy, and decisional privacy⁶⁹. The Supreme Court rejected patriarchal structures that diminish individual dignity in *Navtej Singh Johar v. Union of India*⁷⁰ and *Joseph Shine v. Union of India*⁷¹, affirming that constitutional morality must take precedence over societal morality. Justice K.S. Puttaswamy v. Union of India⁷², which acknowledged privacy and autonomy as fundamental to Article 21, further reinforced this trend. However, the marital rape exception which was kept from the Indian Penal Code, 1860⁷³ into the *Bharatiya Nyaya Sanhita, 2023*⁷⁴ continues to deny married women complete protection of their rights in spite of this progressive jurisprudence. As a result, constitutional guarantees are applied selectively, with liberty being acknowledged in theory but practically limited in the context of marriage.

Examining this dissonance in conjunction with empirical data makes it more convincing. About 29–30% of women who have ever been married have suffered spousal violence, according to the National Family Health Survey (NFHS-5)⁷⁵. The vast majority of sexual violence is committed by husbands, and only a tiny percentage of victims seek institutional care. According to these statistics, intimate partner violence is a major source of gendered injury that

⁶⁹ Government of India. (1950). The Constitution of India.

⁷⁰ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (India).

⁷¹ *Joseph Shine v. Union of India*, (2019) 3 SCC 39 (India).

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

⁷³ Government of India. (1860). Indian Penal Code (Section 375, Exception 2).

⁷⁴ Government of India. (2023). *Bharatiya Nyaya Sanhita*.

⁷⁵ National Family Health Survey (NFHS-5), 2019–21.

is not sufficiently handled by the criminal justice system. In this situation, the law does more than just do nothing; it denies legitimacy to the most common kind of infraction. A comparable ambivalence can be seen in judicial activity. Although strong concepts of autonomy and dignity have been defined by constitutional courts, these safeguards have not been definitively extended to invalidate marital immunity. This conflict is best shown by the split decision in *RIT Foundation v. Union of India*⁷⁶, where institutional restraint and acknowledgement of injury coexist. This illustrates the ongoing tension between judicial deference and transformative constitutionalism. Comparative jurisprudence, on the other hand, shows a distinct and steady development. A convergent constitutional norm is established by the *R v. R*⁷⁷ ruling and legislative changes in countries like South Africa and Canada: consent must be ongoing and revocable, and marriage does not end sexual autonomy. International commitments under the Convention on the Elimination of All types of Discrimination Against Women⁷⁸, which require the eradication of all types of gender-based violence, even in the private sphere, further support these achievements. According to this theory, India's continued use of the marital rape exception is a normative inconsistency that undermines the universality of fundamental rights rather than an issue of cultural distinction. The exception functions as an active legal construct that establishes an area where rights are deliberately suspended and inequality is institutionally maintained rather than as a passive omission. In the end, the issue of marital rape is a test of constitutional integrity rather than being limited to criminal law change. A legal framework that upholds dignity in public but allows it to be undermined in private runs the risk of shattering the concept of rights themselves. Therefore, eliminating the marital rape exception is not only a question of policy; it is a constitutional need that ensures autonomy, equality, and dignity regardless of marital status.

⁷⁶ *RIT Foundation v. Union of India*, 2022 SCC OnLine Del 1404 (India).

⁷⁷ *R v. R*, [1991] UKHL 12 (United Kingdom).

⁷⁸ United Nations. (1979). Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).