
BEYOND THE EXCEPTION: CONSTITUTIONAL, INTERNATIONAL, AND SOCIO-PSYCHOLOGICAL DIMENSIONS OF CRIMINALIZING MARITAL RAPE IN INDIA

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ABSTRACT

Despite advancements in Indian legal principles, the marital rape exception persists as a legally problematic issue, thereby prompting significant inquiries into bodily autonomy and women's rights within the context of marriage. This study offers a critical examination on criminalization of marital rape within the Indian legal system. This study begins by examining how well current laws work, specifically looking at whether the existing legal solutions for 'cruelty' or 'domestic violence' adequately address the unique harm caused by non-consensual sexual intercourse within marriage.

A thorough constitutional analysis is central to this investigation, determining if the marital rape exception violates the fundamental rights protected by Articles 14, 19, and 21 of the Indian Constitution. Additionally, this paper considers India's position in the global legal context, exploring whether the continued lack of criminalization of marital rape goes against commitments made under international human rights treaties and conventions that India has signed. This research also examines the legal and psychological dimensions of the issue.

It also investigates the severe psychological trauma caused by marital rape. Exploring the legal philosophy of whether the law should penalize the act itself or the resulting psychological devastation and disgrace. Finally, the paper anticipates the legal and social consequences of criminalization, weighing concerns regarding the "sanctity of marriage" and potential legal misuse against the imperative to protect individual dignity and human rights. Ultimately, this research seeks to determine whether a legislative shift toward criminalization is constitutionally mandated and socially necessary in contemporary India.

Keywords: Marital Rape, Article 14, Article 21, Indian Constitutional Law, Domestic Violence, Bodily Autonomy, Psychological Trauma.

RESEARCH QUESTION:

1. Whether cruelty by husband or domestic violence is sufficient remedy for marital rape?
2. Should marital rape be criminalized under Indian law in light of constitutional principles and international human rights standards?
3. Does the marital rape exception violate fundamental rights i.e article 14 , 19 and 21 ?
4. Does non-criminalisation marital rape violate the international treaty or convention accepted by India?

1. Introduction

Rape is widely acknowledged as one of the most grievous breaches of human dignity, causing profound physical, psychological, and emotional harm to the victim. Contemporary legal frameworks worldwide have developed to punish sexual assault, thereby safeguarding individual bodily autonomy. A substantial legal and ethical gap endures within the institution of marriage. Although sexual violence committed by a stranger or acquaintance is penalized, non-consensual sexual intercourse perpetrated by a husband against his wife is often referred to as marital rape and continues to be legally condoned or broadly accepted in numerous jurisdictions. The absence of criminalization for marital rape is rooted in deeply ingrained patriarchal ideologies, outdated legal principles, and socio-cultural norms that prioritize the sanctity of the marital institution over the fundamental rights of the individual.

Meaning and Concept of Marital Rape

Marital rape, also known as spousal rape, is defined as sexual intercourse or sexual acts that happen without consent, specifically when a husband forces his wife. This is a specific type of intimate partner violence and sexual abuse that occurs in the private setting of a home. The need to make marital rape a crime is clear, based on serious constitutional, public health, and human rights concerns:

Violation of Constitutional Rights: The exception for marital rape goes against the Constitution of India. It violates Article 14 (Right to Equality) by creating an unfair distinction between

married and unmarried women, which denies married women equal protection under the law. In addition, it violates Article 21 (Right to Life and Personal Liberty), which the Supreme Court has said includes the right to live with dignity, control over one's body, and the freedom to make personal choices about intimate relationships (*Justice K.S.Puttaswamy v. Union of India*).

Severe Mental and Physical Health Impacts: Systematic reviews reveal that women subjected to spousal sexual abuse suffer from catastrophic mental health consequences. Survivors had observe high rates of Major Depressive Disorder (MDD), chronic Post-Traumatic Stress Disorder (PTSD), sleep disorders and suicidal ideation. Yet, the legal minimization of their trauma deters victims from seeking medical and psychological help.

Judicial and Legislative Crossroads: The issue is currently at the forefront of Indian jurisprudence. Following split verdicts in the Delhi High Court (*RIT Foundation v. Union of India*), the matter is pending before the Supreme Court of India (*Hrishikesh Sahoo v. State of Karnataka*). The Union government has historically opposed criminalization citing the destabilization of the Indian family institution and the potential misuse of laws. Though courts have begun to acknowledge that forced unnatural sex amounts to cruelty. Addressing this issue is critical to harmonizing India's penal code with its commitments under international human rights frameworks such as CEDAW.

2. Historical and Legal Foundations

Bride Capture in Customary Law:

During the Paleolithic Era¹, hunter-gatherer societies recognized the practice of capturing or stealing a bride as a legitimate method of marriage². This enduring custom involves kidnapping a woman, subjecting her to sexual assault, and subsequently recognizing the assailant as her legal husband under customary traditions³. English society permitted this method of claiming a wife up through the 1400s⁴. Today, certain rural communities in Kyrgyzstan and other Central

¹ The Paleolithic Age lasted from approximately 2.58 million to 11,700 years ago. See Paleolithic Period, ENCYCLOPEDIA BRITANNICA (Dec. 23, 2019), <https://www.britannica.com/event/Paleolithic-Period>.

² A.S. DIAMOND, PRIMITIVE LAW PAST AND PRESENT 163 (Routledge Library, 1st ed. 1971).

³ See Charles Becker, Susan Steiner & Lin Zhao, Forced Marriage: Models of Ala-kachuu, ASS'N FOR COMPARATIVE ECONOMIC STUDIES 2 (Dec. 31, 2017), <https://www.aeaweb.org/conference/2018/preliminary/paper/kzeZfbd6>. The authors describe this practice as “non-consensual abduction of women into marriage.” *Id.* at 2.

⁴ SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 17 (1976).

Asian tribes continue to permit this tradition, referring to it as "Ala-Kachuu".

Women as Chattel: The Property Theory

The Assyrian Ebla tablets represent some of the oldest surviving records detailing the customs and legal codes of an early civilization. Authored roughly between 2400 and 2300 B.C., these cuneiform inscriptions describe everyday existence within three Northern Mesopotamian realms: Nagar in the Khabur basin, Mari along the Middle Euphrates, and Ebla in West Syria⁵. Within these texts, women are sometimes treated as possessions, evidenced by references to kings paying a "bride price" to acquire spouses⁶. Because owning property inherently includes the right to use or mistreat it, it is highly probable that Eblaite law did not penalize marital rape.

Early Babylonian and Hittite Codes

Dating back to 1780 B.C., the Babylonian Code of Hammurabi established the earliest known written statute against rape⁷. However, it framed the act as a property offense—specifically the theft of virginity belonging to a fiancé or husband⁸; if a married woman was assaulted, she was deemed complicit in adultery and condemned to drown alongside her attacker. Her husband, however, retained the authority to spare her life at his discretion⁹.

Between 1650 and 1500 B.C., the Code of the Nesilim introduced the concept of consent, using the word "willingly" to assess if sexual acts between a man and a woman required penalization¹⁰. Yet, consent alone did not dictate the legal outcome; the physical location of the assault also played a crucial role in deciding the assailant's guilt. The Code dictated that a man who raped a woman in the mountains would be executed for his crime, but if the assault took place inside a home, the woman was blamed and sentenced to death; furthermore, a husband who caught and killed them both faced no legal repercussions¹¹.

⁵ Lauren Ristvet, "Assyria" in the Third Millennium BCE, in *A COMPANION TO ASSYRIA* 1, 36, 44 (Wiley Blackwell, 2017).

⁶ Taking a Wife, in *ANCIENT SYRIAN WRITINGS: PRE-CLASSICAL AND CLASSICAL TEXTS* 1, 96 (2009) (translated by J. Taylor Alalakh)

⁷ *ENCYCLOPEDIA OF RAPE*, xiii (Greenwood Press, 2004).

⁸ *CODE OF HAMMURABI*, art. 130 (translated by L. W. King), available at <http://avalon.law.yale.edu/ancient/hamframe.asp>.

⁹ *CODE OF HAMMURABI*, art. 129.

¹⁰ *CODE OF THE NESILIM*, arts. 190–91.

¹¹ *CODE OF THE NESILIM*, art. 197. See also *ENCYCLOPEDIA OF RAPE*, *supra* note 14, at xiii.

Marriage by Assault and Classical Antiquity

In Biblical law around 621 B.C., the book of Deuteronomy explicitly prohibited sexual assault only when the victim was a virgin. Unbetrothed virgins who suffered an assault were forced to wed their attackers, while the perpetrator's only penalty was a payment of fifty shekels to the woman's father¹². Similarly, sexual violence during warfare was seemingly normalized in Ancient Greece, illustrated by legends detailing the widespread assault of Trojan women by conquering forces¹³. Consequently, Ancient Greek society likely tolerated rape under specific wartime conditions.

In Ancient Rome, the culture's foundational mythology frequently glorified accounts of sexual assault. Scholar Nghiem L. Nguyen notes that in Livy's texts, the god Mars assaults the priestess Rhea Silvia, leading to the birth of Rome's founder, Romulus. This act of violence is portrayed not only as permissible but as majestic, given that the perpetrator is divine and the outcome is the birth of the city's first monarch. Throughout these Roman myths, the focus consistently shifts away from the woman's trauma to highlight a broader political advantage¹⁴. This framing of sexual violence as politically advantageous became a persistent motif in Rome's legal approach to such crimes.

Additionally, the Roman historian Livy documented the mythological assault on the Sabine women. According to his account, Romulus hosted a religious gathering for the neighboring Sabines; facing a shortage of female companions, the Roman men slaughtered the Sabine men and assaulted their women¹⁵. Because the surviving Sabine women eventually wed their attackers, this violent episode is considered the mythological origin of formal marriage within Roman law.¹⁶

Historical Parallels in Ancient India

Concurrently, around 200 B.C., India's Laws of Manu categorized women as the movable

¹² Deuteronomy 22, 28–29.

¹³ Cyril J. Smith, *History of Rape and Rape Laws*, 6 INT'L B.J. 33, 33 (1975)

¹⁴ Nghiem L. Nguyen, *Roman Rape: An Overview of Roman Rape Laws from the Republican Period to Justinian's Reign*, 13 MICH. J. GENDER & L. 75, 83 (2006).

¹⁵ Livy, *The Rape of the Sabines*, in *THE HISTORY OF ROME* (29 B.C.), available at https://creativetime.org/programs/archive/2007/sussman/press/roman_myth.pdf; see also History.com, *When Sexual Assault Made History*, HISTORY CHANNEL (Oct. 9, 2018), <https://www.history.com/news/sexual-assault-rome-slavery-columbus-jim-crow>.

¹⁶ Nguyen, *supra* note 14

assets of either their husbands or father.¹⁷ Echoing the legal frameworks of Babylon and Rome, the Laws of Manu criminalized rape primarily as an infringement on a husband's exclusive rights to his spouse's body. For unmarried victims, however, the crime took on a societal weight, as the loss of her virginity deprived any future husband of her chastity. Consequently, the Manu Laws mandated that an assaulted woman, now considered tainted, be confined indoors, covered in ashes, forced to sleep on a low bed, and provided only minimal sustenance.¹⁸ The social consequences varied by class: assaults by a man of the same caste resulted in distinct punishments for the woman.

This Law laid down the Foundation of marital rape law :

1. The Unification Theory (Doctrine of Coverture): Under English common law, marriage resulted in the suspension of a woman's independent legal existence. Her legal identity merged completely with that of her husband (the principle of coverture). Because the husband and wife were considered a single legal entity, it was deemed legally impossible for a husband to rape himself.
2. The Contractual Theory: This theory posited that the marriage contract itself included an irrevocable grant of sexual access, forming the basis for the enduring "Doctrine of Implied Marital Consent."

The Doctrine of Implied Marital Consent

The justification for the marital rape exception stems from the 17th-century English jurist by Sir Matthew Hale. In his treatise, *History of the Pleas of the Crown* (1736) he proclaimed:

"A husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract."¹⁹

Hale's doctrine established an irrefutable presumption of consent. It theorized that by entering into the civil contract of marriage, a woman provided perpetual and irrevocable consent to

¹⁷ .Kanad Sinha, *Be it Manu, be it Macaulay: Indian Law and the 'Problem' of the Female Body*, 5 J. INDIAN L. & SOC'Y 61, 65 (2007).

¹⁸ Brhaspati, in *THE MINOR LAW BOOKS* at XXIII.14 (Julius Jolly ed., 1969)

¹⁹ Matthew Hale, *The History of the Pleas of the Crown* (1736)

sexual intercourse with her husband. Despite lacking any cited legal authority this extra-judicial declaration became the fundamental of common law globally. While jurisdictions like England and Wales officially abolished this common law fiction in 1991 (*R. v. R.*), the doctrine continues to heavily influence India's legal and socio-cultural stance on the sanctity of marriage.

In India, this doctrine of implicit and irretrievable consent found its home in the colonial code and continues to influence Indian jurisprudence. The Indian Penal Code of 1860 was authored by Lord Macaulay and his Law Commission, chaired by him, under the British Raj. In accordance with Victorian values and the law of England during that time, the IPC had a Section 375 definition of rape and, more significantly, removed an exception to marital rape in Exception 2. The provision is particular to hold sexual intercourse by a man with his wife, the wife not being of some age prescribed, as not being rape. While courts have increased the age of such intercourse over time, the very basis of immunity provided to husbands has nonetheless remained untouched to this day. Even in the light of BNS and the amendments done, especially after rising awareness and activism against sexual assault, marital rape exception remains intact.

Evolution of Rape Law in India and Statutory Framework Governing Sexual Offences

The Indian Penal Code of 1860 (IPC) strongly reflected the patriarchal norms of 19th-century England. Section 375 of the IPC defines rape as sexual intercourse with a woman without her consent and against her will. However, the people who wrote the law also included marital rape as Exception 2 to Section 375, which directly followed Hale's doctrine.^e

"Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape." Even following the sweeping reforms of the Criminal Law (Amendment) Act, 2013²⁰, which broadened the definition of rape to include non-penetrative acts, the marital rape exception was retained.

Bharatiya Nyaya Sanhita, 2023 (BNS): The Indian Parliament enacted the Bharatiya Nyaya Sanhita, 2023 that replaced the IPC. However, Section 63 of the BNS²¹, which states the

²⁰ The Indian Penal Code, 1860, §375 as amended by the Criminal Law Amendment Act, 20

²¹ Bharatiya Nyaya Sanhita § 63, Exception 2 (2024).

offense of rape retains the exact same marital rape exception and continuing to immunize men from prosecution for non-consensual sexual acts against their adult wives.

Alternative Statutory Frameworks: victims often have to rely on alternative civil and criminal statutes that deal with broader domestic violence such as:

Section 498A of the IPC, Now Section 85 of the Bharatiya Nyaya Sanhita (BNS), 2023 (cruelty): This punishes cruelty by a husband or his relatives. Forced unnatural sex had been recognized by some courts as cruelty under this section but it treats the offense as cruelty rather than the distinct, heinous crime of rape, carrying significantly lower penalties.

The Protection of Women from Domestic Violence Act, 2005 (PWDVA) explicitly includes "sexual abuse" in its definition of domestic violence. However, it only provides civil remedies, such as protection orders, and does not make the act a crime.

3. Social and Psychological Dimensions

The psychological effects of marital rape are significant, often made worse by the fact that the perpetrator is a partner in a committed relationship. Systematic reviews and public health research, including studies published in PLOS Global Public Health, reveal a considerable association between spousal sexual violence and negative mental health outcomes in the Indian context.

Survivors frequently exhibit psychological morbidities, including indicators of Major Depressive Disorder (MDD), chronic Post-Traumatic Stress Disorder (PTSD), severe anxiety, and sleep disruptions. These symptoms are often misdiagnosed or self-reported as "tension," a consequence of societal stigma and the lack of legal recognition. Suicidal ideation and attempts are more prevalent among individuals subjected to repeated sexual coercion by their spouses.

The trauma associated with marital rape, in contrast to rape perpetrated by a stranger, entails recurrent abuse within a context that is typically expected to be secure.

The research article Marital rape and its impact on the mental health of women in India²² It

²² Agarwal N, Abdalla SM, Cohen GH (2022) Marital rape and its impact on the mental health of women in India: A systematic review. PLOS Glob Public Health 2(6): e0000601. <https://doi.org/10.1371/journal.pgph.0000601>

details a systematic review investigating the mental health impacts on Indian women victims of marital rape on women in India, based on a comprehensive database search spanning from January 1945 to November 2020. The article selection process was rigorous beginning with an initial identification of 6,294 records further removing duplicate entries the rest 4,260 unique records advanced to the initial screening phase. This screening excluded 4,156 records, leaving 104 full-text articles for thorough eligibility assessment. During this final eligibility review, 93 articles were excluded because they analyzed unmarried women, conducted research outside of India or on non-Indian populations, or failed to examine depression or PTSD as outcomes. Ultimately, 11 of these studies met all the strict criteria and were included in the final qualitative synthesis.

The review synthesized data on adverse mental health outcomes of marital rape, primarily focusing on depression including both antenatal and postnatal forms and Post-Traumatic Stress Disorder (PTSD). Additionally, suicidality was captured incidentally as a secondary outcome. According to the review's findings, depression was the most frequent outcome, reported in almost all included studies. Specifically, researchers Chandra P.S. et al. (2009)²³, Chowdhary N. & Patel V. (2008)²⁴, Indu P. et al. (2018)²⁵, Jain S. et al. (2017)²⁶, Kamimura A. et al., Sheeba B. et al. (2019)²⁷, Supraja et al. (2016)²⁸, and Varma D. et al. (2007)²⁹ all identified

²³ ChandraPS, SatyanarayanaVA, CareyMP. Women reporting intimate partner violence in India: Associations with PTSD and depressive symptoms. *Arch Womens Ment Health* [Internet]. 2009 Aug 13; 12 (4):203–9. Available from: <http://link.springer.com/10.1007/s00737-009-0065-6> PMID: 19283446

²⁴ ChowdharyN, PatelV. The effect of spousal violence on women's health: Findings from the Stree Arogya Shodhin Goa, India. In: *Journal of Postgraduate Medicine*; 2008; 54(4). p. 306–12. Available from: <http://www.jpgmonline.com/text.asp?2008/54/4/306/43514> <https://doi.org/10.4103/0022-3859.43514> PMID: 18953151

²⁵ InduPV, JinuCR, PallikkalNR, SampathkumarR, JoyJ. Experience of Domestic Violence and Psychological Morbidity in Spouses of Alcohol-Dependent Males. *Indian J Psychol Med*. 2018; 40(4):322–7. https://doi.org/10.4103/IJPSYM.IJPSYM_38_18 PMID: 30093742

²⁶ JainS, VarshneyK, VaidNB, GuleriaK, VaidK, SharmaN. A hospital-based study of intimate partner violence during pregnancy. *Int J Gynecol Obstet* [Internet]. 2017 Apr; 137(1):8–13. Available from: <http://doi.wiley.com/10.1002/ijgo.12086> PMID: 28099692

²⁷ KamimuraA, GantaV, MyersK, ThomasT. Intimate partner violence and physical and mental health among women utilizing community health services in Gujarat, India. *BMC Womens Health* [Internet]. 2014 Dec 16; 14(1):127. Available from: <https://bmcmwomenshealth.biomedcentral.com/articles/10.1186/1472-6874-14-127> PMID: 25319589

²⁸ SuprajaTA, ThennarasuK, SatyanarayanaVA, SeenaTK, DesaiG, JangamKV, et al. Suicidality in early pregnancy among antepartum mothers in urban India. *Arch Womens Ment Health* [Internet]. 2016 Dec 26; 19(6):1101–8. Available from: <http://link.springer.com/10.1007/s00737-016-0660-2> PMID: 27565804

²⁹ VarmaD, ChandraPS, ThomasT, CareyMP. Intimate partner violence and sexual coercion among pregnant women in India: relationship with depression and post-traumatic stress disorder. *J Affect Disord*. 2007 Sep; 102(1–3):227–35. <https://doi.org/10.1016/j.jad.2006.09.026> PMID: 17109969

depression as an outcome. The study by Tichy L.L. et al. (2009)³⁰ was the only included research that did not report depression. Meanwhile, PTSD was identified as an outcome in three specific studies: Chandra P.S. et al. (2009), Tichy L.L. et al. (2009), and Varma D. et al. (2007). Finally, suicidality was documented as an incidental outcome in two studies, authored by Chowdhary N. & Patel V. (2008) and Supraja et al. (2016).

4. Reform Recommendations by the Law Commission of India and Committees

The issue of criminalizing marital rape has been extensively analyzed by various statutory commissions in India, demonstrating a multifaceted development of legal perspectives. The initial assessment was presented in the 42nd Law Commission Report³¹, which primarily offers insight into the Commission's historical viewpoint. Significantly, this report refrained from explicitly advising on the retention or removal of the general marital rape exception clause. Instead, it offered two specific suggestions. First, it proposed that the exception should not apply when a husband and wife are judicially separated. However, the reasoning provided was somewhat vague, simply stating that forced intercourse in a technically subsisting marriage does not appear to be right. This stance implicitly relied on the presumption that consent is automatically granted when a couple cohabits but cannot be assumed when they live apart also the report addressed non-consensual intercourse with underage wives between twelve and fifteen years old, suggesting that the corresponding punishment be placed in a separate legal section and explicitly can not be termed rape. Ultimately, this early report demonstrated a clear intent to label marital rape as actual rape and treating it as a lesser sexual misdemeanor while leaning heavily on the presumption of marital consent.

The ideological conflict between individual rights and marital sanctity was confronted later in the 172nd Law Commission Report.³² During the consultation phases it advocates strongly questioned the validity of the exception clause arguing that it is illogical to shield rape from legal operation since the law already criminalizes other forms of domestic violence perpetrated by a husband. However despite these arguments, the Law Commission rejected the push for criminalization and It concluded that removing the exception would lead to excessive

³⁰ TichyLL,BeckerJV,SiscoMM.TheDownsideofPatriarchalBenevolence:AmbivalenceinAddressing Domestic Violence and Socio-Economic Considerations for Womenof Tamil Nadu,India. J FamViolence [Internet]. 2009 Nov 14; 24(8):547–58. Available from: <http://link.springer.com/10.1007/s10896009-9253-4>

³¹ Law Commission of India, Indian Penal Code, Report No. 42 (June 1971), available at <http://lawcommissionofindia.nic.in/1-50/report42.pdf> (last visited on December 15, 2017).

³² Law Commission of India, Review of Rape Laws, Report No. 172 (March 2000), available at <http://www.lawcommissionofindia.nic.in/rapelaws.htm> (last visited on February 6, 2016).

interference with the institution of marriage. It clearly prioritized the perceived stability of the family structure over the prosecution of marital sexual violence.

A significant shift toward progressive legal reform emerged with the J.S. Verma Committee Report in 2012³³, which strongly advocated for the complete criminalization of marital rape. The Committee highlighted that marital immunity is rooted in the archaic notion of women as property who have irrevocably consented to their husbands' sexual demands. Noting that many international jurisdictions have already abolished such immunities, the report emphasized that modern marriages are partnerships of equals where the exception clause has no place. Consequently, the Committee made a two-fold recommendation: first, the straightforward deletion of the exception clause, and second, an explicit legal clarification that a marital or similar relationship cannot serve as a valid defense, is entirely irrelevant in determining the existence of consent, and cannot be considered a mitigating factor during sentencing.

Despite the Verma Committee's strong stance, the 167th Parliamentary Standing Committee³⁴ Home Affairs ultimately maintained the status quo. Tasked with reviewing the Criminal Law Amendment Bill of 2012 and conducting public consultations, the Standing Committee received direct recommendations to amend Section 375 of the Indian Penal Code to remove the marital exception. However, the Committee refused to adopt this change for two primary reasons. First, the argument was made that making marital rape a crime would put a heavier burden on the family unit, fearing that the committee's actions could unintentionally lead to more harm. Second, the reasoning was that there were already enough ways to address these problems. It was suggested that families could handle these matters themselves, and that the existing laws against domestic cruelty, specifically Section 498A of the IPC, were a good enough legal option.

The Ministry of Home Affairs explicitly reiterated its opposition to criminalizing marital rape in 2015. In response to a proposed parliamentary bill, The Criminal Laws (Amendment) Bill,

³³ JUSTICE J.S. VERMA COMMITTEE, Report of Committee on Amendments to Criminal Law (January 23, 2013).

³⁴ STANDING COMMITTEE ON HOME AFFAIRS, Fifteenth Lok Sabha, Report on The Criminal Law (Amendment) Bill, 2012, One Hundred and Sixty Seventh Report, 45, (December 2015).

2014³⁵, which sought to recognize the offense, the Ministry press released a statement.³⁶ This statement claimed that the internationally accepted definition of marital rape didn't fit the Indian situation. A key reason for this position was the prevailing societal view that marriage is a sacred bond, not just a simple agreement³⁷.

Later that same year, in December 2015, the issue resurfaced during discussions on a private member's bill.³⁸ The Home Minister, at that juncture, chose to postpone any immediate legislative moves. He indicated the government would hold off on making firm decisions until the Law Commission's full report was in hand. He also pointed out, importantly, that victims already had sufficient legal avenues available, specifically those related to 'cruelty' as outlined in the Indian Penal Code. This deferential posture continued into 2016 when the Home Minister was questioned once more about the government's plans regarding the marital exception clause.³⁹ He reiterated that the matter remained under the Law Commission's review and confirmed that the government had not decided to pursue criminalization, heavily citing the Parliamentary Standing Committee's prior recommendation to maintain the legal status quo.

5. International Obligations: A Mandate for Equality

Beyond domestic constitutional law, India has also failed to criminalize marital rape despite contradicting its international commitments to gender equality and non-discrimination. India is a signatory to several vital human rights treaties, most notably the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)⁴⁰, ratified by India in 1993.

CEDAW mandates that state parties eradicate all forms of discrimination against women, specifically including violence within the family and marital relationships. Article 16 that

³⁵ The Criminal Laws (Amendment) Bill, 2014, 28 of 2014. (This Bill was a Private Member Bill proposed by Ms. Kanimozhi on the 28th of November, 2014. The status of the Bill is currently pending as of 1st December, 2017)

³⁶ Press Release, PRESS INFORMATION BUREAU, April 29, 2015, <http://pib.nic.in/newsite/PrintRelease.aspx?relid=119938> (Last visited on December 17, 2017).

³⁷ RAJYA SABHA DEBATES, Discussion on the Indian Penal Code (Amendment) Bill, 2015, 53, Session Number 237, December 4, 2015, available at <http://164.100.47.5/newdebate/237/04122015/Fullday.pdf> (Last visited on December 15, 2017).

³⁸ RAJYA SABHA DEBATES, Discussion on the Indian Penal Code (Amendment) Bill, 2015, 53, Session Number 237, December 4, 2015, available at <http://164.100.47.5/newdebate/237/04122015/Fullday.pdf> (Last visited on December 15, 2017)

³⁹ LOK SABHA DEBATES, Question on Marital Rape, 2016, Question No. 2872, March 15, 2016, available at <http://164.100.47.190/loksabhaquestions/annex/7/AU2872.pdf> (Last visited on December 16, 2017).

⁴⁰ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

emphasizes equality in marriage, requiring states to guarantee equal rights and duties for both spouses. This inherently encompasses the freedom to freely give or withhold consent to sexual intercourse. The CEDAW Committee continuously urges states to recognize sexual violence by husbands as a severe human rights violation. By maintaining the marital rape exception, India fails to meet its CEDAW obligations to guarantee women full bodily autonomy and equal rights within marriage.

India is also bound to United Nations General Assembly Declaration on the Elimination of Violence against Women (1993). It explicitly calls upon member states to eradicate all forms of gender-based violence including sexual violence within marriage and framing such acts as severe human rights violations requiring state prevention and punishment. By retaining this laws that legally protect the sexual assault of wedded women India is not merely demonstrating a domestic legislative failure, but an international human rights failing. It effectively turns a blind eye to the cultural acceptance of domestic violence, directly contravening its global commitments to gender equality.

6. The Judicial Approach to the Marital Rape Exception in India

The Supreme Court has firmly established that the "right to life" under Article 21 extends far beyond mere existence; it encompasses the right to live with human dignity and optimal health (*C.E.S.C. Ltd. v. Subhash Chandra*⁴¹; *Regional Director ESI Corpn. v. Francis de Costa*⁴²). Exception 2 is problematic because it doesn't prevent husbands from forcing sexual contact, which significantly harms the physical and mental well-being of married women.

The courts have supported this view through several important decisions about privacy and bodily autonomy. In *Suchita Srivastava v. Chandigarh Administration*⁴³, the Court ruled that a woman's individual freedom includes complete control over her body. Therefore, if a woman has the right to make her own reproductive choices, like having an abortion without her husband's permission, she logically has control over her sexual life in general, including the right to refuse sex within marriage.

⁴¹ *C.E.S.C. Ltd. v. Subhash Chandra*, (1992) 1 SCC 441 (India).

⁴² *Regional Director ESI Corpn. v. Francis de Costa*, 1993 Supp (4) SCC 100; 5 D.D. Basu, Commentary on the Constitution of India, 4711 (LexisNexis 2015).

⁴³ *Suchita Srivastava v. Chandigarh Administration*, (2008) 14 SCR 989 (India)

In addition, the Supreme Court, in *K.S. Puttaswamy v. Union of India*,⁴⁴ recognized privacy as a fundamental right granted by the constitution of India. It specifically stated that "decisional privacy" includes the ability to make personal choices about sexual and reproductive relationships. Forced sexual cohabitation is a direct violation of this right.

In *State of Karnataka v. Krishnappa*⁴⁵, the Court affirmed that non-consensual sexual intercourse is an unlawful intrusion upon the privacy and sanctity of a female.

Long-recognized precedents such as *Govind v. State of M.P.* and *Kharak Singh v. State of U.P.*⁴⁶ establish a constitutional right to privacy that also includes the "right to abstain" from sexual intercourse. The judiciary, crucially, does not contend that this right is relinquished upon the commencement of marriage.

The denial of a woman's bodily autonomy within the institution of marriage serves to reinforce a dated, patriarchal structure that views a wife's body as her husband's possession, thus fundamentally eroding the core of human dignity.

2. Infringement of Article 14: The Right to Equality

Exception 2 further violates the right to equality, as articulated in Article 14, by explicitly discriminating against married women, consequently depriving them of the same protections against sexual violence afforded to unmarried women. As established in *Budhan Choudhary v. State of Bihar*⁴⁷ and *State of West Bengal v. Anwar Ali Sarkar*⁴⁸, any classification under Article 14 must satisfy a "reasonableness test," which necessitates that the classification possesses a rational connection to the objective the statute aims to achieve. The primary objective of Section 375 is to protect women and punish the inhumane act of rape. Excluding husbands directly contradicts this goal. Because the trauma and consequences of rape are the same regardless of a woman's marital status, creating a legal difference based on marriage doesn't logically support the law's protective purpose.

⁴⁴ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) AIR 2017 SC 4161 (India).

⁴⁵ *The State of Karnataka v. Krishnappa*, (2000) 4 SCC 75 (India).

⁴⁶ *Govind v. State of M.P.*, AIR (1975) SC 1378 (India); *Kharak Singh v. State of U.P.*, (1963) AIR SC 1295 (India).

⁴⁷ *Budhan v. State of Bihar*, AIR (1955) SC 191 (India).

⁴⁸ *State of West Bengal v. Anwar Ali Sarkar*, AIR (1952) SC 75 (India).

3. Legislative Inaction vs. Judicial Scrutiny

Even with the obvious constitutional clashes, the wheels of legislation have ground to a halt. After the 2012 Nirbhaya case, the Justice Verma Committee made a clear recommendation: criminalize marital rape. They argued that marriage didn't automatically mean consent to sex at any time. The Indian government, however, ignored this advice.

*With no other options, the courts have had to step in. In the case of *Independent Thought v. Union of India*⁴⁹, the Supreme Court examined Exception 2, which dealt with underage wives. When read alongside the legislative intent of the POCSO Act (2012), the Prohibition of Child Marriage Act (2006), the Juvenile Justice Act (2015), and the Domestic Violence Act (2005), the Court recognized that the exception severely infringed upon the rights of girls married between the ages of 15 and 18, officially doubting its constitutional rectitude and striking it down for that specific age demographic.*

7. Comparative Analysis: The United Kingdom

The Watershed Case of *R v. R* (1991)⁵⁰ stands as a milestone in English jurisprudence. Fundamentally transforming the legal system's recognition and treatment of marital rape. The main issue is whether a husband engages in sexual intercourse with his wife without her consent can be convicted of rape.

Judicial Analysis and Statutory Interpretation In October 1991, the House of Lords issued a unanimous decision led by Lord Keith of Kinkel. This ruling systematically dismantled the historical marital exemption for rape. The Lords determined that this exemption was merely an outdated "common law fiction" that had no legitimate place in modern English society.⁵¹

To justify this ruling, the Lords had to address and resolve the specific language used in Section 1(1) of the Sexual Offences (Amendment) Act 1976⁵².

The "Unlawful" Debate: The 1976 Act defined rape as a man having "unlawful" non-consensual sexual intercourse with a woman. Just a year prior, in the case of *R v J*⁵³, the court

⁴⁹ *Independent Thought v. Union of India*, (2013) 382 SCC (2017) (India).

⁵⁰ *R v. R*, [1991] 1 A.C. 599 (H.L.) (Eng.).

⁵¹ *Regina Respondent v R. Appellant* [1991] 3 W.L.R 767

⁵² Sexual Offences (Amendment) Act 1976, s.1(1)

⁵³ *R v J* (1991) 1 All E.R 759

had interpreted the word "unlawful" to strictly mean sex occurring outside the bounds of marriage.

The Reinterpretation: In *R v. R*, the House of Lords rejected this previous interpretation. They argued that the word "unlawful" in the Act was largely unnecessary also Since extramarital sex isn't illegal in the strictest sense, the term didn't actually safeguard the marital exemption.

The court's decision made it clear: non-consensual sexual intercourse is a crime, period, no matter the victim's marital situation. Lord Justice Lane pointed out that the court wasn't creating a new crime; it was simply getting rid of an outdated and offensive legal rule.

The UK Law Commission played a crucial role Shortly before the trial commenced, the Commission released a working paper strongly advocating for the complete removal legal immunity of husbands regarding marital rape.

8. Conclusion

The persistence of the marital rape exception within Indian law constitutes a significant impediment to safeguarding women's bodily autonomy and human dignity. This legal immunity, originating from outdated patriarchal principles, including the historical perception of women as property and Sir Matthew Hale's seventeenth-century assertion of implied and irrevocable consent, is incompatible with modern legal standards. Contemporary marriage should be understood as an equal partnership, thereby rendering historical rationales that prioritize a wife's individual rights over the family's perceived sanctity completely outdated.

Furthermore, the retention of this exception directly contradicts the fundamental rights enshrined in the Indian Constitution. Specifically, it violates Article 14 by establishing an irrational and discriminatory distinction between married and unmarried women, consequently denying married survivors of sexual assault equal legal protection.

Furthermore, it breaches Article 21, which the Supreme Court has expansively interpreted to include the right to live with dignity, personal liberty, and decisional privacy over one's own body and sexual relationships. The deprivation of these essential rights subjects victims to severe psychological harm; systematic reviews reveal a significant incidence of Major Depressive Disorder, persistent Post-Traumatic Stress Disorder, and suicidal thoughts resulting from recurrent sexual coercion by an intimate partner.

Remediation of this trauma through extant domestic violence legislation or provisions against marital cruelty is demonstrably insufficient. Alternative legal frameworks, including Section 85 of the BNS (formerly Section 498A IPC) and the Protection of Women from Domestic Violence Act, frequently fail to fully recognize the unique and serious nature of rape, generally offering only civil remedies or substantially reduced penalties. Furthermore, the continued lack of criminalization for marital rape places India in direct contravention of its international obligations, particularly the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which explicitly mandates that member states eliminate gender-based violence within the family and guarantee equal rights for both partners.

Consequently, piecemeal reforms or reliance on alternative statutes are inadequate legal solutions. Drawing inspiration from global precedents—such as the United Kingdom's landmark *R v. R* ruling that rightfully abolished the marital exemption as an archaic common law fiction—the Indian legislature must take decisive action. In strict alignment with the Justice J.S. Verma Committee's progressive recommendations, the government must entirely delete the marital rape exception clause from the penal statutes. Criminalizing non-consensual sexual intercourse within marriage is not merely a statutory correction; it is an urgent constitutional mandate and a socio-psychological necessity to ensure that fundamental human rights and individual dignity are protected beyond the threshold of the marital home.