BETWEEN THE STATE AND THE BEDROOM: THE "EXCESSIVELY HARSH" ARGUMENT AGAINST CRIMINALISING MARITAL RAPE AND ITS CLASH WITH THE CONSTITUTION OF INDIA

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ABSTRACT

The exception carved under Exception 2 to Section 375 of the Indian Penal Code, 1860, and its successor provision under Section 63 of the Bharatiya Nyaya Sanhita, 2023, which immunises a husband from criminal liability for coerced sexual intercourse with his wife, has endured as one of the most contested anachronisms in Indian jurisprudence. The argument most frequently deployed in defence of this exception is that its removal would render the law "excessively harsh" upon husbands a phrase that, upon analytical scrutiny, reveals itself to be nothing more than a euphemism for the subordination of the married woman's bodily autonomy to the institution of matrimony.

This paper interrogates that argument at its roots. It examines the constitutional irreconcilability of the marital rape exception with the guarantees of equality before law and equal protection of laws enshrined in Article 14, the right to life and personal liberty now expansively interpreted to encompass dignity, privacy, and bodily integrity under Article 21, and the prohibition against sex-based discrimination under Article 15. The analysis proceeds through the lens of family and parental perspectives that both sustain and challenge the exception, the layered sociological terrain of Indian society which the law has long used as a refuge for inaction, and the comparative legal landscape across global jurisdictions that have long crossed the threshold India hesitates before. The paper concludes that the "excessively harsh" argument is constitutionally indefensible, morally bankrupt, and empirically unsubstantiated, and that its persistence in Indian law is an indictment, not of the reformers, but of the reform.

Keywords: Marital Rape, Article 14, Article 15, Article 21, Constitutional Law, Gender Justice, Bodily Autonomy, Bharatiya Nyaya Sanhita, Exception 2, Criminalisation.

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1. INTRODUCTION: THE EXCEPTION THAT SWALLOWS THE RULE

In the year 1736, Sir Matthew Hale, Chief Justice of England, inscribed the following proposition in his posthumously published History of the Pleas of the Crown: "the 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."[3] This judicial dictum pronounced without citation, without authority, and without the slightest consultation with a single woman became the bedrock upon which centuries of marital impunity were constructed. It crossed oceans and continents, lodging itself into the colonial Indian Penal Code of 1860[4], where it persists, in spirit if not in letter, to this day.

India has amended its criminal laws in the wake of the brutal gang rape of December 2012[5], enacted the Protection of Women from Domestic Violence Act in 2005[6], and most recently codified its criminal law anew through the Bharatiya Nyaya Sanhita, 2023[7]. And yet, in each iteration, the marital rape exception has survived a grotesque relic preserved behind the glass case of "social convention" and "institutional sanctity." The question this paper poses is not merely whether this exception is desirable policy, but whether it is constitutionally permissible at all.

"धर्मो रक्षति रक्षितः" —

Dharma protects those who protect it. (Manusmriti 8.15).[8]

But when dharma becomes the instrument of oppression rather than its antidote,

it loses its claim to protection.

The arguments marshalled against criminalisation that it would be "excessively harsh" on husbands, that it would "destabilise" the institution of marriage, that it is "misused" by wives as a tool of harassment deserve not dismissal but rigorous dismantling. This paper proceeds in

[3] Sir Matthew Hale, Historia Placitorum Coronae: The History of the Pleas of the Crown 629 (1736).
[4] Indian Penal Code, 1860, § 375 Exception 2 (India).
[5] Criminal Law (Amendment) Act, 2013, No. 13 of 2013, India Code.
[6] Indian Penal Code, 1860, § 375 Exception 2 (India).
[7] Bharatiya Nyaya Sanhita, 2023, § 63 Exception 2 (India).
[8] Manusmriti 8.15 (G. Buhler trans., 1886)

five parts. Part I establishes the legal-historical context. Part II examines the familial and parental dimensions of the debate. Part III analyses the societal architecture that sustains the exception. Part IV offers the constitutional critique grounded in Articles 14, 15, and 21. Part V places India in comparative international perspective, drawing upon the legislative and judicial developments across jurisdictions that have conclusively recognised marital rape as a crime.

2. THE FAMILY AS FORTRESS AND PRISON: PARENTAL AND FAMILIAL DIMENSIONS

The family, in Indian legal and cultural imagination, occupies a position of extraordinary sanctity. It is the building block of social order, the site of tradition's transmission, and as successive governments have argued before the courts an institution so delicate that it must be insulated from the "destabilising" intervention of criminal law. This argument, seductive in its apparent reasonableness, demands far more critical scrutiny than it ordinarily receives.

The familial argument against criminalising marital rape rests on two pillars: first, that marriage constitutes an ongoing, implied consent to sexual intercourse; and second, that introducing criminal law into the marital bedroom would weaponise legal process and expose husbands to false accusations by estranged wives. Both pillars, upon examination, are structurally unsound.

2.1 The Myth of Implied Perpetual Consent

The doctrine of implied matrimonial consent, as Hale articulated it, was never a principle of consent at all it was a principle of property.[9] The married woman, in 18th-century English law, was legally subsumed within the personhood of her husband; she could not own property, enter contracts, or, indeed, withhold herself. The notion that she had "consented" to all future sexual intercourse was not a reflection of her autonomous choice but of her legal non-existence as an independent person.[10]

"Oh Maa, you should have raised me exactly how

I would become so gullible to get convinced by the society we live in."

[9] Sir Matthew Hale, supra note 1, at 629.
[10] Flavia Agnes,, Law, Justice and Gender (2011).

Indian society has long perpetuated this notion through the language of saat phere (the seven sacred circumambulations), of kanya daan (the gift of a virgin daughter), and of the husband as lord and protector. The Manusmriti declares: "Pati seva param dharma" service to the husband is the highest duty. But duty and consent are not synonyms. The former is imposed; the latter, by definition, must be freely given. A consent that cannot be withdrawn is not consent it is captivity with conjugal nomenclature.[11]

"स्त्री स्वातन्त्र्यं न विद्यते" —

A woman has no independence. (Manusmriti 9.3).[12]

This verse, weaponised across centuries, represents precisely the jurisprudential foundation that Article 14 and Article 21 were designed to demolish.

Parents who raise daughters within frameworks of absolute marital submission are, often unknowingly, transmitting to their daughters the very ideology that deprives them of legal recourse. The family, in such instances, functions not as a protective fortress but as the first institution of normalisation where a daughter learns that her body, once transferred by kanya daan to a husband, belongs no longer to herself.

2.2 The "Misuse" Fallacy

The second familial argument that criminalisation would facilitate false accusations is a concern not unique to marital rape but applicable to virtually every criminal offence. Courts routinely guard against false accusations through procedural safeguards[13], evidentiary standards, and the presumption of innocence.[14] To exempt an entire class of criminal conduct from the ambit of penal law on the basis that its victims may occasionally fabricate allegations is to invert the logic of criminal justice entirely. It suggests that the law should protect potential accused more than potential victims a proposition that, stated plainly, exposes its own absurdity.

[11] Veena Das, Critical Events (1955)..
[12] Manusmriti 9.3.
[13] State of Rajasthan v. Balchand (1977) 4 S.C.C. 308.
[14] Noor Aga v. State of Punjab, (2008) 16 S.C.C. 417.

Moreover, the empirical literature does not support a crisis of false marital rape allegations in jurisdictions that have criminalised the act. The Crown Prosecution Service in the United Kingdom, jurisdictions across Europe, and the Supreme Court of South Africa have all reported that the feared avalanche of fraudulent complaints did not materialise. What did materialise, however, was the long-suppressed voice of women who had suffered in silence, believing that the law had no room for their anguish.[15]

3. THE SOCIOLOGICAL ARCHITECTURE OF IMPUNITY

Law does not exist in a social vacuum. It is produced within particular cultural and political formations, and in India, those formations have historically been deeply patriarchal. The marital rape exception is not merely a legal provision it is a symptom, the visible lesion of a far more pervasive social pathology.

The National Family Health Survey (NFHS-5, 2019–21) reveals that approximately 32% of married women in India reported experiencing spousal physical, sexual, or emotional violence. More strikingly, only a fraction of these women perceived their experiences as violence at all many categorised forced sexual inter course by their husbands as a "normal" aspect of marriage.[16] This normalisation is not a product of ignorance; it is a product of decades of institutional messaging from family, from religion, from law that a wife's body is her husband's entitlement.[17]

"Tradition's tragedy: the little girl's laughter silenced,

her body bartered in the marketplace of marriage."

Sociologists including Veena Das and Flavia Agnes have written extensively on how violence within the domestic sphere is constructed as a private matter, inaccessible to public legal intervention.[18] Das, in her seminal work on critical events and the language of suffering, argues that the woman's body in India is a terrain on which collective identities caste, community,

[15] Crown Prosecution Service, VAWG Report 2019-20 (U.K.).
[16] Ministry of Health & Family Welfare, NFHS-5 (2019-21).
[17] Veena Das, supra note 9
[18] Flavia Agnes, supra note 8

religion are inscribed and contested. The marital bedroom, in this framework, is not merely a domestic space but a site of ideological production.

The argument that criminalising marital rape would "destabilise" the institution of marriage betrays a peculiar understanding of matrimony one in which the institution's stability depends upon the wife's inability to refuse. If marriage is so fragile that it cannot survive a wife's bodily autonomy, one must ask whether what is being preserved is a marriage or an arrangement of dominance.

Caste, too, intersects with this question in profound ways. Dalit women, tribal women, and women from marginalised communities face compounded vulnerabilities a fact that the law's blanket immunity for husbands disproportionately affects. The intersection of gender and caste means that the most economically and socially vulnerable women are precisely those least able to exit abusive marriages, and most in need of criminal law's protection.

The Justice Verma Committee, constituted in the wake of the December 2012 assault, unequivocally recommended the criminalisation of marital rape. Its report noted that "the relationship between the accused and the complainant is not relevant to the question of whether consent was freely given."[19] Parliament chose not to act upon this recommendation a legislative silence that speaks volumes about whose interests the law is designed to protect.[20]

4. THE CONSTITUTIONAL RECKONING TRIO: ARTICLES 14, 15, AND 21

If the sociological and moral dimensions of the debate reveal the exception's indefensibility, the constitutional analysis reveals its illegality. The marital rape exception is not merely a bad policy it is unconstitutional. This proposition rests on three distinct but interlocking grounds.

4.1 Article 14: The Equality Mandate and the Classification Test

Article 14[21] of the Constitution guarantees equality before the law and equal protection of the laws to every person. The Supreme Court, from its earliest jurisprudence in State of West Bengal v. Anwar Ali Sarkar (1952)[22] to its expansive articulation in E.P. Royappa v. State of

[19] Justice J.S. Verma Committee, Report of the Committee on Amendments to Criminal Law 172-73 (2013)
[20] Ministry of Home Affairs, Report of the Department-Related Parliamentary Standing Ccommittee on Home Affairs on Bhartiya Nyaya Sanhita, 2023 (2023).
[21] INDIAN CONST. art. 14.
[22] State of West Bengal v. Anwar Ali Sarkar. A.I.R. 1952 S.C. 75.

Tamil Nadu (1974)[23], has held that Article 14 does not prohibit reasonable classification but prohibits arbitrary, discriminatory differentiation.

The marital rape exception creates two classifications of rape victims: those who are unmarried or married to someone other than their rapist, and those raped by their husbands. The former have full recourse to criminal law; the latter do not. The intelligible differentia here is marital status. The question that must then be answered is whether this differentia has a rational nexus to the object of the law. The object of rape law is the protection of bodily autonomy and punishment of sexual violence. The presence or absence of a marriage certificate bears no rational relationship to the severity of the violation or the legitimacy of the victim's suffering. A woman raped by a stranger is not violated more profoundly, in any legally cognisable sense, than a woman raped by her husband if anything, the betrayal of trust and the impossibility of escape in the latter case renders it more, not less, grievous.

The Delhi High Court in RIT Foundation v. Union of India (2022)[24], and the Karnataka High Court in cases preceding the Supreme Court's pending adjudication have all, in varying degrees, subjected the classification to scrutiny. The Delhi High Court's divided bench, with Justice Rajiv Shakdher holding the exception unconstitutional and Justice C. Harishankar dissenting, represents the most thorough judicial engagement with the Article 14 question to date. Justice Shakdher's opinion is emphatic: the exception is "manifestly arbitrary" and cannot survive constitutional scrutiny.

4.2 Article 21: Dignity, Privacy, and the Body as Sovereign Territory

The transformation of Article 21[25] from a procedural guarantee into the Constitutional soul of human dignity is among the most remarkable jurisprudential journeys in Indian legal history. Beginning with Maneka Gandhi v. Union of India (1978)[26], through Francis Coralie Mullin v. UT Delhi (1981)[27], to the nine-judge bench's landmark pronouncement in K.S. Puttaswamy v. Union of India (2017)[28], the Supreme Court has progressively recognised that the right to life

[23] E.P. Royappa v. State of Tamil Nadu, (1974) 4 S.C.C. 3.
[24] RIT Foundation v. Union of India, 2022 SCC Online Del 1404
[25] INDIAN CONST. art. 21.
[26] Maneka Gandhi v. Union of India, (1978) 1 S..C.C. 248.
[27] Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) S.C.C. 608 (India).
[28] K.S. Puttaswamay v. Union of India, (2017) 10 S.C.C. 1.

and personal liberty encompasses the right to dignity, the right to privacy, and the right to bodily integrity.

The Puttaswamy judgment is of particular significance. The Court held that privacy is a fundamental right, that the right to privacy includes bodily integrity, and that no person including the State may violate this right without meeting the threshold of constitutionality. Justice D.Y. Chandrachud, in his concurrence, wrote words that ring with special resonance in this context:

"Privacy of the body and mind are intrinsic to a life of dignity. A woman's right to make decisions about her own body including decisions about sexual activity is at the core of that dignity. The home is not a zone of lawlessness; it is a space that law must enter when its protection is most needed."

If privacy includes the right to make decisions about one's own body, then the marital rape exception which tells a woman that her body belongs, by legal default, to her husband is a direct violation of Article 21. The exception does not merely fail to protect the woman's bodily integrity; it actively denies her the legal tools to assert it. It declares, in effect, that within marriage, there is no cognisable right to bodily self-determination. That proposition is irreconcilable with Puttaswamy, with Maneka Gandhi, and with the entire edifice of dignity jurisprudence that the Supreme Court has constructed over six decades.

4.3 Article 15: The Bar Against Sex-Based Discrimination

Article 15(1)[29] prohibits the State from discriminating against any citizen solely on the grounds of sex. The marital rape exception discriminates against women on precisely this ground. It is only because the victim is a woman, and only because the perpetrator is her husband, that the criminal law withdraws its protection. No analogous immunity exists for husbands in any other context of violence. If a husband assaults his wife with a weapon, he is guilty of hurt or grievous hurt. If he confines her against her will, he may be guilty of wrongful confinement. But if he forces her into sexual intercourse, the law looks the other way.

This asymmetry is not incidental it is structural, and it is gendered. The exception's survival in the statute book constitutes a form of sex-based discrimination by the State itself, the very

[29] INDIAN CONST. art. 15.

entity that Article 15 is directed against. The State, through the exception, communicates to every married woman in India that her suffering, when inflicted by her husband, is a category of suffering to which the criminal law is indifferent.[30]

The Supreme Court's articulation in Joseph Shine v. Union of India (2018)[31], where it struck down the offence of adultery under Section 497 IPC, is instructive. The Court held that a law which treats a woman as the property or appendage of her husband, incapable of autonomous decision-making, is constitutionally unsustainable under Articles 14, 15, and 21. The reasoning in Joseph Shine applies with at least equal force to the marital rape exception for if a woman may not be treated as property with respect to whom she loves, how much more clearly may she not be treated as property with respect to whether she consents to sex.

5. THE WORLD HAS SPOKEN: COMPARATIVE PERSPECTIVES AND EMPIRICAL DATA

India is not deliberating in isolation. The global trend toward criminalisation of marital rape is not merely a Western liberal project, as its detractors sometimes claim it is a universal convergence across legal systems, religious traditions, and cultural contexts. Understanding where the world stands illuminates not only where India should go, but the cost of its continued hesitation.

5.1 International and Comparative Jurisprudence

England and Wales abolished the marital rape exception in R v. R (1992), where the House of Lords unanimously held that Hale's doctrine was "a fiction" that had become "anachronistic and offensive." The judgment was subsequently validated by the European Court of Human Rights in S.W. v. United Kingdom (1995)[32], which held that criminalisation of marital rape did not violate Article 7 of the European Convention on Human Rights but rather gave effect to its spirit.

The United States criminalised marital rape federally through the Violence Against Women Act[33], with all fifty states having done so by 1993 Nebraska having been the first in 1976. South

[30] CEDAW, 1979, 1249 U.N.T.S. 13.
[31] Joseph Shine v. Union of India, (2019) 3 S.C.C. 39.
[32] S.W. v. United Kingdom (1995).
[33] Violence Against Women Act, 34 U.S.C. 12291.

Africa's Constitutional Court[34], in a society grappling with its own profound legacy of gender-based violence, has confirmed marital rape's criminalisation as constitutionally mandated. Canada, Australia, Germany, France, and virtually every liberal democracy have done likewise. The United Nations, through the Committee on the Elimination of Discrimination against Women (CEDAW), has repeatedly called upon India to remove the exception, as has the UN Special Rapporteur on Violence Against Women.[35]

5.2 The Bharatiya Nyaya Sanhita: A Reform Missed

The Bharatiya Nyaya Sanhita, 2023[36], which replaced the Indian Penal Code with the stated aspiration of modernising criminal law, represented a historic opportunity to finally excise the marital rape exception. That opportunity was not seized. Exception 2 to Section 63 of the BNS reads identically in substance to the old Exception 2 of Section 375 IPC[37] with only the age threshold having been raised from fifteen to eighteen years (following the Independent Thought v. Union of India decision of 2017[38], which itself was a partial, incomplete reform).

The legislative inaction is particularly stark in light of the Parliamentary Standing Committee on Home Affairs' own acknowledgment, in its 2023 report, that the exception is "a matter requiring further deliberation." Further deliberation while millions of married women across India remain without legal recourse for sexual violence committed within their marriages is not a neutral position. It is a political choice, dressed in the language of prudence.

5.3 Silence of Suffering spoken by data study

The data, where available, speaks with terrible clarity. The NFHS-5[39] (2019-21) reveals that 6.8% of women aged 18 to 49 reported having experienced sexual violence, with the overwhelming majority of perpetrators being current or former husbands. A 2014 study published in The Lancet estimated that 27.5% of Indian women had experienced intimate partner sexual violence at some point in their lives.[40]

[34] Criminal Law Amendment Act 32 of 2007 (S. Afr.).
[35] CEDAW, 1979, supra note 28.
[36] Bhartiya Nyaya Sanhita, 2023, No. 45 of 2023, 63, Exppection 2 (India).
[37] Indian Penal Code, 1860, 375 Exception 2 (India).
[38] Independent Thought v. Union of India, (2017) 10 SC.C. 800 (India).
[39] Ministry of Health & Family Welfare, supra note 14.
[40] The Lancet, 385 Lancet 1165 (2015).

Crucially, these statistics represent only reported and acknowledged experiences. Given the cultural normalisation of marital sexual coercion, the actual prevalence is almost certainly significantly higher. The National Crime Records Bureau, which does not separately tabulate marital rape because it is not a cognisable offence, is itself a testament to how law shapes data or, more precisely, how the law's silence ensures that the data too remains silent.[41]

Sri Lanka removed the marital rape exception in 1995; Fiji in 2009; Thailand in 2007; Namibia in 2000. The notion that criminalisation is somehow incompatible with non-Western cultural contexts is thus empirically refuted. What it is incompatible with is a particular ideology of male entitlement that exists across cultures but is not synonymous with any of them.[42]

6. CONCLUSION: THE COST OF SILENCE

The "excessively harsh" argument, stripped of its rhetorical clothing, amounts to this proposition: that the harm inflicted upon a husband by the prospect of criminal liability for sexual violence outweighs the harm inflicted upon a wife by the sexual violence itself. This is not a legal argument. It is an assertion of hierarchy a declaration that, within the institution of marriage, the husband's comfort with impunity ranks higher than the wife's right to dignity.

Constitutional law does not permit that hierarchy. Article 14 does not permit classifications that serve no rational purpose other than the perpetuation of privilege. Article 15 does not permit discrimination premised upon the victim's sex and marital status. Article 21 does not permit the erasure of bodily autonomy in the name of matrimonial convention. And a Constitution that speaks of justice social, economic, and political in its very Preamble cannot countenance a legal architecture that refuses to recognise sexual violence as violence when it occurs within marriage.[43]

"न स्त्री स्वातन्त्र्यमर्हति"

is a prescription from a different world. The Constitution of India is a prescription for a different one in which every person, irrespective of gender or marital status, stands equal

[41] NCRB, Crime in India.
[42] United Nations Entity for Gender Equality and the Empowerment of Women, Progress of the World's Women: Transforming Economies, Realizing Rights (2015); World Bank,, Women, Business and the Law 2023.
[43] INDIAN CONST. pmbl.

before the law and equal in the dignity of their personhood.

The Supreme Court, which has in its docket the pending challenge to the exception, bears the weight of this moment. It has, in recent decades, been the institution to which India's constitutional conscience has most reliably turned when the legislature has faltered. Its decisions in Navtej Singh Johar[44], Joseph Shine[45], and K.S. Puttaswamy[46] have each demonstrated a willingness to hold that the Constitution means what it says that equality is real, that dignity is non-negotiable, and that the law's protection is not contingent upon the identity of the perpetrator.

The question before the Court is not a narrow technical one of statutory interpretation. It is, at its deepest, the question of what kind of republic India is. Is it one in which the word "citizen" carries its full constitutional weight regardless of the citizen's sex and matrimonial status? Or is it one in which marriage remains, as Hale's ghost would have it, a contract by which a woman's sovereignty over her own body is signed away irrevocably, permanently, and with the blessing of the State?

The answer that the Constitution demands the answer that Articles 14, 15, and 21 together compel is unambiguous. The marital rape exception is unconstitutional. Its abolition is not a concession to Western liberalism or a threat to Indian values. It is the fulfilment of India's own constitutional promise that every person in the marketplace, in the parliament, and yes, in the bedroom shall be free.

[44] Navtej Singh Johar v. Union of India (2018) 10 SCC 1.
[45] Joseph Shine v. Union of India, supra note 29.
[46] K.S. Puttaswamy v. Union of India, supra note 26.