
COLONIAL CONTINUITIES IN THE BHARATIYA NYAYA SANHITA, 2023: A CONSTITUTIONAL AND TRANSFORMATIVE ANALYSIS OF THE MARITAL RAPE EXCEPTION IN INDIA

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ABSTRACT

India is the largest democracy in the world and upholds the principles of democracy through its constitution's guarantee of equality, dignity, liberty and justice. However, India's criminal law system still allows for the exception to marital rape. Traditionally, marriage has always meant irrevocable consent to engage in intercourse; therefore, married women have received no protection in law from their husbands when their husbands commit non-consensual sexual acts against them. The continued legal existence of the exception to marital rape under the Bharatiya Nyaya Sanhita, 2023 has renewed several constitutional debates about bodily autonomy, privacy, consent and gender justice.

This article will examine how the exemption to marital rape has been addressed constitutionally, legally, sociologically, from a feminist perspective and through comparative law. Discuss the history behind changes to the definition of rape in India (e.g., changes in definitions of rape and how the change occurred from 1860 to 2023). Determine whether the exemption to marital rape violates Article 14, Article 15 and Article 21 of the Constitution of India. Also, discuss various judicial decisions that have treated privacy, dignity, bodily autonomy and constitutional morality, including *Independent Thought v. Union of India*, *K.S. Puttaswamy v. Union of India*, *Joseph Shine v. Union of India*, and *RIT Foundation v. Union of India*. The study additionally examines feminist jurisprudence, international legal developments, theological perspectives, and the recommendations of the Justice Verma Committee. It argues that the non-criminalisation of marital rape perpetuates patriarchal assumptions incompatible with constitutional transformation and democratic values. The article concludes that criminalisation of marital rape is not merely a legislative reform but a constitutional necessity essential for ensuring equality, dignity, and protection of bodily autonomy within marriage.

Keywords: Marital Rape, Consent, Bodily Autonomy, Constitutional Morality, Gender Justice, Bharatiya Nyaya Sanhita.

THESIS STATEMENT

This article argues that the marital rape exception under the Bharatiya Nyaya Sanhita, 2023 is not merely a legislative omission but a continuation of colonial patriarchal legality that is structurally inconsistent with India's transformative constitutionalism. It creates a doctrinal paradox wherein consent is recognised as the foundation of sexual offences in all contexts except within marriage, thereby violating the principles of equality, autonomy, and dignity under Articles 14, 15, and 21 of the Constitution.

This article's central contribution is that the marital rape exception under the Bharatiya Nyaya Sanhita, 2023 does not merely reflect legislative inertia but constitutes a structural contradiction within India's transformative constitutionalism. It demonstrates that while Indian criminal law has modernised the concept of consent in all external contexts, it continues to suspend consent within marriage, thereby creating a "zone of constitutional non-applicability" inside the institution of marriage.

CONTRIBUTION OF THE STUDY

This article contributes to existing scholarship by conceptualising the marital rape exception as a "dual-consent anomaly" within Indian criminal law, where consent is recognised as the foundational principle of sexual offences in all contexts except marriage. It further argues that this duality creates a constitutionally impermissible zone of rights suspension within intimate relationships, contrary to the principles of transformative constitutionalism.

INTRODUCTION

In the constitutional law of India, marriage is seen as a partnership between two people of the same status and not a loss of their constitutional rights/identity. The Supreme Court of India has held that all fundamental rights, including dignity, autonomy and privacy, continue to apply in close personal relationships and that they extend into private life.

The presence of the exception for marital rape in Indian criminal law creates tension with the broader aspirations of a constitutional framework that embraces transformative constitutionalism and where criminal laws concerning Rape are based on the absence of consent. While laws on rape are based on absence of consent, the marital rape exception defines

consent to the act as having been unequivocally given because of the form of the parties' relationship's.

The retention of the marital rape exception (as contained in para 62 Exception 2 of the Bharatiya Nyaya Sanhita, 2023) continues the historical legal situation concerning Section 375 Exception 2 of the Indian Penal Code, 1860 and raises questions about the coherence of consent as a basis for criminal law, particularly with developing constitutional principles of bodily autonomy and privacy.

Recent constitutional jurisprudence has increasingly recognised autonomy, dignity, and decisional freedom as central to Article 21. At the same time, academic and feminist discourse highlights that the non-criminalisation of marital rape may perpetuate structural inequality within marriage. The issue therefore sits at the intersection of constitutional morality and social norms governing intimate relationships.

RESEARCH QUESTIONS

1. Whether the marital rape exception under Indian criminal law violates Articles 14, 15, and 21 of the Constitution of India?
2. Whether consent survives within marriage under constitutional jurisprudence?
3. Whether the Bharatiya Nyaya Sanhita, 2023 adequately protects married women against sexual violence?
4. Whether criminalisation of marital rape is necessary for ensuring constitutional morality and gender justice?

OBJECTIVES OF THE STUDY

1. To analyse the concept and legal understanding of marital rape.
2. To critically examine the constitutional validity of the marital rape exception.
3. To analyse the legal framework relating to marital rape under the Bharatiya Nyaya Sanhita, 2023.

4. To examine judicial developments concerning bodily autonomy, privacy, dignity, and consent.
5. To study feminist and comparative legal perspectives relating to marital rape.
6. To suggest reforms necessary for effective criminalisation of marital rape in India.

RESEARCH METHODOLOGY

The present study adopts a doctrinal and analytical methodology. The research primarily relies upon constitutional provisions, statutory interpretation, judicial precedents, Law Commission Reports, parliamentary debates, committee reports, scholarly articles, and comparative legal analysis. Secondary sources including books, journal publications, government reports, and international conventions have been utilised extensively to critically analyse the constitutional and legal dimensions of marital rape.

The study also employs feminist jurisprudential analysis and comparative legal approaches in order to examine the structural and patriarchal foundations underlying the marital rape exception.

CONCEPTUAL UNDERSTANDING OF MARITAL RAPE

Marital rape refers to forced sexual intercourse or sexual acts committed by one spouse without the free and voluntary consent of the other spouse. Consent must be informed, voluntary, unequivocal, and capable of withdrawal at any stage. Marriage cannot convert non-consensual acts into consensual acts merely because the parties share a matrimonial relationship.

Marital rape may occur through:

- i. physical violence,
- ii. emotional coercion,
- iii. threats,
- iv. intimidation,
- v. reproductive coercion,

- vi. manipulation,
- vii. economic dependency,
- viii. or psychological abuse.

The Gujarat High Court in *Nimeshbhai Bharatbhai Desai v State of Gujarat* classified marital rape into three broad categories: battering rape, force-only rape, and obsessive or sadistic rape.¹

The Court recognised that marital rape may involve severe physical violence, degrading acts, and coercive sexual behaviour causing devastating physical and psychological consequences.

Victims of marital rape frequently suffer:

- i. anxiety,
- ii. depression,
- iii. post-traumatic stress disorder (PTSD),
- iv. reproductive health complications,
- v. suicidal tendencies,
- vi. emotional trauma,
- vii. and social isolation.²

Unlike rape committed outside marriage, marital rape often involves continuous proximity between victim and perpetrator, thereby intensifying trauma and vulnerability.

THEOLOGICAL PERSPECTIVE ON MARITAL RAPE

While marital rape may sometimes be defended on the basis of traditional, social or cultural norms; not one, major world religious teaching condones forced, marital intercourse. Most

¹ *Nimeshbhai Bharatbhai Desai v. State of Gujarat*, 2018 SCC OnLine Guj 732.

² World Health Organization, *Violence Against Women Prevalence Estimates, 2018* (2021), <https://www.who.int/publications/i/item/9789240022256> (last visited May 22, 2026).

religious teachings promote mutual respect, dignity, compassion and consent for both spouses.

In Islam, marriage is viewed as a loving, merciful and respectful relationship between two people. In the Muslim holy book; the Qur'an, married partners are referred to as each other's garment; providing them with dignity, protection and emotional intimacy.³ As a result, Islamic doctrine prohibits oppression and cruelty therefore coercion and violence committed against one's spouse are also prohibited.

From the perspective of Hinduism, marriage is also viewed as a spiritual union between a husband and a wife based upon togetherness, companionship and mutual obligations. Ancient Hindu writings also stress the necessity of mutual respect and spiritual cooperation/ partnership between husband and wife.⁴

Likewise, in Christianity, marriage is viewed as a loving, sacrificial and mutually submissive relationship and not one based upon force or domination of one spouse by the other.⁵

Thusly, there is no legitimate religious basis from which marital rape can be justified; rather, the foundation for marital rape exists within patriarchal society which subjugates the individual rights of a person within a marriage.

LEGAL FRAMEWORK PERTAINING TO MARITAL RAPE

Historically, rape has been viewed as one of the most heinous attacks against one's physical body and one's dignity as a human being. The crime of rape has previously been covered under Indian Law in Section 375 of the IPC 1860 and defined what constitutes rape, and the requirement of lack of consent is considered to be one of the necessary elements to constitute the offence. The exception to Section 375 of the IPC 1860 created an immunity for a husband providing that sexual intercourse or other sexual activity by a man with his wife does not amount to rape where the wife was not less than 18 years of age.⁶

The exception for marital rape continues to be a part of the Indian Criminal Legal Framework with Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita 2023.⁷ Therefore, the Bharatiya

³ The Quran, Surah Al-Baqarah 2:187.

⁴ *Rig Veda* 10.85; *Manusmriti* ch 3

⁵ The Holy Bible, Ephesians 5:21–33.

⁶ Indian Penal Code, No. 45 of 1860, § 375 Exception 2 (India).

⁷ Bharatiya Nyaya Sanhita, No. 45 of 2023, § 63 Exception 2 (India)

Nyaya Sanhita continues to exclude the crime of marital rape from any elements of the criminal offences outlined in that legislation, despite replacing colonial laws with new Indian laws.

The disparity present in Criminal Law in India appears through the inconsistency of Section 67 of the Bharat Nyaya Sanhita, 2023, where a husband having sexual relations with his wife during a period of separation without her consent is a criminal offence according to the law.⁸ The law states the consent given must continue throughout the marriage; however, if parties are still cohabiting, it assumes that an irrevocable consent has been given.

The Justice Verma Committee has recommended and clearly stated that marital rape should also be criminalised; they pointed out that a person cannot use the defence of marriage when they have engaged in non-consensual sex, and that marriage is not compatible with the constitutional principles of equality and dignity.⁹ Yet the parliament has not permitted the recommendations to be acted upon.

The Supreme Court states that if sexual intercourse takes place between husband and wife and the wife is under eighteen years of age, it will be classed as rape, regardless of marital status. The Courts decision also states that marriage will not take precedence over the rights of minors to integrity over their bodies and dignity.¹⁰

For example, in Justice KS Puttaswamy v Union of India, the Supreme Court found privacy to be a right in Article 21 and indicated that privacy is made up of two parts: Personal Decision Making and The Physical Body (Bodily Integrity).¹¹ The ruling regarding privacy has affected how courts interpret the marital rape legal prohibition as marriage doesn't terminate one person's authority over another's body.

In another example, Joseph Shine v Union of India invalidated the legal prohibition against adultery as the courts also rejected patriarchal views of women being subservient in relationship and confirmed that both partners were equal within marriage.¹² This ruling has severely weakened the rationale for marital exception to rape laws.

⁸ Bharatiya Nyaya Sanhita, No. 45 of 2023, § 67 (India).

⁹ Justice J.S. Verma Committee, *Report of the Committee on Amendments to Criminal Law* (Gov't of India 2013).

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

¹¹ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.

¹² *Joseph Shine v Union of India* (2019) 3 SCC 39

The doctrine of constitutional morality elaborated in *Navtej Singh Johar v Union of India* also supports criminalisation of marital rape.¹³ The Supreme Court observed that constitutional morality must prevail over social morality whenever fundamental rights are threatened. The continued retention of the marital rape exception reflects patriarchal social morality rather than constitutional morality grounded in dignity and equality.

The Delhi High Court in *RIT Foundation v Union of India* delivered a split verdict regarding the constitutional validity of the marital rape exception.¹⁴ Justice Rajiv Shakdher held the exception unconstitutional on the ground that it violated Articles 14 and 21 by denying married women equal protection against sexual violence. He emphasised that the right to withdraw consent forms an inseparable component of bodily autonomy and dignity. Conversely, Justice C Hari Shankar upheld the constitutionality of the exception by emphasising legislative policy considerations and societal implications.

STATE JUSTIFICATIONS AND COUNTER-ARGUMENTS: A CONSTITUTIONAL APPRAISAL

The exception of marital rape the law has provided for continues to be defended through the argument that criminalising it will change the relationship between law and marriage.¹⁵ It can be seen within the debates on reforming the criminal law that Parliament and government intended for the exception to maintain stability in marriages and limit the extent to which the state will criminalise what take place between couples within the domestic sphere.¹⁶

Marriage is an institution with a specific set of social rules and legal obligations that describe the relationship between two people who are married, and is therefore a different institution than a treatment of any number of specific one-on-one-type relationships.¹⁷ The historical view of the criminal law has been one of restraint on marital issues, other than in situations of physical violence, or separation-related acts.¹⁸

Furthermore, concerns have been raised about whether recognizing marital rape creates an

¹³ *Navtej Singh Johar v Union of India* (2018) 10 SCC 1

¹⁴ *RIT Foundation v Union of India* 2022 SCC OnLine Del 1404

¹⁵ Justice J.S. Verma Committee, *supra* note 9, at 112–13.

¹⁶ Statement of Objects and Reasons, Bharatiya Nyaya Sanhita Bill, 2023, Bill No. 173 of 2023 (India).

¹⁷ Law Commission of India, *172nd Report on Review of Rape Laws* (2000); *State of Rajasthan v. Union of India*, (1977) 3 SCC 592.

¹⁸ *D. Velusamy v. D. Patchaiammal*, (2010) 10 SCC 469; *Shafin Jahan v. Asokan K.M.*, (2018) 16 SCC 368.

expanding exclave through which the Courts will be able to enter into the life of the marriage, resulting in difficulties of enforcement and proof of evidence.¹⁹ These concerns have resulted in a legislative intent for a continued differing treatment of marriages within the larger context of sexual offences.

However, these reasons need to be balanced against the de jure guarantee of equality, dignity and individual liberty, and how as those rights and guarantees become established, the preservation of the institution cannot also impose a limitation on fundamental rights.

There are two primary arguments against criminalising marital rape. First, that criminalising marital rape will lead to instability within the institution of marriage and further encourage excessive interference by the judicial system with private relationships. This argument cannot be constitutionally upheld as the Supreme Court has consistently stated that the State cannot protect an institution through the allowance of the violation of an individual's constitutional rights.²⁰ Marriage's legitimacy under constitutional law is based upon equality and dignity, not upon immunity from liability for the criminal behaviour of a spouse.

Second, there has been continued defence based upon the challenges inherent in presenting sufficient evidence to establish proof beyond a reasonable doubt when the act had taken place within the confines of a marriage. Domestic violence, dowry harassment and child sexual assault may all be suitable examples of offences to be judicially determined which occurred within the individual's home; therefore, criminal law routinely adjudicates offences occurring in private settings. All of the jurisdictions would rely upon similar types of evidence to establish the elements of these crimes. Hospitals frequently use forensic based medical evidence, circumstantial evidence from the scene of the crime, evidence based upon behavioural patterns associated with the commission of these various offences, and testimony by witnesses to establish the burden of proof required.²¹ Therefore, procedural difficulty cannot justify substantive denial of rights.

Lastly, the Supreme Court of India has repeatedly ruled that speculation about the potential use of a law cannot provide grounds for invalidating the penal provision which protects individual

¹⁹ *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384; *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat*, (1983) 3 SCC 217.

²⁰ *Joseph Shine*, (2019) 3 SCC at 58; *Navtej Singh Johar*, (2018) 10 SCC at 138.

²¹ *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384; *Bharwada Bhoginbhai Hirjibhai*, (1983) 3 SCC 217; *Delhi Domestic Working Women's Forum v. Union of India*, (1995) 1 SCC 14.

rights under the Constitution of India.²² Procedures which can be applied to prevent wrongful prosecution exist in procedural laws, and can be bolstered by enhancing procedural due process protections rather than eliminating all safeguards against wrongful prosecution.

Therefore, all standard justifications for the existence of the marital rape exception fail to pass constitutional muster under Section 14, 15, and 21 of the Constitution of India; thus, the exception is not a reasonable choice of policy but is a continuation of the patriarchal legal notions that conflict with transformative constitutionalism.

MARITAL RAPE UNDER THE BHARATIYA NYAYA SANHITA, 2023: DECOLONISATION OR CONTINUITY OF COLONIAL PATRIARCHY

The Bharatiya Nyaya Sanhita, 2023 was introduced as part of India's broader criminal law reform agenda aimed at replacing colonial legal frameworks with a modern, indigenous, and victim-centric criminal justice system. However, despite this transformative objective, the statute continues to retain the marital rape exception under Section 63 Exception 2, thereby preserving a colonial-era legal fiction of implied and irrevocable consent within marriage.

The exception to the rule against marital rape is based on the legal view expressed by Sir Matthew Hale that a husband cannot rape his wife, because consent to sex was given at marriage for the rest of their lives together.²³ This view has also been widely condemned and rejected by many other countries, as it is completely at odds with contemporary legal principles that use individual autonomy and human dignity as the basis for law.

A striking example of the internal contradiction that exists within the Bharatiya Nyaya Sanhita exists with regard to the exception for marital rape. While Section 63(1)(b) of the Act states that a husband cannot be prosecuted for raping his wife, Section 67 of the Act makes it a criminal act for a husband to have sexual intercourse with his wife against her will while separated.²⁴ This creates a contradiction between the two sections and shows that consent is both recognised and not recognised, depending solely on whether or not the spouses live together, rather than on whether or not the wife actually wanted to have sexual intercourse with

²² *State of Uttar Pradesh v. Kaushalya*, AIR 1964 SC 416; *State of Haryana v. Bhajan Lal*, 1992 Supp (1) SCC 335; *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273.

²³ 1 Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* 629 (1736).

²⁴ Bharatiya Nyaya Sanhita, No. 45 of 2023, §§ 63 Exception 2, 67 (India).

her husband.

The continuing existence of this exception to the rule against marital rape demonstrates that the de-colonisation of Indian criminal laws has been largely symbolic, rather than substantive. The colonial-era view of a husband owning his wife's sexual rights continues to impact the present-day design of statutes.

These inconsistencies also mean that Article 14 creates uncertainty around its constitutionality by creating an arbitrary distinction between married women who are in similar circumstances and violate the objective of rape law, which is to protect the victim's sexual autonomy and bodily integrity.

Additionally, the retention of marital rape exceptions also destroys the stated goal of decolonising the laws of India, as a law cannot claim to have modernity if it still includes the patriarchal doctrine that denies an individual's right to choose how they will participate in an intimate relationship.

CONSTITUTIONAL INVALIDITY OF THE MARITAL RAPE EXCEPTION

The marital rape exception under Indian criminal law fails to withstand constitutional scrutiny under Articles 14, 15, and 21 of the Constitution of India, both in terms of classification and substantive rights protection.

Article 14 states that separating married women from unmarried women does not have an intelligible reason for doing so that correlates to the purpose of rape laws. The reason for rape laws is to protect a woman's bodily integrity and sexual autonomy. Marital status does not have any significance constitutionally in determining if consent was given or taken away and creates an arbitrary classification that has independently been recognized as a basis to invalidate a law under the Constitution of India.²⁵

The exemption for marital rape under article 15 negatively impacts women more than it does men and creates an environment of gender inequality in marriage.²⁶ The exemption perpetuates the historical belief that a wife's right to sexual decision-making is lesser than that of her

²⁵ *Shayara Bano v. Union of India*, (2017) 9 SCC 1.

²⁶ INDIA CONST. arts. 14, 15; *Independent Thought*, (2017) 10 SCC at 821.

husband. This is not consistent with the Constitution's declaration of equality.

The most profound violation stems from Article 21 of the Constitution of India, where the Supreme Court case of Justice K.S. Puttaswamy v Union of India finds an individual's right to privacy includes the right to make decisions about their body, make autonomous decisions and control their own private lived experience.²⁷ Consent does not remain static but evolves as a reflection of an individual's will and therefore any legal fiction that considers consent within marriage to be irrevocable is in direct opposition to the notion of personal liberty.

The Court again made clear that reproductive freedom and decision-making autonomy are core aspects of personal liberty found in Article 21 in the case of Suchita Srivastava v Chandigarh Administration²⁸ because, in addition to bodily autonomy, psychologically and physically, forced sexual intercourse within marriage also violates the principles of reproductive freedom and decision-making autonomy, as well as bodily autonomy.

In the case of *X v. Principal Secretary Health & Family Welfare Department*, the Supreme Court determined that reproductive freedom and decision-making autonomy are both central to Article 21, reiterating that personal bodily autonomy is not limited to one's marital status.²⁹

The criminal law's constitutional transformation requires a recognition of intimate autonomy as a fundamental part of the liberty granted to an individual by the Constitution.³⁰ The Supreme Court has consistently interpreted Article 21 as extending to the determination of a person's body, sexual acts, and intimate relationships.³¹ Thus, any statute presuming that one must always consent to sexual acts within marriage creates an unreasonable rigidity against an evolving understanding of personhood as being free to determine one's own life.³² Thus, marriage cannot be interpreted to come at the cost of the constitutional right to be free from violations of one's freedom.³³

²⁷ *Justice K.S. Puttaswamy (Retd.)*, (2017) 10 SCC at 298.

²⁸ *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1.

²⁹ *X v. Principal Secretary, Health & Family Welfare Department*, (2022) 6 SCC 1.

³⁰ *Justice K.S. Puttaswamy (Retd.)*, (2017) 10 SCC at 296.

³¹ *Suchita Srivastava*, (2009) 9 SCC at 12; *X*, (2022) 6 SCC at 41.

³² *Common Cause v. Union of India*, (2018) 5 SCC 1; *Navej Singh Johar*, (2018) 10 SCC at 138.

³³ *Joseph Shine*, (2019) 3 SCC at 57.

Accordingly, the exception to the prohibition on marital rape is not constitutionally permissible because it causes a notion of marriage to exist as a zone of immunity to violate fundamental rights in a manner inconsistent with constitutional morality.

FEMINIST JURISPRUDENTIAL ANALYSIS

Legal systems that uphold the unjust treatment of women because of oppressive systems of masculinity and male domination are the focus of feminist jurisprudence. Wives historically have been viewed as sexual possessions and have surrendered their right to control their sexuality when they marry their husbands.

For this reason, Catharine MacKinnon believes that the male dominion over women through forced sexual intercourse is part of a system of gendered power relationships entrenched in patriarchal societies.³⁴ By denying the existence of marital rape under law, the system continues to discriminate against married women by not providing married women with the same legal protection as all women against violations of their bodily integrity through sexual violence.

The marital rape exception, according to Indian feminist scholar Flavia Agnes, creates a separation between marriage and legal scrutiny under the Constitution and preserves the continued unequal power relations that exist in an intimate partnership.³⁵ Feminist legal analysis supports the idea that consent is an ongoing obligation for both partners in marriage.

INTERNATIONAL AND COMPARATIVE PERSPECTIVE

Several countries across the world have criminalised marital rape by recognising that marriage does not imply irrevocable consent to sexual intercourse.

Countries criminalising marital rape include:

- i. United Kingdom,
- ii. Canada,
- iii. Australia,

³⁴ Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Harvard Univ. Press 1989).

³⁵ Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* (Oxford Univ. Press 1999).

- iv. South Africa,
- v. Nepal,
- vi. and the United States.

In *R v R* the House of Lords abolished the marital rape exemption, thereby ruling that being married does not give a husband the right to have sex with his wife whenever he wants, i.e. it does not mean that the wife is always consenting to having sex.³⁶ International conventions such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) require signatory states to take all necessary measures to eradicate gender based violence against women and discrimination against women.³⁷

The majority of constitutional comparison shows that there is an international consensus that marriage does not extinguish sexual autonomy.³⁸ The Supreme Court of Canada in *R v Ewanchuk* has dismissed the idea of implied consent and held that silence or submission cannot constitute consent.³⁹ Similar to Canadian constitutional case law, post-apartheid South Africa has interpreted its Constitution through the lens of dignity and equality and consequently has recognised sexual autonomy as an integral part of being a person.⁴⁰ Collectively, these cases indicate the global move away from viewing marriage primarily through a patriarchal lens, and the move toward viewing marriage through the lens of rights, consent and equality.⁴¹

India's failure to remove the one exception to the general principle of sexual autonomy - the marital rape exception - does not fit with the evolving international human rights standards that exist today.

CRITIQUES AGAINST CRIMINALISATION AND THEIR CONSTITUTIONAL REBUTTAL

The three main arguments against making it illegal to have sex with your spouse without their

³⁶ *R v. R*, [1992] 1 AC 599 (HL).

³⁷ Convention on the Elimination of All Forms of Discrimination Against Women art. 2, Dec. 18, 1979, 1249 U.N.T.S. 13.

³⁸ Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19: Violence Against Women, U.N. Doc. A/47/38 (1992).

³⁹ *R v. Ewanchuk*, [1999] 1 S.C.R. 330 (Can.).

⁴⁰ S. AFR. CONST., 1996 §§ 10, 12; *Carmichele v. Minister of Safety & Security* 2001 (4) SA 938 (CC).

⁴¹ Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence art. 36, May 11, 2011, C.E.T.S. No. 210.

permission are that the law could be misused, there would be issues with evidence, and it would undermine the stability of marriages. However, each of these arguments is invalid from a legal standpoint and will not hold up in front of a judge.

The argument that the law could be misused is merely a theory, and an unsupported theory cannot serve as a justification for denying someone their rights that are established in law. The Supreme Court has continuously held that the possibility of misuse does not negate the existence of welfare or penal laws to protect rights that are considered fundamental.⁴² As such, one person cannot have their fundamental right to be free from violence hypothetically denied, regardless of the likelihood that someone might misuse the law.

The second argument, claiming that obtaining evidence would be difficult, is also not valid. Criminal law frequently deals with offences committed in private places (e.g., domestic violence, sexual offences, child abuse), and there are no witnesses to these events. The courts use circumstantial evidence, such as medical examination findings, corroborative witness statements, and lifestyle indicators of witness consistency and truthfulness, when creating a criminal conviction based on the evidence presented.⁴³ Therefore, the existence of evidentiary difficulties cannot be used as a reason to establish legal immunity from being charged and prosecuted for a crime.

The third argument i.e. that making sex without consent a crime will harm marriage is based on a misunderstanding of the nature of marriage as an institution. A marriage that is based on coercion and sexual violence is not an institution that qualifies for constitutional protection and moral legitimacy. The legitimacy of marriage is based on equality and mutual consent rather than the granting of immunity to one party over the other.

SUGGESTIONS AND RECOMMENDATIONS

The issue of marital rape cannot be addressed merely through symbolic criminalisation. Effective reform requires a comprehensive constitutional, institutional, social, and victim-centric approach aimed at recognising bodily autonomy and dismantling deeply embedded patriarchal assumptions surrounding marriage and consent. The following recommendations

⁴² *State of Rajasthan*, (1977) 3 SCC at 642.

⁴³ *Bharwada Bhoginbhai Hirjibhai*, (1983) 3 SCC at 224.

are therefore essential for ensuring meaningful legal and social transformation:

1.Repeal of the Marital Rape Exception Under the Bharatiya Nyaya Sanhita, 2023

The Marital Rape Exception in Section 63 Exception 2 of the Bharatiya Nyaya Sanhita, 2023 should be repealed immediately. An unconstitutionally created distinction by this exception exists between married and unmarried women, taking away the right of married women to have equal protection of the laws against sexual violence as to unmarried women. When a person marries, it does not mean that they give up their right to have control over their body or that they will never be able to give up their right to make decisions regarding their body. In addition, repealing the Marital Rape Exception will bring the criminal law of India in line with constitutional morality, international standards of human rights and the evolving body of law dealing with dignity and privacy.

2. Recognition of Consent as a Continuing, Voluntary and Revocable Act of the Parties

Indian criminal law must expressly declare that consent remains within the marriage and the consent given by a spouse may be revoked at any time. Consent should not be inferred because two individuals are in a marriage relationship. Moreover, all individuals have the capacity to continue to exercise their right to control the sexual aspect of their bodies regardless of their marital status. Therefore, legislation should include an express statute clarifying that marriage does not mean that either party has given their consent to engage in sexual intercourse indefinitely or irrevocably.

3. Gender-Neutral and Inclusive Legal Framework

Although the overwhelming majority of victims of marital sexual violence are still women, providing for, or acknowledging, male and gender diverse victims in a gender inclusive/legal framework would strengthen the constitutionally guaranteed rights of Articles 14 and 21 which provide for the equal protection of one's bodily autonomy and sexual integrity, regardless of one's gender identity. This reform will also address concerns about equality before the law raised in this subject.

4. Establishment of Specialised Investigation and Prosecution Mechanisms

There are evidential, psychological and social complexities which make marital rape offences

different to all other offences; these include the nature of the relationships involved and that they occur in private domestic spaces. Therefore, it is essential to set up gender-sensitive specialised units to investigate domestic and sexual violence. In addition, all prosecutors who deal with marital rape cases should be provided with advanced training on trauma-informed interviewing, assessment of evidentiary, psychological abuse/coercive control, and victim protection.

5. Judicial Sensitisation and Capacity Building

All judicial officers should receive ongoing training in respectful, informed of trauma, consent, right to bodily autonomy, coercive relationships, and trauma psychology. The focus of court proceedings should go beyond gender based, stereotypical ideas of entitlement of spouses to one another's body. Therefore, judicial reasoning should evolve to reflect constitutional values of dignity, equality, privacy and individual autonomy.

6. Strengthening Victim Support and Rehabilitation Mechanisms

Victims of marital rape frequently face severe emotional trauma, economic dependency, social isolation, family pressure, and fear of retaliation. Accordingly, the State must establish robust victim-support systems including:

- i. psychological counselling,
- ii. medical assistance,
- iii. shelter homes,
- iv. legal aid,
- v. rehabilitation programmes,
- vi. witness protection mechanisms,
- vii. and financial assistance schemes.

Comprehensive support structures are essential for enabling victims to report abuse and access justice without fear of abandonment or social ostracism.

7. Public Awareness and Educational Reform

Patriarchal misconceptions surrounding marriage and consent continue to normalise sexual violence within marital relationships. Therefore, widespread public awareness campaigns should be conducted through educational institutions, media platforms, legal literacy programmes, and community outreach initiatives to promote understanding regarding:

- i. affirmative consent,
- ii. bodily autonomy,
- iii. gender equality,
- iv. and healthy marital relationships.

Educational curricula should incorporate discussions concerning constitutional morality, gender sensitisation, and sexual autonomy from an early stage.

8. Putting an End to Sexual Violence within a Domestic Violence Framework

The Protection of Women from Domestic Violence Act of 2005 recognizes sexual violence as a form of domestic violence. However, better collaboration between civil and criminal laws that govern domestic violence and sexual violence must exist. Victims need access to immediate, emergency protection orders, short-term and long-term emergency assistance, compensation, and faster means to obtain judicial relief.

9. Consultation with Stakeholders in the Legislative and Policy Reform Process

When reforming marital rape laws, it is imperative that extensive consultation be made with constitutional scholars, women's rights organizations, mental health providers, victim advocacy organizations, sociologists, and legal professionals. Use of evidence-based policy is critical when balancing the need for due process with effective measures to protect victims of sexual violence inside of marriage.

10. Adherence to International Human Rights Treaties

As a signatory to the Convention on the Elimination of All Forms of Discrimination against

Women (CEDAW), India has an obligation to eliminate gender-based violence and discrimination. Criminalization of marital rape would reinforce India's commitment to adherence to the principles of international human rights and constitutional governance based on dignity and equality for all persons.

CONCLUSION

The idea that a spouse cannot rape is an ongoing legal argument and dispute between Indian constitutional law and Indian criminal law. This marital rape exclusion creates tension between the rights guaranteed by the Constitution to people to be equal, have dignity, have privacy, and have liberty and the distinction that exists for persons based upon their marital status. The marital rape exclusion raises issues regarding whether the basis for evaluating whether or not an act is criminal conduct and thus a violation of the law that is based upon an understanding of whether or not there was consent is logical and sound.

The Bharatiya Nyaya Sanhita 2023 seeks to reform colonial statutes governing criminal behaviour; however, by continuing to allow the exception for marital rape, the courts have shown that this is a continuance of legal reasoning regarding how legal systems view marriage as well as the sexual autonomy of women in marriage. Therefore, it can be inferred that legal reform by itself will not adequately address the normative context reflective of the law relative to marriage and consent for sexual activity.

There have been changes in how courts have issued rulings regarding individual autonomy and dignity as it applies to interpreting fundamental rights, especially regarding relationships and choices of an intimate and personal nature, indicating that the Constitution is in the process of developing into a framework where individual autonomy is becoming the primary basis for interpretation of the law.

The debate about marital rape also raises larger implications with respect to the relationship between constitutional morality and social norms with respect to intimate spaces, which further establishes its relevance within the constitutional discourse focusing on equality, dignity, and personal liberty for the foreseeable future.