

“Judicial Approaches and Pending Constitutional Challenges with Reference to Marital Rape”

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Abstract

There are a lot of atrocities that women have been and still are facing in India, just as in other traditional societies. They are manipulated, easily abused, and put at risk of rape both in and out of the house. Also, in India, rape within a marriage is not illegal.

The legality of sexual relations between married people without their mutual consent has long been a contentious topic in Indian criminal law. Despite several constitutional advancements that now recognize the dignity, privacy, physical integrity, and decisional autonomy, the Bharatiya Nyaya Sanhita 2023 (BNS) continues to contain the marital rape exemption. Parliament as a legislator and the courts as a potential invalidator of the constitution have therefore been the main points of contention.

Despite constitutional jurisprudence's advocacy of bodily autonomy, India's legal system still has a glaring loophole when it comes to marital rape. This exemption, which dates back to the colonial era, protects men from prosecution for forced sex with their wives. This culture of impunity is deeply ingrained in our criminal justice system, not just a product of our past.

This study examines judicial responses to marital rape in India, the legal construction of consent within marriage, and pending constitutional challenges. It analyses the marital rape exception, expanding judicial interpretations of marital immunity, family law's sex-consent matrix, and socio-cultural barriers, assessing their implications for equality, dignity, bodily autonomy, and sexual autonomy.

Keywords- marital rape, marriage, consent, constitutional, justice and etc.

1. INTRODUCTION

With the exception of marital rape, which has its roots in a dicta from 1736 by Sir Matthew Hale, a woman is considered property belonging to her husband. This dictum reflected the morality of the early Victorian era, which saw marriage as a hierarchical and proprietary institution that enshrined the husband's right to non-consensual sexual access, eclipsed the wife's legal personality through coverture, and subjugated her autonomy under the union of marriage.

This idea, which was first put forward before the Victorian era, became deeply ingrained during that time and was later canonized in colonial legislation to establish a husband's exemption from being held liable for rape by his wife. The phrase served as a full defense doctrine, making

lawful activity out of any conduct that otherwise met all the requirements of Section 375. But in “*R v. R*”¹, the English court rejected this view as outdated and unjust.

England formally abandoned the Victorian moral beliefs that had justified the exemption of marital rape in this case, as it acknowledged that the common law must adapt to changing societal norms. The changing position of the spouses was the major factor that led to their departure. In today's modern marriage, the court said, the husband and wife are no longer masters of each other but rather partners in a relationship. It is no longer acceptable to hold the traditional view that a woman gives her irreversible agreement to sexual intercourse. Patriarchal norms such as the idea that marriage provides eternal and irrevocable consent persist in Indian criminal law, despite the rule's abandonment in English law.²

1.1 Research Questions

1. What judicial approaches have shaped the legal understanding of marital rape in India?
2. How have Indian courts addressed consent and sexual autonomy within marriage in marital rape cases?
3. What are the key pending constitutional challenges concerning the marital rape exception in India?

1.2 Research Methodology

The methodology used in the paper is doctrinal in nature. The researcher has gathered information from both primary and secondary sources like statutes, case laws, commentaries, reports, books, journal articles and websites.

2. JUDICIAL RESPONSES TO MARITAL RAPE AND THE LEGAL CONSTRUCTION OF CONSENT WITHIN MARRIAGE

2.1 Judicial Engagement and Constitutional Challenges to the Marital Rape Exception

“Articles 14, 19, and 21 of the Indian Constitution” assure equality, dignity, and bodily integrity; scholars have long characterized this legal fiction as antagonistic to these guaranties. Through the practice of viewing wives as property, initially owned by the father and then by the husband, the exception brings back the notion of coverture, which states that a married woman's legal individuality is merged with her spouse's.

The involvement of the judiciary has been disjointed. To bring the Indian Penal Code into line with the superseding provisions of the “Protection of Children from Sexual Offenses Act, 2012 (POCSO)”, the “Supreme Court of India (SC)” in the case of “*Independent Thought v. Union of*

¹ [1992] 1 AC 599 (HL).

² Saptarshi Mandal, ‘The Impossibility of Marital Rape’ (2014) 29(81) Australian Feminist Studies 255.

*India*³ lowered the age restriction under Exception 2 from 15 to 18. Since this is the case, raping girls who are married off before they become 18 is against the law. Rather than rejecting the marital-consent fiction on its merits, the Court's decision hinged on a disagreement between the IPC and the POCSO statutes. The Court avoids judgment on the greater constitutional infirmity by relying on “*Regina v. Clarke*”⁴ from the UK Court to emphasize that the decision only harmonized discordant enactments. Therefore, the ruling solely dealt with the legislative oddity impacting children; marital rape was not acknowledged as a sui generis offense.

“Articles 14 (equality), 15 (non-discrimination on grounds of sex), 19(1)(a) (expression of sexual autonomy), and 21 (dignity and personal liberty)” were invoked in a series of writ petitions filed in “*RIT Foundation v. Union of India*”⁵, which directly challenged the MRE in Section 375 of the IPC. In May 2022, the Division Bench of the Delhi High Court handed down a divided ruling. Using a substantive-equality perspective, Justice Rajiv Shakdher struck down the exception, calling it a “firewall” that unfairly shields married men from prosecution for alleged rape while exposing all other offenders to the full force of the law. Furthermore, he said that the carve-out does not pass the reasonable-classification test because it separates victims who are in the exact same situation based on marital status alone, which has no logical connection to the goal of rape legislation, which is to protect sexual liberty.⁶

In a dissenting judgment, Justice C. Hari Shankar maintained the clause, citing legislative competence, the complexity of society, and the hypothetical possibility of spouses submitting fraudulent complaints. He made the observation that the legislature might categorize crimes by recognizing different “degrees of evil” in response to the reasonable categorization criteria. He ruled that a provision might remain in place so long as it was based on a reasonable basis; but, it could not stand if the foundation was nonexistent, arbitrary, or violated the constitution. The issue is currently before the SC due to the lack of a majority.

However, in the last several decades, there has been a dramatic shift in the constitutional environment regarding autonomy. Decisions that have far-reaching consequences, such the privacy cases “*K.S. Puttaswamy v. Union of India*”⁷ and the adultery decriminalization cases “*Joseph Shine v. Union of India*”⁸.

With this legal framework in place, MRE looks more and more like it will never work. Until the RIT Foundation reference is resolved by the SC, married women are stuck in what legal experts

³ (2017) 10 SCC 800.

⁴ [1949] 2 All ER 448.

⁵ 2022 SCC OnLine Del 1404.

⁶ Srimati Basu, *The Trouble with Marriage: Feminists Confront Law and Violence in India* 145-149 (University of California Press 2015).

⁷ (2017) 10 SCC 1.

⁸ (2019) 3 SCC 39.

call a "doctrinal limbo": they have constitutional autonomy in theory, but when their spouse attacks them, they don't have full criminal protections in practice.

Importantly, the Explanation under Section 63(2) (rape) is still there in the BNS 2023. Legislative reform has not yet addressed the constitutional flaw behind the exemption, since it perpetuates Hale's outmoded assumption into what is ostensibly a "modernized" and "decolonized" penal code in India.

2.2 Judicial Expansion of Marital Immunity and the BNS Legislative Vacuum

To this day, Hale's approach continues to shape judicial interpretation, even in cases where the MRE conflicts with the old "Section 377 of the IPC". A number of unsettling rulings handed down by high courts in recent times show how the IPC dealt with rape in marriages.

"Section 377 of the IPC" read as follows:

"Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

In the case of "*Gorakhnath Sharma v. State of Chhattisgarh*"⁹, which was decided in February 2025, the Chhattisgarh High Court aimed to find a middle ground between Exception 2 of Section 375 and Section 377. Their goal was to ensure that the marital-consent fiction remained absolute by applying the marital rape immunity to forced sexual intercourse cases brought to court under Section 377. The notion that weddings essentially legalize all sexual actions between husband and wife was advanced on the basis of this interpretation.

Shortly over three months later, in the case of "*Manish Sahu v. State of Madhya Pradesh*"¹⁰, the High Court of Madhya Pradesh extended the ruling that a wife's agreement is irrelevant for any sexual act beyond penile-vaginal penetration if she is beyond the legal age. Since the husband and wife did not consent to the sexual actions, the court effectively ruled that the husband could not be charged under Section 377 for these conduct.

The same Court in "*Banti Jatav v. State of Madhya Pradesh*"¹¹, which was decided ten days later, directly cited this precedent to reach the conclusion that Section 377 did not recognize marital rape because "absence of consent of wife for unnatural act loses its importance" once Exception 2 was expanded. Similarly, the Delhi High Court upheld the idea of subsumed consent inside marriage

⁹ 2025 SCC OnLine Chh 2287.

¹⁰ MCRC No 8388 of 2023.

¹¹ 2025:MPHC-GWL:10757.

in the case of “*Sunny Kant v. State (NCT of Delhi)*”¹², reasoning that marital sex could not be criminalized under “Section 377 of the Indian Penal Code”.

Finally, the judges in the aforementioned decisions did not follow any textual basis or precedents in extending the idea of marital impunity from “Section 375 to Section 377” because the two laws essentially encompassed the same sorts of sexual offenses.

The Courts' method completely overturned the decision of “*Navtej Singh Johar v. Union of India*”¹³, which decriminalized consensual same-sex intercourse by merely reading down Section 377. The decision made it clear that sexual consent must be entirely voluntary, free from pressure or coercion, and that this requirement will still apply to any sexual activities performed on adults without their agreement. Since the objective was to only “read down” Section 377 rather than “strike down” it, the conceptual collapse of Sections 375 and 377 was problematic. That Section 377 may still be used to prosecute non-consensual sex between spouses was acknowledged in other decisions, such as “*Nimeshbhai Bharatbhai Desai v. State of Gujarat*”¹⁴, by the Gujarat High Court.

The inability of BNS to provide any comparable protection to Section 377 makes the injustice even more severe, even if the implementation of Section 377 in cases of marital rape was complex and uneven. For victims of rape and the LGBTQ community, this legislative omission is like taking out the good with the bad.

2.3 The Role of Indian Family Law in Constructing Consent and Sexual Obligation within Marriage

The MRE is based on the false assumption that all sexual actions are implicitly and irrevocably consented to when a couple gets married. Ironically, Section 375 defines permission as an ongoing, revocable agreement that must be freely provided for each sexual contact; this falsehood gets at the heart of the matter.

Most notably, family law is permeated with the norm that subjugates women inside marriage by rendering their consent legally meaningless. Overall, the Indian family laws are based on this idea—what one of us has called the “sex-consent matrix”—that sex is fundamental to marriage and consent is (quite) irrelevant.¹⁵

The parties are not need to say “I do” in order for the “Hindu Marriage Act (HMA) or the Special Marriage Act (SMA)” to be valid. The absence of obvious signs of fraud, coercion, or mental infirmity does not invalidate a marriage; in fact, the law presumes that a ceremony carried out in

¹² Criminal Revision Petition No. 990 of 2024.

¹³ (2018) 10 SCC 1.

¹⁴ Special Criminal Application No. 7083 of 2017.

¹⁵ Shivika Choudhary, ‘Marital Rape’ (2020) 5(2) Christ University Law Journal 45.

the presence of witnesses inevitably captures genuine agreement. Social or familial pressure might pass itself off as free will when framed in such a negative light. This implies that entering into a marriage may begin without either the partner's or the institution's explicit approval.¹⁶

One school of thought holds that "Hindu marriage came to be recognized as a sacrament and not a contract, thus precluding any need for the consent of the bride or the groom to deem a marriage valid." Presumably, the SMA also included such a proposal, which is essentially a carbon copy of the HMA's substantial parts (particularly with regard to the grounds of divorce). India has a serious problem with non-consensual marriages, when people are forced to marry against their will using genuine types of compulsion, including threats of violence. With three girls being pushed into marriage in India every minute, it's clear that this is a gendered issue. The complete and unfettered position of marital consent in India is cast in a negative light by this.

Second, if one spouse has left the marital home, the court might order their return and cohabitation under "Section 9 of the HMA or Section 22 of the SMA", which is called "restitution of conjugal rights" (RCR).¹⁷

Lastly, sex is a major factor in the majority of grounds for dissolving or annulling a marriage. The HMA and SMA make the connection voidable in the event of impotence, non-consummation, or willful refusal to have intercourse. Christians can seek a divorce under the "Indian Divorce Act of 1869" in the event of willful non-consumption of a marriage, while Parsis can do the same under the "Parsi Marriage and Divorce Act of 1936". According to the wording of the statute, procreative heterosexual sex is fundamental to the concept of marriage and its maintenance is akin to destroying the institution of marriage.

Collectively, these standards establish a framework for marital law in which sex plays a pivotal role and consent plays a secondary or non-existent one. We find this assumption reinforced in criminal law as well. In this context, the MRE is not an outlier but rather the culmination of a framework that recognizes a wife's body as part of the marital estate. A man can rape his wife as a logical consequence of the law assuming that entering into a marriage means permanent consent, as shown above.

3. SOCIO-CULTURAL BARRIERS AND PENDING CONSTITUTIONAL CHALLENGES CONCERNING MARITAL RAPE IN INDIA

3.1 Socio-Cultural Challenges to the Criminalisation of Marital Rape

Since the Domestic Violence Act already covers sexual abuse and includes sanctions for cruelty toward women, one would wonder why a separate statute is needed. Domestic violence is not

¹⁶ *Id.* at 2.

¹⁷ Vidhik Kumar, 'Marriage or License to Rape? A Socio-Legal Analysis of Marital Rape in India' (2021) 6(3) *Dignity: A Journal of Analysis of Exploitation and Violence* 72.

criminalized under the Domestic Violence Act since it is a civil statute that seeks to protect victims and compensate them financially. As a result, rape victims do not receive the justice they deserve. It does not specifically address rape within marriages, but it does address other forms of violence against women.¹⁸

For example, in 2016, 3,454 incidences of domestic abuse were recorded in Kerala, with spouses or relatives as the culprits. Therefore, the court does not have the power to inflict criminal punishments for marital rape, but it may provide civil remedies or issue a divorce based on cruelty if a woman seeks legal recourse.

False charges may increase if a statute prohibiting marital rape is passed, according to some. This worry, however, does not rule out the possibility of actual instances. Legislation specifically addressing marital rape will help reduce the number of unfounded accusations by requiring thorough investigations and providing victims with appropriate compensation.¹⁹

It may be tough to prove forced sexual intercourse, but that shouldn't stop justice from being served. Circumstantial evidence and medical findings frequently play crucial roles in obtaining convictions in rape cases, despite the complexity of establishing the crime. Conclusive proof of marital rape can be established by a combination of circumstantial information, including medical examinations, witness statements, a history of abuse, and any admissions made by the accused, even if medical evidence alone may not prove force. So long as there is enough proof of the crime, the law might hold those responsible accountable with the right legal measures.

A prominent counterargument against criminalizing marital rape is that the term does not apply in India because of the country's very different cultural norms about marriage compared to other nations. Since the institution of marriage is highly esteemed in many cultures, it follows that criminalizing marital rape will lead to its demise, according to proponents of cultural relativism.

Patriarchal traditions and standards govern 'defined' morality via sexual orientation. Certain cultural metaphors served as vehicles for the predominance of social productions, sexuality, and reproduction. Patriarchy propagated its teachings through many demeaning representations of women, such as the ideal of the selfless mother and wife, and by ritual activities that consistently stressed the supremacy of women in these roles.²⁰

One of the most crucial aspects of understanding why women remain in relationships with rapists is the financial aspect. Women rely on males for financial support and do not have the authority to make decisions regarding their own income. Fear of losing one's house, one's income, and one's

¹⁸ Indira Jaising and Pinki Mathur, *Conflict in the Shared Household: Domestic Violence and the Law in India* 79-84 (Oxford University Press 2019).

¹⁹ N Prabha Unnithan, 'The Continuing Non-Criminalization of Marital Rape in India: A Critical Analysis' (2025) 35(3) *Women & Criminal Justice* 205.

²⁰ Shailja Shukla, *Marital Rape: A Socio-Legal Perspective* 189-199 (Satyam Law International 2022).

ability to provide a safe haven for one's children is a constant companion for women who experience domestic violence. Unemployment and sexual assault by spouses are two additional outcomes of low literacy rates.

It becomes very difficult to establish marital rape because of the intimate nature of the offense. It may be feasible in the event of the first occurrence, but proving it after a certain number of occurrences would be challenging.

3.2 Pending Constitutional Challenges before the Apex Court

The constitutionality of the marital rape exemption is presently pending before the SC. The main issue is “Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita, 2023 (BNS)”, which continues to protect a husband from being prosecuted for raping his adult wife.

One major petition pending is “*Aweksha Women’s Charitable Trust v. Union of India*”²¹, brought under “Article 32 of the Constitution”. The petition challenges the marital rape exemption as violative of Articles 14, 15(1), 19(1)(a) and 21, on the grounds of discrimination, bodily autonomy, dignity, privacy and personal liberty, in particular. On 23rd May 2025, the SC gave notice and tagged the subject with associated applications.

The current constitutional dispute finds its roots in “*RIT Foundation v. Union of India*”, where the “Delhi High Court” handed down a split ruling in 2022. “Justice Rajiv Shakti” ruled that the marital rape exemption was unconstitutional whereas “Justice C. Hari Shankar” ruled that the exclusion was legitimate. The matter has thus been taken to the SC and is pending.

It is consequently for the SC to decide whether the marital rape exemption is in accordance with the constitutional rights of “equality, non-discrimination, dignity, privacy and sexual autonomy”. Related concerns have also been addressed in recent instances as to whether spouses can be charged under other criminal statutes for bodily or mental injury caused via violent or non-consensual sexual activity. Latest reports are that the constitutional issue is still pending before the SC.²²

4. CONCLUSION AND SUGGESTIONS

4.1 Conclusion

When discussing marital rape in Indian courts, long-standing cultural mores, constitutional concerns, and evolving female rights all come into play. In spite of mounting calls for change, the

²¹ WP (Criminal) No 197 of 2025.

²² Dhishna Pannikot, *Navigating Gender Identity in India: Social and Cultural Perspectives on Gender Sustainability* 115-119 (Emerald Publishing 2025).

Bharatiya Nyaya Sanhita (BNS), 2023, upholds the marital rape exception (MRE), which shields from criminal liability any non-consensual intercourse that occurs within a marriage.

The existence of rape within marriages in India has long been a contentious topic due to the complex interplay between gender rights, constitutional safeguards, societal mores, and the law. The marital rape exception (MRE) shields husbands in India from prosecution in situations of sexual interactions between spouses that do not include consent, unlike in many other nations.

The Bharatiya Nyaya Sanhita (BNS), 2023, has reignited discussions on this matter since it replaces the Indian Penal Code (IPC), 1860, while maintaining the legal exemption for marital rape. This blatantly violates women's rights to bodily integrity, autonomy, and the Indian Constitution's Articles 14, 19, and 21. Indian courts have come to different opinions on whether marital rape should be criminalized or constitutionalized.

In taking this legal position, India is going against both its own constitutional safeguards of equality (Article 14), personal autonomy (Article 21), and freedom of expression (Article 19(1)(a)) and international human rights standards, which generally consider rape during a marriage as a heinous crime.

4.2 Suggestions

- Social resistance, concerns over the misuse of legislation, and fears about the dissolution of marriage are the primary barriers to the criminalization of marital rape. Nonetheless, to uphold women's dignity, rights, and physical autonomy, it is imperative to legally recognize consent inside the institution of marriage.
- The legislation must ensure that matrimony does not serve as a front for sexual assault by prioritizing personal liberties above antiquated societal conventions within a forward-thinking legal structure.
- Lawmakers, jurists, and decision-makers must reassess the MRE and align India's legal framework with constitutional mandates and international human rights standards for the nation to advance.
- To attain gender equality and justice within India's legal framework, it is both morally and ethically essential to classify marital rape as a criminal offense.
- To ensure the preservation of individual dignity and physical autonomy, it is imperative to recognize that consent is necessary in all sexual interactions within marriage.

REFERENCES

- Saptarshi Mandal, 'The Impossibility of Marital Rape' (2014) 29(81) Australian Feminist Studies 255.
- Srimati Basu, *The Trouble with Marriage: Feminists Confront Law and Violence in India* 145-149 (University of California Press 2015).
- Shivika Choudhary, 'Marital Rape' (2020) 5(2) Christ University Law Journal 45.

- Vidhik Kumar, 'Marriage or License to Rape? A Socio-Legal Analysis of Marital Rape in India' (2021) 6(3) *Dignity: A Journal of Analysis of Exploitation and Violence* 72.
- Indira Jaising and Pinki Mathur, *Conflict in the Shared Household: Domestic Violence and the Law in India* 79-84 (Oxford University Press 2019).
- Sneha Kadyana and N Prabha Unnithan, 'The Continuing Non-Criminalization of Marital Rape in India: A Critical Analysis' (2025) 35(3) *Women & Criminal Justice* 205.
- Shailja Shukla, *Marital Rape: A Socio-Legal Perspective* 189-199 (Satyam Law International 2022).
- Dhishna Pannikot, *Navigating Gender Identity in India: Social and Cultural Perspectives on Gender Sustainability* 115-119 (Emerald Publishing 2025).