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# **THE MARITAL RAPE EXEMPTION IN INDIA: A CRITICAL ANALYSIS**

AUTHORED BY - ANCE ROSE JIJO

## **Abstract**

The marital rape exemption in India, enshrined in Exception 2 to Section 375 of the Indian Penal Code, 1860, and subsequently retained in Section 63 of the Bharatiya Nyaya Sanhita, 2023, remains one of the most contested relics of colonial criminal jurisprudence. Rooted in Sir Matthew Hale's seventeenth-century implied consent theory, the exemption continues to deny married women the right to bodily integrity and sexual autonomy guaranteed by Articles 14, 15, 19, and 21 of the Constitution of India. This paper undertakes a comprehensive critical analysis of the exemption, tracing its historical origins, examining its constitutional infirmities, surveying comparative international approaches, evaluating the judicial discourse that has emerged from the divergent High Court rulings, and assessing proposed legislative reforms. The paper argues that the exemption is constitutionally indefensible, jurisprudentially anachronistic, and socially catastrophic, and that its immediate abolition is demanded both by the transformative constitutionalism that animates Indian fundamental rights jurisprudence and by India's obligations under international human rights law.

*Keywords: Marital Rape, Indian Penal Code, Bharatiya Nyaya Sanhita, Bodily Integrity, Sexual Autonomy, Constitutional Law, Gender Justice, Transformative Constitutionalism.*

## **I. INTRODUCTION**

Marriage has traditionally been a site where the perpetrator of sexual violence enjoys impunity. Under all legal systems with a patriarchal foundation, the marriage bond has been perceived not only as enabling but also as legitimizing non-consensual sexual intercourse on the rationale that a wife, by the mere act of marriage, grants her husband a permanent and irrevocable license over her body. In India, this is clearly reflected in Exception 2 to Section 375 of the Indian Penal Code, 1860 (hereinafter "IPC"), which states: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being below fifteen years of age, is not

rape."<sup>1</sup> This exemption, henceforth referred to as the "Marital Rape Exemption" or "MRE," has endured for more than one and a half centuries of social, political, and legal change in India, even surviving the comprehensive overhaul of the criminal code contained in the Bharatiya Nyaya Sanhita, 2023, which replaced the IPC, effective July 1, 2024.<sup>2</sup>

The continued validity of the MRE gives rise to a range of fundamental questions of constitutional law, criminal law, and feminist legal theory. Does the exemption comport with the right to equality enshrined in Article 14 of the Constitution of India? Does the exemption violate the right to life and liberty, including bodily integrity and sexual autonomy, enshrined in Article 21 of the Constitution of India? Does the exemption amount to a form of sex discrimination prohibited by Article 15 of the Constitution of India? Does the exemption comport with the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women and other international norms?<sup>3</sup>

These issues have given rise to an unprecedented amount of judicial and academic discourse, leading to a historic split decision by the Delhi High Court in May 2022 and the matter awaiting determination in the Supreme Court of India.<sup>4</sup> This paper undertakes a detailed and critical analysis of the MRE from a variety of historical, statutory, constitutional, comparative, and socio-legal aspects. Part II examines the historical roots of the exemption in Hale's theory of implied consent. Part III outlines the current state of the law. Part IV examines the exemption's constitutional validity. Part V examines the judicial discourse in light of differing decisions from the High Courts. Part VI examines the comparative position in other countries. Part VII examines the empirical and socio-legal aspects from the survivor's point of view. Part VIII examines the legislative proposals and the government's stance. Part IX examines India's human rights obligations. Part X draws the conclusions.

## II. HISTORICAL ORIGINS OF THE MARITAL RAPE EXEMPTION

### A. Hale's Implied Consent Theory

The lineage of the MRE can be traced to a paragraph penned by Sir Matthew Hale, who was the Lord Chief Justice of England, in his treatise *Historia Placitorum Coronae*, more

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<sup>1</sup>Indian Penal Code, No. 45 of 1860, § 375, Exception 2 (India) [hereinafter IPC].

<sup>2</sup>Bharatiya Nyaya Sanhita, No. 45 of 2023, § 63, Exception 2 (India) [hereinafter BNS], enacted by The Bharatiya Nyaya Sanhita Act, 2023.

<sup>3</sup>Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

<sup>4</sup>RIT Foundation v. Union of India, 2022 SCC OnLine Del 1:680 [hereinafter RIT Foundation].

commonly known as *The History of the Pleas of the Crown*, published posthumously in 1736, almost half a century after the death of the author. He opined:

*"But 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."*

<sup>5</sup> This assertion, without any precedent, enacted without legislative sanction, and predicated on a theory of irrevocable implied consent that Hale himself recognized as merely his personal belief, formed the starting premise of the MRE throughout the common law world.

The normative presuppositions of Hale's rule are threefold and intertwined. First, consent to future sexual intercourse is included in the marital contract, rendering ongoing consent otiose. Second, marital status creates a right of sexual access to the wife by the husband. Third, the wife's personality is subsumed into that of her husband at the time of marriage, a principle of "coverture," such that she possesses no personality that can be violated. Each of these presuppositions has been thoroughly undermined by feminist jurisprudence, modern contract theory, and constitutional law.<sup>6</sup>

## **B. Colonial Transplantation: Macaulay's Code**

The IPC, drafted in 1860 by Lord Thomas Babington Macaulay and his members on the First Law Commission, incorporated the MRE as Exception 2 to Section 375 without any discussion. The drafters were borrowing common law principles from their English counterparts and were treating the Hale dictum as settled law. There is no discussion on the justice or logic underlying the exemption in the Macaulay Draft of 1837, the Notes appended thereto, or the deliberations of the Law Commission.<sup>7</sup> The exception was therefore not the result of any considered policy decision, but the unreflecting colonial adoption of a doctrine whose legitimacy in England itself was based on nothing more than the ipse dixit of a single jurist.

It is a deep irony that a country which abolished the doctrine of coverture and entrenched sex equality provisions in its constitution at the time of its independence also retained a provision in its criminal code which was intellectually supported by nothing other than a doctrine grounded on the legal non-existence of women. The MRE has been described as "the subordination of a woman's right to her sexual autonomy and bodily integrity to an

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<sup>5</sup>Matthew Hale, *Historia Placitorum Coronae* 629 (1736).

<sup>6</sup>Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 175 (Harvard Univ. Press 1989).

<sup>7</sup>See T.B. Macaulay et al., *A Penal Code Prepared by the Indian Law Commissioners*, Note Q (1838).

institution and an ideology."<sup>8</sup>

### C. Post-Independence Persistence

Independent India has undertaken many significant amendments to the law of rape, including the Criminal Law (Amendment) Acts of 1983 and 2013, without altering the MRE. The Criminal Law (Amendment) Act of 2013, which was enacted in response to the heinous gang rape of Jyoti Singh in Delhi in December 2012, and which was heavily influenced by the recommendations of the Justice J.S. Verma Committee, greatly expanded the definition of rape but specifically retained the exception.<sup>9</sup> The Verma Committee Report itself had recommended criminalizing marital rape, observing that this exemption was not in keeping with the values enshrined in the Constitution or in international law; the decision of Parliament to not accept this recommendation was therefore not one of oversight.<sup>10</sup>

## III. THE STATUTORY FRAMEWORK: IPC, CRPC, AND BNS

### A. Section 375, Indian Penal Code, 1860

Section 375 of the IPC, before it was replaced by the BNS, described rape as sexual intercourse with a woman in any of seven situations that involved a lack of consent, force, fraud, or incapacity. Exception 2 to Section 375 stated: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape."<sup>11</sup> The effect of the exception was to take marital rape, irrespective of the scale of violence, coercion, and physical injury inflicted on the victim, out of the realm of criminal law altogether. Thus, a husband who repeatedly subjected his wife to violent sexual assault was not punishable for rape. At most, he was punishable for causing hurt or grievous hurt under Sections 319 to 325 of the IPC.

The Supreme Court of India partially lifted the exemption in *Independent Thought v. Union of India* in 2017, declaring Exception 2 to be unconstitutional in its application to wives between the ages of fifteen and eighteen.<sup>12</sup> The Court also read down this exemption to cover only wives aged eighteen and above, making it consistent with the age of consent in general rape laws. However, the Court chose not to pass on the question of rape of adult wives in

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<sup>8</sup>K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1 (Chandrachud, J., concurring) [hereinafter Puttaswamy].

<sup>9</sup>Criminal Law (Amendment) Act, No. 13 of 2013, § 375, Exception 2 (India).

<sup>10</sup>Justice J.S. Verma Committee, Report of the Committee on Amendments to Criminal Law 114 (2013) [hereinafter Verma Committee Report].

<sup>11</sup>IPC, supra note 1, § 375, Exception 2.

<sup>12</sup>Independent Thought v. Union of India, (2017) 10 SCC 800 [hereinafter Independent Thought].

marriage, holding that this question was being separately assessed.<sup>13</sup>

### **B. The Bharatiya Nyaya Sanhita, 2023**

The BNS, which repealed and replaced the IPC with effect from July 1, 2024, renumbered and retained the substance of the exemption relating to marital rape in Exception 2 to Section 63: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being eighteen years of age."<sup>14</sup> The BNS therefore effectively implemented the Supreme Court ruling of 2017 by raising the minimum age of the wife from fifteen to eighteen years but left the exception clause otherwise unchanged. In the examination of the Bharatiya Nyaya (Second) Sanhita Bill, 2023, by the Parliamentary Standing Committee on Home Affairs, several civil society organisations and legal experts made submissions urging the committee to exclude the exception clause, but the committee declined to recommend its exclusion.<sup>15</sup>

### **C. Related Statutory Provisions**

The Protection of Women from Domestic Violence Act, 2005, offers some partial relief to wives who are victims of marital rape, as the Act defines "sexual abuse" as one of the forms of domestic violence that can attract civil remedies, protection orders, residence orders, and monetary reliefs.<sup>16</sup> However, the PWDVA offers no criminal sanctions for marital rape, and the civil reliefs offered are no substitute for the protective and expressive functions of the criminal law. The Special Marriage Act, 1954, and the Hindu Marriage Act, 1955, allow for divorce on the grounds of cruelty, which can include forced sexual intercourse,<sup>17</sup> but again, divorce is no substitute for criminal law.

## **IV. CONSTITUTIONAL ANALYSIS**

### **A. Article 14: Right to Equality**

Article 14 of the Constitution of India provides equality before the law and the equal protection of the laws to all individuals. It has been held by the Supreme Court that Article 14 permits classification but does not allow any arbitrary classification; a classification must be

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<sup>13</sup>Id. at ¶ 77.

<sup>14</sup>BNS, supra note 2, § 63, Exception 2.

<sup>15</sup>Parliamentary Standing Committee on Home Affairs, Report No. 250 on the Bharatiya Nyaya Sanhita Bill, 2023, at 89–92 (2023) [hereinafter Standing Committee Report].

<sup>16</sup>Protection of Women from Domestic Violence Act, No. 43 of 2005, § 3(b) (India) [hereinafter PWDVA].

<sup>17</sup>See *Samar Ghosh v. Jaya Ghosh*, (2007) 4 SCC 511 (holding that certain sexual conduct may constitute cruelty for divorce purposes).

based on intelligible differentia which has a rational nexus with the object of the legislation.<sup>18</sup>

The MRE makes a distinction between married women and unmarried women on the issue of protection under the law of rape. A woman who is raped by a stranger or an acquaintance can seek the full protection of the law, while a married woman who is raped by her husband cannot. The distinguishing factor, obviously, is the marital relationship. But the issue that arises here is whether the differentia has any rational relationship to any legitimate goal of the legislation. There is no such goal. The goals that the legislature might be presumed to have had, such as the preservation of marital harmony, the privacy of the home, or the prevention of false charges, cannot rationally be related to the exemption of violent rape. In fact, the exemption has the reverse effect of the constitutionally legitimate goal of preserving marriage, and instead protects the rapist within the marriage.<sup>19</sup>

Justice Rajiv Shakti, in his concurring opinion in *RIT Foundation v. Union of India*, opined that the MRE violates Article 14 because it classifies married women in an arbitrary and unreasonable manner that denies them equal protection of the law.<sup>20</sup> He explained that this classification is not based on any intelligible differentia that is relevant to the purpose for which rape laws are enacted, i.e., the integrity of the body and sexual autonomy, which are not affected in any manner by marriage.

## **B. Article 15: Prohibition of Discrimination**

Article 15(1) specifically forbids the State from discriminating against any citizen on the grounds of religion, race, caste, sex, place of birth, or any of them. The MRE discriminates against women on the grounds of sex: this is a provision that specifically applies to women as victims and specifically disadvantages women in the context of marriage. A male victim of rape can have recourse to the full weight of criminal law regardless of whether his attacker is a spouse; a woman cannot if her attacker is her spouse.<sup>21</sup>

The Court, in *Navtej Singh Johar v. Union of India*, acknowledged that the provisions of the Constitution must be interpreted in a manner that enhances the transformative potential of the provisions, and that the morality of the Constitution must override the morality of the people.<sup>22</sup> In the context of the MRE, this means that Article 15 must be interpreted as not only

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<sup>18</sup>State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75.

<sup>19</sup>RIT Foundation, supra note 4 (Shakti, J.) ¶¶ 120–135.

<sup>20</sup>Id. ¶ 140.

<sup>21</sup>See Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* 142 (Oxford Univ. Press 1999).

<sup>22</sup>Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, ¶ 79 [hereinafter Navtej Singh Johar].

prohibiting discriminatory legislation, but also legislation that perpetuates the subordination of women through the denial of the protection of the law to them.

### **C. Article 21: Right to Life, Bodily Integrity, and Sexual Autonomy**

However, the strongest challenge to the validity of the MRE is posed by Article 21 of the Constitution, which the Supreme Court has held includes a vast constellation of rights such as the right to health, the right to dignity, the right to bodily integrity, and the right to privacy.<sup>23</sup> In the judgment delivered by the nine-judge bench in *K.S. Puttaswamy v. Union of India*, the right to privacy was held to include "informational privacy, privacy of choice, and decisional autonomy over personal matters including sexual relations."<sup>24</sup> In the opinion written by Justice D.Y. Chandrachud, sexual orientation and gender were specifically referred to as attributes of identity.

If the right of privacy enshrines the right of decisional autonomy over sexual relations, then the MRE, which takes away the legal protection of a woman who has had her sexual autonomy violated by her husband, amounts to a direct attack on the Article 21 rights of the married woman. It cannot be the case that marriage amounts to a waiver of the right to bodily integrity, because no constitutional right can be the subject of a waiver, and certainly not a waiver that lasts for all time, and no private contract can be entered into that authorizes a criminal offence against a person's fundamental rights.<sup>25</sup>

The Supreme Court, in *Justice K.S. Puttaswamy v. Union of India* and *Suchita Srivastava v. Chandigarh Administration*, has reaffirmed the position that the reproductive and sexual choices of a woman are an integral part of her dignity and autonomy and cannot be subject to any external control.<sup>26</sup> The MRE has a direct impact on the sexual autonomy of the married woman, subjecting her reproductive autonomy to the control of her husband for all time, removing from her the legal capacity to withhold consent once she has married.

### **D. The Doctrine of Manifest Arbitrariness**

In *Shayara Bano v. Union of India*, the Supreme Court held that "a law that is manifestly arbitrary, that is to say, a law that is capricious, irrational, or not informed by any rational principle or determining factor whatsoever, is liable to be struck down under Article 14."<sup>27</sup> The

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<sup>23</sup>Francis Coralie Mullin v. Union Territory of Delhi, AIR 1981 SC 746.

<sup>24</sup>Puttaswamy, supra note 8, ¶ 302.

<sup>25</sup>See also *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241.

<sup>26</sup>*Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1, ¶ 15.

<sup>27</sup>*Shayara Bano v. Union of India*, (2017) 9 SCC 1, ¶ 101 [hereinafter *Shayara Bano*].

MRE qualifies this test in full measure. It is founded on a philosophy that has been repudiated by every serious system of legal philosophy: Hale's Implied Consent Theory. It is based on a fiction that marriage gives rise to a perpetual and irrevocable consent, a fiction that is belied by any and every understanding of contract, consent, and personhood that has emerged in the last few centuries. It is a law that is, in the language of *Shayara Bano*, "capricious, irrational, and not informed by any rational principle or determining factor whatsoever."<sup>28</sup>

## V. JUDICIAL DISCOURSE: THE DIVERGENT HIGH COURT RULINGS

### A. RIT Foundation v. Union of India (Delhi High Court, 2022)

The most significant judicial pronouncement on the MRE in India to date is the split judgment delivered by the Delhi High Court in *RIT Foundation v. Union of India* on May 11, 2022.<sup>29</sup> A two-judge bench comprising Justice Rajiv Shakdher and Justice C. Hari Shankar delivered diametrically opposite judgments, thereby making the *RIT Foundation* judgment a landmark on the issue of marital rape.

Justice Rajiv Shakdher found that Exception 2 to Section 375 IPC was unconstitutional and violated Articles 14, 15, 19, and 21 of the Constitution, and that the same had to be struck down. He held that the exemption was unconstitutional because: (i) it created an arbitrary classification between married and unmarried women; (ii) it was discriminatory against women on the basis of sex; (iii) it violated the married woman's right to bodily integrity, dignity, and sexual autonomy; and (iv) it was manifestly arbitrary and based on outdated morality that was inconsistent with constitutional morality.<sup>30</sup> His opinion drew extensively on comparative jurisprudence from the United Kingdom, United States, Canada, Australia, and South Africa, as well as on international human rights instruments.

Justice C. Hari Shankar, on the other hand, upheld the validity of Exception 2. In his judgment, he reasoned that the distinction between married and unmarried women was not arbitrary or unreasonable because of the legitimate expectation of sexual relations inherent in marriage, that the criminal law was an instrument of last resort, that the existing civil remedies under the PWDVA were adequate, that the institution of marriage was a value that was constitutionally protected, and that the courts must defer to Parliament on matters of sensitive

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<sup>28</sup>Id.

<sup>29</sup>RIT Foundation, supra note 4.

<sup>30</sup>Id. (Shakdher, J.) ¶¶ 230–250.

policy regarding the alteration of family law.<sup>31</sup>

The opinion of Justice Hari Shankar has been roundly criticized by legal experts for a tendency to equate the institution of marriage with the right of a husband to have non-consensual sexual intercourse, for treating the availability of civil remedies as a satisfactory substitute for criminal remedies, and for an unacceptable degree of deference on matters of fundamental rights.<sup>32</sup>

## B. Precedents from Other High Courts

Other High Courts have grappled with similar issues. In *State v. Bharatilal Makwana*, the Karnataka High Court noted that the MRE needs to be given urgent consideration in the context of the values of dignity and equality enshrined in the Constitution.<sup>33</sup> In a number of cases involving domestic violence, the Chhattisgarh High Court has held that sexual coercion amounts to cruelty that can justify divorce, suggesting that the judiciary may be receptive to the idea that marital rape is wrong even if not criminalized.<sup>34</sup> In *Nimisha v. State of Kerala*, the Kerala High Court held that a husband who compels his wife to perform sexual acts against her will commits an act of domestic violence as defined by the PWDVA, supporting the civil, though not the criminal, aspect of protection.<sup>35</sup>

## C. The Supreme Court: Pending Adjudication

After the split verdict was pronounced by the Delhi High Court, the matter has been referred to the Supreme Court of India for a final verdict. As of the current date, the Supreme Court bench has taken up the matter and hearings have begun, but no final judgment has yet been pronounced.<sup>36</sup> It is the outcome of this judgment that will decide the fate of the constitutional law of India, whether it will once and for all repudiate the Hale doctrine or continue the colonial exemption that is completely at variance with the constitutional promise of transformation. The matter has elicited unprecedented civil society engagement, with petitions being filed by various NGOs, lawyers' bodies, and survivor groups, and several senior advocates appearing as intervenors.

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<sup>31</sup>Id. (C. Hari Shankar, J.) ¶¶ 117–145.

<sup>32</sup>See Mrinal Satish, Delhi High Court Split Verdict on Marital Rape: A Critical Review, 57 J. Indian L. Inst. 285 (2022).

<sup>33</sup>*State v. Bharatilal Makwana*, CrI. A. No. 100116/2021 (Kar. HC) (unreported).

<sup>34</sup>See *Kavita Srivastava v. State of Chhattisgarh*, MANU/CG/0412/2018.

<sup>35</sup>*Nimisha v. State of Kerala*, 2017 SCC OnLine Ker 3484.

<sup>36</sup>*Union of India v. RIT Foundation*, S.L.P. (CrI.) No. 5765/2022 (S.C.I.) (pending).

## VI. COMPARATIVE JURISPRUDENCE

### A. United Kingdom

The English common law home of the Hale doctrine was the first to reject it. In *R v. R*, decided in 1991 by the House of Lords, Lord Keith of Kinkel, giving his leading opinion, stated: "Hale's statement was a common law fiction which has become anachronistic and offensive and which should be removed. I have concluded that a husband can be convicted of raping his wife."<sup>37</sup> The case concerned a husband who sought to have sexual intercourse with his wife by force while they were separated. The House of Lords was unanimous in deciding that the common law exception was no longer English law. This decision was reinforced by the decision of the European Court of Human Rights in *SW v. United Kingdom*, which held that the criminalization of marital rape was not a violation of the principle of legality under Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms because it was reasonably foreseeable.<sup>38</sup> The Sexual Offences Act of 2003 codified the position, applying the definition of rape uniformly in cases of spousal and stranger rape.

### B. United States

In the United States, marital rape has been criminalized in all fifty states, although this was a gradual process, with North Carolina completing full criminalization in 2019.<sup>39</sup> In the Model Penal Code, the original version of which was promulgated in 1962, the marital exemption was retained, but this was removed in the revision of the sexual assault provisions by the American Law Institute in 2021.<sup>40</sup> The leading case is *People v. Liberta*, in which the New York Court of Appeals held that the marital exemption violated the equal protection clause of the Fourteenth Amendment to the United States Constitution, using an equal protection analysis that is almost identical to that applicable to Article 14 of the Constitution of India.<sup>41</sup>

### C. Canada and Australia

Canada has criminalized marital rape since 1983 by amending the Criminal Code, replacing the crime of rape with provisions for sexual assault, which are gender-neutral and apply without any discrimination based on the marital status of the parties involved.<sup>42</sup> These

<sup>37</sup>*R v. R*, [1992] 1 AC 599, 623 (HL) (Keith, L.J.).

<sup>38</sup>*SW v. United Kingdom*, App. No. 20166/92 (Eur. Ct. H.R. Nov. 22, 1995).

<sup>39</sup>North Carolina Gen. Stat. § 14-27.21 (2019).

<sup>40</sup>Am. L. Inst., Model Penal Code: Sexual Assault and Related Offenses (2021).

<sup>41</sup>*People v. Liberta*, 64 N.Y.2d 152, 167 (1984).

<sup>42</sup>Criminal Law Amendment Act, S.C. 1980-81-82-83, c. 125 (Can.).

provisions have been upheld by the Supreme Court of Canada in *R v. Ewanchuk*, reaffirming the position that consent for a sexual act must be specific, ongoing, and capable of being withdrawn at any time.<sup>43</sup> In Australia, the crime of marital rape was criminalized between 1976 and 1994, starting with South Australia, which became the first jurisdiction worldwide to abolish the exemption by statute in 1976.<sup>44</sup>

#### **D. South Africa and Other Jurisdictions**

South Africa's Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 sets out a comprehensive definition of rape applicable without regard to the relationship between the perpetrator and the victim, and which explicitly excludes any marital exemption.<sup>45</sup> In a series of judgments relating to sexual autonomy and dignity under the Constitution of the Republic of South Africa, 1996, the Constitutional Court has emphasized the importance of consent and rejected any rule that permits non-consensual sex due to a lack of compatibility with the values of equality and dignity.<sup>46</sup> Nepal, Bangladesh, Sri Lanka, and most countries of the European Union have all criminalized marital rape. India is now joined in its retention of the exemption by a small number of countries including Pakistan, Afghanistan, and the Gulf States.<sup>47</sup>

## **VIII. LEGISLATIVE REFORM PROPOSALS AND GOVERNMENT POSITION**

### **A. The Justice Verma Committee Report (2013)**

The most authoritative recommendation for criminalizing marital rape in India has come from the Justice J.S. Verma Committee, formed in December 2012 to suggest amendments to the criminal law in the context of sexual violence. Its report, submitted in January 2013, states: "A rapist remains a rapist regardless of his relationship with the victim."<sup>48</sup> The Committee recommended that Exception 2 to Section 375 of the IPC be deleted, and the provisions relating to rape be extended to the marital context without any exceptions. Parliament did not adopt this recommendation in enacting the Criminal Law (Amendment) Act, 2013. The Statement of Objects and Reasons for the Act does not indicate why this

<sup>43</sup>*R v. Ewanchuk*, [1999] 1 SCR 330, ¶ 26.

<sup>44</sup>Criminal Law (Sexual Offences) Act 1976 (SA) (Austl.).

<sup>45</sup>Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, § 1 (S. Afr.).

<sup>46</sup>*Masiya v. Director of Public Prosecutions* (Pretoria), 2007 (5) SA 30 (CC).

<sup>47</sup>United Nations Women, *Ending Violence Against Women: Legal Frameworks*, available at <https://www.unwomen.org> (last visited Dec. 15, 2024).

<sup>48</sup>Verma Committee Report, *supra* note 10, at 114.

recommendation was spurned.

## **B. Government's Position Before the Courts**

The Union of India, in its affidavit before the Delhi High Court in *RIT Foundation v. Union of India*, resisted the striking down of the MRE on several grounds: that the matter is a sensitive policy question for Parliament; that criminalization might be misused to harass husbands; that existing civil remedies under the PWDVA provide adequate protection; and that the institution of marriage has a recognized constitutional value that must be accommodated.<sup>49</sup> These arguments were analyzed and largely rejected by Justice Shakti. The "misuse" argument is particularly unconvincing: it applies with equal force to any criminal provision protecting women and has never been accepted as a reason to deny women criminal law protection.

## **C. Parliamentary Standing Committee Recommendations**

The Parliamentary Standing Committee on Home Affairs, while examining the Bharatiya Nyaya Sanhita Bill in 2023, received several representations from legal scholars, women's rights groups, and bar associations urging the deletion of the MRE. While the Committee report recognized the controversy surrounding the MRE, it recommended the retention of the exception on the grounds that criminalizing marital rape "could destabilize the institution of marriage" and "it may be difficult to provide evidence in such cases."<sup>50</sup> Both grounds are analytically deficient: the first confuses the protection of marriage as an institution with the protection of marital violence, and the second applies the evidentiary difficulty argument selectively in a manner that would justify the non-criminalization of all domestic violence.

## **D. Proposed Legislative Pathways**

Several legislative routes have been suggested as a means of achieving change. The most direct is simply removing Exception 2 to Section 63 of the BNS and applying the general provisions of rape law to marital rape without qualification.<sup>51</sup> Another is the introduction of a separate offence of "sexual assault in marriage" or "sexual coercion in marriage" with a modified maximum penalty, similar to the distinction between rape and sexual assault in

<sup>49</sup>Affidavit of the Union of India, *RIT Foundation v. Union of India*, W.P. (C) No. 284/2015 (Del. HC), ¶¶ 18–24.

<sup>50</sup>Standing Committee Report, *supra* note 15, at 91.

<sup>51</sup>See Mrinal Satish, *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India* 290 (Cambridge Univ. Press 2017).

Canada. A third is making changes to the PWDVA to impose criminal consequences for sexual abuse, effectively linking civil and criminal law without directly amending the BNS.<sup>52</sup> Each approach has merits and limitations; the simplest and most principled solution remains outright abolition of the exemption.

## IX. INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

### A. CEDAW and the Committee's General Recommendations

India ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1993 with certain declarations. Article 2 of CEDAW provides that "the State Parties shall pursue by all appropriate means and without delay a policy of eliminating discrimination against women and shall take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs, and practices which constitute discrimination against women."<sup>53</sup> The CEDAW Committee's General Recommendation No. 35 on gender-based violence against women explicitly identifies the marital rape exemption as a discriminatory legal provision that States parties are obliged to repeal.<sup>54</sup>

The CEDAW Committee has repeatedly criticized India's maintenance of the MRE in its Concluding Observations. The 2014 Concluding Observations called on India to "define and criminalize marital rape as a criminal offence,"<sup>55</sup> and this recommendation has been repeated in subsequent review cycles. India's periodic reports to the Committee have defended the retention of the exemption on grounds of cultural and social context, grounds that the Committee has consistently rejected as inconsistent with CEDAW's universalist framework.

### B. The Universal Periodic Review

In the process of the Universal Periodic Review (UPR) of India before the UN Human Rights Council, many countries have recommended the criminalization of marital rape. During the third UPR cycle in 2017, and again in the fourth cycle in 2022, these recommendations were noted by the Indian delegation without acceptance.<sup>56</sup> The pattern of India's engagement with UPR recommendations on marital rape, consistent noting rather than acceptance, reflects

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<sup>52</sup>Agnes, supra note 21, at 199.

<sup>53</sup>CEDAW, supra note 3, art. 2(f).

<sup>54</sup>CEDAW Committee, General Recommendation No. 35 on Gender-Based Violence Against Women, U.N. Doc. CEDAW/C/GC/35, ¶ 29(b) (2017).

<sup>55</sup>CEDAW Committee, Concluding Observations on India, U.N. Doc. CEDAW/C/IND/CO/4-5, ¶ 22 (2014).

<sup>56</sup>U.N. Human Rights Council, Universal Periodic Review, India, 4th Cycle, Report of the Working Group, U.N. Doc. A/HRC/44/10, ¶ 24.78 (2020).

a deliberate governmental preference for the status quo over international human rights compliance.

### **C. Customary International Law and Jus Cogens**

A growing body of international legal scholarship asserts that the prohibition on rape, including marital rape, has attained the status of customary international law, possibly reaching the higher status of jus cogens.<sup>57</sup> The International Criminal Tribunals for the former Yugoslavia and Rwanda have held that rape constitutes torture, a crime against humanity, and a war crime, thus reinforcing the international condemnation of rape and sexual violence. While the jus cogens principle has not yet been litigated in Indian courts, its development provides further support to the conclusion that the MRE is inconsistent with India's international law status.

### **D. Sustainable Development Goals**

India's international obligations under its commitments in the 2030 Agenda for Sustainable Development are also pertinent. Sustainable Development Goal 5, namely "achieve gender equality and empower all women and girls," specifically includes Target 5.2: "Eliminate all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation."<sup>58</sup> The retention of the marital rape exemption is obviously incompatible with this goal, as it perpetuates rather than eliminates one of the most prevalent forms of sexual violence against women in the private sphere.

## **X. CONCLUSION**

The exemption for marital rape in India can be said to be an example of what one constitutional scholar has termed "constitutional doublespeak", a provision that the State keeps in its law books while at the same time professing its commitment to equality, dignity, and the rights of women in its Constitution.<sup>59</sup> Its pedigree is dubious. Its formulation in colonial India rested on the views of a solitary seventeenth-century English jurist for whom there was no authority to begin with and women did not exist as a legal concept. Its continued presence in the BNS is a historic opportunity missed. Its constitutional flaws are many and, in the view of

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<sup>57</sup>Patricia Viseur Sellers, *The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation*, Office of the UNHCHR (2007).

<sup>58</sup>G.A. Res. 70/1, ¶ Target 5.2, U.N. Doc. A/RES/70/1 (Oct. 21, 2015).

<sup>59</sup>Upendra Baxi, *The Future of Human Rights* 127 (3d ed., Oxford Univ. Press 2012).

the present writer, insurmountable.

This exemption is violative of Article 14 of the Constitution, as it classifies married and unmarried women in an arbitrary and irrational manner. It is violative of Article 15, as it classifies based on sex and marital status, thereby discriminating against women. It is violative of Article 21, as it takes away the right of the married woman to bodily integrity, sexual autonomy, and dignity. It is also violative on the grounds of manifest arbitrariness, as held in *Shayara Bano*. It is violative of transformative constitutionalism as envisioned by the founding fathers of the Constitution. And it is violative of India's international human rights obligations as a signatory to CEDAW and the broader international human rights framework.

Furthermore, the comparative jurisprudence on the issue is quite stark. All common law jurisdictions from which India has borrowed, England and Wales, the USA, Canada, Australia, South Africa, have criminalized marital rape. International human rights bodies have been urging India to criminalize marital rape. Survivor advocacy, legal academia, and the majority of civil society organizations dealing with women's rights in India have been urging reform.

The Supreme Court of India is today offered a chance to use its most potent form of judicial review: to strike down a law that is irreconcilable with the constitutional order and to assert its commitment to the proposition that the marriage contract cannot be a tool of perpetual subjugation. The onus on Parliament is squarely upon it to modify Section 63 of the Bharatiya Nyaya Sanhita, 2023, by removing Exception 2 and applying the general law of rape without distinction based on marital status.

The final truth is that the question of whether marital rape should be criminalized is not a question of the sanctity of marriage. It is a question of whether a married woman is a person in the full constitutional sense, possessed of rights and dignity and capable of autonomy, or whether she is simply a legal appendage of her husband. The Constitution of India and its commitment to equality, dignity, and liberty as fundamental rights compel only one answer.