INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed

www.ijlra.com

ISSN: 2582-6433

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ISSN: 2582-6433

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ISSN: 2582-6433

LEGAL AND CULTURAL BARRIERS IN CRIMINALISING MARITAL RAPE AND REMEDIES THEREOF.

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ABSTRACT

The current study focuses on the continuing presence of marital rape exception even after the introduction of the new criminal laws such as the Bharatiya Nyaya Sanhita, 2023, which was expected to be based on constitutional principles and the "Indian soul." Although these laws were meant to be the move towards decolonization and achieving justice, the exclusion of marital rape from being considered as an offense under criminal law raises significant concerns about the discrepancy between legislative intentions and constitutional ideals. In the view of this research, Exception II to Section 63 of the Bharatiya Nyaya Sanhita should not just be viewed based on its colonial roots as instigated by the doctrine of Hale, but on the current-day social consciousness that esteems marriage above a woman's autonomy. The first part of this paper will discuss the influence of culture in creating an attitude that resists the enactment of marital rape laws. This paper will go on to discuss the basis of constitutional law under which marital rape is illegal through various landmark judgments of the Supreme Court and different High Courts, and this includes Articles 14 and 21 of the Constitution specifically. Based on the findings obtained from the examination of critical court decisions, policies, and current issues related to the topic, it is suggested that the Supreme Court is the most ideal setting for dealing with this problem. By concentrating on the real experiences of married women and arguing that marriage shouldn't be used as a shield against abuse and violence, the study essentially humanizes the conversation.

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INTRODUCTION

The Hon'ble Home Affairs Minister presented the three new criminal legislations to the Lok Sabha on August 12, 2023, stating that they will "*provide justice and protect constitutional rights.*" These laws will be "*imbibed with the Indian soul*."[1] The main objective of bringing these laws was the Indianisation or Bharatiyakaran of colonial-era criminal laws. However, the claims that he made in Parliament appear to be hollow. The laws that were supposed to safeguard constitutional rights have not given adequate attention to the constitutional rights of married women. The long-standing issue of marital rape remained untouched. The only change that was made regarding the offence of spousal rape is the implementation of the judgment of Independent Thought vs. Union of India[2] via an amendment to S.63 of Bharatiya Nyaya Sanhita 2023, which increases the age of married women from 15 to 18 years in exception II. If you look at the existing literature you will find that existence of exception II to the offence of rape is mostly associated with the infamous Hale's doctrine. Indeed, the incorporation of exception II to the offence of rape in the IPC of 1860 by Macaulay is inspired by Hale's doctrine. Nonetheless, the fact that this notion was maintained in the IPC until 2023 and is still in the BNS suggests a more comprehensive view. The view is that not only is Matthew Hale responsible for inspiring Macaulay to incorporate exception II to S.375, but it is the psyche of Indian society that strengthens Hale's perspective. The paper is divided into four parts. The first part is an introduction, and the second part of the paper will highlight the role of traditional and cultural norms, that substantiate various theories against the criminalisation of marital rape. The third part argues that A.14 and A.21 of the Constitution are the basis for declaring exception II to S.63 of BNS unconstitutional, and the fourth part claims that the Supreme Court is the appropriate forum to adjudicate on this issue.

A night of horrific terror that would forever mark the pages of tragedy happened in the dimly lit room of a peaceful home. A husband performed a brutal crime against the lady he swore to adore and defend. He inserted his hand in his wife's anus with unfathomable brutality. The damage was devastating and intolerable. The pain was too much for her body to bear any longer and eventually, she succumbed to her injuries. Even though life was taken horrifyingly, the Chattisgarh High Court[3] acquitted the perpetrator of the crime, citing the exception to the IPC and BNS that applies to the offence of rape. Rape is a crime that requires the most severe

[1] Rahul Tripathi, *Amit Shah Introduces Three Bills to Replace IPC, CrPC, Evidence Act*, The Economic Times (Aug. 14, 2023), https://economictimes.indiatimes.com/news/politics-and-nation/amit-shah-introduces-three-bills-to-replace-ipc-crpc-evidence-act/articleshow/102659477.cms (last visited April 16, 2026..
[2] Independent Thought v. Union of India, (2017) 13 S.C.R. 821 (India).
[3] Gorakhnath Sharma v State of Chhattisgarh [2025] CGHC 7365.

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denunciation and the most severe legal repercussions since it involves control, brutality, and complete contempt for the dignity of another person. The offence of rape goes against the principles of humanity and still, some of the offenders are immune from the legal liability arising out of this ghastly crime.

India's rape laws have undergone a significant reform in recent decades. The reforms have not only been done at the level of amending the statutes dealing with sexual offences, but the approach of the Indian Supreme Court has also evolved over some time from the stereotypical view taken in the case of Mathura to the more proactive role played in the RG Kar rape case. The offence of rape is defined under S.375 of IPC and now in S.63 of BNS. The current definition of rape is the result of a brutal incident of rape that happened on the street of Delhi in 2012, infamously known as the Nirbhaya rape case. As an aftermath of this case, there was a lot of uproar in the country. The government did not have any other option they needed to make the rape laws more stringent. To complete this task Justice JS Verma's committee was constituted to review the existing rape laws and seeking for the necessary recommendations for the amendment of rape laws. The committee made numerous recommendations for amendments, many of which were implemented. However, the Parliament disregarded several proposals, such as the abrogation of exception II to S.375 of the IPC. Often the MRE is defended on the grounds of preservation of marriage. In 2016 Minister for Women and Child Development Maneka Gandhi made a statement in Parliament regarding the offence of marital rape, according to her, the concept of marital rape cannot be applied in India as it is understood internationally due to factors like education or illiteracy, poverty, countless social customs and values, religious beliefs, the mindset of the society to consider marriage to be a sacrament, etc. In a counter-affidavit submitted to the Supreme Court, the Union of India expressed a similar opinion in opposition to a case against the MRE. It was submitted on behalf of the union that It is well-established that marriage is a sacrament under Hindu Personal Law, particularly concerning the Hindu Marriage Act of 1955. In other words, it is well-established that Hindu personal law accords the institution of marriage with a higher level of sacredness[4]. Law Commission had also rejected the idea of criminalising marital rape in its 172nd report published in the year 2000. It had also given primacy to the institution of marriage and observed that "*We are not satisfied that this exception should be recommended to be deleted since that may amount to excessive interference with the marital relationship*".[5] It is clear from these

[4] *Hrishikesh Sahoo v Union of India*, Special Leave Petition (Crl) Nos 4063–64 of 2022, Preliminary Counter Affidavit on behalf of Union of India (Supreme Court, 2022) 10 https://www.scobserver.in/wp-content/uploads/2023/03/Counter-Affidavit-by-Union-Marital-Rape.pdf.

[5] Law Commission of India, *172nd Report on Review of Rape Laws* (2000) para 3.1.2.1.

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observations that the government does not intend to interfere in this matter. However, it is evident from the experience that whenever the executive or legislature falls short the Supreme Court proactively engages in recognising the rights of women including decriminalising the offence of adultery, reading down the exception to S.375 of IPC, granting maintenance under S.125 CrPC to Muslim women irrespective of their personal laws, granting permanent commissions to women in the army, abolition of the two fingers test, passing the Vishakha guidelines etc. These were a few instances where the Supreme Court took active steps to safeguard women's rights. Likewise, currently, there is a dire need to protect the rights of married women and the Supreme Court is the only institution that can do so. Although various cases related to marital rape and offence-related unnatural acts were decided by different High Courts of the country. However, only a few of them grabbed the media attention, these include RIT Foundation v. Union of India where two judges of the Delhi High Court delivered a split verdict on the constitutionality of exception II to S.375 and Hrishikesh Sahoo v. State of Karnataka where a Karnataka HC judge allowed framing of charge against the accused husband. Currently, Hrishikesh Sahoo v. UOI is pending before the Supreme Court, the case was last listed on 23-10-24 before the bench of then Chief Justice DY Chandrachud, JB Pardiwala and Manoj Mishra, later on, the matter was halted again because of the retirement of CJI.

CULTURAL BARRIERS REFLECTED IN LEGAL RULES THAT PREVENTS CRIMINALISATION OF MARITAL RAPE.

HUSBAND'S PROPERTY

The deeply entrenched traditional beliefs and the outdated legal system prevent the removal of MREs in several parts of the world. The idea of a spouse's consent is often overlooked in discussions about marriage, where the husband is viewed as the primary authority within the marital relationship. The hesitation to see marital rape as a crime stems from the traditional views on gender roles that are prevalent in Indian society. From ancient religious texts to recent political debates all have confined the role of a married woman to the four walls of the household. Married women are usually assigned roles like caregivers and reproducers. Their status in a marital relationship is subservient to that of a husband. Traditionally women are considered to be the property of their husbands. Rape laws were created to safeguard men's interests rather than those of the abused women, who were seen by males as property.[6] Women

[6] Ryder and Kuzmenka (n 9) 394.

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were viewed as the possessions of their husbands, or of their fathers if they were unmarried, in line with traditional views on property.[7] Property and women are frequently discussed in tandem, and it is noted that both must be protected.[8] According to Manu "*In her childhood (a girl) shall be under the will of her father; in (her) youth, of (her) husband; her husband being dead, of her sons; a woman should never enjoy her free will.*"[9] The argument that women should always be under male guardianship, first by their father, then by their husband, and last by their son, is supported by the above-given verse. Women are often depicted as someone unable to make their own choices and needing guidance from men throughout their lives. The primary duty of the woman is to serve her husband according to traditional notions.

IMPLIED CONSENT THEORY

This idea holds that there is an indisputable presumption of consent between a man and a woman when they enter into the institution of marriage[10]. The implied consent theory is the major cause of the introduction of MRE in common law countries as Hale's doctrine which is considered to be the root cause of this exception is based upon the theory of implied consent. The institution of marriage is interpreted to include unrestricted sexual access to his spouse's body, its genesis is rooted in patriarchal legal tradition. Justice Harishankar has also tried to acknowledge this theory through sophisticated terms like "*The expectation of sex of the husband with his wife, is, therefore, a legitimate expectation, a healthy sexual relationship being an integral part of the marital bond. Unjustified denial of sexual access by either spouse to the other, is not, therefore, sanctified or even condoned by the law*"[11]. The statement given by Justice Harishankar seems to imply that access to sexual relations is a pertinent right, particularly for the husband. Although the language used by the Hon'ble Justice is soft and uncontroversial, however, the statement reiterates the traditional implied consent theory that having sex is an entitlement in marriage rather than a spontaneous, negotiated agreement.

UNITE THEORY.

As per this theory, legal status of a woman is merged with that of the husband after marriage[12].

[7] Morgan Lee Woolley, 'Marital Rape: A Unique Blend of Domestic Violence and Non-Marital Rape Issues' (2007) 18 276.
[8] Sinha (n 3) 64.
[9] *The Ordinances of Manu* (Arthur Coke Burnell and Edward W Hopkins trs, 2nd ed, Motilal Banarsidass 1971) V.148.
[10] Kallakaru and Soni (n 13) 122.
[11] *RIT Foundation v Union of India* (2022) 3 HCC (Del) 572. page 99
[12] Ryder and Kuzmenka (n 9) 399.

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Sir William Blackstone elaborated on the common law principle in that "*by marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least incorporated and consolidated into that of the husband.*"[13], the statement talks about the doctrine of coverture where a married woman loses her identity. According to this doctrine, the wife loses her property rights, contract rights, and right to sue or to be sued, after she enters the marital relationship.

Now when we talk about barriers against the criminalisation of marital rape, the abovementioned theories are the foremost barriers that prevent married women from exerting their most fundamental right of bodily autonomy. These theories are based on the patriarchal notions deeply rooted in a traditional society giving prevalence over culture and traditions rather than individual rights. These notions collectively promote that women surrender themselves and their decisional autonomy to their husbands, lose their separate legal identities or unite into the identity of their husbands and become the property of their husbands after marriage. These antiquated ideas are deep-seated in modern legal systems, particularly in India, and are not just scholarly gimmicks. The first provision that incorporates all these theories is exception II to S.63 BNS itself, which reads as "*sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape*" that explicitly prevents criminalisation of marital rape. Other provisions that reflect these theories are S.128[14] of BSA which protects the communication between spouses made during the subsistence of the marriage, the provision seems to see communications between married couples as being within the domain of a single unit, disclosure would therefore be equivalent to violating a protected internal space or betraying unity, the section also implies that in a marital relationship both the parties have implied consent that the communication happened between them will remain confidential. The spousal exemption given to the offence of harbouring under S.249[15] of BNS, reflects the unite theory this implies that a spouse who harbours a partner, even if that partner has committed a criminal offence, is not subject to criminal prosecution. Generally, in criminal law, you are not supposed to act against your interest which is why the protection against self-incrimination has been provided in the Indian Constitution, it would be similar to punishing an offender for not betraying himself, that is the reason the law does not recognise criminal liability of a spouse for harbouring his/her partner as they are considered to be a single unit.

[13] Sir William Blackstone, *Commentaries on the Laws of England*, Book 1 (1st edn, 1765) 261 https://lonang.com/wp-content/download/Blackstone-CommentariesBk1.pdf accessed 12 April 2025.
[14] Bharatiya Sakshya Adhiniyam 2023, s 128.
[15] Bharatiya Nyaya Sanhita 2023, s 249.

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S.9[16] of the Hindu Marriage Act allows Courts to compel the spouses to return to their marital home if the spouse has left the home without any justified cause, this implicitly includes the resumption of a sexual relationship. Though the provision does not explicitly use the term sexual relationship, however, the courts have interpreted the terms "conjugal rights" to include "companionship, cohabitation, and sexual intercourse." This provision reflects the theory of unification. The provision views the wife as a united legal entity, subordinate to the marital institution rather than as an independent individual. By permitting courts to enforce marital responsibilities, even against the will of the other spouse, these legal rules work together to uphold firmly deep-seated cultural and patriarchal customs. These laws strengthen obsolete traditional norms, wherein male supremacy and marital union are given primacy over the autonomy and dignity of women. In the legal system female choices continue to be submissive to marital and cultural norms by implementing the recognition of conjugal rights, assuming perpetual consent inside marriage, and shielding spouses from criminal prosecution.

GROUNDS FOR STRIKING DOWN THE MARITAL RAPE EXCEPTION.

ARTICLE 21

Marital rape is an issue that is prevalent in our society for decades. The stereotypical nature of Indian society has helped in nurturing the idea that marital rape can't be equated with rape by a stranger. All the ingredients of offence are the same in both cases however, the husband is exonerated from the liability simply because he is a 'husband'. The sanctity attached to the institution of marriage in the Indian social set-up often undermines the effect of individual rights enshrined in our Constitution. These rights are popularly known as fundamental rights because they are very basic to human existence. However, these rights are often compromised because of entrenched socio-cultural norms that oppose progressive transformation.

Now the question arises as to why MRE should be removed and what are the grounds on which MRE can be removed from S.63 of BNS. The answer lies in the constitutional provisions and their interpretation done by the Constitutional Courts of this country at various times. In this dissertation, I have dealt with the two foremost grounds for striking down the exception attached to the offence of rape. The first ground is that the exception goes against the principles of A.21 of our constitution that deals with the 'right to life and personal liberty'. It would not be wrong to say that A.21 is one of the most dynamic provisions of the Constitution. This right has been defined and re-defined by the Supreme Court several times since the Constitution's

[16] Hindu Marriage Act 1955, s 9.

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implementation. A plethora of distinct rights have been read into this article by the Supreme Court of India. Examples are the right to livelihood[17], right to shelter[18], right to choose a partner of choice[19], right to reputation[20], right against illegal detention, right to privacy, right to health and many more. Similarly, A.21 has been used by the Supreme Court to uphold women's rights. However, certain rights are of utmost importance for the incumbent study and those rights will be discussed in more detail to substantiate the fact that the exception II to S.63 BNS violates A.21 of the Constitution. The right to life under A.21 encompasses more than just animal existence; it also refers to the right to a dignified existence[21].

The case of the **State of Maharashtra v. Madhukar Narayana Mardikar**[22] can very well be said to be one of the initial cases where the Supreme Court recognised the right to privacy as a fundamental right. The case related to the dismissal of a police officer from the services because he went to the complainant's house alone to have illicit sexual intercourse with her. The High Court refused to rely upon the complainant's testimony, saying that it is harmful to rely upon the testimony of an unchaste woman. The SC held that even a woman with loose morals deserves her privacy, and no one has the right to intrude on her privacy at will. Therefore, it is not permissible for anyone to violate another person whenever they so choose. She has the right to defend herself if someone tries to harm her against her consent. She also has the right to legal protection.

The **State of Karnataka v. Krishanappa** deals with the rape of a minor girl, and the High Court reduced the sentence given by the trial court. Supreme Court enhanced the sentence and observed that, alongside being a degrading act, sexual violence represents an unlawful infringement on a woman's right to privacy and integrity. The victim is degraded and humiliated, and in cases when the victim is a defenceless, innocent child, a painful experience is left behind. It is a serious affront to her utmost accolade and undermines her dignity and sense of self-worth.

T Sareetha vs T Venkat Subbaiah[23]- is a well-known case where S.9 of the Hindu Marriage Act was challenged for being violative of the Constitution. The judgment was progressive and talked about the bodily autonomy of the women. The second part of the judgment dealt with the question of the constitutionality of S.9 of HMA. It was held that S.9 of HMA which deals

[17] *Olga Tellis & Ors vs Bombay Municipal Corporation & Ors. Etc* 1985 (3) SCC 545.
[18] *Chameli Singh & ors v. State of UP & Anr* (1996) 2SCC 549.
[19] *Lata Singh v. State of UP and Anr* [2006] Supp. (3) S.C.R. 350.
[20] *Subramanian Swamy v Union of India, Ministry of Law and Others* [2016] 3 SCR 865 (SC).
[21] *Francis Coralie Mullin v. Administrator Union Territory of Delhi* (1981) 1 SCC 608.
[22] *State Of Maharashtra and Anr vs Madhukar Narayan Mardikar* MANU/SC/0032/1991.
[23] *T. Sareetha vs T. Venkata Subbaiah* AIR 1983 ANDHRA PRADESH 356.

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with the restitution of conjugal rights is violative of the right to privacy and human dignity guaranteed under A.21 of the Constitution. While analysing the definition of the right to privacy the Andhra Pradesh High Court observed "*But it can be confidently asserted that any plausible definition of the right to privacy is bound to take the human body as its first and most basic reference for control over personal identity. Such a definition is bound to include the body's inviolability and integrity and intimacy of personal identity including marital privacy*".

In **Shri bodhisattva Gautam vs Shubhra Chakraborty,**[24] the accused married the victim after she got pregnant, but later he deserted her. It was observed that women are entitled to life and freedom; they deserve to be respected and treated as equal members of society. Their dignity and honour must not be harmed or disrespected. They also possess the right to live a life of dignity and peace. Carving on the severity of the offence of rape court observed "*Rape is thus not only a crime against the person of a woman (victim), it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crises. It is only by her sheer willpower that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim's most cherished Fundamental Rights, namely, the Right to Life contained in Article 21*".

In **Suchita Srivastava & Anr v. Chandigarh Administration**[25]**,** certain rules of the Medical Termination of Pregnancy Act 1971 were in question before the Supreme Court. The Supreme Court extended the right of a woman to make the reproductive choice as a part of personal liberty provided under A.21 of the Constitution. It was observed, that the ability of women to make decisions regarding reproductive choice is undoubtedly a part of "personal liberty" as outlined in Article 21 of the Indian Constitution. It is essential to acknowledge that reproductive decisions can be made both to have children and to refrain from having them. The most crucial factor is to respect a woman's right to privacy, dignity, and bodily integrity. This implies that there must be complete freedom regarding reproductive decisions, including a woman's right to decline to engage in sexual activity or the requirement to use contraceptive methods.

In **X v. The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr**[26], the Court dealt with the issues of whether Rule 3B of Medical Termination of Pregnancy Rules, 2003, is limited only to married women and whether Rule 3B(a) includes marital rape for abortion. The court answered in affirmative and held that "*the meaning of the*

[24] *Shri Bodhisattwa Gautam vs Miss Subhra Chakraborty* (1996) 1 SCC 490.
[25] *Suchita Srivastava & Anr v. Chandigarh Administration* [2009] 13 (ADDL.) S.C.R. 989, 1008.
[26] *X v. THE PRINCIPAL SECRETARY, HEALTH AND FAMILY WELFARE DEPARTMENT, GOVT. OF NCT OF DELHI & ANR*. [2022] 7 S.C.R. 686 [71],[75].

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words "sexual assault" or "rape" in Rule 3B(a) includes a husband's act of sexual assault or rape committed on his wife. The meaning of rape must therefore be understood as including marital rape, solely for the purposes of the MTP Act and any rules and regulations framed thereunder." It was further noted by the court that the category of rape or sexual assault survivors may also include married women. The word "rape" generally indicates engaging in sexual intercourse with someone who has not given their consent or is unwilling, regardless of whether this coerced sexual act occurs within the confines of marriage. If a woman's husband is involved in sexual activity with her without her consent, she could end up becoming pregnant. It would be irresponsible not to recognize that rape constitutes a form of intimate partner violence. It is an unfortunate misbelief that violence based on sex and gender is primarily or almost exclusively executed by strangers. For many years, numerous women have experienced various forms of gender-based violence, including sexual violence, within their own families.

Recently Madras High Court in **R v. B**[27] dealt with the aspect of spousal privacy. It discards the notion of unite theory as discussed in the previous chapter. In this case, the husband secretly got the WhatsApp messages from his wife's mobile phone and presented them in court as evidence to prove adultery against the wife for getting a divorce. The court referred to the KS Puttaswamy judgment and held that the right to privacy also applies to the sphere of marriage and that prying upon the spouse is impermissible. It was observed that "*Snooping on the other destroys the fabric of marital life. One cannot pry on the other. Coming specifically to the position of women, it is beyond dispute that they have their own autonomy*."

Justice K S Puttasawmy (retd.), and Anr. v. Union of India and Ors.[28], the case is popularly known as the "right to privacy" judgment. The Supreme Court ruled that A.21 of the Indian Constitution guarantees the right to privacy. Privacy reflects the core of human nature and respects the capacity of each individual to make choices and judgments that control intimate and personal areas. The Court recognised nine types of privacy. Among these bodily privacy, spatial privacy, decisional privacy, and associational privacy are relevant to the current study. It was observed that "*Privacy is the constitutional core of human dignity. Privacy has both a normative and descriptive function. At a normative level privacy sub-serves those eternal values upon which the guarantees of life, liberty and freedom are founded. At a descriptive level, privacy postulates a bundle of entitlements and interests that lie at the foundation of*

[27] *R v. B* CRP(MD)No.2362 of 2024.
[28] *Justice KS Puttaswamy (Retd) and Another v Union of India and Others* [2017] 10 SCR 569, 832, 844–845 (SC).

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ordered liberty". In addition, "*Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy*."

In **Hrishikesh Sahoo v. State of Karnataka**, The Karnataka High Court noted that post-republic India is governed by the Constitution. The Constitution views marriage as a union of equals and treats women as equals to men. The Constitution does not portray women as inferior to men in any way. The right to sexual autonomy, bodily integrity, personal liberty, reproductive choices, privacy, and freedom of speech and expression are among the fundamental rights guaranteed under Articles 14, 15, 19, and 21 of the Constitution. Equal rights and protection are guaranteed under the Constitution.[29].

From the precedents mentioned above it is clear that A.21 as interpreted by the Supreme Court of India does not talk about mere existence but rather guarantees a life of human dignity, the right to liberty, freedom from cruel and degrading treatment, and the right to personal autonomy are all severely violated by the MRE. By permitting husbands to escape punishment for raping their wives, the law treats married women as second-class citizens compared to their husbands. Married women are deprived of equal rights against sexual violence as unmarried women due to this situation. Apart from being unjust, such differentiation contravenes women's inherent right to control their bodies. As per the KS Puttaswamy judgement, the right to privacy becomes an inherent part of A.21, including the freedom to choose what happens to one's body and sexual life. The MRE overlooks the natural right of privacy by assuming that once a woman gets married, she loses her autonomy and becomes just the object of her husband's desires. This notion is not only unconstitutional but also regressive.

In addition, 'the right to health' was recognised by the SC as an essential element of A.21 of the Constitution in cases like Parmananda Katara v. UOI[30] and Paschim Banga Khet Mazdoor Samity v. State of West Bengal[31], highlighting the duty of the state to protect individuals from degrading practices that affect their mental and physical health adversely. As discussed in the latter part of this dissertation the health consequences experienced by a married woman are similar to those of unmarried women. The legal system overlooks the significant health consequences that married women face and violates their rights to reproductive freedom and

[29] *Hrishikesh Sahoo v. State of Karnataka* 2022 LiveLaw (Kar) 89, [18].
[30] *Pt. Parmanand Katara v Union of India & Ors* 1989 (4) SCC 286.
[31] *Paschim Banga khet Mazdoor Samity v. state of West Bengal & Anr*1996 SCC (4) 37.

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bodily autonomy by permitting marital rape. In addition to physical harm, marital rape inflicts severe psychological and emotional damage. As a result, beyond infringing upon a married woman's health rights, the MRE contradicts India's core principles of equality, dignity, and personal freedom.

ARTICLE 14

India can rightly be called a land where gleaming diversity walks hand in hand with deep-rooted discrimination. The richer a society becomes in its cultural, linguistic, and religious aspects, the more it is haunted by anxiety. In this restless pursuit to assert dominance and identity, the thirst for superiority takes root and, the seeds of discrimination are sown, watered by fear, and nourished by centuries of social conditioning. The discriminations have been prevalent in Indian society for ages, so to break the shackles of discrimination ideas of liberty, equality and fraternity were enshrined in the Indian constitution. For the same reason, A.14 was enacted to provide "equality before the law or equal protection of the laws within the territory of India"[32]. This privilege applies to everyone, including legal persons, and is not just restricted to citizens.[33] The single sentence contains three broad categories of rights within it, these are the right to equality, the rule of law and equal protection of laws. Simply, equality before the law means that everyone is equal in front of the law irrespective of their caste, religion, class, or position in society, rule of law means that everyone is subject to the law, that it is superior, and equal protection under the law implies that people should be treated equally, "*The guarantee of the equal protection of laws means the protection of equal laws. It forbids class legislation but does not forbid classification which rests upon reasonable grounds of distinction*"[34].

For the proper implementation of this article, different tests and doctrines were carved out by the Supreme Court in several cases. The first was the reasonable classification test recognised for the first time in Anwar Ali Sarkar's case. Where Justice SR Das observed that *"In order to pass the test, two conditions must be fulfilled, namely (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others, and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act. The differentia, which is the basis of the classification, and the object of the act are distinct things, and what is necessary is that there must be a nexus between them*".

[32] Constitution of India 1950, art 14.
[33] *Chiranjit Lal Chowdhary v. Union of India*, AIR 1951 SC 41.
[34] Ibid.

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In Chiranjit Lal Chaudhary's case, the SC talking about the classification held that classification must rely on a genuine and significant distinction that has a fair and reasonable relationship to the objects being classified.[35] It was further held that a categorization ought to be "regarded as invalid" if it is "made without any substantial basis." In the State of Andhra Pradesh & Ors v. Dr Rao, V.B.J Chelikani & Ors[36] case, it was observed that "*the classification must never be arbitrary, artificial or evasive*".

However, the reasonable classification test has been questioned multiple times by the Supreme Court. Rather the Court has emphasised scrutinising the very objective of the policy or the legislation. The Court has gradually evolved its approach while deciding cases based on A.14 of the Constitution. In A.L. Kalra v. Project and Equipment Corporation of India Ltd[37], it was observed that an action or policy may be arbitrary in and of itself, and this would be a breach of the equal protection clause.

In the State of AP v. Dr Rao after analysing various precedents Supreme Court highlighted the gradual shift of the Apex Court's approach from classification test to substantive equality. Elaborating upon the concept of substantive equality, it was observed over time, that there has been a noticeable transition from simple formal equality to a more comprehensive understanding of substantive equality, which encompasses the equality principle's various dimensions. Substantive equality, on one side, aims to address historical injustices and challenge stereotypes, stigma, and biases, while on the other side, it examines whether a law or policy is intrinsically discriminatory. The second principle is applicable when there are flaws in the objective's legality and it appears manifestly arbitrary.[38] Elaborating further it was held that Substantive equality is achieved when laws or policies genuinely aim to and create an equal opportunity to meet the criteria for accessing a specific social or economic benefit. It honours individual dignity, which includes three elements: (i) a sense of self-esteem, (ii) safeguarding the fundamental choices an individual makes, and (iii) shielding individuals from damaging stereotypes. Finally, substantive equality is realized when laws or policies promote participation and representation, combating both political and socio-economic marginalisation. Similarly, the concept of manifest arbitrariness was promoted by Justice RF Nariman in Shayara Bano v. Union of India where it was observed that, for something to be considered manifestly arbitrary, the legislature must behave irrationally, capriciously, or without a strong enough guiding basis. Additionally, such regulation would be arbitrary if an action is judged

[35] Ibid.
[36] *State of Andhra Pradesh & Ors v. Dr Rao, V.B.J Chelikani & Ors* 2024 INSC 894.
[37] *A. L. KALRA vs. THE PROJECT & EQUIPMENT CORPORATION OF INDIA LIMITED* [1984] 3 S.C.R. 646.
[38] *Dr Rao,* [59].

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to be excessive and disproportionate. As a result, we think that, as we have explained, the idea of apparent arbitrariness also renders laws unconstitutional under Article 14. After analysing Shayara Bano and Joseph Shine, the SC in Association for Democratic Reforms (ADR) v. Union of India[39], observed that courts must decide whether a statute is erratic, absurd, and lacking a suitable identifying principle, or whether it is excessive and disproportionate when evaluating its validity based on manifest arbitrariness. Therefore, if a provision's intent is at odds with the lawful ideals of the Constitution, it lacks an "adequate determining principle."

In Sukanya Shantha v Union Ors[40], it was finally summarised that "*The constitutional standards laid down by the Court under Article 14 can be summarized as follows. First, the Constitution permits classification if there is intelligible differentia and reasonable nexus with the object sought. Second, the classification test cannot be merely applied as a mathematical formula to reach a conclusion. A challenge under Article 14 has to take into account the substantive content of equality which mandates fair treatment of an individual. Third, in undertaking classification, legislation or subordinate legislation cannot be manifestly arbitrary, i.e. courts must adjudicate whether the legislature or executive acted capriciously, irrationally and/or without adequate determining principle, or did something excessive and disproportionate. In applying this constitutional standard, courts must identify the "real purpose" of the statute rather than the "ostensible purpose" presented by the State, as summarized in ADR. Fourth, a provision can be found manifestly arbitrary even if it does not make a classification. Fifth, different constitutional standards have to be applied when testing the validity of legislation as compared to subordinate legislation*".[41]

From the above discussion, it is clear that a law can be struck down based on a reasonable classification test or if it is manifestly arbitrary violating the principles of substantive equality. In 2021 few members working for an NGO that deals with matters like violence against women conducted a study after perusing service records like medicolegal forms and counselling data of the women who faced domestic violence including marital rape for analysing the effects of sexual violence on the health of a married woman in an intimate partner relationship. The study concluded that physical injuries, "reproductive health problems like abortion, miscarriage, RTIs, and prolapse of the uterus" including mental health problems like attempted suicides, nervousness, tension, and anxiety are the most common consequences of sexual violence

[39] *Association for Democratic Reforms and Another v Union of India and Others* [2024] INSC 209 (SC) 21.
[40] *Sukanya Shantha v. Union of India & Ors* 2024 INSC 753 [34].
[41] Ibid.

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committed within the four walls of a home[42]. Bennice after studying various studies conducted on the ill effects of sexual violence in intimate partner relationships highlighted the fact that married women are prone to experience severe health consequences, such women experiences "vaginal pain, described anal or vaginal stretching, bladder infection, vaginal bleeding, anal bleeding, infertility"[43]. In addition, Women's risk of contracting STIs was considerably raised by domestic abuse[44]. Married women are often forced to have unprotected sex because of socially accepted gender standards that justify controlling the sexuality of women which leads to women getting sexually transmitted diseases like HIV/AIDS[45]. Women who have been raped by intimate partners may struggle more with trust and intimacy. [46] These results strengthen the argument that marital rape is a traumatic event that causes serious emotional, mental, and physiological problems for its victims.[47] Therefore, claiming that outrage/agony felt by a married woman if raped by a stranger or a husband is different and discrete which creates reasonable classification under A.14 (as observed by Justice Harishankar)[48] is untenable and bogus. The nature of the Indian constitution is fundamentally individualistic. It always gives primacy to the dignity and rights of individuals over social institutions like the institution of marriage. This argument can be substantiated by the words used in the articles dealing with fundamental rights, eg, Article 14 guarantees that every person is afforded equal treatment under the law and enjoys the same legal rights, while A.21 protects the life and individual liberty of "each person."

In Francis Coralie Mullin v. Administrator Union Territory of Delhi[49] While highlighting the meaning of the right to life the Court observed that any action that offends or undermines human dignity represents the fundamental essence of the human self. Such actions would amount to a deprivation, albeit partial, of the right to life, and must be subjected to a reasonable, fair, and just legal procedure that aligns with other basic rights. Any form of torture or cruel, inhumane, or degrading treatment is offensive to human dignity and infringes upon the right to life; thus, it should be prohibited by A.21 unless carried out by a legal procedure. However, no law permitting such torture or degrading treatment and no procedure resulting in such actions

[42] Padma-Bhate Deosthali, Sangeeta Rege, and Sanjida Arora, 'Women's Experiences of Marital Rape and Sexual Violence within Marriage in India: Evidence from Service Records' (2022) 29(2) *Sexual and Reproductive Health Matters* 2048455,31.
[43] *Bennice and Resick*, 237.
[44] Shewli Shabnam, 'Sexually Transmitted Infections and Spousal Violence: The Experience of Married Women in India' (2017) 24(1) *Indian Journal of Gender Studies* 24.
[45] Ibid, 40.
[46] *Bennice and Resick,* 238.
[47] Ibid.
[48] *Hrishikesh Sahoo v State of Karnataka* [2022] LiveLaw (Kar) 89, 106.
[49] (1981) 1 SCC 608.

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can ever meet the standards of reasonableness and non-arbitrariness; therefore, it would unequivocally be unconstitutional and invalid for violating Articles 14 and 21.

S.63 of BNS, focuses on defending the individual rights of a woman by defining rape as an offence that lacks consent. Exonerating husbands from the punishment for raping their wives creates an unfair distinction that goes against the objective that S.375 of IPC wants to achieve. The principle of equality before the law stands violated because of this exception, S.63 of BNS punishes rape irrespective of the fact that the victim is known or unknown to the perpetrator, this makes the MRE obstructive.

On the other hand, the MRE provides married women with unequal legal protection by creating an arbitrary distinction between married and unmarried women, which fundamentally contradicts the principle of substantive equality. As highlighted by the Supreme Court in judgments like Shayara Bano v. Union of India, substantive equality requires laws to address existing structural and social inequalities rather than merely offering formal equality. This exception strips married women of their rights to bodily autonomy and dignity while reinforcing patriarchal notions of marriage by shielding husbands from being charged with rape. Moreover, any legislation that is unreasonable, unfair, or arbitrary should be repealed, based on the concept of manifestly arbitrariness as recognized in Shayara Bano. The exception for marital rape is unjust, as it is based on antiquated and prejudiced notions regarding conjugal rights, and it essentially strips married women of the same legal protections afforded to others. This provision is illegal because it contravenes the rights guaranteed by Article 14 of the Indian Constitution.

POWER OF SUPREME COURT TO STRIKE DOWN EXCEPTION II TO S.63 OF BNS.

We know that because of exception II to S.63 of BNS husband can't be held guilty under the offence of rape, however, recent trends have shown that various High Courts are not only acquitting husbands against the charges of S.375 of IPC but they are also hesitant in making them liable under S.377[50] (unnatural sex) of IPC the reasoning relied on these High Courts is that after the amendment of 2013, all the acts of unnatural sex have been covered under S.375 of IPC and S.375 grants special immunity to the husbands. As a result, there is a repugnancy between S.375 and S.377. By applying the doctrine of implied repeal, according to which the later Act shall prevail over the previous one. Therefore, S.377 will not be applicable as an

[50] Indian Penal Code 1860, s 377.

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amendment to S.375 was inserted in 2013. This reasoning has been acknowledged by various HCs including the Madhya Pradesh HC recently in the case of Shamgarh Thana district Mandasaur v. Shri HS Rathore[51], by Chhattisgarh High Court in Gorakhnth Sharma S/o Devcharan Sharma v. State of Chhattisgarh Through Station House Officer, Police Station Bodhghat[52], by Uttarakhand High Court in Dr Kirti Bhushan Mishra v, State of Uttarakhand & Ors.[53] Uttarakhand HC observed that "*If an act between husband and wife is not punishable due to operation of exception II to Section 375 IPC, the same act may not be an offence under Section 377 IPC*"., MP High Court in Umang Singhar, S/O. Mr. Dayaram v. Victim X W/O. Umang Singhar.[54]

This was the case before the implementation of BNS. However, things have become more complicated from July 1, 2024, as the offence of unnatural sex has not been retained in BNS of 2023, which means that hope for an alternative remedy to the offence of marital rape is also thrown out of the box. The non-retention of S.377 is fatal for women who are victims of marital rape and unnatural sex within marriage. In 2024 Delhi High Court directed the Centre to consider the inclusion of S.377 equivalent in BNS and the Centre responded that the matter was under consideration[55]. Now during this time of uncertainty, the Supreme Court of India is the only institution that can provide remedy to married women through the power of judicial review. It is appropriate that the Constitution of India has demarcated the boundaries between different branches of government, and this demarcation is popularly known as the Separation of Power. According to this doctrine, the primary duty of the legislature is to make laws, the executive must implement laws and the judiciary is tasked with the interpretation of the law. The additional power available to the judiciary is that it can declare laws against constitutional values as ultra vires, which is popularly known as judicial review. The argument given by Justice Harishankar and Hrishikesh case that the task of the legislature to frame the law and it is not within their domain to frame policy matters is not a substantial one the reason being counsel appearing against the exception never asked the constitutional courts to legislate or to draft a law dealing with the offence of marital rape. The only issue that needed to be considered

[51] *Shashank Harsh and Others v State of Madhya Pradesh and Another* [2024] MCRC No 40044 (MPHC) https://mphc.gov.in/upload/indore/MPHCIND/2023/MCRC/40044/MCRC_40044_2023_FinalOrder_28-May-2024_digi.pdf.

[52] *Gorakhnth Sharma S/o Devcharan Sharma v. State of Chhattisgarh Through Station House Officer, Police Station Bodhghat* 2025:CGHC:7365.

[53] *Kirti Bhushan Mishra vs. State of Uttarakhand and Ors.* (19.07.2024 - UCHC): MANU/UC/0258/2024.

[54] *Umang Singhar v. State of Madhya Pradesh* 2023 SCC online MP 3221.

[55] Sohini Ghosh, 'Delhi HC directs Centre to consider inclusion of Section 377 equivalent in BNS' (*The Indian Express*, 29 August 2024) https://indianexpress.com/article/cities/delhi/delhi-hc-centre-section-377-bns-9016202/ accessed 14 April 2025.

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was whether exceptions to S.375 of IPC violate fundamental rights given under part III of the Constitution. The Constitutional Courts can very well adjudicate this issue.

According to A.13(1)[56] any law that was in effect before the enactment of the constitution that conflicts with fundamental rights given under part III is null and void. The Supreme Court of India possesses the constitutional power to eliminate the MRE within the BNS by utilising its authority under A.13 of the Constitution. In a like manner, Article 13(2)[57] prohibits the government from enacting laws that limit or abolish fundamental rights; any such legislation will be rendered void to the extent of its inconsistency.

Judge Ahmadi noted in the case of L Chandra Kumar that judges have been empowered to interpret the Constitution to maintain its supremacy. A Court has the jurisdiction to declare a statute, order, or public authority action to be a violation of the constitution if it conflicts with the country's Constitution. Additionally, Justice Ahmadi stated that studying the concept of judicial review is akin to studying the Constitution.[58]

The Supreme Court emphasized the significance of judicial review in the Indian constitution in the Minerva Mills case[59]. It was observed that without the power of judicial review, our constitutional system could not operate; without it, the rule of law would merely be an alluring ideal that would never come to pass, and there would be no Government of laws. The power of judicial review is one feature of our Constitution that is especially crucial to maintaining democracy and the rule of law.

These were some of the illustrative judicial precedents where the importance of the judicial review power of the Supreme Court was highlighted. But now the question arises as to why the SC is a better institution to adjudicate upon the rights of a married woman in this particular case rather than the legislature. Ronald Dworkin can assist us in finding out the answer to this question. Ronald Dworkin in one of his famous seminal works ie. “Rights and Democracy”[60] countered various arguments against right-based adjudication by the judges. He critiques the idea that “it is undemocratic for the unelected judges to decide on the issue of individual rights”. He argues that sometimes courts are the better institution to decide such cases and it's not against the principles of democracy. People argue that the legislature is more legitimate in deciding rights as they are elected by popular will. However, according to Dworkin, this assumption is not correct, determining a person's rights frequently requires using sophisticated

[56] Constitution of India, art 13(1).
[57] Art 13(2).
[58] *L. Chandra Kumar v. Union of India and Others* 1997 (3) SCC 261.
[59] *Minerva Mills Ltd. & Ors vs Union Of India & Ors* 1980 AIR 1789.
[60] Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 22–28.

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reasoning, such as putting oneself in difficult, hypothetical circumstances, compared to politicians or voters, judges are typically more trained for such type of critical thinking. Dworkin claims that democracy is not always about elections and the rule of majority, it's also about protecting the individual rights of the citizens equally. Parliamentarians are often considerate of the political incentives and appeasement of the majority in doing so they often compromise the rights of minorities. On the other hand, the judiciary is more focused on the principles of justice and judges are insulated from political pressures as they have fixed tenures. Critique claims that people might lose respect for the law if judges make political decisions, especially controversial ones which may destabilise society. Dworkin did not support this argument as there is no evidentiary proof of this. Critiques claim that people usually accept laws made by the legislature rather than judge-made laws, Dworkin claims that people are not usually concerned about how the decision was made but about the content of the decision. Moreover, the public is likely to accept the notion that court decisions based on rights are democratic if jurists, judges, and other institutions back it. Critiques claim that if the decisions regarding rights are taken by the courts it would remove the power from elected lawmakers and it will lead to the weakening of political power vested in the citizens. However, Dworkin argues that it is a mistaken belief that everyone has equal political power in a democracy, in reality, wealthy corporate houses, and political lobbies have more influence over the legislature. Therefore, People can demand justice, not simply political compromise, in the principled venue that courts offer. Even in cases where upholding individual rights is politically unpopular, courts are frequently more inclined to do so.

The above-summarised framework aptly justifies why the Supreme Court of India should decide the controversy associated with the issue of marital rape. Dworkin points out that the constitutional rights of minorities cannot be protected by a legislature ruled by the majority, especially when the interests of minorities are in direct conflict with those of the majority. The Parliament of India is predominantly male most of which belong to the upper caste, out of 542 members in Lok Sabha only 78 are females, similarly, in Rajya Sabha out of 224 only 24 are females[61]. Marital rape penalises the conduct of a man in marriage, the very group that represents the people in a majority of numbers in the Parliament.

The Indian Parliament has several times clarified its intention of not criminalising the offence of marital rape. This can be evident from the affidavit filed by the union in the Supreme Court,

[61] Ministry of Parliamentary Affairs, *Information regarding Global Gender Gap Index (GGGI) and Gender Inequality Index (GII)* (Government of India) https://www.mpa.gov.in/sites/default/files/Women%20in%20Parliament_0.pdf accessed 14 April 2025.

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the statement given by Maneka Gandhi in the Parliament in 2015, ignoring the recommendation made by Justice JS Verma Committee and the refusal to acknowledge international human rights obligation etc. Infirmity in dealing with such issues is not based upon moral principles but rather influenced by the politics of vote banks. Parliament is concerned about the backlash they might face from the male-dominated society. Therefore, the SC of India is better positioned to adjudicate this matter as they are isolated from the politics of the vote bank, and judges are better trained and equipped with hypothetical analysis, moral coherence, and constitutional reasoning.

Women in India face massive structural disabilities. As highlighted by Dworkin political power is hardly equally distributed in a democracy, a democracy is not only about elections but also about the protection of the rights of citizens. The Courts can play a crucial role in eliminating inequalities. Courts offer a forum of principles where married women can ask for the enforcement of their constitutional rights. Therefore, by making A.14 and 21 the basis for invalidating the MRE Supreme Court can restore the political power balance and advance substantive democracy.

Dworkin challenges the idea that if courts adjudicate the controversial right-based issue associated with the political and moral pronouncement they might face backlash and citizens may lose respect for the judicial institution. According to him, public discourse is momentary, people may not be happy with the court ruling but still follow the same, Courts often play a normative role in shaping public morality and constitutional culture. If the Supreme Court strikes down MRE it might face resistance from conservative religious groups and can provoke debates regarding the legitimacy of the Court's decision. However, historical experiences show these are exaggerated conclusions. There are ample numbers of cases where similar concerns were anticipated but nothing substantial happened that could have destabilised the legal system. Examples are Navtej Singh Johar v. Union of India, Joseph Shine v. Union of India, Sabarimala Temple Entry Case, Shayara Bano v. Union of India etc. Therefore, by reaffirming that all women are complete citizens, including inside marriage, the Court will gain respect rather than lose it if it strikes down MRE.

The Supreme Court can declare the marital rape exception as unconstitutional and strike it down, as it violates basic rights like A.14 (right to equality), and A.21 (right to life and personal liberty). The marital rape exception is based on the antiquated idea of coverture, which held that a wife had no separate legal position from her husband. The Supreme Court can grant equal protection from sexual abuse to all women, irrespective of their marital status, and delete obsolete and discriminatory laws from the statute books through its power of Judicial Review.

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MRE is a concept that does not fit well with the present constitutionally established values of dignity, autonomy, and equality.

CONCLUSION

In a society that appreciates and promotes democratic values and governance through constitutional law, the tenacious acceptance of the MRE tresses the ideals of justice and equality. A marriage is a collaborative relationship based on shared respect, agreement, and parity, with both individuals enjoying equal rights and obligations. The argument that the removal of MRE would jeopardise the integrity of marriage is irrational from an ethical and legal standpoint. Any social or legal framework that upsets this balance alters the essential characteristics of a just and peaceful union. The persistence of the MRE in Indian penal laws is a glaring example of the deeply-seated patriarchal and stereotyped ideas that continue to shape Indian society and the law. Maintaining this exception allows gender-based violence to continue unchecked and undermines the fundamental principles of justice and moral integrity that our constitution stands for. At its core, the MRE prima faciely violates Articles 14 and 21 of the Indian Constitution. The guarantee of equality before the law under A.14 becomes valueless when a married woman is deprived of the same protection from sexual violence as an unmarried woman. Legal discrimination on this basis is in direct contradiction to the constitutional guarantee of equal protection and non-arbitrariness. Similarly, the Supreme Court, in its evolving jurisprudence, has repeatedly underlined that human dignity and bodily autonomy are essential elements of the right to life and personal liberty under A.21 of the Constitution. By safeguarding MRE, the judiciary sanctions a grave invasion of a woman's bodily integrity, hence undermining the constitutional guarantees of fundamental rights. The responsibility to safeguard the Constitution of India is entrusted to the Supreme Court of India. As the guardian of the Constitution, the Supreme Court must protect fundamental rights and eliminate draconian laws that conflict with the principles enshrined in the Constitution. From legalising same-sex relationships to decriminalising adultery the Supreme Court of India has played a vital role in doing a progressive interpretation of the Constitution. Similarly, it is high time to exercise its power of judicial review to declare the MRE as unconstitutional for being violative of various fundamental rights given under part III of the Constitution. The MRE does not serve any purpose in a democratic nation that is obliged to achieve gender justice based on constitutional principles. Therefore, the removal of the MRE is a moral obligation upon the State to pave the way for a more just and equitable society.