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MARITAL RAPE IN INDIA: A CRITICAL ANALYSIS OF THE LEGAL VACUUM AND THE CASE FOR STATUTORY RECOGNITION

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ABSTRACT

Marital rape, the act of non-consensual sexual intercourse perpetrated by a husband upon his wife, remains one of the most glaring lacunae in Indian criminal jurisprudence. Despite sweeping reforms in sexual offence law following the 2012 Nirbhaya case, Exception 2 to Section 375 of the Indian Penal Code 1860 continues to immunise husbands from prosecution for raping their wives. The persistence of this exemption is a relic of the Hale doctrine, a colonial-era common law fiction grounded in the now-discredited premise of implied perpetual matrimonial consent. This paper critically examines the historical origins of the marital rape exception, maps its constitutional infirmities against Articles 14, 19, and 21 of the Constitution of India, and engages with the principal arguments, cultural, social, and institutional, marshalled by its defenders. It further surveys comparative jurisdictions where the exemption has been abolished, evaluates the inadequacy of existing statutory protections such as the Protection of Women from Domestic Violence Act 2005, and argues that independent criminalisation through a specific provision is both constitutionally mandated and socially imperative. The paper concludes with a framework for legislative reform.

KEYWORDS: Marital *rape; Exception 2 to Section 375 IPC; Hale doctrine; Article 21; conjugal immunity; criminalisation; Bharatiya Nyaya Sanhita 2023.*

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I. INTRODUCTION

The Indian Penal Code 1860 ('IPC'), enacted under colonial rule, defines rape in Section 375 and simultaneously carves out a spousal exception that shields a husband from criminal liability when he has non-consensual intercourse with his wife, provided she is not below fifteen years of age.[1] This exception, unreformed through successive legislative overhauls, most notably the Criminal Law (Amendment) Act 2013, has been the subject of robust academic, judicial, and policy debate for over three decades.

The stakes of this debate extend well beyond legal taxonomy. Marital rape is a form of intimate partner violence that causes profound psychological trauma, perpetuates cycles of domestic abuse, and instrumentalises the institution of marriage to deny women bodily autonomy. The Law Commission of India acknowledged as early as 2000 that the spousal exemption was constitutionally questionable[2] , yet Parliament has refrained from codifying its abolition. The Supreme Court, in landmark decisions expanding the scope of Article 21[3], has progressively elaborated a constitutional right to a life of dignity that logically encompasses protection from spousal sexual violence; yet the specific provision endures.

This paper proceeds in six substantive parts. Part II traces the historical and jurisprudential genesis of the marital rape exception. Part III examines the constitutional challenge to the exception. Part IV evaluates the existing statutory protections and their limitations. Part V engages with the principal counter-arguments and offers a critical rebuttal. Part VI surveys comparative experiences. Part VII proposes a legislative framework. Part VIII concludes.

II. HISTORICAL AND JURISPRUDENTIAL GENESIS OF THE EXCEPTION

The intellectual ancestry of the marital rape exception is traceable to the 1736 treatise of Sir Matthew Hale, who opined that a husband cannot be guilty of rape committed upon his lawful wife, for by their mutual matrimonial consent and contract the wife had given herself irrevocably to her husband.[4] This pronouncement, never subject to appellate adjudication when Hale made it, crystallised into common law orthodoxy throughout the British Empire and was

[1]Exception to s 375 IPC 1860: "sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape."
[2]Law Commission of India, *Review of Rape Laws* (Report No 172, 2000) para 3.2.
[3]Maneka Gandhi v Union of India AIR 1978 SC 597.
[4]Matthew Hale, *History of the Pleas of the Crown* (1st edn, 1736) vol 1, 629.

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transplanted wholesale into the IPC.

Feminist legal scholars have long exposed the gendered ideology underlying this doctrine. Susan Estrich observed that the marital rape exception is the clearest example of how rape law has been shaped not to protect women but to preserve male dominance within the institution of marriage.[5] Jill Hasday, in a seminal historical account, demonstrated that the exception was never the product of judicial deliberation but was instead a policy preference disguised as common law that reflected Victorian notions of coverture and the legal subordination of married women.[6]

The English common law from which the exception derived was itself repudiated in England in 1991, when the House of Lords in *R v R* held that marital rape was a criminal offence and that Hale's statement had never represented good law.[7] The European Court of Human Rights subsequently affirmed the compatibility of this decision with the principle against retroactive criminalisation in *SW v United Kingdom*.[8] India, however, retained the exception through the IPC[9] and, controversially, through the Criminal Law (Amendment) Act 2013.[10]

The Justice JS Verma Committee, constituted in the immediate aftermath of the 2012 gang rape in Delhi, expressly recommended the deletion of the marital rape exception, noting that marriage should not be construed as providing authority to the husband to have sexual intercourse with his wife without her consent.[11] The Committee further emphasised that the exception was inconsistent with the fundamental rights jurisprudence of the Supreme Court.[12] The legislature, bowing to conservative lobbying, declined to implement this recommendation, a legislative abdication that this paper contends is both untenable and unconstitutional.

[5]Susan Estrich, *Real Rape* (Harvard University Press 1987) 8.
[6]Jill Hasday, "Contest and Consent: A Legal History of Marital Rape" (2000) 88 Cal L Rev 1373, 1375.
[7]*R v R* [1991] 4 All ER 481 (HL).
[8]SW v United Kingdom (1995) 21 EHRR 363.
[9]Indian Penal Code 1860, s 375, Exception 2 (prior to the Criminal Law (Amendment) Act 2013).
[10]Criminal Law (Amendment) Act 2013.
[11]Justice JS Verma Committee, *Report of the Committee on Amendments to Criminal Law* (January 2013) 110–114.
[12]ibid 114.

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III. THE CONSTITUTIONAL CHALLENGE TO THE MARITAL RAPE EXCEPTION

A. Article 14: The Right to Equality

Article 14 of the Constitution guarantees equality before the law and the equal protection of the laws.[13] The marital rape exception violates Article 14 on two distinct grounds. First, it creates an irrational classification between married and unmarried women with respect to the protection of the law against sexual assault. A woman who is raped by a stranger enjoys the full protection of the criminal law; a woman who is raped by her husband is denied that protection. There is no intelligible differentia between these two classes of victims that bears a reasonable nexus to the object of the law, which must be to protect bodily integrity. The difference in the identity of the perpetrator cannot rationally diminish the severity of the harm suffered by the victim.

Second, the exception discriminates on the basis of marital status, a ground that, while not explicitly enumerated in Article 15, has been read by the Supreme Court into the broader guarantee of equality. In *Independent Thought v Union of India*, the Supreme Court struck down the sub-exception that excluded wives between fifteen and eighteen years of age from the protection of Section 375, holding that the differentiation was arbitrary and violated Articles 14 and 21.[14] Justice Madan B Lokur, speaking for the Court, reasoned that a married girl child has the same rights as an unmarried girl child with respect to bodily integrity and sexual autonomy.[15] The logical corollary of this reasoning , which the Court did not explicitly address , is that the same conclusion must apply to adult married women.

B. Article 21: The Right to Life and Personal Liberty

Article 21 guarantees the right to life and personal liberty.[16] The Supreme Court has consistently held that this right encompasses a right to live with dignity. In *Puttaswamy v Union of India*, a nine-judge bench unanimously recognised privacy as a fundamental right under Article 21 and held that bodily integrity and personal autonomy are inalienable components of that right.[17] Justice DY Chandrachud, in his concurring opinion, explicitly noted that the right to privacy includes the right of a woman to make reproductive choices and to be free from any

[13]Constitution of India, art 14.
[14]Independent Thought v Union of India (2017) 10 SCC 800.
[15]ibid [135].
[16]Constitution of India, art 21.
[17]Puttaswamy v Union of India (2017) 10 SCC 1.

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form of coercion in respect of her sexual life.[18]

The marital rape exception is incompatible with the right to privacy so understood. By denying a wife the right to refuse consent to sexual intercourse within marriage, the exception instrumentalises the body of the wife as property of the husband, a conception of personhood that the Constitution categorically rejects. The relational context of marriage does not, and cannot, extinguish the constitutional subjectivity of the wife. As the Supreme Court observed in *Navtej Singh Johar v Union of India*, constitutional morality must prevail over social morality when the two are in conflict, and the dignity of the individual cannot be held hostage to majoritarian convention.[19]

C. Article 19(1)(a) and the Right to Sexual Autonomy

Article 19(1)(a) guarantees freedom of speech and expression.[20] While not immediately apparent, this right has been interpreted by the Supreme Court to include the right of an individual to make personal choices regarding her own body and expression of sexuality. In *Vishakha v State of Rajasthan*, the Court recognised that sexual harassment at the workplace constituted a violation of the fundamental right to dignity and expression.[21] The Court has further held that every woman has the right to sexual privacy and that this right is actionable against violation by any person, including a spouse.[22]

The marital rape exception, by restricting the wife's right to refuse and denying her a remedy in criminal law, constitutes a structural violation of this constitutionally protected sphere of autonomy. The Delhi High Court in *RIT Foundation v Union of India* has been examining this constitutional challenge since 2015[23], and the outcome of those proceedings is awaited with considerable judicial and scholarly attention.

IV. EXISTING LEGAL FRAMEWORK AND ITS INADEQUACIES

Defenders of the status quo sometimes argue that marital rape victims are not without legal recourse, pointing to the Protection of Women from Domestic Violence Act 2005 ('PWDVA')[24] as providing adequate redress. This argument, while superficially plausible, fails upon critical scrutiny.

[18]ibid [144] (Chandrachud J).
[19]Navtej Singh Johar v Union of India (2018) 10 SCC 1.
[20]Constitution of India, art 19(1)(a).
[21]Vishakha v State of Rajasthan AIR 1997 SC 3011.
[22]State of Maharashtra v Madhkar Narayan (1991) 1 SCC 57, 62.
[23]RIT Foundation v Union of India W.P. (C) 284/2015 (Delhi HC, pending).
[24]Protection of Women from Domestic Violence Act 2005.

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The PWDVA classifies sexual abuse within marriage as a form of domestic violence and enables a victim to obtain protection orders, residence orders, and monetary relief. However, it is fundamentally a civil statute: it does not criminalise the act of marital rape as a cognisable offence, does not provide for the prosecution and conviction of the perpetrator for the act of rape itself, and does not impose a custodial sentence. The inadequacy of civil remedies in the context of violent sexual crime is well-recognised in comparative jurisprudence: civil protection orders are inherently inadequate to signal the gravity of sexual violence, deter potential perpetrators, or vindicate the dignity of victims.

The Bharatiya Nyaya Sanhita 2023 ('BNS'), which replaced the IPC with effect from 1 July 2024, has replicated the marital rape exception in Section 63, Exception 2, without substantive modification.[25] This was a missed legislative opportunity of considerable magnitude. The BNS, despite introducing several progressive provisions in criminal law, has perpetuated a colonial anachronism that is inconsistent with the constitutional framework articulated by the Supreme Court.

The Protection of Children from Sexual Offences Act 2012 ('POCSO')[26] criminalises sexual offences against minors irrespective of the relationship between the perpetrator and the victim. The anomaly that arises is stark: a husband who commits a sexual act upon a minor wife is liable under POCSO, while the same act committed upon an adult wife attracts no criminal liability under the BNS. The discriminatory treatment of adult married women relative to girl children in the context of spousal sexual violence represents a profound constitutional contradiction that the legislature has yet to address.

V. CRITIQUING THE COUNTER-ARGUMENTS

A. The 'Misuse of Law' Argument

A commonly advanced argument against criminalisation is that it would provide women with a potent weapon to harass innocent husbands through false complaints. This argument is analytically weak for several reasons. First, all criminal statutes carry the risk of false complaints: this risk does not justify the non-criminalisation of the underlying conduct. Second, the argument stereotypes married women as inherently manipulative, a gendered assumption that would not be accepted in any other context of criminal law reform. Third, existing

[25]Bharatiya Nyaya Sanhita 2023, s 63, Exception 2.
[26]Protection of Children from Sexual Offences Act 2012.

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safeguards within the criminal justice system, including the standard of proof beyond reasonable doubt, the right of the accused to cross-examine, and judicial scrutiny of evidence, are adequate to guard against false prosecutions. The Supreme Court has repeatedly warned against using the possibility of misuse as a justification for retaining unconstitutional provisions.

B. The 'Sanctity of Marriage' Argument

A second argument holds that criminalisation would destabilise marriage as an institution by enabling wives to weaponize criminal law against husbands for what are essentially domestic disputes. This argument confuses sexual violence with marital discord. Rape, regardless of the relational context, is a serious violent crime. The sanctity of marriage as a social institution cannot be invoked to immunise one spouse from criminal liability for perpetrating sexual violence upon the other. As the Supreme Court held in *Shayara Bano v Union of India*, no personal law or cultural practice can override fundamental rights.[27] Marriage confers rights but cannot be weaponised to extinguish the constitutional personhood of the wife.

C. The 'Legislative Competence' Argument

A third argument concedes the moral case for criminalisation but insists that it is a matter of legislative policy that courts should not judicially mandate. This argument is partially correct but ultimately insufficient. While the appropriate mode of reform is legislative, the constitutional infirmity of the existing exception does fall within the judicial review jurisdiction of the Supreme Court under Articles 32 and 226. The Court has on several occasions read down or struck down provisions of the IPC that violated fundamental rights, most recently in *Navtej Singh Johar*[28] , and there is no principled reason why the marital rape exception should be insulated from such review.

VI. COMPARATIVE PERSPECTIVES

The international trajectory is unambiguous: the marital rape exception has been progressively abolished across jurisdictions. South Africa criminalised marital rape in 1993.[29] Australia and Scotland have enacted comprehensive statutory provisions that recognise the non-existence of any implied consent arising from the marital relationship.[30] The United States, through a

[27]Shayara Bano v Union of India (2017) 9 SCC 1.
[29]Marital Rape Exemption Abolition Act (South Africa) 1993.
[30]Crimes Act 1958 (Victoria), s 36; Sexual Offences (Scotland) Act 2009, s 1.

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combination of federal and state legislation, criminalised marital rape in all fifty states by 1993. At the international normative level, the CEDAW Committee has in its General Recommendation No 35 expressly called upon State Parties to repeal all laws that exempt perpetrators of sexual violence from criminal prosecution when they are or were in a marital or other intimate relationship with the victim.[31] The Beijing Declaration and Platform for Action similarly identifies the elimination of marital rape as a component of the right to equality and freedom from violence.[32] India, as a signatory to CEDAW and a participant in the Beijing process, has assumed binding treaty obligations that the retention of the marital rape exception violates.

The experience of these jurisdictions demonstrates that criminalisation does not result in an avalanche of false prosecutions or the breakdown of marriage as a social institution. Instead, it sends a clear normative signal that consent is a universal prerequisite for sexual intercourse, inside and outside marriage, and that the state will not countenance sexual violence regardless of the relational identity of the perpetrator.

VII. A FRAMEWORK FOR LEGISLATIVE REFORM

This paper proposes the following legislative reform framework as a minimum response to the constitutional and normative imperatives identified above.

First, Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita 2023 should be deleted. The deletion should be unconditional and should not be replaced by a diluted offence of 'marital sexual assault' that attracts lesser punishment than rape, as has been mooted in some policy circles. The conduct constitutes rape as defined and should be punished accordingly.

Second, a specific provision should be inserted into the BNS clarifying that the existence of a marriage between the accused and the complainant is not a defence to a charge of rape and does not give rise to any presumption of consent. This provision would align the BNS with the POCSO framework and with the evidentiary principles established in *Sakshi v Union of India*.[33] Third, the procedural framework governing the investigation and prosecution of marital rape should be sensitised. This includes mandatory training of police and prosecutors on the

[31]UN Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendation No 35 (2017) para 29(c).
[32]Beijing Declaration and Platform for Action (1995) para 113.
[33]Sakshi v Union of India AIR 2004 SC 3566.

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dynamics of intimate partner sexual violence, provision for in-camera trials, and the appointment of victim support officers in district courts.

Fourth, the PWDVA should be amended to treat the commission of marital rape as a predicate offence that entitles the victim to protection orders, custody orders, and compensation as a matter of course, without requiring a separate civil application.

The Law Commission of India has previously recommended reform of family law to address systemic inequities faced by women within marriage.[34] The present reform proposal is consonant with that broader agenda and reinforces the constitutional commitment to substantive equality.

VIII. CONCLUSION

The marital rape exception is a relic of a legal order premised upon the subordination of women, the institution of marriage as a site of immunity from criminal law, and the fiction of irrevocable matrimonial consent. Each of these premises has been repudiated, by comparative jurisprudence, by the constitutional text and its authoritative interpretation, and by the empirical evidence of the harm that marital rape inflicts on its victims. The NFHS-5 data reveal that approximately 6.3% of ever-married women in India have experienced spousal sexual violence[35], with significant regional variation[36]; yet the NCRB does not separately enumerate marital rape as a cognisable offence[37] , a data lacuna that is itself a product of the legal lacuna this paper critiques.

The criminalisation of marital rape is not an assault upon marriage: it is an insistence that marriage be constituted upon consent rather than coercion. It is the logical extension of the constitutional guarantee of equality, the right to privacy, and the right to a life of dignity. The Bharatiya Nyaya Sanhita 2023, in replicating the exception[38], has failed this constitutional test. Legislative reform, ideally preceded by an authoritative constitutional determination from the Supreme Court, is urgently required. Until that reform is enacted, every married woman in

[34]Law Commission of India, *Consultation Paper on Reform of Family Law* (August 2018) 120.
[35]National Family Health Survey-5 (NFHS-5) 2019–21, Ministry of Health and Family Welfare, Government of India (2022) 74.
[36]NFHS-5 (n 27) 76.
[37]National Crime Records Bureau, *Crime in India 2022* (Ministry of Home Affairs 2023) Table 3A.1.
[38]Bharatiya Nyaya Sanhita 2023 (n 25).

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India who is subjected to non-consensual sexual intercourse by her husband inhabits a legal vacuum in which the state, through its deliberate inaction, is complicit in her victimisation.

The abolition of the marital rape exception is not a matter of legal luxury: it is a constitutional necessity and a human rights imperative.