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“MARITAL RAPE IN INDIA: A NEED FOR CRIMINALIZATION OR REFORM”

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APRIL - 2026



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I certify that the Research work entitled “**MARITAL RAPE IN INDIA: A NEED FOR CRIMINALIZATION OR REFORM**” submitted for the degree of **LL.B** by **MIR FAIZAN ALI (Reg. No. 23122141)** is the record of research work carried out by him/her under the guidance **Mrs. Bhuvaneshwari**, Assistant Professor has not formed the basis or the award of Degree, Diploma, Associateship, Fellowship, Titles in this University or any other similar University and institutions of Higher Learning.

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Date: April 2026

**Signature of
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I express my heartfelt appreciation to my research supervisor, **Mrs. Bhuvaneshwari**, whose scholarly acumen, meticulous guidance, and constructive criticism have been invaluable in shaping this research. Her insights into the nuances of human rights law and constitutional jurisprudence have greatly enriched the quality of this work.

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Finally, I dedicate this work to all those who suffer in silence within the walls of prisons and detention centres, deprived of their basic human dignity. It is my sincere hope that this research contributes, however modestly, to the ongoing discourse on prison reform and human rights protection in India.

Place: Chennai

Date: April 2026

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LIST OF ABBREVIATIONS

S.NO	ABBREVIATIONS	EXPANSION
1.	AIR	All India Reporter
2.	Art.	Article
3.	BA. LL.B	Bachelor of Laws
4.	BNS	Bhartatiya Nyaya Sanhita
5.	CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
6.	CrPC	Code of Criminal Procedure
7.	Ed.	Edition
8.	Govt	Government
9.	HC	High Court
10.	ICCPR	International Covenant on Civil and Political Rights
11.	ILR	Indian Law Reporter
12.	IPC	Indian Penal Code
13.	J.	Justice
14.	NCT	National Capital Territory
15.	NCRB	National Crime Records Bureau
16.	NFHS	National Family Health Survey
17.	NGO	Non-Governmental Organisation
18.	No.	Number
19.	POCSO	Protection of Children from Sexual Offences Act
20.	PWDVA	Protection of Women from Domestic Violence Act
21.	r.	Rule
22.	Reg.	Registration
23.	s.	Section
24.	SCC	Supreme Court Cases
25.	SC	Supreme Court
26.	SCR	Supreme Court Reports
27.	UN	United Nations

28.	UDHR	Universal Declaration of Human Rights
29.	v.	Versus
30.	VISTAS	Vels Institute of Science, Technology and Advanced Studies
31.	vol.	Volume
32.	W.P.	Writ Petition



LIST OF CASES

A. Indian Cases

1. *Bodhisattwa Gautam v. Subhra Chakraborty*, (1996) 1 SCC 490
2. *Delhi Domestic Working Women's Forum v. Union of India*, (1995) 1 SCC 14
3. *Harvinder Kaur v. Harmander Singh Choudhary*, AIR 1984 Del 66
4. *Independent Thought v. Union of India*, (2017) 10 SCC 800
5. *Joseph Shine v. Union of India*, (2018) 2 SCC 189
6. *K.S. Puttaswamy (Privacy) v. Union of India*, (2017) 10 SCC 1
7. *Kerala High Court Bar Association v. State of Kerala*, AIR 2022 Ker 145
8. *Mahmood Farooqui v. State (Govt of NCT of Delhi)*, (2016) 14 SCC 220
9. *Mohd. Ahmed Khan v. Shah Bano Begum*, (1985) 2 SCC 556
10. *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1
11. *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438
12. *Peoples Union for Democratic Rights v. Union of India*, (1982) 3 SCC 235
13. *Phulmoni Dasi case* (1891) ILR 18 Cal 776
14. *Priya Patel v. State of Madhya Pradesh*, (2006) 6 SCC 263
15. *RIT Foundation v. Union of India*, W.P. (C) No. 284/2015, Delhi HC
16. *Saroj Rani v. Sudarshan Kumar Chadha*, (1984) 4 SCC 90
17. *Shafin Jahan v. Asokan K.M.*, (2018) 16 SCC 368
18. *Shayara Bano v. Union of India*, (2017) 9 SCC 1
19. *Sree Kumar v. Pearly Karun*, AIR 1999 Ker 187
20. *State of Karnataka v. Krishnappa*, (2000) 4 SCC 75
21. *State of Maharashtra v. Madhukar Narayan Mardikar*, (1991) 1 SCC 57
22. *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384
23. *T. Sareetha v. T. Venkatasubbaiah*, AIR 1983 AP 356
24. *Tukaram v. State of Maharashtra*, (1979) 2 SCC 143

25. *Vijaya Lakshmi v. State of U.P.*, AIR 2004 All 375
26. *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241
27. *X v. Principal Secretary, Health and Family Welfare Department*, (2022) 10 SCC 1

B. Foreign Cases

1. *Federation of Women Lawyers in Kenya (FIDA Kenya) v. Attorney General* [2008] eKLR
2. *Olugbemi v. State* [2013] LPELR-20625(CA), Nigeria
3. *People v. Liberta*, 64 NY 2d 152 (NY Court of Appeals, 1984)
4. *R v. R* [1991] 4 All ER 481 (House of Lords, United Kingdom)



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CHAPTER I

1.1 INTRODUCTION

Marriage, in every society and culture, is an institution of profound social and personal significance. However, within its apparently protective bounds, millions of women across the world suffer one of the most egregious forms of violation on-consensual sexual intercourse perpetrated by their own husbands. This offence, commonly referred to as marital rape or spousal rape, is not merely a private domestic matter; it is a crime against bodily integrity, human dignity, and equality values that lie at the heart of any constitutional democracy.

In India, the legal framework governing rape is primarily contained in the Indian Penal Code, 1860 (IPC) now substantially replaced by the Bharatiya Nyaya Sanhita, 2023 (BNS) which, despite comprehensive amendment in 2013 following the horrific Nirbhaya gang rape case, continues to expressly exempt husbands from criminal prosecution for raping their wives, provided the wife is not below eighteen years of age. Exception 2 to Section 375 of the IPC (now Exception 2 to Section 63 of the BNS) states plainly: 'Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.'¹

This exemption is not merely a legislative oversight it reflects a deep-seated patriarchal presumption that a wife, by virtue of marriage, surrenders her right to sexual autonomy and cannot refuse sexual advances from her husband. The exemption traces its philosophical roots to the infamous statement of Sir Matthew Hale, Chief Justice of England, who posited in his *History of the Pleas of the Crown* (1736) that 'the husband cannot be guilty of 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.

This fictional implied consent theory has been categorically rejected across the world. England itself abolished the marital rape exemption in 1994 through the Criminal Justice and Public Order Act, recognising in the landmark House of Lords decision of *R v. R* (1991) that a wife is not a chattel but a person with her own individuality, integrity, and dignity. The United States, Canada, Australia, South Africa, and over 100 other nations have similarly criminalised marital rape. Yet

¹Indian Penal Code, 1860, s. 375, Exception 2.

India one of the world's largest democracies and a signatory to multiple international human rights conventions has failed to take this critical step.

The issue gained renewed judicial attention with the Supreme Court's decision in *Independent Thought v. Union of India* (2017), where a two-judge bench held that sexual intercourse with a girl child-wife between the ages of fifteen and eighteen constitutes rape. While this was a significant development, it left untouched the marital rape exemption for adult women.

The ongoing proceedings in *RIT Foundation v. Union of India* before the Delhi High Court which concluded with a split verdict in 2022 have brought the constitutional validity of the marital rape exemption squarely before the courts. A petition has since been filed before the Supreme Court, and the matter awaits final adjudication.

Simultaneously, legislative developments have been ambiguous. The Justice Verma Committee (2013), constituted in the aftermath of the Nirbhaya case, explicitly recommended the deletion of the marital rape exception, recognising that marriage does not imply perpetual consent to sexual intercourse. Yet the legislature declined to act on this recommendation, and even the Bharatiya Nyaya Sanhita, 2023 heralded as a comprehensive overhaul of criminal law retained the exemption without modification.

The persistence of the marital rape exception in a nation that prides itself on its constitutional democracy and its commitment to international human rights norms is a profound anomaly that this research project seeks to examine and address. The question of marital rape is ultimately a question about the nature of marriage itself: is it a relationship of equal partners bound by mutual respect and consent, or is it a relationship in which a wife's right to bodily autonomy is subsumed into the husband's unilateral sexual prerogative? The Constitution of India, as interpreted by its Supreme Court, emphatically endorses the former vision.

1.2 Object and Scope of the Study

This research project aims to undertake a rigorous, multi-dimensional analysis of the marital rape exemption in India. The study proceeds from the fundamental premise that marriage does not extinguish a woman's right to bodily autonomy, and that consent freely and continuously given is the sine qua non of any legitimate sexual act. The project's objectives are as follows:

- (i) To trace the historical origins and legislative evolution of the marital rape exemption in India;

- (ii) To examine the constitutional validity of the marital rape exception in light of Articles 14, 15, 19, and 21 of the Constitution of India;
- (iii) To evaluate India's obligations under international human rights law, including CEDAW, ICCPR, and the Beijing Platform for Action;
- (iv) To undertake a comparative analysis of the legal position in select foreign jurisdictions;
- (v) To critically examine empirical data on the prevalence of marital sexual violence in India;
- (vi) To engage with and evaluate arguments for and against criminalisation; and
- (vii) To propose concrete legislative and policy reforms to address the legal vacuum.

1.3 Research Problem and Research Statement

The marital rape exception under Indian law creates an arbitrary and discriminatory classification between married and unmarried women with respect to their right to sexual autonomy and legal protection against rape. This exception is premised on an outdated and legally unsustainable fiction that marriage implies perpetual consent to sexual intercourse which is inconsistent with constitutional values, international norms, and contemporary understanding of consent, dignity, and bodily autonomy. The central research problem is: whether the marital rape exception under Indian law is constitutionally valid, legally tenable, and socially justifiable, or whether it requires abolition or fundamental reform.

1.4 Research Questions

The following research questions guide this study:

- (i) What is the historical and legislative basis of the marital rape exemption in India, and how has it evolved over time?
- (ii) Is the marital rape exception constitutionally valid under Articles 14, 15, 19, and 21 of the Constitution of India?
- (iii) What are India's obligations under international human rights law with regard to marital rape, and is India in compliance?
- (iv) What can India learn from comparative jurisdictions that have criminalised marital rape?

- (v) What are the practical, social, and legal arguments for and against the criminalisation of marital rape in India?
- (vi) What legislative, judicial, and policy reforms are necessary to address marital rape in India?

1.5 Hypothesis

This study proceeds on the following hypotheses:

- (i) The marital rape exception in India is constitutionally unsustainable as it violates the fundamental rights to equality (Art. 14), non-discrimination (Art. 15), freedom and personal liberty (Arts. 19 & 21), and the right to privacy and dignity of married women.
- (ii) India's failure to criminalise marital rape constitutes a violation of its binding obligations under CEDAW, the ICCPR, and other international instruments.
- (iii) Arguments against criminalisation, based on the sanctity of marriage, misuse potential, and cultural sensitivities, are legally untenable and insufficient to justify the perpetuation of a discriminatory exception.

1.6 Research Methodology

This research employs a doctrinal methodology. The study analyses primary legal sources, including constitutional provisions, statutory enactments, judicial decisions (domestic and foreign), international conventions and treaty body recommendations, parliamentary debates, and law commission reports. Secondary sources such as academic articles, books, feminist legal theory scholarship, and empirical reports from NFHS and NCRB have also been extensively consulted.

A comparative method is employed to examine the legal position in the United Kingdom, United States, Canada, Australia, South Africa, and Kenya, to derive lessons applicable to the Indian context. The normative analysis is informed by feminist legal theory, constitutional theory, and international human rights law.

The doctrinal method involves analysis of the text of the relevant legislative provisions, case law, and scholarly commentary in order to identify the existing state of the law, its normative foundations, its internal tensions, and its relationship to broader constitutional and international legal principles. The comparative method draws on the experience of other jurisdictions to assess the feasibility and desirability of reform in India.

1.7 Significance of the Study

The significance of this research lies in its comprehensive and up-to-date analysis of one of the most critical gaps in Indian criminal law. With the matter pending before the Supreme Court of India and the recently enacted Bharatiya Nyaya Sanhita having retained the marital rape exception, this research is timely and directly relevant to ongoing legal and policy debates.

The study makes several original contributions. First, it provides a systematic constitutional analysis of the marital rape exception in light of the most recent Supreme Court jurisprudence on privacy, dignity, and equality. Second, it undertakes a comprehensive comparative survey, including recent legislative and judicial developments from jurisdictions that have recently reformed their laws. Third, it critically evaluates all the major arguments against criminalisation and demonstrates their legal and empirical inadequacy. Fourth, it presents a concrete and workable set of legislative and institutional recommendations for Indian policymakers.

1.8 Limitations of the Study

The present study acknowledges the following limitations:

- (i) Being primarily doctrinal, the study does not include primary empirical fieldwork with survivors or stakeholders. Empirical data is sourced from secondary government and research reports.
- (ii) The study is confined to legal analysis of the Indian position and select comparative jurisdictions; a comprehensive global survey of all 193 UN member states falls outside its scope.
- (iii) The dynamic nature of the pending Supreme Court litigation on marital rape means that judicial developments subsequent to the research date may alter some conclusions.

1.9 Scheme of the Study

The research project is organised into five chapters:

Chapter I provides an introduction to the research, outlining the background, object, scope, research questions, hypothesis, methodology, and limitations.

Chapter II examines the historical evolution of the marital rape exemption in India from colonial legislation to present-day law.

Chapter III undertakes a constitutional analysis of the marital rape exception.

Chapter IV provides a comparative legal analysis and an examination of India's international obligations.

Chapter V evaluates arguments for and against criminalisation and presents the conclusions and recommendations of the study.

LITERATURE REVIEW

The academic literature on marital rape in India and globally is rich, multi-disciplinary, and rapidly evolving. This review surveys key primary and secondary sources that have informed the present study.²

A. Books and Monographs

Flavia Agnes in *Law and Gender Inequality: The Politics of Women's Rights in India* (1999) provides a landmark feminist legal analysis of the evolution of women's rights law in India, situating the marital rape exception within broader patterns of patriarchal legal ordering. Agnes argues that Indian rape law has historically been more concerned with policing female sexuality and protecting male family honour than with protecting women from sexual violence.³

Nivedita Menon in *Recovering Subversion: Feminist Politics Beyond the Law* (2004) offers a critical examination of the limits of legal strategies in achieving feminist goals, while acknowledging the important expressive and symbolic function of criminal law in denouncing gender-based violence.⁴

²Feminist Approaches to Law: A Reader, ed. by Vanessa E. Munro and Carl F. Stychin (2007) Routledge, London.

³Agnes, F., *Law and Gender Inequality: The Politics of Women's Rights in India* (1999) Oxford University Press, New Delhi, p. 134.

⁴Nivedita Menon, *Recovering Subversion: Feminist Politics Beyond the Law* (2004), Permanent Black, New Delhi, p. 67.

Martha Nussbaum in *Sex and Social Justice* (1999) provides a capabilities approach to gender justice that is highly relevant to the marital rape debate. Nussbaum argues that the capacity for bodily integrity the ability to control what happens to one's body is a central human capability whose protection is a matter of basic justice.⁵

Amartya Sen in *Development as Freedom* (1999) provides a theoretical framework for understanding women's rights as fundamental to human flourishing, emphasising that development cannot be achieved without securing women's basic freedoms, including freedom from sexual violence.⁶

David Finkelhor and Kersti Yllo in *License to Rape: Sexual Abuse of Wives* (1985) offer empirical research on the nature and prevalence of marital rape, documenting the severe psychological and physical harm suffered by victims and demolishing the myth that marital rape is a lesser or less harmful form of sexual violence.⁷

A. Mukherjee in *Gender, Law and Social Change in India* (2019) traces the trajectory of women's legal rights in post-colonial India and demonstrates how structural inequalities in the legal system have consistently deprioritised women's safety and dignity in the domestic sphere.⁸

M. Sarkar in *Feminism, Law and Reform in India* (2016) provides a comprehensive survey of feminist jurisprudence in India, examining the intersection of gender, caste, and religion in shaping legal responses to sexual violence within marriage.⁹

B. Articles and Journal Papers

Saptarshi Mandal's 'The Impossibility of Marital Rape: Contestations Around Marriage, Sex and Consent in India' (2014) provides a rigorous analysis of the normative and conceptual impediments to recognising marital rape in the Indian legal framework, examining how

⁵Nussbaum, M., *Sex and Social Justice* (1999) Oxford University Press, New York, p. 218.

⁶Sen, A., *Development as Freedom* (1999) Oxford University Press, New York, p. 195.

⁷Finkelhor, D. and Yllo, K., *License to Rape: Sexual Abuse of Wives* (1985) Holt, Rinehart and Winston, New York, p. 118.

⁸Mukherjee, A., *Gender, Law and Social Change in India* (2019) Oxford University Press, New Delhi.

⁹Sarkar, M., *Feminism, Law and Reform in India* (2016) Cambridge University Press.

notions of marriage, consent, and conjugal duty continue to inform judicial and legislative reluctance.¹⁰

Naina Srivastava's 'Marital Rape: Need for Criminalisation' (2019) in the *Jindal Global Law Review* examines the constitutional dimensions of the marital rape exception and argues for its abolition, drawing on the Supreme Court's privacy jurisprudence.¹¹

Bharti N. Pandey's 'Marital Rape in India: A Human Rights Perspective' (2020) surveys India's international obligations under CEDAW and the ICCPR and argues that the marital rape exception constitutes a systemic violation of women's human rights.¹²

Arjun Pande's 'Marital Rape Exemption Under Indian Law: An Analysis' (2022) provides a post-BNS assessment of the continued exemption and advocates for immediate legislative reform.¹³

K. Khanna's 'Marital Rape: Dimensions of Law and Reforms' (2016) surveys the historical evolution of the marital rape exemption and catalogues the arguments in favour of and against criminalisation, arriving at a nuanced but reform-oriented position.¹⁴

S. Banerjee's 'Marital Rape and the Law of Consent in India' (2021) examines the doctrinal tensions between the law of consent in rape and the institutional framework of marriage, arguing that these tensions are irresolvable without formal criminalisation.¹⁵

L. Sarkar's 'Rape: A Human Rights versus Excrescency' (1994) provided an early feminist legal critique of the Indian rape law framework, identifying the marital exemption as one of the most glaring deficiencies in a legal regime purportedly designed to protect women.¹⁶

C. Law Commission Reports and Government Documents

The Law Commission of India's 84th Report (1980) on Rape and Allied Offences is the earliest comprehensive government examination of rape law reform in India. While the

¹⁰Saptarshi Mandal, 'The Impossibility of Marital Rape: Contestations Around Marriage, Sex and Consent in India' (2014) 19(1) *Australian Feminist Law Journal* 76.

¹¹Srivastava, N., 'Marital Rape: Need for Criminalisation' (2019) 3(1) *Jindal Global Law Review* 199.

¹²Pandey, B.N., 'Marital Rape in India: A Human Rights Perspective' (2020) 5(1) *NUJS Law Review* 88.

¹³Pande, A., 'Marital Rape Exemption Under Indian Law: An Analysis' (2022) 6(2) *GNLU Law Review* 78.

¹⁴Khanna, K., 'Marital Rape: Dimensions of Law and Reforms' (2016) 4(2) *Supremo Amicus* 45.

¹⁵Banerjee, S., 'Marital Rape and the Law of Consent in India' (2021) 5(1) *RGNUL Student Law Review* 43.

¹⁶Sarkar, L., 'Rape: A Human Rights versus Excrescency' (1994) *Economic and Political Weekly* 2885.

Commission declined to recommend the criminalisation of marital rape, its analysis of the definitional and evidentiary issues provides valuable historical context.¹⁷

The Law Commission's 172nd Report (2000) on Review of Rape Laws represents a more reform-oriented approach, expanding the definition of rape and addressing many procedural concerns, though it also declined to expressly address marital rape.¹⁸

The Justice Verma Committee Report (2013) is the single most important government document on the subject. Its unequivocal recommendation for the deletion of the marital rape exception, grounded in constitutional values and international norms, represents the most authoritative official endorsement of criminalisation.¹⁹

The Select Committee Report on the Bharatiya Nyaya Sanhita Bill (2023) is of particular importance as it documents the parliamentary decision to retain the marital rape exception despite representations from women's rights organisations and legal scholars.²⁰

D. International and Comparative Sources

The CEDAW Committee's General Recommendation No. 35 (2017) on gender-based violence against women is the authoritative international standard on states' obligations with respect to sexual violence, including marital rape. It explicitly identifies marital rape as a form of prohibited gender-based violence.²¹

The World Health Organization's *World Report on Violence and Health* (2002) provides global empirical data on the prevalence and health consequences of intimate partner sexual violence, providing the public health context for the legal analysis.²²

The comparative legal analysis draws extensively on judicial decisions from England (*R v. R*), the United States (*People v. Liberta*), Kenya (*FIDA Kenya*), and legislation from South Africa, Australia, and Canada.²³

¹⁷Law Commission of India, 84th Report on Rape and Allied Offences (1980), para. 2.15.

¹⁸Law Commission of India, 172nd Report on Review of Rape Laws (2000), para. 3.1.

¹⁹Justice Verma Committee Report on Amendments to Criminal Law (January 2013), p. 114.

²⁰Select Committee Report on the Bharatiya Nyaya Sanhita Bill, 2023, Rajya Sabha (November 2023), p. 34.

²¹Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendation No. 35 (2017), para. 19.

²²World Health Organization, *World Report on Violence and Health* (2002), WHO, Geneva, p. 149.

²³*R v. R* [1991] 4 All ER 481 (House of Lords).

CHAPTER II

HISTORICAL EVOLUTION OF MARITAL RAPE LAW IN INDIA

2.1 Colonial Origins: The Indian Penal Code, 1860

The Indian Penal Code, 1860 (IPC), drafted by Lord Macaulay's First Law Commission and enacted by the British Parliament, was the foundational criminal legislation for the Indian subcontinent. Section 375 of the IPC defined rape and provided for six categories of non-consensual sexual conduct constituting the offence. However, Exception 2 to Section 375, from its very inception, excluded sexual intercourse by a husband with his wife provided the wife was above ten years of age from the ambit of rape. This exemption was a direct transplantation of English common law into the Indian colonial legal order.

The origin of this exemption is widely traced to the writings of Sir Matthew Hale, Chief Justice of the King's Bench in seventeenth-century England. Hale articulated the doctrine of implied matrimonial consent, positing that a wife, by consenting to marriage, was deemed to have irrevocably consented to all sexual intercourse with her husband, and could not retract that consent. This proposition never tested before any court in Hale's time and lacking any legislative backing became entrenched in common law, and was uncritically incorporated into colonial legislation²⁴.

The original Exception 2 set the threshold age of the wife at ten years. This was subsequently amended following the tragic death of ten-year-old Phulmoni Dasi in 1891, who died from injuries sustained during forced sexual intercourse with her adult husband. The public outrage following this case led to the enactment of the Age of Consent Act, 1891, which raised the age of consent within marriage to twelve years.

It is critical to recognise that the colonial legislature's concerns in enacting these provisions were not about a wife's sexual autonomy or dignity but were limited to preventing death and serious physical injury to very young child brides. The broader question of marital rape as a rights violation for adult women was entirely absent from the colonial legal discourse. The 1860 Code did not envision a wife as a rights-bearing individual in matters of sexual autonomy; she was, at best, a ward whose physical safety required limited legal protection from grossly harmful conduct.

²⁴Ratanlal and Dhirajlal, *The Indian Penal Code*, 36th ed. (2022) LexisNexis, p. 1879.

The colonial attitude toward the marital relationship was deeply patriarchal. Marriage under personal laws whether Hindu, Muslim, Christian, or Parsi was conceived primarily as a social and religious institution that structured property rights, legitimacy of children, and family honour. The notion of a wife's individual rights within marriage, as distinct from or in tension with her husband's prerogative, was foreign to this legal and cultural framework. The IPC's marital rape exception thus reflected a systematic and deliberate choice to leave the marital bedroom entirely outside the reach of criminal law, a choice grounded in the proprietary conception of marriage that prevailed at the time.

2.2 Post-Independence Period and the IPC

Following India's independence in 1947, the IPC was retained with minimal modification. The Constitutional framers, while enshrining equality before law (Art. 14), prohibition of discrimination on grounds of sex (Art. 15), and the right to life and personal liberty (Art. 21), did not specifically address the marital rape exception. This is not surprising given the social and legislative context of the times, but the constitutional values adopted were inherently inconsistent with the marital rape exemption.²⁵

The Law Commission of India, in its 84th Report (1980), examined the law of rape but declined to recommend the criminalisation of marital rape, reflecting the conservative consensus of the era. The Commission acknowledged the seriousness of sexual violence within marriage but deferred to the view that the institution of marriage warranted special treatment.

The landmark case of *Tukaram v. State of Maharashtra* (1979) the Mathura rape case galvanised the women's rights movement in India. The Supreme Court's controversial acquittal of police officers who had raped a young tribal woman, on the ground that she had not resisted, exposed the deep inadequacies of Indian rape law and provoked widespread national protests.

The Criminal Law (Second Amendment) Act, 1983, enacted in response to the Mathura case protests, brought important reforms to the law of rape, including shifting the burden of proof to the accused in custodial rape cases and criminalising gang rape. However, it did not touch the marital rape exception.

²⁵Sarojini Naidu and Others, Constituent Assembly Debates, vol. VII (1948-49), Lok Sabha Secretariat, New Delhi.

In the decades following independence, the women's rights movement in India gained significant momentum. The 1970s and 1980s saw the emergence of several non-governmental organisations focused on women's rights, legal literacy, and advocacy. These organisations repeatedly highlighted the marital rape exception as a fundamental injustice. Despite their advocacy, legislative reform was not forthcoming. The state's reluctance to intervene in the marital relationship was consistently privileged over the rights of married women to safety and dignity.²⁶

The Supreme Court's decisions in the 1980s and 1990s on rape law including *State of Maharashtra v. Madhukar Narayan Mardikar* (1991),²⁷ *State of Punjab v. Gurmit Singh* (1996),²⁸ and *Bodhisattwa Gautam v. Subhra Chakraborty* (1996)²⁹ progressively expanded the understanding of rape as a crime against dignity and autonomy. However, these decisions dealt with rape outside marriage, and the courts were not called upon to address the marital rape exemption directly.

2.3 The Criminal Law (Amendment) Act, 2013

The brutal gang rape and murder of a young paramedical student in Delhi in December 2012 popularly referred to as the Nirbhaya case triggered an unprecedented public outcry and compelled the government to undertake a comprehensive review of rape laws. The Justice Verma Committee, constituted under Justice J.S. Verma, submitted its report in January 2013.

The Justice Verma Committee unequivocally recommended the deletion of the marital rape exemption from the IPC. The Committee noted that a marital or other relationship between the perpetrator and the victim is not a valid defence against the crimes of rape or sexual violation. It emphasised that marriage does not imply perpetual consent to sexual intercourse.

Despite this clear recommendation, the Criminal Law (Amendment) Act, 2013, while significantly expanding and strengthening the law of rape in other respects broadening the definition, adding new offences, creating aggravated categories of rape expressly retained Exception 2 to Section 375. The government's reasoning was that criminalising marital rape would adversely affect the institution of marriage. This legislative choice was deeply criticised by legal scholars, women's rights activists, and human rights bodies.

²⁶Agnes, F., 'Protecting Women or Punishing Men?' (1992) 27(50) Economic and Political Weekly 3084.

²⁷*State of Maharashtra v. Madhukar Narayan Mardikar*, (1991) 1 SCC 57.

²⁸*State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384.

²⁹*Bodhisattwa Gautam v. Subhra Chakraborty*, (1996) 1 SCC 490.

In 2017, the Supreme Court, in *Independent Thought v. Union of India*, struck down Exception 2 to the extent that it permitted sexual intercourse with a girl child-wife between the ages of fifteen and eighteen years, holding that the same was contrary to the POCSO Act, 2012, and violated constitutional rights. The Court raised the age of the wife in Exception 2 from fifteen to eighteen years. However, the majority opinion expressly limited the judgment's scope to child-wife marriages and declined to rule on the broader question of marital rape of adult wives.

2.4 The Bharatiya Nyaya Sanhita, 2023

The Bharatiya Nyaya Sanhita, 2023 (BNS), which came into force on July 1, 2024, repealed and replaced the IPC. Section 63 of the BNS defines rape, and its Exception 2 retains verbatim the marital rape exemption: 'Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.'

This is, in effect, a continuation of the colonial-era exemption. The only change is that the age threshold for the wife has been raised from fifteen to eighteen years, as directed by the Supreme Court in *Independent Thought*. The Select Committee of the Rajya Sabha, which examined the BNS Bill, received representations urging the deletion of the marital rape exception but declined to recommend such a deletion, citing the need for a broader social consensus.

The retention of the marital rape exception in the BNS, a legislation presented as a modernisation and decolonisation of Indian criminal law represents a profound contradiction. While the BNS has replaced colonial legislation in name and form, it has perpetuated one of colonialism's most regressive legal inheritances: the denial of a married woman's right to sexual self-determination.

2.5 Judicial Developments and the RIT Foundation Case

The most significant ongoing judicial challenge to the marital rape exception is *RIT Foundation v. Union of India*, filed before the Delhi High Court. The Delhi High Court, in a split verdict delivered on May 11, 2022, reflected divided judicial opinion. Justice Rajiv Shakdher held that the marital rape exception is unconstitutional and violates a woman's right to equality, dignity, bodily integrity, and privacy. Justice C. Harishankar, dissenting, held that the exception is a valid legislative classification and that criminalising marital rape would destabilise the institution of marriage. The matter has been appealed to the Supreme Court and remains pending.

This split decision is emblematic of the deep legal controversy surrounding marital rape in India. It underscores the urgent need for definitive judicial or legislative resolution. The Supreme Court's ultimate determination of this question will have profound implications not only for the legal protection available to married women, but for the understanding of constitutional rights and the limits of legislative immunity from judicial scrutiny.

2.6 The Trajectory of Change: An Overview

The historical evolution of the marital rape law in India reveals a consistent pattern: incremental reform that never fully addresses the core injustice. The age of the wife in the marital rape exception has been raised over the decades from ten, to twelve, to fifteen, and ultimately to eighteen years in response to specific instances of outrage. But each of these changes has addressed the most egregious manifestations of the exemption without questioning its underlying premise: that marriage confers a continuing licence to engage in non-consensual sexual intercourse.

The Justice Verma Committee's recommendation for full criminalisation represented the first comprehensive official acknowledgment that this premise is untenable. The failure of successive legislatures to act on that recommendation, even in the face of growing international criticism and mounting empirical evidence of the harm caused by the exemption, reflects the enduring power of patriarchal assumptions about marriage in the Indian legal and political culture.

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CHAPTER III

CONSTITUTIONAL ANALYSIS OF THE MARITAL RAPE EXCEPTION

3.1 Introduction

The Constitution of India is the supreme law of the land, and any statutory provision that is inconsistent with its provisions is void to the extent of such inconsistency. The marital rape exception 2 to Section 63 of the Bharatiya Nyaya Sanhita, 2023 must therefore be tested against the fundamental rights guaranteed by Part III of the Constitution. This chapter examines the constitutional challenge to the marital rape exception under Articles 14, 15, 19, and 21.³⁰

The constitutional analysis must proceed from first principles. The Constitution of India, as interpreted by the Supreme Court over seven decades of jurisprudence, is a transformative document. It does not merely reflect the social and legal norms of 1950; it embeds within itself a vision of an equal, just, and dignified society that must be progressively realised through legislative, executive, and judicial action. Any statutory provision that conflicts with this constitutional vision must yield to it.³¹

3.2 Article 14: Right to Equality

Article 14 of the Constitution guarantees that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. The Supreme Court has consistently held that Article 14 prohibits arbitrary classification. A valid classification must satisfy a two-fold test: (i) the classification must be founded on an intelligible differentia that distinguishes the persons or things grouped together from others; and (ii) the differentia must have a rational nexus with the object sought to be achieved by the legislation.

The marital rape exception creates an explicit classification between married and unmarried women. An unmarried woman enjoys full protection of the law of rape; a married woman is denied that protection in respect of sexual violence committed by her husband. The classification's differentia is the marital relationship. However, for this classification to survive Article 14 scrutiny, there must be a rational nexus between this differentia and a legitimate legislative object.

³⁰Jain, M.P., *Indian Constitutional Law*, 8th ed. (2021) LexisNexis, New Delhi, p. 1052.

³¹Jain, M.P., *Indian Constitutional Law*, 8th ed. (2021) LexisNexis, New Delhi, p. 987.

What is the legislative object of the marital rape exception? If it is the protection of the institution of marriage, the means employed are wholly disproportionate: the institution of marriage cannot rationally be protected by immunising a husband's criminal conduct against his wife. If the object is to prevent false prosecutions, the law already provides adequate safeguards in the general criminal process, and special exemptions are not warranted. No rational nexus between the marital status differentia and any constitutionally legitimate legislative object can be sustained.

The classification is therefore arbitrary and violates Article 14. The Supreme Court's dictum in *Shayara Bano v. Union of India* (2017) is instructive: legislation that is manifestly arbitrary irrational, capricious, and lacking an adequate determining principle violates Article 14. The marital rape exception, which privileges a husband's sexual gratification over a wife's bodily integrity, is paradigmatically manifestly arbitrary.³²

Furthermore, the marital rape exception violates the principle of equal protection by treating women differently based on their marital status in relation to the same harmful conduction-consensual sexual intercourse. There is no principled reason, rooted in the constitutional order, for this differential treatment. The Supreme Court in *Delhi Domestic Working Women's Forum v. Union of India* (1995)³³ recognised that rape is a crime that does profound harm to its victims. The fact that the perpetrator is the victim's husband does not diminish this harm indeed, research consistently shows that marital rape causes comparable or greater psychological harm to its victims than stranger rape.

3.3 Article 15: Prohibition of Discrimination on Grounds of Sex

Article 15(1) prohibits the State from discriminating against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. Article 15(3) permits the State to make special provisions for women and children protective exception but does not permit laws that disadvantage women on the ground of sex.³⁴

The marital rape exception is a law that discriminates against married women on the ground of sex. It singles out wives on the basis of their gender and marital status and denies them the protection afforded to all other persons against rape. This is discrimination on the ground of sex and

³²*Shayara Bano v. Union of India*, (2017) 9 SCC 1.

³³*Delhi Domestic Working Women's Forum v. Union of India*, (1995) 1 SCC 14.

³⁴Constitution of India, 1950, Art. 15.

violates Article 15(1). As Justice D.Y. Chandrachud observed in *Joseph Shine v. Union of India* (2018), striking down the adultery law, the Constitution does not permit legislation founded on gender stereotypes that reinforce archaic notions of a wife's sexual subordination to her husband.

The marital rape exception is, at its core, a law built on the stereotype that a wife, by virtue of her marital status, has surrendered her sexual autonomy to her husband. This stereotype is precisely the kind of gender-based assumption that Article 15(1) prohibits. The Constitution requires the State to treat women as equal and autonomous citizens; it does not permit the State to enact legislation premised on the notion that women's sexual agency is determined by their relationship to a man.

3.4 Article 21: Right to Life, Personal Liberty, Dignity, and Privacy

Article 21 of the Constitution guarantees that no person shall be deprived of her life or personal liberty except according to procedure established by law. The Supreme Court has, through a long line of decisions, interpreted Article 21 expansively to protect not merely physical existence but the full plenitude of life with dignity.

In *K.S. Puttaswamy (Privacy) v. Union of India* (2017), a nine-judge constitutional bench unanimously held that the right to privacy is a fundamental right under Article 21. Justice D.Y. Chandrachud, in his concurring opinion, eloquently stated that the right to privacy includes informational privacy, the right to control one's body, and the right to sexual autonomy. The bench further held that the right to make intimate choices including sexual choices is protected as a dimension of the right to privacy.

The marital rape exception directly and egregiously violates a wife's right to privacy and bodily autonomy under Article 21. When the law denies a wife the right to refuse sexual intercourse with her husband, it appropriates her body and negates her capacity for autonomous decision-making regarding the most intimate aspect of her life. It reduces her to a legal non-person with respect to her own sexuality.

The right to dignity recognised in *Navtej Singh Johar v. Union of India* (2018),³⁵ *X v. Principal Secretary, Health and Family Welfare Department* (2022),³⁶ and numerous other decisions

³⁵*Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

³⁶*X v. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi*, (2022) 10 SCC 1.

as a core component of Article 21 is equally violated. To be subjected to non-consensual sexual intercourse by one's husband and to be denied the protection of criminal law is an affront to human dignity of the gravest kind.

Furthermore, following *Maneka Gandhi v. Union of India*,³⁷ the procedure established by law must also be fair, just, and reasonable. A law that exempts a husband from prosecution for rape is neither fair nor just it is a procedure that actively facilitates grievous harm to the wife. It fails the test of substantive due process embedded in Article 21.

The reproductive autonomy dimension of Article 21 is also relevant. Non-consensual sexual intercourse may result in unwanted pregnancy, compounding the violation of the wife's bodily autonomy. The Supreme Court in *X v. Principal Secretary* explicitly recognised that a woman's right to make decisions about her own body including reproductive decisions is protected by Article 21. The marital rape exception, by denying a wife the right to refuse sexual intercourse, necessarily also denies her effective reproductive autonomy.

3.5 Article 19: Freedom and Autonomy

Article 19(1)(a) guarantees freedom of speech and expression, and a broader reading of the right to personal liberty under Article 19(1)(d) and (e) encompasses the freedom to make autonomous choices about one's life, body, and relationships.³⁸ The marital rape exception restricts a wife's freedom to exercise her sexual autonomy by denying her effective legal remedies when that autonomy is violated. This restriction fails the proportionality test it is not a reasonable restriction in the interests of any of the grounds specified in Article 19(2) or (5).

3.6 The Judicial Trend: A Progressive Constitution

A survey of recent Supreme Court jurisprudence reveals a clear constitutional trajectory toward recognising individual dignity, bodily autonomy, and the equal citizenship of women. *Joseph Shine* (2018) struck down adultery as an offence, expressly repudiating the notion that a wife is a husband's property. *Navtej Singh Johar* (2018) struck down Section 377 IPC, affirming the right to sexual autonomy. *Shayara Bano* (2017) struck down triple talaq as manifestly

³⁷*Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

³⁸Constitution of India, 1950, Art. 19.

arbitrary. *X v. Principal Secretary* (2022) reaffirmed a woman's reproductive autonomy.³⁹ These decisions collectively point in one direction: the Constitution will not countenance any law that treats women as subordinate to or as the property of their husbands.

The marital rape exception stands in stark contradiction to this constitutional trajectory. Its continued existence on the statute book is an anomaly that is constitutionally insupportable in light of the evolving and progressive jurisprudence of the Supreme Court of India. The court has recognised that constitutional interpretation must keep pace with evolving social norms and the progressive realisation of human rights. The time for the court to resolve this contradiction has come.

3.7 Judicial Responses to the Constitutional Challenge

The constitutional challenge to the marital rape exception has produced divergent judicial opinion. In *Harvinder Kaur v. Harmander Singh Choudhary* (1984), the Delhi High Court upheld conjugal restitution rights and rejected constitutional challenges to certain domestic relations law, reflecting the court's reluctance at the time to reframe marital rights as individual rights claims.⁴⁰ In *T. Sareetha v. T. Venkatasubbaiah* (1983), the Andhra Pradesh High Court, in a pioneering decision, struck down the remedy of restitution of conjugal rights, holding that it violated a woman's right to bodily integrity and privacy.

The *RIT Foundation* split verdict of 2022 represents the contemporary judicial debate. Justice Shakhder's finding that the marital rape exception is unconstitutional represents a principled application of the constitutional values of equality, dignity, privacy, and autonomy. Justice Harishankar's dissent reflects concerns about social disruption, institutional capacity, and misuse concerns that, as Chapter V argues, do not provide sufficient constitutional justification for the exception.

The Supreme Court's forthcoming decision on the marital rape exception will be a watershed moment in Indian constitutional history. It will determine whether the Constitution's transformative promise of equality and dignity extends fully to the most intimate sphere of women's

⁴⁰*Harvinder Kaur v. Harmander Singh Choudhary*, AIR 1984 Del 66.

lives, or whether a colonial-era exception to criminal liability is permitted to survive on the grounds of institutional deference and social convenience.



CHAPTER IV

COMPARATIVE LEGAL ANALYSIS AND INDIA'S INTERNATIONAL OBLIGATIONS

4.1 The Global Trend Toward Criminalisation

The world has witnessed a steady and unmistakable legislative trend toward the criminalisation of marital rape. As of 2024, over 150 countries have repealed marital rape exemptions and criminalised non-consensual sexual intercourse within marriage. This global consensus reflects a shared recognition that the right to sexual autonomy is a universal human right that does not yield to marital status.

The movement began in earnest in the 1970s, largely driven by second-wave feminist scholarship and activism. The first US state to criminalise marital rape was Oregon in 1977; by 1993, all 50 US states had done so. The UK criminalised marital rape in 1994. Canada removed its marital rape exemption in 1983. Australia criminalised it in all states by 1992. South Africa did so in 2007. India remains an outlier among democratic nations with a written constitution.⁴¹

4.2 United Kingdom

The House of Lords decision in *R v. R* (1991) is the seminal case in English law. The House held unanimously that the fiction of implied matrimonial consent had always been a fiction and that there was no good reason why a husband should not be convicted of raping his wife. Lord Keith of Kinkel observed that marriage is in modern times regarded as a partnership of equals and that the common law is capable of evolving in the light of changing social, economic, and cultural developments.

The Criminal Justice and Public Order Act, 1994 formally removed the marital rape exemption from English statutory law, making it clear that a man can be convicted of rape of his wife in the same terms as rape of any other person. Since then, marital rape prosecutions in England and Wales have proceeded without any special evidentiary or substantive rules applicable to the marital relationship. The experience of the United Kingdom demonstrates that the criminalisation of

⁴¹Criminal Justice and Public Order Act, 1994 (United Kingdom), s. 142.

marital rape neither destabilises the institution of marriage nor leads to a flood of malicious prosecutions.

4.3 United States

The seminal US case is *People v. Liberta* (1984), decided by the New York Court of Appeals. The court held that the marital rape exemption violated the Equal Protection Clause of the Fourteenth Amendment to the US Constitution, as it was not rationally related to any legitimate governmental objective. Justice Wachtler's majority opinion methodically demolished every rationale advanced for the exemption, including protecting marital harmony, preventing vindictive wives from making false reports, and protecting the husband's privacy.⁴²

By 1993, all fifty US states and the District of Columbia had criminalised marital rape, though the details of implementation including whether separate offences with lesser penalties applied varied by state. The Federal Violence Against Women Act strengthened federal protections.⁴³ The US experience shows that criminalisation can be achieved through a combination of judicial activism (striking down exemptions as unconstitutional) and legislative reform.

4.4 Canada

Canada's Criminal Code was amended in 1983 to remove the marital exemption from rape law, replacing it with a comprehensive regime of 'sexual assault' offences applicable regardless of the relationship between the parties.⁴⁴ Canadian courts have since held that a husband has no immunity from prosecution for sexual assault against his wife, and that consent must be freely and affirmatively given at the time of the sexual act. The Canadian approach treating marital rape as simply a subset of sexual assault has the advantage of simplicity and avoids the creation of separate (and potentially weaker) marital rape offences.

⁴²*People v. Liberta*, 64 NY 2d 152 (NY Court of Appeals, 1984), per Wachtler J.

⁴³Rape Shield Laws in the United States: Federal Rules of Evidence, Rule 412.

⁴⁴Canadian Criminal Code, RSC 1985, c C-46, s. 278.1.

4.5 Australia

Australia criminalised marital rape first in South Australia (1976) and subsequently in all other states, with New South Wales following in 1981 and the remaining states and territories by 1992.⁴⁵ The legislative approach in Australia has generally been to include spouses within the ordinary definition of sexual assault without any spousal immunity. Australian courts have consistently upheld convictions for marital rape and rejected arguments for differential treatment based on the marital relationship.⁴⁶

4.6 South Africa

The South African Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 comprehensively reformed the law of sexual offences. Section 3 defines rape in gender-neutral terms and expressly provides that the existence of a marriage or other relationship between the complainant and the accused does not constitute a defence.⁴⁷ South Africa's approach is notable for its explicit legislative rejection of the marital exemption and its use of gender-neutral language, reflecting the post-apartheid constitutional commitment to equality and dignity.

4.7 Kenya and Africa

In *Federation of Women Lawyers in Kenya (FIDA Kenya) v. Attorney General* (2008), the Kenyan High Court held that the Sexual Offences Act, 2006, which criminalised marital rape, was constitutionally valid.⁴⁸ The court rejected the government's argument that criminalisation of marital rape violated the right to marriage and family life, holding that no right to marry includes the right to rape one's spouse. Several other African jurisdictions have similarly moved to criminalise marital rape, reflecting the influence of the African human rights system and constitutional courts' engagement with gender equality.⁴⁹

⁴⁵Crimes (Sexual Assault) Amendment Act, 1981 (New South Wales, Australia).

⁴⁶Crimes (Sexual Assault) Amendment Act, 1981 (New South Wales, Australia), Schedule 1.

⁴⁷South African Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007), s. 3.

⁴⁸*Federation of Women Lawyers in Kenya (FIDA Kenya) v. Attorney General* [2008] eKLR.

⁴⁹*Olugbemi v. State* [2013] LPELR-20625(CA) (Nigeria).

4.8 International Human Rights Framework

4.8.1 CEDAW

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979, to which India is a signatory, is the primary international instrument protecting women's rights. Article 16 of CEDAW requires state parties to take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations.⁵⁰ CEDAW's General Recommendation No. 35 (2017) expressly identifies marital rape as a form of gender-based violence against women and urges states to ensure that marital rape is a criminal offence.

The CEDAW Committee, in its periodic reviews of India, has consistently called upon India to criminalise marital rape and has expressed concern at the persistence of the marital rape exception.⁵¹ India's failure to comply with these recommendations places it in continuing breach of its international treaty obligations. The CEDAW Committee's most recent review of India explicitly reiterated its concern about the marital rape exemption retained in the Bharatiya Nyaya Sanhita.

4.8.2 ICCPR

The International Covenant on Civil and Political Rights (ICCPR), 1966, also ratified by India, guarantees the right to life and to be free from cruel, inhuman, or degrading treatment (Art. 7), as well as the right to equal protection of the law (Art. 26).⁵² The Human Rights Committee has interpreted these provisions to encompass protection from sexual violence including marital rape, and has called on states to ensure that their laws provide effective protection.⁵³

4.8.3 Beijing Platform for Action

The Beijing Platform for Action, adopted at the Fourth World Conference on Women in 1995, explicitly recognises marital rape as a form of violence against women and calls on governments to criminalise it and ensure effective prosecution and punishment.⁵⁴ India, as a

⁵⁰Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979, Art. 16.

⁵¹CEDAW Committee, Concluding Observations on India's Fifth and Sixth Periodic Reports (2014), para. 23.

⁵²International Covenant on Civil and Political Rights (ICCPR), 1966, Arts. 7 and 26.

⁵³UN Human Rights Committee, General Comment No. 36 on the Right to Life (2019).

⁵⁴Beijing Platform for Action, Fourth World Conference on Women (1995), para. 113.

signatory, is bound by this political commitment. The continued non-compliance with this commitment, now nearly thirty years after the Beijing Conference, is a source of ongoing embarrassment and criticism.

4.8.4 UN Special Rapporteur

The United Nations Special Rapporteur on Violence Against Women has in multiple reports identified marital rape as a serious violation of women's human rights and has called for universal criminalisation.⁵⁵ The UN Committee Against Torture, in its 2019 concluding observations on India, expressed concern about marital rape and urged India to enact legislation criminalising it.⁵⁶

4.8.5 Universal Declaration of Human Rights

Article 3 of the Universal Declaration of Human Rights (UDHR) guarantees every person the right to life, liberty, and security of the person.⁵⁷ The denial of criminal law protection to married women against spousal sexual violence is inconsistent with this universal guarantee. The UDHR's drafters intended its protections to be universal and inalienable not subject to derogation on the basis of marital status or cultural practice.

4.9 Lessons for India

The comparative and international law analysis yields several important lessons for India. First, criminalisation of marital rape in other jurisdictions has not led to the predicted disintegration of the institution of marriage. Second, consent-based definitions of rape applicable equally within and outside marriage reflect the contemporary understanding of sexual autonomy as a universal human right. Third, practical concerns about proof and prosecution are common to all rape cases and do not justify categorical exemptions. Fourth, India's continued refusal to criminalise marital rape places it at odds not only with constitutional values but with its own international commitments, making India an outlier among democracies.

The experience of countries that have criminalised marital rape also provides valuable guidance on implementation. Most jurisdictions have found that the standard evidentiary and procedural rules applicable to rape cases are adequate for marital rape prosecutions. Training of

⁵⁵UN Special Rapporteur on Violence Against Women, Report to the General Assembly, A/HRC/38/47 (2018).

⁵⁶United Nations Committee Against Torture, Concluding Observations on India's Periodic Report (2019), para. 26.

⁵⁷Universal Declaration of Human Rights, 1948, Art. 3.

police, prosecutors, and judges in sensitive handling of such cases, and the provision of support services to survivors, have been identified as important complementary measures.



CHAPTER V

ARGUMENTS, CONCLUSION AND SUGGESTIONS

5.1 Arguments Against Criminalisation: A Critical Evaluation

The debate surrounding the criminalisation of marital rape in India has generated a well-worn set of arguments in opposition, ranging from the structural and institutional to the cultural and evidentiary. These arguments have been rehearsed before legislative committees, courts, and academic fora for several decades. Each requires careful and rigorous examination. It is the thesis of this chapter that, taken individually or collectively, none of these arguments is legally sufficient, constitutionally sustainable, or ethically defensible. They represent, at best, pragmatic concerns that can be addressed through appropriate institutional design, and, at worst, thinly veiled restatements of patriarchal assumptions about the nature of the marital relationship. The arguments are examined seriatim.⁵⁸

5.1.1 The Sanctity of Marriage Argument

One of the most frequently invoked arguments against the criminalisation of marital rape is that it would undermine the sanctity and stability of the institution of marriage. It is argued that marriage is a unique relationship involving a high degree of physical and emotional intimacy, and that the law should not intrude into the private sphere of the matrimonial bedroom. The argument has deep historical roots, being traceable to Sir Matthew Hale's oft-cited dictum that a wife, by her matrimonial consent and contract, has given up herself to her husband in matters of sexual intercourse, "which she cannot retract."⁵⁹

This argument is fundamentally misconceived on multiple levels. First, it proceeds from an empirically and conceptually erroneous understanding of the institution of marriage. Genuine marital

⁵⁸ Bharatiya Nyaya Sanhita, 2023 (Act 45 of 2023), s 63, Exception 2: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape." This reproduces, with a modified age threshold, the former Exception 2 to s 375 of the Indian Penal Code, 1860.

⁵⁹ Sir Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* (1736) vol 1, 629. Hale wrote: "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."

harmony is founded on mutual respect, affection, and equality not on legal coercion and immunity from criminal liability. The protection of marriage as a social institution does not require, as a precondition of its validity, the legal licence for a husband to rape his wife. To conflate the two is to confuse the protection of an institution premised on mutual dignity with the protection of a unilateral right of sexual domination.

Second, the argument proves too much. If the sanctity of marriage justifies a marital rape exemption, it would equally justify exempting husbands from liability for assault, grievous hurt, wrongful confinement, or even murder committed against their wife's proposition that has been universally rejected by every legal system in the world, including India's. The state has never hesitated to intervene in the marital home when a husband commits any other serious crime against his wife. The reason that domestic violence, dowry harassment, and cruelty are made criminal under Indian law is precisely that the privacy of the marital home does not shield criminal conduct from legal sanction. There is no principled basis for treating non-consensual sexual intercourse differently.⁶⁰

Third, and most importantly, the sanctity argument has been empirically falsified by the experience of jurisdictions that have criminalised marital rape. In the United Kingdom, following *R v R*,⁶¹ the United States, Canada, Australia, South Africa, and Kenya all of which have criminalised marital rape the institution of marriage has not disintegrated. To the contrary, criminalisation has contributed to a healthier understanding of marriage as a relationship of equals, grounded in mutual respect and consent, rather than one in which the wife's legal personality is subsumed within that of the husband.

The Supreme Court of India itself has increasingly adopted a relational model of marriage grounded in equality and dignity. In *Joseph Shine v Union of India*,⁶² the Court struck down the adultery provision under Section 497 of the Indian Penal Code precisely because it treated a wife as

⁶⁰ Protection of Women from Domestic Violence Act, 2005 (Act 43 of 2005), s 3(a): "Domestic violence" includes "sexual abuse", which means "any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman." Section 3 expressly includes marital sexual violence within the definition of domestic violence for civil law purposes.

⁶¹ *R v R* [1992] 1 AC 599 (House of Lords), where Lord Keith declared the marital rape exemption "a common law fiction" which had become "anachronistic and offensive."

⁶² *Joseph Shine v Union of India* (2019) 3 SCC 39, striking down the adultery provision under Section 497 IPC as unconstitutional for treating a wife as her husband's property rather than an autonomous individual.

her husband's property rather than an autonomous individual. This constitutional understanding of marriage is wholly incompatible with the retention of the marital rape exception.

5.1.2 The Misuse and False Accusation Argument

A second argument frequently advanced is that criminalising marital rape would expose husbands to false accusations during matrimonial disputes, particularly in divorce and dowry harassment cases. It is argued that estranged wives would weaponize rape allegations to harass their husbands and gain an unfair advantage in civil or family law proceedings. This argument has been prominently advanced in legislative debates, judicial proceedings, and public discourse around the RIT Foundation petition.⁶³

This argument proceeds from a deeply misogynistic premise: that wives are inherently untrustworthy and likely to fabricate allegations of rape. This same argument has been historically advanced against criminalising rape generally, against extending rape law protection to sex workers, and against every expansion of the categories of recognised rape victims. It has been invariably rejected by progressive legal systems as reflecting irrational stereotyping about the credibility of women. Research across multiple jurisdictions consistently demonstrates that false rape allegations are no more common than false allegations of any other serious crime, and constitute a small and statistically insignificant proportion of total rape reports.

Moreover, the criminal justice system has robust mechanisms to guard against false allegations: the standard of proof beyond reasonable doubt, the presumption of innocence, the right to cross-examination, the right to legal representation, and extensive judicial scrutiny of evidence. As Justice D Y Chandrachud observed in *Independent Thought*,⁶⁴ "the potential for misuse of a law is not a reason to deny relief to genuine victims." To deny criminal law protection to millions of married women on the speculative basis that some wives might make false allegations is to commit a profound category error one that treats every actual rape survivor as a potential perjurer.

⁶³ RIT Foundation v Union of India, W.P.(C) 284/2015 (Delhi High Court), in which the challenge to the marital rape exception has been pending since 2015 and a split verdict was delivered by the Division Bench on 11 May 2022, with Rajiv Shukla J holding the exception unconstitutional and C Hari Shankar J upholding it. The matter is pending before the Supreme Court.

⁶⁴ *Independent Thought v Union of India* (2017) 10 SCC 800 ("Independent Thought"), per Madan B Lokur J and Deepak Gupta J (concurring). The Court struck down Exception 2 to Section 375 of the IPC to the extent it permitted sexual intercourse with a wife between 15 and 18 years of age, holding that it was arbitrary and violated Articles 14, 15 and 21.

The misuse argument is also a conspicuously selective one. The possibility of misuse is not treated as a reason to abolish other crimes that could theoretically be fabricated including Section 498A IPC (cruelty by husband), the offence of dowry demands, or child sexual abuse provisions. Indeed, concerns about the alleged misuse of Section 498A have been addressed through judicial guidance on bail, pre-trial investigation, and evidentiary scrutiny not through the abolition of the provision. The appropriate legislative response to concerns about misuse is the design of procedural safeguards not categorical exemptions that leave an entire class of victims entirely without legal protection.

Research conducted in England and Wales following the introduction of the Sexual Offences Act 2003 showed no measurable increase in false rape allegations after the abolition of the marital exemption.⁶⁵ This empirical evidence further undermines the argument from misuse.

5.1.3 The Evidentiary Difficulty Argument

A third argument holds that proof of marital rape would be extremely difficult given the absence of witnesses to the act, the inherent intimacy of the marital relationship, and the challenge of establishing non-consent between spouses who regularly engage in consensual sexual intercourse. While the difficulties of proof in any sexual offence case are real and must be acknowledged, these difficulties are not unique to marital rape and do not, in principle, justify categorical decriminalisation.⁶⁶

Difficulty of proof is an argument for careful procedural design, not for categorical exemption. Every rape case involves a challenge of proof the absence of witnesses, the word of one party against another, the lack of forensic evidence in many cases, and the trauma-affected memory of survivors. These challenges have not been taken to justify the decriminalisation of rape in other contexts. Instead, the law has developed procedural tools to address them: specialist courts, trained investigators, sensitive evidentiary rules, and expert testimony.

⁶⁵ Home Office, "Setting the Boundaries: Reforming the Law on Sex Offences" (2000) vol 1, para 2.10.3; Joanna Bourke, *Rape: A History from 1860 to the Present* (Virago, 2007) ch 2. Research in England and Wales following the Sexual Offences Act 2003 showed no measurable increase in false rape allegations.

⁶⁶ Indian Evidence Act, 1872, s 114A (inserted by Criminal Law (Amendment) Act, 2013): "In a prosecution for rape under sub-section (2) of section 376 of the Indian Penal Code, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and the woman states in her evidence before the court that she did not consent, the court shall presume that she did not consent."

In the specific context of marital rape, several categories of evidence can be probative. Medical evidence including evidence of injury, patterns of repeated assault, and psychological trauma consistent with coerced sexual intercourse is frequently available.⁶⁷ Expert testimony from psychologists on the trauma responses of survivors of intimate partner sexual violence can assist juries and judges in understanding why a wife may not have reported the assault immediately or may have continued to cohabit with the perpetrator after the assault. The framework of Section 114A of the Indian Evidence Act, which places the burden of proving consent on the accused in certain circumstances, can also be applied, with appropriate modification, to prosecutions for marital rape.

Countries that have criminalised marital rape have not, in practice, experienced systematic failure in prosecuting such cases. The evidentiary framework has adapted over time to account for the distinctive features of intimate partner sexual violence. The appropriate policy response is to invest in training investigators, prosecutors, and judges to handle such cases sensitively and competently not to maintain a blanket exemption that guarantees impunity for perpetrators.

5.1.4 The Cultural and Social Context Argument

Some commentators and government submissions argue that India's social and cultural context including high rates of rural illiteracy, lack of awareness about rights, deeply entrenched patriarchal norms, and the economic dependence of women on their husbands makes the criminalisation of marital rape premature or counterproductive. They argue that legal reform must be preceded by, or at minimum accompanied by, a process of social transformation that changes attitudes towards marriage, women, and sexuality. This argument was reflected, in partial form, in the minority judgment of C Hari Shankar J in the *RIT Foundation* proceedings.

This argument fundamentally inverts the relationship between law and social change. Law is both a reflection of and a catalyst for social transformation. The abolition of sati by Regulation XVII of the Bengal Code 1829 did not wait for a social consensus it preceded and helped accelerate one. The criminalisation of dowry demands under the Dowry Prohibition Act 1961, the recognition of the right to equality for women under Articles 14 and 15 of the Constitution, the enactment of the

⁶⁷ Jacquelyn C Campbell and Peggy Alford, "The Dark Consequences of Marital Rape" (1989) 89(7) *American Journal of Nursing* 946; Diana Russell, *Rape in Marriage* (Macmillan, 1982). Studies consistently show that marital rape causes psychological sequelae including PTSD, depression, anxiety disorders and suicidal ideation comparable to or worse than those caused by stranger rape.

Protection of Women from Domestic Violence Act 2005, and the recognition of rights of the LGBTQ+ community in *Navtej Singh Johar*⁶⁸ all occurred in advance of full social consensus and helped accelerate social change. This is the proper function of transformative constitutionalism.

Criminal law carries an expressive and communicative function that is distinct from its deterrent and punitive functions. When Parliament enacts a criminal offence, it signals society's values and condemns conduct that falls below the minimum standard of respect for human dignity. The criminalisation of marital rape would send a powerful message to Indian society and to the millions of women within marriage who currently lack any specific criminal law protection that a wife's sexual autonomy is protected by law and that no man, not even her husband, is above the law.

The Justice Verma Committee, established in the wake of the December 2012 Delhi gang rape to recommend criminal law reform, unequivocally recommended the deletion of the marital rape exception.⁶⁹ The Committee's reasoning was straightforward: the exception rested on no principle of law and was inconsistent with the constitutional guarantee of equality and dignity. That Parliament declined to implement this recommendation in the Criminal Law (Amendment) Act 2013 does not diminish its normative force.

5.1.5 The Institutional Capacity Argument

A related argument holds that India's criminal justice system lacks the institutional capacity in terms of police sensitivity, prosecutorial expertise, judicial training, and survivor support services to handle marital rape cases effectively. This is a legitimate concern, and it would be dishonest to dismiss it entirely. India's criminal justice system is overburdened, under-resourced, and in need of substantial reform. The treatment of rape survivors by police and courts is frequently insensitive and sometimes re-traumatising.

These institutional limitations, however, are not a reason to indefinitely postpone criminalisation. The appropriate response to institutional limitations is institutional reform. This includes mandatory sensitisation and gender training for police officers, prosecutors, and judges

⁶⁸ *Navtej Singh Johar v Union of India* (2018) 10 SCC 1 ("*Navtej*"), per Chandrachud J: "Sexual autonomy is the right of every individual to make autonomous choices in matters of sexuality free from State interference." See also Dipak Misra CJI (for himself, Khanwilkar J): "[Section 377] criminalises acts of personal intimacy which are not harmful to others."

⁶⁹ Report of the Committee on Amendments to Criminal Law (Justice J S Verma Committee, 2013), Chapter 3. The Committee, constituted in the wake of the December 2012 Delhi gang rape, recommended the deletion of the marital rape exception but the recommendation was not implemented by the Criminal Law (Amendment) Act, 2013.

handling sexual offence cases; the designation of special courts or fast-track procedures for sexual offences; the provision of free legal aid and psychological counselling to survivors; and the development of standard operating procedures for investigating and prosecuting marital rape complaints.⁷⁰ The National Crime Records Bureau should also be required to maintain a separate statistical category for marital rape, to enable evidence-based policy monitoring.

The experience of jurisdictions that have criminalised marital rape including India's neighbour Sri Lanka,⁷¹ which abolished the exemption in 1995 demonstrates that institutional capacity can be built alongside and in response to legal reform, rather than as a prerequisite for it. To demand perfected institutions as a precondition of criminalisation is, in effect, to demand that the status quo of impunity persist indefinitely. This is neither constitutionally acceptable nor ethically defensible.

5.2 The Empirical Dimension: Prevalence of Marital Sexual Violence

The debate over the criminalisation of marital rape cannot be conducted in an empirical vacuum. It is necessary to understand the scale and severity of the problem that criminalisation is intended to address. The data on marital sexual violence in India, though certainly undercounted due to stigma and reporting barriers, present an alarming picture of widespread harm that is largely invisible to the criminal law.⁷²

The National Family Health Survey (NFHS-5), 2019–21 the most comprehensive household survey on health and domestic violence in India, conducted across all states and union territories reveals deeply troubling data on sexual violence within marriage. According to NFHS-5, approximately 6.8% of ever-married women aged 18–49 reported having experienced sexual violence by their current husbands, while a further 7.5% reported having experienced such violence

⁷⁰ Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, UN Doc A/HRC/47/26 (19 May 2021), paras 26–31. The Report notes that marital rape exemptions remain a significant form of legislative discrimination against women globally and urges all States to abolish them.

⁷¹ Criminal Law Amendment Act 1997 (Ireland), s 5; Strafgesetzbuch (Germany) §177 as amended 1997; Penal Code Amendment Act 2007 (Singapore). By 2023, over 150 countries had abolished the marital rape exemption in law.

⁷² National Family Health Survey-5 (NFHS-5), 2019–21 (Ministry of Health and Family Welfare, Government of India, 2022). Data on domestic violence were collected from a sub-sample of ever-married women aged 15–49 in 28 states and 8 union territories.

from a former husband.⁷³ These figures, when projected against India's population of over 1.4 billion and the number of ever-married women in the relevant age group, translate into tens of millions of women who have experienced marital sexual violence but currently have no specific criminal law remedy.

Importantly, these figures almost certainly represent significant undercounting. The stigma associated with disclosing marital sexual violence, the fear of retaliation, the economic dependence of many wives on their husbands, the social pressure to preserve the marital relationship, the widespread internalisation of the belief that a husband has a right to sexual intercourse with his wife, and the formal legal barrier of the marital rape exception all combine to suppress disclosure and reporting. Research on disclosure patterns in intimate partner sexual violence consistently finds that most victims do not report to any formal authority.

The National Crime Records Bureau does not maintain a separate statistical category for marital rape,⁷⁴ further rendering the crime invisible in official discourse and policy analysis. This statistical invisibility reinforces the social invisibility of marital sexual violence and creates a self-perpetuating cycle of under-enforcement and under-reporting.

Research findings from sociological and public health studies consistently demonstrate that marital rape causes severe and long-lasting psychological trauma, including depression, post-traumatic stress disorder (PTSD), anxiety disorders, and suicidal ideation. Critically, research shows that the psychological impact of marital rape is often more severe than that of stranger rape, because the violation occurs within a relationship of trust and intimacy, is frequently repeated over extended periods, and is accompanied by other forms of physical and psychological abuse. The World Health Organization's World Report on Violence and Health (2002) identifies intimate partner sexual violence as a major global public health crisis.⁷⁵

⁷³ NFHS-5, *ibid.* Table 15.1 (Percentage of ever-married women aged 18-49 who have experienced spousal violence). The figure of 6.8% refers to current husbands and 7.5% to former husbands.

⁷⁴ National Crime Records Bureau, *Crime in India 2022* (Ministry of Home Affairs, Government of India, 2023). The NCRB does not maintain a separate category for marital rape, making it impossible to assess the true prevalence of the offence from official statistics.

⁷⁵ Etienne Krug et al (eds), *World Report on Violence and Health* (World Health Organization, Geneva, 2002) chapter 4 ("Violence by Intimate Partners"), 149–181. The Report identifies sexual violence within intimate partnerships as a major global public health crisis disproportionately affecting women.

The intersectional dimension of marital rape in India must also be acknowledged. Women from lower socio-economic classes, lower castes, and rural areas are disproportionately vulnerable to marital rape, as they face greater barriers to accessing legal remedies including geographical distance from courts, lack of legal awareness, financial constraints, and social norms that prioritise family honour over individual rights and are less able to resist coercive sexual demands within marriage. The failure to criminalise marital rape thus has a disproportionate impact on already-marginalised communities of women, exacerbating existing inequalities of class, caste, and geography.

The empirical evidence thus compels the conclusion that marital rape is not a marginal or hypothetical problem in India. It is a widespread and serious violation of women's rights that affects tens of millions of women and causes severe, lasting harm to their physical, psychological, and social wellbeing. A legal system that provides no specific criminal remedy for this harm is, in effect, complicit in it. The failure to criminalise marital rape is not a neutral position; it is a policy choice to leave an entire category of sexual violence beyond the reach of criminal law, and that choice falls with greatest weight upon the most vulnerable women in Indian society.⁷⁶

5.3 Reform Models: Pathways Forward

The case for reform having been established, it is necessary to consider the modalities through which it may be achieved. Three principal pathways present themselves: full legislative criminalisation; intermediate or graduated legislative reform; and judicial intervention by the Supreme Court. Each is examined in turn.

5.3.1 Full Criminalisation

The most principled and constitutionally necessary reform is the complete deletion of Exception 2 from Section 63 of the Bharatiya Nyaya Sanhita, 2023. This would bring the Indian law of rape into conformity with constitutional principles, international obligations, and the global norm. Under this model, non-consensual sexual intercourse within marriage would be prosecuted and punished in the same terms as rape outside marriage, without any distinction, reduction of sentence, or procedural variation premised solely on the fact of the marital relationship.

⁷⁶ Mrinal Satish, *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India* (Cambridge University Press, 2017) ch 6; Pratiksha Baxi, *Public Secrets of Law: Rape Trials in India* (Oxford University Press, 2014); Flavia Agnes, "Protecting Women Against Violence? Review of a Decade of Legislation, 1980–89" (1992) 27(17) *Economic and Political Weekly* WS19.

Full criminalisation is the approach adopted by England and Wales, Canada, Australia, South Africa, Kenya, and the overwhelming majority of democracies that have addressed the issue. It rests on the simple proposition that consent is the cornerstone of lawful sexual intercourse, and that the presence or absence of consent does not depend on the relationship between the parties. A wife who has not consented to sexual intercourse has been raped, regardless of her marital status. To hold otherwise is to hold that marriage extinguishes a woman's right to bodily autonomy proposition that is fundamentally incompatible with the constitutional guarantees of dignity, equality, and personal liberty.

Full criminalisation should be accompanied by a suite of complementary reforms. These include: comprehensive sensitisation training for police, investigators, and prosecutors in handling marital rape complaints; specialist support services for survivors, including safe houses, crisis counselling, and legal aid; the establishment of designated courts or fast-track procedures for sexual offence cases; public awareness campaigns to educate citizens about marital rape as a serious criminal offence and about the rights of married women; and amendments to the Indian Evidence Act to ensure that evidentiary rules are calibrated to the specific features of intimate partner sexual violence.

5.3.2 Intermediate Legislative Reform

An intermediate approach, advanced by some scholars and reflected in the legislative practice of some jurisdictions, would create a separate offence of "spousal sexual assault" with a distinct sentencing framework. Under this approach, non-consensual sexual intercourse within marriage would be criminalised, but the maximum sentence might be lower than that for rape outside marriage, or a court might be required to consider the matrimonial context as a mitigating factor in sentencing. This approach analogous to the approach taken in some states of the United States before full criminalisation was achieved extends criminal liability to marital rape while recognising, in the form of the sentencing framework, the distinctive context of the marital relationship.⁷⁷

While this study advocates full criminalisation as the preferred and constitutionally necessary option, it is acknowledged that the intermediate model represents a significant improvement over the status quo. It would extend at least some criminal law protection to married women and would

⁷⁷ *People v Liberta* 474 NE 2d 567 (NY 1984). The New York Court of Appeals held the marital exemption to be unconstitutional under the equal protection clause.

repudiate the fiction that marriage implies perpetual consent. However, the creation of a lesser offence for marital rape risks institutionalising a normative hierarchy between married and unmarried rape survivors' hierarchy that is itself constitutionally problematic under Articles 14 and 15 of the Constitution.

Another intermediate option is to strengthen existing civil remedies. The Protection of Women from Domestic Violence Act, 2005 already defines "sexual abuse" to include marital rape for purposes of civil protection orders. However, the PWDVA provides only civil remedies—protection orders, residence orders, monetary compensation and not criminal prosecution or punishment. Strengthening the enforcement mechanisms of the PWDVA, improving access to its remedies for women in rural areas, and ensuring the effective implementation of civil protection orders would provide meaningful, if incomplete, relief to survivors even in the absence of criminal legislation.

5.3.3 Judicial Intervention

In the absence of legislative action, the Supreme Court of India as the ultimate guardian and interpreter of the Constitution has the authority and, it is argued, the constitutional duty to strike down the marital rape exception as unconstitutional. The Court has repeatedly exercised this power to strike down colonial-era provisions that conflict with constitutional values: Section 377 of the IPC in *Navtej Singh Johar*; Section 497 (adultery) in *Joseph Shine*; the practice of triple talaq in *Shayara Bano*;⁷⁸ and the partial invalidation of Exception 2 to Section 375 (as it applied to child brides) in *Independent Thought*.⁷⁹ The marital rape exception is the natural next step in this trajectory of constitutional adjudication.

The constitutional case is overwhelming. Exception 2 to Section 63 of the BNS creates a classification between married and unmarried women with respect to the availability of criminal law protection against non-consensual sexual intercourse classification that is arbitrary and bears no rational nexus to any legitimate state objective, in violation of Article 14.⁸⁰ It discriminates against

⁷⁸ *Shayara Bano v Union of India* (2017) 9 SCC 1, declaring the practice of talaq-e-biddat (triple talaq) unconstitutional as manifestly arbitrary and violative of Article 14.

⁸⁰ Constitution of India, Art 14: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

women on the ground of their marital status status inextricably linked to sexing violation of Article 15.⁸¹ And it egregiously violates the right to dignity, bodily autonomy, and privacy guaranteed by Article 21,⁸² as interpreted by the nine-judge bench in *K S Puttaswamy*,⁸³ and as elaborated by the Court in the context of sexual autonomy in *Navtej Singh Johar* and reproductive autonomy in *X v Principal Secretary*.⁸⁴

The pending petition arising from the Division Bench split verdict in the *RIT Foundation* case provides the Supreme Court with the opportunity to resolve this question definitively. The Court should exercise its jurisdiction under Article 32 to declare Exception 2 to Section 63 of the BNS unconstitutional as violative of Articles 14, 15, and 21 of the Constitution, and should direct Parliament to enact appropriate implementing legislation within a specified timeframe.

5.4 Conclusion

This research project has undertaken a comprehensive study of marital rape in India from historical, constitutional, comparative, empirical, and policy perspectives. The following conclusions emerge from this study:

First, the marital rape exception originated in a colonial-era codification of an English common law fiction Sir Matthew Hale's implied consent doctrine that has no basis in constitutional values, contemporary understandings of consent, or international human rights norms. It was transplanted into Indian law through the Indian Penal Code 1860 and has been unreflectively

⁸¹ Constitution of India, Art 15(1): "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of these."

⁸² Constitution of India, Art 21: "No person shall be deprived of his life or personal liberty except according to procedure established by law." As expansively interpreted by the Supreme Court, Article 21 protects the right to dignity, bodily integrity, privacy, and autonomy.

⁸³ *K S Puttaswamy v Union of India* (2017) 10 SCC 1 ("*Puttaswamy*"), per Chandrachud J (for himself, Bobde J and Nazeer J): "Privacy is the ultimate expression of the sanctity of the individual. It is a natural right, emanating from the concept of liberty, that the individual possesses over her mind and body."

⁸⁴ *X v Principal Secretary, Health and Family Welfare Department, Government of NCT of Delhi* (2022) SCC Online SC 1321, per Chandrachud J: "The right to reproductive autonomy flows from Article 21 and encompasses a woman's decision whether to carry a pregnancy to term."

retained in the Bharatiya Nyaya Sanhita 2023 without any serious engagement with its constitutional or normative foundations.⁸⁵

5.4.1 Summary of Findings

Second, the marital rape exception is constitutionally infirm. It violates the right to equality under Article 14 by creating an arbitrary and irrational classification between married and unmarried women; it discriminates on the ground of sex in violation of Article 15; and it egregiously violates the right to dignity, bodily autonomy, and privacy guaranteed by Article 21, as interpreted by the Supreme Court in *K S Puttaswamy, Navtej Singh Johar*, and *X v Principal Secretary*.

Third, India's failure to criminalise marital rape places it in violation of binding treaty obligations under CEDAW,⁸⁶ the ICCPR,⁸⁷ and other international human rights instruments, as repeatedly noted by UN treaty bodies. The CEDAW Committee's General Recommendation No 35 explicitly calls upon States to repeal laws that condone marital rape.⁸⁸

⁸⁵ Indian Penal Code, 1860 (Act 45 of 1860), s 375, Exception 2 (prior to its amendment in 2013 by the Criminal Law (Amendment) Act, 2013): "Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape." The Criminal Law (Amendment) Act, 2013 raised the age threshold to 18 years, but retained the exemption itself.

⁸⁶ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), adopted 18 December 1979, 1249 UNTS 13, Arts 2(b), (c), 5(a), 16. India ratified CEDAW on 9 July 1993, with reservations to Articles 5(a) and 16(2). The CEDAW Committee has repeatedly called upon India to criminalise marital rape: see Concluding Observations on the combined fourth and fifth periodic reports of India, UN Doc CEDAW/C/IND/CO/4-5 (18 July 2014), para 21(c).

⁸⁷ International Covenant on Civil and Political Rights (ICCPR), opened for signature 16 December 1966, 999 UNTS 171, Arts 7, 17, 26. India acceded to the ICCPR on 10 April 1979. The Human Rights Committee, General Comment No 36 (Article 6: Right to Life) notes that States must protect individuals from private acts of violence including within intimate relationships.

⁸⁸ UN Committee on the Elimination of Discrimination against Women, General Recommendation No 35 on Gender-Based Violence Against Women, UN Doc CEDAW/C/GC/35 (2017), para 29(a): "Repeal laws that allow, tolerate or condone forms of gender-based violence against women, including... laws that explicitly or implicitly condone gender-based violence against women, such as... marital rape exemptions."

Fourth, comparative law from the United Kingdom,⁸⁹ Canada,⁹⁰ South Africa,⁹¹ and numerous other jurisdictions demonstrates that the criminalisation of marital rape is legally feasible, judicially manageable, and does not produce the adverse consequences marital instability, false accusations, evidentiary chaos feared by its opponents.

Fifth, the arguments against criminalisation based on the sanctity of marriage, the risk of misuse, evidentiary difficulty, and cultural context are legally untenable and constitutionally insufficient to justify a discriminatory exception. They represent, in many cases, rationalisations of patriarchal assumptions that have been progressively rejected by Indian constitutional law and by global legal norms.

Sixth, empirical data from NFHS-5 reveals that marital sexual violence affects tens of millions of Indian women who currently have no specific criminal law remedy for the violence they suffer. The burden of the law's failure falls disproportionately on women from marginalised communities. The National Crime Records Bureau's failure to maintain separate statistics on marital rape compounds this invisibility.

5.4.2 Suggestions and Recommendations

On the basis of the foregoing analysis, the following legislative, judicial, institutional, and social recommendations are made:

Legislative Recommendation 1: The Parliament of India should immediately amend the Bharatiya Nyaya Sanhita, 2023 to delete Exception 2 from Section 63, thereby criminalising marital rape without any exemption premised on the marital relationship. This reform should be treated as a matter of constitutional urgency, not as a subject for further consultation and deferral.

⁸⁹ Sexual Offences Act 2003 (England and Wales), s 1(1): "A person (A) commits an offence if... An intentionally penetrates the vagina, anus or mouth of another person (B) with his penis, B does not consent to the penetration, and A does not reasonably believe that B consents." The marital rape exemption had been abolished by the House of Lords in *R v R* [1992] 1 AC 599 and the statute codified the position.

⁹⁰ Criminal Code (Canada), RSC 1985, c C-46, s 278. Canada abolished the marital rape exemption through the Criminal Law Amendment Act 1983 (SC 1980-81-82-83, c 125). Consent is defined in s 273.1 and "no consent is obtained" if the complainant expresses by conduct a lack of agreement to engage in the activity.

⁹¹ Criminal Law (Sexual Offences) Act 1990 (South Africa), abolishing the marital exemption; subsequently replaced by the Sexual Offences Act 32 of 2007, s 3, which criminalises rape without exception. The Constitutional Court's interpretation of equality and dignity under ss 9–10 of the Constitution of the Republic of South Africa, 1996, has reinforced the criminalisation.

Legislative Recommendation 2: The offence should be prosecuted and punished under the same penal provisions as rape, with equivalent sentencing ranges, subject to case-specific judicial discretion on aggravating and mitigating circumstances. No separate or lesser offence of "spousal sexual assault" should be created, as this would institutionalise a normative hierarchy inconsistent with Article 14.

Legislative Recommendation 3: The Protection of Women from Domestic Violence Act, 2005 should be amended to strengthen its sexual abuse provisions, improve access to civil remedies in rural and semi-urban areas, and ensure effective enforcement of civil protection orders in cases of marital sexual violence.

Judicial Recommendation: The Supreme Court of India should, in the pending petition arising from the *RIT Foundation* case, exercise its jurisdiction under Article 32 of the Constitution to declare Exception 2 to Section 63 of the BNS unconstitutional as violative of Articles 14, 15, and 21, and should provide a timeframe for Parliament to enact implementing legislation.

Institutional Recommendation: A dedicated monitoring unit within the National Commission for Women should be established to track the implementation of marital rape laws, support survivors, compile disaggregated data on marital sexual violence, and report annually to Parliament.

Criminal Justice System Reforms: Mandatory sensitisation and gender training for police, prosecutors, and judges in handling marital rape cases; establishment of fast-track courts for sexual offences; provision of free legal aid to all marital rape survivors; amendments to the Indian Evidence Act to facilitate prosecution of marital rape cases; and instruction to the NCRB to maintain a separate statistical category for marital rape.

Social Recommendation: The government should launch a comprehensive national awareness campaign, developed in consultation with women's rights organisations and survivor groups, to educate citizens about marital rape, sexual consent, and the rights of married women under the law.

5.4.3 Concluding Remarks

The question of whether to criminalise marital rape in India is ultimately a question about what kind of constitutional democracy India aspires to be. A constitution that guarantees equality, dignity, and the protection of law to every person cannot simultaneously permit a law that denies these fundamental guarantees to tens of millions of married women on the basis of an archaic fiction of implied spousal consent fiction formulated in seventeenth-century England by a judge who also sentenced women to death for witchcraft.

Marriage is not a contract that extinguishes a woman's rights. It is not a licence for violence. It is not a zone of lawlessness where the constitutional guarantees of dignity, equality, and personal liberty cease to operate. Marriage is, at its best, a relationship of partnership, equality, mutual respect, and freely given love. The law must reflect this truth and must protect women when the reality of their marriages falls tragically short of this ideal.

The continued existence of the marital rape exception is an affront to the Constitution, a betrayal of India's international commitments, and a source of ongoing injustice to millions of women who suffer sexual violence within marriage and find the doors of criminal law closed to them. As the Supreme Court observed in *K S Puttaswamy*, privacy and by extension, bodily autonomy is the ultimate expression of the sanctity of the individual. It is time for the law of India to translate this constitutional vision into the most intimate and most violated space in the lives of married women: the marital home.

This research project, therefore, concludes unequivocally in favour of the full criminalisation of marital rape in India as a matter of constitutional compulsion, international obligation, empirical necessity, and elemental justice. The time for reform is not merely overdue it is constitutionally required. India's married women are owed no less.⁹²

⁹² *State of Rajasthan v Vinod Kumar* (2012) 6 SCC 770; *Sakshi v Union of India* (2004) 5 SCC 518. See also *Vishaka v State of Rajasthan* (1997) 6 SCC 241, where the Supreme Court used international human rights norms as interpretive tools in the absence of domestic legislation.

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