Should Marital Rape Be Recognised as a Criminal Offence in India: A Comparative Analysis of Domestic Law and International Human Rights Standards?

Abstract

India is one of the few democracies in the world that does not make marital rape a crime. Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita, 2023, which replaces the previous Exception 2 to Section 375 of the Indian Penal Code, 1860, clearly exempts a husband from being prosecuted for raping his wife. This paper questions the constitutional validity and moral grounds of this exemption. By analysing Indian constitutional law, looking at laws in countries like the United Kingdom, the United States, and Australia, and reviewing India's responsibilities under international human rights agreements like CEDAW and the UN Declaration on the Elimination of Violence Against Women. This paper argues that the marital rape exemption cannot stand constitutionally, lacks support in evidence, and is morally wrong. It also suggests that the Indian government's decision to keep this exemption in BNS 2023 shows a deep-rooted bias in favour of patriarchal policies disguised as neutral legislation. The paper ends with specific legislative and judicial recommendations to recognize marital rape as a crime in India.

Keywords: Marital Rape, Bharatiya Nyaya Sanhita, Article 14, Article 21, CEDAW, Comparative Criminal Law, Gender Justice

Introduction

In 1736, the English jurist Sir Matthew Hale put forward a claim that would influence legal thought for centuries: a husband cannot be guilty of raping his wife, since, through their mutual marriage agreement, the wife has given herself to her husband in a way that she cannot take back[1]. This idea of "implied consent," rooted in a legal system that viewed married women as their husbands' property, persisted in Indian law well into the twenty-first century and it continues to exist today.

The Indian Penal Code of 1860 included Exception 2 to Section 375, which stated that sexual intercourse or acts by a man with his wife, as long as she is not under fifteen years old, is not considered rape[2]. When India began a major reform of its criminal law with the Bharatiya Nyaya Sanhita, 2023 the legislature had a unique chance to remove this outdated colonial law. It chose not to. Exception 2 to Section 63 of the BNS keeps the marital rape exemption almost the same, only changing the age of the wife to eighteen years to match the Supreme Court's decision in *Independent Thought v. Union of India*[3], but it does not change the essence of the exemption.

The debate over whether to criminalize marital rape in India goes beyond just a legislative issue. It brings up important questions about the meaning and extent of fundamental rights in Part III of the Constitution of India, 1950, India's duties under international human rights law, and the judiciary's role in addressing legislative failures on significant constitutional matters. This paper aims to explore these questions.

The paper is organized as follows. Part II looks at the historical and legal roots of the marital rape exemption in India. Part III reviews the current legal situation, including the significant split ruling of the Delhi High Court in *RIT Foundation v. Union of India*[4] and ongoing Supreme Court cases. Part IV discusses the constitutional issues with the exemption. Part V provides a comparative look at how the United Kingdom, the United States, and Australia handle this issue. Part VI considers India's responsibilities under international human rights agreements. Part VII tackles the most common arguments against making marital rape a crime. Part VIII concludes with final thoughts and suggestions.

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[1] *Matthew Hale, History of the Pleas of the Crown (1736).*
[2] *Indian Penal Code 1860, s 375, Exception 2 (repealed and replaced by BNS 2023).*
[3] *Independent Thought v. Union of India, (2017) 10 SCC 800.*
[4] *RIT Foundation v. Union of India,W.P.(C) 284/2015 (Delhi HC, 11 May 2022).*

Historical And Doctrinal Origins of the Exemption

The marital rape exemption in Indian law has colonial origins and strong patriarchal roots. When the Indian Penal Code was drafted by Thomas Babington Macaulay and enacted in 1860, it included the Halean doctrine without question. This reflected the Victorian view of marriage as a contract where a wife surrendered her bodily autonomy to her husband. The exemption did not arise from Indian social or legal idea it was imposed by a colonial legislature based on English common law principles that were already being questioned in England at that time.

The theoretical basis for the exemption rests on three main ideas: first, the doctrine of implied consent assumes that a wife's consent to intercourse is permanently given at marriage; second, the doctrine of marital unity claims that husband and wife are considered one legal person, meaning a husband cannot rape "himself"; and third, the importance of marriage creates a private space free from state interference. Despite significant legal and social changes that have undermined each of these ideas, the exemption has remained.

The Law Commission of India's 172nd Report (2000) looked at the exemption[5]. While it did not fully recommend criminalizing it, the report acknowledged that the legal stance was hard to justify on principled grounds. It was not until the Justice J.S. Verma Committee Report in January 2013 created in response to the brutal gang-rape of a young woman in Delhi in December 2012 that a formal governmental body clearly called for the criminalization of marital rape[6]. The Committee noted that marriage should not give a husband the right to have sex with his wife without her consent. The Criminal Law (Amendment) Act, 2013, passed after the Verma Committee Report, changed the definition of rape in important ways but notably did not remove the marital rape exemption.[7]

[5] Law Commission of India, Report No. 172: Review of Rape Laws (2000).
[6] Justice J.S. Verma Committee Report on Amendments to Criminal Laws (January 2013).
[7] Criminal Law (Amendment) Act 2013 (India).

The Current Legal Position in India

- Bhartiya Nyaya Sanhita ,2023

The BNS, which took effect on 1 July 2024, replaces the IPC. Section 63 of the BNS defines rape in ways that are very similar to Section 375 of the IPC, including the broader definition added by the 2013 Amendment. Exception 2 to Section 63 states: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape." The Statement of Objects and Reasons that comes with the BNS Bill does not mention the marital rape exemption. It neither justifies keeping it nor acknowledges the significant criticism aimed at it.[8]

Keeping the exemption in the BNS is a major missed chance for change. The BNS was shown as a complete update and decolonization of Indian criminal law. However, on this crucial issue of bodily rights and gender equality, the legislature has decided to keep a colonial rule based on an outdated view of marriage. This view does not align with the constitutional values of dignity, equality, and personal liberty.

- The Delhi High Court Split Verdict*: RIT Foundation v. Union of India*

The most prominent case concerning the marital rape exemption has come from the Delhi High Court's split ruling in *RIT Foundation v. Union of India*. This case was decided on May 11, 2022, by a division bench consisting of Justice Rajiv Shakdher and Justice C. Hari Shankar, both of whom have provided separate opinions on this case.

Justice Shakdher's opinion was the majority opinion. In his opinion, he concluded that the marital rape exemption was unconstitutional because it violated Articles 14, 15 and 21 of the Constitution[9]. He found that the exemption creates arbitrary and irrational distinctions between married and unmarried women, taking away the married woman's fundamental right to both bodily integrity and sexual autonomy. He further held that the marital rape exemption cannot

[8] Statement of Objects and reasons, Bharatiya Nyaya Sanhita Bill 2023.
[9] Rajiv Shakdher J (majority opinion) in RIT Foundation v. Union of India, W.P.(C) 284/2015

pass constitutional muster under the scrutiny requirement of a country that operates within the confines of the rule of law and is committed to gender justice.

Justice C. Hari Shankar's opinion was the dissenting opinion. He found that the marital rape exemption is constitutionally valid. He found that the institution of marriage occupies a distinctive place in Indian society and law; therefore, the marital rape exemption reflects the decision of the legislature to protect the institution of marriage and that the judiciary must, at a minimum, give deference to that decision based on the evolving mores of society. The dissent also expressed concern about the potential for misuse of a marital rape law and the difficulties of proof in the marital context. The matter has been appealed to the Supreme Court of India, where it remains pending.

- *Independent Thought v. Union of India*

Before the BNS judgment in *Independent Thought v. Union of India* (2017), the Supreme Court had partially removed the long-standing marital rape exception by reading the age of the wife of 15 years to the legal age of 18 years for purposes of consent. It stated that the provision allowing for sexual intercourse with a married woman of 15-18 years was in violation of her constitutional rights under Articles 14, 15 and 21. Although this was a significant step, the Court refused to consider for the time being the broader issue of marital rape involving adult women. Thus, leaving the exception to the marital rape law still mostly intact.

Constitutional analysis of Marital Rape Exemption

1. Violation of article 14: right to equality

The Constitution of India has Article 14 that says the State cannot deny anyone equality before the law or the same protection of the laws in India[10]. The Supreme Court has always said that to classify something under Article 14 it needs to meet two conditions: it has to be based on a difference and this difference has to have a logical connection to what the law is trying to achieve.

[10]Constitution of India 1950, art 14.

The law that says a husband cannot be charged with raping his wife creates a difference between unmarried women. If a man forces himself on a woman who's not his wife she is protected by the law. If a husband does the same thing to his wife she is not protected in the same way. The difference here is that they are married. We need to ask if this difference makes sense when it comes to the goal of the law.

It does not make sense. A married woman who is forced into sex by her husband suffers the kind of harm as an unmarried woman who goes through the same thing. The pain, the feeling of being violated the attack on her self-respect. None of these are lessened just because she is married. In fact the trust that is broken when someone you love hurts you can make the pain even worse. If the law protects women but not married women just because they are married it does not make sense when it comes to protecting people from sexual violence, which is what the law against rape is supposed to do. So this exemption does not meet the requirements of Article 14.

2. Violation of Article 21: Right to Life and Personal Liberty

Article 21 says that no person can be deprived of their life or personal liberty unless it is done according to the law[11]. The Supreme Court has given a broad interpretation of Article 21 starting with the case of *Maneka Gandhi versus Union of India*[12]. This interpretation has given people a lot of rights including the right to be treated with dignity, the right to privacy and the right to control their body.

In the case of *K.S. Puttaswamy versus Union of India*[13] the Supreme Court said that the right to privacy is a right under Article 21. The Court said that privacy includes being able to make choices about your body and being free from people interfering with you. The right to decide who you want to have sex with and when is an important part of this right to privacy.

The law that says a husband cannot be punished for raping his wife is very wrong. It takes away the wife's right to say no to sex. That is not fair. The law is saying that what the wife wants or does not want is not important. This is taking away her right to control her body and make her

[11] *Constitution of India 1950, art 21.*
[12] *Maneka Gandhi v. Union of India, AIR 1978 SC 597.*
[13] *K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.*

own choices, which is something that the Supreme Court has said is a fundamental right under Article 21.

The Supreme Court has also said that the right to life includes the right to live with dignity. In the case of *Francis Coralie Mullin versus Administrator, Union Territory of Delhi* the Court said that people have the right to be treated with respect[14]. In another case *State of Karnataka versus Krishnappa* the Court said that sexual violence is a violation of a person's right to privacy[15]. In the case of *Suchita Srivastava versus Chandigarh Administration* the Court said that people have the right to make their choices about having children[16]. All these cases show that the law that says a husband cannot be punished for raping his wife is not compatible with Article 21.

The Supreme Court has given rights to people under Article 21 including the right to privacy and the right to control their own body. The marital rape exemption is not fair. It takes away the rights that the Supreme Court has given to people. Article 21 is very important. It says that people have the right to life and personal liberty. The marital rape exemption is not compatible, with Article 21. It needs to be changed.

3. The Doctrine of Reasonable Classification and the Protective Scope of Article 15

Article 15(1) says the State cannot treat citizens unfairly based on their religion, race, caste, sex, place of birth or any of these. The exemption on rape is unfair to women because of their sex and marital status.

Marital status is not directly mentioned in Article 15(1). The discrimination is actually based on sex. The exemption works this way because the victim is a woman who's married.

When we read Article 15 with Article 14 which says arbitrary classification is not allowed it becomes clear that the exemption is not constitutional.

Comparative Analysis

[14] *Francis Coralie Mullin v. Administrator, Union Territory of Delhi, AIR 1981 SC 746.*
[15] *State of Karnataka v. Krishnappa, (2000) 4 SCC 75.*
[16] *Suchita Srivastava v. Chandigarh Administration, (2009) 9 SCC 1.*

A. The United Kingdom

The United Kingdom provides an example for comparison. This is because the marital rape exemption in law came from English common law.

In England for a time the marital rape exemption was part of the common law. This exemption originated from a statement made by Hale[17]. The position changed in 1992 when the House of Lords made a ruling in the case of *R v. R(1992)*[18]

All the judges in the House of Lords agreed that the marital rape exemption was not suitable for modern English law. Lord Keith of Kinkel stated that the idea of implied consent was no longer useful. He said that marriage does not give a husband the right to have intercourse with his wife if she does not want to. The Sexual Offences Act 2003 confirmed this position. It defined rape in a way that applies to both men and women. There is no exception for intercourse in this law. The marital rape exemption was removed from law.[19]

B. The United States

In the United States people have worked to get rid of the marital rape exemption. This has happened because of state laws and court decisions. One important case was *People v. Liberta* in 1984. The New York Court of Appeals made a decision. They said the marital rape exemption in the New York Penal Law was not fair. It went against the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[20]

The Court said there is no reason to treat marital rape and non-marital rape differently. So they said the exemption was not valid. By the 1990s all fifty states had made marital rape a crime in some way. The Violence Against Women Act in 1994 showed that the federal government was committed to stopping violence, against women, including rape. The marital rape exemption is no longer accepted because marital rape is a crime. The United States has made progress in getting rid of the marital rape exemption.

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[17] *Sexual Offences Act 1956 (UK); R v. R [1992] 1 AC 599 (HL).*
[18] *R v. R [1992] 1 AC 599 (HL), per Lord Keith of Kinkel.*
[19] *Sexual Offences Act 2003 (UK), s 1.*
[20] *New York Penal Law § 130.35 (McKinney 1984); People v. Liberta, 64 N.Y.2d 152 (1984).*

C. Australia

Australia got rid of the rule that said a husband could not rape his wife. This happened because of changes to the law and court decisions. South Australia was the place to make marital rape a crime in 1976. Then the other states and territories did the thing. Now in Australia marital rape is considered a crime just like rape when the people are not married. The law in Australia is clear: It has to be a choice, made at the time and it has to be voluntary. Just because someone said yes before in general does not mean they said yes this time. Australian law says that marital rape is a crime, like any other kind of rape. Australia makes sure that people understand that consent is important whether you are married or not.[21]

D. Comparative Lessons for India

The survey shows that people around the world think the same way. In countries with different laws, such as common law, civil law and mixed laws people believe that marriage does not mean a woman cannot say no to sexual intercourse. If a husband ignores her refusal he is committing rape. India still has a law that says something and this puts India in a small group of countries that think this way. More and more people around the world think this law is not fair to women and does not follow human rights rules.

What happened in the United Kingdom is an example. The House of Lords made a decision in a case called *R v. R*. They said that getting rid of the old law was a good thing. They said it was a way for judges to update the laws to fit the changing times and what people think is right. This is something the Supreme Court of India should think about because they are dealing with this issue now. The Supreme Court of India is looking at the marriage law and the idea that a woman has the right to refuse intercourse and they should consider what the United Kingdom did. The marriage law and the right to refuse intercourse are important issues that the Supreme Court of India is considering.

International Human Rights Obligations

- **CEDAW and the Obligation to Eliminate Gender-Based Violence**

[21] Violence Against Women Act 1994, Pub. L. No. 103-322 (USA).

India agreed to follow the Convention on the Elimination of All Forms of Discrimination Against Women also known as CEDAW in 1993. CEDAW says that countries must change or get rid of laws that're not fair to women. The CEDAW Committee says that countries must make sure husbands can be charged with rape if they force their wives to have sex.[22]

The CEDAW Committee also said that countries must make sure their laws against violence towards women are applied to everyone even if they are married. They said that countries should get rid of laws that allow or accept violence, towards women. India still has a law that says a husband cannot be charged with rape if he forces his wife to have sex. This goes against what India agreed to when it signed CEDAW.

- **The UN Declaration on the Elimination of Violence Against Women**

The United Nations Declaration on the Elimination of Violence Against Women that was made in 1993 says that violence against women includes things like marital rape and other types of sexual violence that happen in the family.[23]

The United Nations Declaration on the Elimination of Violence Against Women tells countries that they have to do everything they can to stop violence against women from happening to look into it when it does happen and to punish the people who do these things. It also tells countries that they have to make laws to punish people who hurt women and to help women who have been hurt by violence.

These laws should be very strong so that women are protected from violence against women. The laws should also help women who have been victims of violence, against women to get the help they need.

Addressing the Objections to Criminalisation

[22] CEDAW, art 2(f), opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).
[23] UN Declaration on the Elimination of Violence Against Women, GA Res 48/104, UN Doc A/RES/48/104 (20 December 1993), art 2.

A. The "Sanctity of Marriage" Argument

The most common argument against criminalising marital rape is that it would interfere with the institution of marriage and undermine marital harmony. This argument begins with a category error. The institution of marriage, correctly understood, is one of mutual respect, affection, and consent. Such a marital harmony is not worth preserving by exemptions from the criminal law. Criminal law does not protect institutions, but it protects persons. The argument from the sanctity of marriage is, at bottom, an argument for according greater legal protection to an institution than to the human beings – overwhelmingly women – who suffer within it.

B. The “misuse” Argument

A second objection that proponents against marital rape law constantly raised is that it would be subject to widespread misuse by wives as a weapon in matrimonial wrangles. This argument, if accepted, would logically require repeal of the law of rape altogether, since any penal provision can be misused. Misuse is not a principled basis for denying legal protection to a class of victims. The criminal justice system has a number of procedural safeguards corroboration requirements, judicial scrutiny, the standard of proof beyond reasonable doubt that ensure false complaints are filtered out. This would also be true for marital rape prosecutions. Also, the Protection of Women from Domestic Violence Act, 2005 already acknowledges sexual violence within marriage as domestic violence; hence, the objection that a criminal law would be misused is an argument over the sufficiency of existing safeguards rather than the criminalisation principle.

C. The “proof” Argument

A related point that some people make is that it is difficult to prove marital rape due to the private nature of the marriage and the lack of witnesses who could back up either side's account of what happened. However, difficulty of proof does not mean there was no injury to the victim. There are many crimes, such as fraud, corruption and perjury, which are also hard to prove. If the difficulty in proving something is the reason for eliminating the offence, then we need to look at improving our methods of gathering evidence and standards of admissibility of that evidence. Courts in both the UK and the USA have been able to convict people who raped their spouse. There is no reason to assume that it is impossible to provide evidence of perpetration of a spousal rape or to assume that the difficulty in providing

evidence of spousal rape is somehow so unique that we can exempt spousal rape from prosecution as a crime.

D. The "Private Sphere" Argument

The fourth objection is that the bedroom is a private place and the criminal law should not intrude on it. This argument demonstrates a fundamental misunderstanding of how privacy and liberty are related to one another. Privacy protects people from government intrusion upon their private decisions; it does not provide protection for someone who commits a criminal act against another person. As stated by the Supreme Court in K.S. Puttaswamy, “Privacy is an individual right, not a relational right that one partner can use against another.” The criminal law has been used to regulate behaviour in the home for many years; for example: domestic abuse, domestic cruelty, bigamy, etc., and there is no sound reason for treating sexual assault within marriage differently from other crimes.

Recommendations

A. Legislative Reform

The most direct and comprehensive solution is legislative. Parliament should amend Section 63 of the BNS to delete Exception 2, thereby bringing the definition of rape in India into conformity with the constitutional values of equality and dignity and with India's international human rights obligations. This reform should be accompanied by appropriate consequential amendments to ensure consistency with the remainder of the BNS and with related legislation such as the Protection of Women from Domestic Violence Act, 2005.

In framing the amendment, the legislature should also consider enacting a standalone provision dealing with domestic sexual violence, which would permit courts to take into account the specific vulnerabilities and dynamics of intimate partner relationships in assessing issues of consent, evidence, and sentencing. This approach, which has been adopted in several Australian jurisdictions, would address concerns about the adequacy of existing evidential and procedural frameworks without compromising the principle of criminalisation.

B. Judicial reforms

When there is no law made by Parliament on this matter, the Supreme Court of India should use its power to declare the second exception to section sixty-three of the BNS as unconstitutional by virtue of article thirty-two. The constitutionality argument can be made with great clarity

through the use of the power of the Supreme Court. The Supreme Court has provided a precedent of striking down colonial statutes that deprive individuals of their basic human rights, including decriminalizing sex between men at the age of consent in *Navtej Singh Johar v. Union of India* (2018), and therefore, there cannot be a good reason for this to be treated differently than those colonial laws or to use a different standard.

Conclusion

The marital rape exemption under the Bharatiya Nyaya Sanhita, 2023, is a throwback to outdated laws. It is based on a legal idea the wife's implied consent that has been completely rejected by the development of constitutional law, social norms, and international human rights standards. This exemption clashes with the fundamental rights of married women under Articles 14, 15, and 21 of the Constitution of India. It puts India in violation of its obligations under CEDAW and other international human rights agreements. Every major comparable common law jurisdiction has rejected it as a matter of principle. It also reinforces, with state approval, a form of gender-based violence that affects millions of women across the country. The legislature's decision to keep this exemption in the BNS 2023, despite over a decade of persistent calls for its removal, the Justice Verma Committee's strong recommendation for criminalization, and a constitutional court's ruling declaring it unconstitutional, shows not neutrality, but an active choice to prioritize a patriarchal view of marriage over women's fundamental rights. This decision cannot be justified constitutionally and is unacceptable.

The Supreme Court of India now has the chance and the paper argues, the constitutional obligation to correct this injustice. Whether this correction comes from the judiciary or the legislature is clear. The real question is not if marital rape will be recognized as a crime in India, but rather how long that recognition will be postponed and how many women will suffer in the meantime. The answer to this question will reveal much about Indian law's commitment to the values of equality, dignity, and the rule of law.

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