

Marital Rape in India: Criminal Law and Constitutional Morality

Tanmaya Raj Padhi
Rourkela Law College

Abstract—Marital rape remains one of the most challenged issues in Indian criminal law. Even today, Indian law does not fully address forced sexual intercourse by a husband with his wife as rape. These legal lapses raise serious concerns regarding women's bodily autonomy, dignity, and equality. While Indian constitutional law has significantly explained the meaning of privacy, liberty, and personal choice, criminal law continues to preserve an exception that weakens these protections within marriage. This contradiction has led to a much-needed constitutional and social debate.

This article studies the marital rape exception from socio-legal perspectives. It traces the historical background of marital immunity, examines the present legal framework, and analyses its conflict with constitutional values. The article also discusses judicial developments, social realities of sexual violence within marriage, and comparative legal developments in other jurisdictions. Marriage cannot be treated as a source of permanent consent. A woman does not surrender control over her body just because she is married. The article concludes that the marital rape exception is inconsistent with constitutional morality and should be reformed through legislation.

Index Terms—marital rape, bodily autonomy, consent, constitutional morality, criminal law, women's rights

I. INTRODUCTION

Marriage has always been considered as an important part of Indian society. It is not only considered as a legal relationship but also as a moral and cultural institution. A marriage is associated with family honour, social status, and personal duty. Because of this, disputes arising within marriage are often considered private. However, marriage is also a relationship between two individuals, and it cannot be allowed to override fundamental rights.

One of the most challenging features of Indian criminal law is the marital rape exception. This rule generally protects a husband from prosecution for rape committed against his wife. In simple terms, if forced sexual intercourse takes place within marriage, the law does not always treat it as rape. This creates a serious legal contradiction. On one hand, Indian law recognises consent as the foundation of sexual relations. On the other hand, the same law contradicts this principle once marriage begins.

Based on an old legal belief that marriage creates permanent consent to sexual intercourse, it is still not included as an offence in criminal law in India. Due to this belief, a married is presumed to have consented to all future sexual relations with her husband. This idea emerged from English common law and was later incorporated into Indian criminal law during the colonial period. Although legal systems have evolved considerably since then, this exception still exists.

Modern constitutional law in India has recognised dignity, privacy, and autonomy as central constitutional values. Courts have repeatedly affirmed that every individual has the right to control their own body and intimacy as a personal decision. Despite these developments, the marital rape exception continues to deny married women equal protection under criminal law. This inconsistency forms the core issue examined in this article.

II. RESEARCH METHODOLOGY

This study adopts both doctrinal and socio-legal methods of research. The doctrinal part is based on analysis of legal materials such as constitutional provisions, statutory laws, judicial decisions, law commission reports, and parliamentary materials. Primary sources include the Constitution of India, the

Indian Penal Code, 1860 and the provisions under Bharatiya Nyaya Sanhita, 2023.

The socio-legal part of the study throws light on the pathetic lived experiences of women who face sexual violence within marriage. Secondary sources such as books, journal articles, policy papers, and reports published by institutions including UN Women, World Health Organization, and National Crime Records Bureau have also been used. A comparative analysis has been taken into consideration to understand how other countries have dealt with the issue of marital rape.

III. HISTORICAL BACKGROUND OF MARITAL RAPE EXCEPTION

The legal roots of the marital rape exception can be seen in English common law. Sir Matthew Hale famously stated that a husband cannot be guilty of raping his lawful wife because, by marriage, the wife gives irrevocable consent to sexual intercourse (Hale, 1736/1971). This statement reflected the socio-legal position of women during that period. Women were considered subordinate to their husbands, and marriage was seen as transferring certain rights from wife to husband.

This doctrine was closely connected with the theory of coverture. Under coverture, a married woman had no separate legal identity. Her legal personality was absorbed into that of her husband. As a result, the law did not recognise her as an independent rights-bearing individual within marriage.

These patriarchal ideas became a part of Indian law during British rule. The Indian Penal Code, 1860 included Exception 2 to Section 375, which excluded sexual intercourse by a husband with his wife from the definition of rape. Since independence India has undergone major constitutional transformation, still this colonial provision has remained largely intact.

The continued existence of this exception reflects how deeply patriarchal assumptions are embedded within criminal law. It also demonstrates how colonial legal values can survive even in a modern constitutional framework.

IV. PRESENT LEGAL POSITION IN INDIA

Under Section 375 of the Indian Penal Code, 1860 rape was defined along with certain exceptions. Exception

2 created immunity for husbands in relation to sexual intercourse with their wives, subject to age conditions. This meant that a husband could generally not be prosecuted for raping his wife.

The introduction of the Bharatiya Nyaya Sanhita, 2023 did not noticeably change this position. Although India has undertaken criminal law reform, the law still does not fully criminalise marital rape.

Women who experience sexual violence in marriage may seek remedies under other laws such as the Protection of Women from Domestic Violence Act, 2005 or provisions dealing with cruelty. They may also seek divorce or judicial separation. However, these remedies do not amount to recognition of rape as a criminal offence. Domestic violence law mainly provides civil protection. Cruelty provisions focus on broader forms of abuse. Divorce dissolves marriage but does not punish sexual violence.

Thus, the present legal system creates unequal protection. The same act may amount to rape if committed by a stranger, but not if committed by a husband. This distinction raises serious constitutional concerns.

V. CONSTITUTIONAL ANALYSIS

The marital rape exception raises significant issues under Articles 14, 15, and 21 of the Constitution of India. Article 14 guarantees equality before law and equal protection of laws. The marital rape exception creates a distinction between married and unmarried women. The criminal laws protect the unmarried women from the offence of rape while the married women are deprived of the same. This differentiation is based solely on marital status.

Such a distinction is completely irrational. Forced sexual intercourse violates bodily integrity irrespective of marital status. The harm suffered by a married woman is no less serious than that suffered by an unmarried woman. Therefore, the exception appears arbitrary and inconsistent with Article 14.

Article 15 prohibits discrimination on grounds of sex. Although the marital rape exception does not expressly mention discrimination, it is based on gendered assumptions about marriage and women's duties. It assumes that wives owe sexual access to husbands and therefore do not require equal legal protection. This reflects a deeply patriarchal understanding of marriage.

Article 21 is central to this debate. It protects life and personal liberty, including dignity, privacy, and bodily autonomy. In *Justice K.S. Puttaswamy v. Union of India*, the Supreme Court recognised privacy as a fundamental right. Privacy includes bodily integrity and intimate decision-making.

Similarly, in *Navtej Singh Johar v. Union of India*, the Court recognised sexual autonomy as part of dignity and liberty. In *Joseph Shine v. Union of India*, the Court rejected legal ideas based on patriarchal control over women's sexuality. Together, these judgments strengthen the constitutional case against marital rape immunity.

VI. 'CONSENT' WITHIN MARRIAGE

Consent is the most vital ingredient so far as rape laws are concerned. Sexual relations without consent amount to rape. This principle should apply equally within marriage. Marriage cannot convert consent into a permanent legal obligation. A woman may consent on one occasion and refuse on another. Marriage does not remove her right to refuse.

However, social realities in India complicate this issue. Many women are socialised to believe that sexual relations are a marital duty. Refusal may be viewed as disobedience or failure as a wife. As a result, forced sex within marriage is often normalised.

It is evident that women also hesitate to report such violence because of stigma, financial dependency, fear of family breakdown, and lack of legal recognition. The law itself contributes to this silence. When criminal law refuses to address marital rape, it indirectly sends a message that such violence is less serious or less deserving of punishment.

VII. JUDICIAL DEVELOPMENTS

Indian courts have increasingly engaged with this issue. In *Independent Thought v. Union of India* (2017), the Supreme Court read down the marital rape exception in relation to minor wives. This decision was important because it demonstrated that marital immunity is not absolute.

The Delhi High Court later heard constitutional challenges to the marital rape exception. The Court delivered a split verdict. One judge held that the exception was unconstitutional, while the other believed that reform should come from Parliament.

This split reflected the continuing legal and social divide on the issue.

Arguments against criminalisation often include fear of misuse, false complaints, and possible breakdown of marriage. These concerns are not unique to marital rape. All criminal laws carry some risk of misuse. That possibility cannot justify denial of legal protection.

VIII. COMPARATIVE POSITION

United Kingdom

Several countries have already criminalised marital rape. In the United Kingdom, the House of Lords abolished marital rape immunity in *R v R* (1991). The Court held that marriage does not create irrevocable consent.

Canada

Canada criminalised marital rape in 1983 through important changes in its criminal law. Before this reform, Canadian law followed the old English common law rule that a husband could not be charged with raping his wife. This rule was based on the belief that once a woman entered into marriage; she gave permanent consent to sexual relations with her husband.

This position changed with the Criminal Law Amendment Act, 1983. The law removed the immunity earlier given to husbands and replaced the offence of "rape" with the broader term "sexual assault." This new law applied equally to all persons, whether the offender was a stranger, friend, or spouse. The reform was a major step toward recognising women's bodily autonomy and equality within marriage. After 1983, a husband in Canada could be prosecuted for non-consensual sexual intercourse with his wife.

South-Africa

South Africa also recognised marital rape as a criminal offence through both legislative reform and judicial developments. Earlier, the law reflected the traditional idea that marriage protected husbands from rape charges. However, this changed with the enactment of the Prevention of Family Violence Act, 1993, which expressly abolished the marital rape exemption.

The law made it clear that marriage cannot be used as a defence in cases of rape. Later, the Criminal Law (Sexual Offences and Related Matters) Amendment

Act, 2007 further strengthened the legal framework by expanding the scope of sexual offences and improving protection for victims. South Africa's legal reforms are often seen as part of its wider efforts to address domestic violence and gender-based violence.

Nepal

Nepal became one of the first countries in South Asia to criminalise marital rape. In 2002, the country amended its laws to recognise forced sexual intercourse by a husband as a punishable offence. This reform was particularly important because South Asian societies have long been influenced by patriarchal family structures, where marital relations were often considered private matters beyond legal intervention.

By criminalising marital rape, Nepal legally acknowledged that a wife has an independent right to consent within marriage. Although the law initially faced criticism for prescribing comparatively lighter punishment, it was still an important step toward recognising women's sexual autonomy and dignity. Over time, further constitutional and legal reforms in Nepal have continued to strengthen women's rights.

IX. SUGGESTIONS AND CONCLUSION

The marital rape exception should be repealed through legislative reform. Criminal law should recognise that consent is indispensable in all sexual relationships, including marriage. Marriage can never be considered as a licence to forced sexual intercourse.

Institutional safeguards should also be strengthened. Police officers and judges should receive training on handling cases involving sexual violence within marriage. Support services, counselling sessions, and procedural protections should be made conveniently available to victims.

Social awareness is equally important. Legal reform alone cannot change deep rooted socio-legal evil. Society has to get rid off the disbelief that marriage grants ownership over the spouse's body. The marital rape exception is a result of anachronistic legal thinking. It is inconsistent with dignity, equality, and bodily autonomy. A constitutional democracy committed to justice cannot deny protection simply because violence occurs within marriage. Consent never ends with the rituals of marriage. Hence, the law must evolve to recognise this reality.

REFERENCES

- [1] Government of India, *Indian Penal Code*, 1860. India, 1860.
- [2] Government of India, *Bharatiya Nyaya Sanhita*, 2023. India, 2023.
- [3] M. Hale, *History of the Pleas of the Crown*. Professional Books, 1971, originally published 1736.
- [4] *Independent Thought v. Union of India*, (2017) 10 SCC 800.
- [5] *Joseph Shine v. Union of India*, (2019) 3 SCC 39.
- [6] *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.
- [7] *Justice K. S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.
- [8] National Family Health Survey, *NFHS-5 Report*, 2021.