



MARITAL RAPE EXCEPTION IN INDIA: SHOULD IT CONTINUE UNDER INDIAN LAW?

Roshni Rajput*

ABSTRACT

*The marital rape exception remains one of the most contested issues in Indian criminal law, raising fundamental questions concerning consent, equality, dignity, and bodily autonomy within marriage. Although the Bharatiya Nyaya Sanhita, 2023 modernises India's criminal law framework, Section 63 continues to retain the marital rape exception for adult wives. This paper examines the historical origins of the doctrine of implied consent, its incorporation into Indian law, and its continued constitutional relevance. It analyses significant judicial developments, particularly *Independent Thought v Union of India* and *RIT Foundation v. Union of India*, which have shaped the debate surrounding the validity of the exception. The paper further examines the protection available under the Protection of Women from Domestic Violence Act, 2005 and compares India's position with reforms undertaken in the United Kingdom and Canada. It argues that marriage should not extinguish an individual's right to refuse sexual intercourse and emphasises the need to reconcile criminal law with constitutional values while ensuring procedural fairness.*

Keywords: *Marital Rape, Consent, Bodily Autonomy, Constitutional Rights, Bharatiya Nyaya Sanhita, 2023.*

INTRODUCTION

Does marriage imply irrevocable consent? This question lies at the heart of one of the most debated issues in Indian criminal law. While the law criminalises non-consensual sexual intercourse in most circumstances, it continues to recognise an exception when the accused is the husband of the woman. As constitutional values increasingly emphasise equality, dignity, and bodily autonomy, the continued existence of the marital rape exception raises a difficult

*BA LLB (HONS.), SECOND YEAR, SISTER NIVEDITA UNIVERSITY.

question: should marriage shield an act that would otherwise amount to rape? This blog examines the legal framework, judicial developments, constitutional concerns, and competing arguments surrounding the marital rape exception in India.

Rape is unlawful sexual intercourse committed against the will of a person or without their free and voluntary consent. Consent is considered invalid when it is obtained through force, coercion, deception, or when the person is incapable of giving legal consent due to age, mental incapacity, intoxication, or unconsciousness. Under Section 63 of the Bharatiya Nyaya Sanhita, 2023, rape is recognised as a criminal offence.¹ However, marital rape refers to non-consensual sexual intercourse by a husband with his wife. Despite the absence of consent, Indian law generally does not recognise marital rape as the offence of rape because of the marital rape exception under Section 63, except in limited situations such as sexual intercourse by a husband with his wife during judicial separation under Section 67 of the Bharatiya Nyaya Sanhita, 2023.¹ The issue of marital rape remains one of the most controversial and pressing debates in Indian criminal law.

In today's society, marriage is increasingly recognised as a partnership based on equality, dignity, and mutual respect rather than as a relationship that gives one spouse unlimited rights over the other. The growing awareness of consent, gender justice, and human rights has intensified the demand to reconsider the legal treatment of non-consensual sexual intercourse within marriage. While many countries have criminalised marital rape, India continues to debate whether the marital rape exception is compatible with constitutional values such as equality (Article 14), non-discrimination (Article 15), the right to life and personal liberty (Article 21), and the dignity of married women. As discussions on women's rights continue to evolve, the question of whether the marital rape exception should remain in Indian law has become increasingly significant.

The marital rape exception did not originate in India. It came from English common law during the 17th century, when the legal status of married women was governed by the doctrine of coverture. The doctrine states that upon marriage, a woman's legal existence was essentially merged with that of her husband. The married woman was legally dependent on her husband, losing autonomy over her legal rights and property.

¹ Bharatiya Nyaya Sanhita 2023, s 63

A major influence on this principle was the English jurist Sir Matthew Hale, who, in his posthumously published work *Historia Placitorum Coronae* (1736), stated that a husband could not be guilty of raping his lawful wife because, by entering into marriage, the wife had given irrevocable consent to sexual intercourse. This principle, commonly known as a doctrine of implied consent, reflected the social and legal attitudes of that era, where marriage was viewed as creating permanent consent rather than a continuing requirement for mutual agreement.

In contemporary times, the historical justification for the marital rape exception has been widely questioned. Constitutional jurisprudence increasingly recognises that marriage does not extinguish an individual's right to bodily integrity, dignity, or decisional autonomy.² Modern legal thought is based on the understanding that consent must be free, voluntary, and capable of being withdrawn at any stage, irrespective of the marital relationship.

In India, Marital Rape is not considered a crime, and everyone is allowed to have forced sexual intercourse with his wife, and the law itself says this. It's so ironic to say that people talk about keeping women safe within the country, in streets, malls, and all other places except home. They don't consider it necessary to talk about it. But the crimes happening to women inside their homes can't and should not be ignored. The point that needs to be focused upon is that 'Marriage gives consent to having sexual intercourse, but it doesn't snatch away the right from women to 'say no' to it. Denial of this right protects the husband from exercising his marital right of non-consensual and undesired intercourse with his wife.

In the Indian context, the marital rape exception was historically contained in exception 2 to section 375 of the Indian Penal Code, 1860, which provided that sexual intercourse by a man with his own wife, provided she was not under the prescribed age, would not constitute rape. Following the replacement of the IPC by the Bharatiya Nyaya Sanhita, 2023, a similar exception continues under section 63, which states that sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.³

However, the absence of criminal recognition does not mean that a married woman is left without legal protection. The Protection of Women from Domestic Violence Act, 2005 (PWDVA) provides civil remedies to women who experience abuse within a domestic relationship. Under Section 3 of the Act, domestic violence includes physical, sexual, verbal,

² Constitution of India, articles 14 and 21 (for the discussion on equality, dignity, and bodily autonomy).

³ Bharatiya Nyaya Sanhita 2023.

emotional, and economic abuse. Consequently, forced sexual intercourse by a husband without the wife's consent may constitute "sexual abuse" under the PWDVA, even though it is not generally prosecuted as the offence of rape under Section 63 of the Bharatiya Nyaya Sanhita, 2023.⁴ The Act empowers an aggrieved woman to seek protection orders (section 18), residence orders (section 19), monetary relief (section 20), custody orders (section 21), and compensation orders (section 22),⁵ thereby offering important legal protection despite the absence of specific criminal liability for marital rape.

Despite the legal remedies available under the Protection of Women from Domestic Violence Act, 2005, the absence of criminal recognition of marital rape has remained a matter of intense legal and constitutional debate. The marital rape exception has been challenged before the courts because it violates the fundamental rights guaranteed under Articles 14, 15, and 21 of the Constitution. Consequently, the judiciary has played a significant role in examining the validity of the exception and its compatibility with constitutional principles.

JUDICIAL DEVELOPMENTS

Independent Thought v. Union of India (2017) 10 SCC 800 –

Facts of the case: Independent Thought, a non-governmental organisation working for children's rights, filed a Public Interest Litigation under Article 32 of the Constitution challenging Exception 2 to Section 375 of the Indian Penal Code, 1860. At the time, the provision stated that sexual intercourse by a husband with his wife, if she was not below 15 years of age, did not amount to rape.⁵ The petitioner argued that this exception created an arbitrary distinction between married and unmarried girls aged 15 to 18 years, thereby denying married minor girls the same legal protection against sexual violence that was available to unmarried girls. It was also argued that the exception conflicted with the Protection of Children from Sexual Offences Act, 2012 (POCSO) and the Prohibition of Child Marriage Act, 2006, both of which recognised eighteen years as the age of majority for protection against sexual exploitation.

Issue Before the Court: The principal issue before the Supreme Court was whether Exception 2 to Section 375 IPC, in so far as it excluded sexual intercourse by a husband with his wife between 15 and 18 years of age from the definition of rape, violated the constitutional

⁴ Bharatiya Nyaya Sanhita 2023, s 63.

⁵ Indian Penal code 1860, s 375 exception 2.

guarantees of equality and dignity under Articles 14, 15, and 21 of the Constitution. The Court also examined whether the provision was inconsistent with child protection laws enacted by Parliament.

Judgment: A Bench comprising Justice Madan B. Lokur and Justice Deepak Gupta delivered the judgment on 11 October 2017. The Court did not strike down the entire marital rape exception. Instead, it read down Exception 2 to Section 375 IPC and held that sexual intercourse with a wife below eighteen years of age would amount to rape, irrespective of her marital status. The Court harmonised the IPC with the POCSO Act and the Prohibition of Child Marriage Act, holding that there was no rational basis for treating a married girl child differently from an unmarried girl child for protection from sexual offences.

Significance of the Judgment: The decision is regarded as a landmark judgment in protecting the rights of girl children. It effectively raised the age under the marital rape exception from 15 years to 18 years, ensuring that married minor girls receive the same protection as unmarried minor girls against sexual assault. However, the Court deliberately limited its ruling to child marriages and did not decide whether the marital rape exception is unconstitutional for adult married women. Consequently, the broader issue of criminalising marital rape between adult spouses remains unresolved and continues to be the subject of constitutional challenges before the courts.

RIT Foundation v. Union of India (Delhi High Court, 2022) –

Facts of the case: The petition was filed by RIT Foundation, along with several individual petitioners and women's rights organisations, challenging the constitutional validity of Exception 2 to Section 375 of the Indian Penal Code, 1860. The petitioners argued that the marital rape exception violated the fundamental rights of married women by denying them protection against non-consensual sexual intercourse by their husbands. They contended that the exception was arbitrary, discriminatory, and inconsistent with the constitutional guarantees of equality, dignity, privacy, and bodily autonomy. The Union of India opposed the petitions, submitting that criminalising marital rape could have far-reaching social consequences and that the matter required legislative consideration.

Issue Before the Court: The principal issue before the Delhi High Court was whether Exception 2 to Section 375 of the Indian Penal Code, 1860, which excluded non-consensual sexual intercourse by a husband with his wife from the offence of rape, was unconstitutional

for violating Articles 14, 15, 19, and 21 of the Constitution of India. The Court also considered whether the exception could be sustained in light of evolving constitutional principles relating to consent, dignity, and bodily autonomy.

Split Verdict: On 11 May 2022, the Division Bench delivered a split verdict. Justice Rajiv Shakti held that the marital rape exception was unconstitutional. According to him, marriage does not extinguish a woman's right to bodily autonomy, dignity, or sexual consent. He concluded that the exception violated Articles 14 and 21 of the Constitution because it treated married women differently from unmarried women without a constitutionally valid justification.

Justice C. Hari Shankar, however, upheld the validity of the exception. He observed that the issue involved complex questions of social policy and that any decision to criminalise marital rape should be made by Parliament, not by the judiciary. He therefore declined to strike down the provision.

Significance of the Judgment: Although the Delhi High Court did not reach a unanimous decision, the case is regarded as a landmark in the constitutional debate on marital rape. The split verdict highlighted the competing perspectives on consent, marriage, and constitutional rights, while demonstrating the need for authoritative determination by the Supreme Court. Following the conflicting opinions, appeals were filed before the Supreme Court, where the constitutional validity of the marital rape exception continues to be examined. Thus, *RIT Foundation v Union of India* remains one of the most significant judicial developments in the ongoing discourse on marital rape in India.

TRANSFER OF APPEALS FROM THE DELHI HIGH COURT

The split verdict in *RIT Foundation v. Union of India* left the constitutional validity of the marital rape exception unresolved. Since the two judges expressed conflicting opinions on the issue, no binding precedent emerged from the decision. Consequently, the matter was carried before the Supreme Court of India, where the constitutional validity of the marital rape exception is presently under consideration. The Supreme Court's decision is expected to provide clarity on whether the exception is consistent with the constitutional guarantees of equality, dignity, and personal liberty under Articles 14, 15, and 21 of the Constitution.

While the constitutional challenge to the marital rape exception remains pending before the Supreme Court of India, several countries have already re-examined similar legal doctrines and criminalised marital rape through legislative reforms or judicial decisions. Examining these international developments provides valuable insight into how modern legal systems have reconciled the institution of marriage with the principles of consent, equality, and bodily autonomy.

The United Kingdom occupies a significant place in the legal history of the marital rape exception, as the doctrine originated in English common law. During the seventeenth century, the English jurist Sir Matthew Hale propounded the view that a husband could not be guilty of raping his lawful wife because, upon marriage, the wife was deemed to have given irrevocable consent to sexual intercourse. This principle, commonly known as the Doctrine of Implied Consent, influenced the criminal laws of several common law jurisdictions, including India, and remained part of English law for centuries.

The legal position in the United Kingdom changed dramatically with the landmark decision of the House of Lords in *R v R* [1991] UKHL 12; [1992] 1 AC 599. In this case, a husband was prosecuted for attempting to rape his wife after they had separated. He argued that, under the common law marital rape exemption, a husband could not be convicted of raping his wife. The House of Lords unanimously rejected this argument and held that the marital rape exemption no longer formed part of English law. The Court observed that marriage does not imply permanent or irrevocable consent to sexual intercourse and that a wife retains the same right to refuse sexual relations as any other individual. Following *R v R*, marital rape has been fully recognised as a criminal offence in the United Kingdom. The abolition of the marital rape exemption marked a significant shift towards recognising the principles of consent, bodily autonomy, and equality within marriage.

The current legal framework, particularly under the Sexual Offences Act 2003, makes no distinction between married and unmarried persons in relation to the offence of rape.¹ The Crown Prosecution Service also expressly recognises that rape can occur within marriage or intimate relationships and emphasises that every individual has the right to choose whether to engage in sexual activity, irrespective of their marital status. The experience of the United Kingdom demonstrates how a legal system can move away from historical doctrines rooted in implied consent and align its criminal law with contemporary constitutional values and human

rights principles. This development has frequently been cited in comparative legal discussions concerning the recognition of marital rape in India.

The United Kingdom's decision to abolish the marital rape exemption has influenced legal discussions across several jurisdictions. Similar reforms have been undertaken by other countries, reflecting a growing international recognition that marriage does not negate the requirement of consent.

Canada was among the first common law countries to abolish the marital rape exemption through the Criminal Law Amendment Act, 1983.⁶ Before this reform, Canadian law, like English common law, recognised the doctrine of implied consent within marriage. However, the 1983 amendments removed the distinction between married and unmarried victims by replacing the offence of "rape" with a broader framework of sexual assault, making it clear that a husband could be prosecuted for sexually assaulting his wife. Under the current Criminal Code of Canada, consent is required for every sexual act regardless of the marital relationship, and marriage is not a legal defence to sexual assault. Canada's legal framework reflects the principle that marriage does not diminish an individual's bodily autonomy or the right to refuse sexual intercourse, reinforcing equality and personal dignity within intimate relationships.

The comparative analysis of the United Kingdom and Canada demonstrates a significant shift from the traditional doctrine of implied consent towards a legal framework that recognises consent as an essential element of every sexual relationship, irrespective of marriage. While these jurisdictions have reformed their laws to uphold bodily autonomy and equality, India continues to grapple with the constitutional validity of the marital rape exception. This raises a fundamental question: should the institution of marriage continue to justify differential treatment under criminal law, or should the law evolve to reflect contemporary constitutional values?

The continued existence of the marital rape exception presents a complex conflict between traditional perceptions of marriage and modern constitutional principles. Marriage is undoubtedly an important social institution, but it should not diminish an individual's right to bodily integrity, dignity, or personal autonomy. Consent is a continuing and voluntary process that cannot be presumed solely because two individuals are married. At the same time, concerns regarding misuse of criminal law and the potential impact on marital relationships deserve

⁶ Criminal Law Amendment Act, 1983(Canada).

careful legislative consideration. Therefore, any reform should be accompanied by procedural safeguards, clear evidentiary standards, and fair investigation mechanisms to prevent abuse while ensuring effective protection for genuine victims. A balanced legal framework can protect both individual rights and the integrity of the criminal justice system.

CONCLUSION

The marital rape exception remains one of the most debated issues in Indian criminal law. Although the transition from the Indian Penal Code, 1860 to the Bharatiya Nyaya Sanhita, 2023 has modernised many aspects of criminal law, the marital rape exception has largely been retained. Judicial decisions such as *Independent Thought v. Union of India* and *RIT Foundation v. Union of India* have intensified the constitutional debate, while comparative developments in the United Kingdom and Canada demonstrate an international movement towards recognising that marriage does not imply irrevocable consent. As the matter awaits final adjudication before the Supreme Court, the future of the marital rape exception will significantly influence the interpretation of equality, dignity, and bodily autonomy under the Constitution. Any future reform should strive to uphold constitutional values while ensuring procedural fairness, thereby balancing the protection of victims with the rights of the accused.