



INTERNATIONAL LAW
JOURNAL

**WHITE BLACK
LEGAL LAW
JOURNAL**
**ISSN: 2581-
8503**

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

WWW.WHITEBLACKLEGAL.CO.IN

DISCLAIMER

No part of this publication may be reproduced, stored, transmitted, translated, or distributed in any form or by any means—whether electronic, mechanical, photocopying, recording, scanning, or otherwise—without the prior written permission of the Editor-in-Chief of *White Black Legal – The Law Journal*.

All copyrights in the articles published in this journal vest with *White Black Legal – The Law Journal*, unless otherwise expressly stated. Authors are solely responsible for the originality, authenticity, accuracy, and legality of the content submitted and published.

The views, opinions, interpretations, and conclusions expressed in the articles are exclusively those of the respective authors. They do not represent or reflect the views of the Editorial Board, Editors, Reviewers, Advisors, Publisher, or Management of *White Black Legal*.

While reasonable efforts are made to ensure academic quality and accuracy through editorial and peer-review processes, *White Black Legal* makes no representations or warranties, express or implied, regarding the completeness, accuracy, reliability, or suitability of the content published. The journal shall not be liable for any errors, omissions, inaccuracies, or consequences arising from the use, interpretation, or reliance upon the information contained in this publication.

The content published in this journal is intended solely for academic and informational purposes and shall not be construed as legal advice, professional advice, or legal opinion. *White Black Legal* expressly disclaims all liability for any loss, damage, claim, or legal consequence arising directly or indirectly from the use of any material published herein.

ABOUT WHITE BLACK LEGAL

White Black Legal – The Law Journal is an open-access, peer-reviewed, and refereed legal journal established to provide a scholarly platform for the examination and discussion of contemporary legal issues. The journal is dedicated to encouraging rigorous legal research, critical analysis, and informed academic discourse across diverse fields of law.

The journal invites contributions from law students, researchers, academicians, legal practitioners, and policy scholars. By facilitating engagement between emerging scholars and experienced legal professionals, *White Black Legal* seeks to bridge theoretical legal research with practical, institutional, and societal perspectives.

In a rapidly evolving social, economic, and technological environment, the journal endeavours to examine the changing role of law and its impact on governance, justice systems, and society. *White Black Legal* remains committed to academic integrity, ethical research practices, and the dissemination of accessible legal scholarship to a global readership.

AIM & SCOPE

The aim of *White Black Legal – The Law Journal* is to promote excellence in legal research and to provide a credible academic forum for the analysis, discussion, and advancement of contemporary legal issues. The journal encourages original, analytical, and well-researched contributions that add substantive value to legal scholarship.

The journal publishes scholarly works examining doctrinal, theoretical, empirical, and interdisciplinary perspectives of law. Submissions are welcomed from academicians, legal professionals, researchers, scholars, and students who demonstrate intellectual rigour, analytical clarity, and relevance to current legal and policy developments.

The scope of the journal includes, but is not limited to:

- Constitutional and Administrative Law
- Criminal Law and Criminal Justice
- Corporate, Commercial, and Business Laws
- Intellectual Property and Technology Law
- International Law and Human Rights
- Environmental and Sustainable Development Law
- Cyber Law, Artificial Intelligence, and Emerging Technologies
- Family Law, Labour Law, and Social Justice Studies

The journal accepts original research articles, case comments, legislative and policy analyses, book reviews, and interdisciplinary studies addressing legal issues at national and international levels. All submissions are subject to a rigorous double-blind peer-review process to ensure academic quality, originality, and relevance.

Through its publications, *White Black Legal – The Law Journal* seeks to foster critical legal thinking and contribute to the development of law as an instrument of justice, governance, and social progress, while expressly disclaiming responsibility for the application or misuse of published content.

CRIMINALISATION OF MARITAL RAPE: BODILY AUTONOMY OF WOMEN MATTERS IN MATRIMONIAL RELATIONSHIP

AUTHORED BY - AYUSH KUMAR PRAJAPATI
(A 2nd Year of BA LL.B. Student of Shobhit University, Meerut)



INDEX

<i>CONTENT</i>
<i>Introduction</i>
<i>Meaning Of Marital Rape</i>
<i>Types Of Marital Rape</i>
<i>Status Of Marital Rape In India</i>
<i>Theories In Respect Of Marital Rape</i>
<i>Judicial Interpretation</i>
<i>Why Marital Rape Should Be Criminalized</i>
<i>Existing Remedy For Marital Rape Victim</i>
<i>Recent Development</i>
<i>Conclusion</i>
<i>References</i>

INTRODUCTION

Rape is a heinous act of sexual intercourse committed against any natural person forcefully without the consent of such person against whom it is committed. In other words, Rape is a type of sexual assault involving sexual intercourse, or other forms of sexual penetration, carried out against a person without their consent. It may be carried out by physical force, coercion, abuse of authority, or against a person who is incapable of giving valid consent, such as one who is unconscious, incapacitated, has an intellectual disability, or is below the legal age of consent.

Lack of consent is key to the definition of rape. Consent is affirmative “informed approval, indicating a freely given agreement” to sexual activity. Lack of consent may result from either forcible compulsion by the perpetrator or an inability to consent on the part of the victim (who are asleep, intoxicated or otherwise mentally compromised). Sexual intercourse with a person below the age of consent, i.e., the age at which legal competence is established, is referred to as statutory rape.

Section 63 of the Bharatiya Nyaya Sanhita, 2023 (in short ‘BNS’), the corresponding provision under the Indian Penal Code, 1860 is Section 375, defines rape strictly as a crime committed by a man against a woman. Section 63 of the BNS states that,

63. A man is said to commit “rape” if he—

- a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
- b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
- c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
- d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:—
 - i. against her will;
 - ii. without her consent;

- iii. with her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt;
- iv. with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married;
- v. with her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent;
- vi. with or without her consent, when she is under eighteen years of age;
- vii. when she is unable to communicate consent.

Explanation 1.—For the purposes of this section, “vagina” shall also include labia majora.

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.—A medical procedure or intervention shall not constitute rape.

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.

MEANING OF MARITAL RAPE

Marital Rape, or Spousal Rape or inmate partner rape, is non-consensual sex in which the perpetrator is the victim’s spouse. Marital Rape is deemed to be a domestic violence, or sexual abuse. However, if a couple is married, but living separately, then the husband is guilty of rape if his wife does not consent to sexual intercourse. Marital rape is often a chronic form of violence for the victim which takes place within abusive relations.

Types of Marital Rape: - Marital rape may be broadly classified into following two categories;

- i. **Sexual coercion by non-physical means**- this form of coercion involves social coercion in which the wife is compelled to enter into sexual intercourse by reminding her of her duties as a wife. This form of coercion entails applying non-physical

techniques and tactics like verbal pressure in order to get into sexual contact with a non-consenting female. The most commonly used non-physical techniques include making false promises, threatening to end the marital relationship, lies, not conforming to the victim's protests to stop, etc. Such acts of sexual coercion by the use of non-physical stunts though considered less severe in degree as compared with physically coercive sexual acts are widespread and pose a threat to the women's right in the society.

- ii. **Forced Sex**:- this involves the use of physical force to enter into sexual intercourse with an unwilling women. It can further classified into the following three categories;
- a) **Battering Rape**:- this form of rape involves the use of aggression and force against the wife. The women are either battered during the sexual act itself or face a violent aggression after the coerced sexual intercourse. The beating may also occur before the sexual assault so as to compel her into sexual intercourse.
 - b) **Force Only Rape**:- in this form of rape, the husband does not necessarily batter the wife, but uses as much force as is necessary to enter into sexual intercourse with the unwilling wife.
 - c) **Obsessive Rape**:- this form of rape involves the use of force in sexual assault compiled with the perverse act against the wife. It involves a kind of sexual sadistic pleasure enjoyed by the husband.

Marital rape is common but it is only an un-reported crime. In a study conducted by the Joint Women Programme, an NGO found that one out seven married women had been raped by their husband at least once.

In the case of the **People v. Edgar**, The New York Court of Appeals declared the marital rape exception as unconstitutional, stating that, "Rape is a crime that evokes global condemnation because it is an abhorrence to women's value and dignity as a human being. It respects no time, place, age, physical condition or social status. It can happen anywhere and it can happen to anyone. ... Husbands are once again reminded that marriage is not a license to forcibly rape their wives. A husband does not own his wife's body by reason of marriage. By marrying, she does not divest herself of the human right to an exclusive autonomy over her own body and thus, she can lawfully opt to give and withhold her consent to marital coitus. A husband aggrieved by his wife's unremitting refusal to engage in sexual intercourse cannot resort to felonious force or coercion to make her yield. ... Sexual intimacy is an integral part of marriage because it is the spiritual and biological communion that achieves the marital purpose

of procreation. It entails mutual love and self-giving and as such it contemplates only mutual sexual cooperation and never sexual coercion or imposition. ...”

According to **Morton Hunt**, an American Psychologist and Science Writer of U.S.A., “the typical marital rapist is a man who still believes that husband are supposed to rule their wives. This extends, he feels, to sexual matters: when he wants her, she should be glad, or at least willing, if she is not, he has the right to force her. But in forcing her, he gains far more than a few minutes of sexual pleasure. He humbles her and reasserts, in the most emotionally powerful way possible, that he is the ruler and she is the subject.”

Marital rape is a widespread problem for a woman that has existed for centuries throughout the world. This problem has received relatively little attention from the criminal justice system and the society as a whole. While traditionally regarded as a right of husbands, the act is widely - considered as rape in modern times and is becoming increasingly criminalized by many countries' laws.

A woman in this country can protect her right to life and liberty, but not her body, within her marriage. If the husband lays an assault on her wife, then that would constitute an offence under the BNS. If the very same husband lays an assault and forces his wife to have sexual intercourse, he would be liable for assault but not for an offence of rape only because there is a valid marriage between the two.

In December 1993, the United Nations High Commissioner for Human Rights published the Declaration on the Elimination of Violence against Women. This establishes marital rape as a human right violation. This is not fully recognized by all the UN member States. In 1997, UNICEF reported that just 17 states had criminalized marital rape. In 2003, UNIFEM reported that more than 50 states did so. Thus, Marital rape is illegal in 50 American states, 3 Australian states, New Zealand, Canada, Israel, France, Sweden, Denmark, Norway, Soviet Union, Poland, and Czechoslovakia. The issues of sexual and domestic violence within marriage and the family unit, and more specifically, the issue of violence against women, have come to growing international attention from the second half of the 20th century.

STATUS OF MARITAL RAPE IN INDIA

India is one of the thirty-six countries that still have not criminalized marital rape. The definition of rape codified in Section 63 of the BNS, includes all forms of sexual assaults involving non-consensual intercourse with a women. However, Exception 2 of the Section 63 exempts unwilling sexual intercourse between a husband and a wife over eighteen years of age from Section 375's definition of "rape" and thus immunizes such acts from prosecution.

The 172nd Law Commission report had made the following recommendation for a substantial change in respect of the provision of marital rape, "explanation (2) of Section 375 of IPC should be deleted. Forced sexual intercourse by a husband with his wife should be treated equally as an offence just as any physical violence by a husband against the wife is treated as offence.

In 23rd December, 2012, Justice Verma Committee was constituted by the Central Government after the rape of a 23 year old student. The committee was asked to look into the possible amendments in the criminal laws related to sexual violence against women. The committee was conscious of the recommendations in respect of the India made by the U.N. Committee on the Elimination of Discrimination against women in February 2007. The CEDAW committee recommended that the country should "widen the definition of rape in its penal code to reflect the realities of sexual abuse experienced by women and to remove the exception of marital rape form the definition of rape..."

The Verma Committee report points out a 2010 study suggesting that 18.8% of the women are raped by their partners on one or more occasion. The rate of reporting and conviction also remains low; aggravated by the prevalent beliefs that the marital rape is acceptable or is less serious than the other types of rape. The committee notes: ***"changes in the law therefore need to be accompanied by widespread measures raising awareness of women's right to autonomy and physical integrity, regardless of marriage or other intimate relationship."***

Rashida Manjoo, the UN Special Rapporteur on violence against women said that the Justice Verma Committee's recommendation and subsequent legislation was a "golden moment for India" but the recommendations on marital rape age of consent for sex, etc. were not adopted in the Legislation.

In India, approx. 82% of married women aged between 18-49 have blamed their husband for sexual violence. NFHS-5 shows that sexual violence is most often committed by individuals with whom women have an intimate relationship. Among ever-married women aged 18-49 who have experienced sexual violence, 82% report their current husband and 14% report a former husband as perpetrators. The form of

sexual violence most commonly reported by women is that their husband used physical force to have sexual intercourse when they did not want to (5%). Four percent reported that their husband forced them with threats or in other ways to perform sexual acts they did not want to, and two percent reported that their husband forced them to perform any sexual acts they did not want to, as per report, NFHS-5.

In 2005, the Protection of Women from Domestic Violence Act, 2005 was passed which although did not consider marital rape as a crime, yet did consider it is form of domestic violence. Under this Act, if a women has undergone marital rape, she can go to the court and obtain judicial separation form her husband. This is only a piecemeal legislation and much more needs to be done by the parliament in regard to marital rape.

According to the UN Population Fund, more thans two-third of the married women in India, aged between 15 to 49, are severely beaten, or forced to provide sex. In 2011, the International Men and Gender Equality Survey revealed that one in five had forced their wives or partner to have sex. The United Nations published a report stipulating that 69% of the Indian women believe that occasional violence is resorted to when a meal hasn't been prepared in time or when sex has refused. Further statistical research reveals that 9 to 15% of the married women are subjected to rape by their husbands, a staggering and sobering statistic.

Zakiya Luna has, in a 2020 publication, argued that reproduction is both biological and political. According to Luna, it is biological since physical bodies reproduce, and it is political

Table 15.6 Persons committing sexual violence

Among women age 18-49 who have experienced sexual violence, percentage who report specific persons committing sexual violence according to current marital status and age at first experience of sexual violence, India, 2019-21

Person	Marital status		Age at first experience of sexual violence			Total
	Ever married	Never married	<18 years	18 years or higher	Don't know ¹	
Current husband	82.0	na	86.1	85.3	57.9	78.7
Former husband	13.7	na	14.6	14.9	8.3	13.2
Current/former boyfriend	1.6	16.1	2.6	0.8	4.5	2.2
Father/step-father	0.9	3.5	0.5	0.3	2.9	1.0
Brother/step-brother	0.5	3.9	0.1	0.0	2.5	0.7
Other relative	2.3	39.3	2.3	0.4	12.0	3.8
In-law	0.3	na	0.2	0.0	0.9	0.3
Own friend/acquaintance	1.0	2.6	1.0	0.5	2.3	1.1
Family friend	0.4	11.7	0.5	0.0	2.8	0.8
Teacher	0.0	3.9	0.0	0.0	0.8	0.2
Employer/someone at work	0.3	1.8	0.1	0.3	0.7	0.3
Police/soldier	0.1	0.0	0.0	0.0	0.2	0.1
Priest/religious leader	0.0	0.0	0.0	0.0	0.1	0.0
Stranger	0.2	5.2	0.1	0.0	1.5	0.4
Other	0.6	12.0	0.7	0.2	3.1	1.0
Number of women	4,169	176	1,158	2,100	1,087	4,345

na = Not applicable

¹ Includes women who report having ever experienced sexual violence committed only by their current husband if currently married or most recent husband if widowed, divorced, separated, or deserted. For these women, the age at first experience of sexual violence is not known.

since the decision on whether to reproduce or not is not solely a private matter. This decision is intimately linked to wider political, social, and economical structures. A women's role and status in family, and society generally, is often tied to childbearing and ensuring the continuation of successive generation.

THEORIES IN RESPECT OF MARITAL RAPE

Various authors, over a period of time, have come up with different theories regarding the occurrence of marital rape in the society:

- i. **The Feminist Theory:** this theory considers marital rape as a tool in the hands of the patriarchal society that is used to exercise control over the women. They consider that the exemption given in cases marital rape is a remnant of the earlier laws regarding women that considered them to be the property of the husband. The feminists are of the view that marital rape is nothing but a result of a power play by the male spouse in the marriage. Radical feminists have gone to the extent of arguing that any form of heterosexual is based mainly on the basis of the man and is another form of oppression on women.
- ii. **The Social Constructionism Theory:** the believers in the theory of social constructionism are of the view that men have dominated the society in law making and the political arena since time memorial. Law thus came as a reflection of the interest of men. Such laws considered women to be their husband's property after marriage and hence, marital rape was considered an offence of lesser degree as compared to rape. Some jurisprudence even considered that rape in a marriage is not rape at all. The social constructionism believe that marital rape is a means through which men try to assert themselves over their wives so as to retain their long gained power over their property.
- iii. **The Sex-Role Socialization Theory:** these theorists believe that it is the particular gender roles which guide the sexual interactions between the spouses in a marriage. In a marriage, women are always taught to be dominant and aggressive. Care and love are attributed to women, Man, on the hand, are the major perpetrators of sexual entertainment with violent themes. Sex role socialists are of the view that marital rape is nothing but an expression of the traditional perception of sex roles.

JUDICIAL INTERPRETATION

A woman is no longer the chattel-antiquated practices labeled her to be. A husband who has sexual intercourse with his wife is not merely using a property, he is fulfilling a marital consortium with a fellow human being with dignity equal to that he accords himself. He cannot be permitted to violate this dignity by coercing her to engage in a sexual act without her full and free consent.

Further, the delicate and reverent nature of sexual intimacy between a husband and wife excludes cruelty and coercion. Sexual intimacy brings spouses wholeness and oneness. It is a gift and a participation in the mystery of creation. It is a deep sense of spiritual communion. It is an expressive interest in each other's feelings at a time it is needed by the other and it can go a long way in deepening marital relationship.

Besides, a husband who feels aggrieved by his indifferent or uninterested wife's absolute refusal to engage in sexual intimacy may legally seek the court's intervention to declare her psychologically incapacitated to fulfill an essential marital obligation. But he cannot and should not be deemed sexual intimacy from her coercively or violently.

The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence. Women do not divest themselves of such right by contracting marriage for the simple reason that human rights are inalienable.

In the case of the **Anjanaben W/o Bhavinbhai Devshankarbhai Modha v. State of Gujarat**, the Gujarat High Court said that, "... The Constitution treats women equal to man and considers marriage as an association to equals. The Constitution does not in any sense depict the woman to be subordinate to a man. The constitution guarantees fundamental rights under Articles 14, 15, 19 and 21 which are right to live with dignity, personal liberty, bodily integrity, sexual autonomy, right to reproduction choices, right to privacy, right to freedom of speech and expression. Under the Constitution, the rights are equal; protection is also equal.

... Therefore, a man sexually or raping a woman is amenable to punishment under Section 376 of IPC. In most of the cases of such a nature, the usual practice is that if the man is the

husband, performing the very same acts as that of another man, he is exempted. In my considered view, the same cannot be countenanced. A man is man; an act is an act; rape is a rape, be it performed by a man the “husband” on the woman “wife”.”

In India, the culprits are often known to the woman; the social and economic “costs” of reporting such crimes are high. General economic dependence on family and fear of social behaviour. Therefore, the actual incidence of violence against women in India is probably much higher than the data suggests, and women may continue to face hostility and have to remain in environments where they are subject to violence. This silence needs to be broken. In doing so, men, perhaps more than women have a duty and role to play in averting and combating violence against women.

The United Nations Organisation has defined “violence against women” as “any act of gender based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.” The effects of offensive behaviour against women, which laws criminalize physical, verbal, or other acts, which threaten or give them acute discomfort, undermining their dignity, self-worth and respect, is to silence or subdue the survivor.

In the case of the **Karan Daljit Ganbhir S/O Daljit Ganbhir v. State of Gujarat**, The Gujarat High Court stated that “No doubt, marriage has been seen as an automatic grant of sexual consent since decades, however, the modern legal frameworks increasingly recognize the bodily freedom of an individual, even within a marital relationship. Intimacy is normal between every married couples, however, the same has to be a consensual and mutually respectful act. Having an unnatural sex by any spouse against the will and wish of other partner not only cause immense physical pain but it also gives mental, and emotional trauma to the unconsented spouse. ...”

In the case of the **X v. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr.**, The Supreme Court of India observed that, “Married women may also form part of the class of survivors of sexual assault or rape. The ordinary meaning of the word ‘rape’ sexual intercourse with a person, without their consent or against their will, regardless of whether such forced intercourse occurs in the context of matrimony. A women become

pregnant as a result of non-consensual sexual intercourse performed upon her by her husband. He would be remiss in not recognizing that intimate partner violence is a reality and can take the form of rape. The misconception that strangers are exclusively or almost exclusively responsible for sex- and gender based violence is a deeply regrettable one. Sex- and gender based violence (in all its forms) within the context of the family has long formed a part of the lived experiences of scores of women.”

Further stated that, it is not inconceivable that married women become pregnant as a result of their husbands having “raped” them. The nature of sexual violence and the contours of consent do not undergo a transformation when one decides to marry. The institution of marriage does not influence the answer to the question of whether the woman has consented to sexual relation. If the woman is in an abusive relationship, she may face great difficulty in accessing medical resources or consulting doctors.

The ambit of reproductive rights is not restricted to the right of women to have or not have children. It also includes the constellation of freedoms and entitlements that enable a woman to decide freely on all matters relating to her sexual and reproduction health. Reproductive rights include the right to access education and information about contraception and sexual health, the right to decide whether and what type of contraceptives to use, the right to choose whether and when to have children, the right to choose the number of children, the right to access safe and legal abortions, and the right to reproductive healthcare. Women must also have the autonomy to make decision concerning these rights, free from coercion or violence.

The right to reproductive autonomy is closely linked with the right to bodily autonomy. As the term itself suggests, bodily autonomy is the right to take decisions about one’s body. Therefore, the decision to carry the pregnancy to its full term or terminate it is firmly rooted in the right to bodily autonomy and decisional autonomy of the pregnant women.

In the case of the ***KS Puttaswamy v. Union of India***, a nine-judge bench of the Supreme Court recognized the right to privacy as a constitutionally protected right under Article 21 of the Constitution. In this case, held that the right to privacy enables individuals to retain and exercise autonomy over the body and mind. The autonomy of the individual was defined as “the ability to make decision on vital matters of concern of life.”

The judgement described the right to privacy in the following term, "... Privacy postulates the reservation of a private space for the individual, described as the right to be let alone. The concept is founded on the autonomy of the individual. The ability of an individual to make choices lies at the core of the human personality. The notion of privacy enables the individual to assert and control the human element which is inseparable from the personality of the individual. The inviolable nature of the human personality is manifested in the ability to make decisions on matters intimate to human life. The autonomy of the individual is associated over matters which can be kept private. These are concern over which there legitimate expectation of privacy. The body and the mind are inseparable elements of the human personality. The integrity of the body and the sanctity of the mind can exist on the foundation that each individual possesses an inalienable ability and right to preserve a private space in which the human personality can develop. Without the ability to make choices, the inviolability of the personality would be in doubt."

In this case, the court held that personal aspects of life such as family, marriage, procreation, and sexual orientation are all intrinsic to the dignity of the individual. The right to privacy safeguards are respects the decisional autonomy of the individual to exercise intimate personal choices and control over the vital aspects of their body and life. Privacy enables the individual to retain the autonomy of the body and mind. The autonomy of the individual is the ability to make decisions on vital matters of concern of life.

In the case of the **Common Cause v. Union of India**, the Supreme Court observed that right to privacy protects decisional autonomy in matters related to bodily autonomy. Stated that, "the right or privacy resides in the right to liberty and in the respect of autonomy. The right to privacy protects autonomy in making decisions related to the intimate domain of death as well as bodily integrity. Few moments could be of as much importance as the intimate and privacy decisions that we are faced regarding death. Continuing treatment against the wishes of a patient is not only a violence of the principle of informed consent, but also of bodily privacy and bodily integrity that have been recognised as a faced of privacy by this court." The right to decisional autonomy also means that women may choose the course of their lives. Besides physical consequences, unwanted pregnancies which women are forced to carry to term may have cascading effects for the rest of her life by interrupting her education, her career, or affecting her mental well-being.

In the case of the **Francis Coralie Mullin v. Administrator, Union Territory of Delhi**, the Supreme Court recognized that the right to dignity is an essential part of the right to life under Article 21 of the Constitution. It was observed that, "... the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and comingling with fellow human being. ... Every act which offends against or impairs human dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights."

In the case of the **Kesavananda Bharati v. State of Kerala**, the Supreme Court held that dignity forms a part of the basic structure of the Constitution. Such is its fundamental value in our legal system – the concept of dignity forms the very foundation to the Constitution and the right enshrined in it. Dignity inheres in every individual and is an inalienable aspect of one's humanity.

In the case of the **Navtej Singh Johar v. Union of India**, the Supreme Court emphasized the transformation nature of our Constitution. Transformative constitutionalism promotes and engenders societal change by ensuring that every individual is capable of enjoying the life and liberties guaranteed under the Constitution. Dipak Misra, CJ indicated the importance of dignity, "... Dignity while expressive of choice is averse to creation of any dent. When biological expression, be it an orientation or optional expression of choice, is faced with impediment, albeit through any imposition of law, the individual's natural and constitutional right is dented. Such a situation urges the conscience of the final constitutional arbiter to demolish the obstruction and remove the impediment so as to allow the full blossoming of the natural and constitutional rights of individuals. This is the essence of dignity and we say, without any inhibition, that it is our constitutional duty to allow the individual to behave and conduct himself/herself as he/she desires and allow him/her to express himself/herself, of course, with the consent of the other. That is the right to choose without fear. It has to be ingrained as a necessary prerequisite that consent is the real fulcrum of any sexual relationship.

In the case of the **Independent Thought v. Union of India**, the Supreme Court held that sexual intercourse with a girl below 18 years of age is rape regardless of whether or not she is married. Observed that the impact of Exception 2 of Section 375 IPC has to be considered with social

realities of the present. In the context of right to dignity, it was observed, “We must not and cannot forget the existence of Article 21 of the Constitution which gives a fundamental right to a girl child to live a life of dignity. ... The right of a girl child to maintain her bodily integrity is effectively destroyed by a traditional practice sanctified by IPC. Her husband, for the purpose of Section 375 IPC, effectively has full control over her body and can subject her to sexual intercourse without her consent or without her willingness since such an activity would not be rape. Anomalously, although her husband can rape her but he cannot molest her for if he does so he could be punished under the provision of IPC. ...”

In the case of the **Suchita Srivastava v. Chandigarh Administration**, the Supreme Court explicitly recognized the concept of reproductive autonomy. The right of women to make reproductive choices is a dimension of personal liberty under Article 21. It held that reproductive rights includes a women’s entitlement to carry the pregnancy to full term, give birth, and raise children. More importantly, it also recognized that the right to reproductive choice also includes the right not to procreate. It doing so, it situated the reproductive rights of women within the core of constitutional rights.

WHY MARITAL RAPE SHOULD BE CRIMINALIZED

Breach of Article 14: According to the Article 14 of the Constitution of India, it states that, “the state shall not deny to any person equality before the law and equal protection of laws within the territory of India.” Article 14 rejects any type of discrimination based on caste, race, and religion, place of birth or sex. This Article is having a wide ambit and applicability to safeguard the rights of people residing in India.

There can be no doubt that the legislature seek to punish offenders who are guilty of committing rape, this principle is the bedrock on which Section 375 of the IPC is founded. It cannot also be doubted that there is a differentia between married, separated and unmarried couples. It grant impunity qua an act which would otherwise fall within the offence of rape under the main provision, i.e. Section 375, only for the reason it is committed within the bounds of marriage.

Forced sex outside marriage is “real rape” and that the same act within marriage is not rape. A chaste women or young girl is more likely to be considered a ‘victim’; but not a married women. A prior sexual relationship is regarded as a reasonable defence because consent is

assumed; but in the case of a married women, it is not put to test. Sex-worker has been invested with the power to say “no”; by the law; but not a married women. In a gang rape involving the husband of the victim, the co-accused will face the charge of the rape law; but not the offending husband only because of his relationship with the victim. A married women ability to say “no” to sexual communion with her husband when he is infected with a communicable disease or she is herself unwell finds no space in the present framework of rape law.

In every sense, Marital Rape Exception (in short “MRE”) violates the equality contained in Article 14 of the Constitution. Article 14 of the Constitution not only guarantees that the state shall not deny to any person equality before the law but also guarantees that every person within the territory of India will have equal protection of laws. The classification between married and unmarried women in the context of MRE is without doubt unreasonable.

The second exception to section 375 ultra virus the right to equality incorporated in ‘Article’ of the Constitution of India as it discriminates against those women who are married by disconfirming them tantamount security from rape and sexual abuses. MRE provides two classification of women based on their marital status and exempts actions committed by men against their wives. Due to marital status of women, MRE makes the exploitation of married women viable but in the case of unmarried women similar act, i.e., rape and sexual harassment have been criminalized.

MRE violates Article 14 of the Constitution of India. It creates three classes of victims and perpetrators though the act is similar i.e., forced sexual intercourse. It creates an unreasonable, discriminatory and manifestly arbitrary classification. Merely satisfying the test of intelligible differentia is not sufficient to pass muster of Article 14. To pass muster of Article 14, the said provisions must fall within the scope of the following facets of Article 14: there should be intellible differentia between classes, and there must be a rational nexus with the legitimate objects sought to be achieved. MRE suffers from irrationally and manifest arbitrariness as it provides immunity from prosecution for rape to a man who has forcible sex with his wife but not to a man who has forcible sex with a women who is not his wife.

The fact that the law does not operate even-handedly for women who are similarly circumstanced i.e., subjected to forced sex is writ large and no amount of legal calisthenics will sustain MRE. Therefore, MRE is bad in law as it violates Article 14 of the Constitution.

Breach of Article 21: Marital Rape Exception is also violates Article 21 of the Constitution. Article 21 asserts that no person shall be deprived of their life except according to the procedure established by law. This means that every individual has the right to live, and their life cannot be taken away except in accordance with the prescribed legal procedures. The right to life encompasses various aspects, including the right to live with dignity, the right to livelihood, and the right to a healthy environment. Article 21 also protects the personal liberty of individuals. It states that no person shall be deprived of their personal liberty except according to the procedure established by law.

The offence of rape and injury caused remains the same irrespective of who the offender is. The fact that the rapist is the husband of the victim does not make the act of sexual assault any less injuries, degrading or dehumanizing. Irrespective of who the perpetrator is, forced sex mars the women-victim physically, psychologically and emotionally. Rape deserves societal disapprobation in the strongest terms, notwithstanding, the fact that the rapist is in a marital relationship with the victim.

The women by entering into matrimony does not subordinate herself to her spouse or give irrevocable consent to sexual intercourse in all circumstances. Consensual sex is at the heart of a healthy and joyful marital relationship. Not-consensual sex in marriage is an antithesis of what matrimony stands for in modern times. The right to withdraw consent at any given point in time forms the core of the women's right to life and liberty which encompasses her right to protect her physical and mental being. Non-consensual sex destroys her dignity, bodily integrity, autonomy and agency and the choice to procreate or even not to procreate. For example, a wife may refuse to engage in sexual activity with her husband when she is ill or is menstruating or is unable to engage in sexual activity because of a sick child. The wife may also want to keep away from sexual activity in a situation where the husband has contracted an infections, sexually transmissible disease, such as HIV; her refusal in such a situation may emanate not only on account of concern for herself but also, to protect the progeny which may result for such communion.

In the English Criminal law case of the **R v. Clarence**, the case was heard by 13 judges, the dissenting opinion of Hawkins, J. was that, "... this marital privileges does not justify a husband in endangering his wife's health and causing her grievous bodily harm, by exercising his marital privilege when he is suffering form venereal disorder of such a character that the natural

consequence of such communion will be a to communicate the disease to her. ... The husband has a right to the person of his wife, but not if her health is endangered. ... Rape consists in a man having sexual intercourse with a women without her consent, and the marital privilege being equivalent to consent given once for all at the time of marriage, it follows that the mere act of sexual communion is lawful; but there is a wide difference between a simple act of communion which is lawful, and an act of communion combined with infections contagion endangering health and causing harm, which is unlawful.”

In the case of the **T. Sareetha v. T. Venkata Subbaiah**, the Andhra Pradesh High Court held that, the Restitution of Conjugal Right remedy was unconstitutional since it transferred the right of choice to indulge in sexual intercourse from the women to the state. The would violate Article 21 of the Constitution since it infringes upon the personal autonomy of an individual. Moreover, the court accepted that women would be hurt by this provision and notes the importance of sexual autonomy for a women. The court agrees that, “no positive act of sex can be forced upon the unwilling person, because nothing can conceivably be more degrading to human dignity and monstrous to human spirit than to subject a person by the long arm of the law to a positive sex Act.”

Transporting this to the marital rape debate, the argument would be that even though the law treats a married women and an unmarried women different with respect to their rights, it would not be in violence of Article 14 since marriage serves as a reasonable classification. It is important to note that the argument is not that rape per se is not unconstitutional, but rather that marriage satisfies the criteria laid down for reasonable differentia under Article 14 of the Constitution. Therefore, despite rape being a violation of Article 21, it is justified when it is ‘marital’ rape since it amounts to a reasonable classification. To rebut this, we will depict how the concept of marriage has changed legally making women equal partner in a marriage. Using this, we will explain how this evolved understanding of marriage does not allow for the marital rape exception to satisfy the requirements of Article 14.

Breach of Article 15 and 19(1)(a): Article 15 of the Constitution prohibits the state from discriminating against any citizen inter alia on the ground of sex, the instant matters allude to discrimination made within the same sex, solely on the ground of their marital status. Continuance of MRE on the statute violates Article 15 of the Constitution since it triggers discrimination against women based on their marital status. MRE is also violative of Article

19(1)(a) of the Constitution, as it violates the guarantee given by the Constitution concerning freedom of expression, amongst other, to married women who are citizens of this country. The guarantee of freedom of expression includes a women's right to assert her sexual agency and autonomy. The fact that this right is also secured by Article 21 lends strength to the right conferred on a married women a express herself and not be subjected to non-consensual sexual intercourse by the husband.

EXISTING REMEDIES FOR MARITAL RAPE VICTIM

There are avenues available both in IPC/BNS and other statutes which can be taken recourse by a women-victim to agitate her grievance concerning sexual violence once again fails to recognize the fact that none of them brings within its fold the offence of rape.

Section 498A of the IPC/Section 85-86 of the BNS deals with an offence of "cruelty" committed by the husband or his relatives. The expression "cruelty" as defined in Section 498A of the IPC/Section 86 of the BNS means willful conduct which is of such nature that is likely to drive the women to committed suicide or to course grave injury to her life, limb or health. The expression also includes harassment of a women where such harassment is directed towards coercing her or nay person related to her to meet any unlawful demand concerning, property and/or valuable security. Thus, the offence of rape cannot be brought within the ambit of Section 498A of the IPC.

Likewise, the statement of object and reasons of the D.V. Act would distinctly bring forth the point that it was enacted to protect women against domestic violence. The thrust of the D.V. Act is to protect women from becoming victims of domestic violence and to prevent the occurrence of domestic violence in the society. Sexual abuse is included in the definition of domestic violence, the offender is not tried for the offence of rape and the consequences that the offender would have to face, as provided in Section 376(1) of the IPC/Section 64 of the BNS if found guilty. The fact that the magistrate under Section 19(2) of the D.V. Act can order registration of an FIR for every other offence other than marital rape only highlights the fact that the woman-victim is nowhere near the point from which she can trigger prosecution of her husband who has subjected her to forced sexual intercourse.

Insofar as redressal against injury caused on account of sexual abuse amounting to rape tis

concerned, the husband is not visited with any criminal liability for raping his wife.

RECENT DEVELOPMENT

The foundational promise of India's democracy rests on the commitment to equality, dignity, individual agency, privacy and bodily autonomy for all its citizens. Marital Rape Exception in the Indian Penal Code/ Bharatiya Nyaya Sanhita which exempts a husband from punishment for engaging in non-consensual sexual intercourse with his wife who is not under 18 years of age.

On 5th Day of December, 2025, Congress MP Shashi Tharoor was introduced a private member's bill, namely The Bharatiya Nyaya Sanhita (Amendment) Bill, 2024, in the Lok Sabha to criminalise Marital Rape (amendment in Section 63 of the BNS), calling it urgent need to uphold women's rights, emphasizing India's constitutional values. Stated that, the country must move from "NO MEANSE NO" to "ONLY YES MEANSE YES". According to the Statement of Objects and Reason of the said bill, "This failure to criminalize marital rape has left married women legally defenceless, distinguishing them from unmarried women and perpetuating the misconception that marriage voids the necessity of consent. This undermines women's fundamental right to dignity, safety, and bodily autonomy. The alarming prevalence of marital rape is evident from the National Family Health Survey-5 (NFHS-5), which reports that 83% of women aged 18 to 49 who faced sexual violence named their current husband as the perpetrator, reflecting the pervasive nature of sexual violence within marriages. ... Marriage should be a partnership grounded in mutual respect, consent, and equality. Criminalizing marital rape affirms that consent is a fundamental human right, regardless of marital status. Allowing a husband to force sex upon his wife disregards her autonomy and perpetuates a culture of control and gender-based violence. In moving toward equality, it's essential to restore women's agency over their sexual rights within marriage and ensure dignity for all individual, only entrenches gender-based inequality in India's society ... Similarly, factors unrelated to a woman's autonomy – such as her caste, professional, clothing choices, personal beliefs, or past sexual conduct – should never be used to presume her consent. Such assumptions not only perpetuate gender-based inequality but also violate her fundamental rights and dignity; they must be unequivocally rejected."

The Bharatiya Nyaya Sanhita (Amendment) Bill, 2024 was introduced to amend Section 63,

the bill mentioned below hereinafter:

2. In section 63 of the Bharatiya Nyaya Sanhita, 2023,—
- (a) for description (iv), the following description shall be substituted, namely-
- (iv) "with her consent, when the man knows that he is not the person she believes she has given consent to engage in sexual intercourse or sexual acts and that her consent is given because she believes that he is another man with whom she wants to engage in sexual intercourse or sexual acts.";
- (b) in Explanation 2, after the existing proviso, the following proviso shall be inserted, namely:—
- "Provided further that the ethnicity, religion, caste, education, profession, clothing preference, entertainment preference, social circle, personal opinion, past sexual conduct or any other related grounds of a woman shall not be a reason to presume her consent to the sexual activity.; and
- (c) Exception 2 shall be omitted.
- Amendment of section 63.

On 18th Day of January, 2026, at Jaipur Literature Festival, former CJI DY Chandrachud called the continued criminal immunity for marital rape a moral failure of Indian law. He said that the current legal framework, a woman subjected to non-consensual intercourse by her husband cannot file a complaint of marital rape, and according to him, this part of the law requires change. He clearly stated that the law has not kept pace with constitutional values even decades after independence. Further, he said that, "Seventy-five years after Independence, marital rape is still not an offence. A offence who murders his wife is guilty of murder. A husband who grievously assaults his wife is guilty of grievous hurt and can be tried, convicted and sentenced. But a woman who is subjected to non-consensual intercourse cannot complain of marital rape. I think that part of the law has to change."

CONCLUSION

In light of the aforementioned arguments, it is put forward that it is high time marital rape be recognized by Parliament as an offence under IPC/BNS, the punishment of which should be the same as the one prescribed for rape committed other than in marital institution. The fact that the parties are married should not make the sentence lighter because the gravity of the offense is equally grave; otherwise it is analogous to passing off the idea that if a woman consents to be married then she consents to be raped by her husband as well. To culminate, the marital rape exception has no relevance in present scenario.

REFERENCES:

1. Section 63 of the Bharatiya Nyaya Sanhita, 2024, https://www.indiacode.nic.in/show-data?actid=AC_CEN_5_23_00048_2023-45_1719292564123&orderno=63
2. People v. Edgar, <https://elibrary.judiciary.gov.ph/thebookshelf/showdocsfriendly/1/56922>
3. Morton Hunt, https://en.wikipedia.org/wiki/Morton_Hunt
4. United Nations High Commissioner For Human Rights Published The Declaration On The Elimination Of Violence Against Women, <https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-elimination-violence-against-women>
5. UNICEF Report, 1997, <https://www.unicef.org/media/85591/file/Progress-For-Nations-1997.pdf>
6. UNIFEM Report, 2003, <https://www.unicef.org/media/85591/file/Progress-For-Nations-1997.pdf>
7. 172nd Law Commission Report, https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/_2022082487.pdf
8. Justice Verma Committee, 23rd December, 2012, <https://spuwac.in/pdf/jsvermacommittereport.pdf>
9. Rashida Manjoo, https://en.wikipedia.org/wiki/Rashida_Manjoo
10. National Family Health Survey-5, <https://dhsprogram.com/pubs/pdf/FR375/FR375.pdf>
11. The Protection of Women from Domestic Violence Act, 2005 https://www.indiacode.nic.in/bitstream/123456789/15436/1/protection_of_women_from_domestic_violence_act%2C_2005.pdf
12. UN Population Fund, <https://india.unfpa.org/sites/default/files/pub-pdf/ViolenceReport-25-11-10.pdf>
13. The International Men and Gender Equality Survey, 2011, https://www.unfpa.org/sites/default/files/pub-pdf/International%20Men%20%26%20Gender%20Equality%20Survey%20%28IMAGE_S%29%20Global%20Report%202022_EN.pdf
14. Publication of 2020 Zakiya Luna, https://www.researchgate.net/profile/Kristin-Luker/publication/234146333_Reproductive_Justice/links/674e4794359dcb4d9d4c61fd/_Reproductive-Justice.pdf
15. Anjanaben W/o Bhavinbhai Devshankarbhai Modha v. State of Gujarat, May 8, 2024, <https://indiankanoon.org/doc/102595200/>

16. Karan Daljit Ganbhir s/o Daljit Ganbhir v. State of Gujarat, January 5, 2026, <https://indiankanoon.org/doc/99914621/>
17. X. v. Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi, September 29, 2022, <https://indiankanoon.org/doc/123985596/>
18. Justice K.S. Puttaswamy (Retd.) v. Union of India, September 26, 2018, <https://indiankanoon.org/doc/127517806/>
19. Common Cause (A Regd. Society) v. Union of India, March 9, 2018, <https://indiankanoon.org/doc/184449972/>
20. Francis Coralie Mullin v. Administrator, Union Territory of Delhi, January 13, 1981, <https://indiankanoon.org/doc/78536/>
21. Kesavananda Bharati v. State of Kerala, April 24, 1973, <https://indiankanoon.org/doc/257876/>
22. Navtej Singh Johar v. Union of India, September 6, 2018, <https://indiankanoon.org/doc/168671544/>
23. Independent Thought v. Union of India, October 11, 2017, <https://indiankanoon.org/doc/87705010/>
24. Suchita Srivastava v. Chandigarh Administration, August 28, 2009, <https://indiankanoon.org/doc/1500783/>
25. R v. Clarence, https://www.oxbridgenotes.co.uk/law_cases/r-v-clarence
26. T. Sareetha v. T Venkata Subbaiah, July 01, 1983, <https://indiankanoon.org/doc/1987982/>
27. Article 14 of the Constitution of India, <https://indiankanoon.org/doc/367586/>
28. Article 21 of the Constitution of India, <https://indiankanoon.org/doc/1199182/>
29. Article 15 of the Constitution of India, <https://indiankanoon.org/doc/609295/>
30. Article 19 of the Constitution of India, <https://indiankanoon.org/doc/1218090/>
31. The Bharatiya Nyaya Sanhita (Amendment) Bill, 2024, https://sansad.in/getFile/BillsTexts/LSBillTexts/Asintroduced/263_of_2024_AS125202590816PM.pdf?source=legislation
32. Article on Marital Rape of MP Shashi Tharoor, <https://indianexpress.com/article/opinion/columns/shashi-tharoor-writes-the-marital-rape-exception-in-criminal-law-is-a-colonial-relic-it-needs-to-go-10425906/>
33. CJI DY Chandrachud on Marital Rape, <https://www.shoneekapoor.com/legal-news/marital-rape-ex-cji-chandrachud/>