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BETWEEN MARRIAGE AND AUTONOMY

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Abstract

The criminal law's treatment of rape has undergone significant transformation over the past century, evolving from a morality-based framework to one centred on consent, bodily autonomy, and individual dignity. Despite this progress, the persistence of the marital rape exception in several modern legal systems exposes a fundamental inconsistency in the protection afforded to women against sexual violence. The paper begins by examining what constitutes rape in modern criminal jurisprudence, with particular emphasis on the evolving understanding of consent as voluntary, informed, and revocable. It challenges the historically entrenched notion that marriage implies perpetual consent, demonstrating how this assumption is rooted in patriarchal legal doctrines that conceptualised wives as subordinate to their husbands. By situating rape within the framework of sexual autonomy and bodily integrity, the study establishes that non-consensual sexual acts cause harm irrespective of the relationship between the perpetrator and the victim. The research analyses marriage as a disciplinary institution through which sexual access and control are normalised. It argues that the legal immunity granted to marital rape operates as a mechanism of institutional power, legitimising coercion by rendering it invisible to criminal law. Feminist legal theory further informs this analysis by exposing how the public–private divide shields intimate forms of violence from legal scrutiny and reinforces gendered hierarchies within the family. The study undertakes a comparative legal analysis of jurisdictions that have criminalised marital rape alongside those that retain partial or complete exemptions. Focusing on the Indian legal framework, the paper examines the statutory retention of the marital rape exception and evaluates its compatibility with constitutional guarantees of equality, dignity, and personal liberty. Ultimately, the paper argues for the removal of the marital rape exception and the adoption of a consent-based, gender-neutral legal framework that aligns criminal law with constitutional morality and international human rights obligations.

Keywords: Marriage, Rape, Equality, Patriarchy, Autonomy

I. Introduction

The question of whether non-consensual sexual intercourse within marriage should be criminalised has emerged as one of the most contentious and morally charged debates in contemporary criminal law. Traditionally, rape laws were designed to regulate sexual conduct outside marriage, premised on the assumption that marriage itself constituted perpetual and irrevocable consent to sexual relations. This assumption, deeply embedded in patriarchal legal systems, effectively excluded married women from the protection of rape laws, rendering sexual violence within marriage legally invisible. Over time, however, evolving understandings of sexual autonomy, bodily integrity, and gender equality have challenged this archaic conception of marriage, bringing marital rape into sharp legal and constitutional focus.

The relevance of the marital rape debate has intensified in recent decades due to the global

shift toward recognising sexual violence as a violation of fundamental human rights rather than merely a moral or private wrong. Feminist movements, international human rights bodies, and constitutional courts have increasingly underscored that consent must be continuous, voluntary, and revocable, irrespective of marital status. In this context, marital rape is no longer viewed as a private matrimonial issue but as a grave form of gender-based violence that perpetuates inequality, subordination, and coercive control within intimate relationships. The debate thus lies at the intersection of criminal law, constitutional morality, feminist theory, and human rights jurisprudence, making it a critical subject of legal inquiry.

Despite the progressive evolution of rape jurisprudence in many jurisdictions, the marital rape exception continues to persist, either explicitly or implicitly, in several modern legal systems. This persistence reflects the enduring influence of historical doctrines that conceptualised marriage as a legal institution granting the husband sexual dominion over his wife. The marital rape exemption originated in English common law, most notably articulated by Sir Matthew Hale in the 17th century, who asserted that a wife gives irrevocable consent to sexual intercourse upon marriage. Although this doctrine has been formally repudiated in many countries, its underlying logic continues to shape statutory frameworks and judicial attitudes in certain jurisdictions.

In contemporary legal systems where the marital rape exception survives, its justification is often framed in terms of protecting the sanctity of marriage, preserving family stability, or preventing misuse of criminal law. These justifications, however, reveal a troubling inconsistency: while the state readily intervenes in cases of domestic violence, cruelty, and other forms of abuse within marriage, it hesitates to recognise sexual violence as equally deserving of criminal sanction. This selective protection reinforces the notion that a married woman's sexual autonomy is subordinate to the institution of marriage, thereby perpetuating structural gender inequality. The persistence of the exception thus exposes the tension between modern constitutional values of equality and dignity and residual patriarchal norms embedded in criminal law.

II. Research Objectives

- To examine the conceptual and legal foundations of rape and consent, with specific reference to their application within marriage.
- To analyse the historical and theoretical justifications for the marital rape exception and assess their validity in contemporary legal systems.
- To undertake a comparative analysis of jurisdictions that have criminalised marital rape and those that continue to retain exemptions.
- To explore feminist and Foucauldian perspectives on power, control, and sexual violence within marriage.

III. Research Questions

- What constitutes rape in modern criminal jurisprudence, and how is consent conceptualised within this framework?
- On what historical, legal, and ideological bases has the marital rape exception been justified?
- How have different jurisdictions addressed marital rape, and what lessons can be drawn from comparative legal approaches?
- In what ways do power relations within marriage contribute to the normalisation and legal invisibility of sexual violence?

IV. What Constitutes Rape: Legal and Conceptual Foundations

In traditional criminal law, rape was narrowly conceptualised as a sexual offence defined by a fixed set of elements: actus reus, mens rea, and the absence of consent. The actus reus typically consisted of penile-vaginal penetration, reflecting a heteronormative and

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male-centric understanding of sexual violence. Other forms of sexual assault were either excluded or treated as lesser offences, thereby hierarchising sexual harm. The mens rea requirement focused on the accused's intention or knowledge regarding the act, often placing disproportionate emphasis on whether the perpetrator believed the victim had consented. The absence of consent was formally recognised as a central element, yet in practice it was narrowly construed through rigid evidentiary standards that prioritised physical resistance and corroboration.

Historically, the legal understanding of rape was deeply intertwined with notions of female chastity, honour, and property rather than bodily autonomy. In many early legal systems, rape was viewed as an offence against a woman's virtue or against the proprietary interests of her father or husband, rather than as a crime against the woman herself. This conceptualisation rendered married women legally incapable of being raped by their husbands, as marriage was presumed to transfer sexual ownership to the husband. Consequently, rape law functioned less as a mechanism to protect women from sexual violence and more as a tool to regulate sexual access and preserve patriarchal family structures.

This traditional framework also reflected broader social anxieties about morality and legitimacy rather than consent and harm. The credibility of the victim was often assessed through her sexual history, marital status, and perceived respectability, reinforcing the idea that only "chaste" women were worthy of legal protection. Such an approach systematically excluded married women, sex workers, and women who deviated from prescribed moral norms, thereby exposing the inherently gendered and exclusionary foundations of early rape jurisprudence.

The legal understanding of consent has undergone significant transformation, moving away from resistance-based models toward more nuanced, autonomy-centred standards. Traditionally, courts required victims to demonstrate physical resistance to establish the absence of consent, operating on the assumption that genuine non-consent would inevitably be accompanied by visible struggle. This approach failed to account for the realities of sexual violence, including fear, coercion, power imbalances, and psychological paralysis, which often render physical resistance impossible or dangerous. As a result, many acts of sexual violence were excluded from legal recognition, particularly those occurring within intimate or dependent relationships.

In response to feminist critiques and empirical research on sexual violence, modern legal systems have increasingly adopted consent-based frameworks that focus on voluntary agreement rather than resistance. The "no means no" standard marked an important departure from earlier models by recognising verbal refusal as sufficient to negate consent, even in the absence of physical resistance. However, this model still places the burden on the victim to actively refuse, thereby failing to fully capture situations involving silence, fear, or implied coercion.

More progressive jurisdictions have moved toward an affirmative consent model encapsulated in the principle that "yes means yes." Under this standard, consent must be explicit, voluntary, informed, and ongoing, and its absence cannot be inferred merely from silence or passivity. This shift reflects a deeper conceptual change in rape law: sexual activity is no longer presumed lawful unless refused, but rather unlawful unless positively consented to. The affirmative consent model thus reframes sexual relations as a mutual exercise of autonomy rather than an entitlement, significantly strengthening legal recognition of sexual agency and vulnerability.

At its core, rape constitutes a profound violation of sexual autonomy and bodily integrity. Sexual autonomy refers to an individual's right to make free and informed decisions about their body,

sexuality, and intimate relationships, while bodily integrity encompasses the right to be free from non-consensual physical intrusion. Modern legal theory increasingly recognises that rape is not merely a physical act but an assault on dignity, personhood, and self-determination. The harm of rape lies not only in physical injury but in the denial of the individual's authority over their own body.

This understanding marks a decisive shift from morality-based frameworks, which judged sexual conduct through the lens of social propriety, to rights-based frameworks grounded in constitutional and human rights principles. Under a rights-based approach, the focus shifts from whether the sexual act conformed to societal norms to whether it respected the individual's autonomy and consent. This reconceptualization has been particularly significant in challenging legal exemptions for sexual violence within marriage, as it rejects the notion that relational status can override personal agency.

Recognising rape as a violation of dignity and self-determination also aligns criminal law with constitutional values such as equality, liberty, and privacy. It underscores that consent is personal, situational, and revocable, and that no social institution including marriage can extinguish an individual's right to bodily autonomy. This conceptual foundation is crucial for understanding why the marital rape exception represents not merely a statutory anomaly, but a fundamental contradiction within modern rape jurisprudence.

V. Power, Control, and Sexual Violence: A Foucauldian Analysis

Michel Foucault reconceptualised power not as a centralized, coercive force exercised solely by the state or sovereign authority, but as a relational and diffused phenomenon embedded within everyday social practices, institutions, and discourses. Power, in Foucauldian terms, is not merely repressive; it is productive, shaping knowledge, norms, and subjectivities. Rather than operating through overt violence alone, power functions through subtle mechanisms of discipline and normalization, influencing how individuals perceive themselves and regulate their own behaviour. This understanding shifts the analytical focus from visible acts of domination to the structural conditions that render certain forms of control socially acceptable and legally invisible.

Foucault emphasised that power operates through institutions such as the family, law, medicine, and education, which together constitute a network of disciplinary mechanisms governing bodies and conduct. These institutions produce norms that define what is considered natural, legitimate, and permissible, thereby shaping bodily practices and sexual relations. Sexuality occupies a central place in Foucauldian analysis, as it becomes a key site through which power is exercised, regulated, and internalised. The regulation of sexuality is not achieved through constant force but through discourses that normalise certain behaviours while marginalising or silencing others.

Within this framework, power is inseparable from the body. Bodies become sites upon which power is inscribed, regulated, and disciplined through social expectations and legal structures. The absence of legal intervention in certain contexts does not signify neutrality; rather, it reflects an active form of power that legitimises and sustains existing hierarchies. This conceptualisation is crucial for understanding how sexual violence within marriage can persist not despite the law, but through it.

From a Foucauldian perspective, marriage operates as a disciplinary institution that regulates sexuality, intimacy, and gender roles through socially sanctioned norms. Historically, marriage has functioned as a key mechanism for controlling female sexuality by legitimising sexual access within a narrowly defined relational framework. The marital institution has been constructed around expectations of

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sexual availability, obedience, and emotional labour, particularly imposed upon women. These expectations are reinforced through cultural narratives, religious doctrines, and legal rules that portray marital sex as a duty rather than a matter of mutual consent.

The regulation of female sexuality within marriage is achieved not through explicit coercion alone, but through the normalisation of gendered roles and responsibilities. Women are socialised to internalise expectations of submission and accommodation, while male sexual entitlement is often implicitly validated. In this context, coercive sexual acts are frequently reframed as marital obligations or private disputes, thereby stripping them of their criminal character. The legitimacy conferred by marriage masks the presence of force and renders sexual coercion socially intelligible, if not acceptable.

This process of normalisation illustrates how power operates most effectively when it is least visible. By locating sexual relations within the "private" sphere of marriage, the law and society together insulate coercive practices from scrutiny. The marital bond thus becomes a site where disciplinary power functions seamlessly, regulating bodies and desires while maintaining the appearance of consensual intimacy.

Marital rape represents a paradigmatic example of institutionalised power, where sexual violence is legitimised not through explicit endorsement but through legal silence and exemption. The failure of criminal law to recognise non-consensual sex within marriage as rape does not merely reflect legislative inertia; it actively produces a hierarchy of sexual citizenship in which married women are afforded diminished protection. This legal silence operates as a form of disciplinary power by signalling that certain violations fall outside the scope of criminal concern.

Through non-criminalisation, the state becomes complicit in sustaining coercive power relations within marriage. The law's refusal to intervene reinforces the idea that marriage alters the meaning of consent and dilutes the seriousness of sexual violence. In Foucauldian terms, this constitutes a productive exercise of power: it shapes social understanding by defining what counts as harm and who is entitled to legal recognition as a victim. The absence of legal sanction thus becomes a mechanism through which sexual domination is normalised and perpetuated.

By treating marital rape as an exception rather than a crime, the state legitimises a structure in which women's bodies are subjected to regulated access under the guise of marital rights. This institutional endorsement of sexual control undermines constitutional values of dignity, equality, and autonomy. Viewed through a Foucauldian lens, the marital rape exception is not a neutral omission but a deliberate site where law, power, and sexuality converge to sustain patriarchal authority. Recognising and dismantling this exception is therefore not merely a matter of criminal reform, but a necessary step toward disrupting entrenched regimes of power that govern intimate life.

VI. Feminist Legal Theory and Marital Rape

Radical feminist theory conceptualises rape not as an isolated criminal act but as a systemic instrument of patriarchy that reinforces male dominance and female subordination. From this perspective, sexual violence is deeply embedded within social structures that normalise male sexual entitlement and control over women's bodies. Radical feminists argue that rape functions as a mechanism of power rather than desire, operating to discipline women and maintain gender hierarchies. Within marriage, this power dynamic is intensified by legal and social norms that historically legitimised male authority and female submission, rendering marital rape an invisible yet pervasive form of violence.

Marriage, in radical feminist analysis, is understood as a private sphere of domination where patriarchal power operates with minimal

state intervention. The legal construction of marriage as a domain of privacy has historically shielded domestic and sexual violence from scrutiny, reinforcing the idea that what occurs within marriage lies beyond the reach of criminal law. This public–private divide has been instrumental in sustaining the marital rape exception, as it allows sexual coercion to be reframed as a marital duty rather than a violation of bodily autonomy. Radical feminists contend that the non-criminalisation of marital rape reflects the state's complicity in preserving patriarchal structures by privileging marital harmony over women's safety and autonomy.

Liberal feminist theory approaches marital rape through the lens of individual rights, legal equality, and formal non-discrimination. Central to this perspective is the principle that all individuals, irrespective of marital status, are entitled to equal protection of the law. Liberal feminists argue that the marital rape exception violates the foundational legal commitment to equality before the law by creating an arbitrary distinction between married and unmarried women. Such differentiation, they contend, lacks any rational justification in a constitutional democracy committed to personal liberty and dignity.

Consent occupies a pivotal position in liberal feminist advocacy for reform. Liberal feminists emphasise that consent must be continuous, voluntary, and revocable, and that marriage cannot operate as a blanket authorisation for sexual access. From this standpoint, the criminalisation of marital rape is not an attack on the institution of marriage but an affirmation of mutual respect and autonomy within intimate relationships. Legal reform, in this view, should focus on removing statutory exemptions, adopting gender-neutral definitions of rape, and ensuring procedural safeguards that protect both complainants and the accused. While liberal feminism has been critiqued for its reliance on formal equality, it remains influential in shaping rights-based arguments for consent-centred rape law reform.

Intersectional feminist theory expands the analysis of marital rape by examining how gender intersects with other axes of identity and oppression, such as caste, class, religion, disability, and economic status. This approach recognises that women's experiences of sexual violence within marriage are not uniform and that structural inequalities significantly shape vulnerability, access to justice, and legal outcomes. For instance, women from marginalised castes or minority religious communities may face heightened barriers to reporting marital rape due to social stigma, community pressure, and mistrust of state institutions.

Economic dependence emerges as a critical factor amplifying vulnerability within marriage. Intersectional feminists highlight that economically dependent spouses often lack the resources, social support, and bargaining power necessary to resist sexual coercion or pursue legal remedies. This dependence is further compounded for women with disabilities, who may experience heightened levels of control and abuse within intimate relationships while being systematically excluded from legal recognition as sexual subjects. By foregrounding these intersecting inequalities, intersectional feminism challenges one-size-fits-all legal reforms and calls for nuanced responses that address the material and social conditions sustaining marital rape.

Through this lens, the marital rape exception is not merely a gendered legal anomaly but a structural mechanism that disproportionately harms women situated at the intersections of multiple forms of marginalisation. Intersectional feminist analysis thus underscores the necessity of contextualised legal reform that combines criminalisation with broader social, economic, and institutional support systems.

VII. International Human Rights Law and Marital Rape

Under contemporary international human rights law, rape is unequivocally recognised as a serious violation of fundamental human rights,

transcending its characterisation as a mere criminal offence. Sexual violence is understood to infringe core rights such as the right to dignity, bodily integrity, personal liberty, and freedom from violence. This recognition reflects a paradigm shift from viewing rape through a moral or social lens to understanding it as an assault on the inherent worth and autonomy of the individual. The harm of rape lies not only in physical injury but in the profound denial of agency, self-determination, and equality.

Marital rape implicates these rights in an aggravated manner because it occurs within relationships marked by trust, dependency, and power imbalance. International human rights bodies have increasingly rejected the notion that marriage can dilute or extinguish an individual's entitlement to bodily integrity. The idea that consent is permanent or implied by marital status is fundamentally incompatible with the human rights principle that autonomy is continuous and inviolable. Consequently, the failure to recognise marital rape as a violation of human rights constitutes a denial of equal protection and reinforces discriminatory norms that privilege institutional stability over individual dignity.

International legal instruments have played a central role in shaping the global understanding of sexual violence, including marital rape, as a human rights issue. The *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW)[167] obligates States to eliminate discrimination against women in both public and private spheres. Through its General Recommendations, the CEDAW Committee has clarified that gender-based violence, including sexual violence within marriage, constitutes discrimination and undermines women's enjoyment of human rights on an equal basis with men. The Committee has consistently emphasised that States must address violence occurring within the family and cannot rely on cultural or traditional practices to justify legal exemptions.

The *International Covenant on Civil and Political Rights* (ICCPR)[168] reinforces these obligations by protecting the right to life, personal liberty, privacy, and freedom from cruel, inhuman, or degrading treatment. Sexual violence, including marital rape, has been recognised as falling within the scope of these protections, particularly where State failure to prevent or punish such acts results in systemic impunity. The ICCPR framework underscores that human rights obligations extend to harms inflicted by private actors when the State fails to exercise adequate oversight or intervention.

Similarly, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT)[169] has been interpreted to encompass severe forms of sexual violence. International jurisprudence recognises that rape may amount to torture or ill-treatment, particularly when it involves coercion, abuse of power, or State acquiescence. The persistence of marital rape exemptions, by allowing severe sexual harm to occur without legal consequence, has been criticised as a form of State tolerance incompatible with CAT obligations.

In addition, reports and thematic studies by UN Special Rapporteurs on violence against women have explicitly identified marital rape as a human rights violation requiring criminalisation. These reports consistently reject arguments based on marital privacy or cultural relativism and affirm that States must ensure that marriage does not operate as a shield for sexual abuse.

International human rights law imposes both negative and positive obligations upon States in relation to sexual violence. Central to this framework is the *due diligence principle*, which requires States to prevent, investigate, punish,

[167] Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

[168] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

[169] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

and provide remedies for acts of violence against individuals, even when such acts are committed by private persons. A State's failure to exercise due diligence in addressing marital rape constitutes a breach of its international obligations, as it effectively condones violence through inaction or inadequate legal protection.

Beyond due diligence, States are subject to positive obligations to create legal frameworks that actively safeguard human rights. This includes enacting criminal laws that recognise marital rape as an offence, ensuring access to justice for survivors, and dismantling discriminatory legal provisions that privilege marital status over consent. The retention of marital rape exemptions represents a failure to fulfil these positive duties, as it institutionalises inequality and denies married women equal protection under the law.

International human rights standards thus make it clear that criminalising marital rape is not a matter of policy discretion but a legal necessity arising from binding obligations. The State's responsibility extends beyond formal non-interference to proactive intervention aimed at transforming social and legal structures that enable sexual violence. In this sense, the criminalisation of marital rape emerges as a critical component of the State's duty to uphold dignity, equality, and freedom from violence within all intimate relationships.

VIII. Comparative Legal Position: Global Overview

A growing number of jurisdictions have unequivocally criminalised marital rape, reflecting the global shift toward recognising consent and sexual autonomy as indivisible from marital status. In the United Kingdom, the marital rape exemption was abolished through judicial interpretation in *R v R* (1991),[170] where the House of Lords held that marriage does not imply irrevocable consent to sexual intercourse. The court recognised that modern marriage is a partnership of equals and that a wife retains her right to refuse consent at any time. This decision marked a decisive break from common law traditions and laid the foundation for consent-based rape jurisprudence.

In the United States, marital rape is criminalised across all states, although the scope and penalties historically varied. Judicial and legislative reforms during the late twentieth century dismantled spousal immunity doctrines, affirming that rape within marriage constitutes a violation of personal liberty. While some states initially imposed procedural or sentencing distinctions, contemporary legal frameworks increasingly treat marital rape on par with non-marital rape, reinforcing the principle that consent cannot be presumed by virtue of marriage.

Canada adopted a rights-centred approach by amending its Criminal Code in 1983[171] to replace the offence of rape with gender-neutral sexual assault provisions. These reforms explicitly removed marital exemptions and redefined sexual offences around consent and bodily integrity. Canadian jurisprudence consistently emphasises that marriage does not confer sexual entitlement, thereby aligning criminal law with constitutional commitments to equality and human dignity.

In Australia, all states and territories have criminalised marital rape, recognising non-consensual sex within marriage as a serious criminal offence. Legislative reforms were accompanied by judicial acknowledgment that sexual autonomy persists within intimate relationships. Similarly, South Africa criminalised marital rape through statutory reform, informed by constitutional values of equality, dignity, and freedom from violence, particularly in the post-apartheid era.

Continental European jurisdictions such as Germany and France have also abolished marital rape exemptions, grounding their reforms in human rights principles and gender equality. German law recognises rape as a

[170] Criminal Code, R.S.C. 1985, c. C-46, as amended by Criminal Law Amendment Act, 1983 (Canada).

[171] R v. R, [1991] 1 AC 599 (HL).

violation of sexual self-determination, irrespective of the relationship between the parties, while French jurisprudence has consistently affirmed that marriage cannot negate consent. Across these jurisdictions, the underlying rationale is consistent: consent is indivisible, and marriage does not extinguish sexual autonomy.

Several jurisdictions continue to exclude marital rape from the scope of criminal law, either explicitly or through statutory exceptions. India retains a marital rape exception under its criminal law, providing immunity to husbands for non-consensual sexual intercourse with their wives above a specified age. Pakistan and Bangladesh similarly lack explicit criminalisation, with rape laws that either imply spousal immunity or fail to recognise consent within marriage as legally relevant. In Afghanistan, marital rape is not criminalised in practice, owing to a combination of legal ambiguity, customary norms, and institutional barriers.

The justifications advanced for non-criminalisation are remarkably consistent across these jurisdictions. The preservation of the marital institution is frequently invoked, with arguments suggesting that criminalising marital rape would undermine family stability and social order. Concerns about misuse of rape laws and false allegations are also commonly cited, despite the absence of empirical evidence demonstrating disproportionate misuse in jurisdictions that have criminalised marital rape. Cultural and religious norms further shape resistance to reform, particularly in societies where marriage is viewed as conferring sexual rights and obligations.

Evidentiary challenges are another frequently cited justification, with claims that marital rape is inherently difficult to prove due to the private nature of the relationship. However, this argument overlooks the fact that many serious crimes occur in private and that evidentiary complexity has not prevented criminalisation in other contexts. Collectively, these justifications reveal a deeper reluctance to disrupt patriarchal assumptions about marriage and sexual entitlement, rather than genuine legal or practical impediments

IX. The Indian Legal Position

The Indian legal framework governing sexual offences continues to retain a statutory exception that excludes marital rape from the ambit of criminal law. Under the criminal law regime, rape is defined in a manner that expressly immunises a husband from prosecution for non-consensual sexual intercourse with his wife, provided she is above a prescribed age. This marital rape exception is a direct continuation of colonial-era legal assumptions that viewed marriage as conferring irrevocable sexual consent. Despite extensive amendments to rape laws following public outrage over sexual violence and increasing recognition of consent as the cornerstone of sexual offences, the exception has remained substantively intact.

Alongside the marital rape exemption, Indian law also incorporates an age-based distinction, whereby sexual intercourse with a wife below a certain age is criminalised irrespective of consent. This age threshold reflects an implicit acknowledgment that consent cannot be presumed where vulnerability is inherent. However, the coexistence of an age-based exception and a marital exemption expose a fundamental inconsistency in the statutory scheme. While the law recognises that minors cannot consent to sexual activity even within marriage, it simultaneously presumes perpetual consent for adult married women. This distinction reinforces the notion that marriage operates as a legal mechanism capable of suspending sexual autonomy, a presumption that is increasingly incompatible with constitutional values and modern understandings of consent.

X. Myths, Misuse, and Counter-Arguments

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One of the most frequently invoked arguments against the criminalisation of marital rape is the apprehension that rape laws are susceptible to misuse. This concern, however, is neither unique to sexual offences nor supported by empirical evidence to a degree that would justify withholding criminal protection. Comparative data from jurisdictions that have criminalised marital rape demonstrate that the inclusion of spouses within the ambit of rape law has not resulted in disproportionate false reporting or systemic abuse of the legal process. Instead, reporting rates for marital rape remain low, reflecting the persistent social stigma, economic dependence, and fear of retaliation faced by survivors rather than a propensity for misuse.

Indian courts themselves have consistently acknowledged that the possibility of misuse cannot serve as a valid ground to deny legal remedies. Judicial safeguards such as the requirement of proof beyond reasonable doubt, preliminary inquiry mechanisms, and procedural protections for the accused already exist within the criminal justice system. These safeguards apply uniformly across offences and are designed to balance the rights of the accused with the interests of justice. To single out marital rape for exclusion on speculative misuse grounds reflects an unequal application of legal reasoning and undermines the principle that the law must protect against harm irrespective of hypothetical abuse.

Another commonly raised objection concerns the evidentiary difficulties inherent in proving marital rape, given that such acts typically occur in private spaces without independent witnesses. However, evidentiary complexity is not unique to marital rape and characterises a wide range of serious offences, including domestic violence, child sexual abuse, and custodial crimes. The private nature of an offence has never been accepted as a justification for decriminalisation; rather, it necessitates more sensitive and robust evidentiary standards.

Modern criminal jurisprudence increasingly recognises that sexual offences can be established through a combination of testimonial evidence, medical findings, behavioural indicators, and circumstantial proof. The testimony of the survivor, if found credible and consistent, is legally sufficient to sustain a conviction without corroboration. Medical evidence, while supportive, is not determinative, particularly in cases where physical injury may be absent due to delayed reporting or coercive compliance. By acknowledging psychological trauma, patterns of control, and contextual factors, courts are equipped to adjudicate marital rape cases without lowering evidentiary thresholds or compromising fairness.

The argument that criminalising marital rape would destabilise marriage and undermine the family institution rests on a flawed understanding of both marriage and criminal law. Criminal law does not seek to regulate consensual intimacy but to prohibit and punish coercion and violence. Recognising marital rape as an offence does not criminalise marriage; it criminalises non-consensual sexual acts that violate dignity and bodily autonomy. Marriage, as a constitutionally protected institution, cannot be sustained through the denial of individual rights or the tolerance of violence.

Criminal law has historically intervened in marital relationships to address cruelty, domestic violence, and dowry-related abuse without being accused of destroying the family system. On the contrary, such intervention affirms that marriage must operate within the bounds of equality and mutual respect. By framing criminalisation as a regulatory mechanism rather than a destructive force, it becomes clear that recognising marital rape strengthens, rather than weakens, the moral legitimacy of marriage. A legal framework that refuses to condone sexual violence within marriage reinforces the principle that intimate relationships must be grounded in consent, dignity, and autonomy.

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XI. Legislative Models for Reform

The most direct and constitutionally coherent model for reform is the complete removal of the marital rape exception from criminal law. This approach recognises that consent is personal, contextual, and revocable, and that marital status cannot operate as a legal justification for non-consensual sexual intercourse. By eliminating the exception, the law would treat rape within marriage in the same manner as rape outside it, thereby affirming the principle of equal protection and reinforcing the indivisibility of sexual autonomy. Complete removal also avoids the creation of artificial hierarchies of harm, ensuring that married women are not afforded diminished legal recognition as victims of sexual violence.

This model has the advantage of clarity and doctrinal consistency. Partial reforms or conditional criminalisation risk perpetuating patriarchal assumptions by implying that some forms of marital coercion are more acceptable than others. In contrast, full removal aligns criminal law with constitutional values of dignity, liberty, and equality, and reflects the global trend toward recognising marital rape as a serious criminal offence rather than a private wrong.

Legislative reform must also adopt gender-neutral drafting to reflect contemporary understandings of sexual violence and to comply with constitutional mandates of equality. Gender-neutral definitions of rape or sexual assault acknowledge that individuals of any gender may be victims or perpetrators of sexual violence, including within marriage. Such drafting avoids reinforcing gender stereotypes and ensures inclusivity, while still allowing the law to respond effectively to the gendered realities of sexual violence through sentencing and policy measures.

Gender-neutral drafting also strengthens the constitutional defensibility of reform by framing the offence in terms of consent and harm rather than gendered roles. This approach enhances the legitimacy of criminal law by emphasising autonomy and bodily integrity as universal rights. Importantly, gender neutrality does not dilute protections for women; rather, it situates those protections within a broader framework of equal legal entitlement and human dignity.

Concerns regarding misuse and fairness can be addressed through carefully designed sentencing frameworks and procedural safeguards without compromising the criminalisation of marital rape. Sentencing guidelines may consider factors such as the nature of coercion, the presence of aggravating circumstances, and the impact on the survivor, ensuring proportionality and judicial discretion. At the same time, the standard of proof beyond reasonable doubt and existing procedural protections for the accused must remain intact.

Procedural safeguards, including in-camera trials, victim-sensitive evidentiary rules, and protection against secondary victimisation, are essential to ensure access to justice. Simultaneously, safeguards such as preliminary scrutiny, penalties for false complaints, and judicial oversight can address concerns about misuse without creating barriers that disproportionately burden survivors. A balanced procedural framework thus reinforces both accountability and fairness.

Effective reform requires integration between criminal rape provisions and existing domestic violence frameworks. Sexual violence within marriage often occurs alongside other forms of abuse, including physical, emotional, and economic violence. Integrating criminal law responses with civil protection mechanisms ensures a holistic approach that addresses immediate safety, long-term rehabilitation, and legal accountability.

Domestic violence laws can provide protective orders, residence rights, and access to support services, while criminal law affirms the seriousness of sexual violence through penal sanctions. Coordination between these legal

regimes prevents fragmentation and ensures that survivors are not forced to navigate multiple, disjointed systems. Such integration recognises marital rape not as an isolated incident but as part of a broader continuum of domestic abuse, requiring comprehensive legal and institutional responses.

XII. Conclusion

This research has demonstrated that the continued exclusion of marital rape from the ambit of criminal law is neither constitutionally defensible nor normatively justifiable. Through an examination of the legal definition of rape, feminist legal theory, Foucauldian conceptions of power, international human rights obligations, and comparative legal developments, the study establishes that non-consensual sexual intercourse constitutes rape irrespective of the marital relationship between the parties. The marital rape exception emerges as a historical relic rooted in patriarchal notions of ownership, chastity, and conjugal entitlement, rather than in any principled understanding of consent or harm.

The findings reveal that marriage, as presently conceptualised in law, continues to operate as a site where women's sexual autonomy is subordinated to institutionalised power structures. By privileging marital status over individual consent, the law legitimises coercion and reinforces unequal gender relations. Re-conceptualising marriage through the principles of consent, equality, and mutual respect is therefore essential. Such a reconceptualization rejects the idea of irrevocable consent and affirms that marriage does not extinguish bodily autonomy or decisional freedom. Instead, it positions consent as an ongoing, revocable, and central component of intimate relationships.

Recognising marital rape as rape is not merely a matter of expanding criminal liability; it is a necessary affirmation of constitutional morality and human dignity. The denial of legal recognition to survivors of marital rape perpetuates structural discrimination and undermines the guarantees of equality, liberty, and dignity enshrined in the Constitution. Comparative jurisprudence and international human rights standards overwhelmingly support the view that sexual violence within marriage warrants criminal sanction, and India's continued resistance places it at odds with evolving global norms on gender justice.

Looking forward, Indian criminal law reform must adopt a rights-based and survivor-centric approach that removes the marital rape exception, ensures gender-neutral drafting, and integrates criminal accountability with protective civil remedies. Legislative reform should be accompanied by procedural safeguards, judicial sensitisation, and institutional support mechanisms to ensure effective implementation. Ultimately, the criminalisation of marital rape represents not a threat to the institution of marriage, but a reassertion of its ethical foundation, one grounded in consent, equality, and respect for individual autonomy. Without such reform, the promise of substantive gender justice within Indian constitutional democracy remains incomplete.