

## MARITAL RAPE IN INDIA: BETWEEN CONSTITUTIONAL MORALITY AND SOCIAL CONSERVATISM

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### Abstract:

The issue of marital rape in India is one of the most debated topics in modern criminal law and constitutional law. Non-consensual sexual acts are seen as crimes under rape laws, but the marital rape exception shows a major legal inconsistency. This paper looks closely at the conceptual, legal, and constitutional aspects of marital rape in India. It focuses on the reasons why it has not been classified as a crime. The discussion highlights the conflict between laws and fundamental rights, especially the rights to equality, dignity, and bodily autonomy. Additionally, the paper compares India's stance with international perspectives, pointing out the global trend toward classifying marital rape as a crime. The study argues that the ongoing acceptance of the marital rape exception is based not just on legal factors but also on socio-cultural and patriarchal views about marriage. It concludes that real change needs both legal action and a shift in thinking toward individual autonomy within marriage.

### Keywords:

Marital Rape, Consent, Bodily Autonomy, Constitutional Law, Gender Justice, Criminal Law, India, Human Rights.

### Chapter I: Introduction

Marriage has traditionally been a personal, almost sacred institution, closely linked to society, culture, and the law. For a long time, the legal system has been reluctant to interfere in the personal affairs of marriage, especially in relation to sexual activity between spouses. This is partly due to a traditional common law principle articulated by Sir Matthew Hale, a prominent English jurist, that by entering into a marriage, a woman has given irrevocable consent to sexual intercourse by her husband.<sup>1162</sup> Though this principle has been subject to strong criticism in recent times, it remains a reality in many jurisdictions, including India.

In India, rape is focused on in relation to a lack of consent, but there is a glaring exception in

relation to non-consensual intercourse by a husband on a wife who is of a certain age.<sup>1163</sup> There is legal contradiction in this. How can non-consensual intercourse be a serious offense in one context and a legitimate act in another simply on account of marital status? This is a challenge to the very logic of a legal system.

The continuing existence of the marital rape exception creates a conflict with the constitutional rights protected by the Constitution of India. The judiciary has extended its interpretation of legal equality and personal rights to include human dignity and private life and control over one's body.<sup>1164</sup> The existing legal system creates a distinction that violates basic human rights because it does not provide married women with legal protection against

<sup>1162</sup> Sir Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown*, Vol. 1 (London: E. and R. Nutt and R. Gosling, 1736), p. 629.

<sup>1163</sup> *Bharatiya Nyaya Sanhita*, 2023, Section 63, Exception 2  
<sup>1164</sup> *Justice K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

rape. The fundamental conflict in the marital rape debate in India develops from the opposing forces which exist between constitutional values and statutory laws.

The issue has drawn fresh attention from both the legal system and the general public during recent times. The courts have been called upon to examine the validity of the marital rape exception, leading to significant but inconclusive developments. The Supreme Court in Independent Thought v. Union of India restricted the marriage exception which applied to underage wives because the court established that their consent could not be assumed.<sup>1165</sup> The Delhi High Court delivered a split verdict in 2022 in RIT v. Union of India which left the constitutional validity of the exception undecided.<sup>1166</sup>

The criminalisation of marital rape faces opposition because people believe that marriage needs protection and they fear that the law will be abused and they believe that proving consent violations in marriage presents too many challenges.<sup>1167</sup> The social and legal complexities which these concerns represent must undergo assessment because they link to essential justice principles and equality standards and personal freedom rights. The existence of the exception now complete forces us to determine whether the law provides greater protection to marriage as an institution than to individual people who exist within that institution.

From a global perspective, there has been a significant shift towards recognizing marital rape as a violation of human rights and bodily autonomy. Every sexual act needs explicit consent because jurisdictions worldwide have abandoned the outdated principle of implied consent which existed between married couples<sup>1168</sup>. India continues to maintain its marital rape exception which creates a conflict

with the international legal standards that continuously develop.

The social impact of marital rape extends beyond its legal and constitutional aspects. The lack of criminalisation contributes to the mindset where people believe a husband has total authority over his wife's body which breaks down the marital concept of consent. The belief becomes stronger that husbands possess the right to have sex whenever they want without needing to reach an agreement with their wives. The system establishes a situation which allows gender discrimination to continue while creating a standard that permits violent acts to occur without detection and punishment for the victims.

This study investigates marital rape in India through multidimensional lens which include studying the existing legal system and judicial practices and social cultural elements that prevent its recognition as a crime. The study examines how this legal position affects constitutional rights and public perceptions while comparing it to international legal standards. The study argues that the marital rape exception exists as a legal exception which shows how persistent social power differences shape Indian views about marriage and consent.

## **Chapter 2: The Concept of Consent within Marriage**

The idea of consent is key to the laws about sexual offenses. Consent means an individual's choice to participate in a specific act. Legally, it is defined as an action that is free from any pressure and based on a clear and reasonable understanding of what is happening. Consent can also be taken back by a person at any time<sup>1169</sup>. The modern legal shift from requiring physical resistance to emphasizing the presence of consent shows a growing recognition of individual dignity and autonomy. This change is significant because it moves away from expecting victims to fight back.

<sup>1165</sup> *Independent Thought v. Union of India*, (2017) 10 SCC 800.

<sup>1166</sup> *RIT Foundation v. Union of India*, 2022 SCC OnLine Del 1404.

<sup>1167</sup> Government of India, Affidavit in Writ Petition (Criminal) No. 284 of 2022 before the Supreme Court of India.

<sup>1168</sup> *R v R*, [1991] UKHL 12.

<sup>1169</sup> Justice J.S. Verma Committee, Report of the Committee on Amendments to Criminal Law 2013, pp. 72–75.

Instead, it highlights that consent must be active and deliberate.

However, many misunderstand the concept of consent when it comes to marriage. One common misconception is that marriage means permanent and unchanging consent for all sexual activity. This misunderstanding stems from traditional common law principles that viewed consent as a one time agreement given at marriage rather than ongoing consent.<sup>1170</sup> This approach is not aware that consent is always dynamic in nature and must be present at the time of the act. In addition, this approach is not aware that the people involved in the marriage remain as individuals with personal autonomy.

The biggest misconception about implied consent within the institution of marriage is not just a legal issue but also a deeply ingrained societal belief. Marriage is often viewed as giving the husband an inherent right over the wife's body, thus reducing the issue of consent to an issue that is not relevant. This is further complicated by societal beliefs that equate the duties arising from marriage with the concept of submission, particularly on the part of the wife. This is the reason why non consensual acts within marriage are trivialized or not recognized as acts of violence.

The tension between bodily autonomy and marital obligations makes a complex situation out of consent as well. Bodily autonomy, as recognized by constitutional jurisprudence, is based on the principle that every individual has a right to make decisions regarding their own body.<sup>1171</sup> However, in a marital context, bodily autonomy is frequently subject to obligations of marital duty, whereby a refusal of sexual intercourse is considered a violation of marital obligations.

One of the most important facts that is frequently ignored is that consent is a continuous and revocable act. Consent given in one context is not consent given in another

context; a marital context is not a context in itself wherein consent is automatically given by one's spouse. The absence of dissent is not consent, particularly in a marital context wherein there is a power imbalance. Consent is a willing and voluntary act, consent is not given under coercion, consent is not given under duress, consent is not given when one is subjected to social conditioning.

The lack of understanding of the need for constant consent plays a major role in the normalisation of marital rape. The failure of the law to specifically criminalise rape in marriage indirectly validates the notion that rape in marriage is acceptable or not serious enough to warrant criminal action. This, in turn, has a number of implications for society, which can be considered to be harmful.

It must, however, be noted that there is no obligation in law or morality for a wife to have to participate in sexual relations against her will. The notion that marriage imposes an obligation in this regard is a highly patriarchal notion of marriage, wherein the wife's body is subservient to the husband's desires. This not only denies the individual dignity but also reduces them to an identity that merely consists of their role in the marriage. This, in itself, is not in line with modern day constitutional values that place emphasis on individuality.

Furthermore, the normalisation of non consensual sex in a marital context contributes to a culture of silence. There may not be a recognition of non consensual sex by some women due to their internalization of societal norms that emphasize marital harmony rather than individual autonomy.

It is therefore crucial to redefine the meaning of consent in a marital context not just from a legal point of view but also from a social and cultural point of view. The recognition of the necessity of consent in every sexual act challenges societal assumptions regarding marital relationships and reinforces the notion that individual autonomy and dignity do not cease when one is in a marital relationship. A

<sup>1170</sup> Sir Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown*, Vol. 1 (London: E. and R. Nutt and R. Gosling, 1736), p. 629

<sup>1171</sup> Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

proper legal and social framework must recognize a marital relationship as a union of equals rather than a power structure in which one has control over the body of another.

### **Chapter 3: Legal Framework on Marital Rape in India**

The legal framework on sexual offences in India is largely codified under the Bharatiya Nyaya Sanhita, 2023 (hereinafter referred to as “BNS”), which replaced the existing penal code and aims to codify and regulate criminal acts in contemporary India. In this regard, rape has been codified as a sexual act without consent, with consent being a critical element in defining a rape offence.<sup>1172</sup> The law acknowledges that any sexual act performed without the voluntary consent of a woman is a violation of her bodily integrity and dignity.

Notwithstanding this codification of consent as a critical element in defining a rape offence, there remains a significant exception in this framework, which has significant implications for sexual offences in India. Section 63 of the BNS, which defines rape, provides a significant exception by codifying that sexual intercourse or sexual acts by a man with his own wife, provided she is not below eighteen years of age, shall not constitute a rape offence<sup>1173</sup>. This effectively provides a shield for husbands in India from prosecution for sexual acts without consent in a marital relationship, solely on the basis of marital status. This difference, therefore, gives rise to a basic inconsistency in the law. On one hand, the absence of consent is highlighted as a key factor in determining a rape offence, while on the other, this very absence of consent is ignored in a marital relationship.

The continued existence of the marital rape exemption in the BNS, therefore, indicates a continued adherence to colonial era laws, which have always prioritized marriage over individual rights. The concept of a wife giving irrevocable consent to sexual activity with her husband by virtue of marriage is no longer

taken seriously in many jurisdictions, but its continued existence in Indian law indicates a failure to completely align with contemporary constitutional principles and gender equality concepts<sup>1174</sup>. It is also important to mention that the Indian legal system does provide some degree of protection to married women who are victims of sexual violence, although indirectly. Under the civil law, some forms of remedy are available with regard to domestic violence, which includes sexual abuse as an act of cruelty. There is also the remedy available with regard to cruelty by the husband or his relatives. Nonetheless, such forms of remedy do not recognize marital rape as an offense but rather focus on the consequences of the act<sup>1175</sup>.

It is also important to mention that the judicial system has, to some extent, addressed the issue through the courts. In the case of *Independent Thought v. Union of India*, the Supreme Court made the important decision to strike down the marital rape exemption from the law with regard to cases where the victim is below the age of eighteen.<sup>1176</sup> However, the judgment stopped short of addressing the broader issue of marital rape involving adult women, thereby leaving the core exception intact.

The continued existence of this marital rape exception, therefore, underscores a contradiction in terms of recognizing the concept of consent while, at the same time, creating a category where consent is presumed and its absence is effectively ignored in a legal sense. This not only undermines the consistency of the legal framework, but it also raises a number of issues in terms of its capability to effectively uphold the rights and dignity of married women.

Moreover, this legal position has a number of broader implications in terms of its potential to shape attitudes towards the concept of consent in a broader sense. By not effectively

<sup>1172</sup> Bharatiya Nyaya Sanhita, 2023, s. 63.

<sup>1173</sup> Bharatiya Nyaya Sanhita, 2023, s. 63, Exception 2.

<sup>1174</sup> Sir Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown*, Vol. 1 (London: E. and R. Nutt and R. Gosling, 1736), p. 629.

<sup>1175</sup> Protection of Women from Domestic Violence Act, 2005.

<sup>1176</sup> *Independent Thought v. Union of India*, (2017) 10 SCC 800.

criminalizing marital rape, this aspect of the law indirectly contributes to a number of misconceptions in terms of recognizing the concept of consent in a marital relationship.

#### **Chapter 4: Social Impact and Normalisation of Marital Rape**

The misconception that a marital relationship necessarily involves continuous and unconditional consent further aggravates this situation. There are many people, especially in traditional societies, who are not aware of the difference between consensual sexual activity and coerced sexual activity in a marital relationship. This lack of knowledge leads to a situation where marital activity is normalised, which would otherwise be clearly recognized as a case of rape in any other situation.<sup>1177</sup> The lack of legal intervention in this situation further aggravates this situation, as people generally look to law as a yardstick to determine what constitutes acceptable behaviour. The role of law as a medium of social conditioning cannot be ignored either. Law not only conditions behaviour but also conditions morality and social values. By not incorporating marital rape in the legal system, what is effectively communicated is a message of conditional consent in a marital relationship, which directly affects how individuals, especially men, view their relationship in a marital context.

This entitlement based approach has significant implications for understanding the notion of consent. This is because, when an individual feels that they have a right to sex within marriage, they will not be concerned with issues of consent. This not only encourages harmful practices, but also ensures that a meaningful dialogue on issues of consent is not initiated within marriage. Failure to challenge such an approach has resulted in the continued practice of acts that violate the dignity and autonomy of women.

This is because the law does not operate in isolation. It plays a very important role in

<sup>1177</sup> Catharine A. MacKinnon, "Rape: On Coercion and Consent" in *Toward a Feminist Theory of the State* (Harvard University Press, 1989), p. 171

shaping the attitude and behavior of people in society. In the context of the non criminalisation of marital rape, it is important to note that the consequences thereof transcend the domain of the law into the social fabric of the people. It is generally believed that when the law does not criminalise a particular act, it is perceived to be either right or not serious enough to be condemned.<sup>1178</sup> This is evident in the context of the non criminalisation of marital rape in India, which has resulted in the normalisation thereof.

One of the most worrying consequences thereof is the perpetuation of the belief that the husband possesses an inherent right over the body of his wife. This belief is rooted in patriarchal ideology, which holds the view that marriage is not merely a union between two people, but is hierarchical in nature. It is believed that the wife is required to perform certain duties towards her husband, including the duty to be sexually available.<sup>1179</sup> It is also believed that this belief negates the very concept of consent and the individuality of women.

However, it is also important to consider the impact of such a legal approach on women. The normalisation of non-consensual sex within marriage has resulted in a form of internalisation, where women fail to acknowledge their experiences as acts of abuse, or feel obliged to continue with such practices within marriage.<sup>1180</sup> Social shame, lack of awareness, and legal ignorance also prevent women from coming forward and reporting such acts. This has resulted in a culture of silence, where such practices remain invisible.

Moreover, the non criminalisation of marital rape is also a contributing factor to the overall phenomenon of the low reporting of cases of sexual violence. When a form of violence is not acknowledged by law, it is less likely to be

<sup>1178</sup> Flavia Agnes, "Protecting Women against Violence? Review of a Decade of Legislation, 1980-1989" (1992) 27(17) *Economic and Political Weekly* WS19.

<sup>1179</sup> Justice J.S. Verma Committee, Report of the Committee on Amendments to Criminal Law (Government of India, 2013), p. 74.

<sup>1180</sup> Upendra Baxi, "The Crisis of the Indian Legal System" (Vikas Publishing House, 1982), p. 45.

reported and addressed.<sup>1181</sup> This not only leads to an incorrect assessment of the prevalence of the problem but also does not help in the development of an appropriate policy to address the problem. The continuation of such beliefs is also an indicator of the disparity between constitutional ideals and social beliefs. The Constitution is based on the ideals of dignity, equality, and individual freedom. However, these ideals are not fully realized in the context of marriage due to cultural beliefs. The non criminalisation of marital rape is not only a matter of law but also a matter of the lack of will to overcome cultural beliefs.

Furthermore, the fact that the marital rape exception continues to exist in the legal framework also has a significant impact on society. It reinforces the idea that some forms of violence are acceptable in society, particularly in the domain of marriage. The relationship between public and private sphere violence challenges the idea of universal rights, where there is a hierarchy of rights, and the rights of married women are less than those of unmarried women. Thus, in the context of violence against women in India, the silence of the legal framework does not merely mirror the views of society; it reinforces these views. The legal framework fails to address the issue of marital rape, thereby continuing the cycle of violence, where practices are normalised, victims remain voiceless, and the idea of consent is undermined. Thus, to address this issue, it is not merely a legal solution that is required, but a solution that challenges the social views that have come to accept this.

### **Chapter 5: Judicial Approach and Constitutional Conflict**

The judiciary in India has taken a vital yet careful step in dealing with the problem of marital rape. Even while recognizing the value of consent, dignity, and bodily autonomy, the judiciary has, at the same time, avoided ruling on whether the marital rape exception is unconstitutional or not. The most significant

judicial pronouncement in dealing with marital rape in India is in the case of *Independent Thought v. Union of India*, where the Supreme Court has modified the marital rape exception to include sexual intercourse with a wife below the age of eighteen as constituting rape.<sup>1182</sup> The Court in this case has held that the marital rape exception cannot override the rights of minor girls and that consent cannot be presumed merely on the basis of marriage. This decision is significant in recognizing the value of consent, despite marital status, at least in child marriages.

Nevertheless, the Court chose to restrict its decision to minor wives while leaving the issue of marital rape with adult women unresolved. This is another example of the judiciary's cautious approach, whereby the judiciary tries to reduce the severity of an unjust situation but does not go as far as to remove the underlying legal framework.

A direct test of the constitutional validity of the marital rape exception was posed in the *RIT Foundation v. Union of India* case, where the Delhi High Court gave a split verdict in 2022<sup>1183</sup>. The case placed the issue of the constitutional conflict between the marital rape exception and the fundamental rights enshrined in the Constitution of India, particularly Articles 14 and 21, on the front burner. In his opinion, Justice Rajiv Shukla has held that the marital rape exception is unconstitutional. He has based his decision on the fact that there is an arbitrary classification of women who are married and those who are not, which is a clear violation of the principle of equality under Article 14 of the Constitution. Further, he has highlighted that a woman's right to bodily autonomy and dignity cannot be taken away simply because she is in a marriage, and sexual acts perpetrated on her without consent are just as violative of personal liberty as those perpetrated outside marriage.

On the other hand, Justice C. Hari Shankar has upheld the validity of the marital rape

<sup>1181</sup> Nivedita Menon, *Seeing Like a Feminist* (Zubaan, 2012), p. 112.

<sup>1182</sup> *Independent Thought v. Union of India*, (2017) 10 SCC 800.

<sup>1183</sup> *RIT Foundation v. Union of India*, 2022 SCC OnLine Del 1404.

exception, focusing on the importance of judicial restraint in this case. He has highlighted that a decision on marital rape would have significant implications on marriage, which is a legislative policy decision and not a judicial one.

It is clear from these opinions that there are two different approaches: one which focuses on individual rights and prioritises them over marriage, and another which focuses on the larger implications of a decision on marriage and prioritises those over individual rights.

The split decision in RIT Foundation is important because it symbolizes the larger judicial conundrum in addressing marital rape in India. While there is an increasing realization of the need to ensure that the law conforms to the ideals of equality, dignity, and autonomy enshrined in the Constitution, there remains an unwillingness to intervene in a manner that could be construed to be interfering with the status quo or overstepping judicial authority.

The challenge to the marital rape exception in the Constitution can be understood in terms of its inconsistency with Articles 14 and 21. Article 14 ensures equality under the law and guards against classifications based on arbitrariness. The marital rape exception results in a classification based solely on marital status, denying women who are married the same rights to protection against rape that unmarried women have. This classification lacks a rational nexus to the purpose of the law, which is to safeguard individuals from non-consensual sexual acts.

Similarly, Article 21, which provides protection for the right to life and personal liberty, has been expansively interpreted to include a right to dignity, a right to privacy, and a right to autonomy over one's body<sup>1184</sup>. The marital rape exception, in this regard, takes away these rights, effectively denying women control over their bodies. Despite these issues with the constitution, which provide a basis for a strong argument in favour of a right to bodily

autonomy, the judiciary has always remained cautious in dealing with this issue. This is evident from their constant deferring to legislative inaction on this issue, which they justify on the basis of complex policy issues involved in criminalising marital rape, effectively demonstrating the separation of powers doctrine, but also raising a number of questions on their role in protecting fundamental rights, especially in the face of legislative inaction on this critical issue.

The judicial response to marital rape in India, therefore, remains marked by incremental steps and inherent contradictions. Although there have been some landmark judgments that have pushed the debate forward in terms of notions of consent and autonomy, the lack of a definitive judgment on the validity of the marital rape exception remains a grey area. This not only impacts the enforcement of rights but also contributes to the perpetuation of social attitudes that negate the notion of consent in marriage.

The judicial response to the issue of marital rape in India, therefore, remains reflective of the larger struggle to balance constitutional ideals with social realities. The enforcement of individual rights, however, has begun to make an impact, but the inability to fully negate the marital rape exception reflects the incomplete nature of this evolution. The resolution of this dichotomy, however, remains in the hands of the judiciary and whether they choose to enforce constitutional morality over social realities.

### **Chapter 6: Justifications for Non-Criminalisation in India**

The non criminalisation of marital rape in India is not only a legislative oversight but is also accompanied by a number of rationales provided by the State. While these rationales are couched in terms of the need for social stability and practical difficulties, it is imperative that these rationales are not only viewed from a legal point of view but also in the context of the social reality that informs them.

<sup>1184</sup> Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

One of the most important arguments against the criminalisation of marital rape is based on the need to maintain the sanctity of marriage. The argument is that if marital rape is made a crime, the very fabric of marriage will be threatened and marital harmony will be disrupted.<sup>1185</sup> The underlying assumption of this argument is that the very existence of marriage is of greater significance than the rights of the individuals involved in the marriage.

Another argument often put forward is the fear of misuse of the law. The State has contended that the criminalisation of marital rape might encourage false accusations and persecution of husbands<sup>1186</sup>. While the fear of misuse is not entirely irrational, such an argument cannot be used as an excuse to deny the legitimacy of the violation. It is argued that there is evidentiary difficulty, which is perceived as an important barrier to the criminalisation of marital rape. It is contended that the lack of consent in marital rape is difficult to prove because the act is private in nature.<sup>1187</sup> While such an argument is not entirely irrational, the difficulty in proof is not unique to marital rape. There are many instances of rape that occur behind closed doors, but the law is not powerless in such cases. The exclusion of marital rape on the basis of evidentiary difficulty is an unjustified exemption.

The availability of alternative remedies is another reason which is cited for not granting protection to married women. The alternative remedies include the provisions of civil laws regarding domestic violence and cruelty<sup>1188</sup>. However, these laws do not include non-consensual sexual acts in marriage as a form of rape. This is because these laws do not take into account the violation of bodily autonomy and dignity that is involved in such acts.

In addition to the above mentioned legal and institutional explanations for the non

criminalisation of marital rape, it is important to analyze the role of social conditioning in the perpetuation of the non criminalisation of marital rape. The patriarchal role is not only internalized by men but also by women over the course of generations. The role of married life is often internalized by women to include an obligation of absolute subordination and submissiveness, including in the context of sexual relationships. Therefore, non consensual sex in marriage is not seen as a violation but a normal part of married life.

This internalisation of patriarchal values has serious implications. In most cases, for example, when issues of marital rape are raised in the family, they are often ignored or trivialised, even by other women, such as mothers or elder family members. The tendency to “brush it under the carpet” is a reflection of a larger cultural reluctance to accept the reality of the problem. Such reactions can have a demoralising impact on the victims, further discouraging them from speaking out or seeking assistance. It reinforces the idea that the victims’ experiences are not serious enough to warrant consideration or intervention. The role of women in promoting these values has to be understood in the context of a larger patriarchal society. It is not a question of personal failing; it is a function of cultural conditioning. This underscores the need for a more holistic response to the problem of marital rape. It is not simply a legal issue, there is a need for social education.

In this context, the role of law as a means of social change assumes significance. While the legal recognition of marital rape as a criminal act would not only address the issue in terms of punishment, it would also send out a message that sexual intercourse without consent in marriage is not acceptable. It would challenge the status quo and contribute to the change in the way society looks at the issue. It would send out the message loud and clear that consent is required in all circumstances, including marriage. It would assume the role of educating both the man and the woman. In the absence

<sup>1185</sup>Government of India, Affidavit in Writ Petition (Criminal) No. 284 of 2022, Supreme Court of India

<sup>1186</sup>*Ibid*

<sup>1187</sup>Law Commission of India, 172nd Report on Review of Rape Laws (2000).

<sup>1188</sup>Protection of Women from Domestic Violence Act, 2005.

of such legal recognition, the situation remains unclear, and the misconception persists that consent is not required in marriage. It is in this context that the failure to criminalize marital rape is seen to assume significance not only in terms of punishment but also in terms of social change.

In conclusion, it is important to note that the arguments against non-criminalisation must be seen in relation to the social circumstances which support them. The arguments based on institutional maintenance, abuse, and difficulties in evidence are all related to the social attitudes towards marriage and gender roles. It is important to address the issue of marital rape with a holistic approach. It is important to note that recognising marital rape as a crime is one way towards accepting the idea that consent is essential, and no relationship, including marriage, is above the individual.

### **Chapter 7: Comparative Analysis – Global Position on Marital Rape**

The global legal position in relation to marital rape has witnessed a major shift in the past few decades. Earlier, most countries adopted the common law principle that marriage constituted an irrevocable consent to sexual intercourse. Nevertheless, this notion has been rejected in most countries, and many have adopted the view that marital rape is a criminal offense. It has been estimated that over fifty countries have adopted the view that non-consensual sexual intercourse in marriage is a criminal offense.<sup>1189</sup> This, in essence, demonstrates a major shift in the global legal position in favor of recognizing the importance of consent and bodily autonomy, irrespective of whether parties to a marriage are in a relationship or not. This demonstrates a major shift towards a global view that domestic law should be in line with modern notions of human rights and gender equality.

A landmark development in this context is the decision in *R v R*, where the House of Lords abolished the marital rape exemption under English law.<sup>1190</sup> The Court held that the concept of giving irrevocable consent in a marriage is outdated and not in consonance with contemporary legal principles. It also highlighted that marriage is a partnership of equals, which does not take away from a woman the right to refuse giving consent. This judgment has been a watershed in the development of legal changes in other countries. The criminalisation of marital rape in the USA has been a gradual process. All states have enacted legislation in this regard. By the early 1990s, all states had removed the exemption for marital rape. However, there are some differences in the mode of punishment and the standards of evidence required.<sup>1191</sup>

Likewise, Canada made marital rape a crime in 1983 by amending its laws and acknowledging the need for consent in all forms of sexual relationships, regardless of marriage.<sup>1192</sup> This is a part of a wider effort to modernise the law and align it with contemporary principles of equality and self-determination. South Africa also acknowledges marital rape as a crime and bases its laws on constitutional principles such as dignity, equality, and freedom.<sup>1193</sup> This shows that despite the different contexts of different legal systems and societies, the world is moving towards a consensus on the role of consent in relationships.

International human rights laws have also contributed to this global phenomenon of acknowledging the role of consent in relationships. The Convention for the Elimination of All Forms of Discrimination against Women (CEDAW) requires all States to take legislative action to end all forms of violence against women, including those in marriage

<sup>1190</sup>*R v R*, [1991] UKHL 12.

<sup>1191</sup>Jill Elaine Hasday, “Contest and Consent: A Legal History of Marital Rape” (2000) 88 California Law Review 1373.

<sup>1192</sup>Criminal Law Amendment Act, 1983 (Canada).

<sup>1193</sup>Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (South Africa).

<sup>1189</sup>United Nations, Handbook for Legislation on Violence against Women (UN Women, 2012).

relationships.<sup>1194</sup> This is a clear acknowledgement by the world community that marital rape is not a private matter but a public concern that needs to be addressed by law.

A major argument, which is commonly put forward in India in this regard, is the difficulty in proving a lack of consent in a marital relationship. However, it is pertinent to note that these are not unique issues, and other jurisdictions, such as the United Kingdom, Canada, and the United States, have also encountered similar issues before finally deciding to criminalise marital rape. In *R v R*, the House of Lords decided to abolish the marital rape exemption, despite these issues, on the basis that these issues cannot justify a denial of legal protection. Similarly, in Canada and the United States, legislative reforms were made despite these issues, which highlighted the potential for abuse and difficulty in proving consent. The aforementioned jurisdictions have encountered similar issues in this regard, which are now being cited in India in order to justify a denial of legal protection to victims of marital rape. However, these issues are not insurmountable, and they are a transitional phase in any legislative reform process. By choosing to criminalise marital rape, these jurisdictions have asserted the importance of individual autonomy and dignity over traditional marital rights.

On the other hand, India's refusal to remove the marital rape exception and continue to treat marital rape as an exception to the law puts it at odds with this global movement. While concerns about abuse of power, difficulties of proof, and social implications are raised, these have not prevented other countries from acknowledging marital rape as a serious criminal act. This may be seen as a reluctance to move away from deeply ingrained social and legal traditions, even if it is in conflict with constitutional principles and values that are changing over time. Moreover, the global

movement towards criminalizing marital rape has also resulted in a shift in societal attitudes. The acknowledgment of marital rape as a crime by these countries has also helped to educate society about the need for consent in all situations and circumstances, even in marriage.

In conclusion, one can say that a comparative analysis emphasizes the growing difference between India's legal framework and international progress in a given area. The experience of other countries confirms that criminalisation is possible and necessary in spite of certain difficulties. The persistence of these difficulties in the Indian context implies not a lack of possible solutions, but rather a lack of political will to put individual rights above traditional concepts of marriage. It is high time to bridge this gap in order to bring our legislation in line with international standards of justice, equality, and dignity.

### Chapter 8: Conclusion

The continued failure to criminalise marital rape in India is a troubling reminder of the disconnect between constitutional ideals and legal practice. By continuing to allow this exemption under the Bharatiya Nyaya Sanhita, 2023, not only are women in these marriages not receiving protection, but they are also receiving a dangerous message from society, that non-consensual sex in a marriage is not a serious crime, but something to be endured.

The criminalisation of marital rape is not just a legal necessity, but a social one as well. Even a basic level of understanding that this behaviour will result in legal consequences can help to change entrenched attitudes and demonstrate to individuals that consent is required at all times. The experiences of other nations, especially after *R v R*, show that these issues were not seen as a barrier to change, but as issues to be addressed in conjunction with change.

The excuses used in India to not address this problem must no longer be a barrier to change. Ultimately, the question must be

<sup>1194</sup> Convention on the Elimination of All Forms of Discrimination against Women, 1979.

considered not in terms of maintaining marriage or religious beliefs, but in terms of constitutional law. Equality, dignity, and autonomy cannot be made conditional. Marriage is not a licence, and consent is not unconditional. The recognition of marital rape as a criminal act is not simply a legal evolution, it is a necessary progression to ensure that no individual is considered to be above the law and that no relationship or individual can supersede the right to say no.

