

# MARITAL RAPE IN INDIA: A CONSTITUTIONAL AND LEGAL ANALYSIS

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## ABSTRACT

Rape is considered as one of the most barbaric and heinous offence which affects the victim mentally and physically. Marital rape is an act of sexual violence in which the husband forces his wife to have sexual intercourse without her consent. This problem is not bound to any country or a region rather it's a global problem which is neglected by many countries. India one of the country that does not recognize marital rape as a crime. The main reason for marital rape is due to patriarchal and male dominated society, where the husband tries to assert dominance on his wife. The old Indian Penal Code, 1860 and the present Bharatiya Nyaya Sanhita, 2023 that readjusted the existing laws but failed to address marital rape in it. The main problem that arises is it gives the husband free consent over his wife ignoring her fundamental right of privacy. This research mainly focuses on the constitutional principles, judicial precedents for the need to criminalize marital rape and it also set forth the psychological and social consequence faced by the victims. Criminalizing marital rape is not only a legal necessity but a moral safeguard to a woman's dignity.

This research examines how women resist the gender biases in law regarding marital rape. It shows while justice system provides a legal platform for women to raise voice and claim their rights it often fails to protect them fully and subject them again to injustice.

**Keywords:** marital rape, patriarchal, consent, wife.

## Introduction

When a person mentions rape people think it as a serious crime but usually no one thinks about it in the context of marriage. Marital rape is a serious crime and a widespread problem that has existed for centuries and is still continuing till this day. Rape is no doubt a barbaric crime but, marital rape might be much more serious in nature because in a grievous crime as rape the victim committed by a stranger has a legal right to seek justice and protection with the help of judiciary, but when a victim is of marital rape they are denied of the same legal redress which will affect the victim and cause serious damage to a person's lifestyle. When a rape is committed by an unknown person they are met with widespread sympathy and legal protection

but when it's done by someone the victim knows loves trusts the most is usually hidden under the veil just to protect the family honor. Marital rape can cause severe psychological trauma to an individual but also destroys the person's trust and belief on the spouse.

## Definition

According to United Nation handbook on Violation Against Women says Marital rape is treated as sexual violence within the domestic sphere- unwanted sexual intercourse or penetration obtained through force, threat, deception, or when the victim is unable to consent and should be covered by legislation addressing violence against women (Menon, 2012)

The word rape has been clearly defined in the Bharatiya Nyaya Sanhita, 2023 under Section 63 which is analogous to Section 375 of India Penal Code, 1860 retaining the same definition exception concerning marital rape. The provision explicitly states “sexual intercourse by a man with his own wife, the wife not being under eighteen years of age, is not rape”. (Indiacode.in, 2023).

So marital rape can be understood as the wife’s irrevocable consent to have sexual intercourse husband. When a husband has sexual intercourse with his wife without her consent and by using force to exert authority and turning intimacy domination. It’s not just the violation of her body but also the moment that turns love into fear and promise of protection into power to control.

### Historical Aspect

Across the span of human history women have always endured suppression in the patriarchal system that has always put men in a dominant position. From ancient times till modern time the societies have been favoring males, so it automatically limits the women’s opportunity and voice. Numerous efforts were made by women despite that they were forced to live under the shadows of men who always silenced them and never gave them the proper opportunity to express themselves.

Women throughout history always had limited rights as compared to men as they were considered inferior to men. They couldn’t vote, own property deprived of education, even if educated that women couldn’t gain same respect and status of that of a man.

The system of patriarchy too has ancient origins: “Patriarchy is a historic creation formed by men and women in a process which took nearly 2,500 years to its completion,” says historian Gerda Lerner, as she traces its origin to early Mesopotamia. (Lerner, The Creation of Patriarchy, 1987)

Greek mythology is filled with stories of sexual violence against girls and women. Susanne

Moraw, a classical archaeologist, draws striking comparisons between Ancient Greece and the present day, through motifs of sexualized murder, penetration by objects such as a symbolic phallus, and sexualized torture and rape. She also observe that in most cases “the perpetrator is ascribed an explicitly higher status than is his victim, apart from the fact that he is male and she is not.” (Moraw, 2017)

### Constitutional provisions

**Article 14. Equality before law. –The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.** (indiacode.nic, n.d.)

What lies at the heart of challenging the marital rape exception is Article 14, demanding uniformity before the law while rejecting baseless differentiations. Forced sex within marriage draws separate handling solely due to the existence of a wedding bond, despite causing identical damage to non-marital assault. Because being married bears no logical link to vulnerability against sexual abuse, such legal separation seems unjustifiable and contrary to constitutional principles. A person’s right to control their body remains intact after marriage; legal personhood does not vanish with matrimony. To withhold from wife’s protections granted to others facing rape contradicts meaningful equality and undermines fairness embedded in the constitution.

**Article 21. Protection of life and personal liberty. –No person shall be deprived of his life or personal liberty except according to procedure established by law.** (Indiacode.in, 2023)

Forced sexual acts breach personal boundaries, even within marriage. When one partner has no say over intimacy, core rights like self-determination and respect erode. Consent remains essential; its absence undermines human worth. Legal union does not erase the need for mutual agreement. Bodily sovereignty persists irrespective of relationship status. Article 21 applies firmly here.

Hence comes criticism of the marital rape exemption – seen as endorsing forced sex inside marriage by assuming ongoing permission from wives. Constitutional safeguards for private freedom and self-determination stand at odds with this view, since such rights cover deeply personal matters, including sexual intimacy.

### Statutory provisions

#### Section 63 BNS

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, (mha.gov.in, n.d.)

Beginning with agreement, Section 63 of the Bharatiya Nyaya Sanhita, 2023 frames consensual permission as central to legal intimacy. Where such accord is missing – whether due to compulsion, threats, fraud, unconsciousness, drugs, or pressure – the act becomes classified as rape. Notably, silence or absence of struggle cannot be interpreted as acceptance. The provision underscores that willingness must be active; its absence turns contact into a crime.

Still, the law keeps an exemption: when a husband engages sexually with his wife – provided she is eighteen or older – it does not count as rape. Because of this, forced sex between legally married adults remains outside the legal definition, drawing scrutiny under constitutional principles such as personal

freedom, equal protection, physical self-determination, and private life.

### THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, 2005

#### Section 3

Definition of domestic violence. –For the purposes of this Act, any act, omission or commission or conduct of the respondent shall constitute domestic violence in case it—

(a) harms or injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or

(b) harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or

(c) has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or clause (b); or

(d) otherwise injures or causes harm, whether physical or mental, to the aggrieved person.

Recognized by law since 2005, marital sexual violence falls under domestic abuse through the Protection of Women from Domestic Violence Act. Civil solutions exist – protection directives may follow, along with rulings on housing, financial support, shared assets, child care rights, and limitations on contact. Abuse, as defined in Section 3, takes forms beyond injury: it spreads into feelings, speech patterns, monetary control, and intimate misconduct. When acts of a sexual kind strip away respect or reduce worth, they count as violation under this provision. Such conduct undermines personal value; legal response becomes applicable.

Even though the law does not treat marital rape as a crime, it states plainly that being married cannot excuse non-consensual sex. The mere presence of this provision matters, since it

confirms consent still applies inside marriage and acknowledges sexual harm in intimate relationships can be addressed by legal means - though those solutions fall under civil procedures instead of criminal penalties.

### Remedies

Even without full criminalization of marital rape in India, options remain open for women subjected to sexual violence inside marriage. Under the Protection of Women from Domestic Violence Act, 2005, access exists to protection measures, rights over shared homes, financial support, reparations, child custody arrangements, and further non-criminal safeguards - since sexual abuse falls within the definition of domestic harm. When sex is imposed against will during matrimony, consequences might emerge through laws on spousal cruelty, including Section 498A of the Indian Penal Code. Similar accountability now appears under equivalent clauses of the Bharatiya Nyaya Sanhita, enacted in 2023.

Separation between spouses brings into play Section 67 of the Bharatiya Nyaya Sanhita, 2023, which treats forced sexual acts by a husband toward his wife during this time as a punishable offence. Though not always framed directly around assault, options like divorce, court-ordered separation, financial support, or child care decisions might still apply when sexual harm forms part of broader abuse patterns. Legal challenges to the exemption allowing marital rape could emerge via constitutional petitions grounded in equality, non-discrimination, and personal dignity guarantees found in Articles 14, 15, and 21. Beyond litigation, affected individuals can access recovery-focused services - medical treatment, psychological guidance, temporary housing, monetary reparation, lawyer assistance, and long-term social integration - through established government channels.

Even with such measures, failing to recognize marital rape as a distinct crime continues to raise significant legal questions. Where consent is absent inside marriage, the law does not

respond as it would beyond it. This imbalance persists despite evolving understandings of rights. One key gap remains unaddressed in statutory frameworks. Though other reforms exist, equal protection has not been fully realized here. The distinction between private and public acts shapes outcomes unequally. A husband's actions may escape penalties applied to strangers. Legal parity fails at this boundary. Silence in legislation echoes broader societal hesitations. Without explicit provisions, accountability weakens. Recognition lags behind principle.

### Conclusion

Still today, marital rape stands debated within India's legal system due to a clause that separates treatment based on relationship status, leaving those who are married without equal defense when facing forced sexual acts. Often challenged, such an approach appears rooted in old views where marriage overrides personal autonomy.

Even when laws address domestic abuse, harsh treatment, marital rules, or basic rights, they frequently fall short by failing to classify coerced intercourse inside marriage as rape. This gap places the matter directly within ongoing discussions about personal worth, control over one's body, fairness between partners, and how agreement functions in a shared life.

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