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Between Matrimony and Autonomy: Analysing the Imperative and Impediments to Criminalising Marital Rape in India

Saiprasad Ameet Vaidya^a

^aSymbiosis Law School, Nagpur, India

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The Indian laws, unfortunately, give importance to the cultural thinking rather than the rights, such as privacy to sexual acts, right against self-incrimination, right to bodily autonomy and equal protection of law. This is the reason why the concept of Marital Rape is not criminalised in India. Marital Rape is an act of sexual intercourse by the husband with his wife without the consent of the wife. This paper aims to discuss what are the reasons behind the occurrence of the action of Marital rape, how the action of Marital Rape violates all the above-mentioned fundamental rights, how exception II to Section 63 of the Bharatiya Nyaya Sanhita 2023 (BNS) is unreasonable, why the marital rape should be criminalized and what are the challenges which the legislature and judiciary are facing in criminalizing the act of Marital rape in India. The author has a vision that this article will enlighten the people with the aspect how it is of the extreme importance of criminalising marital rape and how the fundamental rights which are being violated by the commission of the act of Marital Rape supersede the challenges which are present in the criminalisation of this act.

Keywords: *marital rape, fundamental right, right to privacy, right against self-incrimination.*

INTRODUCTION

In India, obscenity and vulgarity remain controversial elements that challenge the limits between personal liberties and community ethics. Marital Rape is the action of rape where

the perpetrator is the spouse of the victim. The definition of rape remains the same for the action of Marital Rape, the sexual intercourse or the sexual penetration carried out by men against women, where there is the absence of the consent of women for the commission of the act of sexual intercourse/penetration with her.¹ If we apply the liberal rule of interpretation present in the Indian Legal Jurisprudence, then the definition given in Section 63 of BNS clearly construes us to the interpretation that to constitute the offence of rape, it must be proved that the act of sexual intercourse/penetration has been carried out with the victim without her consent. If taken into consideration the legal mandate of the term burden of proof in criminal cases, as established by the Bhartiya Sakshya Adhiniyam the burden of proving the guilt of the accused is upon the prosecution. This means that the duty to prove that sexual intercourse/penetration is committed by the perpetrator without the consent of the victim is cast upon the victim herself.² If we take into consideration the wording of Section 63(d)(vi) of BNS 2023³, the wording used in this section is “with or without her consent when she is below the age of eighteen years”. If we take into consideration the wording of Section 2 of the Indian Majority Act⁴, the age of majority mentioned in the section is 18 years, irrespective of gender. The wordings of exception II of Section 63 of BNS are “Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.” This means that Marital Rape is still recognised as legal if the wife is a minor. But if we take into consideration the wording of exception two in section 375 of IPC, then Marital rape was recognised as an offence only if the wife was below 15 years of age. It is the Hon’ble Supreme Court of India which led the way to the wording of exception 2, which is present in BNS in the case of *Independent Thoughts v Union of India*⁵, by altering the wording of exception 2, as the act of sexual assault by the husband will be considered as rape if the wife is below 18 years of age. The Hon’ble Supreme Court in the case of *Bodhisattwa Gautam v Subhra Chakraborty*⁶ has aptly defined rape in form as “deathless shame and the gravest crime against human dignity. If the Hon’ble Supreme Court has made such an observation about rape in any form, then the author is unable to understand why the legislature and the judiciary are falling in declaring exception 2 present in then Section 375

¹ Bhartiya Nyaya Sanhita 2023, s 63

² Bhartiya Sakshya Adhiniyam 2023, s 104

³ Bhartiya Nyaya Shanita 2023, s 63(d)(iv)

⁴ Indian Majority Act 1875, s 2

⁵ *Independent Thoughts v Union of India* (2017) 10 SCC 800

⁶ *Bodhisattwa Gautam v Subhra Chakraborty* AIR 1996 SC 922

of IPC and now in Section 63 of BNS as unconstitutional and led a path towards the criminalization of marital rape as like all other form of rapes it also violates lot of fundamental rights of the women. The Hon'ble Supreme Court and the legislature are casted with the most important duty of protecting the fundamental, constitutional and legal rights of the citizens but The Genesis of Marital Rape Exemption: A Legacy of Patriarchal Jurisprudence they are miserable falling in fulfilling their duty of protecting the fundamental rights of the women by not criminalizing marital rape, as non-recognition of Marital Rape as an offence is violating numerous of the fundamental rights of the married women guaranteed by the constitution daily.

THE NOTION OF MARITAL RAPE IN CONTEMPORARY DISCOURSE

The general notion and sacrosanct thinking about the word rape is that the perpetrator and the victim are strangers to each other. Sections 9 of the Hindu Marriage Act⁷ and Section 22 of the Special Marriage Act⁸ talk about the concept of restitution of conjugal rights. This means if any spouse is not allowing the other spouse to avail its conjugal rights, then the spouse whose conjugal rights are getting violated can go to the court and obtain a decree which will compel both the spouses to stay together and perform their conjugal rights. Given the presence of this particular provision in the law, it is hard to believe that rape can exist within the institution of marriage because both society and the wife herself will think that the husband is carrying out his conjugal rights, which he has towards his wife. There is no concrete definition of the term marital rape but still marital rape can be defined as an act of penetration which can either (vaginal, anal or oral) done by husband with his wife, when there is absence of the free consent from the wife or if the wife is not in state in which a normal prudent person can give a free consent. If we take into consideration the general legal jurisprudence, then the term free consent means a consent which is given without the presence of any kind of force, coercion or threat. The word 'rape' has been derived from the term 'rapio', which means 'to seize'. Rape is therefore, forcible seizure, or the ravishment of a woman without her consent, by force, fear or fraud. It involves coercive, non-consensual sexual intercourse with a woman. Rape can be viewed as an act of violence against the bodily autonomy of a woman, an outrage by all means. It is the ultimate violation of the self of a

⁷ Hindu Marriage Act 1955, s 9

⁸ Special Marriage Act 1954, s 22

woman.⁹ The justification given by the Indian Legislature for not recognising marital rape as an offence, the act which destroys the freedom of the body of the woman, is that in the cultural thinking of India, women are considered to be the property of the husband, and men cannot violate their own property. The presence of this thinking in the Indian Society is in itself a blunt violation of their individuality and their agency as citizens.

The intricate and intimate nature of a marital relationship makes it difficult for the victim to even accept herself as a victim, let alone report the offending conduct to the police. For this reason, marital rape is one of the crimes that goes unreported, the most violent offenses. Due to their financial dependence on their husbands, even women who do view themselves as victims are reluctant to contact the authorities, and doing so may result in their financial support being withheld, leaving them and their children homeless.

Today, many countries have either enacted marital rape laws, repealed marital rape exceptions or have laws that do not distinguish between marital rape and ordinary rape. These countries include: Albania, Algeria, Australia, Belgium, Canada, China, Denmark, France, Germany, Hong Kong, Ireland, Italy, Japan, Mauritania, New Zealand, Norway, the Philippines, Scotland, South Africa, Sweden, Taiwan, Tunisia, the United Kingdom, the United States, and recently, Indonesia. Turkey criminalised marital rape in 2005, and Mauritius and Thailand did so in 2007. The criminalisation of marital rape in these countries, both in Asia and around the world, indicates that marital rape is now recognised as a violation of human rights. In 2006, it was estimated that marital rape is an offence punished under the criminal law in at least 100 countries, and India is NOT one of them. Even though marital rape is prevalent in India, it is hidden behind the sacrosanct curtains of marriage.¹⁰ The Indian legislature has framed the laws which protect women to get abuse, from cruelty, domestic violence, dowry and female infanticide, which are present within the ambit of the family. But it is a very shameful thing that the Indian legislature has not even made an attempt to criminalise the act of Marital Rape, which in itself tears and breaks the woman from inside because this act is committed on her by the person from whom she least expected in the world. Women who experience rape at the hands of their spouses are likely to

⁹ Dr Bhavish Gupta and Dr Meenu Gupta, 'Marital Rape: - Current Legal Framework in India and the Need for Change' (2013) 1(1) Galgotias Journal of Legal Studies

<<https://www.galgotiasuniversity.edu.in/pdfs/issue2.pdf>> accessed 05 August 2025

¹⁰ *Ibid*

experience repeated rapes. They are subjected to oral and anal rape in addition to vaginal rape. In addition to using intimidation, verbal threats, physical assault, or firearms to coerce their wives into having non-consensual sex, husbands frequently rape their wives while they are asleep.

Millions of women around the world endure daily torture and suffering from the grave issue of marital rape. Accurate data on domestic violence and rape against women is hard to come by, partly because of family loyalty, fear of their abuser's retaliation, incapacity to leave the relationship, concerns about their children's future, or the lack of strict laws protecting victims of marital rape. Women are reluctant to report incidents when they are raped by their husbands. Marital rape certainly has a significant impact on the lives of women who experience it, even though it is underreported. For example, according to the data on marital rape in the US, one in seven or eight married women has had rape or attempted rape at the hands of their spouse.¹¹ Another estimate states that between 10% and 14% of married women are raped while they are married.¹²

THE GENESIS OF MARITAL RAPE EXEMPTION: A LEGACY OF PATRIARCHAL JURISPRUDENCE

If taken into consideration the legal jurisprudence of numerous countries, then it can clearly be said that rape has been defined in many legal jurisprudences as an act of sexual intercourse by a man towards a female without her consent, where the female is not his wife. This particular exemption gave a licence to the men to rape their know wives. The origin of this offence can be traced to the wording given by Lord Mathew Hale in the seventh century. The wording which he has used is as follows: "Because of their joint agreement and contract, the wife has given herself up to her husband in a way that she cannot take back, hence the husband cannot be guilty of raping his legitimate wife on his own."¹³

It is an utterly shocking thing that Lord Mathew Hales has neither referred to any argument, legal provision, nor case to justify the statement made by him. This is the statement which has given rise to the theory of irrevocable consent within marriage. The only assertion given by him for the statement made by him is that in the marriage wife handovers her legal person

¹¹ Steven Box, *Power, Crime and Mystification* (London, Tavistock Publications 1983) 122

¹² Diana. E. H. Russell, *Rape in Marriage* (Indiana University Press, Bloomington 1990)

¹³ Sir Mathew Hale, *The History of the Pleas of the Crown* (vol 1, London Professional Books 1972) 629

to the husband, and since the concept of conjugal rights exists as a statutory right, the marriage in itself is considered to be the irrevocable consent of the wife towards the husband. This notion of the theory of irrevocable consent within marriage has created a concept that a woman, once married to a person, gives consent to have sexual intercourse with that person according to his "*Whims and Fancies*", and the said consent is irrevocable in nature. This also established that once a woman gets married to a person, then she has no right to refuse to have sexual intercourse with that person. This led us to the conclusion that it is the duty of the married woman to have intercourse with her husband. The belief in the existence of this duty till today makes the existence of the theory of irrevocable consent in contemporary times and as well as in India. A female slave is morally obligated to refuse her master the last familiarity, and she has the acknowledged right to do so. The wife doesn't think so.

Unfortunately, she may be shackled to a cruel tyrant who can take advantage of her and impose the lowest human decency being, that is, being made to perform an animal function against her will.¹⁴ The existence of marital rape not only marks the surrender of the dignity of women, but it also marks the surrender of dignity to such a level that it makes the stature of women beneath that of a slave; hence, marital rape is not welcomed by any woman. This was the statement made by Sir John Stuart Mill as long back as 1869. The fundamental tenet of this assumption is the myth that the husband cannot be held accountable for rape because the woman is believed to have given her irreversible agreement to sexual relations with him at the time of marriage. The idea of 'irrevocable implied consent' served as the foundation for the principles of the marital rape exception. According to this theory, a woman's implicit agreement to sexual activity is seen to be irrevocable once she marries a man. The common law theories that a woman was her husband's property and that her legal existence was 'incorporated and consolidated into that of a husband' were the other conventional explanations for the marital exemption. At the last under this head, the author would like to say that it is a very shameful thing that in a country like India, where women are worshipped as goddesses, the unethical act of marital rape exists.

¹⁴ John Stuart Mill and Susan Moller Okin, *The Subjection of Women* (Hackett Publishing 1988) 33

UNDERSTANDING CONJUGAL RIGHTS WITHIN THE FRAMEWORK OF MARRIAGE

Conjugal Rights and Restitution of Conjugal Rights: The term 'Conjugal rights' means the right of citizens to stay together as a married couple. This means that after marriage, the married persons have to stay together and perform all the duties and obligations towards each other which arise from the sacral relation of marriage. The Indian legal Jurisprudence establishes a concept known as Restitution of Conjugal Rights. The meaning of the term restitution of conjugal rights is a decree of the court which obligates the spouses to stay together and perform the marital obligation. The laws which discuss this concept are:

- Section 9 of the Hindu Marriage Act will apply to a person who comes within the ambit of Section 2f of the Act.
- The Muslim law and this law will apply to all Muslims residing in India.
- Sections 32 and 33 of the Indian Divorce Act.

Section 9 and Restitution of Conjugal Rights: The idea of Restitution of Conjugal Rights is covered in Section 9 of the Hindu Marriage Act 1955. This section offers a legal remedy in cases when one spouse has stopped participating in the other spouse's society without a valid justification. By submitting a petition to the district court, the party who feels wronged can request the restoration of conjugal rights. The court may order restitution of conjugal rights if it finds no legal basis to reject the application and is satisfied that the petition's allegations are true.

Key Points regarding Section 9: Application Grounds: When one spouse has unjustifiably left the other's company, the clause is applicable. By submitting a petition, the harmed party, whether the husband or the wife, can start the legal procedure.

The Objective of Section 9: Restoring marital rights is the main goal, which requires the spouses to live together when one has unjustly distanced themselves. It emphasises the value of preserving marital ties and is seen as a marriage-saving provision.

Historical Background: The idea of restoring marital rights has a long history and was first used in England. For the first time, the Indian Privy Council acknowledged and used this remedy in the *Moonshee Basloor v Shamsunissa Begum* case.

Elimination of English Remedy: Although this matrimonial remedy was originally included in English law, it was eliminated in 1970.

Section 9 requirements include the following:

- The spouses cannot live together.
- The harmed party must proactively seek restoration of marital rights.
- One party's separation from the other must be without a valid reason.

When one spouse has unjustifiably distanced themselves from the other, Section 9 essentially acts as a legal tool to promote the couple's reunion. In situations where withdrawal is unwarranted, it emphasises the value of maintaining marital unity and offers a methodical way to request the restoration of conjugal rights.

Who can Seek Relief: Either spouse, when one has unjustly withdrawn from the other's society without sufficient justification, can petition the district court for restitution of conjugal rights. The court examines the truth of the petition and ensures no legal reason to deny restitution.

Why is the Relief Given: To preserve the integrity and legitimacy of marriage, the legislation offers a statutory remedy that allows spouses to regain the companionship of the person who departed without cause.

Conjugal Rights of Husband: Conjugal rights, which result from marriage, include a husband's or wife's right to be with their spouse. Personal laws that regulate marriage, mutual divorce, and family-related issues acknowledge these rights. Many personal laws expressly forbid the denial of conjugal rights, so if a wife violates them, the husband may seek legal help to restore them.

Benefits of Restitution of Conjugal Rights (RCR) for Husband: The advantages of RCR differ for every situation. It is frequently employed as a tactic to persuade the opposing side to consent to a divorce. The husband may ask to have his wife's property attached if RCR is approved, but she declines to get back together. The husband may file for divorce if the couple doesn't reconcile after a year. A lawful divorce application is not nullified by a negative RCR ruling.

Restitution of Conjugal Rights Under Muslim Law: According to Muslim law, a court may order the restoration of conjugal rights to protect the rights of the person who has been wronged if one spouse unfairly distances themselves from the other's society or neglects their marital duties. This has historically been linked to the precise fulfilment of a contract and is about protecting legal rights. Muslim law mandates a lawsuit for reparation rather than a petition, in contrast to other laws.

Restitution is an equitable and discretionary remedy that can only be sought in a valid marriage. A wife may request the fulfilment of marital duties, and her husband may launch a lawsuit if she refuses to live with him without a good reason. This remedy is not a given because the court typically sides with the woman and requires strong proof for matrimonial relief. Although the husband has power, the Quran commands him to treat his wife with kindness.

Restitution of Conjugal Rights Under Christian Law: Sections 32 and 33 of the Indian Divorce Act 1869 give Christians in India the ability to request the restoration of their marital rights. If one spouse has unjustly distanced themselves from the other's society, Section 32 permits either spouse to petition the district or high court. After confirming the accusations and determining that there is no justification for dismissing the petition, the court may grant restitution of conjugal rights. According to Section 33, the only defences against a restitution request are those that do not result in the marriage being deemed void or in a judicial separation action.

Challenging the Notion of Conjugal Rights Through the Lens of Marital Rape: It is well-established legal jurisprudence that the fundamental rights have an overriding effect over the basic legal rights guaranteed to the citizens of India by the different statutes created either by the Parliament or by the state legislature.

It is a fact on the face of record that the existence of crime like Marital Rape violates the right to privacy and right to Bodily Autonomy of a woman. In the case of *K.S. Puttaswamy v Union of India*¹⁵, the nine-judge bench of the Hon'ble apex court has clearly established that both the rights are fundamental rights enshrined under Article 21¹⁶. Therefore, conjugal rights,

¹⁵ *K.S. Puttaswamy v Union of India* (2017) 10 SCC 1

¹⁶ Constitution of India 1950, art 21

which are a statutory right, cannot override the fundamental right to privacy and Bodily Autonomy. Therefore, conjugal rights cannot be a valid reason for not recognising marital rape as a crime.

CHALLENGES IN THE CRIMINALISATION OF MARITAL RAPE: LEGAL, SOCIAL, AND CULTURAL BARRIERS

The challenges which are persistent in India for the Criminalisation of Martial Rape are as follows:

Martial Unity: The Principle of Covertures was defined by William Blackstone as follows: 'By marriage, the husband and wife are one person in law: that is, the woman's very being or legal existence is suspended.' She is referred to in our French legal system as a *feme covert*, *foemina viro co-operta*; she is said to be covert-baron, or under the protection and influence of her husband, her baron, or her lord; and her condition during her marriage is known as her coverture. During the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection, and cover she performs everything.

Another argument against making marital rape a crime is that the idea of marital rape is incompatible with Indian culture because of the significant cultural divide between Indian society and other nations' conceptions of marriage. The cultural importance put on the sanctity of marriage supports the claim that making marital rape a crime would undermine the institution of marriage, which is a truth that comes from the cultural relativism argument.¹⁷

Patriarchy System: 'Defined' morality is governed by patriarchal norms and ideals through sexuality-based character traits. It has a direct influence on sexuality, reproduction, and social productions, all of which were represented by certain cultural metaphors. Various inferior symbols of women, such as self-sacrificing and self-effacing images of women, as well as ritual activities that consistently reinforced the dominance of women as obedient wives and pious mothers, were used by the patriarchy to convey its messages.¹⁸

¹⁷ William Blackstone, *Commentaries on the Laws of England 1765-1769* (1765)

¹⁸ Dr. Mrs. Annie John, *Violence against women - Need to awaken the conscience of humanity* (Asia Law House 2013)

Implied Consent: The concept of implied consent in a marriage is sometimes invoked to argue against making marital rape a crime. The husband cannot be guilty of rape committed by himself against his lawful wife because, by their mutual matrimonial consent and contract, the wife has given herself up in this kind to her husband, which she cannot retract, according to Sir Matthew Hale of England, Chief Justice of England, in his well-known thesis, *Historia Placitorum Coronea*, published in 1736.¹⁹

Use of Law for an Ulterior Purpose: Defendants of the marital rape exception hold the opinion that women would incriminate their husbands for personal gain. The specific argument and criticism against Article 398A (Dowry provisions) is that women may tend to abuse this provision. According to the Men's Welfare Trust, an NGO, regulations have already granted married women a special status that entitles them to receive maintenance, alimony, and the right to live with their husbands through a number of measures. As a result, men are more susceptible to being victimised by women, who may fabricate allegations of domestic abuse, sexual harassment, or 498-A IPC.

In an affidavit submitted to the Delhi High Court, the Indian government said that 'it must be sufficiently ensured that marital rape does not become an easy tool for harassing husbands.' The affidavit goes on to say that making rape a crime could cause marriages to fall apart and leave men open to abuse from their wives.²⁰

Economic Factor: Understanding the economic aspect of why women continue to live with rapists is crucial. Women are financially reliant on men, and they are not even entitled to make decisions regarding their own money. Women constantly worry that they may lose their house, their job, and their child's refuge if they report the crime or even attempt to flee. Additionally, illiteracy contributes to unemployment and increases a person's vulnerability to sexual abuse by their spouse.

Impossible to prove as Rape: It would be challenging to prove marital rape because it is such a personal crime. It might be feasible in the first instance, but it would be challenging to verify after several recurrences.

¹⁹ Hale (n 13)

²⁰ 'Men May Suffer if Marital Rape Becomes Crime, Indian Government Says' *Reuters* (30 August 2017) <<https://www.voanews.com/a/men-suffer-marital-rape-crime-india-government-says/4007251.html>> accessed 05 August 2025

CRIMINALISING MARITAL RAPE: A NECESSITY AMIDST PERSISTENT CHALLENGES

Under this head, the author will discuss the stand of the Law Commission about criminalisation of Marital Rape and how non-recognition of Marital Rape as a crime is violating a lot of fundamental rights of women in India.

42nd Law Commission Report: In its 42nd report, the Law Commission of India argued that marital rape should not be included in Section 375. Naturally, they state that there are extremely few prosecutions for this offence. We believe it would be preferable to completely remove this offence from the scope of section 375 and not even technically classify it as rape. A different section may also contain the penalty for this offence.

The National Commission for Women and numerous women's organisations have been calling for the removal of Section 375 of the Indian Penal Code's exemption clause, which declares that 'sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.' Nonetheless, the Government of India's Women and Child Department established the Task Force on Women and Children, which held the opinion that a broader discussion on this matter was necessary. The Task Force was tasked with reviewing all current laws and programs that affect women.

The most important of the Task Force's four recommendations on rape under the Indian Penal Code concerns the definition of rape. It adopted the stance that all types of sexual abuse should be included in the definition of rape. According to the report, the current definition of rape in Section 375 IPC might be replaced with the Law Commission's proposed concept of sexual assault since it is wide, comprehensive, and acceptable. Like the Law Commission, the Task Force did not, however, suggest adding marital rape to the revised definition.

172nd Law Commission Report: The following recommendations for significant changes to the law regarding rape were included in the 172nd Law Commission report²¹, which was passed in March 2000.

- 'Sexual Assault' should be used instead of 'Rape'.

²¹ Law Commission, *Review of Rape Laws* (Law Com No 172, 2000) para 3.1.2.1

- Section 375 of the IPC states that all forms of penetration, including penile/vaginal, penile/oral, finger/vaginal, finger/anal, and object/vaginal, shall be included in sexual intercourse.
- Sexual assault on any part of the body should be interpreted as rape in the context of *Sakshi v Union of India* and Ors.
- Since the law has ignored the rape of young boys in custody, rape legislation ought to be gender neutral.
- Section 376E, a new offence titled 'unlawful sexual conduct,' ought to be established.
- It was also requested that Section 509 of the IPC be changed to provide harsher penalties for offences committed with sexual intent.
- Marital Rape: Section 375 of the IPC's explanation (2) ought to be removed. Just as any physical aggression committed by a husband against his wife is considered an offence, so too should forcing sexual relations between a husband and his wife be considered an offence. Section 376 A was to be removed for the same reason.
- In accordance with the Indian Evidence Act (IEA), the court will assume that a victim gave their agreement to a sexual conduct if this is contested.

Nothing has been done as of yet, despite the Law Commission of India's 172nd Report, which was delivered to the Indian government more than nine years ago and urged Parliament to amend Section 376 IPC's current definition of rape to include a more inclusive definition of sexual assault that is age and gender neutral.

The Indian Constitution vis-à-vis Rape Marital Exemption: A nation's constitution is the document that captures the essence of the country. The Indian Constitution reflects the nation's traditions and experiences, organises and regulates authority, protects human rights, strikes a balance between conflicting demands of society and private interests, and serves as a catalyst for the advancement and unification of the nation.

According to the Indian Constitution, all laws passed in the nation must be consistent with the values and principles stated therein. Any legislation that does not adhere to this criterion is deemed *ultra vires* and could be overturned by the courts and ruled unconstitutional.

It shall now be examined how the theory of marital immunity from rape does not adhere to the requirements of Articles 14 and 21 of the Indian Constitution.

Equal Protection of the Law: Every Indian citizen is guaranteed equal protection under the law and equality before the law under Article 14.²² Although Article 14 stipulates that equals within a community must not be treated differently and that the unequal in that society must not be treated equally, it does not demand that every individual be treated equally in every situation. As early as 1952, the Supreme Court established the two requirements for a valid classification:

- The classification must be based on a discernible differentia that sets the grouping together from others; and
- The differentia must make sense in relation to the goal the legislation is intended to accomplish.²³

Therefore, any rule that classifies something in a way that is superfluous or unrelated to its goals is considered to be outside the bounds of the Constitution. The Constitution is a living text since what is reasonable will always depend on the opinions of the judges, and with each new generation of judges comes a new interpretation of the law and reasonability. To reduce gender-biased unequal treatment, it is imperative to stop gender-based stereotyping. Therefore, it is crucial to exercise caution when employing the equality test to ensure that the patriarchal ideology's encouraged stereotyping does not dictate what constitutes a valid classification.

A woman is protected from coerced sexual contact against her will and without her agreement by Section 375 of the IPC, which also makes rape a crime. As a result, the provision protects women from criminal attacks on their physical autonomy and illustrates the state's desire to bring those who breach this autonomy to justice. Therefore, it is accurate to state that Section 375 of the IPC aims to safeguard women's autonomy and right to self-expression by treating rape as a violent crime that disregards all other rights accorded to individuals. However, oddly, violent sexual contact within a marriage is not considered rape under Section 375 of the IPC, which classifies it under an exemption.

²² Constitution of India 1950, art 14

²³ *State of West Bengal v Anwar Ali Sarkar* AIR 1952 SC 75

Due to her marital status, a married woman's protection under Section 375 of the IPC is withdrawn by this exemption. The premise behind the categorisation and unequal treatment of married women is that, in contrast to other individuals, they have no interest in having the state protect them from sexual and violent abuse. Additionally, the assumption is based on the idea that a wife in a marriage has irrevocably consented to having sex with her husband. Such an assumption, it is argued, is incorrect, illogical, and not supported by any discernible differentiation.

Married women require legal protection in the same way as men, and single women have their personal domains. Although the remainder of section 375 of the IPC aims to safeguard a victim's rights against the crime of rape, these rights are revoked upon marriage, and the emphasis is given to the concept of conjugal rights. Instead, the focus of the law changes to protecting the rapist. It effectively denies a woman her personality and bodily autonomy, as well as her freedom of choice. As a result, the classification is pointless, incomprehensible, and against Article 14's requirements. Article 14's test of categorisation is broken when the protection of Section 375 of the IPC is denied to rape victims based only on their marital status. This is irrelevant for legislative purposes.

Right to Life and Personal Liberty: The right to life and personal liberty are guaranteed by Article 21 of the Indian Constitution.²⁴ Despite being written negatively, Article 21 guarantees everyone the fundamental right to life and personal freedom. Following the *Maneka Gandhi v Union of India*²⁵ case. It now serves as the foundation for all rights pertaining to the defence of human life and liberty. Thus, the definition of 'life' has broadened and can be succinctly expressed by Field J. in the well-known ruling of *Munn v Illinois*²⁶, where he concluded that life means 'something more than mere animal existence.' The Supreme Court of India further upheld this interpretation in the *Bandhua Mukti Morcha v Union of India*²⁷ case.

²⁴ Constitution of India 1950, art 21

²⁵ *Maneka Gandhi v Union of India* AIR 1978 SC 597

²⁶ *Munn v Illinois* [1877] 94 US 113

²⁷ *Bandhua Mukti Morcha v Union of India* AIR 1984 SC 802

Several rights that have arisen from the phrase 'right to life and personal liberty' under Article 21 are violated by the idea of marital exemption from rape in light of this growing body of case law. There is no more flagrant and egregious breach of Article 21.

The right to privacy, right to bodily self-determination, and right to good health, all of which have been acknowledged at different times as essential components of the right to life and personal liberty, are all violated by the marital exception to rape.

Right to Live with Human Dignity: Under Article 21 of the Constitution, the right to life encompasses the right to human dignity and all of its components, including the basic needs of life, such as sufficient food, clothing, and a roof over one's head, as well as the ability to read, write, and express oneself in a variety of ways, move freely, and interact with other people.²⁸ One of the most fundamental aspects of the right to life, which acknowledges each person's autonomy, is the right to live with human dignity.

In numerous cases, the Supreme Court has ruled that rape is a crime that infringes upon someone's right to life as well as the victim of rape's right to live with human dignity.²⁹ According to the Supreme Court, rape is a crime against the Indian Penal Code as well as an offence against the whole community. Rape is more of an act of hostility intended to degrade and humiliate women than it is a sexual offence.³⁰ Therefore, a woman's right to live with human dignity is likewise upheld by the marital exemption theory.

Right to Sexual Privacy: The Indian Constitution makes no mention of the right to privacy. Nonetheless, the Supreme Court has acknowledged in several judgments that Article 21³¹ guarantees a right to privacy. The right to solitude is part of the Article 21 right to privacy. Any kind of coercive sexual contact is against the right to privacy. It is argued that by compelling a married woman to engage in sexual activity against her will, the theory of marital exemption from rape infringes upon her right to privacy.

In the *State of Maharashtra v Madhkar Narayan*³² case, the Supreme Court ruled that every woman had the right to sexual privacy and that no one could violate that right whenever

²⁸ *Francis Corallie Muin v Union Territory of Delhi* AIR 1981 SC 802

²⁹ *The Chairman, Railway Board v Chandrima Das* AIR 2000 SC 988

³⁰ *Bodhisattwa Gautam v Subhra Chakraborty* AIR 1196 SC 922

³¹ *Kharak Singh v State of U.P.* AIR 1963 SC 1295; *Govind v State of Madhya Pradesh* AIR 1975 SC 1378; *Neera Mathur v LIC* (1992) 1 SCC 286

³² *State of Maharashtra v Madhkar Narayan* AIR 1991 SC 207

they wanted to. The Supreme Court expanded this right to privacy to include workplaces in the *Vishakha v State of Rajasthan*³³ case. Moreover, it is also true that even in marriage, there is a right to privacy before engaging in sexual activity. The marital exemption theory is illegal because it violates a married woman's right to privacy by decriminalizing rape within a marriage.

Right to Good Health: The claim that the marital exemption from rape infringes on the victim's right to good health is another argument against the theory. Article 21 recognises the right to good health as a component of the right to life.³⁴ A person's ongoing intellectual and spiritual well-being depends on having this right. The marital exemption theory infringes upon a victim's right to good health since it invariably results in severe psychological and bodily suffering. It throws a woman into a severe emotional crisis and damages her psyche. In situations where the victim of rape has an STD as a result of coercive sexual contact in a marriage, a stronger case can be presented. The marital exemption theory is illegal since it essentially denies married women their right to good health.

In addition to violating several rights and the categorisation doctrine under Article 14, Article 21's notion of marital immunity from rape violates both Articles 14 and 21 of the Indian Constitution because it fails to meet the standards of 'just, fair, and reasonable' law. Constitution. In numerous judgments, the Supreme Court has concluded that any 'law' that is subject to scrutiny under Article 14 or Article 21 must pass this standard of reasonability to be referred to within the Constitution's framework.

Even if the married exemption to the rape theory is accepted. It must nevertheless pass the 'just, fair, and reasonable' legal test to be classified as constitutional under Article 14.³⁵ Similarly, in the context of Article 21, it must be possible to argue that since a person can be deprived of her/his right to life and personal liberty through a 'procedure established by law' and since the marital exemption doctrine is a 'procedure established by law', it is within the framework of the Constitution. But this is an old and miserable argument, and the Supreme Court has held in several cases that 'Article 21 requires that no one shall be deprived

³³ *Vishakha & Ors v State of Rajasthan* AIR 1997 SC 3011

³⁴ *CESC Ltd. v Subhash Chandra* (1992) 1 SCC 441; *Regional Director, ESI Corpn. v Francis de Costa* (1993) Supp (4) SCC 100

³⁵ *Ajay Hasia v Khalid Mujib* AIR 1981 SC 487

of his life or personal liberty except by procedure established by law and this procedure must be reasonable, fair and just and not arbitrary, whimsical or fanciful'.³⁶

JUDICIAL STAND

In *Queen Empress v Haree Mytheme*³⁷, the court traced the history of court rulings on husbands causing serious harm to their wives and noted that, in the case of married women, the law of rape does not apply between husband and wife after the age of 15; even if the wife is older than 15, the husband has no right to disregard her physical safety, for example, if the circumstances are such that sexual contact is likely to result in death. In this instance, the husband was found guilty under section 338 of the Indian Penal Code of rupturing his eleven-year-old wife's vagina, resulting in a haemorrhage that ultimately killed her.

In *Emperor v Shahu Mehrab*³⁸, the husband was found guilty under section 304A of the Indian Penal Code of killing his child-wife by careless or reckless sexual activity.

'There is no question that a decree of restitution of conjugal rights thus enforced violates the inviolability of the body and mind subject to the decree, offends the integrity of such a person, and invades their privacy,' the Andhra Pradesh High Court ruled in *Saretha v T. Venkata Subbaih*³⁹.

If the right to privacy is breached by state-enforced sexual relations between a husband and wife, then a woman's right to privacy is unquestionably violated when she engages in non-consensual sexual relations with her husband. The conditions of a private contract between two people do not apply to the rights and obligations of a marriage, such as its formation and dissolution. Marriage does not take away one's right to privacy.

In *State of Maharashtra v Madhukar Narayan Mandikar*⁴⁰, the Supreme Court referred to the right to bodily privacy. In this instance, it was determined that a prostitute was entitled to decline sexual contact. It is distressing to learn that all rapes by strangers are now illegal, and

³⁶ *Munn v Illinois* [1877] 94 US 113

³⁷ *Queen Empress v Haree Mytheme* (1891) ILR 18 Cal. 49

³⁸ *Emperor v Shahu Mehrab* AIR 1917 Sind 42

³⁹ *Saretha v T. Venkata Subbaih* AIR 1983 AP 356

⁴⁰ *State of Maharashtra v Madhukar Narayan Mandikar* AIR 1991 SC 207

all women—aside from spouses—have been granted the right to privacy over their bodies, which includes the ability to deny sexual relations and withhold consent.

The Kerala High Court noted in *Sree Kumar v Pearly Karun* that, because the wife was not living apart from her husband as required by a separation decree or any other tradition or usage, even if she was subject to her husband having sex with her against her will and without her consent. Consent will not result in an offence under Section 376A of the IPC. In this instance, the parties were engaged in an ongoing divorce lawsuit. Following that, the husband and wife came to an agreement and decided to stay together in their home. The wife claimed that she was the victim of sexual activity by her husband against her will and permission when she was staying with him for two days. Therefore, even though the husband was *de facto* guilty of raping his wife, he was found not guilty.

The idea that rape inside marriage is impossible or that a woman's shame of being raped might be alleviated by marrying the rapist appears to have been entirely dismissed by the judiciary for its own convenience. The problem is in the widely held belief that a marriage is essentially inviolable. Mutual respect and trust are expected to flourish instead of forcing the woman to submit to the husband's every desire, particularly sexual ones. Being raped by a family member or someone you know is far more painful, and living with him is even harder. How can the law overlook this flagrant breach of a married woman's fundamental freedom to have her body protected from abuse?

CONCLUSION

The marital exception of rape in the Indian law remains a constitutional and Jurisprudential paradox. Under the exception codified under Exception 2 to Section 375 of the Indian Penal Code, this is contradictory to the balance of autonomy, bodily integrity of a person, and the equality under the law, as defined in Articles 14, 21 of the Indian Constitution. This statutory provision effectively creates a subclass of citizens who are married women and are denied the autonomy of exercising the right to deny, and hence violates the equal protection of law doctrine.

The rationale that the criminalisation of marital rape will disturb the peaceful coexistence of a marriage is based on obsolete male-dominated societal settings, which assume a marriage to be more of a religion and hence the rape of marriage will undermine the religion. This

logic is fundamentally flawed and in conflict with the contemporary approach to marriage as a partnership of equals. Any fear regarding the misuse of such a law, although, is a reasonable concern for lawmakers, cannot trump the state's primary duty of enacting a law addressing clear and serious injury. While such misuse may need to be addressed through safeguards exceptional to other laws, no criminal provision should be left unenacted on the grounds of such fear.

The abolition of marital rape laws, in a comparative legal perspective, is a revision of the law that reflects contemporary appreciation of compliance and individual freedom. With consideration of legal instruments like CEDAW and ICCPR, India's legal position is in direct defiance of CEDAW's and ICCPR's international frameworks. Indian law should provide in clear terms that marriage does not mean an everlasting and unconditional surrender of a woman's right to bodily autonomy.

The foregoing reflects that the repeal of the marital rape exception is the solution. This is not simply a legal change; it is a constitutional change that would serve to restate that consent is the primary factor that defines a sexual act, even when the parties are married. In such a case, the law would maintain that marriage cannot be used as a cover to legitimise sexual abuse and that society should be modern enough to allow individuals' right to dignity.