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**MARITAL RAPE EXCEPTION: A CONSTITUTIONAL PARADOX IN  
INDIAN CRIMINAL LAW**- Pratha Paras<sup>1</sup>**Abstract**

The Marital Rape Exception in the Indian criminal law represents a profound paradox where all forms of non-consensual sexual intercourse are punishable except within the marital relationship. Such an exception is rooted in colonial jurisprudence and a patriarchal mindset regarding a woman's status in marriage, which grants husbands complete legal immunity for sexual intercourse that otherwise would have constituted rape, disregarding the wife's bodily autonomy. Despite constitutional guarantees of dignity, bodily autonomy, equality and privacy, several criminal amendments to the IPC, and the subsequent enactment of Bharatiya Nyaya Sanhita, the exception has still been retained, demonstrating a deliberate legislative intent to preserve it rather than a mere legislative oversight.

This article critically examines the MRE as a constitutional anomaly, which is in clear violation of Articles 14, 15, 19(1)(a), and 21 of the Constitution. It demonstrates how the exception creates an irrational and arbitrary distinction between married and unmarried women thereby denying married women equal protection of the law, suppresses a married woman's consent in marriage and violates her bodily autonomy and dignity. The exception primarily rests on a legal fiction of implied and irrevocable consent by the wife, which is inconsistent with the current understanding of consent as continuous and revocable.

The article further argues that the often-invoked justification of sanctity of marriage is legally flawed, for courts have held that constitutional morality must prevail over social morality and that popular opinion cannot dictate rights guaranteed by the constitution. The article concludes that the abolition of marital rape exception is not merely desirable but constitutionally necessary to protect women from sexual violence in a marriage.

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<sup>1</sup> Student at Symbiosis Law School, Pune

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## Introduction

Marital Rape Exception (MRE) refers to the statutory exemption within the criminal law that excludes non-consensual sexual intercourse by a husband with his wife from the purview of rape. It provides legal impunity to sexual acts by the husband against his wife, irrespective of the wife's consent. Such an exception is embodied in Section 375 of the Indian Penal Code, which defines rape and carves out an exception stating that any kind of sexual act by a husband with his wife would not amount to rape under the section, unless she is below 18 years of age<sup>2</sup>. The irony of this section is that though it recognizes that a sexual intercourse might amount to rape and is rape under ordinary circumstances would not attract criminal liability solely because of the marital relationship between the parties.

## Historical Origin: Colonial Legacy and Patriarchal Foundations

MRE has its origin in the English common law and was incorporated by the British in the Indian Penal Code, without taking into consideration the indigenous social realities or women's rights in India. This reflected the Victorian morality, patriarchal family structures and an overriding concern to preserve male authority in marriage. Sexual access was treated as a marital right of the husband and not a matter of ongoing consent. Post-Independence India retained the IPC, including the marital rape exception. Despite several criminal amendments in 1983 following the Mathura rape case<sup>3</sup> and 2013 after the Nirbhaya incident<sup>4</sup>, no efforts were made to remove the marital rape exception. The Justice Verma Committee recommended the removal of MRE, stating that marriage should not be used as a defence to rape<sup>5</sup>. However, this recommendation was rejected by the Parliament stating that criminalizing marital rape would undermine the sanctity of marriage and could be misused.

The enactment of Bharatiya Nyaya Sanhita, 2023, which sought to remove all forms and impressions of outdated provisions and colonial imprint on the earlier criminal laws, failed to remove this exemption that violates the very purpose Section 375 seeks to fulfil, which is to protect the bodily autonomy and dignity of women and is grounded in colonial jurisprudence.

## Implied Consent and the Legal Fiction of Marriage

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<sup>2</sup>Bharatiya Nyaya Sanhita, 2023, Act No. 45 of 2023, § 375 (India)

<sup>3</sup>The 1972, Mathura rape case, where a minor was raped by two police officers, which led to the Criminal Law (Second Amendment) Act, 1983 (No. 43 of 1983), to include provisions for custodial rape.

<sup>4</sup>The 2012, Nirbhaya Gangrape case, which exposed the narrow definition of rape, inadequate punishments and weak procedural safeguards, that led to the Criminal Law (Amendment) Act, 2013 (No. 13 of 2013).

<sup>5</sup>Justice J.S. Verma Committee, Report on Amendments to Criminal Law, Pg. 72–74 (2013).

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MRE is grounded on the legal fiction of implied, continuous and irrevocable consent. The law is based on the presumption that when a woman enters marriage, she gives consent to any and all forms of sexual activities with her husband, regardless of whether, at the time of the sexual act she explicitly refused or the state of her physical or mental health or any other circumstances that otherwise would have implied a lack of consent to the sexual act. Such a presumption disregards the dignity and bodily autonomy of the woman and reduces her to a subordinate position within marriage. MRE creates a paradox in the criminal law, by recognizing any form of non-consensual act of sexual intercourse as rape when committed by a stranger, friend or partner, but decriminalizes the same act if committed by the husband. The irony in the law is that even though it recognizes the fact that a husband might commit rape against his wife, but refuses to attribute criminal character to such an act.

#### A Conflict between Sanctity of Marriage and Fundamental Rights

The debate surrounding marital rape in India is primarily a conflict between sanctity of marriage and fundamental rights. The proponents of MRE argue that marriage is a sacred institution and that criminalizing marital rape would introduce the element of state surveillance in private relations which would undermine the sanctity of marriage. Marriage in India is portrayed as a sacrosanct institution, that deserves protection from legal intrusion. Furthermore, the provision is believed to be misused in certain cases, as wives might falsely accuse their husbands of rape. However, these arguments fail to take into consideration the bodily autonomy and the free will of the wife. It reveals the deep mistrust of women's agency and a preference to preserve the patriarchal family structures over individual rights. It also disregards the fact that the law already has its imprints in a marital relationship by relevant provisions for validity of marriage, divorce, adoption, maintenance and alimony.

#### Article 14: Reasonable Classification and Arbitrariness

From a constitutional perspective, MRE is a clear and blatant violation of the fundamental rights of a married woman under Article 14, 15(1), 19(1)(a) and 21. Article 14 allows for reasonable classification, which means that the classification must qualify as an intelligible differentia and it must have a rational nexus with the object sought to be achieved by the law<sup>6</sup>. MRE classifies women on the basis of their marital status, creating a clear distinction between married and unmarried women. While it may fulfil the first ground of reasonable

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<sup>6</sup>*India Constitution, article-14*

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classification by creating an intelligible differentia, it fails to comply with the second requirement of rational nexus. The object of rape laws defined under Section 375 is to protect women from non-consensual sexual intercourse, thus protecting their dignity and bodily autonomy. However, the MRE undermines this objective by removing husbands from the ambit of rape laws, solely because of the marital relationship between the parties, devaluing the woman's consent. MRE is arbitrary because it creates an irrational differentiation on the basis of marital status, assuming that a married woman has provided irrevocable consent to all forms of sexual acts. In the case of *Maneka Gandhi v Union of India*<sup>7</sup>, it was held that arbitrariness is antithetical to the right to equality under Article 14.

#### Article 15: Gender-Based Discrimination

Article 15 prohibits discrimination on grounds of sex<sup>8</sup>. MRE creates an arbitrary and indirect sex-based distinction, by preventing women from any legal recourse against sexual violence committed by her husband. Such kind of gender-based discrimination perpetuates systemic gender inequality and violates the substantive equality mandate of the constitution. While formal equality focuses on equal treatment by law, substantive equality, as recognized in the case of *Anup Garg v Hotel Association of India*, requires state to actively dismantle social and legal structures that reinforce gender hierarchies and stereotypes<sup>9</sup>. MRE is entrenched in the patriarchal assumption that women's consent is subsumed within marriage and her sexual agency is subordinate to marital expectations.

#### Article 19(1)(a): Suppression of Sexual Autonomy and Consent

Article 19(1)(a) guarantees one the right to freedom of expression, which means the freedom to express one's will, choices and consent freely<sup>10</sup>. MRE violates a woman's freedom to express her sexual consent- by failing to give legal recognition to a woman's denial or refusal to engage in sexual intercourse with her husband, thus silencing her voice in the marital relationship. By failing to give legal recognition to a married woman's "no" in a marriage, it legitimizes acts of coercion by her husband and suppression of her free will.

#### Article 21: Dignity, Privacy, Bodily Integrity and Sexual Autonomy

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<sup>7</sup>*Maneka Gandhi v. Union of India*, (1978) 1 S.C.C. 248 (India).

<sup>8</sup>*India Constitution*, article-15

<sup>9</sup>*Anuj Garg v. Hotel Ass'n of India*, (2008) 3 S.C.C. 1 (India).

<sup>10</sup>*India Constitution*, article-19(1)(a)

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The Supreme Court has given an expansive interpretation to Article 21 of the constitution, to include right to dignity, privacy, bodily integrity and sexual autonomy<sup>11</sup>. MRE treats a married woman's consent in sexual acts as irrelevant, treating them as objects of unlimited sexual access by the husband, thus undermining her bodily integrity and sexual autonomy. Such an exception goes against the constitutional understanding of dignity, which recognizes that every person is capable and has the right to make independent choices. Further, right to privacy which was recognized as an intrinsic part of Article 21, in the *K.S. Puttaswamy* case, encompasses decisional autonomy in matters concerning one's body and intimate relationships<sup>12</sup>. MRE strikes at the core of this right by not giving recognition to a woman's decision regarding sexual intercourse in a marriage and failing to act against sexual violence in a marriage.

#### Constitutional Morality Supersedes Popular or Social Morality

Courts have consistently held that constitutional morality must take precedence over social morality. MRE is rooted in the outdated social morality that marriage is a sacrosanct institution that needs to be safeguarded from legal intervention, placing it at a higher pedestal than the constitutionally guaranteed fundamental rights. In *Navtej Singh Johar v. Union of India*, the court observed that societal disapproval cannot justify the denial of fundamental rights to any section, and that constitutional morality must prevail over popular or social morality<sup>13</sup>. Similarly, in the case of *Joseph Shine v Union of India*, the court striking down the adultery law, rejected the patriarchal notion of marriage where women are seen as property of their husbands, emphasizing individual autonomy and dignity within a marriage<sup>14</sup>. These judgements reaffirmed the view that popular opinions cannot supersede constitutionally guaranteed rights, even in matters as private and intimate as marriage.

#### Way Forward

MRE is one of the many legal loopholes that have been preserved, using sanctity of marriage as an excuse. What the continued legislative stance and court overlooks is that once an act of sexual violence, disregarding a woman's consent occurs within a marriage it ceases to be sacred. No relationship, however intimate and strong justifies denial of fundamental rights.

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<sup>11</sup>India Constitution, article-21

<sup>12</sup>Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 S.C.C. 1 (India).

<sup>13</sup>Navtej Singh Johar v. Union of India, (2018) 10 S.C.C. 1 (India).

<sup>14</sup>Joseph Shine v. Union of India, (2019) 3 S.C.C. 39 (India).

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Further, no relationship can be more sacred than that of a parent and child, still acts of physical violence that are punishable under criminal law make no exception for such a relationship. The continued existence of MRE, thus reflects not preservation of marital institution, but normalization of violence against women and their objectification in a marital relationship.

A woman's consent to acts directed against her body must be recognized regardless of her marital status. The legislature while repealing such an arbitrary and unreasonable exception can create adequate safeguards to ensure that the provision isn't misused. At this stage, abolition of the MRE is not merely desirable but constitutionally necessary.



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