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## Irrevocable Consent and Marital Rape: A Juridical Analysis in the Light of Ancient Hindu Texts

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### ABSTRACT

This paper explores the complex intersection of irrevocability of consent in marriage as perceived in ancient Hindu texts and the contemporary legal and juridical debate surrounding marital rape. Examining the historical context of marriage within the Hindu tradition, we analyze the evolution of consent, particularly the notion of its irrevocability once the marital bond is established. This exploration then transitions to a critical analysis of marital rape, a concept largely absent in ancient texts, through the lens of modern legal frameworks and feminist philosophical perspectives. By juxtaposing historical perspectives with contemporary jurisprudence, this paper aims to illuminate the challenges of reconciling tradition with evolving understandings of individual autonomy, consent, and bodily integrity within the institution of marriage.

**Keywords:** Marriage, Irrevocable Consent, Marital Rape, Consent, Bodily Autonomy, Hindu Law, Dharma Shastras, Feminist Jurisprudence, Sexual Violence.

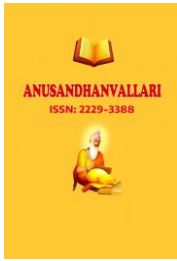
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### INTRODUCTION

The concept of consent forms the cornerstone of sexual offences under criminal law. However, the question of consent within the marital sphere has remained legally contentious, particularly in jurisdictions like India where marital rape is not explicitly criminalized. The historical positioning of marriage as a sacrosanct institution and the doctrine of coverture have deeply influenced the legal treatment of spousal sexual violence.

### HISTORICAL OVERVIEW ON MARRIAGE

Institutions have emerged gradually over the years as products of people living together. In sociology, an institution is a system of organizing social relationships which embodies certain common values and procedures and meets certain basic needs of the society. Marriage, as an institution has had a very long history. In every society, form, nature, and aim of marriage are different. Robert O' Blood (1960) states marriage is perceived by sociologists as a system of roles of a man and a woman whose union has been given social sanction as husband and wife. The equilibrium of the system requires adjustment between the two partners so that the role enactment of one (partner) corresponds to the role expectations of the other.



Various scholars have studied marriage as a social institution in India through different theoretical frameworks. The **Functionalist approach** stresses the importance of functions of marriage as an institution for the society as a whole. According to this perspective marriage will serve the needs of society, of producing children, regulating the relation between the sexes, both the partners benefit from the gendered division of labour, etc. The **Conflict or Marxist perspective** studies the differences in people, and the disputes that are caused by these differences. According to Conflict theorists, in most of the marriages throughout the world, husbands have more power than the wives which creates resentment among women and leads to conflict as the men are try to maintain their power and women attempt to oppose to it, resulting in conflicts in marriage. The **Feminist Perspective** study how marriage remains the main site of women's oppression. It remains a site where there is production and reproduction of gender hierarchies. It leaves women exploited and powerless. Ramaswamy Periyar's idea of 'the Self-Respect Marriage' is interpreted to mean that respect in a marriage is neither traditional, nor sacramental. Self-Respect Marriage not only recognizes the equality of men and women, it also helps the removal of the Caste System. According to Periyar, marriage regulates and disciplines women's familial and reproductive labour even as it actively denies their desires and rights to a self respecting life of their choice (V.Geetha, 2006).

### CONCEPT OF MARRIAGE AS A SACRAMENT AND IMPLIED CONSENT IN ANCIENT TEXTS

Marriage has long existed as a social union or legal contract ,considered as a sacrament under Hindu Law. The Sanskrit term 'Vivah' translates to 'to carry away.' Interpretations vary, which prevents a unified understanding of marriage. One perspective posits that marriage unites two individuals, families, and by extension, society at large. The primary goal of marriage is to establish a family with the legitimacy for sexual relations. It also forms a bond between two kin groups. Among Hindus, marriage is considered a sacrament, one of the 'Samskaras,' where newlyweds are advised to strengthen their nuptial bond to overcome physical desires.<sup>1</sup> Marriage was a religious necessity for both men and women; neither could attain heaven without their duly married partner.<sup>2</sup>

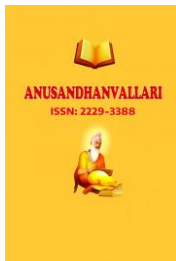
### FORMS OF MARRIAGE IN HINDU CULTURE

Ancient texts describe eight forms of marriage, ranging from Brahma (gift of the daughter by the father after adorning her with jewels) to Rakshasa (marriage by abduction from her family after battle). These forms highlight a spectrum of marital arrangements where the woman's agency varied significantly. In Brahma and Daiva (gift of the daughter to a priest as his fee), the father's consent was paramount, raising questions about the bride's autonomy. However, forms like Gandharva (marriage by mutual consent of the couple) offer a glimpse into scenarios where individual choice played a more prominent role. These differences suggest that the concept of consent was not monolithic, and its actual manifestation depended on the prevailing social and economic circumstances.<sup>3</sup>

<sup>1</sup> Parimal B. Kar, *Sociology: The Discipline and its Dimensions* 207 (New Central Book Agency, Kolkata, 2nd edn., 2018).

<sup>2</sup> A. S. Altekar, *The Position of Women in Hindu Civilization* 338 (Motilal Banarsidas, 2nd edn. Delhi, 1959).

<sup>3</sup> S.Venkataraman (ed.), N.R. Raghavachariar's *Hindu Law Principles and Precedents* 35 (The Madras Law Journal Office, Madras, 1980).



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## THE DOCTRINE OF IMPLIED CONSENT IN MARRIAGE

The exercise of freedom and self-determination is essential for personal decision-making, with permission serving as a crucial manifestation of this autonomy. It is fundamental to equality, autonomy of choice, and individual freedom in all human interactions. The legal system duly acknowledges the significance of contracts in diverse economic scenarios, rendering them unlawful and unenforceable without adequate authorization. In the domain of marriage law, the notion of free consent may frequently acquire a somewhat adverse meaning. It is characterized by the lack of elements such as fraud, coercion, or undue influence. The value assigned to the parties' consent in a marital contract is not always uniform.

The societal and cultural expectations tied to marriage play a pivotal role in shaping how marital rape is perceived. Prevailing gender roles and norms frequently underpin the belief that sexual entitlement is a marital right, thus overshadowing the vital need for consent. This belief upholds the idea that wives have a duty to satisfy their husbands' sexual demands, regardless of their personal willingness or consent. Such societal norms can lead to the trivialization of non-consensual sexual interactions within marriages.<sup>4</sup> marriage is revered as a sacred or inviolable institution. This sanctity often extends to all aspects of the marital relationship, including sexual relations, where the concept of consent may be overshadowed by the perceived marital obligations. Sexual Entitlement is the notion that marriage grants unconditional sexual rights to spouses, particularly from husbands towards wives, is a pervasive cultural belief. This can lead to the normalization of coercive sexual behavior within marriage. In the domain of marriage law, the notion of free consent may frequently acquire a somewhat adverse meaning. It is characterized by the lack of elements such as fraud, coercion, or undue influence. The value assigned to the parties' consent in a marital contract is not always uniform.

The implied consent law of marriage has classically relied upon law as well as cultural tradition. Assumed to be behind the belief is that by being placed into the marital status, the woman has given permanently and irreversibly her consent to sexual relations through union. The doctrine, despite its well-rooted establishment in traditional as well as ancient culture, is actually violative of the law of autonomy.

### Irrevocable Consent in Ancient Hindu Texts

Marriage has historically occupied a sacrosanct position within Hindu religious and philosophical traditions, where it is conceptualised not merely as a social contract but as an indissoluble sacrament. Normative texts such as the *Manusmriti* and other *Dharmashastras* articulate a marital framework in which the wife's fidelity and obedience to her husband are elevated as cardinal virtues, often treating marital consent as permanently subsumed within the institution of marriage itself.<sup>5</sup> Although early Vedic hymns occasionally portray marriage as a relationship grounded in companionship and mutual respect,<sup>6</sup> subsequent patriarchal exegesis marginalised these egalitarian strands and reinforced the belief that a wife's consent, once given through marriage, was irrevocable. Over time, Hindu legal and social practices increasingly legitimised male authority over female autonomy, thereby entrenching the notion of perpetual marital consent.<sup>7</sup>

The heterogeneity of Hindu religious texts has rendered marriage both complex and deeply sacrosanct in the Indian socio-legal imagination. *Vivāha* came to be recognised as one of the essential *samskāras* of life and, in

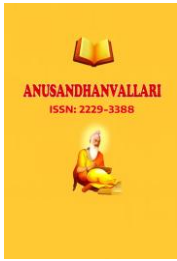
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<sup>4</sup> Ratna Kapur, *Subversive Sites: Feminist Engagements with Law in India*, 9 INT'L J.L. POL. & FAM. 339, 341 (1995)

<sup>5</sup> Refer to *Manu Smriti*, ch 5, verses 147–155.

<sup>6</sup> Refer to *Rig Veda* 10.85.

<sup>7</sup> Werner Menski, *Hindu Law: Beyond Tradition and Modernity* (OUP 2003) 45–47.



practice, assumed a compulsory character, particularly for women.<sup>8</sup> In the later Vedic period, the husband's role evolved to encompass that of a moral guide and disciplinarian, with normative sanction to exercise coercive authority over his wife in cases of perceived misconduct.<sup>9</sup> This authority expanded progressively, often assuming an almost absolute character. While marriage vows were formally undertaken by both spouses as *dampatī*, implying joint participation and responsibility, social practice revealed a pronounced asymmetry: husbands were seldom subjected to social censure for failing to fulfil their conjugal or moral obligations, whereas wives were held to exacting standards of devotion and compliance.<sup>10</sup> By the later Vedic period, ritual and customary practices were increasingly deployed to validate male control over economic resources and the reproductive capacities of women.<sup>11</sup> Within this framework, coercion and the overt assertion of power became normalised, while the patriarchal context of family organisation and the unequal power relations embedded within marriage remained largely unexamined.

The doctrine of *dharma*, which occupies a central position in Hindu jurisprudential thought, significantly shaped the normative understanding of marital roles. The *Dharmashastras* consistently foregrounded *strīdharmā*, prescribing a wife's primary duties as obedience to her husband, service to his needs, and the preservation of familial honour.<sup>12</sup> This normative insistence on subservience, reinforced by prevailing patriarchal norms, frequently translated into severe restrictions on a woman's bodily autonomy and sexual agency. Classical legal and religious texts tended to prioritise the husband's entitlement to procreation and lineage continuity, implicitly constructing sexual relations within marriage as a marital prerogative of the husband, with the wife positioned as a passive participant.<sup>13</sup>

Vātsyāyana's *Kāmasūtra* presents a more nuanced, though still patriarchal, articulation of marital sexuality. While the text does not conceptualise consent in contemporary terms and reflects the subordination of women within sexual relations, it simultaneously cautions against the use of force by husbands.<sup>14</sup> Vātsyāyana warns that coercive sexual conduct may engender aversion towards intimacy and even hostility towards men, thereby advocating an approach that accounts for a woman's disposition and preferences.<sup>15</sup> He further suggests that marriage does not confer upon a man an absolute proprietary right over his wife as a person, although he circumscribes the scope of legitimate female resistance.<sup>16</sup> At the same time, the *Kāmasūtra* envisions women as active participants in sexual relations, revealing the ambivalent power dynamics characteristic of the patriarchal order. The text also accommodates the presence of aggression within sexual activity, conceptualised as *kalāh-rūpam surataṁ*, wherein masculine dominance is normalised as an expression of virility.<sup>17</sup>

In contrast to the *Bhagavad Gītā*, which privileges duty, restraint and detachment, the *Kāmasūtra* accords normative legitimacy to *kāma* as an independent pursuit oriented towards pleasure and personal fulfilment rather than procreation alone.<sup>18</sup> Kautilya's *Arthaśāstra* further complicates the narrative by recognising limited circumstances under which a wife could seek separation or dissolution of marriage, thereby acknowledging a

<sup>8</sup> Paras Diwan, *Hindu Law* (23rd edn, Allahabad Law Agency 2019) 87–89.

<sup>9</sup> S Radhakrishnan, *Indian Philosophy*, vol 1 (2nd edn, George Allen & Unwin 1951) 372.

<sup>10</sup> Bina Agarwal, *A Field of One's Own* (CUP 1994) 56–58.

<sup>11</sup> Romila Thapar, *Early India* (Penguin 2002) 124–126.

<sup>12</sup> Refer *Manu Smṛiti*, ch 9, verses 2–3.

<sup>13</sup> Flavia Agnes, *Law and Gender Inequality* (OUP 1999) 18–19.

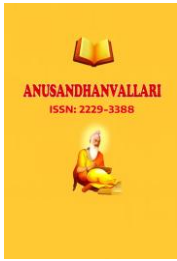
<sup>14</sup> Refer Vātsyāyana, *Kāmasūtra* bk 2, ch 1.

<sup>15</sup> *ibid.*

<sup>16</sup> *id* bk 4, ch 1.

<sup>17</sup> *ibid* bk 2, ch 8.

<sup>18</sup> Refer *Bhagavad Gītā* ch 3; *Kāmasūtra* bk 1, ch 2.



woman's capacity to exit oppressive or violent marital relationships.<sup>19</sup> These textual references indicate that the existence of force and violence within marriage was acknowledged in ancient Indian thought, even if not uniformly condemned.

In the modern reformist discourse, Maharshi Dayanand Saraswati advanced a markedly egalitarian interpretation of marriage. Emphasising moral and temperamental compatibility between spouses, he asserted that sexual relations within marriage—particularly for the purpose of procreation—must be founded upon the mutual consent of both husband and wife. He unequivocally rejected the legitimacy of force or violence within marital relations, contending that such conduct was fundamentally incompatible with the ethical foundations of marriage.<sup>20</sup>

The concept of marital rape is far from a novel occurrence, with roots tracing back to ancient India. The specific timeframe of its emergence remains unknown, yet its presence throughout ancient, medieval, and modern Indian history is irrefutable.<sup>21</sup> In those eras, women were often not recognized as individuals with autonomy but rather were viewed as the possessions of their fathers, and subsequently their husbands after marriage. They lacked independence and were deprived of rights. Such erroneous beliefs gave rise to the scourge of marital rape in India. During those times, India lacked robust legal protections for women. Women had scant rights, and even the minimal rights they possessed were often unknown to them. Additionally, women were entirely dependent on their husbands and had no choice but to comply with their husbands' wishes, whether just or unjust. These factors collectively facilitated the rampant incidence of marital rape in India. Thus, the spectre of marital rape spans across the nation's ancient, medieval, and modern eras.

The belief that a woman, upon marriage, consents to sexual intercourse, and that a husband cannot rape his wife, was prevalent. Rape was seen as a crime and a theft of a man's property, not as harm inflicted upon a woman but as damage to her father or husband. A legal doctrine asserted that a woman's legal rights were absorbed by those of her husband upon marriage. Women were considered the property of their fathers, and after marriage, of their husbands. Consequently, it was assumed that a man could not rape his own wife, as she was his possession. Marital rape is especially prevalent in cases of forced marriages.

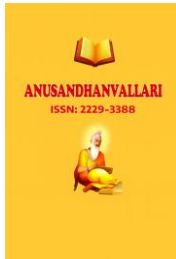
India has historically been a patriarchal society, which explains why marital rape is often not regarded as a wrongdoing. The victims are predominantly women; had men been the victims, marital rape would likely have been outlawed in India long ago. There are few advocates in India calling for the prohibition and criminalization of marital rape. Society plays a crucial role in eradicating any social evil, which cannot be eliminated unless society itself rejects it. In India, the societal rejection of marital rape is lacking, allowing the issue to persist.

Marriage should not be defined merely as a license for sexual relations but rather as an authorization for parenthood. Weddings, through public ceremonies, highlight the importance of marriage to both individuals and society, emphasizing societal control and the importance of the commitment undertaken by the couple. As a patriarchal society, India has always prioritized men over women, relegating women to subordinate roles. Women were not allowed to participate in decision-making, even in matters that affected their lives. They were seen primarily as homemakers. Men, being the primary earners, were accorded more respect and viewed as superior. Practices like 'Sati pratha,' where a widow immolated herself on her husband's pyre, were prevalent until 1829. Women endured prolonged suffering and turmoil. Regardless of the arbitrariness of a man's decisions, women were expected to obey blindly, and husbands could disrespect their wives. The entrenched gender disparities have led to numerous atrocities against women. However, as society progresses and modernizes, perspectives are

<sup>19</sup>Refer Kautilya, *Arthashastra* bk 3, ch 2.

<sup>20</sup> Refer Dayanand Saraswati, *Satyarth Prakash* ch 4.

<sup>21</sup> Dr Raj Kumar Yadav and Manish Dalal, "Marital Rape in India: A Critical Study." Available at SSRN 3847118 (2021).



evolving, and the gap between genders is narrowing. Many social activists have dedicated their lives to uplifting women, enabling them to live on their terms. Historically, women rarely complained against their husbands or in-laws due to societal teachings to respect and preserve their marriages at all costs. Such teachings and the overarching patriarchal mindset have fostered a belief in women's inferiority and weakness, encouraging them to tolerate crimes against them and denying them individual rights.

References to marriage, family, and sexual relations are abundant in various Hindu texts and Vedas. Interpretations of these codifications reveal contrasting views on women's status. Some scholars argue that women have been subjugated and deprived under the guise of social values and norms, while others believe that women once held high and respectable positions in ancient Indian society. Hindu religious texts and their varied interpretations have made marriage both intriguing and sacred in India. Marriage is regarded as one of the primary 'Samskaras' of life, becoming mandatory, especially for women. During the later Vedic period, husbands became authoritative figures with the power to coerce their wives if they committed any misstep. Over time, this power grew boundless. While both partners took marriage vows as 'dampati' (joint holders), societal expectations did not enforce the same level of conjugal duty on husbands. Rituals in the later Vedic period legitimized male control over resources and women's reproductive roles. Displays of power and coercion became accepted behavior, further entrenching the patriarchal and social framework within family and marriage dynamics.

## EVOLUTION OF BODILY AUTONOMY AND REPRODUCTIVE RIGHTS OF WOMEN

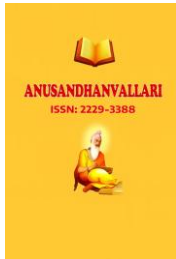
Sexual autonomy stands at the core of bodily integrity, dignity, and the broader human rights framework. It encompasses the ability of individuals, particularly women, to make independent choices regarding their bodies, sexuality, and reproductive lives, free from coercion, discrimination, and violence.<sup>22</sup> The concept of individual freedom and autonomy has evolved significantly over time, driven by philosophical movements, legal reforms, and feminist advocacy. The enlightenment era and subsequent movements emphasized individual rights and the importance of self-determination. In India, however, the exercise of sexual autonomy by women has historically been constrained by entrenched patriarchal structures, which have sought to regulate women's bodies as repositories of family honour, religious morality, and community identity.<sup>23</sup> Yet, India's social fabric reveals important exceptions that nuance this otherwise grim picture. Matrilineal societies such as the Nairs of Kerala and the Khasi tribes of Meghalaya present alternate models where women traditionally enjoyed greater sexual and economic autonomy.<sup>24</sup> In these contexts, lineage, property, and sometimes even social power were traced through women, challenging the dominant Brahmanical-patriarchal norms that governed much of the Indian mainland.<sup>25</sup> Despite these exceptions, for the vast majority of Indian women, the right to exercise sexual autonomy remained, and continues to remain, heavily policed — both socially and legally. The present landscape reveals a paradox: while legal reforms and judicial interventions increasingly recognize women's sexual and reproductive rights, societal attitudes often lag, reinforcing stigma against women asserting autonomy outside traditional frameworks of marriage and family.

<sup>22</sup> B. Sivaramayya, *Sexual Autonomy and the Law* (1995).

<sup>23</sup> Nivedita Menon, *Recovering Subversion: Feminist Politics Beyond the Law* (Permanent Black, 2004).

<sup>24</sup> K. Saradmoni, *Matriliney Transformed: Family, Law and Ideology in Twentieth-Century Travancore* (Sage Publications, 1999). See also, Tiplut Nongbri, *Gender and Khasi Family Structure: The Matrilineal System in Meghalaya* (Rawat Publications, 2000).

<sup>25</sup> Uma Chakravarti, *Gendering Caste: Through a Feminist Lens* (Stree, 2003)



## LEGAL FRAMEWORK OF MARITAL RAPE IN INDIA

Laws are generally considered among the most effective mechanisms for regulating and preventing unethical conduct within society.<sup>26</sup> The importance of laws in this context resides in their capacity to establish explicit rules, standards, and penalties for particular behaviors, thereby offering a structured framework for shaping societal norms and ethical principles. Laws function as the fundamental basis for preserving order, guaranteeing justice, and supporting the welfare of both individuals and society as a whole.

The harsh reality for married women in India is that they are at risk of sexual assault by their spouses within the boundaries of their own residences. The Indian legal framework addressing sexual violence within marriage is characterized by a complex interplay between criminal law exemptions and civil or quasi-criminal protective mechanisms. At the core of this framework lies the Bharatiya Nyaya Sanhita, 2023<sup>27</sup>, which governs offences relating to sexual violence and has replaced the Indian Penal Code, 1860<sup>28</sup>. While the BNS modernizes several aspects of substantive criminal law, it retains the long-standing marital rape exemption, thereby continuing to exclude non-consensual sexual intercourse within marriage from the ambit of the offence of rape.

Section 63 of the Bharatiya Nyaya Sanhita, 2023 defines the offence of rape in expansive terms, recognizing a range of non-consensual sexual acts. However, Exception 2 to Section 63 expressly provides that sexual intercourse or sexual acts by a man with his own wife shall not constitute rape, provided the wife is not below eighteen years of age.<sup>29</sup> This statutory exception operates as an absolute bar to criminal prosecution for rape within marriage, irrespective of the presence of force, coercion, violence, or absence of consent. By virtue of this provision, marital status functions as a determinative legal shield, insulating husbands from liability for conduct that would otherwise amount to one of the gravest sexual offences under criminal law.

Notwithstanding the exclusion of marital rape from the definition of rape under the BNS, Indian law provides limited protection to married women through other penal and protective statutes. Section 85 of the Bharatiya Nyaya Sanhita<sup>30</sup> criminalizes cruelty by a husband or his relatives, encompassing both physical and mental cruelty inflicted upon a married woman. While this provision has been invoked in cases involving sexual coercion, its scope remains circumscribed, as it does not specifically recognize forced sexual intercourse as an independent sexual offence and carries comparatively lower penal consequences. As a result, sexual violence within marriage is often subsumed under the broader and less precise category of matrimonial cruelty.

In addition to the BNS, the Protection of Women from Domestic Violence Act, 2005 (PWDVA) constitutes a significant civil law mechanism aimed at safeguarding married women from various forms of domestic abuse, including sexual abuse.<sup>31</sup> The Act adopts an expansive definition of “domestic violence,” expressly recognizing sexual abuse as conduct that violates the dignity and bodily integrity of women within domestic relationships. However, the remedies under the PWDVA are predominantly civil in nature, focusing on protection orders, residence orders, and monetary relief rather than criminal sanctions. Consequently, while the Act acknowledges the existence of sexual violence within marriage, it does not criminalize marital rape per se.<sup>32</sup>

<sup>26</sup> H.L.A. Hart, *The Concept of Law* (2nd edn., Oxford University Press 1994).

<sup>27</sup> Bharatiya Nyaya Sanhita, 2023, Section 63, Exception 2.

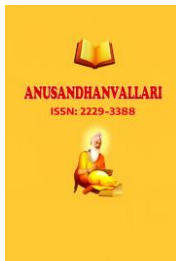
<sup>28</sup> Section 376 of the now repealed Indian Penal Code, 1860.

<sup>29</sup> Supra note 26

<sup>30</sup> Ibid, at sec.85

<sup>31</sup> Protection of Women from Domestic Violence Act, 2005, Sec.3; see also Section 18–22 (providing for protection orders, residence orders, monetary relief, custody orders and compensation).

<sup>32</sup> Ibid.



Other statutory provisions provide ancillary protection but do not directly address marital rape. Laws relating to maintenance, such as Section 144 of the Bharatiya Nagarik Suraksha Sanhita, 2023, and personal law remedies under statutes like the Hindu Marriage Act, 1955, allow courts to consider cruelty and sexual misconduct as grounds for judicial separation or divorce.<sup>33</sup> These remedies, however, are remedial rather than punitive and operate within the framework of matrimonial relief rather than criminal accountability. They do not challenge the core assumption underlying the marital rape exemption—that marriage negates the requirement of ongoing consent.

The current legal framework in India presents a disjointed and uneven approach to addressing sexual violence within marriage. Although civil and quasi-criminal laws recognize and tackle specific instances of sexual abuse experienced by married women, the ongoing existence of Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita reinforces a clear denial of criminal protection. This disjunction highlights the constraints of the existing legal framework, where the acknowledgment of women's bodily autonomy within marriage is still incomplete and secondary to the maintenance of marital immunity under criminal law.<sup>34</sup>

The Indian legal system has long upheld the doctrine of marital exemption in rape laws. The now repealed Indian Penal Code (IPC) (Exception 2 to Section 375) as well as the newly enacted Bharatiya Nyaya Samhita, 2023 (Exception 2 to Section 63) explicitly states that non-consensual intercourse by a husband with his wife is not considered rape, provided she is above 18 years of age. This legal exception is rooted in colonial-era statutes and patriarchal norms that regard a wife's consent as implicit within marriage. Because marital rape is not classified as a crime, a husband who rapes his wife is immune from criminal prosecution under Indian law.

## MARITAL RAPE AND JUDICIAL DEVELOPMENTS

The Indian judiciary plays a pivotal role in upholding the country's democratic system, serving as a crucial pillar that safeguards justice, equality, and the rule of law. Situated within the constitutional framework, the judiciary acts as a custodian of individual rights and freedoms, ensuring that democratic principles are not only enshrined in the Constitution but also diligently upheld.<sup>35</sup>

The power vested in the Indian Judiciary regarding marital rape is indeed circumscribed by the absence of specific legislation criminalizing marital rape. The lacuna in the legal framework has perpetuated a situation where marital rape is not expressly punishable as a distinct criminal offense. Instead, the judicial recourse for victims has been limited to seeking justice under alternative provisions of the legal system, such as domestic violence laws or cruelty provisions under the IPC (now repealed and replaced by the BNS, 2023).<sup>36</sup> The limitations of the judiciary in relation to the issue of marital rape is evident in a number of cases. For example, in the case of *Nimeshbhai Bharatbhai Desai v. State of Gujarat*<sup>37</sup>, though the judges have vehemently criticized the concept of Marital Rape, yet, found their hands tied in delivering a judgment penalizing the husband for the same. The reluctance of the judiciary to recognize marital rape as a crime was reflected in this judgment.

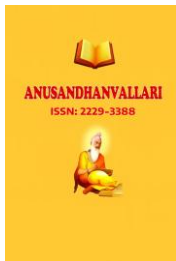
<sup>33</sup> Hindu Marriage Act, 1955, Section 10, 13; Bharatiya Nagarik Suraksha Sanhita, 2023, Section 144.

<sup>34</sup> *Independent Thought v. Union of India*, (2017) 10 SCC 800.

<sup>35</sup> Mahima Sharma, *Criminalization of Marital Rape: An Analytical Study In India* (2025) (Unpublished PH.D thesis, Galgotia University, U.P.).

<sup>36</sup> Ibid

<sup>37</sup> (2017) R/CR.MA 26957.



In *Sakshi v. Union of India*<sup>38</sup>, the Supreme Court failed to take the progressive step of recognising marital rape as a punishable offence under the Indian Penal Code, 1860. The petitioners sought deletion of the marital exception to the offence of rape. In response, the Government defended the impugned provision by contending that, according to Hindu religion, customs, and moral values, it is inconceivable for a husband to rape his wife by means of coercion, threats, or force, and therefore the existing statutory exception was justified. The Court, however, rejected this argument and categorically observed that Hindu religious texts and traditions emphasise purity, moral conduct, and mutual trust within marriage, and do not legitimise or excuse sexual violence against a wife. The Court thereby clarified that sexual relations within marriage must be grounded in consent and ethical conduct.<sup>39</sup>

In *State of Karnataka v. Krishnappa*<sup>40</sup>, the Supreme Court unequivocally held that sexual violence is not merely a degrading act but also amounts to a violation of a woman's constitutional right to privacy and personal sanctity. The Court further recognised that sexual intercourse without consent constitutes both physical and sexual abuse.<sup>41</sup>

The constitutional protection of sexual autonomy was further reinforced in *Suchita Srivastava v. Chandigarh Administration*<sup>42</sup>, wherein the Supreme Court affirmed that a woman's right to make decisions regarding sexual activity is intrinsically linked to the rights to personal liberty, dignity, privacy, and bodily integrity under Article 21 of the Constitution.<sup>43</sup>

The constitutional protection of sexual autonomy was significantly reinforced by the decision of *Justice K.S. Puttaswamy (Retd.) v. Union of India*<sup>44</sup>, where the Supreme Court recognised the right to privacy as a fundamental right. The Court held that privacy includes decisional autonomy, particularly in matters concerning intimate personal choices such as sexual relations, reproduction, and the selection of intimate partners.<sup>45</sup>

Importantly, none of these constitutional pronouncements draw a distinction between married and unmarried women, nor do they suggest that marriage results in the surrender of a woman's fundamental rights. Consequently, the cumulative effect of these judgments indicates judicial recognition of every woman's right to refuse sexual relations, irrespective of her marital status, as an essential facet of Article 21.

A crucial development in this context occurred in *Independent Thought v. Union of India*<sup>46</sup>, where the petitioner NGO approached the Supreme Court under Article 32 to challenge the violation of fundamental rights of married girl-children between the ages of 15 and 18.<sup>7</sup> After examining the statutory framework, the Court held that the Protection of Children from Sexual Offences Act, 2012, being a special legislation enacted for the protection of children, would prevail over the IPC. The Court found that Exception 2 to Section 375 IPC, which fixed the age of consent for married girls at 15 years, was arbitrary and discriminatory when contrasted with the POCSO Act, which prescribes 18 years as the age of consent. Accordingly, the Court read down the exception to criminalise sexual intercourse with a minor wife below the age of 18, while expressly refraining from pronouncing on the broader issue of marital rape.<sup>47</sup>

<sup>38</sup> *Sakshi v. Union of India*, (2004) 5 SCC

<sup>39</sup> *Id*

<sup>40</sup> *State of Karnataka v. Krishnappa*, (2000) 4 SCC 75.

<sup>41</sup> *Ibid*

<sup>42</sup> *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1.

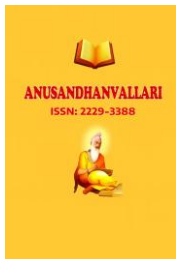
<sup>43</sup> *Ibid*

<sup>44</sup> *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1

<sup>45</sup> *Ibid*

<sup>46</sup> *Independent Thought v. Union of India*, (2017) 10 SCC 800

<sup>47</sup> *Ibid*



The question of criminalising marital rape was subsequently examined by the Delhi High Court in *RIT Foundation v. Union of India*<sup>48</sup>, wherein multiple petitions were filed challenging the constitutional validity of Exception 2 to Section 375 IPC. A survivor of marital rape intervened in the proceedings, seeking justice not only for herself but also for numerous women adversely affected by the existing legal framework. The petitioners argued that the marital rape exception perpetuates a legal fiction that presumes irrevocable consent upon marriage, thereby denying women their right to sexual autonomy and bodily integrity—rights that flow directly from Article 21, as recognised in *Puttaswamy*.<sup>49</sup> In May 2022, the Delhi High Court delivered a split verdict. Justice Rajiv Shakdher held that the marital rape exception was unconstitutional, emphasising that a woman’s right to withdraw consent is central to her right to life and personal liberty.<sup>50</sup> In contrast, Justice C. Hari Shankar dissented, observing that the issue involves complex social, cultural, and legal considerations and therefore falls within the domain of legislative reform.<sup>51</sup> The matter is currently pending adjudication before a Constitution Bench of the Supreme Court.<sup>52</sup>

#### **CHALLENGES IN PROSECUTION AND ENFORCEMENT:**

Despite increasing legal recognition, prosecuting marital rape cases often presents significant challenges. Evidentiary difficulties, social stigma, and a lack of awareness among law enforcement officials can hinder effective prosecution. Furthermore, societal attitudes that perpetuate the idea that a wife is obligated to satisfy her husband's sexual desires can create biases within the legal system. Many still view marriage as a private domain where state intervention is unwarranted. Critics argue that criminalizing marital rape could lead to misuse of laws and the breakdown of marriages. Religious and conservative groups oppose legal reforms, citing traditions and the sanctity of marriage. Many victims do not recognize marital rape as a violation of rights due to deep-rooted cultural conditioning.

The issue of marital rape in India highlights a significant problem, where the sanctity and legal framework of marriage are frequently exploited to justify nonconsensual sexual acts, thus infringing upon the fundamental rights and dignity of individuals within the marital relationship. Even with advancements in social movements and evolving perspectives, the idea of marital consent continues to be entangled in conventional and patriarchal views. Such interpretations frequently overlook the independence and agreement of individuals, especially women, within the framework of marriage.

#### **RECONCILING TRADITION AND MODERNITY: A PATH FORWARD:**

Physical intimacy between the couple is a natural way of showing love and affection to each other. It has no space for cruelty or coercion of any sorts. It is supposed to bring wholeness and oneness among the couple. It can also be referred as a spiritual communion. It is the hope for procreation and the continuation of family. It has a deep role in strengthening the marital bond between the couple. It has no space for coitus by force, intimidation or violence. It entails only mutual love and sexual cooperation and not sexual coercion. Also, a husband who feels aggrieved by the indifference of wife towards establishing sexual relationship has the legal remedy of approaching the court for declaring the woman as psychologically incapable of fulfilling an essential marital obligation. It is

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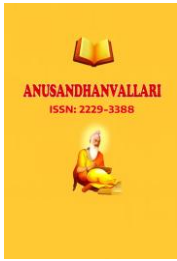
<sup>48</sup> *RIT Foundation v. Union of India*, 2022 SCC OnLine Del 1404

<sup>49</sup> Supra note 24

<sup>50</sup> Supra note 28 at 1408

<sup>51</sup> Id at 1409

<sup>52</sup> *RIT Foundation v. Union of India*, Special Leave Petition (Crl.) pending before the Supreme Court.



regarded as cruelty and a valid ground for divorce.<sup>53</sup> Reconciling the traditional perspective on marriage with contemporary understandings of consent and bodily autonomy requires a nuanced approach. It is crucial to acknowledge the historical context and cultural significance of traditional practices while simultaneously advocating for reforms that promote gender equality and protect individual rights.

Further, rather than blindly adhering to outdated interpretations, scholars and religious leaders can re-examine ancient texts through a modern lens, emphasizing the principles of mutual respect, compassion, and justice. This involves highlighting passages that promote equality and challenging interpretations that reinforce patriarchal norms.

More importantly, raising awareness about marital rape and its devastating impact is crucial for changing societal attitudes and empowering individuals to seek help. Education programs can help challenge harmful stereotypes and promote healthy communication within relationships.

Legislative reforms are necessary to ensure that marital rape is unequivocally recognized as a criminal offense in all jurisdictions, and that adequate resources are allocated to investigate and prosecute such cases. Effective enforcement mechanisms are essential to protect victims and hold perpetrators accountable.

The intersection of irrevocable consent in ancient Hindu marriage traditions and the modern debate on marital rape highlights the complex interplay between culture, law, and individual rights. While ancient texts reflect the societal norms and power structures prevalent at the time, they should not be interpreted as justification for violating an individual's bodily autonomy or perpetuating gender inequality. As societies evolve, legal frameworks and ethical understandings must adapt to reflect the evolving values of human dignity, equality, and the right to consent. By engaging in critical dialogue, promoting education, and enacting progressive legal reforms, we can strive to create a world where marriage is based on mutual respect, consent, and the equal protection of all individuals under the law. The true strength of tradition lies not in its rigidity, but in its capacity to adapt and evolve in accordance with the principles of justice and compassion. The coexistence of the concept of irrevocable consent in Hindu texts and the denial of legal protection against marital rape reflects deep contradictions in Indian society. While marriage continues to be revered, it must evolve to respect individual autonomy and dignity. Legal recognition of marital rape is not an attack on the institution of marriage but a step toward ensuring justice and equality within it. The need for legal reforms, combined with societal awareness, is imperative to protect the rights of married individuals and to uphold the fundamental principles of justice and human dignity.

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<sup>53</sup> *Vidhya Viswanathan v. Kartik Bala Krishnan* (2014) 15 SCC 21.