

THE IMPERATIVE TO STRENGTHEN LEGAL RECOGNITION OF MARITAL RAPE IN INDIA

by

Nandana Biju, Kerala Law Academy Law College*

ABSTRACT

This paper is a critical evaluation of the present legal provisions relating to marital rape in India. India remains one of the countries which does not criminalize marital rape reflecting the lack of progressiveness. Marital Rape can be defined as the act of nonconsensual sexual intercourse or other acts of sexual nature by an intimate partner. Under Exception 2 of Section 63 of The Bharatiya Nyaya Sanhitha, 2023 it is stated that “Sexual Intercourse or Sexual Acts by a man with his own wife, the wife not being under 18 years of age is not rape.” Thus, decriminalizing the act of marital rape further leading to denial of justice to victims of the aforementioned offence. Under BNS, 2023 “rape” is defined as sexual violence in all forms which involves nonconsensual intercourse with another woman. India still lags behind global standards that acknowledge marital rape as a punishable offense subject to criminal sanctions. The reasons behind decriminalization of marital rape can be found in several Parliamentary Debates and Judicial rulings. The reasons range from protecting the institution of marriage arguing that criminalizing marital rape could interfere excessively with the marital relationship, to the already existing alternative remedies in law. The marital rape exemption under BNS, 2023 violates Article 14 of the Constitution of India which guarantees the right to equality before the law and equal protection of the laws. Numerous international jurisdictions have removed spousal exemptions and criminalize marital rape explicitly. This paper will discuss the significance of criminalizing the act of marital rape in India emphasizing that the current legal framework fails to protect women’s rights and violates gender equality and bodily autonomy.

Keywords: Marital Rape, Bharatiya Nyaya Sanhitha 2023, Sexual Violence, Constitution of India, Decriminalization, Women’s rights

*Fifth year [B.Com.](#) LLB Student at Kerala Law Academy Law College

INTRODUCTION: THE INVISIBLE INJUSTICE

The most heinous of all sexual offenses which not only subjects women to a thoroughly detestable physical conquest from which there can be no retaliation in kind—a rape for a rape—but also socially ostracizes the woman, who simultaneously becomes the victim and the transgressor—stamping on her a social stigma with long lasting psychological ramifications is rape.¹To put it in the words of Susan Brownmiller, “Rape became not only a male prerogative, but man’s basic weapon of force against woman, the principle agent of his will and her fear. His forcible entry into her body, despite her physical protestations, became the vehicle of his victorious conquest of her being, the ultimate test of his superior strength, the triumph of his manhood.”²Marital rape refers to the non-consensual sexual intercourse or any acts of sexual nature committed by the spouse or intimate partner. The definition of rape is as follows, “sexual intercourse or sexual penetration where there is a lack of consent”³The lack of consent in this scenario is a major component to prove that an act of rape has been committed and the victim has the burden to prove it. In some instances, as in the case of minors, it is presumed that consent does not exist as they are presumed by law to be incapable of consenting to such sexual acts.⁴Often, the presumption that consent is present exists when the victim and the perpetrator are married.⁵Such a presumption by law is fundamentally unconstitutional and constitutes the violation of a woman’s human rights and her bodily autonomy. Twentieth century onward, there has been growing international conventions and voices against sexual and intimate partner violence in marriages (more specifically for sexual violence against women).⁶ However, in spite of the devastating consequences of any form of forcible sexual encounter, marital rape has remained under the shadow of legal ambiguity in many nations, outside the criminal law and widely tolerated.⁷

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1. S. Devika & T. Mohan, Marital Rape and Criminal Law: Patriarchal Phantoms and Neutral Facades, 3 STUDENT ADVOC. 15 (1991).
 2. Susan Brownmiller, Against our will—Men, Women and Rape (New York: Bantam, 1975).
 3. The Bharatiya Nyaya Sanhitha, 2023, Section 63(India).
 4. Protection of Children from Sexual Offences Act, No. 32 of 2012, Section 3(India).
 5. The Bharatiya Nyaya Sanhitha, 2023, Section 63, *Exception 2*(India).
 6. JEFFREY E. HASDAY, Contest and Consent: A Legal History of Marital Rape, 88 CALIF. L. REV. 1373(2000).
 7. Debanjan Banerjee & T.S. Sathyanarayana Rao, The Dark Shadow of Marital Rape: Need to Change the Narrative, 9 J. PSYCHOSEXUAL HEALTH 1(2022)

THE MARITAL RAPE EXEMPTION UNDER INDIAN LAW

Throughout the history of most societies, it has been acceptable for men to force their wives to have sexual intercourse against their will.⁸ The traditional definition of rape in most countries was ‘sexual intercourse with a female not his wife without her consent.’ This provided the husband with an exemption from prosecution for raping their wives—“a license to rape.”⁹ The foundation of this exemption can be traced back to statements made by Sir Mathew Hale, Chief Justice in 17th Century England. Lord Hale wrote that: ‘the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual consent and contract, the wife hath given up herself this kind unto her husband which she cannot retract.’¹⁰ Section 375 of the Indian Penal Code, defines the offence of rape by specifying acts that constitute rape under law, containing 2 major exceptions. It is the second exception, which is commonly known as the *marital rape exemption clause*¹¹, which states that sexual intercourse or any act of sexual nature by a man with his spouse or intimate partner, the wife not being under fifteen years of age, shall not be considered as an act rape. Before the enactment of the Bharatiya Nyaya Sanhitha, The Supreme Court’s landmark judgement in *Independent Thought v. Union of India* (2017), partially addressed the marital rape exemption.¹² The Court struck down Exception 2 to Section 375 IPC insofar as it related to girls between 15 and 18 years of age and ruled prospectively that Sexual intercourse with a wife between 15-18 years constitutes rape regardless of consent.¹³ On 21 December 2023, Parliament passed the Bharatiya Nyaya Sanhitha, 2023.¹⁴ Section 63 of the Act which deals with the act of “rape” also includes the same marital rape exception as found under Section 375 of the IPC.¹⁵ The one and only noteworthy change in Section 63 of the Act of BNS is the increase in minimum age for exemption from 15 years of age to 18. Although its notable,

8. Bhavish Gupta & Meenu Gupta, *Marital Rape: Current Legal Framework in India and the Need for Change*, 1 Galgotias J. Legal Stud. 1(2013).

9. Ibid

10. Hale, Matthew. 1 History of the Pleas of the Crown 629 (London, Professional Books 1972) (1736).

11. Raveena Rao Kallakuru & Pradyumna Soni, *Criminalisation of Marital Rape in India: Understanding Its Constitutional, Cultural and Legal Impact*, 11 NUJS L. REV. 121.(January-March 2018).

12. Patekar, Manoj Bhimrao, Ashish Mohan Pathak & Amol Balwant Shinde, *Changes in Laws Against Sexual Offences in BNS-It’s Legal Implications*, 10 IP Int’l J. Forensic Med. Toxicology.Sci.67(2025).

13. Lokur MB, Gupta D. *Independent Thought v. Union of India*. AIR 2017 SC 4904.

14. *Challenge to the Marital Rape Exception*, Supreme Court Observer (July 8, 2025), <https://www.scobserver.in/cases/challenge-to-the-marital-rape-exception-hrishikesh-sahoo-v-state-of-karnataka/>.

15. Ibid

The decriminalization of marital rape effectively continues. There is an urgent need to strengthen the legal framework for marital sexual violence in our country.

GRAVE VIOLATION OF CONSTITUTIONAL RIGHTS

In *Shri Bodhisattwa Gautam vs. Ms. Subhra Chakraborty*¹⁶, the Supreme Court held that rape violates Article 21 of the Indian Constitution as it hindered fundamental human rights and breached the victim's right to life and dignity.¹⁷ In 2015, the RIT Foundation filed a Public Interest Litigation in Delhi High Court summoning the immunization of marital rape in sections 375 of the Indian Penal Code on the grounds of violation of the fundamental rights i.e., Article 14, 15, 19 and 21 of the Indian Constitution.¹⁸ The Indian Constitution organizes and controls power, ensures human rights, balances the competing claims of social and individual interests, mirrors the cultures and experiences of the country and operates as a vehicle for national progress and unity.¹⁹ In accordance with Article 14 of the Constitution of India “the State shall not deny to any person equality before the law or equal protection of the laws within the territory of India.”²⁰ Although the Constitution guarantees equality to all, Indian criminal law discriminates against female victims who have been raped by their own husbands.²¹ But times have changed. Indian law now affords husbands and wives separate and independent legal identities, and much jurisprudence in the modern era is explicitly concerned with the protection of women.²² This concern is evident in the plethora of statutes intended to protect women from violence and harassment that have been passed since the turn of the century,²³ including “The Protection of Women from Domestic Violence Act” and the “Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act.”²⁴

Despite the existence of modern laws that claim to empower women, the current legal

16. *Shri Bodhisattwa Gautam vs Ms. Subhra Chakraborty*, 1996 AIR 922, 1996 SCC (1) 490

17. Bhagyashikha Saptarshi, Marital Rape and Law, Manupatra (2024), <https://articles.manupatra.com/article-details/Marital-Rape-and-Law>.

18. Ibid

19. Sudhanshu Roy & Iti Jain, Criminalizing Marital Rape in India: A Constitutional Perspective, 4 Crim.L. J. 81 (2008).

20. V.N SHUKLA, CONSTITUTION OF INDIA 201 (M.P. Singh ed., 13th ed. 2017).

21. Sarthak Makkah, Marital Rape: A Non-criminalized Crime in India, 132 Harv. L. Rev. Online 1 (2019). <https://journals.law.harvard.edu/hrj/2019/marital-rape-a-non-criminalized-crime-in-india/>.

22. Ibid

23. Ibid

24. Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament, 2005 (India); Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, No. 14, Acts of Parliament, 2013 (India).

framework on marital rape continues to deny them even their fundamental constitutional rights. According to the Hindu Centre For Politics and Public Policy, legal ambiguity about “consent” in sexual violence within marriage is commonly decided by mediation and compromise rather than legal discourse.²⁵ It has been argued that the concept of “obligatory sexual interaction” by the virtue of marriage is against Article 14(Right to Equality) and Article 21(Right to protection of life and personal liberty) of the Constitution of India.²⁶

CONCLUSION: BREAKING THE SILENCE

According to the United Nations Declaration on the Elimination of Violence against Women, violence against women is defined as “any act of gender-based violence that results in, or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life”.²⁷ The debate of marital rape is crucial in establishing substantive equality for married women who are otherwise relegated in public and legal discourse to the confines of their home.²⁸ The debate on marital rape highlights tensions between personal autonomy, legal equality and socio-cultural norms.²⁹ Marital Rape remains a legally unrecognized crime in India, largely due to societal and legislative reluctance to view women’s autonomy with marriage as a fundamental right. Critical distinction between non-marital rape and marital rape persists in law, although several women’s groups have successfully raised awareness against domestic violence and established laws to protect women from abuse. Until both lawmakers and society at large embrace the idea that every woman has the right to refuse sexual advances even from her husband, criminalization and effective punishment of marital rape will remain elusive. As per Nigam, “the culture of silence, tolerance, adjustment, compromise among women is propagated to save and respect the honour, the pride and the values of the Indian family overlooking the fact that incest, violence, suicides and murders are the price that women pay.”³⁰

25. Misra A, Bronitt, *Reforming Sexual Offences in India: Lessons in Human Rights and Comparative Law*, 2 Griffith Asia Q. 37(2014).

26. Supra note 7

27. Mandal S., *The Impossibility of Marital Rape: Contestations Around Marriage, Sex, Violence and the Law in Contemporary India*, 29 AUSTL. FEM. STUD. 255, 255-72(2014).

28. Supra note 11

29. “Marital Rape in India”, Drishti IAS, Feb. 15, 2025, <https://www.drishtiias.com/daily-updates/daily-news-analysis/marital-rape-in-india-2>.

30. Nigam S., *The Social and Legal Paradox Relating to Marital Rape in India: Addressing Structural Inequalities* (June 2, 2015).