
BEYOND THE THRESHOLD: THE LEGAL INVISIBILITY OF SEXUAL VIOLENCE WITHIN MARRIAGE

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ABSTRACT

India's criminal jurisprudence has witnessed several significant reforms over the past decade, albeit Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita (BNS), 2023 retaining spousal immunity, legally exempting forced sexual intercourse by a husband from the definition of rape. The legislative anomaly is a blatant case of gender inequality that denies a victim a voice and fails to recognize her pain through any form of vocabulary or legal redressal. This article highlights the state's justification for marital rape using the "privacy sanctity" defence.

Additionally, this article focuses on the social and economic dependence of the victims along with the societal perception of the "ideal wife" that fails to deter crime and forensic evidence through the civil remedy of Protection of Women from Domestic Violence Act, 2005 and other provisions such as the restitution of conjugal rights. In the end, the victims are stuck in an environment where they have no option but to live between continuous violation and total destitution.

To achieve the legal parity, it requires dismantling marital immunity, affirming that marriage is never a perpetual surrendering of consent, all the while ensuring that a woman's bodily integrity remains protected regardless of her marital status.

The Line Where Justice Stops

According to India's National Family Health Survey (NFHS-5)¹, over 95% of married women who survived sexual violence identified their current or former husband as the perpetrator. Nevertheless, when the discussion of marital rape is discussed in socio-political discourse, the focus quickly shifts to the "destruction of the sacred institution of marriage", further it quickly raises evidentiary questions - "how can you prove it even happened". While the imperative question that the society conveniently bypasses are how did marriage even become the singular legal contract where a woman's "no" is stripped of all legal consequences? This reflects the upsetting reality of our society.

By retaining immunity, the state's apparent neutrality transforms into an affirmative action shielding abusers from prosecution, thereby violating the basic structure of the constitution.

This statutory protection creates an indefensible and rigged double standard. When a stranger commits sexual violence against a woman, it is treated as a grave offence but when a spouse commits the same act, the question of consent would instantly be rendered moot, leaving the woman no recourse. Under the current criminal framework, the state explicitly abdicates its duty by creating this legislative gap. Retaining spousal immunity under exception 2, Section 63 of the Bharatiya Nyaya Sanhita (BNS), 2023² actively protects the abuser, treating marriage as a contract that demands perpetual, irrevocable consent as a structural rule.

To understand the real cost of this loophole, it becomes important to move past abstract legal theories and focus on the physical realities that the victims have to face on a day-to-day basis. How the colonial idea of "permanent marital consent" invariably treating women property of their husbands - has not disappeared but manifested into our 21st century laws, managing to survive even the overhaul from IPC to BNS.

The Violence Within

The deep-rooted horror involved in the crime of marital rape may only be understood through a careful examination of the structural geometry of trauma. In an attack by a stranger, the experience is immediate, shocking, and horrifying; the victim is left to deal with the deep

¹ Ministry of Health and Family Welfare [MoHFW], Government of India, National Family Health Survey (NFHS-5) 2019–21 (2021).

² Bharatiya Nyaya Sanhita, 2023, § 63, Exception 2.

physical and emotional trauma caused by the attack. The physical space within which the attack took place can be left, and the perpetrator is a face of the dark. In contrast, marital rape crime becomes an act of domestic terror because there is no place to escape. The location of the crime is not an alien space; it is not an abandoned location; it is her bed. The perpetrator is not an unknown predator; it is her very own family- her very own husband.

This continuing permanence leads to a particular kind of claustrophobia mixed with fear, all bottled up within her, for, the man who abused her a few hours ago, sits right in front of her at the breakfast table, asking her to pass the paper or pour the tea. The very structural framework of the institution of marriage is so entangled that it makes it almost impossible for the victim to escape from it. It is the abuser who controls the budget, who runs the house, and the one who has a claim over their child's custody. At night, it becomes her responsibility to sleep in the same bed where the abuse happened, reliving the horrific incident over and over. This immunity which is given to the husband turns this relationship of safety into a frightful endeavour.

This creates a state of terror in the mind of the wife which stays persistently and engulfs her completely. Once the label of crime and the ensuing punishment is taken away, the act is going to be repeated over and over again. Adding to her grievances, a wife cannot legally and rightfully stop her husband from doing so for that would be labelled as cruelty by the society. Thus, her nervous system remains on constant alert. The risk of violence starts hanging around her like a second shadow in all her everyday interactions in the house. In the course of months and years, fear takes a toll on her psyche and body, stripping her of self-respect, causing anxiety and trauma.

The Legal Erasure

When the law refuses to legally recognize a crime, it signals to the society its indifference to the crime being committed. And therefore, denies the victim the right to name her suffering. Through exception 2 to Section 63 of the Bhartiya Nyaya Sanhita (BNS), the Indian legal system explicitly considers sexual assault within a marriage as a conceptual impossibility. Yet statistics state otherwise: NFHS-5 data states that nearly 3 in 10 ever-married women (29.2%) reported experiencing physical/sexual violence by their husband, with over 80% of survivors never seeking formal legal or institutional help³.

³ Ministry of Health and Family Welfare [MoHFW], Government of India, National Family Health Survey

This stark contradiction is highlighting the state's ultimate failure in performing its constitutional duty to protect its citizens. This immunity to the offenders goes beyond being a statutory loophole but an act of institutional erasure where the woman is deprived of legal and conceptual vocabulary required to process, articulate, and seek justice. Victims are left with no choice but to minimize their own suffering, forced to bear a profound trauma without legal recognition.

This institutional forgetting within the legal realm further facilitates social narratives like “the good wife”. As long as the society remains entrenched in patriarchal practices, where the men are placed above women, the state's indifference creates a void that society attempts to fill with social myths. It reframes violence as an obligatory marital duty, normalizing the abuse as an expected byproduct of wedlock.

When a victim attempts to resist, it is her social circle that suppresses her voice first. Cultural taboos are weaponized against her quickly followed by shifting the blame from the perpetrator to the victim, labelling her as the “bad wife” failing her family for simply resisting what is clearly violence and loss of her bodily autonomy.

This ultimately compounds into deep, internalized guilt. When the two pillars of the society- the law and the society both fail her, the victim is left with no place to seek relief from, leaving her stranded in a web she rarely understands.

Privacy: A Shield

The state's resistance to criminalizing marital rape consistently relies on a rather trite and deflection defense – the imperative to protect the “sanctity and privacy of the matrimonial bedroom” from what the state considers unwarranted judicial intervention.

By invoking the preservation of the family as a sacred institution, the State redirects societal discourse away from what is a clear constitutional violation, therefore reframing a fundamental human rights issue into a dispute over the permissible boundaries of marital life. This stance assumes a false neutrality where the state is using the shield of privacy to “protect the marital space” eroding a woman's fundamental right to bodily autonomy and shifts the burden of

(NFHS-5) 2019–21 (2021).

maintaining social stability entirely onto the victim.

However, this line of reasoning falls apart under basic constitutional scrutiny, by using privacy as a shield the state's argument erodes a woman's right to bodily autonomy. SC's landmark ruling in *K.S. Puttaswamy v UOI* (2017)⁴ has made it clear that privacy belong to individual beings and not to a geographical location or a place like a bedroom. Privacy is rather intrinsically linked to bodily autonomy, personal identity as well as human dignity. Therefore, treating the physical bedroom as a sacred space, the State misapplies the concept of privacy to shield an institution but not the individual; this reflects the state's reliance on an obsolete logic rooted in patriarchal traditions.

Moreover, the argument that investigating marital sexual assault constitutes an unconstitutional invasion of a man's privacy ignores the core realities of criminal jurisprudence. Where a criminal investigation which by its very basic nature involves breaking some boundaries in order to access justice. The law does not hesitate about these same boundaries when it's about a stranger assaulting a woman but when the victim is confined in the very same four walls with her own perpetrator, the law then finds it rather convenient to use the defence of boundaries and privacy of individuals.

Therefore, by retaining this exception under the *Bharatiya Nyaya Sanhita*, 2023, the state is not maintaining a neutral posture it so demonstrates. Instead, it is actively choosing to discriminate against married victims. The law in such cases is intervening selectively, choosing to protect the privacy of a physical room over the bodily integrity of the person, systematically stripping married women of their basic constitutional rights.

Walking Away: A Myth

When talking about marital rape, one of the questions that often comes to mind is, "Why doesn't she just leave?" But this question is not just insensitive; it's one that pays no heed to the sordid sociological situations millions of women are in in India. It reflects the strong patriarchy in the society in which we live and the value that is often attached to women merely as wives and mothers, stripping away any conception of who they are beyond the household sphere. The pedestalisation of men, the submissiveness and prioritisation of the desires and stability of the family above the safety and dignity of the woman are normalised in society. The assumption

⁴ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 S.C.C. 1.

that women have the real power to 'just leave' implies that there are no serious repercussions.

But looked at carefully, this notion of "choice" becomes utterly unhinged when viewed in actual situations. A woman's decision to leave a marriage is a much more difficult one than a walk through the door to the outside. A woman's marriage property rights are practically non-existent and most women have little financial autonomy, once a marriage ends, a woman finds herself economically displaced, without a home and completely financially dependent. In addition to these material concerns, walking away means that a woman faces severe social isolation, condemnation and embarrassment at the core of our society.

Due to social stigma, her natal family will hardly take her back and she will be left with no options. In addition, she faces the frightening prospect of losing her kids or being separated from them permanently. Also, there are no laws against marital sexual violence, resulting in minimal legal avenues for her to seek remedy and civil remedies which don't consider the act a crime of significance, and leave her with little emergency shelter and long, drawn out legal proceedings for basic maintenance. All of this takes away her freedom to choose. Staying with her rapist is a desperate way of maintaining her survival – and it is routinely misread by society as consent or acceptance.

The truth reveals the depth of the injustice in our system of laws. The current law imposes an untenable choice on married women: either to take up with constant physical violation, or to be fully structurally destitute and homeless. The victim of a sexual assault is expected to change her entire life, to be banished from society, and to suddenly become poor. Basic safety from sexual assault requires the victim to rearrange her whole life, to be socially exiled, and to risk sudden poverty. In the meantime, the perpetrator is still able to enjoy the comfort and security of the very four walls under which the crime was committed, not to mention the very four walls that help him to conceal the crime. At the same time, the perpetrator is still enjoying the comfort and the security of the four walls where the crime was committed, not to mention the four walls that help him hide the crime.

Let's get to the central dilemma of the whole discussion: Why should it be necessary for a woman to lose her home in order to escape sexual violence? A person who survived the attack is not only forced to leave her home and security, but it is an admission by the state that it has completely failed to protect her in her own home.

The Legal Gap

The exclusion of marital rape offence from the BNS has created several difficulties at the ground level for those who have suffered the grave crime. What happens when a married woman approaches the police with a complaint and evidence of sexual assault by her husband? The police cannot file the complaint as a rape, instead the case can be treated under Section 85 of the BNS, 2023⁵. This section deals with cruelty inflicted upon by the husband and his relatives. This provision although useful, changes the nature of a sexual violence complaint into a broader case of domestic cruelty. Thus the aggrieved woman has to prove that she is being harassed and facing cruelty on a continual basis.

The law provides one other route, through the protection of women from Domestic Violence Act, 2005. This act deals with sexual violence as a form of domestic abuse and provides women with a provision to seek protection orders, monetary relief and also residence orders. These provisions are indeed effective but are civil and protective remedies. They shall not create the effective criminal consequences that follow a rape complaint. So, a woman can for sure receive protection from sexual assault but the assault in itself will not be treated as a criminal offence.

This creates a severe gap in evidence collection and medical documentation at a very initial stage of the complaint. In cases of ordinary rape investigations, the justice system can trigger the initiation of medical examinations and collection of evidence such as DNA samples or other necessary biological material. Where the law does not recognise an act of sexual assault as rape because it was committed by a woman's husband, the same forensic and criminal procedure may not even begin. Due to this overlooking, by the time a case related to marital rape reaches the court, important physical evidences might have disappeared. what is left is her testimony and mental trauma while the legal system continues to work without any provisions dealing with marital rape as rape.

This existing framework can give a husband (the perpetrator) a leverage. In a scenario where a woman leaves her marital home because of sexual violence, the husband can ask for restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955⁶, asking the court to order her to resume cohabitation. As configured, marital rape is not considered as a rape and thus the legal system does not treat the husband's wish for marital relations a criminal matter. This existing framework places women under pressure both emotional and financial, forcing her to

⁵ Bharatiya Nyaya Sanhita, 2023, § 85 (India).

⁶ Hindu Marriage Act, 1955, § 9, No. 25, Acts of Parliament, 1955.

agree to a partial, unfair settlement. This prevents her from the burden of a long litigation procedure. So, the problem does not end at the absence of a criminal offence, it affects police response, remedies available and mostly the woman's right and ability to get out of the abusive marriage.

CONCLUSION

Marriage is a beautiful commitment to share life not an agreement to lose control over one's own body. The Sindhoor, the mangalsutra or any of the other ceremonial practices do not snatch a woman's right over her body, it does not give the husband an unconditional right of sexual activity for the rest of their lives. Consent must be given every single time and just 'being married' does not change this principle. Whether married or unmarried, a 'No' is a 'No'.

Exception 2 to section 63 of BNS gives a very opposite message. It distinguishes between a woman's control over her body on the mere basis of her marital status. The very same act when done by a stranger- it is rape, a grievous crime. When done by her own husband- it is not a rape, not a crime. This will only treat the consent of the married woman as less important when the perpetrator is her husband. This also moulds the opinion of the society, no one actually believes marital rape to be a rape when it is actually a very deep and concerning matter.

The Nirbhaya case⁷ makes the contrast even more evident.

The state responded in a critical manner by strengthening rape laws, creating fast track courts, catering to the grave need of protecting the women of the country and providing justice in cases of sexual offences. Still, a woman facing sexual violence in her own home finds herself outside the protection of the law due to exception 2.

The issue, therefore, is not the absence of criminal provision. The issue lies in how a woman's right over her own body is ascertained by whether she is married, unmarried, separated and who the perpetrator is-her husband or a random stranger. Marriage is not a blank cheque and consent is not given once and forever. Consent is to be given every time and that consent must be respected unconditionally, but, unless the law recognises and inculcates this, justice for women will remain incomplete.

⁷ *Mukesh & Anr. v. State for NCT of Delhi & Ors.*, (2017) 6 SCC 1 (India).