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# MARITAL RAPE AND THE CRIMINAL JURISPRUDENCE OF INDIA: A CRITICAL ANALYSIS

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Yash Shrivastava, BBA. LLB. (Hons.), Siksha 'O' Anusandhan (Deemed to be University), Bhubaneswar.

## ABSTRACT

In the Indian socio-legal world, marriage has traditionally been considered to be a sacrosanct institution granting the husband an unconditioned and life-long possession of the body of his wife. It is also a very strong patriarchal assumption that has been used as the ideological underpinning of the marital rape exception, which is not a criminal offence on the part of a husband who has forcibly penetrated his wife. She welcomed the new Indian criminal law as a groundbreaking change in the Indian criminal law by replacing the Indian Penal Code of 1860 and the new law was called Bharatiya Nyaya Sanhita, 2023. Nevertheless, the new code, in one of its greatest failures, not only kept the marital rape exception but made it continue to hold an archaic and constitutionally questionable legal stance. Section 63 of the BNS which defines rape still excludes the non-consensual sexual intercourse between a husband and his wife who is above eighteen years old. The paper is a critical analysis of the theoretical foundation of this exception, its origins in the common law, and an analysis of the exception in the context of constitutional morality, feminist jurisprudence, and international human rights norms. It also scouts across pertinent Indian judicial precedents as well as comparative jurisdictions, question the perennial role of the State in naturalising sexual violence in marital relations. As the paper says, the omission of marital rape by the Bharatiya Nyaya Sanhita is not a legislative omission, but rather an acceptance of retrogressive social convention which cannot be expressed in the constitution and is immoral.

**Keywords:** Conjugal Rights, Consent, Constitutional Morality, Feminist Jurisprudence, Sexual Autonomy.

## INTRODUCTION

The passing of the Bharatiya Nyaya Sanhita, 2023 was packaged to the Indian populace as a historic landmark in jurisprudence of the country a radical break with the colonial tradition of the Indian Penal Code, 1860. The government argued that the new code reflected the Indian constitutional values and rights-focused vision of criminal justice. However, when it comes to the most telling measure of whether a legal system is devoted to gender justice such as the handling of marital rape, the continuity of the issue is dishearteningly smooth instead of a sign of discontinuity.<sup>1</sup>

The simplest definition of rape is an act of violence that is based on the lack of consent. It does not make a difference whether the offender is a stranger, friend or a partner. The psychological harm that the survivor suffered, the breach of the integrity of the body, and the loss of individual control are no lesser when the attacker is the husband. But Indian law, either ancient or modern, has resisted to the uttermost the acknowledgement of this reality in the union between husband and wife.<sup>2</sup>

The marital rape exception has existed since the notorious dictum of Sir Matthew Hale in the seventeenth century, who stated that a husband could never be guilty of a rape committed by his own acts on his legal wife, because through the matrimonial consent and contract of the marriage the wife had surrendered herself in this respect to her husband, and could not take it back. This doctrine of implied matrimonial consent, which has been rejected wholesome in the majority of the democratic legal systems in the world, has clung to Indian law with amazing tenacity.<sup>3</sup>

Section 375 of the Indian Penal Code has an exception that is almost the same as the one in the Bharatiya Nyaya Sanhita, 2023, in Section 63. Under the exception, sexual intercourse is exempt when a man has sex with his own wife and the wife is not less than the age of eighteen years. The paper aims at examining how this exception is legally invalid, constitutionally invalid, and socially invalid. This it does by interacting with other pertinent theories, studying case laws, and presenting a critical review of the legislative option inherent in the silence of the Bharatiya Nyaya Sanhita.<sup>4</sup>

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<sup>1</sup> Singh, S. (2023). Marital Rape: Curse within Institution of Marriage. *Legal Spectrum J.*, 3, 1.

<sup>2</sup> Kumari, S. (2023). Marital rape in India: A critical analysis. *Jus Corpus LJ*, 4, 167.

<sup>3</sup> Ratna, M. J. (2025). Irrevocable Consent and Marital Rape: A Juridical Analysis in the Light of Ancient Hindu Texts.

<sup>4</sup> Bharatiya Nyaya Sanhita, 2023, Section 63.

## **GENERAL THEORIES RELATED TO THE AREA OF RESEARCH**

Marital rape exception cannot be conceptualized or criticized without reference to the theoretical constructs which help to shed light on its origins and reveal its injustice. A number of the classical theories of jurisprudence, political philosophy and feminist thought come together to offer answers to the question of why the silence of the law on marital rape is not a technical issue alone but a serious moral failure.<sup>5</sup>

The most important and the oldest theory is the doctrine of coverture which was based upon the English common law. According to this doctrine, when a woman was married, the legal person of the wife was included in that of the husband. She lost the status of a legal personality. Her property, body and her legal agency were incorporated in the unit of marriage. This doctrine gave the ideological foundation to the marital rape exception that was developed by Hale, the wife had already given up her body to the husband by getting married. Even though the concept of coverture has long since been abolished in the majority of the common law world, its spirit still lingers in the Indian matrimonial law in the form of the marital rape exception.<sup>6</sup>

Feminist jurisprudence presents a strong opposition to coverture in terms of counter-narrative. Based on the works of other scholars like Catharine MacKinnon and Susan Estrich, the feminist legal theory claims that the law on rape has long been shaped through the lens of the male attacker, as opposed to the female victim. The theory of dominance offered by MacKinnon assumes that law being a patriarchal institution systematically subordinates women and endorses the male sexual access. In this context, the marital rape exception is not an exception but it is a rational manifestation of a system of laws that remains male-oriented. The fact that the law has refused to make marriage rape a criminal offence exemplifies and even strengthens the ideology that the body of women in the marriage is a tool to male sexual satisfaction and not to personal desire and denial.

Social contract theory, as postulated by authors like John Locke and John Rawls, also proves a valuable point of view. The marital rape exception breaches the first principle of Locke who states that no individual may be denied life, liberty, or property without his consent. A woman who is not willing to engage in sexual intercourse is denied her bodily freedom. The injustice

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<sup>5</sup> Drieschner, K., & Lange, A. (1999). A review of cognitive factors in the etiology of rape: Theories, empirical studies, and implications. *Clinical Psychology Review*, 19(1), 57-77.

<sup>6</sup> Martin, E. K., Taft, C. T., & Resick, P. A. (2007). A review of marital rape. *Aggression and Violent Behavior*, 12(3), 329-347.

in question is further revealed through veil of ignorance by Rawls in which no rational actor, regardless of his or her gender and marital status, would agree to the legal order allowing sexual violence in marriage. Such principle as justice as fairness suggests equal legal protection of all individuals regardless of their status in relations.<sup>7</sup>

The concept of constitutional morality, which is frequently used by the Supreme Court of India in various landmark cases, including *Navtej Singh Johar v. Joseph Shine and union of India*. The most straightforward theoretical challenge to the exception of marital rape is made by Union of India. As expressed by the Court, constitutional morality prevails over popular morality and requires commitments to constitutional morality of dignity, equality and non-discrimination. The exception of marital rape is the manifestation of the popular morality the social agreement that marital rape is no actual crime. The morality that is set out in the constitution needs the law to defend the dignity and independence of every woman, married or otherwise. The fact that the exception has been retained in the *Bharatiya Nyaya Sanhita* is a legislative abdication of constitutional morality in favor of popular morality.<sup>8</sup>

## **LEGAL CONCEPTS AND RELEVANT CASE LAWS**

The law on marital rape in India is characterized by the interplay between legal requirements, judicial rulings, and constitutional guarantees. The most notable part of this discussion is section 63 of *Bharatiya Nyaya Sanhita, 2023*, which defines rape and retains, in its exception clause, the immunity of a husband against prosecution in non-consensual sexual intercourse with his wife over eighteen years old. This exception is the most famous law concept that is examined.

Consent is the corner stone to any serious interpretation of the law on rape. Section 63 of the BNS, as the forebear, identifies consent as an unambiguous voluntary pact expressed in words, gestures or any other type of verbal or non-verbal communication. However, the marital rape exception works exactly in this way since it assumes that the consent, in the marriage, is irrevocable, and thus, rendering the statute itself null. This is an internal contradiction itself, accepting consent as the defining character of rape, and at the same time assuming that it is a part of marriage.

The right to privacy, which is considered as a basic right in the Article 21 of the Constitution

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<sup>7</sup> Bennice, J. A., & Resick, P. A. (2003). Marital rape: History, research, and practice. *Trauma, Violence, & Abuse*, 4(3), 228-246.

<sup>8</sup> Dixit, P. (2020). *Navtej Singh Johar v Union of India: decriminalising India's sodomy law*. *The International Journal of Human Rights*, 24(8), 1011-1030.

in *K.S. Puttaswamy v. The concept of bodily integrity and sexual autonomy is embodied in Union of India (2017)*.<sup>9</sup> The Supreme Court determined that the right to privacy and the right of each person to make decisions concerning the body, without any interference and coercion by the State. By denying a wife the ability to have the protection of the law over non-consensual penetration, the marital rape exception amounts to depriving her of the right to have the protection of the law in the marital domain, which is guaranteed in the constitution. The marriage certificate cannot serve as a licence to infringe on the privacy rights.<sup>10</sup>

The split judgment of the Delhi High Court in *RIT Foundation v. is the most directly applicable Indian judicial pronouncement. Union of India (2022)*. Justice Rajiv Shakhder affirmed that the marital rape exception was not constitutional in that it was a violation of Articles 14, 19 and 21 of the Constitution. The judicial scholar found that the exception established an arbitrary division between married and unmarried women in terms of protection of their body integrity, which had no rational nexus to a valid State goal. The exception was accepted by Justice C. Hari Shankar, though he believed that marriage is a valid ground to provide a different treatment and that such policy formulation was the prerogative of the legislature. The case has since been submitted to the Supreme Court of India, where it is under judicial review.<sup>11</sup>

In *Independent Thought v. In the case of Union of India (2017)*, the Supreme Court criminalised a child bride marital rape, i.e., a marriage between a wife aged between fifteen and eighteen, thus somewhat undermining the marital rape exception. The Court ruled that, it was unconstitutional to classify a married minor and an unmarried minor differently on the issue of rape. Although this ruling did not concern marital rape against adult women, it provided the essential groundwork that marriage does not override the right of a wife to bodily integrity, which would eventually form the basis of the total invalidation of the exception in judicial rulings.<sup>12</sup>

The criminalisation of the marital rape is highly advocated by comparative jurisprudence. In *R v. the United Kingdom, the House of Lords in R (1992)* made it clear that the marital rape exception was abolished and Hale fiction was outdated, and could no longer be accepted, and

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<sup>9</sup> Chandrachud, D. Y. (2017). Supreme Court of India Justice KS Puttaswamy (Retd)... vs Union Of India And Ors. on 24 August, 2017.

<sup>10</sup> Akhil Kumar, K. S. (2023). The Bhartiya Nyaya (Second) Sanhita 2023: An Integrated Perspective-A Comprehensive Study and Analysis. *Jus Corpus LJ*, 4, 350.

<sup>11</sup> Sharma, M. (2023). Criminalisation of Marital Rape: An Analysis of Its Constitutionality with Reference to Judicial Pronouncements in India. *Issue 4 Int'l JL Mgmt. & Human.*, 6, 929.

<sup>12</sup> Reddy, R. K. (2022). *Independent Thought v. Union of India: An Analysis from the Feminist Theory of Rape*. *Issue 5 Indian JL & Legal Rsch.*, 4, 1.

could not be tolerated as a comment, in the present culture, where women are now recognised as equal citizens. The court believed that fiction of implied consent was out of place in a society where women are fully and independent legal persons. In the same way, the acknowledgment of the United States Supreme Court, through a set of legislative changes in individual states and case law, that marital rape is a severe offense is a reflection of the international agreement that the relationship of married people does not grant any right of sexual intercourse in the absence of consent.<sup>13</sup>

In its General Recommendation No. 35, the United Nations Committee on the Elimination of Discrimination against Women has requested State parties to eliminate all the laws which explicitly or implicitly authorize or condone gender-based violence, including marital rape. The fact that India has not yet succeeded in criminalising marital rape as stipulated by the Bharatiya Nyaya Sanhita puts India in further violation of the obligations that it has had on the Convention on the Elimination of All Forms of Discrimination against Women of which it is a signatory in the year 1993.

### CRITICAL ANALYSIS

Retaining the marital rape exception, in the Bharatiya Nyaya Sanhita, 2023, is not a non-partisan legislative decision. It is a conscious political choice of the benefit of patriarchal societal norms in comparison to constitutional principles. Arguments used to justify the exception in defence of marriage as a social institution, which deserves special treatment, that uniting marital rape involves disrupting families, false claims would increase on the ground cannot be subjected to thorough analysis.<sup>14</sup>

The fact that marriage is a special institution that warrants different treatment of marital rape gets the definition of marriage and rape misconstrued. Marriage: is a union based on choice of two equal partners. It establishes both rights and responsibilities but in a constitutionally defensible system cannot, in any way, annul the right of a woman to her own body. The act of rape is not any less offence merely because of the reason that the offender is the husband. The physical injury, mental destruction, and humiliation of a married rape victim are not less dramatic than the one of an unmarried victim. This inability of the law to acknowledge this equivalent is not a preservation of marriage, but a preservation of marital impunity.

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<sup>13</sup> Ferencz, D. M. (2006). United Kingdom House of Lords: RV Jones Et al. (Conjoined Appeals). *International Legal Materials*, 45(4), 992-1014.

<sup>14</sup> Sharma, M. (2023). Criminalisation of Marital Rape: An Analysis of Its Constitutionality with Reference to Judicial Pronouncements in India. *Issue 4 Int'l JL Mgmt. & Human.*, 6, 929.

The fear-of-false-cases argument is also not convincing. The same line of reasoning was made on the criminalisation of other kinds of sexual violence and about letting women testify in court and it was justifiably disproved. The law does not leave criminalisation of any act just because it is prone to false allegations. There are the safeguards against false complaints which are represented by the investigation procedure, the standard of evidence, and prosecutor discretion. The threat of false cases should not be used to abandon the true victims to face justice.<sup>15</sup>

The family destruction argument that the criminalisation of marital rape would cause goes in the wrong way. The rape is what destroys the family and not the criminal law itself that recognises the rape. In that giving the law a free pass on criminalising marital rape, families are not being safeguarded but rather rapists in a family. Moreover, the law already offers a variety of matrimonial remedies such as the judicial separation and divorce based on cruelty and the courts have decided that marital rape could be cruelty in these purposes. Assuming that marital rape is atrocious enough to warrant divorce, then it is atrocious enough to draw criminal punishment.

Bharatiya Nyaya Sanhita too turns out to be a failure in the examination of constitutional morality by forming a very arbitrary and irrational classification. In Article 14<sup>16</sup> of the Constitution, the State is not permitted to treat similarly situated persons unfairly unless the State has a rational foundation. A raped married woman and an unmarried woman who is raped by their spouses and partners respectively are both equally placed in the context of the nature of harm they endure. The distinction between them, in accordance with the legal status of marriage alone, has no rational nexus on the objective of legitimate prevention and penalty of sexual violence. The exception thus infringes upon Article 14.

It also infringes Article 21 that safeguards the right to life and personal liberty in its ultimate dimension that includes the right to bodily integrity, dignity and sexual autonomy.<sup>17</sup> To guard these aspects of personhood, the Supreme Court has continually increased the scope of Article 21.<sup>18</sup> An act that allows a man to commit forcible sexual intercourse on his wife without committing a crime is not compatible with the constitutional right to dignity that Article 21 endorses. The silence of the Bharatiya Nyaya Sanhita on marital rape is therefore not just a

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<sup>15</sup> Mehta, M. (2021). The Inefficacy of Internal Complaint Mechanisms in Resolving Sexual Harassment Claims-A Study in the Context of Sexual Harassment Law and# MeToo in India. *NUJS L. Rev.*, 14, 412.

<sup>16</sup> Shukla, P. (2014). An Approach to Indian Constitution. *Scholedge International Journal of Business Policy & Governance*, 1(1), 8-16.

<sup>17</sup> Jani, N. (2013). Article 21 of constitution of India and right to livelihood. *Voice of Research*, 2(2), 61-66.

<sup>18</sup> Kumar, P. (2021). Interpretation of Indian Constitution Article 21 with Special Reference to the Right to Human Dignity: An Analysis. *Indian JL & Legal Rsch.*, 2, 1.

legislative option- but it is the breach of the constitution.<sup>19</sup>

Another curious dissonance is the progressive rhetoric of the BNS and the regressive content as well. The new code was hailed as an Indian spirit and its consideration of the rights of the victims. However, it failed on the issue of marital rape to an English common law exception that was based on seventeenth century misogyny. The inversion of keeping the doctrine of Hale in a code that is supposed to help discard the legacies of colonial law is ironic. This shows that the BNS reform agenda was not holistic and gender justice was not one of the concerns of the drafters of the legislation.<sup>20</sup>

## CONCLUSION

By keeping the marital rape exception, the Bharatiya Nyaya Sanhita, 2023, has opted to remain silent in cases where the constitution requires that they speak, opted to be complicit in cases where justice required protection, and opted to regress in cases where reform could have been undertaken. The exception, which is based on Hales seventeenth century fiction of implied matrimonial consent, does not coincide with the constitutional values of equality, dignity, and autonomy, on which the Indian legal order is built.<sup>21</sup>

The legislation should understand that a woman is not the property of her husband when they are married. She is an independent person, full legal person, the fact that she has a right to refuse sexual intercourse does not weaken in case of marriage. At the altar, consent is not made irrevocable. Any sexual intercourse should be consensual irrespective of whether there is a legal relationship between both parties. It is not an extreme suggestion - it is a simple requirement of constitutional righteousness and humanity.<sup>22</sup>

The legislative and judicial bodies in India need to take action and take action to fill the vacuum that the Bharatiya Nyaya Sanhita has opted to keep. In the ongoing debate of the matter, the Supreme Court can do what Parliament had been able to do, to pronounce the marital rape exception unconstitutional, as well as to pronounce that no woman in India, whether married or not, should be deprived of the protection of the law against sexual violence. Until that day comes, the hush of the Bharatiya Nyaya Sanhita will still speak, loudly, shamefully and at the price of millions of women who have a right to better of the law that regulates them.<sup>23</sup>

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<sup>19</sup> Mehta, M. (2021). The Inefficacy of Internal Complaint Mechanisms in Resolving Sexual Harassment Claims-A Study in the Context of Sexual Harassment Law and# MeToo in India. NUJS L. Rev., 14, 412.

<sup>20</sup> Duxbury, N. (1990). Robert Hale and the economy of legal force. Mod. L. Rev., 53, 421.

<sup>21</sup> Dailey, A. (1986). To have and to hold: The marital rape exemption and the fourteenth amendment.

<sup>22</sup> Pant, R. (2022). Exception to Marital Rape: A Violation of Human Rights. Issue 6 Indian JL & Legal Rsch., 4, 1.

<sup>23</sup> Ryan, R. M. (1995). The sex right: A legal history of the marital rape exemption. Law & Social Inquiry, 20(4), 941-1001.

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6. Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.
7. Joseph Shine v. Union of India, (2018) 2 SCC 189.
8. R v. R [1992] 1 AC 599 (House of Lords).
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