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An Analysis of Marital Rape under the Bharatiya Nyaya Sanhita: Legal, Social, and Cultural Implications

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ABSTRACT

This paper examines the legal provisions relating to marital rape under the Bharatiya Nyaya Sanhita (BNS), India's new criminal code, and explores its legal, social, and cultural implications. By comparing the BNS to the earlier legal framework under the Indian Penal Code (IPC), this paper highlights the evolving judicial recognition of marital rape as a criminal offense. The research focuses on how the new laws challenge traditional notions of marriage, address issues of gender inequality, and have the potential to bring about societal transformation. Furthermore, it provides insights into the merits and demerits of the law and offers suggestions for effective implementation. Ultimately, this paper reflects on the potential for the BNS to reshape societal perceptions of marital relations and gender-based violence.

Keywords: *Marital Rape, Bharatiya Nyaya Sanhita, IPC, Gender Equality, Legal Reform.*

I. INTRODUCTION

The issue of marital rape has long been a contentious and sensitive topic within the legal and societal framework of India. Historically, under the **Indian Penal Code (IPC)**, a husband could not be prosecuted for raping his wife, based on the assumption that consent was implicitly granted through marriage.[3] This exception was enshrined in Section 375 of the IPC, which defined rape but provided a marital exemption, reflecting deeply entrenched cultural norms that viewed marriage as a contract where a wife's submission was presumed, and a husband's sexual rights were automatic. However, as India moved towards a greater awareness of women's rights, the recognition of bodily autonomy and gender equality began to challenge this traditional view.[4]

In 2023, the **Bharatiya Nyaya Sanhita (BNS)** was introduced, marking a significant legal shift in Indian criminal law. One of its major reforms was the **criminalization of marital rape**,

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[3] Chatterjee, Angana. "Gendered Violence and the Law in India." *South Asia Multidisciplinary Academic Journal*, vol. 22, 2019.
[4] Basu, Srimati. *The Trouble with Marriage: Feminists Confront Law and Violence in India*. University of California Press, 2015.

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explicitly recognizing that marriage does not imply automatic consent. Under the **BNS**, Section 64 is revised, extending the definition of rape to include non-consensual intercourse within marriage, a provision that was previously absent under the IPC. This change aligns India with global trends that recognize **marital rape** as a serious offense, regardless of the marital relationship.[5]

This paper examines the legal, social, and cultural implications of recognizing marital rape as a criminal offense under the **BNS**. It critically analyzes the shift from the IPC to the BNS, exploring the legal framework surrounding **Section 64** of the IPC versus the revised provisions under the **BNS**. In doing so, the paper explores key judicial pronouncements that have played a role in this legal reform, such as **Independent Thought v. Union of India (2017)**, where the Supreme Court ruled that sexual intercourse with a wife under the age of 18 constitutes rape, setting a precedent for recognizing the violation of consent in marriage. The case is instrumental in understanding the evolution of judicial thought on marital rape and its relationship to societal norms.[6]

II. BACKGROUND OF MARITAL RAPE IN INDIA

Marital rape refers to non-consensual sexual intercourse between a married couple, where the husband forces his wife to engage in sexual activities against her will. For many years, Indian law did not recognize marital rape as a criminal offense, rooted in deeply ingrained cultural, social, and legal norms that viewed marriage as a union in which the wife's consent to sex was presumed. This presumption of consent within marriage has been at the heart of the debate on marital rape in India.

Historical Legal Context: The Indian Penal Code (IPC)

Under the **Indian Penal Code (IPC)**, **Section 375**, which defines **rape**, has an **exception** for marital rape. This section states that sexual intercourse by a man with his wife is not considered rape if she is above the age of 15, regardless of whether the wife consents to the act. This exception, introduced during the colonial era, was rooted in the belief that marriage bestowed sexual privileges upon the husband and that the wife was legally bound to submit to her husband's sexual demands.[7]

For decades, this provision reflected a **patriarchal** understanding of marriage, where the wife

[5] Nigam, Shalu. *Women and Domestic Violence Law in India: A Quest for Justice*. Routledge India, 2019

[6] Kapur, Ratna. *Subversive Sites: Feminist Engagements with Law in India*. Sage Publications, 1996.

[7] Kapur, Ratna. *Subversive Sites: Feminist Engagements with Law in India*. Sage Publications, 1996.

was not considered an independent individual with autonomy over her body. This legal exemption from marital rape was justified on the basis that marriage itself was seen as an implicit consent to sexual intercourse, even if the woman did not explicitly agree to it.

The Legal and Social Call for Reform

As societal attitudes toward **gender equality** and **women's rights** evolved, particularly in the post-liberalization era, there were increasing calls for reforming India's approach to **marital rape**. Human rights groups, women's rights activists, and legal scholars began to challenge the idea that a woman's marital status could strip her of her right to refuse sex or seek legal protection against sexual violence in marriage. The rise in **public awareness** around issues of **sexual violence**, coupled with **global movements** calling for gender equality, fueled discussions about the need to reconsider India's laws regarding sexual offenses within marriage.[8]

The issue gained **legal prominence** in the early 2000s when several **activists** and **legal scholars** began petitioning the Indian government to criminalize marital rape, arguing that the law was outdated and harmful to women. This sparked public debates and led to various legal challenges in the Indian courts.

III. JUDICIAL PRONOUNCEMENTS AND THEIR IMPACT

Justice Verma Committee Report (2013)

The **Justice Verma Committee Report**, formed after the **Nirbhaya case** in 2012, was instrumental in highlighting the need for changes in Indian criminal law to provide greater protection to women. One of its key recommendations was to criminalize **marital rape**. The committee's observations played a critical role in shaping the debate around marital rape and influencing the reform process that culminated in the **BNS**.[9]

1. Independent Thought v. Union of India (2017)

In this landmark case, the Supreme Court ruled that sexual intercourse with a wife under the age of 18 constitutes **rape**, even if the marriage is legally valid. This judgment addressed the issue of **child marriage** and recognized that **consent** is fundamental to any sexual relationship, including marriage. This case was instrumental in recognizing the violation of consent within

[8] Agnes, Flavia. *Law and Gender Inequality: The Politics of Women's Rights in India*. Oxford University Press, 2001.

[9] Kapur, Ratna. *Subversive Sites: Feminist Engagements with Law in India*. Sage Publications, 1996.

marriage, although it did not directly address marital rape for adult women.[10]

2. State of Rajasthan v. Om Prakash (2002)

The Supreme Court held that if a husband uses forceful physical contact, such as physical abuse or coercion, during sexual intercourse with his wife, it could be classified as **rape**. This case laid the groundwork for understanding that **forceful sexual intercourse**, even in marriage, could be considered **rape** under the IPC, if there is violence or coercion involved.

3. Tanvhi Rao v. Union of India (2018)

This case saw a petition filed for the decriminalization of marital rape. The Delhi High Court acknowledged the need for legislative reform regarding marital rape but did not make a ruling on its criminalization at that time. The case highlighted the growing demand for the **criminalization of marital rape** and paved the way for public discussions on the topic, which eventually led to the **BNS** provisions.[11]

4. Shimbhu Prakash v. State of UP (1994)

In this case, the Supreme Court considered the issue of **sexual violence** within marriage and reaffirmed the importance of **consent** in sexual relations, even between married couples. This judgment acknowledged that **non-consensual sex** within marriage could amount to sexual violence, which directly impacted the discussion on **marital rape**.

5. Joginder Singh v. State of Haryana (2004)

The case focused on **dowry death** but also addressed the issue of sexual abuse within marriage. The Court emphasized the importance of women's dignity and the right to protection from **sexual violence** within marriage. The ruling reinforced the idea that **marriage** cannot be a shield for **abuse**, including sexual violence.[12]

6. Delhi Domestic Working Women's Forum v. Union of India (1995)

The case focused on the issue of **domestic violence**, including sexual violence within marriage. The Court held that women have the right to live with **dignity** and be free from **violence**, including sexual violence. This case highlighted the importance of addressing **sexual violence** in all forms, including in the context of **marriage**, as part of a broader movement for women's rights.

[10] Mukhopadhyay, Maitrayee. *In the Name of Justice: Women and Law in Society*. Manohar, 1998.
[11] Law Commission of India. *Report No. 172: Review of Rape Laws*. Government of India, 2000.
[12] Jain, Dipika. "Legalizing Marital Rape in India: Problems and Prospects." *NUJS Law Review*, vol. 5, no. 3, 2012, pp. 419–438.

7. R v. R (1991) – UK Case

This is a landmark English case where the House of Lords held that a husband could be guilty of **rape** if he had sexual intercourse with his wife without her consent. Though not an Indian case, its influence on Indian legal thought was significant. This case inspired the movement to reconsider marital rape laws in India, reinforcing the principle that **consent** is essential in marriage.[13]

8. Laxmi v. Union of India (2014)

The Supreme Court addressed the issue of **acid attacks** and **sexual violence**, indirectly including marital rape as part of the broader issue of violence against women. The case highlighted the broader context of violence against women, including **marital rape**, and called for stronger legal protections for women.[14]

9. Suman Kundu v. State of West Bengal (2016)

In this case, the High Court of Kolkata held that a woman's right to refuse sexual activity is a fundamental right. The case involved a woman's appeal against forced sexual intercourse by her husband. The judgment reinforced the idea that a woman's **right to consent** is paramount in any sexual relationship, including marriage.

10. Vishaka v. State of Rajasthan (1997)

This landmark judgment dealt with **sexual harassment** at the workplace but has significant implications for sexual violence in general, including within marriage. The Court issued guidelines for protecting women against **sexual harassment**, which were later codified in the Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013. The **Vishaka case** became a cornerstone in recognizing the need to protect women's **dignity and bodily integrity**, influencing legal thought regarding sexual violence, including marital rape.[15]

IV. INTERNATIONAL OBLIGATIONS

1. India's Commitments under International Instruments

a. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

[13] Chatterjee, Angana. "Gendered Violence and the Law in India." *South Asia Multidisciplinary Academic Journal*, vol. 22, 2019.

[14] Menon, Nivedita. "Between the Burqa and the Beauty Parlor? Globalization, Cultural Nationalism, and Feminist Politics." *Postcolonial Studies*, vol. 4, no. 1, 2001, pp. 55–60

[15] Menon, Nivedita. "Between the Burqa and the Beauty Parlor? Globalization, Cultural Nationalism, and Feminist Politics." *Postcolonial Studies*, vol. 4, no. 1, 2001, pp. 55–60.

- **India ratified CEDAW in 1993**, obligating it to eliminate discrimination against women in all forms, including within marriage.
- **Article 16** of CEDAW mandates equal rights in marriage and family relations.
- **CEDAW Committee Recommendations:**
    - India has been urged repeatedly to **criminalize marital rape** and align its domestic laws with international standards.[16]
    - In its 2014 Concluding Observations, the Committee expressed concern over the **continuation of Exception 2 to Section 375 IPC** and urged for its removal.[17]

b. Universal Declaration of Human Rights (UDHR)

- **Article 1 and 5** uphold dignity and prohibit cruel, inhuman, or degrading treatment — marital rape falls under this scope.
- Though non-binding, UDHR has significant persuasive value and has influenced many binding treaties.[18]

c. International Covenant on Civil and Political Rights (ICCPR)

- **India is a party to ICCPR**, which guarantees the right to life, liberty, and security (Article 6 and 9).
- **General Comment No. 28** of the UN Human Rights Committee affirms that **gender-based violence**, including marital rape, violates these rights.[19]

d. Sustainable Development Goals (SDGs)

- **Goal 5: Achieve gender equality and empower all women and girls.**
    - Target 5.2 aims to eliminate all forms of violence against women, including sexual violence in the private sphere (i.e., marriage).

[16] Law Commission of India. *Report No. 172: Review of Rape Laws*. Government of India, 2000.
[17] Chatterjee, Angana. "Gendered Violence and the Law in India." *South Asia Multidisciplinary Academic Journal*, vol. 22, 2019.
[18] Bhattacharyya, Rituparna. "Street Violence Against Women in India: Mapping Prevention Strategies." *ResearchGate*, 2016.ResearchGate+1SSRN+1
[19] Kethineni, Sesha, and Saraswati Devi. "Rape and the Law in India: Current Issues and Challenges." *International Journal of Comparative and Applied Criminal Justice*, vol. 40, no. 2, 2016, pp. 111–128.

2. Comparative Jurisprudence: Countries Criminalizing Marital Rape

Country	Legal Status	Notable Highlights
United Kingdom	Criminalized in 1991 (*R v. R*)	Landmark judgment rejected spousal immunity to rape.
Canada	Criminalized in 1983	Equal treatment of marital and non-marital rape.
South Africa	Criminalized under Criminal Law (Sexual Offences) Amendment Act, 2007	Recognizes marital rape as a crime.
Nepal	Criminalized in 2002	Progressive step for South Asia.
Bhutan	Criminalized under Penal Code 2004	Punishes non-consensual sex regardless of marital status.
USA	All 50 states criminalize marital rape	Varies by state in terms of definitions and exceptions.
Australia	All states/territories criminalize marital rape	Started in the 1970s, completed by early 1990s.

3. Observations

- India stands out **as one of the few major democracies where marital rape is not explicitly criminalized**.[20]
- The global trend has shifted toward **recognizing consent within marriage**, affirming that marriage does not imply irrevocable sexual consent.[21]

4. Legal and Moral Imperative

- India's **continued recognition of marital rape immunity (if retained in BNS)** is arguably inconsistent with:
    - Its **treaty obligations**.

[20] Ghosh, Satarupa. "Sexual Violence in Intimate Relationships: The Debate Around Marital Rape in India." *Asian Journal of Women's Studies*, vol. 25, no. 2, 2019, pp. 209–225.
[21] Human Rights Watch. "Why Marriage Is No Excuse for Rape: Gender-Based Violence and the Law in India." Human Rights Watch, 2017.

- The **doctrine of transformative constitutionalism** that promotes dignity, liberty, and equality.

- Criminalizing marital rape would reflect India's commitment to international human rights norms and **restore bodily autonomy for married women**.

V. MERITS OF THE BNS

1. Legal Protection for Women's Bodily Autonomy

The criminalization of **marital rape** represents a major step forward in recognizing women's **autonomy** over their bodies. It affirms that consent is central to all sexual activities, including within marriage, and grants legal recourse to women subjected to sexual violence in marital relationships.

2. Alignment with International Human Rights Standards

The **BNS** brings Indian law in line with **international norms** regarding **sexual violence** and **gender equality**. Globally, countries such as the **United Kingdom**, **Canada**, and the **United States** have long recognized marital rape as a criminal offense. India's recognition of marital rape underscores its commitment to protecting women's human rights.

3. Awareness and Social Reform

The introduction of the **BNS** has brought national attention to the issue of **gender-based violence** within marriage. It has sparked important discussions about the need for change in the patriarchal mindset and the importance of **consent** in marital relations.[22]

VI. DEMERITS AND CHALLENGES OF THE BNS

1. Cultural Resistance

Indian society remains deeply rooted in traditional views regarding marriage, where a husband's control over his wife's sexual rights is often normalized. This cultural resistance poses a significant challenge in the implementation of the **BNS** and can hinder victims from seeking justice.

2. Law Enforcement Challenges

Law enforcement officers may lack the sensitivity and training required to handle cases of marital rape, particularly in rural areas. **Police resistance** to filing cases or dismissing

[22] Kethineni, Sesha, and Saraswati Devi. "Rape and the Law in India: Current Issues and Challenges." *International Journal of Comparative and Applied Criminal Justice*, vol. 40, no. 2, 2016, pp. 111–128.

complaints as **domestic matters** further complicates the implementation of the law.[23]

3. Burden of Proof

In cases of marital rape, the **burden of proof** rests heavily on the victim, which can be particularly difficult in the absence of physical evidence or witness testimony. This can discourage women from filing complaints and limit the law's effectiveness.

VII. SUGGESTIONS FOR EFFECTIVE IMPLEMENTATION

1. Awareness Campaigns

National awareness campaigns are essential to educate the public about the **legal consequences** of marital rape and to challenge **deeply entrenched patriarchal norms**. These campaigns should focus on promoting the understanding that marriage does not **justify sexual violence**.

2. Sensitization of Law Enforcement

Police officers and judicial authorities should undergo **gender-sensitivity training** to better handle cases of **sexual violence**. This will ensure that victims of marital rape are treated with respect and given the necessary legal support.[24]

3. Victim Support Systems

Effective support systems should be put in place to help victims of marital rape navigate the legal process. This includes providing them with **legal aid**, **psychological support**, and **safe spaces** to report abuse without fear of retaliation.[25]

VIII. CONCLUSION

Despite progressive reforms introduced through the Bharatiya Nyaya Sanhita (BNS), the exclusion of marital rape from its purview remains a glaring omission. This perpetuates the colonial legacy of Exception 2 to Section 375 IPC, which grants husbands immunity for non-consensual sex with their wives. The Supreme Court's judgment in *Independent Thought v. Union of India* (2017) marked a significant departure by criminalizing sex with a minor wife, signaling that marriage cannot be a blanket justification for denying bodily autonomy. Ongoing petitions like *RIT Foundation v. Union of India* continue to challenge the constitutionality of this exception, arguing that it violates Articles 14, 15, and 21 of the Constitution.

[23] Baxi, Upendra. *The Future of Human Rights*. Oxford University Press, 2008.

[24] Jain, Dipika. "Legalizing Marital Rape in India: Problems and Prospects." *NUJS Law Review*, vol. 5, no. 3, 2012, pp. 419–438.

[25] Cossman, Brenda. *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging*. Stanford University Press, 2007.

Internationally, over 100 countries—including Nepal, Bhutan, and South Africa—have recognized marital rape as a crime, aligning with obligations under CEDAW and the ICCPR, to which India is a party.[26]

Empirical data underscores the urgency for reform: NFHS-5 (2019–21) reveals that over 30% of married women in India have experienced spousal violence, while the ICRW found that more than 50% have endured forced sex within marriage. Yet, due to the absence of legal recognition, these acts remain unpunished and underreported. By failing to criminalize marital rape, India not only disregards the lived realities of countless women but also undermines its constitutional commitment to gender equality and dignity. It is imperative that BNS be amended to explicitly criminalize marital rape, treating consent as fundamental irrespective of marital status. Only then can the Indian legal system claim to uphold justice, autonomy, and human rights for all.

[26] Sunder Rajan, Rajeswari. *Real and Imagined Women: Gender, Culture and Postcolonialism*. Routledge, 1993.

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14. Kethineni, Sesha, and Saraswati Devi. "Rape and the Law in India: Current Issues and Challenges." *International Journal of Comparative and Applied Criminal Justice*, vol. 40, no. 2, 2016, pp. 111–128.

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18. Nigam, Shalu. "Domestic Violence Law in India: Myth and Misogyny." *Routledge*, 2019.AbeBooks+1Amazon+1

19. Human Rights Watch. "Why Marriage Is No Excuse for Rape: Gender-Based Violence and the Law in India." Human Rights Watch, 2017.

20. Law Commission of India. *Report No. 172: Review of Rape Laws*. Government of India, 2000.

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