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MARITAL RAPE DEBATE IN INDIA: LAW, CONSENT, AND PATRIARCHY

-Khyati Oraon

India takes immense pride in voicing that it is the world's largest democracy and has a Constitution that promises equality, dignity, and personal liberty to each citizen; yet, the law turns a blind eye to the many married women who consider their home to be their haven.¹ The marital rape exception within the Indian legal code is no simple clause but, instead, is a glaring inconsistency at the core of the legal framework in India; it is a remnant of colonialism and continues to deny justice to innumerable women.² As expressed by former Chief Justice DY Chandrachud, he regrets this injustice and considers it a moral failure of the Indian legal system.³

The Law's Blind Spot

The newly created Bharatiya Nyaya Sanhita (BNS), which is Chapter 63 of the Indian Penal Code, defines rape as any act of sexual intercourse without the consent of the victim.⁴ However, an exception to this definition provides that sexual intercourse between a man and his own wife over the age of 18 cannot be charged as rape; therefore, the very same act of sexual intercourse will be charged as rape if it is committed against an identified stranger for a ten-year mas sentence, but will be treated legally as though it never occurred if it is committed by a husband on his wife.⁵

The idea that marriage constitutes an automatic and intentional agreement to engage in sex has been shown to stem from poor reasoning.⁶ According to the National Legislative Studies Forum, seeing marriage as a

¹ INDIA CONST. art. 14, 15, 21.

² BHARATIYA NYAYA SANHITA § 63, Exception (2023); INDIAN PENAL CODE § 375, Exception 2 (1860).

³ D.Y. Chandrachud, Former Chief Justice of India, Remarks at the International Conference on Family Justice (2024).

⁴ BHARATIYA NYAYA SANHITA § 63 (2023) (defining rape as sexual intercourse with a woman without her consent or under circumstances specified therein); see also Indian Penal Code § 375 (1860).

⁵ BHARATIYA NYAYA SANHITA § 63, Exception (2023) (providing that sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape); INDIAN PENAL CODE § 375, Exception 2 (1860) (same, prior to replacement by BNS).

⁶ RIT DALMIA V. UNION OF INDIA, W.P. (C) No. 284/2015 (Del. High Court 2022) (challenging the constitutional validity of the marital rape exception on grounds of Articles 14, 19, and 21); see also INDEPENDENT THOUGHT V. UNION OF INDIA, (2017) 10

‘place of sexual access,’ rather than an egalitarian relationship, has been pointed out as one of the biggest blind spots in Indian law.⁷ The Justice Verma Committee issued its report after many months of inquiry (the inquiry took place following the brutal gang rape in Delhi on December 16, 2012) and demanded that this provision be repealed, based on ‘the circulating contradiction between the purpose of the law and the manner in which the law provides a loophole for spouses to commit the most serious sexual assaults against women.’⁸ While substantial efforts have been made to make progress towards the protection of women from sexual violence, more than a decade has passed since then without any changes being made to this loophole in the law.⁹

The Unseen Crisis

The magnitude of this calamity cannot be overstated - The National Family Health Survey-5 paints a disturbing picture; approximately 6% of married women in India report having experienced sexual assault by their husbands. 6% may seem minimal on the surface level, but when viewed in totality, this means that more than 10 million women have experienced sexual assault. Additionally, 83% of women who experienced sexual assault report that their current husbands are the ones who perpetrated the assault. The actual rate of prevalence may be as high as 20.5%, about 90% of all women who are survivors of sexual assault never seek out assistance or help.¹⁰

What does this utter silence look like? A prime example would be the shock caused by an event that occurred in 2025, wherein a ruling by a single judge of the Chhattisgarh High Court reversed an earlier conviction of a man who had raped his wife, a violent incident that resulted in her demise. Unfortunately, due to the laws in India, which expressly state that husbands cannot be charged with rape, the court had to reverse the previous conviction. As a Member of Parliament, Shashi Tharoor summarised well when he proposed a private member's bill to criminalise marital rape, "This is not a component of marriage; it is a component of violence."¹¹

SCC 800 (holding Exception 2 to § 375 inapplicable to wives below eighteen years of age and reading down the exception accordingly).

⁷ NAT'L LEGISLATIVE STUD. FORUM, REPORT ON GENDER JUSTICE AND SEXUAL VIOLENCE LAWS IN INDIA 42–45 (2021).

⁸ JUSTICE J.S. VERMA ET AL., REPORT OF THE COMMITTEE ON AMENDMENTS TO CRIMINAL LAW 107–10 (Jan. 23, 2013) (recommending removal of the marital rape exception from § 375 of the Indian Penal Code as irreconcilable with constitutional guarantees of equality and dignity).

⁹ BHARATIYA NYAYA SANHITA § 63, Exception (2023) (re-enacting without amendment the marital rape exception recommended for abolition by the Justice Verma Committee in 2013).

¹⁰ MINISTRY OF HEALTH & FAM. WELFARE, GOV'T OF INDIA, NATIONAL FAMILY HEALTH SURVEY (NFHS-5) 2019–21: INDIA REPORT, vol. I, at 565–70 (2022) [hereinafter NFHS-5] (finding approximately 6% of ever-married women reported spousal sexual violence; 83% of women who experienced sexual violence named their current husband as perpetrator; and approximately 90% of survivors never sought help).

¹¹ State of Chhattisgarh v. [Name Withheld], Crim. App. (2025) (Chhattisgarh H.C.) (setting aside conviction on ground that the marital rape exception precluded prosecution); Shashi Tharoor, M.P., The Marital Rape (Criminalisation) Bill, 2022, Lok Sabha Private Member Bill No. 47 (Dec. 9, 2022) (proposing deletion of Exception 2 to § 375 of the Indian Penal Code).

Patriarchy's Legal Armour

The legal framework surrounding marital rape is not merely the result of poor drafting; rather, its existence is a legal manifestation of patriarchy. The patriarchal nature of society has given rise to these laws and shaped their content. The origin of the marital rape exception can be traced back to colonial law that treated wives as property of their husbands. Unfortunately, this patriarchal view of the ownership of women persists in India even to this day.¹²

The underlying assumption that when a woman consents to a marriage at the altar to a man, she is agreeing to give up her right to withhold consent for all future sexual actions with that man goes directly against the principles of constitutional jurisprudence. The Supreme Court of India has made several groundbreaking decisions, including the decriminalisation of same sex relationships (Navtej Singh Johar case) and the decriminalisation of adultery (Joseph Shine case), both of which further established the position that sexual autonomy is an inherent component of human dignity as defined by Article 21 of the Indian Constitution. However, the creation of a 'marital rape exception' means that women who are married have less autonomy over their bodies than unmarried women, thereby creating a constitutional paradox. Senior counsel Karuna Nundy succinctly expressed this dilemma at the Supreme Court when she said, "This is not a battle between men and women but a battle between the people and patriarchy".¹³

How the Government Contradicts Itself

When the Supreme Court started holding hearings involving petitions to remove the marital exception to rape laws, the central government's response indicated a wider ideological divide between them and the petitioners. In its affidavit, the central government claimed that if marital rape were criminalised, it could "severely impact the conjugal relationship and result in serious disturbances to the institutional sanctity of marriage." This argument equates marriage as a power-based relationship where violence can be tolerated to keep the institution's "sanctity."¹⁴

¹² 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 629 (1736) (asserting the common-law rule that a husband cannot be guilty of rape upon his wife, on the theory of implied matrimonial consent—the doctrine that directly informed the colonial-era codification now retained in Indian law); see also Flavia Agnes, LAW AND GENDER INEQUALITY: THE POLITICS OF WOMEN'S RIGHTS IN INDIA 54–58 (Oxford Univ. Press 1999).

¹³ NAVTEJ SINGH JOHAR V. UNION OF INDIA, (2018) 10 SCC 1 (reaffirming that sexual autonomy is an intrinsic component of personal liberty and dignity under Article 21 of the Constitution and decriminalising consensual same-sex relations); JOSEPH SHINE V. UNION OF INDIA, (2019) 3 SCC 39 (striking down § 497 of the Indian Penal Code and holding that a married woman's sexual agency cannot be subordinated to her husband's interest); see also Karuna Nundy, Senior Advocate, Oral Arguments, RIT DALMIA V. UNION OF INDIA, W.P. (C) No. 284/2015 (S.C. India 2023).

¹⁴ Counter Affidavit of the Union of India, RIT DALMIA V. UNION OF INDIA, W.P. (C) No. 284/2015 (S.C. India, filed Jan. 2023) (opposing criminalisation of marital rape on the ground that it would "severely impact the conjugal relationship and result in serious disturbances to the institutional sanctity of marriage").

The government's own data does not support this position. According to the NFHS, almost 30% of married women currently living with physical, sexual, or emotional violence. For the many women who experience violence in marriage, marriage currently is an institution that has failed them because of the absence of legal reform, not because of legal reform.¹⁵

Conclusion: From Silence to Justice

India is one of only 36 countries that still exempt marital rape, a fact that reflects poorly on our legal system. Contrary to fears that criminalisation would destroy marriage, it would instead transform marriage from a power-based institution to one built on mutual respect and ongoing, enthusiastic consent. As Shashi Tharoor argued, India must move from "No Means No" to "Yes Means Yes" to uphold constitutional values. Every woman has the right to bodily integrity and dignity within marriage, yet our laws still fail to provide this. The question is no longer whether we will change the law, but how many more women must suffer before we do.¹⁶

¹⁵ NFHS-5, *supra* note 10, at 559 (reporting that 29.3% of ever-married women aged 18–49 had experienced physical, sexual, or emotional spousal violence).

¹⁶ UN WOMEN, PROGRESS OF THE WORLD'S WOMEN 2019–2020: FAMILIES IN A CHANGING WORLD 91 (2019) (identifying approximately 36 jurisdictions worldwide that retain a marital rape exemption); Shashi Tharoor, M.P., Speech on the Marital Rape (Criminalisation) Bill, 2022, Lok Sabha (Dec. 9, 2022) (arguing that India must shift from a “No Means No” to a “Yes Means Yes” standard of consent to align rape law with constitutional guarantees of dignity and personal liberty).