
WHEN THE LAW ENTERS THE BEDROOM, AND LOOKS AWAY: CASTE, CLASS, AND MARITAL RAPE IN INDIA

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ABSTRACT

According to Indian criminal law, the legality of marital rape is upheld through Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita, 2023 (BNS), which provides for exemption from punishment of the sexual activities of a husband against his wife on the condition that she is more than fifteen years old. While there have been numerous scholarly discussions about the gendered implications of the said exception, little emphasis has been given to the exception's intersectionality with caste and class-based discrimination. It is, therefore, proposed herein that the persistence of marital rape is due to casteism and classism in relation to sexual morality rather than merely patriarchal practices. Based on historical records in connection with the said exception, conflicting judgments from the High Courts of Karnataka and Delhi, and feminist jurisprudence, this Note discusses the exclusion of women from lower castes and poor socioeconomic backgrounds from receiving any form of justice from existing laws. The reform approach employed in *RIT Foundation v. Union of India* and the position adopted by the Central Government in the Supreme Court case will be critically analyzed herein.

Finally, the Note calls for a three-tier approach to change: (i) making marital rape an offense irrespective of any condition; (ii) ensuring caste/class sensitivity in enforcing the provisions; and (iii) conducting mandatory training of judges/authorities on intersectional harm. For the Note, failing to make such radical reforms perpetuates a victim hierarchy inconsistent with constitutional guarantees of dignity and equality.

Keywords: Marital Rape, Exception 2 to Section 63 BNS, Caste, Intersectionality, Sexual Violence, Constitutional Law, Feminist Jurisprudence

I. The Opening Wound

Given the role that India's constitutional courts have played in recognizing the transformative power of fundamental rights, the perpetuation of this exception to rape in India constitutes an emblem of legal anachronism. Under Exception 2 to Section 375 of the Indian Penal Code, 1860 (which was carried forward unchanged into Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita, 2023), sexual intercourse by a man with his own wife, she not being less than fifteen years old, is not rape.¹ The rationale behind this provision finds roots in an argument put forward by Matthew Hale during the seventeenth century, according to which the act of marriage constituted the wife's consent to intercourse on a permanent basis. India happens to be one of the few jurisdictions that continue to maintain the exception in substance.²

What should be noted is that, so far as the Indian legal arena is concerned, the controversy has been primarily centered around gender. The impact of caste and class upon this issue remains unexplored in mainstream legal scholarship. It will be argued that the phenomenon of the invisibility of marital rape within the law of India is a dually structured one: firstly, in that it remains invisible to the extent that it is not classified under the law as a criminal act; and secondly, that it is invisible due to the fact that those who are most vulnerable to becoming victims of this crime are the very people who have the least amount of social power to report it.

II. The Expectation That Outlived Reform

Section 375 of the Criminal Law Amendment Act, 2013, passed following the Nirbhaya case, made significant changes to the laws governing sexual crimes as suggested by the Justice Verma Committee. In particular, it proposed doing away with the marital rape exception entirely on the grounds that 'the relationship between the accused and the complainant is not relevant to the inquiry into whether the complainant consented.'³ However, the legislature decided to retain the marital rape exception but increased the minimum age of the wife from thirteen to fifteen years, a stipulation subsequently diluted further by the Supreme Court in *Independent Thought v. Union of India*.⁴

¹ Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India), Section 63, Exception 2.

² Matthew Hale, *The History of the Pleas of the Crown* 629 (1736).

³ Justice J.S. Verma Committee, *Report of the Committee on Amendments to Criminal Law* (Jan. 23, 2013).

⁴ *Independent Thought v. Union of India*, (2017) 10 SCC 800.

The BNS, 2023, which supplanted the IPC as an overhaul of old legislation, was hailed as modern legislation. Submissions before the Parliamentary Standing Committee overseeing the bill included calls for the criminalisation of marital rape.⁵ Nonetheless, the exception remained intact. From the legislative record emerges an unwavering official rationale that justifies retaining this exception on grounds that the criminalisation of marital rape would 'destabilise the institution of marriage.'⁶ What this rationale reflects is a vision of conjugal domesticity shaped by the concerns of the upper-caste and propertied classes with honour within the family. The lived reality of women for whom marriage provides neither the social capital nor the financial protection that makes leaving a marriage a feasible choice have generally been left out of this paradigm.

III. Contesting Consent

Exception 2 came under a constitutional challenge, leading to a confrontation between two High Courts on the issue. In *State of Karnataka v. Hanu*,⁷ the High Court of Karnataka did not dilute Exception 2, highlighting legislative jurisdiction and social consensus as its rationale. On the other hand, in *RIT Foundation v. Union of India*,⁸ the Delhi High Court delivered a conflicting decision: whereas Justice Rajiv Shaktidher declared Exception 2 unconstitutional, violating Articles 14, 19, and 21, Justice C. Harishankar sustained the exception as a rational classification, based on the special character of the matrimonial union. The case is pending in the Supreme Court. Justice Shaktidher's opinion, which has received acclaim, dealt with the autonomy and dignity aspects of the exception.⁹ Yet, even in this judicial exercise, there was no attempt at addressing the interface of caste and sexual violence within marriage. The construction of the 'wife' as a singular legal entity erases the reality that a Dalit wife in a marriage with an upper-caste man, or a woman coerced to marry because of economic necessity, holds a different social location than a wife from a middle-class background.

Differences in their approaches to the issue of 'sanctity of marriage as an institution' also reveal a socially determined idea about conjugality which discriminates against those women who do

⁵ Parliamentary Standing Committee on Home Affairs, Report on the Bharatiya Nyaya Sanhita, 2023 (Nov. 2023), at 47-52.

⁶ Uma Chakravarti, Gendering Caste: Through a Feminist Lens 23-47(2003).

⁷ *State of Karnataka v. Hanu*, CrI. P. No. 201816 of 2017 (Kar. H.C. Mar. 23, 2022).

⁸ *RIT Foundation v. Union of India*, 2022 SCC OnLine Del 1569.

⁹ *RIT Foundation*, 2022 SCC OnLine Del 1569, at p. 196-223 (Shaktidher, J., opinion) (holding that the exception violates Articles 14, 19, and 21 and that consent cannot be contractually extinguished by the act of marriage).

not have equality within the institution of marriage.

IV. Double Marginalisation, Double Silence

Statistics generated by the National Crime Records Bureau¹⁰ consistently underreport the incidence of marital rape under the broader heading of cruelty by husbands/relatives under Section 498A of the Indian Penal Code (today, Section 85 BNS) as rape inside marriage is not a cognizable offence. This lack of statistical reporting is significant since research carried out by the International Center for Research on Women and others have found that lower caste and rural women are more reluctant to report incidents of sexual abuse because of the dependence of the resolution of such disputes on community bodies, social ostracization, distrust of police, and economic dependency on the accused.¹¹

There are at least three ways in which caste and marital rape interrelate in India. First, caste codes of honour (*izzat*) often come into play in discouraging the wife from speaking up about the violence by portraying her speech as betrayal of family or caste interests.¹² Secondly, there is the risk of double subordination faced by women who belong to the lower castes. Sexual violence by husbands against women from the Dalit community would be considered discredited due to their being wives and Dalits.¹³ Third, the economic aspect of caste implies that lower-caste women who are engaged in insecure work arrangements will not have access to lawyers, will depend for their income on their husband's wages, and will be prone to employer and creditor threats to drop any claims. Class functions independently too. In the logic behind the exception, whereby marriage gives rise to an area of private regulation in which there is no need for state intrusion, one finds the values of bourgeois domesticity that have always functioned in class-specific ways.¹⁴ The state has never hesitated to intrude into the homes of the poor; it does so routinely through its policing and welfare surveillance activities. This makes the exemption for marital privacy that justifies excluding certain crimes from the ambit of criminal law a privilege of married women who have socially and

¹⁰ National Crime Records Bureau, *Crime in India 2022*, Table 5A.1 (2023), Ministry of Home Affairs, Government of India.

¹¹ International Center for Research on Women, *Intimate Partner Violence and Sexual Violence Against Women in India: A Review of the Literature 18-22* (2012).

¹² Pratiksha Baxi, *Public Secrets of Law: Rape Trials in India* 34-41 (2014).

¹³ Sharmila Rege, *Writing Caste/Writing Gender: Narrating Dalit Women's Testimonios* 15-19 (2006); see also National Dalit Movement for Justice, *Report on Sexual Violence Against Dalit Women* 29-33 (2019).

¹⁴ Nivedita Menon, *Seeing Like a Feminist* 98-104 (2012).

economically distinguished husbands.

V. Illusion of Gradual Reform

The arguments for retention have put forward several options in between, namely, making a separate, less-severe law on 'marital sexual assault'; allowing prosecution only on the basis of a wife's complaint (as against state action of its own accord); or limiting the criminality of marital rape to serious cases of physical assault.¹⁵ The Central Government, in its response to the Supreme Court, argued that individual states might be allowed to make their own decision regarding retention of the exception or removing it. Each of the three options, however, fails on an intersectional analysis of the problem.¹⁶ Separate lesser punishment for marital rape, by definition, suggests that it is a smaller wrong than the act of rape itself, thus reiterating the subordination of the dignity of the victim of marital rape. An act based on a complaint again does not alter the reality of the existing situation. A woman who does not have the means of independence, social support, and security cannot possibly bring about a criminal complaint without support. Differing policies in different states will simply mean that the right to equality and respect is conditional on place of residence. In effect, incremental changes retain the same principles as those underlying the provision.

It preserves the fundamental assumption that a wife's consent is inherently distinct from everyone else's an assumption that intersects with class and caste, and results in a stratification of bodily autonomy, where marginalized women occupy the lowest rung.

VI. Structural Reform for Structural Violence

The present note puts forward a multi-faceted approach to reforms which go much further than criminalization of acts in question.

The **first** measure requires unconditional abolition of Exception 2 to Section 63 of the BNS. The Supreme Court, guided by the reasoning in Justice Shakti Singh's opinion and considering Articles 14, 19(1)(a) and 21, needs to establish that 'no classification based on relationship of marriage can be the ground for denying criminal protection to victims of forcible sex.' This will

¹⁵ For a survey of reform models, see Mrinal Satish, *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India* 211-217 (2017).

¹⁶ *Affidavit of the Union of India, RIT Foundation v. Union of India*, W.P. (C) No. 284 of 2015 (Del. H.C.) (filed Feb. 3, 2022).

not be a new development in itself because there have been previous cases wherein it was held that “marriage does not mean that the wife must submit her body on the demand of the husband’.”¹⁷

Second, criminalisation must be coupled with caste/class-specific implementation strategies, including: (a) setting up dedicated response teams at police stations composed of trained officers from SC and ST backgrounds whose task will be to process reports of sexual assaults by a husband; (b) modifying the legal aid system to guarantee legal assistance to all victims of marital rape without regard to their economic status, by eliminating the condition of poverty certificates that many women find difficult to provide; and (c) mandatory referral procedures between police, health care and social services, along the lines of the Sakhi One- Stop Centres programme, adequately funded in rural and peri-urban areas.

Third, both the judiciary and law enforcement need to undergo mandatory training on intersectional harm. This training should be incorporated into the curriculum of judicial education at the National Judicial Academy and State Judicial Academies with regards to structural disadvantages facing women from poor or Dalit/SC backgrounds who become survivors of sexual violence in marriage.

VII. Epilogue of Silence

India’s persistent failure to criminalize marital rape in the face of a growing body of research suggesting that rape within marriage may actually occur at greater frequency than non-marital rape is a disgraceful state of affairs that only deepens in scope when one considers its intersection with caste and class. The statute not only fails to provide protection but positively reinforces an inequality of victims such that the most common victims of sexual violence in marriage those who are poor, from lower castes, and economically dependent are those least likely to receive redress. In order to rectify this situation, it will be necessary to take a holistic approach and not merely make minor alterations to existing laws. The Indian Supreme Court has both the constitutional jurisdiction and precedent available to invalidate Exception 2 to Section 63 of the BNS. The real struggle for justice remains with legislators, administrators, and lawyers.

¹⁷ Suchita Srivastava v. Chandigarh Administration, (2009) 9 SCC 1, p. 25.