



INTERNATIONAL LAW
JOURNAL

**WHITE BLACK
LEGAL LAW
JOURNAL
ISSN: 2581-
8503**

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

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MARITAL RAPE AND THE JURISPRUDENCE OF CONSENT: A FEMINIST CRITIQUE

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ABSTRACT

The historical trajectory of family law and criminal justice has been profoundly shaped by the ideological demarcation between the “public” and “private” spheres. Traditionally, the state has actively regulated the public sphere of commerce and politics while treating the private sphere of the home and family as a sacrosanct domain, immune from state intervention. This project examines how this legal fiction of a protected “private sphere” has historically served and continues to serve as a veil to shield patriarchal domination and intimate partner violence from legal scrutiny, most glaringly through the marital rape exemption.

The jurisprudential foundation of this exemption is notoriously rooted in the doctrine of coverture and Sir Matthew Hale’s 18th-century treatise, which declared that a husband cannot be guilty of rape against his wife because “by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract”. This archaic formulation legally reduced women to the property of their husbands and institutionalised the concept of irrevocable consent.

INTRODUCTION

While modern jurisprudence has largely discarded the doctrine of coverture, the ghosts of Hale's declaration remain deeply embedded in contemporary legal systems. Even in jurisdictions where the explicit marital rape exemption has been repealed, its ideological remnants persistently infect the jurisprudence of consent through judicial leniency, lesser sentencing guidelines, or the requirement of heightened burdens of proof for married survivors. This research posits that as long as the law tolerates a dual-tiered system of sexual violence—where a felony in the public sphere is treated as a private, familial dispute within marriage—the fundamental rights of women to bodily autonomy and equal protection remain illusory.

The continued non-criminalisation of marital rape in India represents one of the most enduring

contradictions within its constitutional framework. At its core lies the legal fiction of “perpetual consent”, a doctrine that presumes irrevocable sexual consent within marriage. This presumption fundamentally conflicts with the guarantees enshrined under the Constitution of India, particularly the rights to equality, dignity, and personal liberty. By excluding marital rape from the ambit of criminal law, the State effectively creates a class-based exception where married women are denied the same bodily autonomy afforded to unmarried women.¹ The problem is therefore not merely legislative silence but active constitutional violation. Article 14’s guarantee of equality before the law is undermined by a statutory distinction that classifies rape based on the marital status of the victim rather than the nature of the act. Article 21’s expansive interpretation, which includes the right to live with dignity and bodily integrity, is similarly compromised when forced sexual intercourse within marriage is rendered legally invisible² The law thus institutionalises a hierarchy of victims. This leads to a deeper paradox: marriage, traditionally conceptualised as a protective social institution, functions in this context as a discriminatory divider. Instead of safeguarding rights, it becomes a legal boundary that determines whether an act of sexual violence is recognised as a crime. The same act of non-consensual intercourse attracts criminal sanction when committed by a stranger but is immunised when committed by a spouse.³ Existing scholarship has extensively critiqued marital rape through feminist lenses, emphasising issues of autonomy, consent, and gender justice. However, a critical research gap remains in examining how contemporary Indian courts continue to reinforce the doctrine of marital sanctity despite progressive constitutional jurisprudence. Courts have increasingly recognised privacy, decisional autonomy, and sexual agency in landmark judgments⁴. Yet, paradoxically, these principles are often diluted when applied within the marital sphere.

This paper seeks to address that gap by interrogating how judicial reasoning continues to “weaponise” the sanctity of marriage against constitutional guarantees. It argues that the persistence of the marital rape exception is not merely a relic of colonial law but an actively sustained legal construct that reflects deeper socio-legal anxieties about family, morality, and state intervention in the private sphere.

¹ Constitution of India 1950, arts 14, 21.

² *Maneka Gandhi v Union of India* AIR 1978 SC 597.

³ Indian Penal Code 1860, s 375 Exception 2.

⁴ *Navtej Singh Johar v Union of India* (2018) 10 SCC 1.

LITERATURE REVIEW

1. *Carole Pateman, The Sexual Contract*⁵.

Pateman is essential for understanding how the social contract is fundamentally a sexual contract that subordinates women. She argues that the private sphere was deliberately constructed to grant men patriarchal rights over women's bodies, masking this subjugation under the guise of “privacy”.

2. *Catharine A. MacKinnon, Toward a Feminist Theory of the State*⁶.

MacKinnon famously argued that the legal concept of privacy is a “sword” used against women. By keeping the state out of the home, the law effectively abandons women to the unchecked power of men. She argues that piercing this veil is necessary because the private sphere is where women are most frequently violated.^[SEP]

3. *Sir Matthew Hale (History of the Pleas of the Crown)*⁷.

Hale’s doctrine is the genesis of the marital rape exemption. He wrote the infamous legal maxim:^[SEP] “*But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.*” Literature reviewing the exemption almost universally starts by deconstructing Hale’s premise of implied, irrevocable consent.

4. *Susan Estrich, Real Rape*⁸.

Estrich critiques how the law defines “rape,” arguing that the criminal justice system distinguishes between “real rapes” (stranger danger, public sphere) and “simple rapes” (acquaintances, private sphere). Her work highlights how the jurisprudence of consent is skewed against victims who know their attackers, peaking in the marital context.^[SEP]

5. *Pratiksha Baxi, Public Secrets of Law: Rape Trials in India (2014)*⁹.

Baxi provides a searing sociological critique of how Indian courts handle rape trials,

⁵ Carole Pateman, *The Sexual Contract* (Polity Press 1988).

⁶ Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989).

⁷ 3. Sir Matthew Hale, *Historia Placitorum Coronæ: The History of the Pleas of the Crown* (E and R Nutt and R Gosling 1736).

⁸ Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989).

⁹ Pratiksha Baxi, *Public Secrets of Law: Rape Trials in India* (Oxford University Press 2014).

discussing how patriarchal notions of chastity, marriage, and family honour shape the jurisprudence of consent.^{[1][2]}

6. **Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India (1999)*¹⁰.**

Agnes dissects how personal laws and criminal codes in India work in tandem to maintain male dominance within the marital sphere.^{[3][4]}

RESEARCH GAP

Despite extensive feminist critiques of the marital rape exemption's historical origins, a critical jurisprudential gap remains. There is a lack of contemporary legal analysis examining how modern courts continue to weaponise the abstract doctrine of “marital sanctity” to actively override recent, progressive constitutional guarantees of individual bodily autonomy and privacy.

STATEMENT OF PROBLEM

The non-criminalisation of marital rape reveals a fundamental flaw in the jurisprudence of consent, with the presumption that marriage constitutes a perpetual, irrevocable waiver of bodily autonomy. This creates a dual-tiered legal system discriminating between two categories of rape based on marital status, ultimately prioritising the ‘sanctity’ of the marital institution over a woman’s physical and psychological inviolability.

HYPOTHESIS

In a matrimonial relationship, the concept of consent needs to undergo a paradigm shift, wherein consent is redefined as an active and continuous process rather than an implied declaration at the start of the relationship. This shift, when manifested in both statutory law and judicial behaviour, would go a long way towards criminalising marital rape at both legislative and jurisprudential levels.

¹⁰ Flavia Agnes, *Law and Gender Inequality: The Politics of Women’s Rights in India* (Oxford University Press 1999).

RESEARCH QUESTIONS

1. How does the non-criminalisation of marital rape violate constitutional and human rights guarantees of equality, dignity, and personal liberty?
2. In what ways has the jurisprudential reliance on the “private sphere” actively harmed married women by systematically deprioritising marital rape?^[1]
3. How must the legal definition of consent evolve to recognise that matrimonial status does not equate to perpetual, irrevocable consent to sexual intercourse?

RESEARCH OBJECTIVES AND METHODOLOGY

The main objectives of this study are:

- i. To trace the historical and ideological foundations of non-criminalisation of marital rape and its survival in contemporary legal systems.
- ii. To critically analyse how the public/private dichotomy serves as a jurisprudential shield for marital rape.
- iii. To evaluate the legal paradox of “implied consent” within marriage against standards of affirmative, continued, enthusiastic, and revocable consent.
- iv. To propose a legal paradigm shift that entirely decouples bodily autonomy from marital status.^[2]

The method of study employed in this work is the *doctrinal method of study*.

MARITAL RAPE: A CONCEPTUAL ANALYSIS

The conceptual foundations of the marital rape exemption are deeply embedded in the historical division between the public and private spheres. Feminist theorist Catharine MacKinnon argues that the notion of “privacy” has long functioned as a mechanism to shield domestic spaces from legal scrutiny, thereby enabling systemic subordination of women¹¹. Within this framework, the home is constructed as a site beyond the reach of law, where male authority operates with minimal interference.

This public/private dichotomy is not neutral; it is structurally gendered. By relegating issues of sexual violence within marriage to the “private” domain, the law effectively abdicates its responsibility to protect women from harm. The result is a legal vacuum where coercion and violence are normalised under the guise of marital intimacy.

¹¹ Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989).

The historical architecture of this exemption can be traced to the writings of Sir Matthew Hale, particularly his articulation of the doctrine that a husband cannot be guilty of raping his wife. Hale's reasoning was grounded in a contractual understanding of marriage, wherein the wife was deemed to have given irrevocable consent to sexual relations upon entering the marital union¹². This doctrine became a foundational principle of common law and was subsequently incorporated into colonial legal systems, including India's penal framework.

At its core, Hale's doctrine reflects the patriarchal conception of marriage as a transfer of proprietary rights over a woman's body. Consent, in this framework, is not an ongoing process but a one-time transaction. Such a view fundamentally negates the autonomy and agency of women, reducing them to subjects within a hierarchical marital structure.

The modern persistence of the marital rape exemption cannot, therefore, be dismissed as a mere oversight. Rather, it represents the continued operation of these historical and ideological constructs within contemporary legal systems. The exemption serves to preserve traditional notions of marital unity and male authority, even at the cost of individual rights¹³

THE JURISPRUDENCE OF CONSENT: STATUS VS. AGENCY

The legal understanding of consent in sexual offences has historically been shaped by narrow frameworks. Susan Estrich distinguishes between "real rape" and "simple rape," where the former involves stranger violence, and the latter includes assaults by acquaintances or spouses¹⁴. Legal systems have traditionally prioritised the former, thereby marginalising the latter.

This distinction has profound implications for marital rape. By framing sexual violence within marriage as less severe or less credible, the law implicitly devalues the experiences of married women. The emphasis on stranger danger obscures the reality that a significant proportion of sexual violence occurs within intimate relationships.

A key issue in this context is the privileging of status over agency. Matrimonial status operates as a legal override, nullifying the requirement for explicit consent. The marital rape exemption

¹² Matthew Hale, *Historia Placitorum Coronæ* (1736).

¹³ Flavia Agnes, 'Marital Rape: Law and the Indian Experience' (2013).

¹⁴ Susan Estrich, *Real Rape* (Harvard University Press 1987).

effectively transforms consent from an individual right into a status-based presumption. A woman's identity as a wife supersedes her autonomy as an individual. This approach is fundamentally incompatible with modern constitutional jurisprudence. The Supreme Court in *Justice K.S. Puttaswamy v Union of India* affirmed that privacy includes decisional autonomy and bodily integrity¹⁵. Similarly, in *Suchita Srivastava v Chandigarh Administration*, the Court recognised a woman's right to make reproductive choices as part of personal liberty¹⁶.

The shift towards affirmative consent—defined as continuous, voluntary, and revocable agreement—offers a more robust framework. It rejects implied consent and recognises that consent cannot be presumed from marital status.

THE HISTORICAL ARCHITECTURE: HALE'S DOCTRINE OF IMPLIED CONSENT

The jurisprudence surrounding the marital rape exemption is universally traced back to English common law, specifically the writings of Sir Matthew Hale, Chief Justice of the King's Bench. In his posthumously published treatise, *History of the Pleas of the Crown* (1736), Hale laid down the definitive legal maxim that would shield husbands from prosecution for centuries:

*"But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."*¹⁷

Hale's doctrine established the legal fiction of perpetual and irrevocable consent. Under this framework, the act of marriage was construed as a contract wherein a woman surrendered her bodily autonomy to her husband. This aligned seamlessly with the broader common law doctrine of coverture, which dictated that a woman's legal rights and obligations were subsumed by those of her husband upon marriage. Consequently, sexual intercourse within marriage was viewed not as an act requiring continuous, affirmative agency, but as an enforceable marital right (a patriarchal prerogative) possessed by the husband. By inextricably linking consent to marital status, Hale created a jurisprudential paradox that defined rape solely by the relationship between the parties rather than the presence or absence of volition.

¹⁵ Justice K.S. Puttaswamy v Union of India (2017) 10 SCC 1.

¹⁶ Suchita Srivastava v Chandigarh Administration (2009) 9 SCC 1.

¹⁷ Sir Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* (first published 1736, Sollom Emlyn ed, 1800) 629.

THE PUBLIC/PRIVATE DICHOTOMY IN LAW

The survival of Hale's doctrine in modern legal systems is largely facilitated by liberal legal theory's rigid bifurcation of the world into two distinct spheres: the "public" and the "private".

The Public Sphere: Governed by the state, this sphere regulates interactions between individuals in the marketplace, politics, and civil society. Here, the law actively intervenes to protect individual rights, bodily integrity, and autonomy.

The Private Sphere: Centred around the home and the family, this sphere is historically conceptualised as a sanctuary of domesticity and marital sanctity. The law has traditionally exercised profound restraint in this arena, adopting a policy of non-intervention under the guise of protecting familial privacy from state overreach.

THE FEMINIST CRITIQUE: DECONSTRUCTING THE PARADOX

Feminist legal critique actively targets the status vs. agency paradox, arguing that the retention of implied consent in marriage is a mechanism of patriarchal control rather than a legitimate legal principle. Scholars emphasise that a contract cannot validly transfer ownership or overriding rights over a human being's physical person.

By treating marriage as a space where the standard rules of bodily inviolability are suspended, the state legally sanctions the commodification of women's bodies. The non-criminalisation of marital rape sends a chilling normative message: it prioritises the preservation of the abstract institution of marriage over the physical and psychological safety of the individual woman within it. Feminist jurisprudence argues that "marital sanctity" can only truly exist in an environment of equality and mutual respect, which is fundamentally undermined when one party holds a legally protected right to commit sexual violence.

THE INDIAN FRAMEWORK: IPC, BNS, AND THE "SANCTITY" DOCTRINE

The legal treatment of marital rape in India has been shaped by both colonial and contemporary statutes. Section 375 of the IPC, along with Exception 2, explicitly excludes marital rape from its ambit¹⁸. This exception has historically functioned as a legal shield for perpetrators within marriage.

¹⁸ Indian Penal Code 1860, s 375 Exception 2.

The introduction of the Bharatiya Nyaya Sanhita was presented as a step towards decolonisation. However, a critical examination reveals that the marital rape exemption has largely been retained, raising concerns about whether substantive reform has truly occurred¹⁹.

Judicial discourse further reinforces this position. In *Independent Thought v Union of India*, the Supreme Court read down the marital rape exception for minor wives, highlighting its constitutional inconsistencies²⁰. However, the broader exemption for adult wives remains intact.

Scholars such as Pratiksha Baxi and Flavia Agnes have shown how courts invoke family honour and marital sanctity to justify leniency²¹. Bail and sentencing decisions often prioritise preservation of marriage over justice for victims.

THE MISSED OPPORTUNITY: SECTION 63 OF THE BHARATIYA NYAYA SANHITA, 2023

The jurisprudence of consent in India underwent a watershed moment following the Justice Verma Committee Report (2013), which unequivocally recommended the complete deletion of the marital rape exemption, stating that marriage cannot be viewed as a license to violate a woman's bodily integrity.

However, the recently enacted Bharatiya Nyaya Sanhita, 2023 (BNS), which overhauled India's criminal justice system, represents a profound missed opportunity for feminist jurisprudence. Section 63 of the BNS, which replaces Section 375 of the IPC, retains the exemption almost verbatim. Exception 2 to Section 63 of the BNS states:

Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.

The retention of this exception in a modern, 21st-century penal code is a glaring contradiction. While the BNS adopts a stringent, agency-based definition of consent for unmarried women, it immediately reverts to a status-based framework for married women. This creates a discriminatory dual-tier system that violently clashes with the constitutional guarantees of Article 14 (Right to Equality) and Article 21 (Right to Life and Personal Liberty).

¹⁹ Bharatiya Nyaya Sanhita 2023.

²⁰ *Independent Thought v Union of India* (2017) 10 SCC 800.

²¹ Pratiksha Baxi, *Public Secrets of Law* (OUP 2014).

THE 'SANCTITY OF MARRIAGE' DOCTRINE

The primary jurisprudential shield used by the state and conservative legal theorists to defend the retention of Exception 2 is the “Sanctity of Marriage” doctrine. This doctrine argues that criminalising marital rape would “destabilise” the institution of marriage, open the floodgates for false allegations, and bring the heavy machinery of criminal law into the sacred, private space of the bedroom.

From a feminist perspective, this doctrine relies on a fundamentally flawed and weaponised understanding of “sanctity”. Pratiksha Baxi’s sociological critique of the Indian legal system highlights how courts often utilise patriarchal notions of family honour to shape the jurisprudence of consent²². The ‘sanctity’ doctrine presupposes that the preservation of the abstract familial unit is of greater jurisprudential value than the fundamental physical inviolability of the woman within it. Feminist jurisprudence argues that true marital sanctity cannot be built upon a foundation of state-sanctioned sexual coercion. If an institution requires the subjugation of a woman's bodily autonomy to survive, it is an institution rooted in structural violence, not sanctity.

CONCLUSIONS & SUGGESTIONS

The continued existence of the marital rape exemption is incompatible with constitutional morality. The doctrine of marital sanctity cannot override the fundamental right to bodily integrity. Legislatively, the exemption must be repealed to ensure parity between marital and non-marital rape. The law must explicitly define consent as voluntary, continuous, and revocable²³. Marriage should be reconceptualised as a civil partnership rather than a transfer of rights. Judicially, courts must refrain from invoking restitution of conjugal rights as a mitigating factor. The reasoning in *Joseph Shine v Union of India*, which rejected patriarchal notions of marriage, provides a strong foundation for this shift²⁴.

The non-criminalisation of marital rape remains one of the most glaring contradictions in contemporary criminal jurisprudence. As this study has explored, the legal survival of this exemption—from Sir Matthew Hale’s archaic doctrine of implied consent to its modern

²² Pratiksha Baxi, *Public Secrets of Law: Rape Trials in India* (Oxford University Press 2014).

²³ UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No 35.

²⁴ *Joseph Shine v Union of India* (2019) 3 SCC 39.

retention in Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita (BNS), 2023—is not grounded in logical legal principles, but in the patriarchal weaponisation of the “public/private dichotomy”. By operating on a status-based framework of consent, the state creates a discriminatory, dual-tiered legal system that inherently devalues a married woman's bodily autonomy. The reliance on the “sanctity of marriage” doctrine to justify this exemption is a jurisprudential fallacy; it prioritises the preservation of an abstract social institution over the fundamental constitutional guarantees of equality (Article 14) and the right to life and personal liberty (Article 21).

A feminist critique reveals that marriage is a civil partnership, not a contract of physical ownership or a perpetual waiver of bodily integrity. Therefore, dismantling the marital rape exemption requires more than incremental judicial reform; it demands a radical paradigm shift that entirely decouples sexual agency from matrimonial status.

To rectify the deeply entrenched legal fiction of perpetual consent and align the criminal justice system with modern human rights standards, the following multi-pronged approach must be adopted by the legislature and the judiciary:

1. Explicit Legislative Repeal and Statutory Parity

Abolishing the Exemption: The most immediate and necessary solution is the unconditional removal of any explicit or implicit marital rape exemptions from the penal code. The BNS must be amended to explicitly state that the marital relationship between the perpetrator and the victim cannot be used as a defence against charges of rape or sexual assault.

Standardising Penalties: The penal code must eliminate any dual-tiered sentencing structures. The punishment for sexual violence within marriage must carry the same weight, severity, and minimum sentencing guidelines as sexual violence committed by a stranger or acquaintance.

2. Codifying Continuous and Revocable Consent

Affirmative Consent Standards: To counter the presumption that marriage operates as an unwithdrawable waiver of bodily autonomy, the legal definition of consent must be updated. The law must explicitly define sexual consent as a continuous, affirmative, and entirely revocable state, regardless of the overarching relationship or previous sexual history between the parties.

Separating Contract from Autonomy: Legislation should clarify that marriage is a civil partnership, not a contract that transfers ownership or overriding rights over a spouse's physical person.

3. Jurisprudential Shift: Prioritising Constitutional Rights

Centring Bodily Integrity: Courts must fundamentally shift their interpretative framework away from preserving the 'sanctity of marriage' and toward upholding fundamental human rights. Appellate and Supreme Courts must establish binding precedents that place an individual's constitutional rights—specifically the right to dignity, equality, and bodily autonomy—above the preservation of the marital institution.

4. Eliminating Procedural Hurdles and Judicial Leniency

Removing Judicial Leniency: Judicial guidelines must be established to prohibit judges from citing the preservation of the family unit, the prospect of "restitution of conjugal rights", or the marital status of the parties as mitigating factors during sentencing or bail hearings for sexual offences.

Evidentiary Parity: The legal system must ensure that the burden of proof for marital rape is no higher than that of non-marital rape. Procedural barriers that implicitly require married women to provide evidence of extreme physical violence or legal separation before validating a claim of non-consensual sex must be completely abolished.

Ultimately, a just legal system must recognise that consent does not expire upon marriage. The sanctity of marriage cannot be preserved at the cost of a woman's dignity and autonomy.

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