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THE MARITAL RAPE EXCEPTION UNDER THE BHARATIYA NYAYA SANHITA, 2023: A CRITICAL ANALYSIS

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Abstract

The Bharatiya Nyaya Sanhita, 2023, was introduced as a major reform of India's colonial criminal law. While it expands the definition of rape and adopts more victim-centred language, it retains the marital rape exception under Section 63. This article critically examines the exception's historical roots, its continuity from the Indian Penal Code, and its implications under the Constitution. It analyses how the provision conflicts with the rights to equality, non-discrimination and dignity under Articles 14, 15 and 21. Drawing on comparative experiences from other jurisdictions, and arguments for and against criminalisation, the paper highlights the socio-legal harm caused by the exception and the gaps in existing remedies. It concludes by proposing targeted legislative reforms and complementary measures that would align Indian criminal law with constitutional values and international standards on consent and gender justice.

Keywords: Marital Rape, Exception, Bharatiya Nyaya Sanhita 2023

1. INTRODUCTION

The Bharatiya Nyaya Sanhita, 2023¹, was presented as a landmark reform of India's criminal law, intended to replace the colonial Indian Penal Code and modernise the justice system. While the new code expands the definition of rape and adopts more victim-centred language, it retains the long-standing marital rape exception under Section 63². This provision continues to exclude non-consensual sexual acts by a husband with his adult wife from the offence of rape. The persistence of this exception raises serious questions about gender equality, consent and the constitutional rights of married women. Drawing on historical background, constitutional analysis, empirical evidence and comparative perspectives, this article critically examines the exception's implications and argues for its removal or significant narrowing.

¹ Bharatiya Nyaya Sanhita, No. 45 of 2023.

² Bharatiya Nyaya Sanhita, No. 45 of 2023, § 63 Exception 2.

2. HISTORICAL AND LEGISLATIVE BACKGROUND

The belief that a husband cannot rape his wife traces back to 17th-century English common law. Jurist Sir Matthew Hale stated that marriage implied a woman's permanent consent to sexual intercourse with her husband.³ This doctrine shaped colonial India's criminal law. When the British enacted the Indian Penal Code in 1860, they included it as Exception 2 to Section 375⁴. Sexual intercourse by a man with his own wife was excluded from the definition of rape, provided she was above a specified age (later raised to 18).

In traditional Indian society, this position aligned with prevailing cultural norms. Marriage was regarded as sacrosanct under personal laws influenced by Hindu, Muslim and other religious customs. Wives were expected to fulfil "conjugal duties," and individual consent within marriage received little recognition. Patriarchal values, reinforced by ancient texts such as the Manusmriti, placed strong emphasis on family honour, community pressure and the privacy of marital relations.⁵ Sexual violence inside marriage was rarely discussed openly, and the home was viewed as a private domain where state intervention was unwelcome.

Even after Independence, the colonial provision remained largely untouched for decades. Rising female literacy, urbanisation and women's rights movements gradually challenged this position. The Justice Verma Committee strongly recommended removing the marital rape exception, arguing that marriage could not licence sexual violence.⁶ The government declined to implement the recommendation, citing concerns about preserving the institution of marriage, potential misuse of the law and evidentiary difficulties.

The Bharatiya Nyaya Sanhita, 2023⁷, expanded the definition of rape and adopted more victim-centric language. Yet it retained the exception. Section 63, Exception 2 states that sexual intercourse or sexual acts by a man with his own wife (not under 18 years) do not constitute rape. This continuity reflects the continuing tension between modern constitutional values of equality and autonomy and deeply rooted traditional views on marriage.

3. LEGAL FRAMEWORK UNDER THE BHARATIYA NYAYA SANHITA, 2023

One of the most important provisions of the Bharatiya Nyaya Sanhita, 2023⁸, which replaced the erstwhile Indian Penal Code, 1860⁹, is Section 63 defining the offence of rape. The said section is broader and more

³ 1 Sir Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* 629 (1736).

⁴ Indian Penal Code, No. 45 of 1860, § 375 Exception 2.

⁵ Harleen Kaur & Aayush Tripathi, *Exception to Marital Rape in India: An Unconstitutional Intrusion into the Victim's Right to Equality and Privacy*, ILI L. Rev. 299, 301 (Winter 2022).

⁶ Justice J.S. Verma Comm., *Report of the Committee on Amendments to Criminal Law* 113 (Jan. 2013).

⁷ Bharatiya Nyaya Sanhita, No. 45 of 2023.

⁸ *Id.*

⁹ Indian Penal Code, No. 45 of 1860.

detailed than the old code, however it still contains the controversial marital rape exception. Under Section 63, a man commits rape if he engages in sexual intercourse or certain sexual acts with a woman under any of the following conditions: against her will, without her consent, or through coercion, fear, or misrepresentation.¹⁰ The law now clearly includes not just the traditional penile-vaginal penetration but also other acts such as oral sex, anal penetration, or using objects or body parts. It also covers situations where the woman is unable to consent because she is intoxicated, unconscious, or mentally incapable. The age of consent remains 18 years.

Crucially, the BNS has two main exceptions in Section 63. The first is for genuine medical procedures. The second and most debated is the marital rape exception. It states that sexual intercourse or sexual acts by a man with his own wife, when she is not under 18 years of age, do not amount to rape. This means that even if the wife clearly does not consent, the act is not legally classified as rape if the couple is married and she is an adult. There is one limited protection within marriage. Section 67 of the BNS punishes a husband for having sexual intercourse with his wife during the period of separation when they are living separately under a decree or custom.¹¹ But this does not apply to a normal, ongoing marriage.

The punishment for rape under the BNS is strict, usually imprisonment for a minimum of 10 years, which can extend to life imprisonment, and in some cases like causing death or vegetative state, even the death penalty. However, because of the marital exception, a husband forcing himself on his adult wife does not face these rape-specific punishments. He may still be charged under other sections, such as cruelty¹² or domestic violence laws, but these carry lighter penalties and do not carry the same social and legal stigma as a rape conviction. The BNS recognizes that consent is essential in most sexual relationships, but it draws a clear line at marriage. This creates an unusual situation where a woman's right to say "no" depends heavily on whether she is married to the man or not. The law treats marital and non-marital sexual violence differently, even though the physical and emotional harm can be the same.

4. CONSTITUTIONAL CRITIQUE

Violation of Right to Equality (Article 14)

The marital rape exception in Section 63 of the BNS raises serious concerns under Article 14 of the Indian Constitution, which guarantees equality before the law and equal protection of laws. The exception creates two different classes of women, married and unmarried. An unmarried woman who is forced into sexual acts can see her perpetrator charged with rape. But a married woman in the exact same situation has no such protection if the offender is her husband. Legal experts argue this classification is arbitrary and lacks any reasonable

¹⁰ Bharatiya Nyaya Sanhita, No. 45 of 2023, § 63.

¹¹ Bharatiya Nyaya Sanhita, No. 45 of 2023, § 67.

¹² Bharatiya Nyaya Sanhita, No. 45 of 2023, § 86.

basis.¹³ The harm suffered by the woman, physical, emotional, and psychological, remains the same regardless of her marital status.

Discrimination Against Women (Article 15)

Article 15 prohibits the state from discriminating against citizens on the ground of sex. The marital rape exception is widely seen as discriminatory because it is built on outdated stereotypes that treat married women as having lesser rights and being the property of their husbands. In the landmark case of *Vishaka v. State of Rajasthan*¹⁴, the Supreme Court took a strong stand against sexual harassment and emphasized the need for gender equality and protection of women's dignity in all spheres of life. The exception appears to contradict this progressive approach.

Right to Dignity, Privacy and Bodily Autonomy (Article 21)

Article 21 is the heart of fundamental rights in India. It protects the right to life and personal liberty, which the Supreme Court has interpreted broadly to include the right to live with human dignity, personal privacy, and control over one's own body. In *Justice K.S. Puttaswamy v. Union of India*¹⁵, a nine-judge bench unanimously declared that privacy and personal autonomy are intrinsic to Article 21. Forcing a woman to have sex against her will, even within marriage, directly violates these rights. Similarly, in *Independent Thought v. Union of India*¹⁶, the Court ruled that sexual intercourse with a minor wife constitutes rape, rejecting the idea that marriage provides automatic consent. Many argue the same reasoning should apply to adult married women.

Additional landmark cases support this view. In *Shakti Vahini v. Union of India*¹⁷, the Supreme Court underscored the importance of individual choice and autonomy in intimate relationships. The choice of an individual is an inextricable part of dignity, for dignity cannot be thought of where there is erosion of choice.¹⁸ In *Navtej Singh Johar v. Union of India*¹⁹, the Court decriminalized consensual homosexuality and held that laws based on societal morality rather than constitutional morality cannot stand. In *Joseph Shine v. Union of India*²⁰, the adultery law was struck down because it treated women as the property of their husbands and violated their dignity and equality. It was observed that “the Court cannot conceive of women still being treated as a property of men...”.²¹ These judgments collectively highlight that patriarchal assumptions about marriage have no place in modern constitutional law.

¹³ Harleen Kaur & Aayush Tripathi, *supra* note 5, at 306-308.

¹⁴ *Vishaka v. State of Rajasthan*, (1997) 6 S.C.C. 241.

¹⁵ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 S.C.C. 1.

¹⁶ *Independent Thought v. Union of India*, (2017) 10 S.C.C. 800.

¹⁷ *Shakti Vahini v. Union of India*, (2018) 7 S.C.C. 192.

¹⁸ *Id.* at ¶ 38.

¹⁹ *Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C. 1.

²⁰ *Joseph Shine v. Union of India*, (2019) 3 S.C.C. 39.

²¹ *Id.* at ¶ 5.

The government has defended the exception by arguing that it protects the sanctity of marriage and that other provisions, such as cruelty under Section 86 of BNS and the Protection of Women from Domestic Violence Act, 2005²², offer sufficient remedies. Critics counter that these alternatives are weaker, carry less stigma for the offender, and often fail to deliver real justice due to social pressures. The constitutional critique boils down to the fact that marital rape exception fails the tests of equality, non-discrimination, and dignity established through decades of progressive Supreme Court judgments. It is time for the law to catch up with constitutional values.

5. SOCIO-LEGAL IMPACTS AND EMPIRICAL REALITIES

Prevalence and Scale of the Issue

Recent national data shows that 29% of married Indian women have faced spousal violence, which includes sexual violence. The National Family Health Survey (NFHS-5) reveals the widespread nature of this problem.²³ However, because the BNS does not recognize marital rape when the wife is over 18, most cases are not treated as rape in official records. This leads to massive underreporting, with many experts estimating that over 90% of incidents never reach the police.

Effects on Victims

Women who experience forced sexual acts in marriage often suffer from physical injuries, unwanted pregnancies, and higher risks of infections. Many of the women face depression, anxiety, panic attacks and long-lasting trauma. The lack of legal recognition makes the situation worse and harder, as victims do not receive the validation or support that comes with acknowledging the act as rape.²⁴

Economic and Social Barriers

Most married women in India depend financially on their husbands, which makes leaving an abusive relationship very difficult. Many of the women feel bound by the traditional institution of marriage. Socially, victims often face blame and pressure from family and community to “adjust” for the sake of marriage.²⁵ These challenges are even greater for women from rural areas, lower castes, tribal communities, and minority groups, where traditional norms are stronger and support systems are weaker.

Challenges in the Legal System

²² Protection of Women from Domestic Violence Act, No. 43 of 2005.

²³ Int'l Inst. for Population Scis. (IIPS) & Ministry of Health & Family Welfare (India), *National Family Health Survey (NFHS-5), 2019–21: India*, Volume I 643 (Mar. 2022), <https://dhsprogram.com/pubs/pdf/FR375/FR375.pdf> (reporting that 29% of ever-married women aged 18–49 experienced spousal physical violence and 6% experienced spousal sexual violence).

²⁴ Dr. Yogesh Kumar, *Marital Rape in India – A Socio-Legal Analysis*, 9 Int'l J. Educ. & Sci. Res. Rev. 1 (May–June 2022).

²⁵ *Id.* at 8.

Victims are compelled to turn to weaker laws, such as provisions on cruelty²⁶ or the Protection of Women from Domestic Violence Act, 2005²⁷. These options provide less protection and carry lighter consequences for the husband. Police and courts frequently view marital issues as private matters, leading to low rates of complaints being registered and even fewer convictions.

Wider Impact on Society

The exception strengthens old patriarchal ideas that a wife has no right to refuse sexual intercourse with her husband. This affects not just individual women but also how society views marriage and gender roles. Children growing up in homes where such violence occurs may see it as normal, passing the problem to the next generation. There is also a clear urban-rural divide where educated women in cities may find ways to resist, while women in rural and conservative places have fewer options.

Data Limitations and Policy Gaps

Because marital rape is not separately recognized, collecting reliable data is difficult. This affects the government's ability to understand the problem and create effective solutions. The fear of family breakdown, social stigma, and lack of awareness keeps many women silent.

Therefore, the socio-legal impacts of the marital rape exception are deep and lasting. It denies justice to many women and weakens India's progress toward genuine gender equality.

6. COMPARATIVE PERSPECTIVES

A clear international shift has emerged against the marital rape exception. Most developed common-law jurisdictions have abolished it, treating non-consensual sex as rape irrespective of marriage. This reflects a consensus that consent cannot be irrevocably implied by marriage and that bodily autonomy applies equally to married women.

In the United Kingdom, the House of Lords in *R v. R* (1991)²⁸ rejected the common-law marital exemption, holding that a husband could be prosecuted for raping his wife. The Sexual Offences Act 2003²⁹ later confirmed that relationship status is no defence. Canada removed the exemption in 1983 through amendments to its Criminal Code, reclassifying rape as sexual assault applicable to spouses. Australia began reform in South Australia with the Criminal Law Consolidation Act Amendment Act 1976³⁰, which removed the presumption of

²⁶ Bharatiya Nyaya Sanhita, No. 45 of 2023, § 86.

²⁷ Protection of Women from Domestic Violence Act, No. 43 of 2005.

²⁸ *R. v. R*, [1992] 1 A.C. 599 (H.L. 1991).

²⁹ Sexual Offences Act 2003, c. 42 (U.K.).

³⁰ Criminal Law Consolidation Act Amendment Act 1976 (S. Austl.).

consent and adopted full criminalisation across all states and territories followed by the early 1990s. Within the region, Nepal criminalised marital rape in 2006 under its criminal code³¹ and through Supreme Court rulings, recognising forced sex within marriage as an offence. These reforms were accompanied by training for police and prosecutors and support services for victims.

These jurisdictions show that criminalisation does not dismantle the institution of marriage. Instead, it strengthens equality by affirming that consent remains essential. Concerns about misuse have been addressed through evidentiary standards and prosecutorial guidelines rather than blanket immunity. India can draw on these models to narrow or remove the BNS exception while introducing safeguards that balance rights and practical enforcement challenges.

Therefore, comparative law demonstrates that recognising marital rape is now an established international standard. Aligning the BNS with these reforms would bring Indian criminal law closer to global human-rights norms and constitutional principles of dignity and equality.

7. ARGUMENTS FOR AND AGAINST CRIMINALISATION

Arguments in Favour of Criminalisation:-

Equality and Consent: Marriage does not erase a woman's right to consent. Criminalising marital rape would bring the law in line with the constitutional principles of equality (Article 14) and dignity (Article 21). It treats married women the same as all other women.

Harmful to women: Forced sex causes serious physical and psychological harm. Recognising it as rape provides stronger legal protection and greater social condemnation than existing cruelty or domestic-violence provisions.

International Standards: Most countries, including the UK, Canada, Australia and Nepal, have already removed the exception. India's retention of the exception under Section 63 of the BNS places it out of step with global human-rights norms.

Deterrence and Social Change: Clear criminalisation can discourage violence and gradually shift social attitudes that currently treat forced sex within marriage as acceptable.³²

Arguments Against Criminalisation:-

Sanctity of Marriage: Critics argue that bringing the criminal law into the private sphere of marriage could damage family stability and encourage litigation that harms both spouses and children.

³¹ National Penal (Criminal) Code Act, 2017 (Nepal).

³² Raveena Rao Kallakuru & Pradyumna Soni, *Criminalisation of Marital Rape in India: Understanding its Constitutional, Cultural and Legal Impact*, 11 NUJS L. Rev. 1 (2018).

Risk of Misuse: There is concern that the law could be misused in matrimonial disputes, especially in cases involving property, custody or divorce, leading to false or exaggerated complaints.

Evidentiary Difficulties: Proving lack of consent in the intimate setting of marriage is often challenging. The absence of witnesses and the complex dynamics of long-term relationships make investigation and prosecution difficult.³³

Existing Remedies: Opponents point out that other laws already address marital violence, including Section 86 of the BNS (cruelty) and the Protection of Women from Domestic Violence Act, 2005. They argue these are sufficient without creating a new offence.

While concerns about misuse and family impact are valid and must be carefully addressed through procedural safeguards, the arguments for criminalisation rest on stronger constitutional and human-rights foundations. The experience of other jurisdictions shows that well-designed reforms can protect victims without destroying the institution of marriage.

8. REFORM PROPOSALS

Legislative Changes

The most direct step is to remove Exception 2 from Section 63 of the BNS³⁴. This would make non-consensual sexual acts within marriage a criminal offence, treating married women on the same footing as others. Alternatively, the exception could be narrowed to apply only in limited situations, such as when the spouses are living separately under a court order. Clear definitions of consent and specific guidelines for investigation would help reduce fears of misuse.

Complementary Measures

Legal reform alone is not enough. Police and judicial officers need specialised training to handle marital sexual violence sensitively. Support services, including counselling, legal aid, and temporary shelters, should be strengthened so that victims feel safe to come forward.³⁵ Public awareness campaigns can also help change social attitudes that currently view forced sex in marriage as a private matter.

Balanced Approach

Any reform should include safeguards against false complaints, such as strict scrutiny of evidence and penalties for proven misuse.³⁶ Graduated punishments could distinguish between different levels of severity. These steps,

³³ Badapbiang T. Dakhar, *Protecting India's Women: The Need for Criminalization of Marital Rape and the Criminal Law (Amendment) Act, 2013*, 1 Alexis J. Pub. Pol'y & L. 38 (2014).

³⁴ Bharatiya Nyaya Sanhita, No. 45 of 2023, § 63 Exception 2.

³⁵ Sakshi Kanodia & Ranjabati Ray, *Why Penalize Marital Rape*, 21 IOSR J. Human. & Soc. Sci. 49 (2016).

³⁶ Anne M. Dailey, *To Have and to Hold: The Marital Rape Exception*, 99 Harv. L. Rev. 1255, 1256 (1986).

drawn from successful models in other countries, would protect victims while respecting genuine concerns about family stability and evidentiary challenges.

9. CONCLUSION

The marital rape exception under Section 63 of the Bharatiya Nyaya Sanhita, 2023 remains a significant shortcoming in India's progressive criminal law reform. By retaining a colonial-era immunity, the law continues to treat married women differently from others and undermines the constitutional guarantees of equality, dignity, and bodily autonomy. Empirical evidence shows that spousal sexual violence is widespread and yet victims lack adequate legal recognition and protection. Comparative experience from the United Kingdom, Canada, Australia and Nepal demonstrates that criminalising marital rape is both workable and consistent with modern human-rights standards. The concerns about misuse and family stability deserve careful attention, but they can be addressed through clear definitions, procedural safeguards and support systems rather than by preserving a blanket exception. Removing or substantially narrowing the exception would bring Indian criminal law into closer alignment with constitutional values and international norms. Legislative action, supported by judicial scrutiny of pending petitions, is now essential to close this long-standing gap and ensure that consent remains central in every relationship.