
MARITAL RAPE UNDER THE BHARATIYA NYAYA SANHITA, 2023: A MISSED OPPORTUNITY FOR GENDER JUSTICE IN INDIA

Mr. Kartikey Mishra, Student, LLM, NALSAR University of Law, Hyderabad

Ms. Namrata Mishra, Student, 4th Year B.A. LL.B. Jiwaji University, Gwalior

ABSTRACT

The Bharatiya Nyaya Sanhita, 2023 (BNS) was introduced with the objective of modernising India's criminal law and replacing the colonial Indian Penal Code, 1860. However, Section 63 of the BNS continues to preserve the marital-rape exception, stipulating that sexual intercourse by a man with his own wife, provided she is not under eighteen years of age, does not amount to rape. This paper argues that the retention of this exception represents a profound failure of legislative reform and a continuation of patriarchal legal structures that deny women equal protection of the law. Drawing upon constitutional jurisprudence, feminist legal theory, and empirical evidence, the paper critically analyses how this exemption undermines the principles of autonomy, dignity, and equality under Articles 14, 15 and 21 of the Constitution of India. It examines the judicial evolution of the issue from *Independent Thought v Union of India* (2017) and *Justice K.S. Puttaswamy v Union of India* (2017) to the pending constitutional challenge in *RIT Foundation v Union of India* (2022), currently before the Supreme Court. According to the National Family Health Survey-5 (2019-21), nearly thirty per cent of married women between ages eighteen and forty-nine have experienced physical or sexual violence, yet marital sexual assault remains legally invisible. Through a feminist reading of consent and bodily integrity, this paper contends that by maintaining the exception under Section 63, the BNS has missed a historic opportunity to affirm gender justice in India.

Keywords - Marital Rape, Bhartiya Nyaya Sanhita, Consent, Patriarchal Legal Structures, Feminist Legal Theory

HISTORICAL AND LEGAL FOUNDATIONS OF THE MARITAL-RAPE EXCEPTION

1.1 Historical Roots of the Exception

The marital-rape exception in Indian law originates from nineteenth-century colonial jurisprudence. Section 375 of the Indian Penal Code, 1860, which defined rape, was modelled on English common law and contained an exception that excluded sexual intercourse by a man with his wife if she was above a prescribed age. This exception derived from the pronouncement of Sir Matthew Hale in *The History of the Pleas of the Crown* (1736), where he stated that “*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 herself up in this kind unto her husband.*”¹ The doctrine rested on the patriarchal assumption that marriage implied permanent and irrevocable consent. The colonial state transplanted this fiction into Indian law without consideration for women’s autonomy or consent. For decades, the provision went unchallenged, reflecting the broader social norm that treated marriage as a private sphere immune from state scrutiny. The notion that a wife’s consent was subsumed by marriage became a legal and cultural truth that shaped Indian criminal law for more than a century.

1.2 From Section 375 of the IPC to Section 63 of the Bharatiya Nyaya Sanhita

The Bharatiya Nyaya Sanhita, 2023, was enacted to replace the IPC and align India’s criminal law with contemporary constitutional values. Section 63 of the BNS defines rape in substantially similar language to Section 375 of the IPC but retains the exception for marital intercourse. The provision reads:

“A man is said to commit rape if he has sexual intercourse with a woman under any of the following seven descriptions... provided that sexual intercourse by a man with his own wife, the wife not being under eighteen years of age, is not rape.”

Although the provision updates the age threshold in line with the legal age of marriage, it continues to shield a husband from prosecution for non-consensual intercourse. This legislative continuity reveals a conscious decision to preserve the marital-rape exception despite evolving constitutional and international standards. The reform, therefore, remains largely cosmetic, leaving intact a doctrine that denies women legal recognition as autonomous agents within marriage.

¹Sir Matthew Hale, *The History of the Pleas of the Crown* (1736) 1 Hale PC 629.

1.3 Judicial and Constitutional Developments

Indian constitutional jurisprudence has progressively expanded the interpretation of personal liberty and dignity. In *Justice K.S. Puttaswamy v Union of India*² the Supreme Court held that the right to privacy encompasses decisional autonomy, bodily integrity, and sexual freedom. Similarly, in *Independent Thought v Union of India*³ the Court struck down the marital-rape exception in Section 375 to the extent that it permitted sexual intercourse with a wife below eighteen years, holding it to be arbitrary and violative of Article 14. However, the Court refrained from extending its reasoning to adult women, leaving the larger issue unresolved. Currently, a batch of petitions including *RIT Foundation v Union of India*⁴ and *All India Democratic Women's Association v Union of India* are pending before the Supreme Court, challenging the constitutional validity of the marital-rape exception. The petitioners argue that the exemption violates Articles 14, 15, 19, and 21 of the Constitution by denying married women equal protection and bodily autonomy. These cases mark a pivotal moment in the constitutional evolution of women's rights in India.

1.4 The Disjunction between Law and Lived Reality

Despite constitutional guarantees, the continued exemption of marital rape highlights a deep disconnection between law and lived experience. According to the National Family Health Survey–5 (2019–21), thirty per cent of married women in India have faced physical or sexual violence, and six per cent have specifically experienced sexual violence from their partners.⁵ Yet, due to the legal immunity afforded to husbands, these acts remain outside the purview of criminal justice. The BNS, by maintaining Section 63's exception, perpetuates a structural form of inequality that privileges the institution of marriage over the rights of women. It effectively normalises sexual violence within marriage and undermines the constitutional promise of equality and dignity. The persistence of this exception thus reflects not merely legislative inertia but an enduring patriarchal conception of marriage that continues to shape Indian criminal law.

²*Justice K.S. Puttaswamy v Union of India* (2017) 10 SCC 1

³*Independent Thought v Union of India* (2017) 10 SCC 800.

⁴*RIT Foundation v Union of India* WP (C) No 382 of 2019 (Supreme Court, pending).

⁵Ministry of Health and Family Welfare, *National Family Health Survey–5 (2019–21): India Report* (2022).

JUDICIAL RESPONSES AND THE CONSTITUTIONAL CHALLENGE TO THE MARITAL-RAPE EXCEPTION

2.1 Divergent High Court Rulings and the Fragmented Jurisprudence

The Indian judiciary has long faced the question of whether marital rape should be recognised as an offence under existing law. However, judicial pronouncements have been divided, reflecting the continuing tension between tradition and constitutional morality. The most significant development came from the *Delhi High Court* in **RIT Foundation v Union of India** (2022), where a two-judge Bench delivered a split verdict. Justice Rajiv Shakdher held that the marital-rape exception violates Articles 14, 15, and 21 of the Constitution by discriminating against married women and by treating their consent as legally irrelevant. He observed that marriage cannot extinguish a woman's autonomy or her right to bodily integrity, and that *"a husband's expectation of sexual access cannot translate into an unqualified legal right."*

In contrast, Justice C. Hari Shankar upheld the constitutionality of the exception, reasoning that the legislature, and not the judiciary, is the appropriate forum to determine such a moral and social question. He maintained that criminalising marital rape could disrupt the *"sacred institution of marriage"* and have unintended social consequences. The case is now pending before the Supreme Court, where a constitution bench will examine the validity of Section 63 of the *Bharatiya Nyaya Sanhita, 2023* in light of these conflicting views.

The divergence between these two judgments illustrates a deeper conflict within Indian legal thought between the traditional conception of marriage as a private, sacramental relationship and the modern constitutional understanding of marriage as a partnership of equals.

2.2 The Supreme Court's Expanding Recognition of Sexual Autonomy

Although the Supreme Court has not yet directly ruled on marital rape for adult women, its broader jurisprudence on sexual autonomy and privacy lays the groundwork for such recognition. In *Justice K.S. Puttaswamy v Union of India* the Court recognised privacy as a fundamental right intrinsic to dignity and autonomy. This reasoning necessarily extends to a woman's right to refuse sexual activity, irrespective of marital status. Similarly, in *Joseph Shine v Union of India* which struck down the offence of adultery under Section 497 IPC, the Court held that a woman cannot be treated as the property of her husband and emphasised that marriage does not extinguish individual constitutional rights.

These decisions collectively signal a jurisprudential shift from patriarchal notions of control toward recognising consent as central to personal liberty. The logic of *Joseph Shine* and *Puttaswamy* implies that the marital-rape exception cannot coexist with the constitutional guarantee of equality and dignity. Yet, the absence of a definitive ruling on this specific issue continues to leave married women without protection against sexual violence from their partners.

2.3 International Human Rights Obligations

India's continued retention of the marital-rape exception also places it in conflict with its international commitments. Under the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), to which India is a signatory, states are obligated to ensure that women are protected from all forms of violence, including those occurring within marriage.⁶ The CEDAW Committee has repeatedly urged India to criminalise marital rape, most notably in its Concluding Observations of 2014 and 2023. Similar recommendations have been made by the United Nations Human Rights Council during India's Universal Periodic Review. The persistence of the exception therefore undermines India's compliance with its treaty obligations and its own constitutional promise of gender equality.

2.4 Feminist Legal Critique and the Constitutional Vision of Equality

From a feminist perspective, the marital-rape exception represents a legal embodiment of patriarchy. By presuming perpetual consent within marriage, it denies women the agency to define the boundaries of their own bodies. Feminist scholars have described this as a form of "legalised sexual servitude," where the wife's personhood is subordinated to the husband's conjugal rights. This approach is inconsistent with the constitutional conception of equality, which demands not merely formal sameness but substantive recognition of women's lived experiences and structural disadvantages. The framers of the Constitution envisioned equality as a transformative ideal, seeking to dismantle hierarchies entrenched in custom and religion. Retaining the marital-rape exception within the BNS therefore contradicts this constitutional ethos. It privileges a patriarchal understanding of marriage over the individual's right to consent and bodily autonomy, effectively excluding married women from the protection of criminal law.

⁶Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13

Hence, the pending constitutional challenge before the Supreme Court presents a historic opportunity to reconcile India's criminal law with its constitutional values. If the Court recognises that the marital-rape exception violates Articles 14, 15, and 21, it would align Indian jurisprudence with global human-rights standards and reaffirm the equality and dignity of all women. However, lasting change will also require legislative initiative. Parliament must act to amend Section 63 of the BNS, recognising that true reform lies not in preserving social comfort but in upholding constitutional morality. Only then can the promise of gender justice envisioned by the Constitution be fulfilled.

CONSTITUTIONAL MORALITY, FEMINIST JURISPRUDENCE, AND THE QUESTION OF CONSENT

3.1 Constitutional Morality and the Role of the State

The Indian Constitution enshrines not only political democracy but also a vision of social transformation. In *Navtej Singh Johar v Union of India*, the Supreme Court held that constitutional morality must prevail over social morality and that individual autonomy, dignity, and privacy are fundamental to human existence. The marital-rape exception, however, continues to privilege social morality rooted in patriarchy over the constitutional morality of equality. It assumes that the state's role is to preserve the sanctity of marriage rather than protect the bodily integrity of women within it. Constitutional morality requires that personal relationships, including marriage, conform to the principles of justice, liberty, and equality. By refusing to criminalise non-consensual intercourse within marriage, Section 63 of the *Bharatiya Nyaya Sanhita, 2023* contradicts this moral framework. It denies women the equal protection of the law and reinforces a hierarchy where the husband's conjugal rights supersede the wife's right to autonomy. The duty of the state under Article 15(3) to make special provisions for women includes the responsibility to protect them from all forms of violence, including those perpetrated within marriage.

3.2 Feminist Jurisprudence and the Myth of Marital Consent

Feminist legal theorists have long critiqued the notion of "*implied consent*" within marriage. Catharine MacKinnon argues that the law often mirrors male perspectives, defining women's subordination as natural rather than coercive.⁷ Similarly, Carol Smart observes that legal discourse has historically transformed women's bodies into sites of regulation rather than

⁷Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989) 161.

autonomy. In the Indian context, the marital-rape exception epitomises this dynamic: it institutionalises the idea that a wife's consent is irrevocable once marriage occurs. From a feminist standpoint, the law's refusal to recognise marital rape functions as a tool of control. It reinforces a patriarchal structure in which the husband's access to his wife's body is legally guaranteed, while her autonomy is systematically denied. The assumption that marriage legitimises sexual access reduces women to instruments of conjugal fulfilment. This understanding is not merely outdated but incompatible with modern constitutionalism, which regards consent as continuous, revocable, and central to personhood.

3.3 The Constitutional Meaning of Consent

The idea of consent is not merely factual but normative. Under the Constitution, consent must reflect genuine choice, free from coercion or subordination. The Supreme Court in *State of Karnataka v Krishnappa* recognised that every woman has an inalienable right to bodily integrity and sexual autonomy. Extending this reasoning, it is illogical to assume that a married woman loses her right to refuse sexual intercourse merely because of her marital status. The jurisprudence of consent also finds resonance in *Suchita Srivastava v Chandigarh Administration*, where the Court affirmed that a woman's reproductive and sexual decisions fall within the ambit of personal liberty under Article 21. This principle underscores that the right to make decisions regarding one's body is fundamental and cannot be overridden by marital ties. Thus, the marital-rape exception represents an anomaly within a legal system that otherwise upholds autonomy and dignity as inviolable constitutional values.

3.4 Equality, Dignity, and the Transformative Promise of the Constitution

The Indian Constitution envisages equality not as a static ideal but as a transformative one that dismantles entrenched hierarchies. As Justice D.Y. Chandrachud observed in *Navtej Singh Johar*, equality is not merely about equal treatment but about recognising and remedying historical subordination. The marital-rape exception violates this transformative vision by perpetuating the patriarchal notion that a woman's autonomy is secondary to her husband's authority. Dignity, too, is central to the constitutional project. In *Francis Coralie Mullin v Union Territory of Delhi*, the Supreme Court held that the right to life includes the right to live with dignity. The denial of legal recourse to a woman who faces sexual violence within marriage strips her of dignity, forcing her to endure violation without recognition or

remedy. By retaining the marital-rape exception, the BNS denies married women the equal dignity guaranteed to all individuals under Article 21.

COMPARATIVE AND INTERNATIONAL PERSPECTIVES ON MARITAL RAPE

4.1 The Evolution of Legal Recognition in Common Law Jurisdictions

The marital-rape exception, once deeply embedded in the common law, has been systematically dismantled across the world over the past few decades. The landmark English case of *R v R* (1992) marked a historic turning point when the House of Lords held that a husband could be guilty of raping his wife. The Court declared that the fiction of irrevocable consent was “*anachronistic and offensive*,” recognising that marriage does not extinguish a woman’s right to refuse sexual intercourse. This judgment reflected the shift in legal understanding from marriage as a contract of possession to one of mutual respect and autonomy.

Similarly, in the United States, all fifty states have criminalised marital rape, though differences remain regarding evidentiary thresholds and sentencing. The transformation began with *People v Liberta* (1984), where the New York Court of Appeals struck down the state’s marital-rape exemption as unconstitutional. The Court observed that the exemption violated the Equal Protection Clause of the Fourteenth Amendment by arbitrarily distinguishing between married and unmarried women. These developments in common law jurisdictions demonstrate an emerging global consensus that marital rape constitutes a grave violation of human rights and should not be shielded by marital status.

4.2 Regional Precedents: Lessons from South Asia

Within South Asia, countries with similar socio-legal contexts have begun to recognise marital rape as a punishable offence. Nepal’s *Eleventh Amendment to the Country Code* (2002) explicitly criminalised marital rape, prescribing imprisonment of up to six months. The Supreme Court of Nepal, in *Meera Dhungana v Nepal Government*, upheld the amendment, emphasising that marriage cannot justify violence and that the state has a constitutional duty to protect women’s dignity. Bangladesh, by contrast, continues to retain the exception under Section 375 of its Penal Code, though civil society advocacy and law commission reports have repeatedly urged reform. Sri Lanka’s Penal Code (Amendment) Act of 1995 made partial progress by criminalising marital rape in cases where judicial separation

has been granted. These examples reveal the varied pace of reform within the region but also show that India now stands among a diminishing minority of nations where marital rape remains fully exempt from criminal sanction.

4.3 Comparative Constitutional Insights

Constitutional courts around the world have interpreted equality and dignity as extending to protection from sexual violence within marriage. The *Constitutional Court of South Africa*, in *S v Baloyi* (2000), held that domestic and sexual violence in marriage constitute violations of equality, dignity, and bodily integrity, placing positive obligations on the state to protect victims. The Court noted that privacy cannot be invoked to shield violence, as constitutional rights operate equally within the domestic sphere. These comparative precedents underscore that recognising marital rape as an offence does not undermine the institution of marriage; rather, it affirms marriage as a relationship of mutual respect and equality. The global movement toward criminalisation reflects an understanding that human dignity is indivisible and that marriage cannot serve as a defence to sexual coercion.

4.4 Implications for India

India's continued retention of the marital-rape exception under Section 63 of the *Bharatiya Nyaya Sanhita, 2023* isolates it from the evolving global and regional standards of justice. The comparative experience demonstrates that criminalisation does not destabilise family structures but strengthens them by ensuring that consent and equality form their foundation. The Indian judiciary has already embraced these values in cases concerning privacy, sexual orientation, and reproductive autonomy. Extending them to marital rape would therefore not constitute judicial activism but a faithful application of constitutional principles in harmony with international law. Ultimately, India must recognise that the legitimacy of its criminal law depends not on its continuity with colonial or cultural traditions, but on its ability to safeguard the dignity and autonomy of all citizens. The reform of Section 63 is thus not merely a legal necessity but a moral one, aligning India's constitutional practice with the universal principles of justice and equality.

CONCLUSION AND THE WAY FORWARD

The debate surrounding marital rape in India transcends legal semantics; it is a reflection of how the law perceives women's autonomy within the most intimate of relationships. Section 63 of the *Bharatiya Nyaya Sanhita, 2023*, by continuing to exclude non-consensual intercourse within marriage from the definition of rape, perpetuates the colonial assumption that marriage extinguishes a woman's right to refuse. This not only contradicts constitutional guarantees of equality and dignity but also isolates India from the evolving global consensus that consent remains central to all sexual relations.

The judiciary has in recent years demonstrated a willingness to expand the frontiers of personal liberty. Decisions such as *Justice K.S. Puttaswamy v Union of India* (2017) and *Joseph Shine v Union of India* (2018) have reaffirmed the centrality of consent, privacy, and sexual autonomy to human dignity. Extending these principles to the marital sphere is the logical culmination of India's constitutional vision. Legislative reform must therefore move beyond symbolic recognition and ensure substantive protection through clear definitions, victim-support mechanisms, and gender-sensitive enforcement. Criminalisation of marital rape will not weaken the institution of marriage; rather, it will strengthen it by grounding it in mutual respect and equality. True reform lies not merely in the amendment of statutes but in the transformation of social attitudes that normalise coercion under the guise of marital obligation.

As the feminist scholar Catharine MacKinnon once observed,

“The law sees and treats women the way men see and treat women.”

India's future legal imagination must, therefore, strive to see women not as dependents within marriage but as equal bearers of rights, capable of choice, deserving of dignity, and entitled to justice.