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WHEN CONSENT ENDS AT ‘I DO’: A STUDY OF MARITAL RAPE

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ABSTRACT

This paper, “*When Consent Ends at ‘I Do’: A Study of Marital Rape*” critically explores the lack of legal recognition for marital rape in India, especially under Exception 2 of Section 63 in the *Bharatiya Nyaya Sanhita, 2023*. Despite recent overhauls in criminal law, this provision still grants legal immunity to husbands for non-consensual sexual acts within marriage. The paper examines how this exemption contravenes constitutional protections—specifically Articles 14 and 21—which guarantee equality and bodily autonomy. It reviews relevant case law, civil recourse under the *Protection of Women from Domestic Violence Act, 2005*, and the evidentiary framework under the *Bharatiya Sakshya Adhinyam, 2023*. Additionally, it offers a comparative analysis with legal systems in the UK, Canada, and South Africa, proposing urgent reforms, including the criminalisation of marital rape, consent-based legal definitions, and integration of civil and criminal remedies. The study calls for aligning Indian criminal law with constitutional morality and international human rights standards to ensure gender justice in marriage.

KEYWORDS

Marital rape, Bharatiya Nyaya Sanhita, Constitutional rights, Gender justice

INTRODUCTION

A. Background and Purpose

The offence of rape under Section 63 of the “Bharatiya Nyaya Sanhita, 2023” criminalises sexual acts committed without consent. However, Exception 2 to this section explicitly states 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.” This immunity to husbands contradicts the spirit of personal

autonomy and dignity embodied in the new criminal framework and the Constitution of India.¹ The continued presence of this exception starkly conflicts with the inclusive language and gender-sensitive intention of the BNS as a progressive criminal code.

Despite India's legal modernization under the BNS, the doctrine of implied consent within marriage still dominates. This idea is historically rooted in colonial interpretations of marriage as an irrevocable contract. Yet, in present jurisprudence, no individual married or otherwise should be stripped of their right to bodily autonomy. The language of Section 63 criminalizes sexual acts without consent, but Exception 2 essentially nullifies that protection within the marital sphere.²

This contradiction requires immediate scholarly and legal attention. Moreover, Section 2(1)(d) of the "Bharatiya Nagarik Suraksha Sanhita, 2023" defines a "complaint" to include any allegation made to a Magistrate regarding the commission of an offence. However, because of the immunity under the BNS, no cognizance can be taken by a Magistrate if the accused is the woman's husband, unless the victim is below eighteen. This procedural blockade entrenches a serious gap in access to justice for married survivors of sexual violence.³

The "Bharatiya Sakshya Adhinyam, 2023", under Section 22, continues to uphold the importance of consent and conduct as evidence. However, where the law presumes consent merely by virtue of marriage, any opportunity to present evidence against a non-consensual sexual act becomes redundant. Survivors are not allowed the evidentiary platform they are otherwise entitled to under this new law.⁴

B. Understanding Marital Rape

Marital rape refers to forced or coerced sexual acts by one spouse—usually the husband—without the other's consent. This challenges the outdated belief that marriage implies perpetual sexual consent.⁵ While Indian law criminalizes non-consensual sex generally, it carves out an exception for married couples, thereby creating a legal contradiction: consent is central to defining rape but not recognized in marital relationships.⁶

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

² Id.

³ Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, § 2(1)(d) (India).

⁴ Bharatiya Sakshya Adhinyam, No. 47 of 2023, § 22 (India).

⁵ BLACK'S LAW DICTIONARY 1270 (10th ed. 2014).

⁶ Bharatiya Nyaya Sanhita, No. 45 of 2023, § 63 Exception 2 (India).

Globally, organizations like WHO and the UN recognize marital rape as a human rights violation.⁷ However, Indian law continues to ignore it, offering immunity to husbands and denying legal acknowledgment to such abuse.

This issue also infringes on constitutional rights under Articles 14, 19(1)(a), and 21—violating equality, the right to express refusal, and the right to dignity and life. Judicial precedents like *Suchita Srivastava v. Chandigarh Administration* affirm that reproductive and sexual autonomy is a part of personal liberty under Article 21.⁸ Still, under the current framework, survivors cannot present evidence if the law doesn't recognize the act as a crime.

The “Bharatiya Sakshya Adhinyam, 2023” under Section 22, emphasizes the probative value of conduct and statements in cases involving consent. However, in cases where the law presumes that a wife cannot legally refuse sexual contact, the evidentiary framework becomes redundant. No statement, however compelling, can establish the crime if the act is not legally recognized as an offence to begin with.⁹

In the comparative legal landscape, jurisdictions such as the United Kingdom, Canada, and South Africa have criminalized marital rape by abolishing similar exceptions. The UK's landmark case *R v. R*, [1991] UKHL 12, recognized that a husband could be prosecuted for raping his wife, marking the end of the common law marital rape exemption.¹⁰

C. Research Objectives

1. To assess the constitutional legitimacy of the marital rape exemption in Section 63 of the *Bharatiya Nyaya Sanhita, 2023*, in the context of Articles 14, 19, and 21.
2. To analyze the sufficiency of civil legal remedies under the *Protection of Women from Domestic Violence Act, 2005* in addressing marital sexual abuse.
3. To study international legal approaches to marital rape and suggest reforms for Indian criminal law in line with global human rights standards.

⁷ “United Nations General Assembly, Declaration on the Elimination of Violence against Women, A/RES/48/104 (Dec. 20, 1993).”

⁸ “*Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1.”

⁹ *Bharatiya Sakshya Adhinyam*, No. 47 of 2023, § 22 (India).

¹⁰ “*R v. R*, [1991] UKHL 12 (UK House of Lords).”

D. Research Questions

1. Does the marital rape exception violate the constitutional rights to equality, dignity, and personal liberty under Articles 14 and 21?
2. Are civil remedies under the Domestic Violence Act effective in delivering justice to survivors in the absence of criminal accountability?
3. What can India learn from jurisdictions like the UK, Canada, and South Africa regarding the criminalisation of marital rape, and how can these insights inform Indian legal reforms?

LEGAL AND SOCIAL CONTEXT

Under current Indian criminal law, sexual acts without consent between a husband and wife—if the wife is 18 or older—are not considered rape. This is due to Exception 2 of Section 63 in the *Bharatiya Nyaya Sanhita, 2023*, which grants complete legal protection to husbands. Despite the modernization of criminal law, this outdated exception remains intact, rooted in colonial-era British common law that wrongly presumed marriage as permanent consent.¹¹ Ironically, the UK abolished this notion in the landmark case *R v. R* (1991).¹²

Although Indian judiciary has expanded the interpretation of personal liberty and dignity under Article 21 of the Constitution, it has hesitated to confront marital rape directly. In *Independent Thought v. Union of India*, the Supreme Court ruled that sexual relations with a minor wife qualify as rape, thus narrowing the marital exception—but this protection does not extend to adult women.¹³ This selective protection contradicts Article 14's guarantee of equal rights and Article 15(3)'s mandate for the State to enact laws in favor of women.¹⁴

Procedurally, the *Bharatiya Nagarik Suraksha Sanhita, 2023* oversees criminal proceedings. Yet, the immunity in substantive law means that police cannot register an FIR for rape within marriage unless the woman is a minor. This legal gap reinforces the flawed societal belief that a wife cannot refuse sex within marriage.¹⁵

¹¹ Id at 7.

¹² Id at 12.

¹³ “*Independent Thought v. Union of India*, (2017) 10 SCC 800.”

¹⁴ INDIA CONST. arts. 14, 15(3), 21

¹⁵ *Bharatiya Nagarik Suraksha Sanhita*, No. 46 of 2023, ch. XIII (India).

Culturally, the issue is compounded by deep-rooted silence and stigma around sexual violence in marriage. Patriarchal values continue to treat a wife's body as her husband's entitlement. Many women remain silent due to social shame, lack of legal support, and fear of being ostracized. According to *National Family Health Survey (NFHS-5)* data, a notable proportion of married women endure sexual violence, but very few report these incidents.¹⁶

While Section 22 of the *Bharatiya Sakshya Adhinyam, 2023* governs evidentiary rules concerning consent, these provisions have little utility in marital rape cases. Since the act isn't legally recognized as a crime, any physical resistance or statement by the wife becomes irrelevant in court.¹⁷ This legal void fosters systemic injustice and further traumatizes survivors.

The contradiction becomes more glaring when viewed alongside the *Protection of Women from Domestic Violence Act, 2005*, which explicitly includes sexual abuse within marriage as a form of domestic violence. Although this law acknowledges the harm, it lacks a parallel criminal provision, leaving survivors without full legal recourse.¹⁸

MARITAL RAPE IN THE INDIAN LEGAL FRAMEWORK

A. Provisions under the *Bharatiya Nyaya Sanhita* and the Marital Rape Exception

Section 63 of the *Bharatiya Nyaya Sanhita, 2023* outlines the offence of rape in broad and inclusive terms, covering both penetrative and non-penetrative acts carried out through force, coercion, deception, or in the absence of valid consent. Consent is central to this definition—its absence turns a sexual act into a punishable crime.

However, this principle is severely undermined by **Exception 2** of the same section, which explicitly states that sexual intercourse or acts between a man and his wife—provided she is over 18 years of age—do not qualify as rape.¹⁹

This clause perpetuates an outdated belief from colonial British law that marriage implies permanent, irrevocable consent to sex. In effect, it grants husbands legal protection for sexually

¹⁶ Ministry of Health and Family Welfare, National Family Health Survey (NFHS-5), India (2021)<https://dhsprogram.com/pubs/pdf/FR375/FR375.pdf> (last visited on April 16, 2025).

¹⁷ *Bharatiya Sakshya Adhinyam*, No. 47 of 2023, § 22 (India).

¹⁸ *Protection of Women from Domestic Violence Act*, No. 43 of 2005, § 3 (India).

¹⁹ *Id* at 7.

violating their wives. While the BNS brings many progressive reforms to criminal law, this particular provision remains untouched, thereby hollowing out the notion of consent for married women.²⁰

The contradiction is glaring: Section 63 criminalizes non-consensual acts against any woman, except when the perpetrator is her husband. This unequal treatment directly conflicts with constitutional protections under **Article 14** (equality before the law) and **Article 21** (right to life and personal liberty), which include the right to dignity and bodily autonomy.

The only change from previous law is the age cutoff of eighteen, introduced to comply with the *Independent Thought v. Union of India* judgment, which declared that sex with a minor wife constitutes rape.²¹ Yet, the broader issue—lack of protection for adult married women—remains unresolved.

While Section 64 of the BNS specifies punishments for rape, including aggravated circumstances, the marital rape exception ensures that husbands cannot be held accountable, even when their acts are identical to those punishable in other contexts. This exception is not grounded in sound legal reasoning but rather reflects deep-rooted patriarchal thinking.²²

Additionally, the exemption undermines the rules of evidence outlined in the *Bharatiya Sakshya Adhinyam, 2023*. Normally, a rape survivor's testimony alone can be enough for conviction. But when the law refuses to recognize the act as a crime in the context of marriage, her testimony is rendered meaningless.²³

This selective application of criminal law also causes procedural failure under the *Bharatiya Nagarik Suraksha Sanhita, 2023*. If the accused is a husband, no **FIR** can be filed, no investigation can proceed, and no charges can be framed.²⁴ As a result, the legal system effectively silences the survivor—denying her justice even before she has the chance to speak.²⁵

²⁰ Bharatiya Nyaya Sanhita, No. 45 of 2023, § 63(1)(a)-(g).

²¹ Id at 15.

²² INDIA CONST. arts. 14, 21

²³ Bharatiya Nyaya Sanhita, No. 45 of 2023, § 64 (India).

²⁴ Id at 19.

²⁵ Id at 17.

B. Judicial Trends and Analysis

Indian courts have repeatedly addressed the issue of marital rape, though they have stopped short of declaring the marital rape exception unconstitutional. While most judgments avoid directly challenging the legality of the exception, they increasingly affirm the importance of bodily autonomy, dignity, and the right to refuse sex—even within marriage.

In the case of *Independent Thought v. Union of India*, the Supreme Court partially invalidated Exception 2 to Section 375 of the Indian Penal Code (IPC), ruling that sex with a minor wife constitutes rape. The Court found that this exception violated Articles 14, 15, and 21 of the Constitution.²⁶ However, this judgment protected only minor wives, leaving adult married women without the same legal protection.

In *Suchita Srivastava v. Chandigarh Administration*, the Supreme Court emphasized that reproductive choices fall within the domain of personal liberty and autonomy under Article 21.²⁷ Although not a marital rape case, the decision strongly upheld the principle of sexual autonomy, reinforcing the significance of consent regardless of marital status.

In *State of Karnataka v. Krishnappa*, the Court acknowledged that sexual violence not only dehumanizes the victim but also violates the fundamental right to life under Article 21.²⁸ Though the case didn't involve marriage, the Court's statements about the physical and emotional trauma caused by rape are equally applicable to marital rape.

In *Aparna Bhat v. State of Madhya Pradesh*, the Supreme Court warned judges against using gender stereotypes when ruling on cases of violence against women. This caution is particularly relevant in marital rape cases, where courts have historically been influenced by notions of marital privacy and submission.²⁹

A more direct confrontation with the marital rape exception occurred in the Delhi High Court case *RIT Foundation v. Union of India*, which resulted in a split verdict. Justice Rajiv Shakdher found the exception unconstitutional, stating it discriminates between married and unmarried women and ignores consent. However, Justice C. Hari Shankar upheld the

²⁶ Id at 13.

²⁷ “Suchita Srivastava v. Chandigarh Administration, (2009) 9 SCC 1.”

²⁸ State of Karnataka v. Krishnappa, (2000) 4 SCC 75.

²⁹ Aparna Bhat v. State of Madhya Pradesh, (2021) 11 SCC 732.

exception, arguing that only Parliament has the authority to amend the law.³⁰ Although no legal change followed, Justice Shakti Chaudhary's opinion strongly reinforced constitutional principles and set a precedent for future challenges.

The judiciary has also indirectly acknowledged sexual abuse within marriage through civil remedies. In *V.D. Bhanot v. Savita Bhanot*, the Court held that past instances of cruelty—including sexual abuse—can be considered under the *Domestic Violence Act*. While the term “rape” was not used, this recognition shows that non-consensual sex in marriage is legally understood as harm.³¹

Overall, while the Supreme Court has yet to fully strike down the marital rape exception, the legal reasoning developed in these cases—centered on autonomy, consent, and dignity—provides a solid constitutional foundation for challenging the validity of the exception in the future.

C. Domestic Violence Act and Related Provisions

The *Protection of Women from Domestic Violence Act, 2005* (PWDVA) offers civil legal remedies to women subjected to abuse within domestic settings. Under **Section 3**, domestic violence is broadly defined to include physical, sexual, verbal, emotional, and economic abuse. Importantly, **sexual abuse** is described as any sexual behavior that insults, humiliates, or violates a woman's dignity—implicitly encompassing acts similar to marital rape.³²

Unlike the *Bharatiya Nyaya Sanhita, 2023*, which under **Section 63 Exception 2** grants immunity to husbands in cases of rape, the PWDVA does not differentiate between victims based on marital status. Courts have supported this inclusive interpretation. For instance, in *V.D. Bhanot v. Savita Bhanot*, the Supreme Court allowed evidence of abuse that occurred even before the Act came into force to be considered in ongoing domestic violence proceedings.³³

The PWDVA provides various reliefs, such as protection, residence, custody, and compensation orders. In *Krishna Bhattacharjee v. Sarathi Choudhury*, the Court upheld a

³⁰ “RIT Foundation v. Union of India, W.P.(C) 284/2015 (Del HC).”

³¹ *V.D. Bhanot v. Savita Bhanot*, (2012) 3 SCC 183.

³² Protection of Women from Domestic Violence Act, No. 43 of 2005, § 3 (India).

³³ “*V.D. Bhanot v. Savita Bhanot*, (2012) 3 SCC 183.”

wife's right to claim compensation for sexual abuse even after a judicial separation, showing a growing willingness to acknowledge sexual harm in marriage—though only as a civil offence.³⁴

Section 22 of the Act allows Magistrates to grant compensation for mental and emotional trauma, including injuries from sexual abuse. Since the law follows civil procedure, the burden of proof is lower than in criminal trials. However, because there is no corresponding criminal offence for marital rape, abusive husbands are not subject to criminal prosecution even when the conduct is comparable to rape.

Despite its progressive intent, the implementation of the PWDVA is weak. Many women avoid reporting abuse due to fear of stigma or retaliation. Protection officers are often unavailable, and the lack of trained personnel affects the handling of sexual abuse complaints. Survivors of marital rape thus face compounded trauma—civil remedies may exist, but criminal justice remains out of reach.³⁵

GLOBAL PERSPECTIVES AND COMPARATIVE LAWS

In most modern legal systems, the marital rape exemption has been repealed. Over **150 countries** have either fully or partially criminalised rape within marriage. India remains one of the few major democracies where a husband cannot be prosecuted for raping his wife simply due to their marital relationship.³⁶

The **United Kingdom** abolished the marital rape exemption in the landmark case **R v. R (1991)**. The House of Lords declared that marriage does not equate to automatic consent and rejected the outdated common law notion of irrevocable spousal consent.³⁷ This judgment led to statutory reforms, and marital rape is now punishable under the **Sexual Offences Act, 2003**.

In the **United States**, all 50 states now criminalise spousal rape, though definitions and penalties differ. Initially, many states had exemptions or imposed stricter evidentiary requirements, but feminist legal reforms gradually removed these barriers. Today, spousal rape

³⁴ Krishna Bhattacharjee v. Sarathi Choudhury, (2016) 2 SCC 705.

³⁵ “National Commission for Women, Study on the Functioning of Protection Officers under PWDVA, (2018),” http://ncw.nic.in/sites/default/files/ANNUALREPORT2017_18.pdf (last visited on April 17, 2025).

³⁶ “UN Women, Progress of the World’s Women 2019-2020: Families in a Changing World, at 161 (2019).”

³⁷ “R v. R, [1991] UKHL 12 (House of Lords).”

is recognised as a crime regardless of marital or living arrangements.³⁸

Canada amended its **Criminal Code in 1983** to criminalise marital rape, following widespread advocacy. Under **Section 273.1**, the law explicitly defines consent and makes it clear that being married does not imply ongoing consent.³⁹

South Africa also recognises marital rape as a criminal offence. The **Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007** closed any legal gaps. The **Constitutional Court**, in cases such as **S v. Jordan (2002)**, emphasized the importance of dignity and equality in sexual offence law, rejecting marital status as a defence to sexual violence.⁴⁰

On the international front, frameworks such as the **Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)** categorically oppose the marital rape exception. **General Recommendation No. 19** of CEDAW affirms that gender-based violence includes physical and sexual abuse within the home, explicitly including marital rape.⁴¹

REFORMS AND RECOMMENDATIONS

The marital rape exemption under **Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita** should be abolished. This provision undermines the constitutional rights to **equality (Article 14)** and **personal dignity (Article 21)** by treating married women differently from others without any valid legal rationale. Simply being in a marital relationship should not justify non-consensual sex.⁴²

Criminal law must be **centered around consent**, which should be **explicitly defined** in legal terms as voluntary, informed, and revocable. The law must apply the same consent standard to all sexual relationships, regardless of whether the parties are married. Any sexual act lacking consent—including within marriage—must be criminalised.⁴³

³⁸ National Center for Victims of Crime, Marital and Partner Rape Fact Sheet (2020).

³⁹ Criminal Code, R.S.C., 1985, c. C-46, § 273.1 (Can.). ⁴⁰ “S v. Jordan, 2002 (6) SA 642 (CC) (S. Afr.).”

⁴⁰ “S v. Jordan, 2002 (6) SA 642 (CC) (S. Afr.).”

⁴¹ “Committee on the Elimination of Discrimination against Women, General Recommendation No. 19, ¶¶ 6–7, U.N. Doc. A/47/38 (1992), <https://www.refworld.org/legal/resolution/cedaw/1992/en/96542> (last visited on April 17, 2025).

⁴² Bharatiya Nyaya Sanhita, No. 45 of 2023, § 63 Exception 2 (India).

⁴³ INDIA CONST. arts. 14, 21.

The **Protection of Women from Domestic Violence Act, 2005 (PWDVA)**, which already recognises sexual abuse within marriage, should be aligned with criminal laws. At present, the PWDVA offers **only civil remedies**, creating a contradiction in the legal framework. Survivors should be able to pursue both protection and **criminal accountability**.⁴⁴

Furthermore, law enforcement and judicial authorities—**police, magistrates, and prosecutors**—must undergo **mandatory training and sensitisation**. Due to social stigma and lack of institutional support, many survivors do not report marital rape. **Special protocols** must be adopted for handling such cases with care and sensitivity. Protection officers should also be adequately trained to identify and properly document complaints of sexual abuse.⁴⁵

Fast-track courts should be designated for marital rape cases to ensure **confidentiality, psychological support, legal aid, and access to healthcare**. Legal procedures must be survivor-centric and **non-traumatising**. The courts should embrace **transformative justice**, which prioritises healing and systemic change over mere punishment.⁴⁶

CONCLUSION

Marital rape continues to be excluded from India's criminal law framework. The protection husbands receive under **Section 63, Exception 2** of the Bharatiya Nyaya Sanhita denies married women equal rights and bodily autonomy. This outdated exception is inconsistent with current understandings of **human dignity and consent**.⁴⁷

While courts have started recognising sexual violence within marriage through **civil remedies** under laws like the PWDVA, criminal justice remains inaccessible. The **Bharatiya Sakshya Adhinyam** does not offer evidentiary support for victims of spousal rape. This **legal silence reflects and reinforces societal silence**, perpetuating harm.⁴⁸

Internationally, countries like the **UK, Canada, South Africa**, and all **U.S. states** criminalise rape within marriage, showing that legal reform does not threaten marriage but rather

⁴⁴ “Protection of Women from Domestic Violence Act, No. 43 of 2005, § 3 (India).”

⁴⁵ National Commission for Women, Evaluation Study on the Protection Officers under PWDVA (2018).

⁴⁶ *Aparna Bhat v. State of Madhya Pradesh*, (2021) 11 SCC 732.

⁴⁷ Bharatiya Nyaya Sanhita, No. 45 of 2023, § 63 Exception 2 (India); INDIA CONST. arts. 14, 21.

⁴⁸ Protection of Women from Domestic Violence Act, No. 43 of 2005, § 3 (India); Bharatiya Sakshya Adhinyam, No. 47 of 2023, § 22 (India).

dismantles impunity. These jurisdictions put **consent above relationship status**.

India, as a signatory to **CEDAW and the Universal Declaration of Human Rights (UDHR)**, has a legal and moral duty to eliminate all forms of gender-based violence, including those occurring within marriage.

Reform must be unambiguous. The law must clearly criminalise marital rape—**no vague language, no partial measures**. Consent must be non-negotiable, irrespective of marital status. It is time to stop hiding sexual violence behind marriage. **Exception 2 must be repealed**, and survivors must find justice not just in therapy rooms or civil courts, but **in the criminal justice system**.⁴⁹

Marital rape is not a personal issue—it is a public wrong, a constitutional lapse, and a legal injustice. The time for silence has passed.

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- Committee on the Elimination of Discrimination against Women, General Recommendation No. 19, U.N. Doc. A/47/38 (1992).

- Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention), CETS No. 210 (May 11, 2011).
- Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948).

