
CONSENT WITHIN MARRIAGE: RETHINKING EXCEPTION 2 TO SECTION 63 BNS

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ABSTRACT

Rape is one of the most serious and violent crimes. It affects the victims both physically and mentally. This paper aims to examine the validity of Exception 2 of Section 63 of Bhartiya Nyaya Sanhita, 2023 which excludes sexual intercourse or sexual act by husband with his own wife not below eighteen years of age from the definition of Rape. This exception is based on the principle that wife is the property of husband and after marriage the spouses become one entity which leads to conversion of sexual access into conjugal entitlement. This paper argues that the exemption is contrary to constitutional jurisprudence, human rights and bodily autonomy. This paper beings analysis by tracing the colonial and patriarchal roots of exception to marital rape, connecting it with outdated notion of property and marital unity. The paper further dives into the concept of consent where it highlights the difference between informed, voluntary consent versus submission obtained via coercion and structural dependency. This paper reflect upon the inconsistency lying in recognising bodily autonomy of a women in every other sphere of law while denying it within marriage. The paper further puts exception 2 of Section 63 under constitutional scrutiny and express its inconsistency with Article 14, 15 and 21. The Sexual autonomy based on gender equality, autonomy in making decision and life free from violence questions the assumption of extinguishment of sexual autonomy within marriage. International perspective revealed that many countries have repealed marital rape immunities and declared them as discriminatory to fundamental human rights. The biggest reason for not uncovering the blanket immunity of marital rape is the fear of misuse, false accusations. This paper argues that this can handled by way of procedural safeguards instead of maintaining blanket exemptions. Such criminal exemption undermine effort towards gender justice and normalises sexual atrocities and violence. The whole idea is that the exemption tends to undermine the sexual autonomy of a wife in order to achieve stability in marriage. Therefore it is important to reimagine consent within marriage not only to fit it in within the legal sphere but also to affirm the fundamental principle of dignity and bodily integrity which can't be surrendered just because a women entered into marriage.

Keywords: Marital rape, consent, sexual autonomy, bodily integrity, patriarchy, constitutional principles, autonomy,

Introduction:

There are certain topics in the criminal jurisprudence that raises constitutional, ethical and social debates. Marital rape is one such topic where the sexual consent with marriage raises debate. Section 63 of Bhartiya Nyaya Sanhita, 2023 defines rape and provides circumstances in which sexual intercourse would amount to rape. However exception 2 of section 63 provides that sexual intercourse by a husband with his own wife is not considered rape if she is above eighteen years. This exception assumes that the institution of marriage provides for permanent irrevocable consent for sexual intercourse. It transforms sexual access into sphere of conjugal entitlement rather than sphere governed by bodily autonomy. This exception raises question regarding equality, bodily autonomy and evolution of place of women in constitutional democracy. The exception of marital rape signifies the old school colonial legal thought embedded with patriarchal structures. Sir Matthew Hale was one of the greatest scholars on the history of English common law, well known for his judicial impartiality during England's Civil War (1642–51). Sir Matthew Hale quoted that “a husband cannot be guilty of a rape committed upon his lawful wife because of their mutual matrimonial consent and contract.”¹ On this assertion Indian law imbibes the presumption that marriage dissolves the boundary of one's own sexual autonomy. For years this presumption was justified on the grounds of privacy of family, marital harmony and sanctity of marriage. But on the other hand the constitutional jurisprudence revolves around dignity, autonomy of decision, privacy and therefore the assumption of irrevocable consent can be challenged. Contemporary consent is understood as capable of being voluntary, informed and capable of being withdrawn at any moment. If consent is obtained via threat, fear, coercion than it cannot be considered as genuine consent. When by establishing legal fiction immunity is established by way of exemption it establishes dual standards where bodily autonomy exist of women outside marriage but it is diluted for a married women. This dual standards not only diminishes women's equal citizenship but at the same time it normalises sexual violence in the name of marital obligations. When we scrutinise exception 2 at Constitutional level it violates Article 14 and 15 as it is discriminatory as it treats married and unmarried women differently. It also violates Article 21 as right to live with dignity and privacy is now a part of basis structure and merely because sexual intercourse occurs within marriage it cannot be insulated form accountability. Growing of legal jurisprudence on

¹ Harshit Sangwan, *Marital rape and the myth of Conjugal Consent*, ADV PRATAP SINGH (Aug. 26, 2025), <https://officeofpartapsingh.com/our-presence/f/marital-rape-and-the-myth-of-conjugal-consent?blogcategory=Civil+Law>

reproductive rights, domestic violence, cruelty makes it clear that marriage is no more a zone for immunity. All this has led to heated debate on the issue of criminalisation marital rape but at the same time the critics had fear that this might lead to extreme misuse and marriage breakdowns. Therefore instead of surfacing blanket exemption the challenge lies in creating procedural safeguards that prevents misuse and at the same time prevents fundamental rights. The paper attempts to reconsider the exception 2 of section 63 through constitutional and comparative lens. It traces historical roots of exception, analyse the concept of consent in contemporaneous times and evaluates section 63 of Bhartiya Nyaya Sanhita, 2023 with constitutional perspectives. It draws central question that Can a democratic country like India that is committed to the principles of equality and dignity continue to presume consent within marriage?

Ultimately if we try to reshape consent within marriage than it is not a attack on the institution of marriage rather it is based on the belief that coercion cannot claim legitimacy on grounds of morality and legality. While recognising the sexual autonomy of women it is necessary that criminal law must align with constitutional principles ensuring that marriage remains a safe space filled with mutual respect.

Concept and Evolution of Consent in Criminal Law

The concept of consent in criminal law has evolved from a very narrow understanding as submission to a broad framework grounded in dignity, autonomy and free decision making. In early patriarchal setup violation of a bodily integrity of a woman was more viewed as against the family honour and social morality. Consent was presumed to exist in the institution of marriage and therefore lack of consent require proof of physical violence and resistance. This approach made married women dependent lacking sexual autonomy which made offence aggravated in social context rather than being violation of one's own will.

With the passage of time as criminal law shifted its focus from protecting morality and property towards protection rights of person the shape of consent begins to transform. Courts and the legislature begins to understand that absence of consent cannot always be expressed through physical struggle. Sometimes fear, threat, and psychological pressure can override persons will without leaving any injuries and marks. This evolution in understanding of consent led to move away from witnessing the signs of physical violence to focusing on whether engaging in sexual activity was voluntary and informed. In many countries the shift has been

closely connected with the development of constitutional law, human rights and feminist jurisprudence.

In modern law the concept of consent has been transformed and now it has aligned with the principles of autonomy and integrity. Genuine consent must be voluntary, free from any form of coercion or intimidation; informed, with both partners understanding the nature of the act; specific, meaning that approval is required for each encounter; and revocable, allowing withdrawal at any time.² Of course, consent obtained by threat or coercion or under intoxication cannot be considered consent given by free will.³ Consent must be in expressed form and it should not be inferred from silence, or prior intimacy and passivity. The law also recognises the situation of unequal power dynamics where because of undue influence the authenticity of consent can sometimes be compromised even in the absence of any form of physical forces.

One such significant step in the evolution of consent is that the presumption that marriage creates a permanent sexual consent has been now questioned in the contemporary times. Now many jurisdictions recognise that spouse retains the right to refuse to sexual act and any nonconsensual intercourse is considered to be violation of body autonomy. Criminalising marital rape will not destroy marriage; it will redefine it in healthier terms. It signals that marriages must be built on respect, not coercion, on understanding, not entitlement. It affirms that consent must be continuous, enthusiastic, and revocable — even within the most intimate relationships.⁴ The evolution of consent has showcased the victim centered perspective and now it focuses on fear, trauma that a victim faces. Now reforms treat individuals as persons who bears right and their choice is what matters. Ultimately the modern concept shifted focus from whether the accused used force to whether the victim exercised free will. By fixing the principles of dignity, equality, autonomy and bodily integrity in sexual offences the law not only tries to protect physically but also secure fundamental right of person to decide when and how and with whom to engage in any sexual activity. This journey has raised debate on how consent can be understood within marriage and whether any presumption of consent can be

² Tajjosi Dey, *Marriage is not consent: Rethinking Immunity for Marital Rape*, INTERNATIONAL JOURNAL OF RESEARCH PUBLICATION AND REVIEWS, (Nov., 2025), <https://ijrpr.com/uploads/V6ISSUE11/IJRPR55671.pdf>

³ Sudhanshu Chaudhari, *Rape or no rape-that is the Question: An Analysis of Consent on the basis of a promise to Marry*, SCC ONLINE, (March, 25, 2022), <https://www.scconline.com/blog/post/2022/03/25/rape-or-no-rape/>

⁴ PAHUJA LAW ACADEMY, <https://www.pahujalawacademy.com/marital-rape-a-crime-or-a-conjugal-right#:~:text=Criminalising%20marital%20rape%20will%20not,institutes%20in%20Judicial%20Coaching%20circles.> (last visited Feb. 1, 2026).

existed in a country committed to constitutional and human right.

Historical Background of the Marital Rape Exception

The exception 2 of section 63 of Bhartiya Nyaya Sanhita, 2023 is deeply rooted in the patriarchal traditions. The Marital Rape Exception (MRE) has its roots in the historical doctrine of coverture from English common law. This doctrine essentially deprived married women of their legal identity, merging it with that of their husbands. Under coverture, a married woman had no individual legal rights, including the right to own property or enter contracts independently.⁵ In this framework the sexual access was not viewed as an act requiring her consent but rather as a conjugal entitlement. In such a situation the consent was presumed to have been taken permanently without even imagining that a husband could also rape his wife. The concept of marital rape immunity was most famously articulated by Sir Matthew Hale, a British jurist, in his 1736 treatise. Hale wrote 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 has given up herself in this kind unto her husband, which she cannot retract.”⁶ The rationale behind this was that marriage was viewed as permanent union and sexual obligation was seen as a compulsory marital duty. Therefore as a result the law tend to protect marital interest rather than protecting bodily autonomy of a married woman. When British codified criminal law in India they retained this notion in exception 2 of section 63 which made sexual relation within marriage outside the purview of rape. For years the exception tend to protect family privacy and marital harmony. However, critics pointed out that the main harm in non consensual sex within marriage is fear, trauma etc. 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 The feminist movement and greater recognition of women's rights and bodily autonomy have changed the way the law views sexual violence within marriage. Marital rape is now recognised as an affront to human rights and personal dignity. In the 20th and 21st

⁵ LUKMAAN IAS, <https://blog.lukmaanias.com/2024/10/21/marital-rape-the-legal-issue-in-consideration-before-the-supreme-court/>, (last visited Feb. 1, 2026)

⁶ *Id.*

⁷ INDIAN LEGAL WING, <https://www.indianlegalwing.com/post/marital-rape-under-the-bharatiya-nyaya-sanhita-2023-a-missed-opportunity-for-gender-justice-in-ind#:~:text=3.2%20Feminist%20Jurisprudence%20and%20the,revocable%2C%20and%20central%20to%20per%20sonhood.> (Last visited Nov. 7, 2025).

centuries, many countries have updated their legal codes to criminalise marital rape, acknowledging that consent is the foundation of all sexual relationships, including within the bonds of marriage.⁸

Exception 2 to Section 63: Textual and Doctrinal Analysis

Section 63 of Bhartiya Nyaya Sanhita, 2023 provides for circumstances in which the sexual intercourse would amount to rape. This provision keeps consent at the center in regulate sexual autonomy and criminalise sexual intercourse obtained via force, coercion and intoxication. Section 63 provides for Exception 2 which excludes sexual intercourse or sexual act by husband with his own wife not below eighteen years of age from the definition of Rape. This exception acts as an immunity rather than being a justification. The exception does not allow the act of the husband rather it does not treat it as rape even though all the essentials of rape are present. This exception basically does dual behaviour as it recognises women's outside marriage with full legal with full sexual autonomy while in case of married women it provides partial protection. This difference in treatment question about arbitrariness as people who are similarly situated must be treated alike. Also this exception do not fit with Protection of women from Domestic Violence Act, 2005 as it recognises sexual violence as domestic violence. Thus it can be clearly inferred from this that any form of coercive sexual activity requires intervention of state and since it addresses cruelty and harassment within marriage it undermines the idea that marriage is a private affair away from the scrutiny of criminal law. Despite recognising harm the criminal law refuse to badge the conduct with rape. The courts have in in cases observed the fact that non consensual sex within marriage is morally and constitutionally wrong but they acknowledge the fact that deleting the exception lies within the domain of parliament. The growth in the constitutional and humanitarian jurisprudence has already shaken the foundation of this exception.

The doctrinal analysis of exception 2 of Section 63 highlights the contradiction. As per section 63 the consent must be free, voluntary but the exception presumes the consent based on the status of marriage. Thus a coherent framework of criminal law is needed so that the meaning of consent remains the same recognising the fact that marriage can structure the intimacy but it cannot allow force or coercion.

⁸ Garima Mohan Prasad, *Conflict between Conjugal Rights and Marital Rape*, JOURNAL OF EMERGING REANDS AND NOVEL RESEARCH, (April 4, 2025), <https://rjpn.org/jetnr/papers/JETNR2504008.pdf>

Constitutional Examination

The constitutional examination of exception 2 of section 63 needs analysis of whether the immunity granted to a husband under exception 2 of section 63 is in consonance with the fundamental rights. The exception treats married and unmarried women differently in matters related to bodily autonomy and integrity. When the state does not criminalise sexual violence because the accused is a husband it leads to discrimination, arbitrariness and violation of fundamental right.

Article 14 provides for equality before law and equal protection of law. It does not prohibit all kind of classification but rather it requires that the classification must be based on intelligible differentia that is the classification must have rational nexus with the objective. The differentia here is the marital status. The crucial question here is whether the differentia is reasonable and whether granting immunity to husband fulfils constitutional objectives. But here the test fails as the harm caused by non-consensual intercourse is much more than protecting marital harmony, family privacy and preventing false cases.

Article 15 of the constitution prohibits discrimination on ground of religion, race, caste sex and place of birth. Although exception 2 of section 63 is neutral but it overburden women with the offence of rape. By protecting husband from prosecution the state privilege male over female sexual entitlement over female bodily autonomy or integrity. This establishes a stereotype that women once married, they are expected to submit to sexual intercourse as a part of marriage duty. Thus, here Article 15 which prohibits discrimination is violated as the exemption reinforces gender inequality by treating married women as inferior and lacking agency over their own bodies.⁹

Article 21 of the constitution provides for right to life and personal liberty. The judicial interpretation of Article 21 has expanded its meaning and it is now rather expressed as right to have dignified life. Thus now it protects dignity, bodily autonomy, integrity and privacy. Since it protects bodily autonomy the person has freedom to make decision in intimate matters. Still, the significant subsistence of Exception 2, falls short to dissuade men from involving in acts of coerced venereal proximity with their wives affecting the corporal and psychic health

⁹ Dey, *Supra* note 2

of wives negatively & sabotage their right and capability to live a dignified life.¹⁰ When law do not recognise rape within marriage it denies enjoyment of Article 21.

The people who support marital rape exception often fear about disruption of family life. The constitutional jurisprudence favours individual rights over customs and it cannot approve coercion just to preserve customs of marriage. Instead constitutional jurisprudence requires that marriage should evolve to support equal right of spouses. Another important dimension is that state has positive obligations that is not only prohibit from violating fundamental rights but also duty to protect individual from violence. The blanket immunity provided has abdicate their positive obligation. The failure to provide equal protection to both the spouses undermines the idea that fundamental rights are enforceable against both State and Private entity.

The constitutional analysis shows that Exception 2 is arbitrary and promotes sex based discrimination. A country that is committed to the equality and human dignity cannot presume consent permanently. Thus repealing exception 2 is a constitutional imperative as the fundamental guaranteed by constitutional remains effective irrespective of the marital status of women.

International Perspectives

Comparative and International Perspective to marital rape shows deviation away from the presumption of irrevocable marital consent. Reform is taking place through out the world, judicial interpretation is taking place and it reflects a premise that marriage cannot act as a shield for sexual violence. The evolution of criminal jurisprudence with regard to bodily integrity in United Kingdom has lead to amendment in marital rape laws. The roots of marital rape exemption lies within the common law. The marital rape exemption can be traced to statements by Sir Mathew Hale, Chief Justice in England, during the 1600s. He wrote, “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 in kind unto the husband, whom she cannot retract.”¹¹ The turning point came with the landmark case of *R v R* (1991), where the House of Lords unequivocally abolished the marital rape exemption, holding that

¹⁰ Bhagyashikha Saptarshi, Marital Rape and Law, MANUPATRA ARTICLES, April 9, 2024), <https://articles.manupatra.com/article-details/Marital-Rape-and-Law>

¹¹ Priyanka Rath, *Marital Rape and the Indian Legal Scenario*, INDIA LAW JOURNAL (last visited Feb. 7, 2026), https://www.indialawjournal.org/archives/volume2/issue_2/article_by_priyanka.html

marriage does not extinguish a woman's right to refuse sexual intercourse.¹²

The criminalisation of marital rape in United States of America evolved from states rather than single uniform law for the whole country. Previously US has adopted the common law rule that exempt husband from prosecution for rape with his own wife. Oregon became the first state to criminalise marital rape in 1975, following the case of *Oregon v. Ride-out*, which generated nationwide debate about consent within marriage. Over the next two decades, every state progressively repealed the exemption, and by the early 1990s, all fifty states recognised marital rape as a criminal offence in some form.¹³ In Australia the criminalisation of marital rape happened through both judicial interpretations and legislative reforms. In *R v L* (1991), the High Court of Australia held that a husband could be prosecuted for raping his wife, affirming that "the notion of irrevocable consent is no longer acceptable in law."¹⁴

International perspective reveals that nations stated treating consent has independent of marital status and is revocable. When the exemption exist it is viewed as leftover of patriarchal traditions. It is important to align domestic laws with the new understanding of equality, dignity and bodily integrity.

Social, Cultural, and Policy Considerations

Marital rape is influenced by deeply rooted sociocultural factors like traditional gender roles, patriarchy, power dynamics, social standards, and cultural practices.¹⁵ Marriage is considered as a sacramental relationship and therefore the wife is duty bound to fulfill marital obligations. In this framework the refusal of sex by wife is considered as disobedient behaviour. This belief of society makes it difficult to considered forced sex within marriage as violence. Patriarchal society even reimposes the male authority in the household relationship and often considered male member as the head of the family. Economic dependence and social stigma discourages women from reporting this sexual violence. The fear of abuse, financial insecurity and concern

¹² Uttkarsh Gandharva, *Criminalizing Marital Rape: A Comparative Study Of India and Developed Nations*, INTERNATIONAL JOURNAL OF CREATIVE RESEARCH THOUGHTS, (Oct. 10, 2025), <https://www.ijcrt.org/papers/IJCRT2510803.pdf>

¹³ *Id.*

¹⁴ Gandharva, *Supra* note 12

¹⁵ Asad Naushad Khan, *Marital Rape: Understanding the Complexities and Addressing the Silent Epidemic*, JURIS CENTRE, (Aug. 24, 2023) <https://juriscentre.com/2023/08/24/marital-rape-understanding-the-complexities-and-addressing-the-silent-epidemic/#:~:text=Sociocultural%20Factors%20Influencing%20Marital%20Rape,and%20dignity%20within%20marital%20relationships.>

for children discourage them from seeking legal remedies. Other biggest reason is that family is considered as private sphere and therefore any violence within marriage is often neglected as domestic matter that has to be resolved internally. This privacy act as a shield for abuse and exempting husband from the preview of rape this reinforces the assumption that marriage is outside the scope of protection.

Critics argue that the criminalisation will lead to misuse, breakdown and false accusations on innocent's. But similar arguments were made with regard to domestic violence and sexual harassment at workplace. However they were proved to be useful. The fear of misuse and false accusation is a procedural and evidentiary matter and not a justification for denying legal recognition to the harm. Sound legislative effort is needed to protect fundamental rights.

Effective policy requires not only requires criminalisation of marital rape but a holistic approach should be adopted, combining it with education, awareness programmes, counselling services and community based interventions.

In country like India there exist multicultural societies where marriage is considered a domestic and personal affair and therefore backlash from communities can be there therefore the policy must be in a way that balances the tension between cultural diversity and protecting fundamental rights and human rights. In totality a holistic approach is needed to protect bodily autonomy and family bonds.

Critical Analysis

Exception 2 raises questions about bodily autonomy and equality. This exception has created marriage as legal space where women's sexual autonomy is subordinate to conjugal rights. Contemporary Criminal system recognise that consent is personal, dynamic and irrevocable. Retaining the exception contradicts the premise that Rape law is based upon free, voluntary and informed consent. This exception arbitrarily classifies women based on marital status. A women outside marriage is protected from violence but the women within marriage in not protected because of conjugal rights. The classification do not withstand with the constitutional principles under Article 14 and 21 as equality, dignity, privacy are integral components of fundamental rights.

Other aspect of this is that on one hand the state criminalises cruelty, assault unnatural sex and

domestic violence within marriage but on other hand preserve exception. This signals that sexual violence within marriage is less harmful when caused by husband. However marital rape is often recognised as a form of cruelty in divorce proceedings which give emphasis on spousal dignity but law prevent it from coming within the definition of rape.

Critics emphasis upon false cases or accusations and disruption of family. The argument that criminalisation of marital rape is a threat to institution of marriage defeats the purpose of law. It is not the prosecution of marital rape that disturbs the marriage rather it is the tolerance of violence that destabilises it.

Ultimately exception 2 highlights the conflict between the patriarchal assumption of irrevocable consent and constitutional guarantees of dignity, equality, bodily integrity. The retention of exception 2 reveals that married women's right are subordinate to that of husband. Constitutional principles at least demands reinterpretation of exception so that all sexual relationship have consent as the deciding factor. Reform should be holistic and should include training, awareness programmes Victim centred procedure etc.

Recommendations and Law Reform Options

Firstly, the martial rape exception should be removed from Bhartiya Nyaya Sanhita, 2023. Marriage cannot act as a shield against sexual violence. Repealing exception 2 of section 63 will align BNS with constitutional principles.

Secondly reform should address misuse and evidentiary-aspect without reducing the protection. There should be improved provision of evidence, judicial training and specialised prosecutors.

Thirdly holistic approach must include medical care and emergency shelters. Economic dependency on husband and children discourages them from seeking remedies therefore civil remedies such as resident rights, interim maintenance and provision for custody of children must be strengthened.

Fourthly reform must include training across institutions including police, prosecutors, judges, medical professionals. Without any reform in attitude it is almost difficult to enforce the reforms. In conclusion the reform is not merely about inserting or adding words in the statute rather it means that transformation is made legally and socially both. Reforms should ensure

that constitutional rights should be recognised.

Conclusion

The debate around exception 2 of section 63 is a not about technical defect in the statutory language rather it is a conflict between patriarchal values and constitutional principles. The exception came from Hale's doctrine in colonial era that treated wife subordinate to husband and presumed irrevocable consent of women within marriage for sexual intercourse. This presumption within marriage is in contrast with the current constitutional principles of equality, dignity and bodily integrity. The Indian jurisprudence continued to evolve and recognised consent in the epicentre of sexual offences. This existence of contradiction has created inconsistencies. The analysis through this paper suggest that the exception fails to withstand with the Constitutional principles. It is arbitrary and discriminatory as it draws classification between married and unmarried women on irrational reasons. It tends to promote sexual violence within marriage. International perspective reveals that many countries have tries to criminalise marital rape without destabilising marriage. When the question arises at to whether the law should criminalise marital rape and how to do that that answer lies in a holistic approach that should involve training, awareness, survivor centric procedure. At the end the goal is not to criminalise marriage rather it is to prevent it from becoming a harbour of violence. Repealing of exception 2 and adopting holistic approach as essential from transforming marriage into a safe space for partnership. When law will unequivocally affirm that both married and unmarried women has a right to say no than only India will move near to the constitutional principles of equality, divinity and bodily autonomy.