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## INCOMPLETE REFORM IN THE BNS: EXCEPTION TO MARITAL RAPE

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The Bhartiya Nyaya Sanhita 2023 (the BNS)<sup>1</sup>, aimed to eradicate colonial evils of criminal law in India. Macaulay's Indian Penal Code was criticized for being unevolved, needed constant amendments to accommodate "gender neutrality" and to decolonize laws by narrowing the scope of sedition laws and mob-lynching.<sup>2</sup> Decolonization in criminal law refers to the dismantling of institutions and practises influenced by the colonial period to remove power structures; moving towards a more equitable order of society. However, BNS retained the exception to rape by the veil of marriage under Exception 2 of Section 63<sup>3</sup> (formerly under Section 375 of the IPC, for the purposes of this article, may be referred to Section 63, BNS). This is in direct contradiction of both the promises of gender neutral laws through heavy patriarchal biases and of decolonizing the Indian Penal Code through keeping the wife's role in a marriage unchanged.

Section 63<sup>4</sup> under the BNS recognises rape as one of the most grave violations of bodily autonomy and sexual agency, considered a barbaric crime by every country, including India<sup>5</sup>. Yet, when the said act is committed by a husband against the will or without the consent of his wife, the law withdraws the label of rape and replaces it with exceptions, and provides civil remedies under Domestic Violence Act. Legislative intent is not only of stark importance due to face value itself; but mainly as the courts focus on the intention and purpose of the Legislature behind the making of the law to interpret it fairly. The next step taken by the Legislature must be consistent with the legislative intent of enacting the BNS. Towards a truly post-colonial criminal law beginning by dismantling colonial patriarchy embedded in the very architecture of rape law. This article aims to highlight the gap between the Legislature enacted

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<sup>1</sup> The Bhartiya Nyaya Sanhita 2023.

<sup>2</sup> S. M. Aamir Ali and Pritha Mukhopadhyay, 'Bhartiya Nyaya Sanhita: Decolonizing Criminal Law or Colonial Continuities?' (2024) 62(2) IAC 411.

<sup>3</sup> The Bhartiya Nyaya Sanhita 2023, s63.

<sup>4</sup> Ibid.

<sup>5</sup> Ravi Kaustav Reddy, 'Independent Thought v. Union of India: An Analysis from the Feminist Theory of Rape' (2022) 4 IJLLR 207.

(the BNS) and the legislative intent for the same in context of the marital Rape exception.

The retention of the exception delves into whether, it is the deep rooted patriarchal structures that limit a wife's role to that of her husband's property or it is also the state fearing a domino effect challenging the institution of marriage which validates such retention. This legal anomaly raises a foundational question: why does the identity of the perpetrator alter the legal character of the crime, even when the harm remains identical? Even if not categorised as marital rape, reports are often made and studied by the label of intimate partner violence or sexual violence by a partner. According to the 2019–21 National Family Health Survey (NFHS-5), 29% of women who had ever been married reported physical or sexual intimate partner violence (IPV).<sup>6</sup> Such reports are necessary to conclude that even so the act isn't a crime, it is prevalent. The moral standpoint of marital rape has been reiterated by courts subtly, by granting it to be a ground for divorce and creating insufficient remedies for it under the Domestic Violence act<sup>7</sup>, the court and the state do acknowledge that on the face of it, marital rape, if exists, is morally wrong. The Domestic Violence act recognises forceful sexual acts by the husband upon his wife as sexual abuse, as a form of domestic abuse, assigning it to the realm of "private, domestic matters". The juxtaposition between the stringent punishment for rape u/s 64<sup>8</sup>, "rigorous imprisonment of either description for a term which shall not be less than ten years, which may extend to imprisonment for life, and also be liable to fine", and the limited civil remedies available to a wife under the Domestic Violence Act<sup>9</sup>, such as protection orders, monetary relief, and residence rights, reveals a significant disparity. The central issue faced by married woman in this context is twofold:

1. The high prevalence of non-consensual sexual acts within marriage
2. The limited and inadequate civil remedies available to victims of Marital Rape in contrast with the harsh, and severe punishments prescribed in the BNS for acts which constitute the legal definition of rape.

This reflects a clear disregard for wives who are compelled to submit to sexual intercourse by their husbands. The judicial subtlety that creates a criterion for marital rape, at least as a wrong

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<sup>6</sup> Seema Sahay, Sampada Bangar and Ameeta S Kalokhe, 'Reliable local data for effective prevention of intimate partner violence in India, *The Lancet Global Health*' (2023) 11 1483.

<sup>7</sup> The Protection of Women from Domestic Violence Act 2005, s3.

<sup>8</sup> The Bhartiya Nyaya Sanhita 2023, s64.

<sup>9</sup> DV Act 2005, s3.

is minute, inadequate nonetheless a relevant and a telling acknowledgement of the issue. Even in 2026, the Parliament has offered zero recognition of non-consensual marital sex as rape, treating it as a "private matter" unfit for the surveillance criminal law. The labelling of non-consensual marital sex as a private matter is extremely harmful to a society. This highlights the selective non-interference of the said surveillance in cases of marital rape which is contradictorily ignored to interfere with the private matters of marriage of same-sex couples and recognition of transgenders. The court on several occasions has deliberated on the criminalization of non-consensual marital sex; major changes brought about firstly by, criminalising non-consensual marital sex for minors under the age of 15<sup>10</sup>, then increasing the age bar to that of 18<sup>11</sup>, thirdly, by the State for protecting the institution of marriage concerned by the "excessively harsh" stance of criminalizing marital rape.

The Jaya Jaitley Committee was set up in 2020 by the Ministry of Women and Child Development, recommending the minimum age requirement of a woman to be lawfully wedded must be increased to 21, this in turn through judicial intervention might have a possible affect by increasing the age of the act (non-consensual sex between marital partners) which constitutes rape by 3 years, making it 21.<sup>12</sup> The committee also emphasized that the notion where wives are considered the chattel of the husband is outdated. The Government of India has directed women seeking remedies under Section 63 BNS<sup>13</sup> (formerly S.375 IPC) towards other remedies stating that there are enough remedies and statutes in place to prevent sexual abuse for women. However, a wife who attained majority (i.e. the age of 18) stands with no discourse. In the affidavit submitted by the State to the Supreme Court in 2024, the government has put out harmful ideas questioning whether fundamental rights and protection of women against sexual abuse is more crucial or the stability of the institution of marriage. The idea of consent was put vaguely, affirming that the husband does not have a "legal right to force sex" but on the other side, mixing non-consensual sex with a "reasonable expectation of continuous physical activities". NCRB data (2022-2023) shows a rise in crimes against women, with over 4.5 lakh cases reported in 2023, where "cruelty by husband or relatives" constitutes over 30% of cases.<sup>14</sup> Conviction rates for sexual abuse and domestic violence remain low, with studies

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<sup>10</sup> *Independent Thought v. Union of India* (2017) 10 SCC 800.

<sup>11</sup> *RIT Foundation and Ors. v. The Union of India* (2022) 3 HCC (Del) 572.

<sup>12</sup> Garima Bairagi, 'Analysis of Increase in Age of Women for Marriage in India' (2021) 1 Legal Spectrum J 1, 3.

<sup>13</sup> The Bhartiya Nyaya Sanhita 2023, s63.

<sup>14</sup> India records close 4.5 lakh crimes against women in 2023: NCRB report, *The Economic Times I* (Sep 30 2025) <https://economictimes.indiatimes.com/news/india/india-records-close-4-5-lakh-crimes-against-women-in->

highlighting a 27-28% conviction rate for rape.<sup>15</sup> Non-consensual marital sex is masked by cruelty under the former IPC and as sexual abuse under the Protection of Women from Domestic Violence Act, 2005.

In *Independent Thought v. Union of India*,<sup>16</sup> the Court redefined the exception by deeming non-consensual sex with a minor (by her husband) between the ages of 15-18, in fact, as rape. This is further aligned by POCSO Act. The legislative intent behind POCSO, is to protect children from sexual abuse, primarily because minors do not hold the capacity to mindfully decide and provide consent, especially in cases of sexual activities. Therefore any form of sexual activity with a minor is considered to be statutory rape with no exceptions. This makes the reason for children's protection against sexual abuse to primarily revolve around not attaining proper consent. Similarly, a wife, who has attained majority, must be guarded by her right to consent, and for her consent to hold weightage and to be decisive for categorizing a sexual act as rape or not rape; not the relation she holds with the man. This creates an artificial distinction based on age, not consent, diverging from the key element that makes a sexual encounter rape. Distinction without reasonable nexus does not form intelligible differentia. The concern of false FIRs must be secondary, relating to the facts of the case, evidence provided, statements, and proper investigation like in any other crime. Another landmark judgement in the discussion of criminalizing marital rape is *RIT Foundation v. Union of India 2022*; famously known as the Delhi High Court split judgement of 2022.<sup>17</sup> The issue presented in court was direct, "Should a husband be held criminally liable for raping his wife who is not under 18 years of age?"<sup>18</sup> Mr Sai Deepak in the course of his arguments stated that the Marital Rape Exception is part of India's colonial legacy which has gone through the process of "Indianization" after 1950.<sup>19</sup> "The marriage to a victim does not make a rapist a non-rapist", this highlights the key contention made through an illusory distinction between married and unmarried women masked under the guise of "intelligible differentia with a reasonable nexus". Justice Rajiv Shakhder held Exception 2 of Section 63, unconstitutional by applying the tests of arbitrariness under Article 14 and dignity under Article 21.<sup>20</sup> This exception is not just a barrier to the

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2023-ncrb-report/articleshow/124230733.cms?from=mdr accessed 15 April 2026.

<sup>15</sup> Ibid.

<sup>16</sup> *Independent Thought v. Union of India* (2017) 10 SCC 800.

<sup>17</sup> *RIT Foundation and Ors. v. The Union of India* (2022) 3 HCC (Del) 572 108.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Manish Kumar Sahu and Abhishek Mishra, 'Criminalization of Marital Rape: A Study of Legislative Silence and Judicial Activism' (2025) 5 IJLR 367-372.

fulfilment of the goals of Feminism under the Feminist Theory but also stands as a grave violation of Human Rights.<sup>21</sup> The court recognised the flaws of the Marital Rape Exception, however, the concern of separation of powers and concerns with the decision being ultra vires with legislative perception. The European Court of Human Rights in the case of *C.R. v. the United Kingdom* looked down upon implied consent upon marriage and forceful submission of the wife into sexual intercourse.<sup>22</sup> The court concluded that a rapist does not cease to be one merely because of his relationship with the victim.<sup>23</sup> In *Gorakhnath Sharma v. State of Chhattisgarh*, the court held that non-consensual unnatural sexual acts by a husband, resulting in the death of his wife, do not fall within the legal definition of rape.<sup>24</sup> This judicial interpretation emphasizes how the privacy and upliftment of marital relations and rights are the chief focus of the State, rather than the privacy, autonomy, and upliftment of individual rights of a woman. Individual rights are conferred upon citizens through the Constitution of India, however, the rights of a marital couple although absent from specific provisions, are prioritized in courts.

A major argument on behalf of the opponents of criminalising marital rape is that of broad liability due to false accusations and inadequate decree of evidence. In matters of rape, evidence remains easily conclusive when violent injuries are shown on the face of it, however the definition of rape does not require it to be violent. Verifiable bodily trauma is not always present. This raises the concern of false accusations/complaints, leading on to the question as to whether the fear of accounting for false reports is a fear large enough to subsume that of the offense itself. While there exists large statistics of false cases, and it is a threat much likely to occur in case marital rape is criminalised; the complete disregard of the act as “rape” is contentious as well. Rape is not the only offense where false reports are registered. Attempt to murder u/s 109 is also a realm of offense where evidence is difficult to provide, it in fact, provides an even broader scope of legislation. But, the resistance to criminalise a gendered offense in India (the perpetrator can only be a “man” u/s 63) is more regardless of the statistics showing the number of legitimate cases for rape in itself is huge as compared to falsely registered ones. National Crime Records Bureau’s (NCRB) Crime in India report 2020, less than 8% of all cases under investigation for rape were found to be 'false'. The differing relation

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<sup>21</sup> Ravi Kaustav Reddy, 'Independent Thought v. Union of India: An Analysis from the Feminist Theory of Rape' (2022) 4 IJLLR 207.

<sup>22</sup> *C.R. v. the United Kingdom* (1995) 21 EHRR 363.

<sup>23</sup> *RIT Foundation and Ors. v. The Union of India* (2022) 3 HCC (Del) 572 75.

<sup>24</sup> *Gorakhnath Sharma v. State of Chhattisgarh* (2025) SCC OnLine Chh 2287, 14.

of the perpetrator with the victim changes and annuls the entirety of an offense, raising a question of whether the wife's role in a marriage is still restricted to that of the husband's property influenced by our colonial past, entitling him with the right to exploit the bodily autonomy of his wife.

Marriage does not equate to an implied consent of sexual intercourse till the duration of marriage. In the broader context, consent should be a continuous process not a one-time acquisition of such "rights" by the husband upon marriage. Rape through the lens of the Feminist Theory asserts rape as a form of social control.<sup>25</sup> The idea of consent and the definition of what constitutes rape are constantly subject to debate. Consent must be obtained subsequent to every sexual act. There must be mutual consent of husband and wife, it should not be viewed as "wifely obligations" if women are to be treated as equal marital partners.<sup>26</sup> The origination of rape laws stem from the value of protecting the chastity of men's property, i.e. a man's mother, a man's wife, a man's daughter, a man's sister, but not individually of a woman.<sup>27</sup> The role of a woman in a marriage, i.e. the role of a wife must be uplifted in all realms. The term "India's daughter", encourages the notion of a woman to be protected by "outsiders", but the protection of women from "insiders", for example her husband is disregarded and unrecognised. This is because the power structures that appear in our society are biased towards men and husbands making the wife's role limited to the liberty conferred upon her by her husband. The use of terms such as chastity continue to appear in legal language, as seen in the Hindu Marriage Act<sup>28</sup>, where such terminology is applied to wives. Although, women are now given the status of equal citizens, the justifications for such legal exemption has changed from the wife being the chattel of the man to now more nuanced justifications of "implied consent" and non-interference of the judicial system in marital relationships. This exception is largely derived and influenced by the principles and law practised by the British during their time in India. The doctrine of Coverture was one of the most distinct doctrines applied by the British heavily influenced by the gender hierarchy. It functioned by the assumption of a married couple being a single united entity in the eyes of law. Under this, a married woman had no legal persona, "marital unity" was emphasized, where the rights of the women got completely suspended and merged with that of her husband upon marriage.<sup>29</sup> Continually, the woman

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<sup>25</sup> Ravi Kaustav Reddy, 'Independent Thought v. Union of India: An Analysis from the Feminist Theory of Rape' (2022) 4 IJLLR 207.

<sup>26</sup> M. V. Sankaran, 'The Marital Status Exemption in Rape', (1978) 20 Journal of Indian Law Institute 594, 601.

<sup>27</sup> Ibid.

<sup>28</sup> The Hindu Marriage Act 1995, s25.

<sup>29</sup> Allison A. Tait, 'The Return of Coverture', (2016) 114 Mich. L. Rev. First Impressions 99.

being raped by her husband came as an unnatural and overly harsh application of acts constituting as rape to the lawmakers then. Although Coverture is now redundant and removed from practise, and the narrative of marriage is showcased to be more equitable, marriage is still an institution shaped by hierarchy, gender differentiation, and female disempowerment.<sup>30</sup> Through amendments and acts such as the Married Women's Property Acts, abolishing the suspension of rights of a wife upon marriage, the status of a wife did uplift; but the power structures remain shaping the core of the institution of marriage. These principles that treated women as chattel, especially upon her marriage, deeply affect the shaping of the BNS even if it claims to be free from colonial evils. International standards set by International Human Right treaties such as the ICCPR and CEDAW, encourage the criminalization of Marital Rape, ceasing for it to be an exception as it is a grave violation of Human Rights.<sup>31</sup> Countries like Canada and Brazil have therefore deliberated on such and criminalized Marital Rape. <sup>32</sup>

Marital rape is criminalized in 150 countries. Progress is not just incomplete, it is uninitiated if it only uplifts the rights of some. India's criminal law which is highly influenced by that of the United Kingdom has also successfully criminalised Marital Rape in 1991. The Marital Rape exception was struck down in the United Kingdom by the landmark House of Lords ruling in *R v R*, 1991. Common law and the U.K are tightly linked, with any change in the law by the courts of the UK, reshaped the norms and principles of common law. It was held that marriage is not an irrevocable surrender of consent to the husband, setting aside the assumption of implied consent largely used by Courts even now. The inability of Courts of India and the Legislation to recognise and read down the Marital Rape exception places India behind most countries in terms of compliance to Human Rights and upliftment of women especially the role of women in a marriage. Thirty-five years without reform and progress to eradicate non-consensual marital sex showcases social underdevelopment, with absence of the very concept of spousal consent in sexual relations. Along with such a change in legislation, there will arise concerns raised by opponents of criminalizing non-consensual sex between marital partners, however, the legislation must align with the values enshrined in the Constitution of India under article 14, 15, 19(1)a, 21.<sup>33</sup> India must take a step forward as a country that values equal rights among men and women as a whole without marginalizing the "wives". The arguments of

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<sup>30</sup> Ibid.

<sup>31</sup> Randall and Melanie, 'The Right to No: The Crime of Marital Rape, Women's Human Rights, and International Law', (2015) 41 Brooklyn journal of International Law 1.

<sup>32</sup> Ibid.

<sup>33</sup> The Constitution of India 1950, art 14, 15, 19(1)a, 21.

implied consent and prevalence of sexual abuse in marital relations do provide evidence for the presence of non-consensual sex in itself but the only factor differentiating and exempting it from constituting as a crime is; the nature of the relationship between the victim and perpetrator, i.e. the wife and the husband. The BNS aims and strives as a newer, decolonized, and more aligned with Indian values version of the IPC. Therefore the retainment of the Marital Rape Exception sends out a regressive signal revealing the patriarchal structures of Indian society. The acknowledgement through several judgements must seek to remove the strict barriers protecting the Marital Rape Exception. The Supreme Court is considered to be the guardian of fundamental rights, it must interpret the law with the regard of judicial activism.<sup>34</sup> This becomes meaningful in practice only when it is followed by legislative action. The primary aim of the BNS; (a) decolonizing criminal law and (b) introduction of gender neutral laws promoting gender justice, are only partly fulfilled. In the context of today's socio-legal world, where equity stands as a counter stone for the proper functioning of a developed country. It is time for India to join the 150 countries and move forward a more equitable society.<sup>35</sup>

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<sup>34</sup> *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225.

<sup>35</sup> Pranshu Bharti, 'Why it is time for India to join 150 countries in criminalising marital rape' Firstpost (August 10, 2021) <https://www.firstpost.com/india/why-it-is-time-for-india-to-join-150-countries-in-criminalising-marital-rape-9876111.html> accessed 15 April 2026.