MARRIAGE, CONSENT AND THE MARITAL RAPE EXCEPTION: A CONSTITUTIONAL REASSESSMENT UNDER INDIAN LAW

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ABSTRACT

Indian criminal law continues to contain a marital rape exception in Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita, 2023 (BNS), under which sexual intercourse or sexual acts by a man with his own wife, where the wife is not under eighteen years of age, do not constitute rape under that provision. This raises the issue of the tension between the statutory recognition of consent and the different treatment of non-consensual sexual acts within marriages. The anomaly is highlighted by section 67, which punishes a husband for having sex while living separately without her consent. Recently in September 2026, a three-judges Supreme Court bench of (CJI Surya Kant, JJ. Bagchi and Mohana) revived the constitutional challenges to this exception and listed it for final hearing. This article critically examines whether the exception can survive Article 14,15 and 21 scrutiny. Marriage may have special legal status, but it cannot override an individual autonomy over her body. At the same time concerns about legal process, misuse and social impact highlight the need for carefull safeguards. Ultimately, the article contends that marriage should not be treated as irrevocable consent; the present exception is constitutionally vulnerable, and any reforms must include appropriate procedural safeguards.

Keywords: Marital Rape, Consent, Bharatiya Nyaya Sanhita, Constitutional Validity, Bodily Autonomy, Gender Justice.

INTRODUCTION:

Marriage establishes a legal and social relationship, but it does not destroy the separate identities or rights of either partner. But Indian law treats the same sexual act differently depending on marital status. BNS Section 63[1] defines rape as the act of penetration without consent. In Explanation 2, consent is defined as a "unequivocal voluntary agreement" (by words or gestures) and it is made clear that mere absence of physical resistance is not consent. Despite this modern, consent-based definition, the Act still contains a marital exemption: Exception 2 to section 63 states that "sexual intercourse or sexual acts by a man with his own wife, if the wife was under the age of eighteen years, it was not rape." As a result, the absence of consent in a marriage does not necessarily fall under the offense of rape in section 63 when the statutory marital exception is applied. This brings up issues of equality, physical autonomy and the legal significance of consent in marriage. This exemption therefore provides a legal shield for husbands which is not open to any other perpetrator. The question is not any longer a theoretical one. The Supreme Court (CJI Surya Kant) heard these questions.

OBJECTIVES OF THE PAPER:

- To analyze the impact of marital rape exception on women's rights like privacy, dignity, bodily autonomy, personal liberty, etc.
- To evaluate the effectiveness of BNSS provisions in relating non-consensual sexual Intercourse.
- To assess the need for legal transformation with balancing protection of womens sexual autonomy with procedural safeguards
- To study the judicial approach regarding marital rape through landmark judgments such as Indian thoughts **v**. UOI, Puttaswamy **v**. UOI.

RESEARCH METHODOLOGY

This paper employs a doctrinal and analytical research methodology to examine the constitutional validity of the marital rape exception under the Bharatiya Nyaya Sanhita, 2023

[1] Bharatiya Nyaya Sanhita, 2023, § 63, Explanation 2.

(BNS). The primary sources of information used in this paper include: Section 63 of the BNS defining rape and providing the marital exception, Section 67 of the BNS dealing with sexual intercourse by a husband with his wife during separation and Articles 14, 15 and 21[2] of the Constitution of India. The paper also refers to relevant case laws pertaining to consent, bodily autonomy, privacy and the legal regulation of non-consensual sexual acts within marriage. In addition, secondary sources of information used in this paper consist of the Justice J.S. Verma Committee Report (2013)[3], relevant Law Commission reports and literature. These sources of information are used to evaluate the constitutional validity of the marital rape exception and propose possible legal reforms.

UNDERSTANDING CONSENT WITHIN MARRIAGE:

Consent is central to the legal definition of sexual offences. Consent in the ordinary sense is a person's voluntary decision to engage in a particular sexual act. Trouble begins when this principle is applied to marriage. Marriage is often linked with mutual companionship, intimacy and family life. But none of these expectations demands that one spouse has unlimited dominion over the other spouse's body. Consent may be given on one occasion and withdrawn on another. A person can consent to sex one time and refuse at another. The existence of earlier agreement does not make every sexual act consensual . Indian law regards the same sexual act in a different way according to whether the individuals are married. Section 63 of the BNS gives the definition of rape in terms of penetration and the absence of consent; Explanation 2 to that section defines consent as an "unequivocal voluntary agreement" (either by words or by gestures) and makes it clear that a lack of physical resistance does not amount to consent. Even though this definition of consent is modern in character, the Act includes an exception with respect to marriage: Exception 2 to Section 63 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". Hence this exemption provides husbands with a legal protection which is not available to any other perpetrator.

The matter is not any longer purely theoretical; on 10 September 2026 the Supreme Court considered these questions and has set the final hearing for three weeks later. The Court specifically pointed out the contradiction: if the marital-rape exemption is still in force, how

[2] The Constitution of India, arts. 14, 15 and 21.
[3] Justice J.S. Verma Committee, Report of the Committee on Amendments to Criminal Law (2013).

then can a husband be prosecuted for raping his wife? It has therefore formulated two main questions to be heard: If the exception is to survive, can criminal proceedings still be brought against husbands, and is the exception itself constitutionally valid? To sum up, the Court is considering whether the constitutional protection against non-consensual sex should be overridden by marital status. The article examines this issue in light of Articles 14, 15 and 21 of the Constitution.

The stakes are high. The law at once acknowledges that consent is a prerequisite to lawful sex, but creates marriage as a blanket license to sex which cannot be retracted. The BNS accentuates this incoherence by criminalizing forced sex when the spouses are separated, but not when they live together. The outcome of the pending cases will decide whether an adult married woman has the same right to her body against her husband as she has against other men. In a constitutional democracy that prides itself on on equality and dignity, the very idea of denying married women the protection against rape is a matter of great concern to personal liberty and gender justice.

MARITAL RAPE UNDER THE BNS,2023: THE QUESTION OF CONSENT.

The BNS, which was enacted in December 2023, failed to repeal the marital-rape exception. Section 63 of the BNS reproduces a definition of rape similar to that in the old IPC section 375: it criminalises a man penetrating a woman's vagina, mouth, anus, etc., without her consent, amongst other circumstances. The Act contains two provisions concerning consent. Explanation 2 to section 63 provides that "consent means an unequivocal voluntary agreement when the woman...communicates willingness to participate in the specific sexual act". It also explicitly adds: "a woman who does not physically resist...shall not by reason only of that fact, be regarded as consenting". Thus by its very wording, the statute incorporates the contemporary view that consent must be explicit and may be retracted.

Yet Exception 2 to section 63 grants a categorical immunity: it provides 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”. In practice this means that if a husband forcibly or coercively engages in a non-consensual sex act with his adult wife, the offense of rape is simply deemed not to have occurred; the husband cannot be charged with rape, no matter how egregious the conduct. This status-based exemption is strikingly inconsistent with the rest of the provision’s emphasis on consent.

The anomaly is compounded by Section 67 of the BNS. Section 67 creates a specific offence of sexual intercourse by a husband with his wife "living separately" (by virtue of a separation order or otherwise), which carries a penalty of 2–7 years' imprisonment and a fine[4]. Section 67 thus criminalizes the identical non-consensual sexual intercourse by a husband and wife as Section 63 does for any other sexual intercourse "without her consent." The difference is that non-consensual sexual intercourse by spouses who are living together is not prohibited by the BNS, while the same conduct by married people living separately is prohibited by Section 67.

The practical effect of this anomalous couplet of Sections is that a married couple who have non-consensual sexual intercourse in their home cannot be convicted of rape, whereas if they lived separately, the husband could be convicted of rape under Section 67 for exactly the same act. Moreover, any other man who raped the wife (whether married to her or not) would also be guilty of rape, while a husband who rapes his wife in their home would not be. In essence, marriage (with an adult wife) confers an exemption from liability for rape, regardless of whether the rape occurs in the "home." The comparison between Sections 63 and 67 reveals the tension within the BNS between a general rule requiring the consent of the sexual partner in order for sexual intercourse to be lawful and several specific exceptions to that rule based on marriage.

Article 14 and the Issue of Classification Based on Status:

Article 14 of the Constitution provides for equality before the law and equal protection of laws. Any law which makes distinction between individuals has to have a basis which is reasonable in relation to the aim of the law. The marital-rape exemption makes a classification of all women on the basis of their marital status as it classifies non-consensual sexual intercourse with an unmarried woman or minor as rape but not so with the same act committed with an adult wife.

The inconsistency is clearly brought out by the statute itself. According to section 67, the legislature has conceded that forcing sexual intercourse upon the wife when she is separated from her husband is a crime (as non-consensual sexual intercourse). It is hard to imagine why the wife's consent becomes irrelevant the moment she reunites with her husband. Thus, the law seems to suggest that consent does matter during separation but not during marriage, which

[4] Bharatiya Nyaya Sanhita, 2023, No. 45 of 2023, § 67.

appears to be an anomaly based on statuses alone. This will be hard for any court to rationalize – it is as if the sanctity of marriage itself is being protected and not the autonomy of the individuals concerned.

This has been noted by the courts as well. In RIT Foundation v. Union of India, 2022[5] the Delhi High Court dealt with the exception and gave leave to appeal by a majority. Justice Rajiv Shakdher held that the classification based on whether the woman is married or not is "unreasonable and arbitrary" as if non-marital rape was the only "real rape". He held that Exception 2 violated both Articles 14 and 21 because "marriage does not convert an illegal act into legal."

Finally, the exception under Article 14 creates an arguably arbitrary classification since classifying married and unmarried women is not justified under the goal of the law on rape. On the contrary, the exception may actually be seen as violating the goal since it violates the principle of equality before the law for married women.

Article 21: Dignity, Privacy and Bodily Autonomy:

Article 21 safeguards life and personal liberty, which have been construed by Indian courts to cover dignity, privacy, and autonomy over one's body. In K.S. Puttaswamy vs. Union of India (2017), the Supreme Court unambiguously recognized privacy as an integral part of dignity and personal liberty[6], connecting it with bodily integrity, intimate choices and sexual autonomy. Though Puttaswamy was an information privacy case, it made it clear that choices over one's body and sexuality are central to personal liberty. The said principle applies directly in this situation. The consent to engage in sexual relations is by definition a personal decision. An individual has the right to refuse to give his or her consent or revoke such consent whenever he or she wants. Marriage can be characterized by reciprocity and trust, but it certainly cannot result in the loss of one of the spouses' right to control his or her body.

Article 15 and Gender-Based Protection:

According to article 15, no discrimination based on one's sex should be made. However, while the marital exemption clause states that the restriction will be based on one's marital status, the

[5] RIT Foundation v. Union of India, 2022 SCC OnLine Del 1404.
[6] Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1.

consequences of this restriction will affect only women since only the husbands will benefit from it. It is also allowed to make special provisions for women in the Constitution provided that they promote the well-being of women and not worsen their position in society. The legal provision makes it worse for an adult married woman than for an unmarried woman when there are similar cases of sexual assault. It is difficult to reconcile such discrimination with the constitutional mandate of gender justice. In the words of one scholar, the exception "discriminates against married women who are sexually assaulted and abused by their husbands." While Article 15 alone does not necessarily mean that any marital discrimination will be unconstitutional, an erroneous presumption of perpetual sexual consent on account of marriage could amount to a denial of gender equality.

JUDICIAL DEVELOPMENTS:

- Independent Thought v. Union of India (2017, SC): The Supreme Court (Justice Lokur and Justice Gupta) looked at Exception 2 in relation to child wives (ages 15-18). The Court, by an unanimous decision, read down Exception 2 to increase the age of consent to 18[7]. This case abolished the constitutional anomaly of child wife exemption from rape since the Court held that the age of consent cannot be lowered on account of the marriage of the girl.

- RIT Foundation vs. Union of India (2022, Del HC): A division bench of the Delhi High Court consisting of Sh. Shakdher and Shri Hari Shankar, J.J. differed on whether to invalidate the provision related to wife above 18 years of age. The lead opinion by Sh. Shakdher, J., declared the provision as arbitrary and in violation of Article 14, 15 and 21. In very strong terms, the judge observed how it will be "tragic" if the cries of justice by a married woman went unheeded simply because of her marriage status. Shri Hari Shankar, J., dissented in view of intelligible differentia and left it to the Parliament to change it.

- Hrishikesh Sahoo v. State of Karnataka (2022, Karnataka High Court)[8]: A Karnataka bench of one judge did not allow an appeal in a case against a husband charged with rape. The court pointed out that marriage does not give license to commit rape and that

[7] Independent Thought v. Union of India, (2017) 10 SCC 800.
[8] Hrishikesh Sahoo v. State of Karnataka, Criminal Petition No. 4060 of 2020 (Karnataka High Court, Mar. 23, 2022).

granting blanket immunity would be in violation of Article 14. It held that giving exemption to husbands from rape charges is "contrary to Article 14." (Though the SC stayed this decision on appeal, this case shows that courts are willing to hear such cases.)

This demonstrates the conflict between the two viewpoints. In one way, the courts have acknowledged the inherent incongruity between the exception and equality/autonomy (Independent Thought, RIT/Shakdher, Sahoo). However, on the other side, the judges and lawmakers have taken into account considerations related to marital harmony or practicality. The hearing of the Supreme Court in consolidated form during late 2026 has brought together all these arguments. The bench has to decide on the issues of continuation of the prosecutions under the law (till the decision is delivered) and validity of Exception 2.

ARGUMENTS IN FAVOUR OF RETAINING THE EXCEPTION:

1. Legislative Authority

It could be said that criminal law is a legislative field. The creation or amendment of an offense might have implications for arrest, investigation, evidence, prosecution, and sentencing. Thus, Parliament would be seen as having the institutional advantage of determining what to do about marital sexual violence.

2. Potential for Misuse

Cases of matrimonial conflict could include issues of cruelty, domestic violence, maintenance, divorce, and custody. It has been stated by opponents of criminalisation that the offense of marital rape could be used in addition to existing conflicts. The potential for misuse must not be overlooked. The fact is, however, that just because there may be a potential for misuse, this does not mean that all complaints would necessarily be false.

3. Evidence issues

Sexual acts between spouses normally take place in private. For a criminal prosecution, proving the background against which consent took place will be challenging.

Nevertheless, evidence issues do not distinguish cases of sexual offences within marriage from others. Criminal courts have always had to deal with evidence obtained in private. The right approach would then be careful investigation and judicial review, and not outright statutory exemption.

4. **Protection of the institution of marriage**

There is another claim that criminalisation will increase conflict within marriages and thus destabilise the family. Nevertheless, this claim rests on the assumption that there is a specific form of martial authority which must be protected in order to protect the institution of marriage. Another way to look at this issue is that marriage which is constitutionally sound should be founded on the principle of equality and respect.

PRACTICAL CHALLENGES IN CRIMINALISING MARITAL RAPE

1. **Determining consent**

Consent is often a question of circumstances. Courts would have to examine communications, conduct, surrounding events and other relevant evidence without adopting stereotypes about how a married woman is expected to behave.

2. **False complaints.**

Any new offence should preserve the ordinary safeguards of criminal procedure. A complaint should not automatically result in conviction merely because an allegation has been made.

3. **Privacy of family members**

Inquiries concerning spouses may reveal deeply private details. It is thus important to ensure that such inquiries do not result in any undue exposure of individuals.

4. **Relationship between criminal law and matrimonial law**

The criminal case can run parallel to divorce, maintenance and custody cases. The court and the investigating agency will have to take care not to consider the presence of any matrimonial issue automatically as evidence of falsehood or guilt.

RECOMMENDATIONS:

1. **Re-evaluate the concept of the absolute marital exemption**

The law needs to reconsider whether there is an absolute exclusion of people who commit acts of rape through marriage.

2. **Maintain procedures for safeguarding**

It is vital to keep the standard process for investigation, proof, and trial intact. Criminalization does not necessarily mean conviction.

3. **Sensitive investigative processes**

Issues that come up from within marriage must be addressed by professionals who can deal with sexual assault cases without having to presume any guilt or lying simply because the individuals are married.

4. **Protect confidentiality**

The privacy of complainants should receive particular attention because matrimonial sexual allegations involve exceptionally personal information

5. **Coordinate criminal and matrimonial cases**

In instances where criminal cases take place along with divorce, alimony or child custody cases, coordination of judicial actions will avoid contradictions and harassment.

6. **Enhance awareness of the law**

There needs to be an emphasis on the fact that although marriage implies obligations, it does not imply consent to all sexual activity.

7. **Sentencing should be considered separately from criminalization**

This issue can be dealt with in sentencing if Parliament feels that marital considerations are relevant in sentencing rather than excluding the conduct from criminal responsibility altogether.

CONCLUSION

Exception 2 to Section 63 of the BNS assumes an unusual place in the Indian criminal law. Despite its recognition of voluntary consent as an essential component of sexual autonomy, Exception 2 to Section 63 renders the regular law on rape inapplicable to sexual intercourse or sexual acts between adult husbands and wives. Meanwhile, Section 67 provides that non-consensual sexual intercourse on the part of a husband may be constituted as a punishable offense, if the wife lives separately.

Indeed, marriage is a peculiar institution both in legal and social senses. Yet, the acknowledgment of marriage as an institution does not mean that one spouse should have perpetual control over the body of the other. Article 14 presents the issue as to whether marital status constitutes an adequate ground for differential criminal protection. Article 15 deals with equality issues, while Article 21 introduces the topics of dignity, privacy and autonomy directly into the debate. These arguments on legislative jurisdiction, false allegations, evidentiary problems and family stability are valid points. However, they ought to constitute part of any serious legislation, but they do not necessarily demand the retention of an absolute immunity. The proper course would be to distinguish between two issues that are generally merged together: the issue of whether marriage deserves protection and whether non-consensual sexual acts deserve protection simply by virtue of occurring inside a marriage