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MARITAL RAPE EXCEPTION UNDER SECTION 63 OF THE BHARATIYA NYAYA SANHITA, 2023: CONSTITUTIONAL INCOMPATIBILITY, AUTONOMY, AND THE LIMITS OF MARITAL IMMUNITY

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Abstract

The marital rape exception preserved under Section 63 of the Bharatiya Nyaya Sanhita, 2023²¹⁸⁸, continues a colonial legal fiction that presumes irrevocable consent within marriage. By excluding sexual intercourse by a husband with his wife above eighteen years of age from the definition of rape, the provision creates a structural immunity grounded in marital status. This paper argues that the exception is unconstitutional under Articles 14, 15, and 21 of the Constitution of India. Drawing upon transformative constitutional jurisprudence developed in decisions such as *K.S. Puttaswamy v. Union of India*²¹⁸⁹, *Joseph Shine v. Union of India*²¹⁹⁰, *Navtej Singh Johar v. Union of India*²¹⁹¹, and *Independent Thought v. Union of India*²¹⁹², this paper demonstrates that the marital rape exception fails the tests of reasonable classification, substantive equality, and proportionality. It further argues that the doctrine of “perpetual consent” is incompatible with contemporary understandings of bodily autonomy and dignity. By situating the issue within comparative constitutional frameworks and engaging with counter-arguments concerning institutional stability and misuse, this paper concludes that the marital rape exception cannot survive constitutional scrutiny and must be repealed.

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²¹⁸⁸ Bharatiya Nyaya Sanhita 2023, s 63 Exception 2.

²¹⁸⁹ *K.S. Puttaswamy v Union of India* (2017) 10 SCC 1.

²¹⁹⁰ *Joseph Shine v. Union of India* (2019) 3 SCC 39

²¹⁹¹ *Navtej Singh Johar v. Union of India* (2018) 10 SCC 1.

²¹⁹² *Independent Thought v. Union of India* (2017) 10 SCC 800.

I. Introduction: The Constitutional Paradox

Indian criminal law defines rape primarily through the absence of consent. Section 63 of the Bharatiya Nyaya Sanhita, 2023 (BNS), much like its predecessor Section 375 of the Indian Penal Code²¹⁹³, criminalizes non-consensual sexual intercourse. Yet, Exception 2 to Section 63 provides that sexual intercourse or sexual acts by a man with his own wife, provided she is not under eighteen years of age, shall not constitute rape.

This exception produces a constitutional paradox. The same act—non-consensual sexual intercourse—constitutes a grave criminal offence when committed by a stranger, acquaintance, or intimate partner outside marriage, but is rendered legally immune when committed by a husband against his wife.

The anomaly becomes sharper in light of India's constitutional transformation over the past decade. The Supreme Court has repeatedly emphasized dignity, autonomy, privacy, and substantive equality as core constitutional values. The Court has rejected patriarchal understandings of marriage and repudiated legal doctrines that treat women as subordinate within marital relationships. Yet the statutory framework continues to embed a doctrine that presumes enduring consent.

The central claim of this paper is that the marital rape exception cannot be reconciled with contemporary constitutional doctrine. It violates:

1. Article 14, by creating an irrational classification based on marital status;
2. Article 15, by perpetuating gender-based structural disadvantage; and
3. Article 21, by extinguishing bodily autonomy within marriage.

The paper proceeds doctrinally. It first examines the historical origins of the exception and its

legislative continuity. It then undertakes a detailed analysis under Articles 14 and 21, applying both the reasonable classification test and proportionality review. Subsequently, it examines the internal inconsistency created by Independent Thought, evaluates counter-arguments, and situates the issue within comparative constitutional law.

II. Historical Origins and Legislative Persistence

The marital rape exemption originates in seventeenth-century English common law. Sir Matthew Hale²¹⁹⁴ articulated the principle that “the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.”²¹⁹⁵ This formulation reflected the doctrine of coverture, under which a married woman's legal identity merged with that of her husband.

When the Indian Penal Code²¹⁹⁵ was drafted in 1860 under colonial rule, this common law principle was incorporated without serious normative debate. Marriage was treated as a civil status that implied ongoing consent to sexual relations.

Post-independence constitutionalism radically altered the normative foundations of Indian law. The Constitution guaranteed equality before law and protection of life and personal liberty. Yet, the marital rape exception remained intact.

The Justice J.S. Verma Committee²¹⁹⁶, constituted after the 2012 Delhi gang rape, explicitly recommended deletion of the marital rape exception.²¹⁹⁷ The Committee observed that marriage should not be a defence to rape and that the law must reflect bodily autonomy irrespective of marital status. Parliament, however, declined to adopt this recommendation in the Criminal Law (Amendment) Act, 2013²¹⁹⁷.

²¹⁹⁴ Matthew Hale, *Historia Placitorum Coronae* (1736).

²¹⁹⁵ Indian Penal Code 1860.

²¹⁹⁶ Justice J.S. Verma Committee Report, 2013.

²¹⁹⁷ Criminal Law (Amendment) Act 2013.

²¹⁹³ Indian Penal Code 1860, s 375 Exception 2.

In 2023, Parliament enacted the Bharatiya Nyaya Sanhita to replace the IPC. Although it introduced several structural changes, it retained the marital rape exception, merely raising the age threshold from fifteen to eighteen in light of prior judicial intervention.

Thus, the exception represents not merely historical inertia but an active legislative choice to preserve a doctrine rooted in pre-constitutional morality.

III. Article 14: Equality Before Law and the Collapse of Reasonable Classification

A. The Classification Framework

Article 14²¹⁹⁸ prohibits arbitrary state action and ensures equal protection of the laws. The traditional test requires:

1. Intelligible differentia; and
2. Rational nexus with the object sought to be achieved.

The marital rape exception creates two classes of women:

- Unmarried women (fully protected against rape);
- Married women (denied protection against rape by their husbands).

The differentia is marital status. The critical question is whether this classification bears rational nexus to a legitimate legislative objective.

B. Identifying the State's Objective

Two primary justifications are typically advanced:

1. Preservation of the institution of marriage;
2. Prevention of misuse of criminal law.

Neither withstands scrutiny.

C. Preservation of Marriage as a Legitimate Aim

The argument that criminalizing marital rape would destabilize marriage presupposes that marital harmony depends on immunity from accountability for sexual violence. This premise is constitutionally untenable.

In *Joseph Shine v. Union of India*, the Supreme Court invalidated the offence of adultery, holding that marriage does not entail the subordination of a woman's autonomy. The Court observed that constitutional rights permeate the private sphere and that "a woman loses her voice, autonomy and agency" when treated as property within marriage.

If marriage cannot justify criminalizing consensual adult relationships (as in *Joseph Shine*), it cannot justify decriminalizing non-consensual sexual violence.

Similarly, in *Navtej Singh Johar v. Union of India*, the Court emphasized that constitutional morality supersedes social morality. The State cannot preserve traditional institutions at the cost of fundamental rights.

Therefore, preservation of marriage, even if a legitimate state interest, cannot rationally justify immunity for sexual violence.

D. Misuse Concerns and Equality Doctrine

The second justification concerns potential misuse or false complaints. However, the Supreme Court has consistently held that the mere possibility of misuse does not justify invalidating a penal provision or sustaining discriminatory classification.²¹⁹⁹

If misuse concerns justified immunity, numerous criminal offences would require repeal. The criminal justice system addresses misuse through evidentiary safeguards, not categorical exemptions.

Thus, the marital rape exception fails both prongs of the reasonable classification test.

²¹⁹⁸ Constitution of India, art 14.

²¹⁹⁹ *Arnesh Kumar v State of Bihar* (2014) 8 SCC 273.

IV. Article 21: Bodily Autonomy and Sexual Integrity

Article 21²²⁰⁰ guarantees that no person shall be deprived of life or personal liberty except according to procedure established by law. Judicial interpretation has expanded this guarantee to include dignity, bodily integrity, and decisional autonomy.

A. Privacy and Autonomy

In *K.S. Puttaswamy v. Union of India*, a nine-judge bench recognized privacy as intrinsic to life and personal liberty. The Court held that privacy includes bodily integrity and decisional autonomy in intimate matters.

Justice Chandrachud emphasized that autonomy “constitutes the core of human dignity.”

Sexual consent lies at the heart of decisional autonomy. To deny married women the legal capacity to withdraw consent is to extinguish their autonomy within marriage.

B. Sexual Autonomy in Marriage

Joseph Shine further clarified that marriage does not eclipse constitutional rights. The Court rejected the idea that the husband has control over the wife’s sexuality.

The marital rape exception, by contrast, presumes enduring consent once marriage is solemnized. It denies the wife the ability to refuse sexual intercourse without legal consequence for the husband.

Such denial amounts to state-sanctioned violation of bodily integrity.

V. Proportionality Review and the Structural Overbreadth of the Exception

Contemporary constitutional adjudication in India increasingly employs the doctrine of proportionality, particularly in cases involving restrictions on fundamental rights. Although proportionality analysis is most commonly invoked in Article 19 contexts, its principles are

relevant in assessing whether state action that differentiates between classes under Article 14 or limits autonomy under Article 21 is constitutionally justified.

The proportionality test requires:

1. A legitimate aim;
2. A rational connection between means and aim;
3. Necessity (least restrictive means);
4. Balancing (proportionality stricto sensu).

A. Legitimate Aim

The State may argue that the exception serves to:

- Preserve the stability of marriage;
- Prevent criminalization of intimate disputes;
- Avoid evidentiary misuse.

Even if preservation of marriage is treated as a legitimate objective, the inquiry does not end there.

B. Rational Connection

There is no empirical or doctrinal basis to conclude that criminal immunity for sexual violence promotes marital stability. Marriage is a civil institution grounded in mutual respect and consent. Legal protection against violence strengthens institutional legitimacy rather than weakening it.

Moreover, if the State’s aim is to prevent misuse, granting total immunity to a specific category of offenders is irrational. Misuse concerns are addressed by procedural safeguards, evidentiary standards, and judicial scrutiny—not categorical exemptions.

Thus, the rational connection prong itself is fragile.

C. Necessity

Even assuming a rational connection, the exception fails the necessity requirement. The necessity prong demands that the State adopt the least restrictive measure available.

²²⁰⁰ Constitution of India, Article 21.

If the concern is false complaints, Parliament could:

- Require preliminary judicial scrutiny before arrest;
- Prescribe specific evidentiary standards;
- Provide penalties for malicious prosecution.

A blanket exemption is the most restrictive possible measure from the perspective of the victim, as it eliminates her criminal law protection entirely.

The exception therefore fails the necessity test.

D. Balancing

The balancing stage weighs the severity of rights infringement against the importance of the objective.

The rights infringement here is profound. It involves:

- Physical bodily violation;
- Psychological trauma;
- Denial of sexual autonomy;
- Institutional subordination within marriage.

Against this, the State's asserted objective—preservation of marital harmony—cannot outweigh fundamental bodily integrity.

Under proportionality review, therefore, the marital rape exception cannot survive.

VI. Independent Thought and Doctrinal Inconsistency

In *Independent Thought v. Union of India*, the Supreme Court addressed the marital rape exception insofar as it applied to minor wives between fifteen and eighteen years of age.

The Court read down the exception, holding that sexual intercourse with a wife under eighteen constitutes rape. The Court reasoned that:

- Marriage does not override bodily integrity;

- Minor wives are entitled to constitutional protection;
- The exception violated Articles 14, 15, and 21.

This decision is doctrinally significant for two reasons.

A. Recognition of Autonomy Within Marriage

The Court explicitly rejected the notion that marriage creates immunity from criminal liability. It affirmed that the wife's bodily integrity remains protected.

Although the decision concerned minors, its reasoning rested not merely on age but on constitutional values.

B. Logical Extension to Adult Wives

If bodily autonomy cannot be overridden by marriage in the case of minor wives, what principled distinction justifies denying protection to adult wives?

The only difference is age. Yet, adult women possess greater legal capacity and autonomy than minors. To deny adult women the same protection granted to minors produces a doctrinal inversion.

The State cannot coherently argue that marriage negates autonomy for adults but not for minors. *Independent Thought* thus exposes the internal inconsistency of the continuing exception.

VII. Article 15 and Substantive Equality

Article 15²²⁰¹ prohibits discrimination on grounds of sex. Although the marital rape exception is framed as a gender-specific immunity for husbands, its structural effect is to disadvantage women.

The Supreme Court has increasingly embraced substantive equality, recognizing that formal equality is insufficient where structural disadvantage persists.

²²⁰¹ Constitution of India, art 15.

A. Structural Subordination in Marriage

Indian marriage historically reflects patriarchal hierarchies:

- Economic dependency of women;
- Social stigma associated with divorce;
- Cultural normalization of conjugal obedience.

In such a context, presuming perpetual consent reinforces male dominance.

Substantive equality requires the law to dismantle structural hierarchies, not entrench them.

B. Indirect Discrimination

Even if the provision does not explicitly discriminate on grounds of sex (since it applies to husbands and wives in defined roles), its impact is gendered.

The Supreme Court has recognized indirect discrimination as unconstitutional where neutral provisions disproportionately burden women.

The marital rape exception entrenches gender asymmetry by privileging male sexual access.

VIII. Feminist Constitutional Theory and the Private–Public Divide

The persistence of the marital rape exception reflects a deeper conceptual divide between public and private spheres.

Historically, constitutional rights were perceived as regulating public state action, leaving private family relations beyond scrutiny. Feminist jurisprudence challenges this divide, arguing that the private sphere is often the site of structural oppression.

A. Marriage as a Site of Power

Marriage is not merely a private contract but a legally regulated institution. The State defines marital rights, obligations, property consequences, and dissolution procedures.

By granting immunity within marriage, the State actively structures power relations.

B. The Myth of Conjugal Unity

The doctrine of coverture treated husband and wife as a single legal entity, with the husband representing that entity. Although formally abolished, vestiges persist in the marital rape exception.

Feminist constitutionalism demands recognition of wives as independent rights-bearing individuals.

C. Bodily Integrity as Non-Derogable

Bodily integrity is foundational to personhood. No civil status—marriage included—can nullify the right to refuse sexual intercourse.

The exception transforms consent from a continuous requirement into a one-time matrimonial event. This is incompatible with modern conceptions of agency.

IX. Psychological and Social Harm

The harms of marital rape are not merely physical.

Empirical studies indicate:

- Higher incidence of depression and anxiety;
- Increased risk of sexually transmitted infections;
- Long-term trauma;
- Coercive control dynamics.

By denying criminal recognition, the law communicates that such harm is less serious within marriage.

This normative signaling reinforces silence and stigma.

X. The Argument from Institutional Stability Revisited

It is sometimes argued that criminalizing marital rape would open the floodgates to litigation and destabilize family courts.

However:

- Domestic violence is already criminalized;

- Cruelty under Section 498A IPC²²⁰² (now corresponding provisions under BNS) is prosecutable;
- Protection of Women from Domestic Violence Act²²⁰³ recognizes sexual abuse as domestic violence.

The system already acknowledges violence within marriage. Excluding rape specifically creates arbitrary hierarchy among harms.

XI. Comparative Constitutional Jurisprudence

A constitutional analysis of the marital rape exception must situate India within broader global developments. Comparative constitutional law does not determine domestic outcomes, but it illuminates how similarly situated constitutional democracies have resolved analogous tensions between marital privacy and bodily autonomy.

A. United Kingdom: From *Hale* to *R v R*

The United Kingdom, from which India inherited the marital rape doctrine, formally abolished the immunity in *R v R* (1991)²²⁰⁴. The House of Lords held that the marital rape exemption had become anachronistic and incompatible with modern conceptions of marriage.

Lord Keith observed that the fiction of irrevocable consent no longer reflected contemporary legal principles. Marriage, the Court held, is a partnership of equals, not a relationship of domination. The decision rejected *Hale*'s doctrine as "a common law fiction."

Significantly, the Court did not wait for legislative intervention. It treated the doctrine as judicially constructed and therefore judicially removable. Parliament later codified the position in the Sexual Offences Act 2003.²²⁰⁵

The reasoning in *R v R* parallels the transformative constitutional approach of the

Indian Supreme Court in cases like *Joseph Shine v. Union of India*, where the Court dismantled patriarchal assumptions embedded in statutory frameworks.

B. Canada: Criminal Code Reform and Equality Jurisprudence

Canada eliminated the marital rape exemption in 1983 through amendments to its Criminal Code.⁵ Subsequent constitutional litigation under the Canadian Charter of Rights and Freedoms reinforced the principle that consent must be continuous and voluntary, irrespective of marital status.

Canadian courts emphasized:

- Sexual autonomy as intrinsic to dignity;
- The irrelevance of prior sexual history;
- The necessity of affirmative consent.

The Canadian experience demonstrates that criminalization did not destabilize marriage as an institution. Instead, it aligned criminal law with constitutional equality guarantees under Section 15 of the Charter.

C. South Africa: Post-Apartheid Constitutionalism

South Africa's post-apartheid constitutional order explicitly foregrounds dignity and equality. The Criminal Law (Sexual Offences and Related Matters) Amendment Act criminalizes marital rape without distinction.

South African courts have repeatedly emphasized that marriage does not diminish bodily autonomy. The constitutional right to dignity under Section 10 and equality under Section 9 operate robustly within the private sphere.

India's constitutional text similarly foregrounds dignity (Article 21) and equality (Article 14), making the persistence of the exception doctrinally anomalous.

D. United States: Gradual State-Level Reform

In the United States, marital rape exemptions were historically widespread. However, by 1993,

²²⁰² Indian Penal Code 1860, s 498A

²²⁰³ Protection of Women from Domestic Violence Act 2005.

²²⁰⁴ *R v R* [1991] UKHL 12.

²²⁰⁵ Sexual Offences Act 2003 (UK).

all fifty states had criminalized marital rape, though some retained procedural distinctions.⁶

While American constitutional jurisprudence differs structurally, the evolution reflects recognition that marriage cannot immunize sexual violence.

E. Implications for India

Comparative experience demonstrates three consistent themes:

1. The doctrine of irrevocable consent has been universally rejected in constitutional democracies.
2. Criminalization has not destroyed marriage.
3. Courts have treated autonomy and dignity as paramount.

India's continued retention of the exception places it in a shrinking minority of jurisdictions.

XII. International Human Rights Obligations

India is a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)²²⁰⁶. Article 2 obligates States to eliminate discrimination against women in all spheres, including within marriage.

CEDAW General Recommendation No. 19 clarifies that gender-based violence constitutes discrimination.⁷ General Recommendation No. 35 further emphasizes that States must criminalize marital rape.

Additionally, the International Covenant on Civil and Political Rights (ICCPR)²²⁰⁷, to which India is a party, protects the right to security of person and freedom from degrading treatment.

While international treaties do not automatically override domestic statutes, the Supreme Court has repeatedly held that international obligations may inform constitutional interpretation where domestic law is ambiguous.²²⁰⁸

The marital rape exception, therefore, conflicts not only with domestic constitutional values but also with India's international commitments.

XIII. Addressing Serious Counter-Arguments

A robust research paper must engage with counter-arguments seriously.

A. Evidentiary Complexity and Intimate Context

One argument posits that proving absence of consent within marriage is particularly difficult because of ongoing sexual relations and private settings.

However:

- The law already adjudicates consent in acquaintance rape cases;
- Courts assess credibility, medical evidence, and circumstantial factors;
- Difficulty of proof cannot justify immunity.

Legal systems routinely handle offences committed in private spaces.

B. Risk of False Allegations in Matrimonial Disputes

Concerns are raised that criminalizing marital rape could be weaponized in divorce proceedings.

This argument assumes bad faith while ignoring structural underreporting. Empirical data indicates that sexual violence within marriage is under-reported due to stigma and dependency.

Further, false allegation risk exists across criminal law. Procedural safeguards—such as preliminary inquiry requirements or penalties for malicious prosecution—are available.

Blanket immunity is a disproportionate response.

C. Criminal Law as a “Last Resort”

Some argue that criminal law should not intrude into intimate relationships and that civil

²²⁰⁶ Convention on the Elimination of All Forms of Discrimination Against Women (1979).

²²⁰⁷ International Covenant on Civil and Political Rights (1966).

²²⁰⁸ Vishaka v State of Rajasthan (1997) 6 SCC 241.

remedies under the Protection of Women from Domestic Violence Act suffice.

However, forced sexual intercourse is a grave violation of bodily integrity. Classifying it as merely a civil wrong trivializes its seriousness.

The State criminalizes grievous hurt and assault within families. Sexual violence cannot be uniquely exempted.

D. Cultural Relativism

A further argument suggests that Indian cultural norms differ and that marital rape criminalization reflects Western imposition.

Constitutional rights, however, are not culturally contingent. The Supreme Court has repeatedly affirmed that constitutional morality prevails over social morality.⁹

Fundamental rights are universal within the constitutional framework.

XIV. Legislative Reform Blueprint

A principled reform must address both constitutional compliance and practical implementation.

A. Deletion of Exception 2 to Section 63 BNS

The most direct reform is deletion of the marital rape exception. Consent must be defined identically irrespective of marital status.

B. Clarification of Consent

Statutory clarification could emphasize that consent must be:

- Free;
- Voluntary;
- Capable of withdrawal at any time.

C. Procedural Safeguards

To address misuse concerns:

- Require judicial oversight before arrest in marital rape cases;
- Provide mandatory counselling and support mechanisms;

- Ensure medical and psychological assistance for survivors.

D. Training and Sensitization

Judicial and police training must focus on:

- Understanding coercive control;
- Avoiding victim-blaming stereotypes;
- Ensuring confidentiality.

E. Integration with Family Law

Recognition of marital rape should influence:

- Grounds for divorce;
- Custody determinations;
- Maintenance orders.

Such integration ensures coherence across legal regimes.

XV. The Transformative Constitutional Imperative

Indian constitutional jurisprudence has undergone a marked shift toward transformative constitutionalism. Decisions such as *Navej Singh Johar v. Union of India* and *Joseph Shine v. Union of India* have dismantled legal structures rooted in patriarchal morality.

The marital rape exception represents one of the last vestiges of coverture ideology in Indian criminal law.

Transformative constitutionalism requires that rights penetrate private hierarchies. Marriage cannot be insulated from constitutional scrutiny.

XVI. Conclusion

The marital rape exception under Section 63 of the *Bharatiya Nyaya Sanhita* rests upon an outdated doctrine of irrevocable consent that is incompatible with constitutional guarantees of equality, dignity, and autonomy.

Under Article 14, the exception creates an irrational classification based solely on marital status.

Under Article 15, it entrenches structural gender inequality.

Under Article 21, it extinguishes bodily autonomy within marriage.

Proportionality analysis confirms that the exception is neither necessary nor balanced. Comparative constitutional experience demonstrates that abolition is both feasible and normatively justified. International human rights commitments reinforce this conclusion.

The Indian Constitution envisions individuals—not marital units—as rights-bearing entities. Marriage is a partnership of equals, not a domain of immunity.

To sustain the marital rape exception is to preserve a colonial fiction incompatible with transformative constitutionalism.

The constitutional trajectory of the Supreme Court suggests that the exception's days are numbered. Its repeal is not merely desirable; it is constitutionally compelled.

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