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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

**MARRIAGE CANNOT TRUMP THE CONSTITUTION:
A SOCIO-LEGAL CRITICAL ANALYSIS OF THE
MARITAL RAPE EXEMPTION UNDER THE
BHARATIYA NYAYA SANHITA, 2023**

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Abstract

The marital rape exemption in Indian criminal law represents a serious violation of women's constitutional rights to equality, dignity, and bodily autonomy. By excluding non-consensual sexual acts within marriage from the offence of rape, the law creates a legally sanctioned space for sexual violence based solely on marital status. This article examines the historical roots of the exemption in outdated doctrines such as coverture and implied consent, and shows how these principles are incompatible with modern constitutional values and global human rights standards.

Placing India within the international context, the article highlights the growing global consensus that marital rape constitutes gender-based violence and discrimination. It critically analyses the retention of the exemption under Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita, 2023, and argues that it violates Articles 14, 15, and 21 of the Indian Constitution. The article also exposes contradictions within the new criminal law framework, where cruelty within marriage is criminalised but sexual violence is immunised. It concludes that marriage cannot override fundamental rights, and that the abolition of the marital rape exemption is a constitutional and moral necessity.

Keywords: Marital rape exemption, Bharatiya Nyaya Sanhita, Article 21, bodily autonomy, gender equality.

1. Introduction

1.1. The Legal Problem: Marriage as a Shield for Violence

At its heart, criminal law is the definitive expression of the State's promise to its citizens: the assurance of individual security and the protection of fundamental human autonomy. The law recognizes that the deepest violation one person can inflict upon another is the seizure of the body, and the most egregious form of this violation is sexual assault. Consequently, modern democratic jurisprudence universally elevates bodily integrity and sexual self-determination to the level of inalienable rights, shielded by constitutional guarantees.¹

Yet, standing as a grotesque distortion within this otherwise principled legal structure is the *Marital Rape Exemption (MRE)*.

The MRE is more than a mere technicality, it is a foundational legal contradiction. By granting a husband explicit or residual immunity from prosecution for non-consensual sexual acts against his wife, the law carves out a legally sanctioned zone of violence. This exemption transforms an act that is universally condemned as a severe felony when perpetrated by a stranger into a non-crime, or reduces it to a lesser, often ineffective, civil grievance when committed by a spouse.

This distinction is profoundly perverse. It is predicated on a historical legal fiction: the archaic and offensive notion that the marriage vow includes a perpetual and irrevocable waiver of a woman's right to refuse sex². The legal lacuna suggests that upon signing the marriage register, a woman signs away her sovereign control over her own body, handing over a license for sexual access that cannot, under any circumstance, be rescinded, even in the face of force or coercion. Ultimately, the Marital Rape Exemption serves as the law's ultimate betrayal. It strips the most vulnerable victims, those subjected to intimacy and betrayal, of the protection offered to all other citizens, transforming the institution of marriage from a bond of partnership into a legal shield for sexual violence. This article commences its critical journey by tracing this poisonous legal lineage, committed to demonstrating its irrelevance under constitutional scrutiny and its profound moral failure in the face of modern human rights.

¹ Article 3, UDHR <https://www.un.org/en/about-us/universal-declaration-of-human-rights>
Article 9, ICCPR <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>

² Hale, Sir Matthew. *The History of the Pleas of the Crown*. Vol. 1. 1736

1.2. The Thesis: A Constitutional and Moral Failure

The central argument of this article is two-fold:

- 1. Historically and Doctrinally:** The marital rape exemption is a direct descendant of the archaic doctrine of coverture and Sir Matthew Hale's dictum, principles which are now universally rejected by progressive legal systems as fundamentally incompatible with the status of women as autonomous legal persons.
- 2. Constitutionally and Pragmatically:** The continued maintenance of the MRE, even in its diluted, residual forms, violates the fundamental rights of married women to equality before the law (Article 14/15), personal liberty, and bodily autonomy (Article 21). It is a discriminatory provision that must be excised from the statute books.

2. Global Context

The legal journey to criminalize marital rape has been one of the most significant shifts in global human rights law over the last fifty years. Today, the world has reached an overwhelming consensus: sexual violence is unacceptable, regardless of where it occurs. through targeted legislative reforms that simply deleted the spouse exemption from their rape statutes. More than 100 nations have outlawed it, a major shift that began in many places, including Britain, which criminalized it back in 1991³.

This change has been strongly driven by global human rights mandates. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), a foundational international treaty, is unequivocal. The CEDAW Committee classifies the failure to criminalize marital rape as a clear violation of a state's duty to eliminate discrimination and protect women from gender-based violence⁴. Essentially, international law views the MRE as state-sanctioned inequality.

However, India stands with approximately three dozen other countries such as Pakistan, Afghanistan, and Saudi Arabia, where this legal immunity for husbands remains valid in the current law⁵.

³ Geeta Pandey and Cherylann Mollan, "India government says criminalising marital rape excessively harsh", BBC News, 4th October 2024 <https://www.bbc.com/news/articles/c80r38yeempo>

⁴ CEDAW. General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19. 2017

⁵ Geeta Pandey and Cherylann Mollan, "India government says criminalising marital rape excessively harsh", BBC News, 4th October 2024 <https://www.bbc.com/news/articles/c80r38yeempo>

3. NFHS Data on spousal violence in India

The NFHS-5 survey from 2019 to 2021 was carried out across approximately 6.37 lakh households in 707 districts spanning 28 states and eight Union Territories. The survey covered 7,24,115 women and 1,01,839 men, enabling the generation of disaggregated estimates at the district level. According to this survey, nearly 1 in 3 Indian women between the age of 18 to 49 have suffered some form of spousal abuse, and *around 6% have suffered sexual violence*⁶.

4. Jurisdictional Focus: India's Constitutional Fight Against the Exemption

India's legal battle against the marital exemption is the most important fight of its kind happening right now. For more than 160 years, the exemption sat quietly in the old law, the Indian Penal Code (IPC), that said a husband could not rape his wife.

Today, even though the government has replaced the old IPC with the new Bharatiya Nyaya Sanhita (BNS), 2023, they chose to keep this rule. It is now hidden in the BNS as *Exception 2 to Section 63*⁷. This choice is what makes India the world's biggest test case for the fight for bodily autonomy.

The courts have already taken some steps, showing that the law is moving, even if slowly. The first big push came in 2017 with the Supreme Court's *Independent Thought case*⁸. Even though the case was mainly about the age of consent, the Court delivered a powerful message by essentially saying that a husband who has forced sex with his wife when she is between 15 and 18 years old is guilty of a crime. This ruling made it clear that marriage cannot be a license to harm a child. The BNS later followed this by setting the protective age limit to 18 years, but it refused to protect adult wives.

The battle for adult women escalated in 2022 with the Delhi High Court's ruling. The two judges on the bench could not agree, resulting in a *split verdict*⁹. One judge argued that the exemption was unconstitutional because it was completely unfair and violated a woman's dignity. The other judge disagreed, saying that the judges should not interfere in the lawmaking

⁶ Times of India, "Nearly 1 in 3 women have suffered spousal sexual, physical violence : Family Health survey", 11th May, 2022 <https://timesofindia.indiatimes.com/india/nearly-1-in-3-women-have-suffered-spousal-sexual-physical-violence-family-health-survey/articleshow/91491367.cms>

⁷ Section 63, Exception 2 of Bharatiya Nyaya Sanhita, 2023.

⁸ Independent Thought v. Union of India (2017) 10 SCC 800.

⁹ Delhi High Court. RIT Foundation v. Union of India. (2022) W.P. (C)

job of the Parliament. This deadlock pushed the entire, massive question to the Supreme Court for a final answer.

The core question now facing the Supreme Court is profound: *Does the institution of marriage trump the Constitution of India?* In other words, can a private contract (marriage) legally erase the basic rights that the Constitution promises every single citizen? The answer the Supreme Court gives will not just change the law; it will change the very meaning of what it means to be a woman in India.

4.1 Constitutional Crisis and the Lie of Consent

The entire legal crisis hinges on the word *consent*.

Under the Bharatiya Nyaya Sanhita, 2023, Section 63¹⁰ defines *consent* as an "*unequivocal voluntary agreement*", meaning it must be affirmative, specific, and, critically, revocable at any moment.

The MRE (Exception 2 to Section 63) operates by rejecting every single one of these principles for married women over 18. The law enforces the ancient, discriminatory idea of *implied consent*, which assumes the marriage contract itself serves as a permanent, unchangeable waiver of the wife's right to refuse sex. The MRE thus creates an illegal class of citizen: the married woman whose fundamental right to say "*No*" is nullified by law.

5. The Core Conflict: Constitutional Breakdown in India

The current legal challenge before the Supreme Court is not just about updating an old law; it is about whether the law protects half of the country's population from violence. The petitioners argue that the Marital Rape Exemption (MRE), now found in *Exception 2 to Section 63 of the BNS, 2023*, simply cannot stand because it directly violates the fundamental rights promised by the Indian Constitution.

5.1. Violation of Article 21: The Right to Dignity and Bodily Autonomy

Article 21¹¹ is the most powerful shield against this exemption. It guarantees every person the Right to Life and Personal Liberty, a right the Supreme Court has expanded to include the

¹⁰ Section 63, Bharatiya Nyaya Sanhita, 2023.

¹¹ Art. 21, the Constitution of India, 1950.

fundamental Right to Dignity and the Right to Bodily Autonomy, the absolute right to make decisions about one's own body. The MRE shatters this right for married women. The exemption operates on a terrible idea: that the marriage certificate forces a woman into a permanent, unchangeable surrender of her body. This legal rule denies the wife the most basic right to control who touches her, when, and how. By saying a wife cannot withdraw sexual consent, the law makes her body legally accessible to her husband. This is the ultimate violation of autonomy. Justice Shakti, in the Delhi High Court's split verdict, pointed this out, arguing that the exception was *manifestly arbitrary* and could not survive alongside the dignity guaranteed by Article 21¹².

5.2. Violation of Article 14: The Right to Equal Treatment

Article 14¹³ promises every person equality before the law. The MRE creates an unreasonable division: it protects victims of stranger rape fully, but it deliberately leaves victims of spousal rape unprotected. The State cannot offer any logical reason why marriage should make the crime less severe or remove legal protection. This failure was highlighted by the Supreme Court judges themselves during hearings. They questioned the absurdity: "*All the acts of confinement or assault are crimes, but the final, coercive act of forced intercourse is not? How can that be logical?*". This shows that the MRE is legally indefensible because it creates an unearned, discriminatory privilege for married men that violates the core constitutional principle of equality.

5.3. Violation of Article 15: Prohibition of Sex Discrimination

Article 15¹⁴ strictly bans discrimination based on grounds including sex. The MRE is discriminatory because it is a law that almost exclusively harms women, and the person granted immunity is always a man (the husband). The MRE is a clear case of indirect discrimination because it reinforces and relies on patriarchal stereotypes about the roles of men and women in marriage. By retaining the immunity, the State is actively using the BNS to codify and enforce gender discrimination. The law prioritizes the husband's freedom from prosecution over the wife's fundamental right to be treated as an equal citizen.

¹² Delhi High Court. Justice Shakti's Finding in RIT Foundation v. Union of India. (2022) W.P. (C).

¹³ Art. 14, the Constitution of India, 1950.

¹⁴ Art. 15, the Constitution of India, 1950.

6. The BNS and the Legal Contradiction: A Deeper Look into Indian Criminal Law

The retention of the MRE in *Section 63, Exception 2* is even more glaring when viewed against other modern provisions of the new Indian criminal law framework. The *Bharatiya Nyaya Sanhita, 2023* and the *Bharatiya Nagarik Suraksha Sanhita, 2023* were introduced to modernize the legal system, yet they carry forward this historical burden.

6.1. Contradiction within the BNS

The BNS itself defines "rape" in *Section 63¹⁵* using a broad, inclusive definition that covers various forms of penetration - oral, object, and bodily, and clearly states that *consent* must be an "unequivocal voluntary agreement". The moment a woman communicates unwillingness, the act is non-consensual. However, Exception 2 then steps in to make an arbitrary carve-out, overriding the expansive definition of consent and the broad scope of rape solely based on the victim's marital status.

Furthermore, the BNS has a specific section on cruelty. *Section 85 of the BNS*, which replaces IPC 498A, criminalizes a husband or his relative subjecting a woman to cruelty¹⁶. The definition of "cruelty" in *Section 86* includes wilful conduct that is likely to cause grievous injury to her health¹⁷ (whether mental or physical).

Forced sexual acts are universally recognized as causing grave mental and physical injury. It is illogical that the husband can be punished for the lesser acts of mental or physical cruelty surrounding the sexual violence, but the most severe, core act of sexual assault itself is immunized. This contradiction demonstrates the legal system's confused and contradictory approach to violence against married women.

6.2. Procedural Hurdles under BNSS

If the MRE was abolished, the new procedural code, the *Bharatiya Nagarik Suraksha Sanhita, 2023*, would govern the investigation and trial. While the BNSS aims to be more "victim-centric," its procedures still present potential challenges for victims of IPSV:

¹⁵ Section 63, Bharatiya Nyaya Sanhita, 2023

¹⁶ Section 85, Bharatiya Nyaya Sanhita, 2023

¹⁷ Section 86, Bharatiya Nyaya Sanhita, 2023

- **Mandatory Forensic Evidence:** The BNSS mandates forensic investigation for offences punishable with seven years of imprisonment or more¹⁸. Since rape carries heavy punishment (BNS Section 64 sets a minimum of ten years), forensic evidence would be mandatory. In an intimate relationship setting, collecting this evidence, especially from a crime that may have occurred weeks or months prior, can be highly complex and often relies less on DNA and more on consistent testimony and circumstantial evidence of coercion.
- **Victim-Centric Recording:** The BNSS provides for recording the statement of the victim of sexual assault at her residence by a woman police officer¹⁹. This is a positive step towards ensuring sensitivity, which is vital for a victim of spousal abuse who may face extreme difficulty stepping out of her home to file a complaint.

The procedural law is modernizing, but it must be backed by a substantive law (BNS) that actually defines the violence as a crime in the first place. The MRE renders all these progressive procedural safeguards useless for a married woman over 18.

7. The Sociological Reality: Trauma, Betrayal, and the Private Sphere

The legal arguments over constitutional articles often overshadow the devastating real-world trauma caused by intimate partner sexual violence (IPSV). The law's attempt to keep the crime hidden within the "private sphere" of marriage ignores the severe, often compounded, damage inflicted upon the victim.

Research confirms that IPSV is often more traumatic than rape by a stranger. This is due to several factors that the legal exemption fails to recognize:

- **Compounded Betrayal:** The violence comes from the person sworn to protect, leading to a profound collapse of trust and safety. The home, which should be a refuge, becomes a constant source of threat.
- **Cycles of Abuse:** Marital rape is rarely an isolated incident. It often exists as one element in a wider pattern of domestic abuse, including physical assault, emotional blackmail, and economic coercion. The frequency and repetitive nature of the abuse deepen the psychological injury.

¹⁸ Bharatiya Nagarik Suraksha Sanhita, 2023.

¹⁹ Bharatiya Nagarik Suraksha Sanhita, 2023.

- **Psychological Damage:** Victims of marital rape experience high rates of depression, anxiety, Post-Traumatic Stress Disorder (PTSD), and suicidal ideation, often struggling more with recovery because the perpetrator is a constant presence in their lives. The State's failure to criminalize this act effectively tells the victim her trauma is legally trivial.

By refusing to criminalize the act, the law effectively denies the victim access to criminal justice mechanisms, police support, criminal charges, and punitive action, forcing her to rely solely on the far weaker remedies of the *Domestic Violence Act, 2005 (PWDVA)*. The law treats sexual violence not as an attack on the State's duty to protect her, but as a manageable "marital dispute."

8. The State's Defence and Moral Failure

In court, the government and opponents of abolition often raise two main arguments to keep the exemption. Both arguments are legally weak and morally wrong.

First, they claim that criminalizing marital rape will destroy the institution of marriage²⁰. This argument is fundamentally flawed. A marriage sustained by coercion and fear is already destroyed. The law should not protect an institution; it must protect the vulnerable individual within it. The sanctity of the marriage certificate can never be prioritized over the sanctity of the human body.

Second, opponents argue that criminalization will lead to a misuse of the law, that wives will file false rape cases during divorce proceedings²¹. The possibility of misuse applies to every single criminal law, but we do not abolish the laws for those crimes. The fear of misuse should never stop the law from protecting genuine victims of horrific violence. The government's true moral failure here is its willingness to use the *possibility* of a false complaint as an excuse to deny protection to millions of real victims.

²⁰ Utkarsh Anand, "In Supreme Court, Centre defends marital rape exception", Hindustan Times, 4th October 2024 <https://www.hindustantimes.com/india-news/in-sc-centre-defends-marital-rape-exception-101727981691940.html>

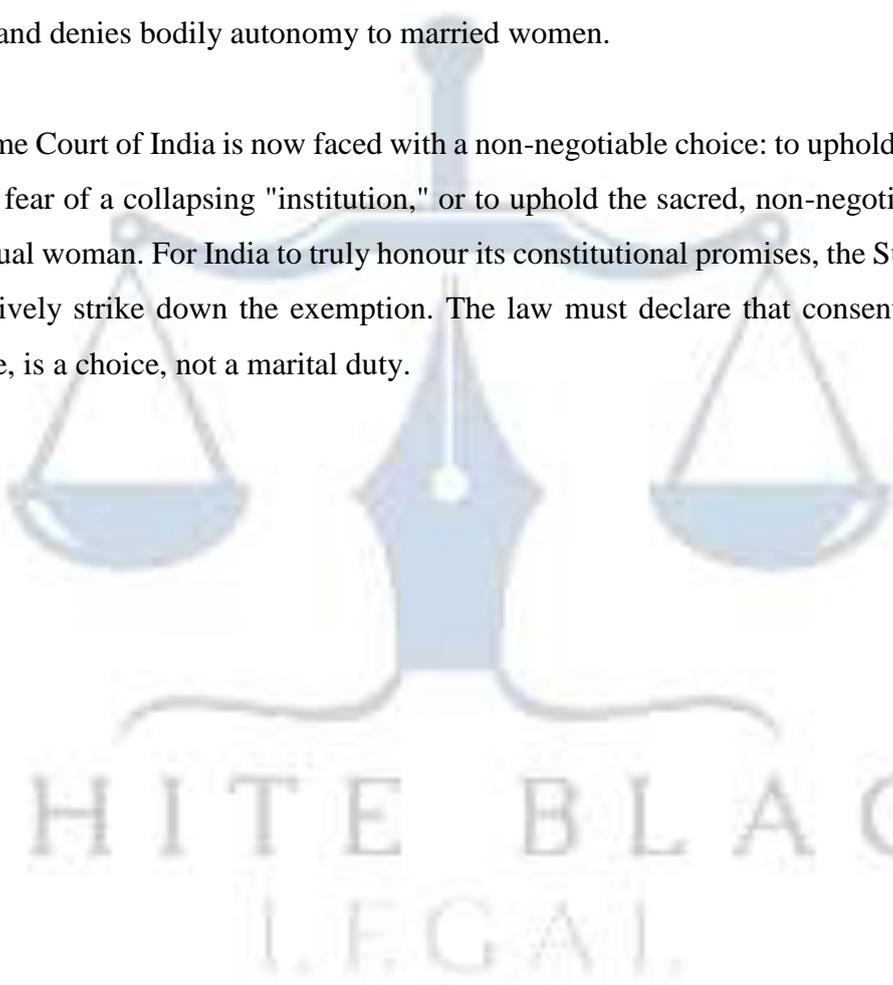
²¹ Utkarsh Anand, "In Supreme Court, Centre defends marital rape exception", Hindustan Times, 4th October 2024 <https://www.hindustantimes.com/india-news/in-sc-centre-defends-marital-rape-exception-101727981691940.html>

9. Conclusion and Call to Action

The marital exemption, currently Exception 2 to Section 63 of the BNS, is a legal and constitutional relic that has no place in a modern democratic republic built on the promises of equality and dignity.

The rule is structurally inconsistent with the BNS's own criminalization of all other forms of domestic violence and the expansive definition of consent. Most critically, it fails the constitutional tests of Article 14, Article 15, and Article 21. It strips dignity, sanctions unequal treatment, and denies bodily autonomy to married women.

The Supreme Court of India is now faced with a non-negotiable choice: to uphold the outdated, patriarchal fear of a collapsing "institution," or to uphold the sacred, non-negotiable rights of the individual woman. For India to truly honour its constitutional promises, the Supreme Court must decisively strike down the exemption. The law must declare that consent, always and everywhere, is a choice, not a marital duty.



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