



CRIMINALIZING MARITAL RAPE: CULTURAL, SOCIAL, AND LEGAL TENSIONS BETWEEN JUSTICE AND MISUSE

Abul Hasem*

ABSTRACT

This article critically examines the contested topography of criminalizing marital rape, positioning it within social, cultural, and legal frameworks. While advocates argue that recognizing marital rape as a criminal offence supports the principles of bodily autonomy, equality, and justice, critics caution against potential misuse that could destabilize marital institutions and dissipate trust. Drawing on South Asian perspectives, with a focus on India, where Section 63 of the Bharatiya Nyaya Sanhita (BNS) continues to exclude marital rape from the definition of rape, this study explores how patriarchal norms, religious traditions, and entrenched legal immunities perpetuate silence around marital rape. At the same time, it discusses comparative international experiences where criminalization has been both protective and, in some contexts, measures the vulnerability to misuse. The analysis argues that the debate cannot be reduced to binaries of justice versus misuse but must address the complexities of social values, cultural sensitivities, and the evolving interpretation of rights in marriage. The short article calls for refined legal reforms that protect victims while safeguarding against arbitrary exploitation.

Keywords: Marital Rape, Section 63 of BNS, Gender Justice, Consent and Autonomy, Human Rights and Law Reform.

INTRODUCTION

The provision of the Bharatiya Nyaya Sanhita has led to a new look at India's criminal justice system. Even though many definitions and punishments were changed and made more Indian, Section 63's retention of the marital exception to the crime of rape is still legally and ethically

*LLM, TATA INSTITUTE OF SOCIAL SCIENCES.

questionable. [\(Cody, 2022\)](#) The legal fiction that marriage gives a man the right to have sex with his wife, as long as she is not under eighteen, is the same as saying that marriage gives a guy the right to have sex with anyone. This research not only reiterates established critiques. Instead, it looks at Section 63 from a practical and legal point of view, asking not only what the law says but also why it decides to erase consent in marriage and what a fair way to move forward may look like. [\(Torenz, 2021\)](#) In doing so, I examine a series of practical and philosophical inquiries central to current discourse: the definition of rape in normative and doctrinal contexts; the exclusion of marital rape from criminal law; the significance of the age threshold of eighteen and the intersection of the POCSO framework with spousal exceptions; the approaches taken by lawmakers and judges regarding these issues; and the feasibility of criminalizing marital rape in a manner that is both principled and pragmatically enforceable, while avoiding potential misuse. The assignment integrates doctrinal analysis, comparative reference, literature review, and social reality to assert that the marital exception is incoherent, harmful, and amendable; contingent upon the conjunction of criminal law reform with procedural safeguards, victim support, and public education and awareness. [\(Fus, 2006\)](#)

What IS RAPE? THE CONCEPTUAL CORE: CONSENT AND AUTONOMY

At its essence, rape law constitutes a legal reaction to the infringement of physical liberty via sexual intrusion. In the past few decades, courts around the world and more progressive parts of Indian law have changed the idea from a restricted finding of physical resistance or visible injury to one based on whether or not there was free, voluntary, and revocable permission. [\(Nayar et al., 2023\)](#) Consent is not an absolute signature granted once for all; it is an ongoing communicative act, revocable at any time, and tainted by force, threat, deceit, or impairment. A consent is not something that has the power to override the unforeseen threats to the body and the legal resonance. This system foregrounds autonomy: sexual intercourse without consent is thus not a private quarrel but an assault on the person's self-determination, right to body, right to choice, and right to life. [\(Fischel & O'Connell, 2015\)](#)

Despite this doctrinal shift, the law still presents remnants of previous reasoning. One longstanding debate is the idea that certain social statuses alter the meaning of consent. The marital exception entrenched in Section 63 resurrects precisely that idea: it treats the marital bond as grounds to construe sex differently, in a manner that sex is a condition of marriage. This is philosophically and morally troubling. If the moral distinction that matters is the voluntariness of sexual participation, why should a husband's identity remove the requirement

of consent? ([Dougherty, 2018](#)) Conversely, if the state is prepared to protect the autonomy of an unmarried person against sexual violation, it is unclear why it denies married women the same basic protection. Conjugal relations between husband and wife are a certain fact; however, it is still not taken that the wife will remain happy forever in her law-in-house, which is why section 85 holds the provision, which deals with domestic cruelty. ([R, 2023](#))

In short, a consent-based view of rape sees the partner's identity as only important if it impacts consent, not as a reason to excuse the act. This statement asserts that a legal framework about consent is essential for comprehending the complexities of rape. In this type of study, the identities of the people involved, including their gender, age, or relationship to each other, only matter in reference to the idea of consent. These characteristics do not constitute definitive justifications or excuses for the crime of rape. The focus should instead be on whether consent was given, as this is the most important thing to think about when judging the validity of sexual interactions. So, consent becomes the most important problem, going beyond individual identities. ([Dougherty, 2018](#))

THE MARITAL EXCEPTION: HISTORY, TEXT, AND IMMEDIATE PECULIARITIES

Colonial criminal codes historically included a marital exemption for rape, embodying patriarchal social norms that regarded wives as integral to husbands' conjugal rights. The BNS's Section 63 keeps a close copy. The linguistic phrasing is inadequate in its implications: sexual intercourse between a man and his wife, if she is under eighteen, does not constitute rape. The literalism of this clause is significant because legislation is not only descriptive; it delineates the parameters of criminal liability. In this regard, there exist principles of reasonableness, the paramount criteria for interpreting statutes, and constitutional morality. ([Wegerstad, 2021](#))

Once the provision of rape is read in context with Articles 14, 19, and 21, peculiar anomalies emerge. The BNS also criminalizes certain sexual acts by husbands during judicial separation or where other specific fearful circumstances exist. In this way, the same non-consensual act may be punishable if the spouses are formally separated, but not when they cohabit. From a moral standpoint, this produces a paradox: the wrongfulness of an act depends not on the presence or absence of consent, but on the couple's domestic status. From a legal standpoint, the exception creates an unevenness that makes the statute appear less a principled demarcation

of criminal culpability and more a repository for social preferences about the sanctity of certain private relations. ([DOWDS, 2022](#))

AFE EIGHTEEN AND CHILD PROTECTION LOGIC

The age limit of eighteen is not arbitrary. The Protection of Children from Sexual Offences Act (POCSO) of 2012 in India defines a kid as anyone under the age of 18 and says that sexual actions involving children are always non-consensual. The Supreme Court's rationale in *Independent Thought v. Union of India* necessitated an interpretation of prior rape statutes to align with this protective principle; hence, sexual intercourse with a wife under the age of eighteen is classified as rape, regardless of marital status. That judicial parallel acknowledges a fundamental and evident truth: where power, maturity, and agency are fundamentally imbalanced, as in child marriage, purported assent is legally untrustworthy and must be rejected. ([Dağ et al., 2021](#))

This protecting logic, however, reveals a more profound error. If marriage cannot legitimize sexual relations with minors due to age, unequal capacity, and coercive circumstances, why can it be allowed to supersede consent for adult women? It can be said that adults have more freedom, but this freedom is not necessarily equal in adult marriage. Power imbalances, economic dependence, societal pressure, and ideological norms can all make it seem like adults are consenting when they are not. The law's protective posture toward minors indicates that sexual activity within specific relational situations is inherently problematic; there exists no compelling principled barrier that transforms married adulthood into automatic and perpetual consent. ([Dougherty, 2018](#))

LAWMAKERS, JUDGES, AND THE DYNAMICS OF CONFUSION

The link among various statutes, legal interpretations, and policy execution regarding marital rape is contentious. Parliament's preservation of the married exception during the transition to the BNS indicates a status-quo stance: instead of abolishing the exception, the legislator chose to maintain it, potentially reflecting political prudence or cultural conservatism. When we look at the decisions and statements made by different courts and judges, we see that judicial interventions have had uneven results. Some courts and committees, like the Justice Verma Committee, have called for the termination of the marital exemption. Other judges, on the other hand, have supported its ongoing existence by saying that marriage is sacred or that it is

necessary for police work. ([“Report of the Committee on Amendments to Criminal Law, 2013,” 2023](#))

The Delhi High Court's split ruling on petitions against the marital exception is a clear example of how judges can be unsure of what to do. One side said the exception was unlawful because it was an arbitrary difference that went against equality and dignity. The other side said the exemption was valid since marriage is unique and can't be compared to relationships between strangers. That split is not merely a difference of legal technique; it demonstrates a disputed value judgment about whether marriage should be protected as an institution even at the cost of subordinating individual autonomy. ([Schultz-Knudsen et al., 2023](#)) This divergence highlights the deep-seated societal implications and historical underpinnings of marital rape laws, often rooted in traditional patriarchal constructs that historically denied wives sexual autonomy and upheld the husband's conjugal rights as inviolable. ([Heinskou et al., 2019](#)).

One more internal contradiction that deserves attention is the legislature's concurrent acknowledgment of the detrimental effects of sexual violence in different statutory contexts. The Medical Termination of Pregnancy law's recognition of “rape” as a ground for abortion, with attendant presumptions about mental injury, implies that pregnancy resulting from rape produces serious harm. Yet, criminal law refuses to treat comparable acts inside marriage as punishable crimes. The net result is legal incoherence: one statute recognizes that rape damages a woman's health and autonomy, while another refuses to back up that recognition with criminal sanction when the perpetrator is a husband. ([Kahn-Freund, 1953](#))

This dilemma in legal provisions throughout the Acts reveals the understanding of the complex situations of marital rape and loopholes therein. While the Medical Termination of Pregnancy Act states that the severity of the rape necessitates proper medical care and punishment for the perpetrator, section 63 preserves the exception of marital rape due to the challenging feasibility of this offence, perhaps. This dissonance outlines a broader legislative failure to comprehensively address gender-based violence within marital frameworks, culminating in a system where the unique vulnerabilities of married women are not adequately protected by the criminal justice system. ([Bennice & Resick, 2003](#)).

SOCIAL ROOTS: HOW MARRIAGE BECAME A LICENSE TO ERASE CONSENT

When legal peculiarities are exposed, they rarely remain purely doctrinal. That is to say, when unusual legal issues are identified, they often have real-world implications beyond just legal

theory. The marital exception has social foundations; in many parts of South Asia, marriage is treated not merely as a private relationship but as a social contract with clearly gendered expectations. For instance, marriage in Muslim is purely contractual in nature as per the Islamic Law, and this marriage solemnization requires a Dower (Mehr) to be provided to the wife as a transaction for purchasing an organ. This is the literal and doctrinal interpretation of Muslim Law as per its Fiqh (theory of Islamic Law), where the reasoning for Dower is determined as to the purchase of a female vagina. [\(Oman, 2010\)](#) Resultantly, Muslim Law involves the very core principle of contract. On the other hand, Hinduism perceives marriage as a sacramental one and eternal; hence, there were no grounds for divorce in earlier times. Though nowadays legal and sociological experts are no longer considering marriage in Hinduism as a sacramental one in regard to the protection of personal freedom. [\(Saadiya, 2018\)](#)

A marriage certificate is usually interpreted as a cultural signal of the wife's unending sexual availability. In other words, it's a cultural belief that being married means the wife will always be there for her husband in that way. That belief is reinforced by religious teachings, familial pressure, and patriarchal norms that exacerbate domestic harmony and the preservation of the marital unit above the individual autonomy of spouses. In practical terms, many women have been co-opted and taught that refusing sex can be indistinguishable from undermining the marriage, inviting social boycott, violence, or economic insecurity. [\(Kornrich et al., 2013\)](#)

The split verdict by the Delhi High Court captures this interpenetration of law and social belief vividly, as written by Aradhana Cherupara. It notes that child marriages are voidable and that legal reform has attempted to blend child protection with rape law, but that the older exception allowed husbands to claim a right to sexual access from minor wives. This demonstrates that often the law's silence about wives' consent reflects a wider social license that treats marriage as a sacramental or contractual mechanism that serves the authorization of sexual access. Law, in such situations, is not merely reflecting social practice but is legally entrenching power relations; it also helps to maintain the existing power dynamics and relationships between different groups, which perpetuate the inequalities. [\(Aradhana, 2022\)](#)

This social understanding also explains why some activists and scholars worry about criminalizing marital rape. In contexts where honor, family reputation, and economic survival are significant factors, women may be pressured not to report. On the contrary, critics argue that criminalization can be weaponized in marital conflicts. These tensions are real and must be addressed; however, they do not justify maintaining a complete exemption that leaves many

actual victims without redress. This necessitates a critical and circumstance-based approach implementing legal reformation, whereas there will be a check and balance. [\(Husovec, 2023\)](#)

THE REALITY OF HARM: PREVALENCE, REPORTING, AND UNDER-RECOGNITION

Quantitative and qualitative studies indicate that sexual coercion within marriage is not rare. Large-scale surveys and smaller qualitative studies at the household level report considerable rates of reported sexual coercion among married women. Significantly, official criminal statistics undercount the phenomenon because, until criminalized, many acts do not register as offences, and victims do not approach police for a crime that the statute denies exists. Even where victims approach civil remedies (for instance, under domestic violence legislation), the framing and available relief may be inadequate to address the severity of sexual violence, and these domestic issues often get tiresome and delayed. Survivors narrate experiences that range from repeated, ritualized, and honored coercion used as punishment to violent sexual assaults that produce physical and mental trauma comparable to stranger rape. These narratives undermine the claim that marital rape is a theoretical or marginal concern; the harms are concrete, factual, and widespread. [\(Martin et al., 2006\)](#)

THE MISUSE ARGUMENT: REAL WORRY, WRONG REMEDY

One of the most politically potent arguments against criminalization is the possibility of misuse; false or exaggerated complaints brought by spouses as instruments of revenge or leverage in marital disputes, or for any other reason. While misuse is a legitimate policy concern, the appropriate response is not to deprive victims of protection by creating a statutory safe space for perpetrators. In the criminal justice system, in fact, in the police system, it routinely faces the problem of false accusations across offences; yet procedural safeguards, prosecutorial discretion, evidentiary thresholds, and judicial mechanisms exist to establish the due process of law and equal protection of law. What criminalization would require is not unique: a careful design of arrest, investigation, and prosecution protocols that mitigate misuse while allowing genuine survivors access to justice. To enter into the fear that any law will be misused, and thus to refuse protection, is to privilege a hypothetical risk over real and ongoing harm, which washes out the essence of justice and human dignity. [\(Huzela et al., 2023\)](#)

COMPARATIVE JURISDICTIONS THAT ABOLISHED MARITAL IMMUNITY

Looking outward to shed light on this debate is instructive. The United Kingdom's repeal of marital rape in *R v R* rejected the old common-law doctrine of irrevocable marital consent and applied ordinary criminal law to spousal sexual violence. Post-apartheid reforms in South Africa reframed sexual offences around consent and removed relationship-based immunities. Several other countries have embraced similar reforms, effectively without the social collapse that critics predicted. ([Abrahams et al., 2013](#))

The comparative data show that criminalizing marital rape is doctrinally manageable and institutionally feasible when accompanied by supportive measures such as victim services, police training, specialized prosecution teams, appropriate forensic investigations, and awareness campaigns. These regions didn't create extra obstacles for spouses who report abuse; instead, they used the regular criminal laws already in existence. They also provided additional support to acknowledge the delicate nature of domestic violence. This subtle approach raises the question of whether relying solely on existing standards is enough to adequately protect and support victims in such sensitive situations. To enhance their effectiveness, policy and lawmakers could consider integrating specialized training for law enforcement and judicial staff to better understand the nuances and distinctions of domestic violence cases. ([Ewin et al., 2020](#))

BALANCING CRIMINALIZATION WITH SAFEGUARDS

A principled, pragmatic path forward requires a comprehensive reform. At the legislative level, the marital exception in Section 63 should be repealed so that consent, not status, becomes the decisive criterion. However, repeal alone is insufficient and may have further complexity. The criminalization should be accompanied by a set of safeguards: mandatory training for police, prosecutors, forensic experts, and especially psychologists on intimate-partner sexual violence. ([Rigotti & McGlynn, 2022](#))

Establishing pre-arrest supervisory review protocols for domestic allegations to prevent unnecessary arrests while preserving the capacity to tackle such issues when evidence permits; protocols for swift medico-legal examination and forensic collection sensitive to trauma; legal aid and economic supports for complainants who may face retribution; and clear prosecutorial guidelines to reduce the risk of unbalanced or arbitrary charges. Additionally, sentencing guidelines can maintain proportionality by distinguishing degrees of harm and culpability,

therefore addressing concerns that criminalization might produce disproportionate punishment in minor conflicts. The overall construction should be rights-affirming rather than punitive for the sake of punishment. [\(Kendall, 2025\)](#)

INSTITUTIONAL AND CULTURAL INFLUENCE

Law alone cannot eradicate marital sexual violence. A sustained social and policy strategy is necessary with attention to a rights-based approach. Public education and awareness campaigns that restructure consent as an ongoing right, community involvement and outreach to pull apart norms that define marital duty with sexual availability, and engagement with religious and community leaders to reimagine doctrinal and cultural modifications are indispensable. Education and economic empowerment programs possess crucial tools for women to reduce familial dependence, which makes victims vulnerable to continuing in abusive relationships. Equally important are supports for men; rethinking masculinities, the nuances of consent, the mental and physical state of the partner, and offering counselling and awareness programs can lessen the incidence of coercive behavior. [\(Huntley et al., 2020\)](#)

PRACTICAL CONCERNS ABOUT EVIDENCE AND INVESTIGATION

The challenges come when sceptics point to evidentiary challenges and the occurrence of crimes in private spaces. These challenges are real but not determinative. Sexual offences often rely on careful credibility assessments, medical reports, digital communications, witness networks, and sometimes expert testimony on the trauma of the victims and statements by the accused. Strengthening forensic capacity, ensuring early medico-legal access, and preserving "evidence handling procedure" are practical steps that reduce evidentiary uncertainty. The system should also avoid demanding special corroboration rules that implicitly discredit spousal testimony; instead, courts should assess credibility on standard principles while being informed by trauma-sensitive practices, considering the magnitude of the previous cruelty in the household, for better comprehension. [\(Lamb et al., 2007\)](#)

WHY REFORM IS CONSISTENT WITH CONSTITUTIONAL VALUES

The constitutional framework provides a strong standardizing basis for reform. The right to life and personal liberty under Article 21 has been read to embed bodily integrity and dignity. Equality guarantees under Article 14 posit the argument against a classification that denies married women the same protection as unmarried women. The constitutional assurance of

dignity and privacy commits that the state must guard intimate autonomy, not erase it. The selective protection of minors under the POCSO Act, 2012, demonstrates that the legislature and courts can and do read statutes with consistency to protect vulnerable groups; encompassing that protection to adult spouses is a logically coherent and morally defensible step in resonance with constitutional commitments. ([Nayar et al., 2023](#))

CONCLUSION

Marriage cannot be a license to violate autonomy. Section 63's marital exception opinions at the convergence of law, social normativity, and institutional choice. It codifies a social and structural conception of marriage that immunizes institutional preservation over individual autonomy. Nonetheless, modern criminal law, constitutional values, and comparative experience all suggest that consent is the right borderline around which sexual offences should interchange. Criminalizing marital rape is not an attack on marriage; it is a defense of the dignity, bodily integrity, and equality of those within it. The route to reform must be cautious, critically analyzed, evidence-informed, and rights-positive; eliminate the exemption, design procedural safeguards and rules to reduce misuse, strengthen investigatory and support institutions, and implement a public awareness campaign to challenge the social assumptions that have long produced marital sexual violence untold. The law can cease to follow the traditional and oppressive social values and begin to protect the autonomy central to the constitutional morality only by combining legal change with institutional capacity and cultural engagement. ([Sunaryo et al., 2022](#))

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