



CONSENT AFTER 'I DO': RETHINKING MARITAL IMMUNITY IN INDIAN RAPE LAW

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ABSTRACT

In India, the debate over "Consent After 'I Do'" centres on Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita (BNS) (formerly Section 375 of the IPC), which grants legal immunity to husbands for non-consensual sexual acts with their wives, provided they are over 18. This principle is based on the "implied structure doctrine", which suggests that marriage constitutes a permanent and irrevocable agreement to sexual intercourse. The underlying issue with waiving consent for sexual intercourse during marriages is that it undermines Article 21 of the Indian Constitution directly. Every individual has the right to life and personal liberty, which includes the right to bodily autonomy, and Article 14 of the Indian Constitution guarantees equality before the law and equal protection of the laws within the territory of India. 31,677 rape cases have been identified in India for the year 2021¹, with no definite distinction for marital rape victims. Various countries in Western Europe, North America and some parts of Asia and Africa criminalise marital rape; many have no stance on it, India, however, does not criminalise. The UN has urged countries multiple times to criminalise marital rape. Despite global progress, Indian law continues to exempt marital rape, creating a gap between constitutional rights and criminal law. This paper will focus on the extent to which this non-penalisation causes societal distress, and is against the right to life and the right that guarantees equality before the law and equal protection of the laws within the territory of India. The study adopts a doctrinal approach, analysing case laws, statutory provisions, and comparative jurisprudence. The analysis reveals that the exception violates Articles 14 and 21 of the Constitution. The paper argues for its removal, aligning Indian law with international human rights standards.

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¹ <http://mha.gov.in/MHA1/Par2017/pdfs/par2024-pdfs/LS06082024/2412.pdf>

1. INTRODUCTION

Section 63 of the *Bhartiya Nyay Sanhita* explicitly states Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape. What is this if not a law defeating the purpose of itself, evil circumvention perhaps. But what is marital rape? Non-consensual sexual intercourse or sexual penetration induced by force, coercion, threat, in simple words, not borne out of free will and is within the course of a marriage, is defined as marital rape. India does not have a standalone law on the pressing issue, but it does legalise marital rape under Section 63, Exception-2 of BNS. This grants an unprecedented and unchecked immunity to partners, fosters sexual abuse and violates the right to life under Article 21 and right to equality before law under Article 14 by undermining bodily autonomy, consent and right to life with dignity. The National Family Health Survey found that between 2019-2021, 32% of married women experienced physical, sexual or emotional violence by their current husbands (15.6.1), and 82% of married women aged 18-49 who have experienced sexual violence reported their current husbands as the perpetrators (15.3.2). However, it is important to note that, according to the same survey, 9.9 out of 10 cases of sexual assault go unreported in India². Explanation 2 of Article 2 of the Medical Termination of Pregnancy Act (1971) further reiterates just how arbitrary Exception 2 is. The Act permits abortion if the pregnancy has been “caused by rape”, which can cause a “grave injury” to the pregnant woman’s mental health. This law was recently applied in *X v The State of Madhya Pradesh*. In the 2022 ruling, the Supreme Court explicitly stated that the meaning of “rape” must include marital rape for the MTP Act. What criteria are used to decide when to penalise men less severely for a crime that costs a woman her life and dignity? It is irrational that the Indian Parliament openly recognises that marital rape causes incalculable harm in the Medical Termination of Pregnancy Act, but refuses to criminalise it in the Penal Code. This highlights that sexual violence is likely far more widespread than survey data suggests. In its ruling, the Supreme Court refrained from addressing whether it is constitutional to leave married adult women without any legal protection against sexual violence by their husbands. This raises a critical question: why should a woman’s age or marital status determine whether an act is legally recognised as rape?

In the wake of the 2012 “Nirbhaya” Gang Rape, a three-member committee led by former Chief Justice JS Verma was formed. The committee’s analysis of India’s sexual assault laws

² <https://dhsprogram.com/pubs/pdf/FR375/FR375.pdf>

emphasised that rape is not a crime of passion but an expression of power, archaic patriarchy at that. It was argued that a “marital or other relationship” should not serve as a defence against sexual violence, and marriage does not provide “irrevocable consent” to forceful sexual acts.

The Delhi High Court, in a two-judge bench, for *RIT Foundation v. Union of India*³, delivered a 1:1 split decision, where Justice Rajiv Shakti argued that it violates articles 14 and 21 and that forced sex is “equally injurious” whether the perpetrator is a husband or a stranger—stated that the “sanctity of marriage” cannot be saved by granting immunity for a heinous crime. Justice C. Hari Shankar posed an “intelligible differentia” or a logical distinction between sexual acts within marriage and those with strangers. It was claimed that marriage accompanies itself with “legitimate expectation of sex” and that criminalising it would be “antithetical to the institution of marriage.” It was maintained that defining a new offence is the role of the Legislature, not the Courts.

Would this then mean that if a couple is expecting a boy child and they are blessed with a girl, should they have the autonomy to kill said child simply because their institution of parenthood wants a boy child? Why must the institution of marriage run on the man’s, in our case the husband’s expectation to indulge in sexual intercourse and not the wife’s? Why is it then that the implied consent runs only for the perpetrator? Does this not violate the sacrosanct bond that said institution of marriage is built upon?

2. HISTORY OF MARITAL RAPE IN INDIA

2.1 The Colonial Legacy and the Doctrine of "Implied Consent"

The contemporary legal framework regarding marital rape in India is rooted in 19th-century British common law. When Lord Macaulay drafted the Indian Penal Code (IPC) in 1860, he incorporated Exception 2 to Section 375, which said that sexual intercourse by a man with his own wife was not rape.

This exception was built upon two archaic legal doctrines namely, The Hale Doctrine (1736) where Sir Matthew Hale famously asserted that “the husband cannot be guilty of a 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.”

³ Case date

Can this implied consent not be used as a façade by husbands to prey upon their wives? What is this if not a patriarchal veil?

The Doctrine of Coverture viewed a woman's legal identity as being "covered" by or merged into her husband's upon marriage, effectively rendering her his chattel (property). A testament to the gravity of this doctrine is evidenced in *Queen Empress v. Hurree Mohun Mythee (1890)*, where the Calcutta High Court could not convict a man for the rape of his 10-year-old wife—despite the act leading to her death—because the marital exception legally sanctioned the violence. A ten-year-old girl, before asking our male-biased society to view this as an imposition of forced adulthood on a girl, could one be urged to view that a minor was driven to death because marriage comes with the innate expectation of sex? The law's refusal to call this violence by its name reinforces a culture in which submission is idealised and resistance is shamed.

2.2 Post-Independence Stagnation and the "Sanctity of Marriage"

Following independence, the Indian judiciary largely remained hesitant to interfere in the "private sphere" of the home. In cases like *Harvinder Kaur v. Harmander Singh (1984)*, the courts argued that introducing constitutional Law into the home would be like "introducing a bull into a China shop," fearing it would dismantle the institution of marriage, the very sacred institution that, as per the understanding of a defendant-driven society argues the importance of desire over consent and bodily autonomy.

This era could be easily defined by a judicial priority of "institutional sanctity" over "individual bodily autonomy."

The institution has changed and evolved through the years in terms of education, later marriages and higher rates of divorces, but its sacralisation has produced a pattern of "continuity more than change," It is stagnant and lies in the hands of the doer of the wrongful deeds.

The downfall of the Hindu Code Bill proposed by B.R. Ambedkar failed, and the ruins of the bill led to a disappointed man's resignation. Any measures that have ever been taken to pose this heinous crime for what it is have been eaten by parasites of such kind.

India has run for years on a system that shields the perpetrators under a veil of relationships. Would it truly matter if the rapist was a husband, father or a stranger? Does the expectation of sex become so high to the point that we begin to treat the other gender as an object.

2.2 The "Nirbhaya" Catalyst and the Justice Verma Committee (2013)

The 2012 Delhi gang-rape infamously known as the "Nirbhaya" gang-rape case marked a chaotic point in the Indian criminal law, leading to widespread public outrage that compelled the state to re-examine its legal framework on sexual violence. In response, the government appointed the Justice Verma Committee, which in 2013 delivered a landmark report that unequivocally recommended the removal of the marital rape exception.

The Committee argued that the law should be amended to clarify that a marital or other relationship between the perpetrator and the victim is not a valid defence. It stressed that the common law doctrine of "implied consent" has no place in modern jurisprudence and that marriage cannot be treated as a licence for non-consensual sex or undermining of bodily autonomy.

Acting on several of its recommendations, the legislature enacted the Criminal Law (Amendment) Act, 2013, which significantly expanded the definition of rape, introduced new offences relating to aggravated sexual assault, and strengthened punishments for various forms of sexual violence.

However, this progressive overhaul, the legislature notably omitted the specific recommendation to criminalise marital rape; not only does it justify the exclusion on the ground that doing so might "destabilise the traditional family structure," but also highlights a stark imbalance that traditional family structure comes at the cost of consent, sexual autonomy and personal freedom for a woman.

In *Independent Thought v. Union of India* (2017), the Supreme Court struck down the exception for wives under 18 years of age, holding that a minor girl's right to bodily integrity and protection from sexual violence cannot be sacrificed merely because she has been married off, thereby making it clear that marriage cannot be used to justify what would otherwise be statutory rape.

In *X v. State of Madhya Pradesh* (2022), the Supreme Court took a further step by holding that for the Medical Termination of Pregnancy Act, the term “rape” must be interpreted to include marital rape, so that a married woman impregnated through non-consensual sex by her husband can access abortion services as a rape survivor; this, however, produced a striking legal paradox in which the woman is treated as a victim of rape for medical and reproductive rights, yet the husband remains insulated from prosecution as a “rapist” under the Indian Penal Code because the marital rape exception still stands.

In *Hrishikesh Sahoo v. State of Karnataka* (2022), the Karnataka High Court refused to quash rape charges against a husband at the threshold, observing that “a man is a man; an act is an act; rape is a rape,” reinforcing the principle that the character of the act, not the status of the relationship, must determine whether an offence of rape has occurred.

Are numerous connotations where marital rape has been recognised as the parasite that it is, slowly draining the society of its true essence, stripping away Bharat MATA from the divine femininity that the personification possesses

3. THE CONTEMPORARY LANDSCAPE: BNS, JUDICIAL DEADLOCK, AND SOCIETAL REALITIES

With the implementation of the Bharatiya Nyaya Sanhita (BNS) in 2024, the Indian legislature had a historic opportunity to bring criminal law in line with modern constitutional values by addressing the marital rape exception, but it largely replicated the earlier position instead. Section 63, Exception 2 of the BNS mirrors the old Indian Penal Code provision, and although it incorporates the Independent Thought judgment by fixing the age of consent for a wife at 18, it still retains the core “immunity” for husbands in cases of non-consensual sex within marriage.

This choice reflects a legislative preference for treating marriage as a kind of arrangement in which sexual access is presumed, thereby placing the supposed stability of the marital bond above an individual woman’s right to refuse and to exercise full bodily autonomy.

Following the 2022 split verdict of the Delhi High Court on the validity of the marital rape exception, the constitutional spotlight has now shifted squarely to the Supreme Court of India, which is hearing a batch of petitions that challenge the exception on the touchstone of “constitutional morality.” At the heart of this challenge lies a fundamental question: can the right to privacy within the home—often invoked to keep the state out of family affairs—be

stretched so far that it becomes a shield for “private violence” and immunises husbands from accountability for serious violations of bodily integrity? The petitioners argue that privacy cannot be turned into a licence for abuse and that the Constitution’s guarantees of equality, dignity and autonomy demand that the marital bedroom not be placed beyond the reach of criminal law when it comes to sexual violence.

The contemporary reality, however, exposes a stark disjunction between law and lived experience. Data from the National Family Health Survey (NFHS-5) indicates that nearly one in three women in India suffers spousal violence, suggesting that the home is a major site of physical and sexual abuse. Yet, marital rape remains the only form of physical assault that is effectively legitimised by criminal law, because non-consensual sex by a husband continues to be excluded from the definition of rape. This legal silence not only denies survivors meaningful remedies but also fuels a culture of “normalisation,” in which women internalise abuse as part of marital duty and often do not seek help, believing that no crime, in the eyes of the law, has actually occurred.

The horror of marital rape becomes even more unbearable when we look at it against the backdrop of political turmoil, communal riots, and war, where women’s bodies are turned into battlegrounds.

In a Draupdi by Mahasweta Devi, a woman, Dopdi, from a tribal background, suffered the loss of her husband in tribal riots. Dopdi was bought in by army officials and gang-raped. When presented in front of an officer, she was asked to put on clothes, to which she refused. Her nakedness becomes a terrifying confrontation for the perpetrators. It symbolises a refusal to be shamed, forcing the oppressors to face the reality of their own brutality. Her refusal to put on clothes represented a stark shift in the power dynamics when the perpetrators had to face the consequences of their actions. The addition of termination of pregnancy out of a marital rape in the MTP stands as a testament to how society will venture to all the ways possible to avoid accountability for men, even if it means providing temporary relief instead of penalising the root cause. Instead, women are taught to be ashamed of their bodies, dressing sense, haircut, the length of their skirts in schools, and the lip balms that they wear. A systematic inclusion of this patriarchal mindset of blaming for lack of mere self-control and respect for consent has always been blamed on women’s way of living.

In such moments of collective breakdown, sexual violence is deliberately used as a weapon of domination and humiliation, a way to “teach a lesson” to a community, to cleanse, to mark territory through the most intimate form of cruelty.

Yet, while this brutality by enemy soldiers rightly shocks the conscience of the nation and the world, a quieter, more insidious violence unfolds in the shadows of the same conflict-ridden homes. In areas torn by border disputes, insurgencies, or riots, women often find that the rage and frustration of war follow their husbands back into the house, where the bedroom becomes an extension of the conflict outside. It is the weakest of men who enforce their power upon women who are deprived of their consent at the disposal of more such men. When the state is fully occupied with tanks, borders, and ceasefires, it becomes blind to the bruises hidden under sarees and salwar kameez, to the silent screams swallowed in the dead of night. A woman raped by an enemy soldier is recognised as a “victim of war,” a symbol of what the enemy has done to “us,” but if she is raped by her own husband in that same shattered home, the law looks away and calls it a “private matter,” denying her even the vocabulary of victimhood.

This cruel distinction creates a permanent conflict zone within the marriage itself, where the wife lives as if under occupation, her body governed by someone else’s will, her “no” disarmed by the fact of a wedding ceremony and a sacred bond. In refusing to name marital rape as a crime, the legal system silently tells her that violence is only real when the perpetrator is a stranger with a gun, not a familiar hand that locks the door from the inside, and so she remains trapped in a war that never makes it to the news, a war where the frontline is her own body and there is no promise of rescue.

MARITAL RAPE AND THE INDIAN STATE: LAW, SILENCE, AND THE INNER CONFLICT ZONE

It is tempting to believe that the greatest threats to women’s bodily integrity come from the outside: from strangers on dark streets, from enemy soldiers in distant wars, from mobs whipped into frenzy by communal hatred. Implied consent is nothing but a simple way of detaching from the reality of the actions that a husband does to his wife under the façade of marriage. Demeaning the sacred institution of marriage for a desire of sex and lack of self-control.

For countless women in India, the most enduring violence is not inflicted by an unknown, but by the man who they are made to trust, and share their legal identity as “wife.” Marital rape

sits at the heart of this contradiction. It is both ordinary and unspeakable, pervasive and legally invisible. The tension between the sanctity of marriage, as imagined by law and society, and the sanctity of a woman's own body, as promised by the Constitution, is exposed like an open wound by these questions on marital rape.

It is disappointing to know that the difference between conjugal rights and rape is just a wedding ceremony. This distinction is not accidental it is founded on age old practices of prioritising gender, caste, creed and colour over knowledge and civic sense.

For decades, Indian criminal law has carved out a special zone of immunity for husbands, treating non-consensual sex within marriage as something less than rape, or not rape at all. Shocking is that manier times this marital rape has been identified as a grave injury to a woman's body and mind and yet not one comprehensive step has been taken to tackle the problem.

Year after year, when parents phrase their sentences as "*shadi ke baad pati ke saath jaana*" they are ingraining the patriarchal mindset that sets the base for the war zone that is being run under the sham of marriage. Here, the ordinary protections of criminal law are suspended in the name of marital harmony, family honour, and social order."

The wife's right to say "no" is quietly negotiated away at the altar, the registry office, or the mandap, often without her knowledge and certainly without her explicit consent. She may believe she enters into a partnership; the law treats her as entering into a sexual contract that she cannot revoke.

The emotional and psychological consequences of this legal fiction are profound. A woman raped by a stranger can, at least in theory, name what happened to her and seek recognition as a victim. She may face stigma and disbelief, but the language of crime and injustice is available to her. A wife raped by her husband, on the other hand, is denied even this basic dignity of naming. When she reaches for words, the law pushes her hand away. She is told that what she feels as a violation is, in fact, a duty

Over time, this produces a deep internal fracture. Many survivors begin to doubt their own perception of reality. They normalise the abuse as part of being a "good wife," telling themselves that silence is sacrifice, that endurance is love, that consent is not needed when

there has been a wedding ceremony. The law's refusal to call this violence by its name reinforces a culture in which submission is idealised and resistance is shamed.

This is why the metaphor of the "permanent conflict zone" is so powerful. In a conventional war, there is at least the hope of ceasefire, of negotiation, of eventual peace. For a woman trapped in an abusive marriage, the war is endless and internal. The front line runs through her own body, and there is no neutral territory where she can retreat to safety. Every night can become a potential site of battle; every locked door, a fortified bunker. The enemy is not outside the gates but sleeping beside her, his power sanctioned by social norms, religious sermons, and statutory exceptions. The state, which rushes to condemn sexual violence in public spaces and on international platforms, becomes curiously absent here. Its silence is not neutral; it is complicity. By refusing to criminalise marital rape, the law effectively declares that some forms of violence do not count, that some bodies are less deserving of autonomy, and that the vows of marriage can override the fundamental rights of the individual.

Yet, within this bleak landscape, there are also signs of resistance and hope. Survivors who speak out, often at enormous personal risk, challenge not only their abusers but also the legal system that has failed them. Feminist movements, human rights advocates, and progressive jurists have steadily chipped away at the moral legitimacy of the marital rape exemption. They insist that marriage cannot be a licence to violate; that privacy cannot be a shield for cruelty; that equality and dignity must follow a woman into the bedroom, not stop at the threshold of her home. Each story told, each petition filed, each judgment that recognises a wife's right to bodily integrity, pushes back against the centuries-old narrative that a husband's desire is paramount and a wife's consent is optional.

To treat marital rape as a private matter is to misunderstand its public significance. It shapes how society understands sex, consent, and gender roles. It teaches men that entitlement can masquerade as love, and women that endurance is their fate. It reproduces a hierarchy in which the institution of marriage is valued more highly than the person who inhabits it, elevating the abstraction of "family" over the lived experiences of those most vulnerable within it. A just legal order cannot accept this hierarchy. If the Indian Constitution means what it says about equality, dignity, and personal liberty, then the law must eventually step into the so-called private sphere and draw a clear line: a wife is not a subject; her body is not a battlefield; and her "no" does not lose its meaning at the moment she says "I do."

This chapter, then, is not merely about a gap in the penal code. It is about the emotional universe of women whose pain has been normalised, whose voices have been softened into silence by the twin pressures of culture and law. It is a call to recognise that the home, often idealised as the safest place for a woman, can also be the site of her most intimate terror. It asks the reader—whether as citizen, lawyer, judge, or policymaker—to confront an uncomfortable truth: as long as marital rape remains outside the reach of criminal law, the promise of equality and dignity for women in India will remain tragically incomplete.

The refusal to criminalise marital rape in India is not just a gap in the statute book; it is a deliberate constitutional silence that reveals how little autonomy the State is willing to recognise for married women. So long as the law preserves a special exemption for husbands, it effectively carves out a private enclave inside the home where equality, dignity, and bodily integrity are suspended in the name of preserving the marital bond. A country that aspires to global leadership in human rights cannot continue to defend an institution whose supposed sanctity is built upon the routine denial of a woman's right to control her own body. The real test of our constitutional morality lies not in preambles and speeches but in whether the promise of rights follows a woman into her marriage. The time has come to shift our legal and moral focus from protecting the ****institution**** of marriage to protecting the individual within it, and to affirm, without qualification, that every woman—married or not—has an unquestionable, enforceable right to say “no.”