

# Marital Rape as An Invisible Crime: Challenges in Criminalization and Prosecution in India

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## ABSTRACT

Marital rape is a hidden, pervasive and routinely neglected GBV crime in India that is given legal protection, social protection and institutional protection. Millions of married women are a victim of such crime, but it is still underreported, under prosecuted, and under-recognized. Even the exception of marital rape of the colonial era was in Bharatiya Nyaya Sanhita 2023, which was referred to as a complete revamp of Indian Criminal Law. The paper attempts to delve into the various complexities which render marital rape invisible within the Indian criminal law and society. The study identifies three main barriers to the implementation of this law: (1) exclusion of marital rape from the definition of rape in the law as per Section 63 of BNS; (2) lack of support systems and prosecutorial problems including evidentiary issues and institutional biases; (3) sociocultural barriers to reporting rape including patriarchal norms, family honour concerns and economic dependence. This paper summarises the efforts to pass legislation from 2013 to 2023, looks at the similarities and differences between the domestic violence and criminal rape legislation, and briefly examines enforcement challenges. The results of this comparative analysis of jurisdictions successful in criminalizing and prosecuting marital rape offers a basis for a comprehensive reform plan for the BNS, which may include reforming the statute, developing prosecution guidelines, assisting victims, and creating public awareness campaigns.

**Keywords:** Marital Rape, Invisible Crime, Bharatiya Nyaya Sanhita, Criminalization, Prosecution Challenges, Section 63 BNS, Domestic Violence, Evidentiary Issues, Legal Reform, Gender-Based Violence

## I. INTRODUCTION: THE PARADOX OF INVISIBLE VIOLENCE

Marital rape is an 'invisible crime' in India, for which only an estimated 30% of married women have experienced it in 'real life'<sup>1</sup> but not yet in criminal law, where it remains unrecognized, widely experienced and only rarely reported, and perpetrated and prosecuted to a limited extent.

Marital rape is not accidental, but rather structural, evident in laws that clearly exclude marriage from the definition of "rape", social relations and norms, and institutional practices that do not promote victim seeking for redress. This retention was a historic missed opportunity as the Indian New Criminal Code (the Bharatiya Nyaya Sanhita, 2023) was created from scratch and they had chosen to retain an exception in the new code from the old Indian Penal Code, which was based on the now discredited doctrine of coverture. This retention is of great significance<sup>2</sup>. There was a lot of public discussion about the need for a decolonisation of Indian law and rendering it consistent with the values of the constitution

<sup>1</sup> National Family Health Survey-5 (2019-21), Ministry of Health and Family Welfare, Government of India (2022).

<sup>2</sup> The Bharatiya Nyaya Sanhita, 2023 (BNS) came into force on July 1, 2024, replacing the Indian Penal Code, 1860.

as the BNS was enacted. However, when it came to the far more egregious case of marital rape, which may be the most staggering example of colonial patriarchy that has been sewn into criminal law, Parliament chose to preserve the status quo.

### Here's what the latest NFHS says about marital rape in India

For most sexually abused married women, husband was the perpetrator

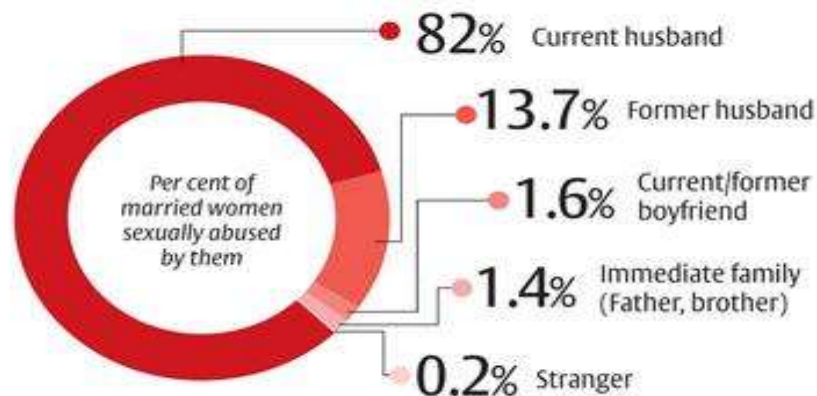


Figure 1: Supreme Court on Criminalization of Marital Rape<sup>3</sup>

Fig 1, Marital rape is not visible in every sense of the word; it is a part of the existing legal system in India that is being actively preserved. This paper aims to discuss why marital rape is invisible and the barriers for visibility and successful prosecution of the crime in the criminal law system. The analysis covers five parts: Part II discusses the concept of invisibility in context of marital rape; Part III discusses the difficulties in criminalizing marital rape and the continued legislative resistance, and Part IV discusses prosecutorial challenges regardless of the legislation on domestic violence; Part VI discusses a framework for tackling the invisibility and for meaningful criminalization and prosecution.

## II. THE ARCHITECTURE OF INVISIBILITY

### A. Legal Invisibility: From IPC Section 375 to BNS Section 63

The most basic aspect of invisibility is legal. The categorical exclusion had multiple functions: to preclude the victim from speaking of the experience as rape, to preclude remedies for criminal law for victims of rape, who were not victims of marriage rape, and to promulgate a strong social message that there was a qualitative difference between a man and his wife and rape by strangers and acquaintance rape.<sup>4</sup>

A great deal of excitement greeted the passage of the Bharatiya Nyaya Sanhita by Parliament in 2023, especially among women rights activists and the legal reform community, that this rewrite of the criminal law would finally remove the marital rape exception. The anomaly had been recognized one time decades before by the Law Commission of India, which observed that the exception does not belong in the current criminal jurisprudence, but such a change had not yet been made by the BNS, who

<sup>3</sup> Abhyankar, Kalyani, and Anushka Datta. "Marital rape: Legal status and development." *Journal of Victimology and Victim Justice* 5, no. 1 (2022): 71-79.

had raised the age limit to eighteen years<sup>4</sup>. It's especially important for the exception to be retained in the BNS since it shows that the legal invisibility isn't a static condition, but a conscious decision. Parliament could have produced a new criminal code, one that was up to date with the present values, and consistent with the country's constitutional obligations and international commitments. Rather, it intentionally selected to move the colonial exception into the new legislation, indicating that marital rape is still out of the scope of criminal law<sup>5</sup>.

### **B. Social Invisibility: Patriarchal Norms and Normalization**

There is social invisibility, the invisible cultural attitudes that prevent a woman from having sex with her husband without her husband's permission, without it being thought of, named and reported. There is social invisibility, meaning that the cultural assumptions and attitudes that make it unacceptable for a woman to have sex with her husband without her husband's permission are unimaginable<sup>6</sup>, unthinkable, unnameable, and unreportable. Indian society's sexuality is under the control of patriarchy and marriage is a way of transferring this power from fathers to husbands.

In this context, the idea of marital rape seems to be counterintuitive: how can the husband rape the wife, when marriage is viewed as the husband's rights to the wife's body? This normalization takes place at several levels. Forced sexual intercourse by husband or husband/husbands is a form of rape, but many women do not know this. They have internalized the concept that a woman should be sexually available to her husband/husbands. Second, the data from the national family health survey indicates that commonly women who experience sexual violence in marriage do not consider it abuse as it is a private family matter and it would bring shame and instability to the family.

Third, social attitudes that are broader in scope influence marital rape in its perception of lesser seriousness than stranger rape, such as the belief that "true rape" is only perpetrated by an unknown man beyond the confines of marriage<sup>7</sup>. This sexual violence hierarchy is harming the sexual violence of married women<sup>8</sup>. These social attitudes are evident and a part of the legal system, and the BNS' decision not to except marital rape aligns with the social belief that marital rape is somehow different from rape.

### **C. Statistical Invisibility: The Underreporting Phenomenon**

Marital rape is systematically underreported, so it is invisible in statistics and statistics hide the extent of the problem. Marital rape is also not legally recognised as a crime under BNS, Section 63 and this acts as a driver to underreporting as victims are not permitted to report marital rape as rape if they wish to. Women do report domestic violence but tend not to mention sexual violence<sup>9</sup>. The stigma attached to discussing marital sexuality is evident in the reluctance to mention sexual abuse in cases brought under Protection of Women from Domestic Violence Act.<sup>10</sup> Reports are hindered by a number of barriers, including a lack of trust in the credibility of reporting, financial dependence, fears about the wellbeing of their children, pressure within the family system, lack of awareness, and the expectation of bias in institutional responses.

### **D. Institutional Invisibility: Police and Judicial Attitudes**

In some areas, the attitudes of law enforcement and the judicial system themselves, make marital rape invisible, and they respond to it on a reconciling basis. Police officers are often accused of turning away

<sup>4</sup> The Bharatiya Nyaya Sanhita, 2023, No. 45 of 2023, § 63 Exception 2 (India).

<sup>5</sup> Rao, TS Sathyanarayana, Nilesh Shah, and Chittaranjan Andrade. "Marital rape in India." *Journal of Psychosexual Health* 4, no. 4 (2022): 221-222.

<sup>6</sup> The Indian Penal Code, 1860, § 375 Exception 2 (before repeal).

<sup>7</sup> Shousha, Nayera Mohamed, and Dina Magdy Taha. "Sacred bonds, silent pain: Understanding women's perceptions and experiences of marital rape in Egypt." *Journal of Family Violence* (2025): 1-16.

<sup>8</sup> Law Commission of India, 172nd Report on Review of Rape Laws 3-4 (2000).

<sup>9</sup> Justice J.S. Verma Committee, Report of the Committee on Amendments to Criminal Law 442-448 (2013).

grievances about marital sexual violence, instead referring them to a counselling service. Police officers are frequently accused of ignoring complaints of marital sexual violence and just sending them to counsel services instead of investigation. In cases of a complaint, it is generally made a domestic violence matter, rather than a sexual crime, and therefore the outcome is different and there is a different level of social recognition<sup>10</sup>. Judges' attitudes also contribute to invisibility<sup>11</sup>. Evidence of marital sexual violence is often overlooked or undervalued in divorce, custody and maintenance cases, which are typically less significant than cases involving physical battery or economic abuse. The tone of this institutional minimisation sends a clear message about the relative seriousness of marital rape and makes more individuals hesitant to report marital rape, and in turn helps to normalise marital rape.

### III. CHALLENGES IN CRIMINALIZING MARITAL RAPE

#### A. The 2013 Moment: Post-Nirbhaya Reforms

The brutal gang rape and murder of a young woman in Delhi in December 2012 triggered widespread protest and calls for the complete overhaul of rape laws. The Justice J.S. Verma Committee was set up for the purpose of making recommendations for law amendments and released a report which was very clear that the marital rape exception be removed from the law. But Parliament did not remove the marital rape exception from the Criminal Law (Amendment) Act, 2013<sup>12</sup>, which was passed, suggesting that it failed to engage substantively with the issue, thus affirming the status quo by legislative silence. The reforms of 2013 are therefore the first big one, showing how even the public was being made aware of the issue of sexual violence, marital rape was still not addressed.

#### B. Parliamentary Standing Committee Debates

The Parliamentary Standing Committee on Home Affairs discussed the issue of criminalization of marital rape and expressed many concerns which have persisted up to the enactment of the BNS, one of which was that criminalization would result in “excessive interference with the marital relationship”, while another was that criminalization of marital rape would have a negative impact on family stability. The argument supersedes any real injury to individual women in focusing on notions of family integrity<sup>13</sup>.

Secondly, the idea of “false accusations” was raised, implying that the criminalization of women would allow them to file “false” accusations to intimidate husbands. Thirdly, the Committee mentioned the socio-cultural background of India as a factor against the criminalisation of the law. The cultural relativism argument is thus constructed as ‘Indian culture’ being a male-dominated culture and the denial of legal protection for women is justifiable on that account alone.

#### C. The 2023 BNS: A Lost Opportunity for Reform

The Bharatiya Nyaya Sanhita 2023 is the most significant opportunity for criminal law reform since Independence. The BNS was designed by the Government as a decolonizing tool, removing antiquated British era provisions and rationalizing the criminal justice system. However, when it came to the clause on marital rape one of the most blatant instances of colonial patriarchy in the Indian Criminal law Parliament chose to retain it. Section 63 of the BNS restates Exception 2 which states that sexual intercourse by a man with his wife over the age of 18 is not rape<sup>14</sup>.

<sup>10</sup> Khokhlova, Olga, Miranda Horvath, Katherine Allen, and Nishtha Lamba. "Understanding marital rape perception in MENA and South Asia: The role of resistance, sexual deprivation, and jealousy." *Violence against women* (2025): 10778012251366222.

<sup>11</sup> *Independent Thought v. Union of India*, (2017) 10 SCC 800.

<sup>12</sup> International Institute for Population Sciences, NFHS-4: India Fact Sheet (2015-16).

<sup>13</sup> Parliamentary Standing Committee on Home Affairs, 167th Report at 45-48 (2013).

<sup>14</sup> Lawyers Collective Women's Rights Initiative, *Staying Alive: Fourth Monitoring Report 2012 on PWDV Act* (2013).

The retention is especially glaring due to the extensive consultation, parliamentary debate and public input that went into the BNS drafting process. Well-crafted memoranda from women's rights groups were presented asking to repeal the exception. Attorneys said that the clause was unconstitutional. However, no move was made by Parliament<sup>15</sup>. Even if the BNS' hanging on to the marital rape exception doesn't have a legal value, it still has a symbolic value. Obviously, Parliament did not want to take this element of the definition of rape away from the statute books while modernizing other elements of sexual offense law and so it has decided to keep it there, meaning that the autonomy of married women has been given less protection than that of unmarried women.

#### D. The Gap Between Domestic Violence Protection and Criminal Law

When discussing the exception of marital rape, those who want to keep it often cite the Protection of Women from Domestic Violence Act of 2005 as a remedy on offer. The term domestic violence as defined by the Act is sexual abuse and it is broadened to encompass protection orders, residence orders, and compensation. But this is a bad replacement to criminalization under the BNS.

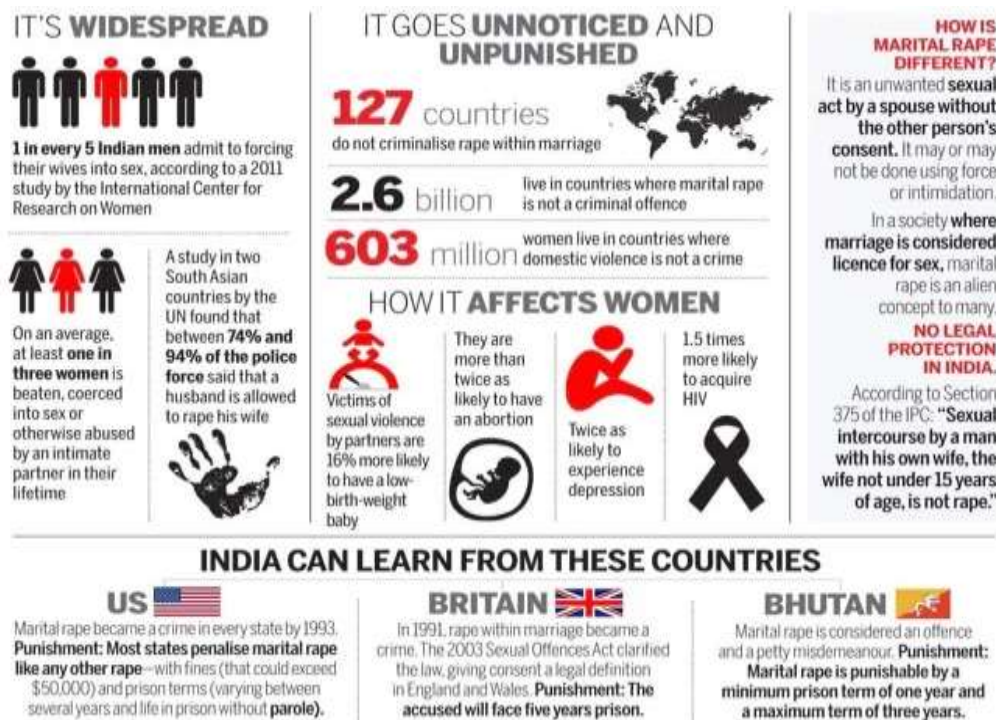


Figure 2: Marital Rape and its Impact<sup>16</sup>

First, PWDVA is a civil law remedy, and does not make marital rape a criminal matter nor criminal punishment. If the BNS were not criminalized, the law remains to suggest a distinction between marital and non-marital rape<sup>17</sup>. Secondly, remedies under PWDVA are civil, and do not result in criminal imprisonment or criminal sanctions. When sexual offences are serious the civil remedies are woefully inadequate. Third, the capacity to enforce PWDVA orders is very weak and a lot many orders are ignored routinely<sup>18</sup>.

<sup>15</sup> The Bharatiya Sakshya Adhiniyam, 2023, § 117 (presumption of absence of consent).

<sup>16</sup> Atrey, Ishan. "Marital rape: Unveiling the hidden crime within intimate relationships." *International Journal of Human Rights Law* 2, no. 4 (2023).

<sup>17</sup> Davis, Andrew P., and Morgan Johnstonbaugh. "Safe at home? Examining the extension of criminal penalties for marital rape in cross-national context, 1979–2013." *Law & Society Review* 58, no. 1 (2024): 126-148.

<sup>18</sup> RIT Foundation v. Union of India, W.P.(C) No. 284/2015, pending Delhi High Court.

#### IV. PROSECUTORIAL CHALLENGES

##### A. The Evidentiary Dilemma

But if Section 63 of the BNS was amended, there would be obvious barriers that would arise that would not exist for stranger rape cases<sup>19</sup>. The most troublesome part of the central prosecutorial case is establishing that sexual activity was not consensual, which is a difficult standard to meet given that sexual activity between spouses is presumed consensual in marital relationships, and has been consensual in other instances in the past.

The concept of presumption of absence of consent in rape cases under Section 117 of the Bharatiya Sakshya Adhiniyam, 2023, was intended for the cases of stranger rape and may not be suitable for cases of conjugal rape. It might not be used in court if the parties are still married to each other, particularly with evidence of mutual sexual activity at another time. In marital rape cases, there is also seldom any physical evidence of force.

Trauma indicating sexual activity with force might be considered consensual activity between spouses. When there is no concrete physical evidence, the case can become a credibility battle in which judge's prejudices regarding marriage and sexuality can make all the difference.

##### B. Credibility Challenges and Victim Testimony

Issues of credibility that marital rape victims must deal with when they testify. When cases of domestic violence are being heard, the court can ask why a woman was in a relationship with a rapist, as a potential explanation for why she hasn't left her relationship. This is a mindset that overlooks the various economic, social and family barriers that stop many women from leaving.

Another one is late reporting. Stranger rapes were more likely to be reported immediately after the crime and marriage were more likely to be reported after months or years. In an intimate violence context, disclosure is delayed, which is exploited by defence counsel as evidence that it is a false disclosure, but may be justified<sup>20</sup>.

The cross-examination may be especially distressing in the context of marital rape cases, as the defence attorney may question intimate details of the marriage and sexual relations to suggest consent, or to impugn the victim's character.

##### C. Institutional Biases and Investigative Failures

The police have a dis-engaged attitude and bias regarding marital sexual violence. The police practices have not changed significantly, though the Bharatiya Nagarik Suraksha Sanhita, 2023 came into existence. The Bharatiya Nagarik Suraksha Sanhita, 2023 has not brought any major changes in police practices. Police could discourage the lodging of a FIR and instead encourage the victims to seek reconciliation. It is a "gatekeeping" function that can successfully filter out a lot of cases from the criminal justice system. Investigations, if done, can be cursory.

Evidence may not be collected in a timely manner, witnesses may not be interviewed, and a quick medical exam may not be performed. But there are also institutional factors that limit the ability of prosecutors to do their jobs: They are put under pressure to take on a heavy caseload, to be eager to convict, and to perform. Prosecutors are less likely to prosecute marital sexual violence cases if they see evidence, is a problem.

<sup>19</sup> Agarwal, Nandini, Salma M. Abdalla, and Gregory H. Cohen. "Marital rape and its impact on the mental health of women in India: A systematic review." *PLOS global public health* 2, no. 6 (2022): e0000601.

<sup>20</sup> Deosthali, Padma-Bhate, Sangeeta Rege, and Sanjida Arora. "Women's experiences of marital rape and sexual violence within marriage in India: evidence from service records." *Sexual and reproductive health matters* 29, no. 2 (2022): 2048455.

#### **D. Lack of Victim Support Infrastructure**

Support systems for the victims are key to successful prosecution. At present there are no special services available for survivors of marital rape in India. Domestic violence, counselling services and legal aid programs are usually the ones that deal with domestic violence and not sexual violence in marriage<sup>21</sup>. Economic support is especially needed because many female victims of marital rape are financially dependent on their husband. Women are unlikely to pursue criminal complaints if they don't have shelter, financial assistance, and employment.

### **COMPARATIVE PERSPECTIVES**

#### **A. United Kingdom: Criminalization and Its Aftermath**

The U.K. abolished the marital rape exemption by judicial ruling in 1991, and then, in 2003, by the Sexual Offences Act 2003, which redefined sexual offense law to give equal treatment to marital and non-marital rape. The experience of the UK provides several lessons for India. Criminalization is insufficient training must be given to law enforcement and judicial officers<sup>22</sup>.

Secondly, the quality of police reporting and investigation is higher for units that have a dedicated sexual assault unit. Third, victim-witness support programs are a vital element to maintaining prosecutions. The UK also has guidelines for prosecution specifically for marital rape cases, acknowledging the unique issues to evidence and credibility that may arise in those cases. If the BNS changes to exclude Exception 2 from Section 63, these guidelines can be used as a template for India.

#### **B. South Africa: Addressing Systemic Violence**

The experience of South Africa is particularly relevant as South Africa has some similarities with India, including a high incidence of gender-based violence and patriarchal social and cultural norms. Since apartheid ended, South Africa has gone a step further by criminalizing marital rape and has taken steps to better protect persons that suffer sexual violence<sup>23</sup>. In South Africa dedicated courts dealing with sexual offenses were created and judges appointed who were trained and processes put in place, with support for victims. In India, such specialized mechanisms could be beneficial to overcome the institutional deficiencies and corruption in investigations.

### **VI. CONCLUSION: RENDERING THE INVISIBLE VISIBLE**

Marital rape is reported NOT by chance, but by design: by laws that exclude it from scope of criminal law, through social norms that normalize the rape, and by systematic underreporting and institutional practices that dismiss rape. This newest episode of the story of invisibility is the marital rape exception of Section 63 of the Bharatiya Nyaya Sanhita, 2023. Parliament could have drafted a new Indian criminal law, but it did not and chose instead to pass one of the most outrageous relics of British rule in India. This paper proposes the following four ways to address the problem of marital rape in India: 1) a need for legislative changes to the BNS, to remove Exception 2 and make all sexual intercourse without

<sup>21</sup> Mukhtar, Sonia, and Shamim Mukhtar. "The hidden shadow pandemic of marital rape during covid-19 pandemic outbreak: a critical role of women's march for awareness of rape, consent, and sexual and reproductive rights." *Journal of psychosexual health* 4, no. 2 (2022): 80-94.

<sup>22</sup> Makam, Ganesh. "Marital rape laws in India: Bridging the gap between gender equality and criminal justice." *Available at SSRN 4475468* (2023).

<sup>23</sup> Venkatesh, Vasanthi. "Pluralistic Legal Systems and Marital Rape: Cross-National Considerations." *The Right to Say No: Marital Rape and Law Reform in Canada, Ghana, Kenya and Malawi*.

consent a criminal offence. Second, institutional change, such as special training for police and judicial officers, and guidelines for prosecutors on marital rape cases in the amended BNS, and the creation of domestic and sexual violence special units. Third, victim support infrastructure, including economic support, shelter support, legal assistance and counselling and accompaniment in the criminal justice system. Fourth, public awareness campaigns and educational programmes interrupting social normalisation of women's limitation of body autonomy in the context of marital sexual violence, challenging the social norms concerning marriage, consent and women's body autonomy. The BNS's decision to keep the exception now has an extra urgency, given the impending constitutional challenges to the exception against marital rape. If law reform is unsuccessful, judicial annulment can be considered. Courts should recognise that Exception 2 to Section 63 is not consistent with the constitutional rights to equality, dignity and control over one's body. Removing the marital rape exception isn't simply a change in the laws, it's a constitutional and moral duty. As India transitions to a new criminal law structure based on BNS, the question being asked is that whether it would maintain the colonial-based patriarchy or make sure that everyone, irrespective of gender, is equally protected under the law and equality is maintained. The answer will be “invisible” or “visible” in terms of the law and justice regarding marital rape.