



## Marital Rape and POCSO: Examining the Legal Protection for Child Brides

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### ABSTRACT

The widespread practice of child marriage in India continues to have a negative impact on the well-being, independence, and rights of countless young girls. There have been several attempts to outlaw the practice, yet it persists nonetheless, and it frequently leads to grave abuses of children's rights, especially their sexual autonomy. In this study, we look at the Indian legal system's policies on child marriage and marital rape, analysing statutes such the 'Protection of Children from Sexual Offences Act, 2012 (POCSO)' and the Bharatiya Nyaya Sanhita, 2023 (BNS), which define rape differently. Through an analysis of judicial precedents, statutory provisions, and legal contradictions, the paper evaluates the extent of protection afforded to minor girls within marriage, examining whether the current laws adequately safeguard their bodily integrity and legal rights. The study also highlights the conflicting legal standards between personal laws, PCMA, POCSO, and BNS, and recommends harmonization for more effective protection. The findings suggest that while progressive judicial pronouncements have expanded the scope of protection under POCSO, the persistence of marital rape exceptions and the voidable nature of child marriages continue to undermine justice for minor brides.

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## I. Introduction

A socio-legal problem persisting in India despite many legislative interventions is child marriage, which is defined as a formal union involving persons below the age of 18. Approximately 23.3% of women aged 20-24 were married before reaching the legal age of 18, according to the National Family Health Survey (NFHS-5), highlighting a significant disparity between the two sets of standards<sup>1</sup>. Among the myriad human rights violations that stem from child marriage, the issue of sexual autonomy and consent for minor brides remains central and unresolved.

The protection of child brides faced substantial obstacles due to the marital rape exception in the old Indian Penal Code (IPC), even though sexual intercourse with children is prohibited by India's legal framework. New focus on the need to reevaluate marital rape laws in light of the Bharatiya Nyaya Sanhita (BNS), 2023, the revised criminal code, has emerged.

Concurrently, the '*Protection of Children from Sexual Offences Act, 2012 (POCSO)*' criminalizes all forms of sexual contact with children under 18, without exception for marital relationships<sup>2</sup>. This statutory clarity is in direct contrast to the erstwhile IPC, and now the BNS, wherein ambiguity regarding marital exceptions continues to create interpretative challenges. Complicating matters further is the interplay of personal laws, which sometimes condone child marriage, creating legal pluralism that undermines the protection framework for minors<sup>3</sup>.

The recently enacted '*Bharatiya Nagrik Suraksha Sanhita (BNSS), 2023*', which replaces the 'Code of Criminal Procedure (CrPC)', and the '*Bharatiya Sakshya Adhiniyam (BSA), 2023*', which supersedes the 'Indian Evidence Act (IEA)', further reflect the ongoing legal reforms that should align with protective laws like POCSO<sup>4</sup>. However, the question remains—do these legal instruments, especially in their current form, provide adequate protection to child brides who are victims of sexual assault within marriage?

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<sup>1</sup> "National Family Health Survey (NFHS-5), Ministry of Health and Family Welfare, Government of India, 2021–22."

<sup>2</sup> "Protection of Children from Sexual Offences Act, 2012, Section 2(d), 3, 4, 42A."

<sup>3</sup> "Centre for Reproductive Rights, *Securing Reproductive Justice in India*, 2020."

<sup>4</sup> "Bharatiya Nyaya Sanhita, 2023; Bharatiya Nagrik Suraksha Sanhita, 2023; Bharatiya Sakshya Adhiniyam, 2023."



This paper critically examines the interplay between marital rape laws and the protections offered under POCSO for child brides, within the framework of the newly restructured Indian criminal laws.

## II. Legal Framework

The legal architecture surrounding child marriage, sexual offenses, and marital rape in India is layered and complex. With the introduction of reformed statutes such as the '*Bharatiya Nyaya Sanhita (BNS), 2023*', '*Bharatiya Nagrik Suraksha Sanhita (BNSS), 2023*', and '*Bharatiya Sakshya Adhinyam (BSA), 2023*', there arises a need to evaluate how these laws interact with established frameworks like the '*Protection of Children from Sexual Offences Act, 2012 (POCSO)*' and the '*Prohibition of Child Marriage Act, 2006 (PCMA)*'. This section delves into these statutes to understand the legal protection afforded to child brides, particularly in the context of sexual offenses within marriage.

### A. Prohibition of Child Marriage Act, 2006 (PCMA)

In an effort to outlaw the solemnisation of marriages between minors, the PCMA defines a "child" as a male who is under the age of 21 and a female who is under the age of 18<sup>5</sup>. The Act makes child marriage voidable at the instance of the contracting minor party, rather than automatically void<sup>6</sup>. This conditional voidability undermines the rights of minor girls who may not have the social or financial capacity to challenge such marriages.

The Act penalizes those who perform, permit, or promote child marriages, but enforcement remains weak due to societal acceptance and lack of awareness. Importantly, the PCMA does not criminalize the act of consummation within child marriage unless accompanied by additional charges under other laws<sup>7</sup>.

### B. Bharatiya Nyaya Sanhita, 2023 (BNS)

In 2023, the definition of rape under Section 63 of the BNS superseded the previous one under Section 375 of the IPC. Having sexual relations with one's wife, so long as the woman is not younger than

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<sup>5</sup> "Prohibition of Child Marriage Act, 2006, Section 2(a)."

<sup>6</sup> "Ibid, Section 3."

<sup>7</sup> "Ibid, Sections 9–11."



fifteen, can not constitute rape—this is the contentious Exception, though<sup>8</sup>. This marital exception continues to stand in contradiction to the principles of bodily autonomy and consent, especially when applied to child brides between 15 and 18 years of age.

This exception is particularly regressive when juxtaposed with the Protection of Children from Sexual Offences Act, 2012, which criminalizes all sexual acts with persons under 18, regardless of marital status<sup>9</sup>.

### **C. ‘Protection of Children from Sexual Offences Act, 2012 (POCSO)’**

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Crucially, POCSO does not provide any marital exemption. Section 42A of the Act further states that its provisions will override any inconsistent provisions in other laws<sup>11</sup>. This creates a direct legal conflict with the marital rape exception in the BNS, prompting interpretive challenges in courts when dealing with cases involving minor wives.

### **D. Bharatiya Nagrik Suraksha Sanhita, 2023 (BNSS) and Bharatiya Sakshya Adhiniyam, 2023 (BSA)**

While the BNSS and BSA are procedural and evidentiary laws replacing the CrPC and IEA, their implications in sexual offenses are profound. BNSS emphasizes expedited trials for crimes against women and children and introduces digital evidence as a mainstream form of admissibility<sup>12</sup>. The BSA, meanwhile, strengthens the evidentiary framework by incorporating scientific methods of proof, crucial in establishing non-consensual acts in cases involving minor brides<sup>13</sup>.

<sup>8</sup> “Bharatiya Nyaya Sanhita, 2023, Section 63, Exception 2.”

<sup>9</sup> “Protection of Children from Sexual Offences Act, 2012, Section 2(d), 42A.”

<sup>10</sup> Ibid, Sections 3–10.

<sup>11</sup> Ibid, Section 42A.

<sup>12</sup> “Bharatiya Nagrik Suraksha Sanhita, 2023, Chapter XII, Section 193.

<sup>13</sup> “Bharatiya Sakshya Adhiniyam, 2023, Sections 61–65.”

These procedural enhancements need to be harmonized with substantive laws like POCSO to ensure that legal protection for child brides is not just theoretical but enforceable in practice.

### III. Judicial Interpretations

The Indian court system has been essential in determining how to interpret the controversial overlap between protections against sexual assault on children and exemptions for married couples. The landmark decision in *Independent Thought v. Union of India* (2017) came from the Supreme Court of India, which ruled that the exclusion of sexual intercourse with a wife aged 15 to 18 years from the definition of rape under the former Section 375 of the Indian Penal Code (IPC) was unconstitutional<sup>14</sup>. Articles 14, 15, and 21 of the Constitution ensure equality, protection from discrimination, the right to life, and personal liberty, respectively. The Court saw the exemption as violating these articles<sup>15</sup>. Given the total criminalisation of sexual contact with children under the 'Protection of Children from Sexual Offences Act, 2012 (POCSO)', the Court stressed that such an exclusion constituted an artificial distinction between married and unmarried girls under the age of 18<sup>16</sup>. The judgment effectively brought marital rape of minor wives under the definition of rape, harmonizing the IPC with POCSO.

Later rulings by the High Court have upheld this view. In the case of *XXX v. State of Maharashtra* (2021), for example, the Bombay High Court maintained a man's conviction for raping his underage wife, reiterating that the marital exception does not apply to girls under the age of 18, in accordance with previous decisions made by the Supreme Court<sup>17</sup>. Similarly, the Karnataka High Court upheld the prosecution of rape under POCSO for any sexual intercourse with a minor wife, even in a socially sanctioned marriage<sup>18</sup>.

These judicial interpretations have significantly advanced the cause of child rights in India by asserting that marital status cannot be a defence for sexual exploitation of minors. However, the persistence of the marital rape exception in the newly enacted *Bharatiya Nyaya Sanhita, 2023* (BNS) creates confusion in application, requiring further judicial and legislative clarification. Courts have thus had to continually assert the primacy of POCSO over conflicting provisions, reiterating the supremacy of child protection norms over customary practices and outdated legal exceptions.

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<sup>14</sup> “*Independent Thought v. Union of India*, (2017) 10 SCC 800.”

<sup>15</sup> “*Ibid*, paras 99–104.”

<sup>16</sup> “Protection of Children from Sexual Offences Act, 2012, Sections 3–5 and 42A.”

<sup>17</sup> “*XXX v. State of Maharashtra*, 2021 SCC OnLine Bom 5162.”

<sup>18</sup> “Karnataka High Court, *Sri H v. State of Karnataka*, 2022 SCC OnLine Kar 1398.”



#### IV. Conflict Between Laws

The legislative framework governing child marriage, marital rape, and sexual offences in India is characterized by significant internal contradictions, particularly when juxtaposing personal laws, the “*Prohibition of Child Marriage Act, 2006 (PCMA)*”, the “*Protection of Children from Sexual Offences Act, 2012 (POCSO)*”, and the *Bharatiya Nyaya Sanhita, 2023 (BNS)*. This discordance creates a confusing and often harmful legal environment for child brides.

An important disagreement stems from the fact that, whereas POCSO plainly makes it illegal to engage in sexual relations with anybody under the age of 18—regardless of marital status or consent—<sup>19</sup>—Sexual relations with a wife who is not less than fifteen years old are still not considered rape according to the BNS's marital rape exemption<sup>20</sup>. Child brides between the ages of 15 and 18 are caught in a legal limbo because, although they are considered minors under POCSO, the exclusion clause in BNS effectively excludes them from the same degree of protection. The wording in the BNS does not directly reflect the Supreme Court's reading of this exemption to bring it into line with POCSO, even though the Court did so in the 2017 case of *Independent Thought v. Union of India*<sup>21</sup>.

Adding to the complexity is the PCMA, which only makes child marriages “voidable” rather than automatically void<sup>22</sup>. This allows such marriages to legally persist unless actively challenged and annulled by the minor, who may be under familial or societal pressure not to do so. Moreover, personal laws—such as those governing Hindu or Muslim marriages—sometimes permit marriage below the statutory age based on puberty or customary practices, further conflicting with secular statutory protections for children<sup>23</sup>.

This lack of legal harmony has a chilling effect on enforcement. For instance, law enforcement agencies and judicial officers may hesitate to act against marital rape of minors due to ambiguity in whether the marriage is legally recognized or whether the exception under BNS overrides POCSO. This is despite

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<sup>19</sup> “Protection of Children from Sexual Offences Act, 2012, Sections 3, 4, 42A.”

<sup>20</sup> “Bharatiya Nyaya Sanhita, 2023, Section 63, Exception 2.”

<sup>21</sup> “*Independent Thought v. Union of India*, (2017) 10 SCC 800”.

<sup>22</sup> “Prohibition of Child Marriage Act, 2006, Section 3.”

<sup>23</sup> “Law Commission of India, Report No. 205 on Proposal to Amend the Prohibition of Child Marriage Act, 2006, 2008.”



Section 42A of POCSO clearly stating that its provisions shall prevail in the event of any inconsistency with other laws<sup>24</sup>.

Thus, the coexistence of child marriage permissibility under personal laws, the voidable nature of child marriages under PCMA, the protective scope of POCSO, and the marital rape exemption under BNS creates a fragmented and often contradictory system. It undermines the uniform application of child protection laws and leaves minor brides vulnerable to continued abuse and denial of justice.

## V. Recommendations

1. Amend the PCMA to render all child marriages void ab initio, eliminating ambiguities and ensuring uniformity in legal provisions.
2. Implement comprehensive awareness programs to educate communities about the legal implications of child marriage and the rights of minors, aiming to shift societal norms and practices.
3. Enhance the capacity of law enforcement agencies and the judiciary to effectively implement and enforce laws protecting minors, including specialized training on handling cases involving child brides.
4. Establish accessible support systems, including counseling and rehabilitation services, for victims of child marriage and sexual offenses, ensuring their reintegration into society and access to education and employment opportunities.

## VI. Conclusion

The legal landscape concerning marital rape and child marriage in India has evolved to offer greater protection to minors, particularly through the provisions of POCSO and progressive judicial interpretations. However, challenges remain in harmonizing various laws and effectively enforcing them to safeguard the rights and dignity of child brides. A concerted effort involving legal reforms, societal change, and robust enforcement is essential to eradicate child marriage.

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<sup>24</sup> “Protection of Children from Sexual Offences Act, 2012, Section 42A.”





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