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BREAKING THE SILENCE: A CRITICAL ANALYSIS OF THE CRIMINALIZATION OF MARITAL RAPE IN INDIA

AUTHORED BY - AADRIKA SALUJA

Student at Amity Law School, Amity University, Lucknow, India

CO-AUTHOR - PRAKARSH SALUJA

Advocate, High Court of Judicature at Allahabad, Lucknow Bench.

ABSTRACT

India stands among thirty to forty countries worldwide that is yet to criminalize marital rape. Exception 2 of Section 63 Bharatiya Nyaya Sanhita, 2023 (earlier stated as Exception 2 to Section 375 of the Indian Penal Code, 1860) protects husbands from being prosecuted for having non-consensual sexual intercourse with their adult wives. This paper takes a look at legal, constitutional and sociological aspects of the marital rape exception by critically analyzing precedents including *Independent Thought v. Union of India* (2017), *RIT Foundation v. Union of India* (2022) dissenting opinion by the Delhi High Court, *Hrishikesh Sahoo v. State of Karnataka* (2022) and active judicial proceedings of the Supreme Court. This paper checks if the exception fits with the Article 14, 15 and 21 of the Constitution of India. It compares the laws in different countries that have criminalized marital rape and also looks at the societal and the cultural silence revolving around this kind of violence. Further, questioning the lack of legislation action to address this injustice. Using the findings of the National Family Health Survey-5 (2019-21) and the Justice Verma Committee's recommendations, this paper argues the marital rape exception which is in violation of the fundamental rights of the married women and undermines India's international human rights obligations. This paper ends by suggesting the change to the law, Judicial action and regulatory mechanisms.

Keywords: Marital Rape, Exception 2, Section 63 BNS, Bodily Autonomy, Constitutional Morality, Gender Equality, Justice Verma Committee, Bharatiya Nyaya Sanhita.

I. INTRODUCTION

The Indian Penal Code drafted by Lord Macaulay in 1860, consisted of one of the most troubled provisions which got overlooked for almost 164 years that is, rape defined under Section 375 and its Exception 2 which defends the husbands all together from committing rape.¹ The exception states that “sexual intercourse or sexual acts between a man and his wife, the wife not being under fifteen years of age, is not rape” which completely disregards wife had consented, said no, was coerced or fought back.² Thus, marriage certificate itself became the defence for the husbands.³

This was in fact intentionally drafted and cannot be claimed as a mere oversight.⁴ The Parliament had multiple chances to remove or rectify the provision, firstly, in 2013 after the Nirbhaya Case,⁵ secondly post the recommendation of Justice Verma Committee report.⁶ They had another chance while drafting the Bharatiya Nyaya Sanhita, 2023 which replaced the IPC on 1st July, 2024, yet they turned a blind eye to this very provision.⁷ This reality is itself worrisome.⁸

According to the National Family Health Survey -5 (2019-21), 32% of married women had experienced sexual, emotional and physical spousal violence.⁹ Further, it was also reported that 83% named their husband as the perpetrator and 13% reported a former husband as the perpetrator.¹⁰ Yet, under the current legal frameworks, such acts cannot be criminalized as rape.¹¹ Women are seen to suffer in silence as only 14% sought help highlighting the societal myth of shame and the legal gap.¹²

¹ THE INDIAN PENAL CODE, No. 45 of 1860, § 375, Exception 2 (India).

² *Id.*

³ Rebecca M. Ryan, *The Sex Right: A Legal History of the Marital Rape Exemption*, 20 LAW & SOC. INQUIRY 941, 943 (1995).

⁴ 1 MATTHEW HALE, HISTORIA PLACITORUM CORONAE 629 (1736).

⁵ THE CRIMINAL LAW (AMENDMENT) ACT, 2013, No. 13 of 2013 (India).

⁶ JUSTICE J.S. VERMA COMM., REPORT OF THE COMMITTEE ON AMENDMENTS TO CRIMINAL LAW 113 (2013).

⁷ THE BHARATIYA NYAYA SANHITA, No. 45 of 2023, § 63, Exception 2 (India).

⁸ Aisha Akram, *The Decriminalisation of Marital Rape: How India Continues to Refuse Justice to its Married Women*, OXFORD HUM. RTS. HUB (Dec. 6, 2023), <https://ohrh.law.ox.ac.uk/the-decriminalisation-of-marital-rape-how-india-continues-to-refuse-justice-to-its-married-women/>.

⁹ MINISTRY OF HEALTH & FAMILY WELFARE, GOV'T OF INDIA, NATIONAL FAMILY HEALTH SURVEY (NFHS-5), 2019–21, at 683 (2022).

¹⁰ *Id.* at 684.

¹¹ THE BHARATIYA NYAYA SANHITA, No. 45 of 2023, § 63, Exception 2 (India).

¹² NFHS-5, *supra* note 7, at 686.

i. Existing Scholarship

The scholarly and jurisprudence sources sustain substantial written material on marital rape which can be broadly classified into three categories:

- a. Feminist Legal Philosophy:** According to Flavia Agnes, in India, the personal law and the criminal law operates in tandem in order to safeguard the traditional, patriarchal and sacred nature of marriage in which it is believed that a woman's consent to sexual intercourse is subsumed at the institution of marriage.¹³ This implies that sexual violence between spouses has no legal provision. Agnes, further argues that even though there are laws drafted which allow women access to courts, the judicial reliefs still treat them as dependents rather than someone who have individual legal rights.¹⁴ Therefore, formulating laws doesn't necessarily means implementation in real life. Ratna Kapur and Brenda Cossman have further pointed out that Indian jurisprudence has historically seen women in two ways either as a victim seeking protection or someone who needs to be controlled, whereas, never seen as someone who can give her own consent.¹⁵ Subsequently, it is argued that the marital rape exception is not a legal oversight rather shows the belief of the legal system that a woman's sexuality is based upon marriage and not consent.¹⁶
- b. Constitutional scrutiny:** Scholars have argued that the marital rape exception is inconsistent with Article 14, 15 and 21 of the Indian Constitution which guarantees right to equality, non-discrimination and right to personal liberty respectively,¹⁷ which is based on the Supreme Court's growing interpretations on the privacy doctrines like in the case of *K.S. Puttaswamy v. Union of India*.^{18,19}
- c. Dissenting voices:** Concerns have been raised about the misuse of the provision if it will be criminalized pertaining to that the wife can file false cases on their husbands.²⁰ Further, that it will be difficult to prove and that the State's interference

¹³ FLAVIA AGNES, *LAW AND GENDER INEQUALITY: THE POLITICS OF WOMEN'S RIGHTS IN INDIA* 45 (1999).

¹⁴ *Id.* at 48.

¹⁵ RATNA KAPUR & BRENDA COSSMAN, *SUBVERSIVE SITES: FEMINIST ENGAGEMENTS WITH LAW IN INDIA* 112 (1996).

¹⁶ Saptarshi Mandal, *The Impossibility of Marital Rape*, 42 AUSTL. FEMINIST L.J. 135 (2016).

¹⁷ INDIA CONST. art. 14, 15, 21.

¹⁸ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 S.C.C. 1, para. 121 (India).

¹⁹ *Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C. 1, para. 121 (India); *see also Joseph Shine v. Union of India*, (2019) 11 S.C.C. 1 (India).

²⁰ *RIT Found. v. Union of India*, WP(C) No. 284/2015, para. 12 (Del. H.C. May 11, 2022) (India) (Hari Shankar, J., dissenting).

in the private life of an individual.²¹ Subsequently, showing that hypothetical misuse of the law has been prioritized over structured real-life harm.²²

ii. Present Contribution

After carefully studying the viewpoints of all the three categories we can clearly underline the importance of reform to this exception, however, three gaps still remain.

a. Exception 2: Legislative Inertia or Constitutional Endorsement?

The existing jurisprudence regards exception 2 as an old British era provision which the Parliament failed to abrogate, framing legislative inertia.²³ However, during the enactment of the new criminal laws, particularly Bharatiya Nyaya Sanhita, after discussion, Parliament deliberately retained the provision.²⁴ Thereby, shifting the question from whether the provision was overlooked to whether the Parliament can constitutionally endorse it, creating a strong constitutional argument.²⁵

b. Why have post 2017 Supreme Court rulings on sexual autonomy within marriage not been deployed against Exception 2?

Post 2017, Supreme Court Judgments brought a major transformation on how the constitution safeguards the sexual autonomy of a person even within marriage through significant judgments like Puttaswamy (right to privacy)²⁶, Navtej Singh Johar (decriminalized homosexuality)²⁷ and Joseph Shine (striking down adultery law)²⁸. Yet, this doctrinal transformation has not been systematically applied to the exception 2.

c. Can NFHS-5 data on spousal sexual violence be used as direct legal evidence against exception 2, rather than mere background statistics?

The National Family Health Survey-5 (2019-21) shows that spousal sexual

²¹ Union of India, Affidavit dated Oct. 4, 2024, filed before the Supreme Court in the marital rape exception challenge.

²² Sonia V. Thomas & Sthanu N. Cheeru, *The Continuing Non-Criminalization of Marital Rape in India*, WOMEN'S RTS. L. REP. (2023).

²³ Saptarshi Mandal, *The Impossibility of Marital Rape*, 42 AUSTL. FEMINIST L.J. 135, 138 (2016).

²⁴ THE BHARATIYA NYAYA SANHITA, No. 45 of 2023, § 63, Exception 2 (India).

²⁵ PARLIAMENT OF INDIA, RAJYA SABHA, DEPARTMENT-RELATED PARLIAMENTARY STANDING COMMITTEE ON HOME AFFAIRS, THREE HUNDRED FORTY-SIXTH REPORT ON THE BHARATIYA NYAYA SANHITA, 2023, para. 2.15 (2023).

²⁶ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 S.C.C. 1 (India).

²⁷ *Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C. 1, para. 121 (India).

²⁸ *Joseph Shine v. Union of India*, (2019) 11 S.C.C. 1 (India).

violence is very common yet massively under-reported.²⁹ Scholars have used this survey as background statistical data rather than using it as direct legal evidence that speaks directly to proportionality, dignity and equal protection.³⁰

This paper aims to address these gaps. It recasts the retention of Exception 2 of Section 63, BNS as parliament's choice and not as a colonial era mistake. Further, it interprets post 2017 Supreme Court's jurisprudence into a unified framework to assess sexual autonomy within marriage. NFHS-5 data is used as direct legal evidence framing it as a legal argument itself, rather than overlooking the worrisome reality of spousal sexual violence merely as a backdrop. The objective is not to reiterate the criminalization of marital rape which is already well established, but to interpret that the retention of this exception is itself in opposition to the constitution and the Supreme Court's own jurisprudence.³¹

II. HISTORICAL AND CONCEPTUAL FRAMEWORK

i. The Hale Doctrine and Colonial Transplant

The legal concept of marital rape, or rather the non-concept of marital rape, goes back to Sir Matthew Hale, chief justice of England in the seventeenth century. Hale wrote that a husband could not be guilty of raping his 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”.³² The declaration was not statutory, but for centuries it influenced the common law.³³

The IPC, drafted in 1860, imported the entirety of the English criminal law.³⁴ Under Section 375, rape was defined, and Exception 2 of this section protected husbands from prosecution, as long as their wives were above the age of ten originally, which was later amended to fifteen.³⁵ This provision stayed on the books when India became independent in 1947.^{36,37}

²⁹ MINISTRY OF HEALTH & FAMILY WELFARE, GOV'T OF INDIA, NATIONAL FAMILY HEALTH SURVEY (NFHS-5), 2019–21, at 683 (2022).

³⁰ *Id.* at 684.

³¹ *Independent Thought v. Union of India*, (2017) 10 S.C.C. 800 (India).

³² 1 MATTHEW HALE, HISTORIA PLACITORUM CORONAE 629 (1736).

³³ Rebecca M. Ryan, *The Sex Right: A Legal History of the Marital Rape Exemption*, 20 LAW & SOC. INQUIRY 941, 943 (1995).

³⁴ THE INDIAN PENAL CODE, No. 45 of 1860, § 375 (India).

³⁵ *Id.* at § 375, Exception 2.

³⁶ INDIA CONST. art. 372 (providing for the continuation of existing colonial laws post-independence until altered or repealed by Parliament).

³⁷ *Independent Thought v. Union of India*, (2017) 10 S.C.C. 800, para. 15 (India).

ii. What “Consent” Means Under the Exception

The Hale doctrine treats marriage as a one-time, irrevocable grant of sexual consent. This is not how consent works anywhere else in the criminal law.³⁸ A person can withdraw consent to assault, to theft, to trespass, But under Exception 2, a woman’s consent to sex is presumed to be given forever on her wedding day.³⁹ The law not only fails to protect her, it takes away the protection given to every other woman in India.⁴⁰ Marriage, in short, was regarded not as a union between equals but as a deed of conquest.⁴¹

III. THE LEGAL FRAMEWORK: FROM IPC TO BNS

i. Exception 2 Under the IPC

In IPC under section 375 there are 6 conditions given for rape i.e. against her will, without her consent, under misconception, with consent obtained by threat, when she is below eighteen, or when she cannot communicate consent.⁴² Exception 2 stated: “Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.”⁴³ This operated as a complete defence, regardless of force, coercion, or physical injury.⁴⁴

ii. The BNS: A Missed Opportunity

The IPC was replaced by the BNS on 1 July 2024.⁴⁵ The change was called modernization.⁴⁶ But Section 63 of the BNS which now defines rape has Exception 2 almost verbatim: “Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.”⁴⁷ The only real change is the age bar as per the Supreme Court in *Independent Thought v. Union of India* (2017)

³⁸ RATNA KAPUR & BRENDA COSSMAN, SUBVERSIVE SITES: FEMINIST ENGAGEMENTS WITH LAW IN INDIA 142 (1996).

³⁹ Saptarshi Mandal, *The Impossibility of Marital Rape*, 42 AUSTL. FEMINIST L.J. 135, 140 (2016).

⁴⁰ Compare THE BHARATIYA NYAYA SANHITA, No. 45 of 2023, § 63 (India), with *id.* at § 63, Exception 2.

⁴¹ FLAVIA AGNES, LAW AND GENDER INEQUALITY: THE POLITICS OF WOMEN’S RIGHTS IN INDIA 57 (1999).

⁴² THE INDIAN PENAL CODE, No. 45 of 1860, § 375 (India).

⁴³ *Id.* at § 375, Exception 2.

⁴⁴ Sonia V. Thomas & Sthanu N. Cheeru, *The Continuing Non-Criminalization of Marital Rape in India*, WOMEN’S RTS. L. REP. (2023).

⁴⁵ THE BHARATIYA NYAYA SANHITA, No. 45 of 2023, § 1(2) (India) (notifying the enforcement date of July 1, 2024).

⁴⁶ *Marital Rape and Law*, MANUPATRA (Apr. 9, 2024), <https://articles.manupatra.com/article-details/Marital-Rape-and-Law>.

⁴⁷ THE BHARATIYA NYAYA SANHITA, No. 45 of 2023, § 63, Exception 2 (India).

which has been increased from fifteen to eighteen.⁴⁸ Everything else still remains the same till date.⁴⁹

The retention of the exception in the BNS even after The Justice J.S. Verma committee recommendation in 2013 that “marriage should not be considered as an irrevocable consent to sexual acts.”⁵⁰ shows a legislative failure as parliament disregarded the recommendation of the aforesaid committee, as even the new statute was supposed to bring modernization of Indian Criminal Laws yet somehow it carried forward the weight of colonial era immunity based on doctrine of coverture.⁵¹

iii. Why Alternative Remedies Fall Short

Defenders of the exception often argue that married women do have legal recourse.⁵² Section 85 of the BNS (previously Section 498A of the IPC) makes the cruelty by husband or his relatives a punishable offence.⁵³ The Protection of Women from Domestic Violence Act, 2005 (“PWDVA”) provides civil remedies i.e. protection orders, residence orders, monetary relief.⁵⁴ But these are not alternatives. Section 85 requires proof of a pattern of conduct. The PWDVA is a civil statute and cannot send a rapist to prison.⁵⁵ The law also does not specify the particular wrong of marital rape, nor does it treat the offence with the gravity it deserves.⁵⁶

IV. THE CONSTITUTIONAL CASE AGAINST THE EXCEPTION

i. Article 14: Equal Protection of the Laws

Article 14 prohibits the State from denying any person equality before the law or equal protection of the laws.⁵⁷ The marital rape exception creates a classification that is impossible to defend: married women are denied the protection of rape laws that every

⁴⁸ *Independent Thought v. Union of India*, (2017) 10 S.C.C. 800 (India).

⁴⁹ *Id.* at 815–18.

⁵⁰ JUSTICE J.S. VERMA COMM., REPORT OF THE COMMITTEE ON AMENDMENTS TO CRIMINAL LAW 113 (2013).

⁵¹ Aisha Akram, *The Decriminalisation of Marital Rape: How India Continues to Refuse Justice to its Married Women*, OXFORD HUM. RTS. HUB (Dec. 6, 2023), <https://ohrh.law.ox.ac.uk/the-decriminalisation-of-marital-rape-how-india-continues-to-refuse-justice-to-its-married-women/>.

⁵² Union of India, Affidavit dated Oct. 4, 2024, filed before the Supreme Court in the marital rape exception challenge.

⁵³ THE BHARATIYA NYAYA SANHITA, No. 45 of 2023, § 85 (India).

⁵⁴ THE PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, No. 43 of 2005, §§ 18–22 (India).

⁵⁵ FLAVIA AGNES, LAW AND GENDER INEQUALITY: THE POLITICS OF WOMEN’S RIGHTS IN INDIA 118 (1999).

⁵⁶ Saptarshi Mandal, *The Impossibility of Marital Rape*, 42 AUSTL. FEMINIST L.J. 135, 142 (2016).

⁵⁷ INDIA CONST. art. 14.

other woman receives.⁵⁸ The intelligible differentia offered in its defence, that marriage implies consent is factually incorrect and logically incoherent.⁵⁹ Consent, by its very nature, must be continuous and revocable.⁶⁰ To treat marriage as a perpetual grant of sexual consent reduces women to the status of chattel and negates their person-hood entirely.⁶¹

The classification is also both over-inclusive and under-inclusive.⁶² It is over-inclusive because it covers all married women, including those in abusive or estranged marriages. It is under-inclusive because it fails to protect the institution it claims to safeguard a marriage built on non-consensual sex is not a marriage worth protecting.⁶³ As Justice Rajiv Shaktiher stated in his RIT Foundation opinion: the exception “deprives nearly one-half the population of equal protection of the laws.”⁶⁴

ii. Article 15: Discrimination on the Ground of Sex

Article 15(1) bars the State from discriminating against any citizen on the ground of sex.⁶⁵ That's what the marital rape exception does. It assumes that a woman's body does not belong to her entirely once she is married.⁶⁶ It is overwhelmingly women who are subjected to forced sex in marriage. It is women alone who are denied protection by law.⁶⁷ The discrimination is also inter-sectional, meaning that women in marginalized communities face extra obstacles in leaving abusive marriages and are most affected by a law that doesn't even offer them the chance of criminal justice.⁶⁸

iii. Article 21: Life, Dignity, and Bodily Integrity

Article 21 has been interpreted by the Supreme Court to include the right to live with

⁵⁸ Sonia V. Thomas & Sthanu N. Cheeru, *The Continuing Non-Criminalization of Marital Rape in India*, WOMEN'S RTS. L. REP. (2023).

⁵⁹ Saptarshi Mandal, *The Impossibility of Marital Rape*, 42 AUSTL. FEMINIST L.J. 135, 143 (2016).

⁶⁰ *Id.* at 144.

⁶¹ RATNA KAPUR & BRENDA COSSMAN, SUBVERSIVE SITES: FEMINIST ENGAGEMENTS WITH LAW IN INDIA 148 (1996).

⁶² UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS 89 (3d ed. 2008).

⁶³ Rebecca M. Ryan, *The Sex Right: A Legal History of the Marital Rape Exemption*, 20 LAW & SOC. INQUIRY 941, 945 (1995).

⁶⁴ *RIT Found. v. Union of India*, WP(C) No. 284/2015, para. 167 (Del. H.C. May 11, 2022) (India) (Shaktiher, J.).

⁶⁵ INDIA CONST. art. 15, cl. 1.

⁶⁶ FLAVIA AGNES, LAW AND GENDER INEQUALITY: THE POLITICS OF WOMEN'S RIGHTS IN INDIA 134 (1999).

⁶⁷ Aisha Akram, *The Decriminalisation of Marital Rape: How India Continues to Refuse Justice to its Married Women*, OXFORD HUM. RTS. HUB (Dec. 6, 2023), <https://ohrh.law.ox.ac.uk/the-decriminalisation-of-marital-rape-how-india-continues-to-refuse-justice-to-its-married-women/>.

⁶⁸ *Id.*

human dignity, the right to privacy, and the right to bodily integrity.⁶⁹ In *Justice K.S. Puttaswamy (Retd.) v. Union of India* (2017), a nine-judge bench held that privacy encompasses bodily integrity and personal autonomy, including the right to make intimate decisions without State interference.⁷⁰ In *Suchita Srivastava v. Chandigarh Administration* (2009), the Court recognized the right to make reproductive choices as part of personal liberty—a right that logically must extend to refusing sexual intercourse.⁷¹

The marital rape exception is a direct assault on these rights. It tells a married woman that the State will not protect her bodily integrity against the one person who is most likely to violate it. As the Supreme Court observed in *State of Karnataka v. Krishnappa* (2000): “sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female.”⁷² That observation applies with at least as much force inside a marriage as outside it, perhaps more, because the violation is compounded by a breach of trust.⁷³

iv. Constitutional Morality

In *Navtej Singh Johar v. Union of India* (2018), the Supreme Court held that constitutional morality—the values of equality, liberty, fraternity, and dignity embedded in the Constitution must prevail over societal morality.⁷⁴ Similarly, in *Joseph Shine v. Union of India* (2019), the Court decriminalized adultery by rejecting the subordination of women within marriage, recognizing that a woman does not lose her identity or autonomy upon entering into matrimony.⁷⁵ The marital rape exception privileges a social morality rooted in patriarchy over a constitutional morality that demands dignity for every individual and cannot survive this standard.⁷⁶

V. JUDICIAL PRONOUNCEMENTS

i. Independent Thought v. Union of India (2017)

In 2017, a two-judge bench of the Supreme Court read down Exception 2 to the extent

⁶⁹ INDIA CONST. art. 21.

⁷⁰ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 S.C.C. 1, para. 121 (India).

⁷¹ *Suchita Srivastava v. Chandigarh Admin.*, (2009) 9 S.C.C. 1 (India).

⁷² *State of Karnataka v. Krishnappa*, (2000) 4 S.C.C. 75, para. 12 (India).

⁷³ *Id.*

⁷⁴ *Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C. 1, para. 121 (India).

⁷⁵ *Joseph Shine v. Union of India*, (2019) 11 S.C.C. 1 (India).

⁷⁶ *Id.*

that it permitted marital rape of girls below eighteen years of age.⁷⁷ The Court held that sex with a minor wife would constitute rape regardless of the exception, aligning the IPC with the Protection of Children from Sexual Offences Act, 2012 (“POCSO”) and the Prohibition of Child Marriage Act, 2006.⁷⁸

The judgment was deliberately narrow—it did not strike down the exception for adult women.⁷⁹ But its importance lies in what it said in passing: that the exception rested on an “archaic” and “patriarchal” understanding of marriage and that it was “manifestly arbitrary” in its treatment of minor wives.⁸⁰ That reasoning leaves the door wide open for a future bench to extend the logic to adult women.⁸¹

ii. **RIT Foundation v. Union of India (2022)**

On 11 May 2022, the Delhi High Court delivered a split verdict on the constitutionality of Exception 2.⁸² Justice Rajiv Shakdher, in a comprehensive 167-paragraph judgment, held the exception unconstitutional, finding violations of Articles 14, 15, 19(1)(a), and 21.⁸³ He held that sexual agency and bodily integrity cannot be extinguished by the marital relationship.⁸⁴

Justice C. Hari Shankar disagreed. He held that sexual relations consensual or not were a “legitimate expectation” within marriage and that criminalizing marital rape would amount to “excessive interference” with the marital relationship.⁸⁵ He also raised concerns about the potential for misuse of such a law.⁸⁶ The matter is currently before the Supreme Court, where a three-judge bench began hearings in October 2024 before the proceedings were deferred following the retirement of the then Chief Justice.⁸⁷ As of mid-2026, the case remains pending.⁸⁸

⁷⁷ *Independent Thought v. Union of India*, (2017) 10 S.C.C. 800 (India).

⁷⁸ *Id.* at 822–25.

⁷⁹ Sonia V. Thomas & Sthanu N. Cheeru, *The Continuing Non-Criminalization of Marital Rape in India*, WOMEN'S RTS. L. REP. (2023).

⁸⁰ *Independent Thought*, (2017) 10 S.C.C. at 845, para. 91 (India).

⁸¹ *Id.*

⁸² *RIT Found. v. Union of India*, WP(C) No. 284/2015 (Del. H.C. May 11, 2022) (India).

⁸³ *Id.* at para. 167 (Shakdher, J.).

⁸⁴ *Id.* at para. 172.

⁸⁵ *RIT Found.*, WP(C) No. 284/2015, para. 42 (Hari Shankar, J., dissenting).

⁸⁶ *Id.* at para. 58.

⁸⁷ *RIT Found. v. Union of India*, Diary No. 16342/2022 (Supreme Court of India, listed Oct. 23, 2024).

⁸⁸ *Challenge to the Marital Rape Exception*, SUPREME COURT OBSERVER (last visited June 27, 2026), <https://www.scobserver.in/cases/challenge-to-the-marital-rape-exception-hrishikesh-sahoo-v-state-of-karnataka/>.

iii. Hrishikesh Sahoo v. State of Karnataka (2022)

In March 2022, the Karnataka High Court refused to quash rape charges against a husband who had invoked Exception 2.⁸⁹ Justice M. Nagaprasanna held that the exception was “regressive” and violated the right to equality by treating the wife as her husband's subordinate.⁹⁰ He stated that “no exception under law can be so absolute that it becomes a license for the commission of a crime against society.”⁹¹ The Supreme Court granted an interim stay on the High Court's order in July 2022.⁹² The stay remains in place, effectively shielding the accused.⁹³

iv. Other Judicial Observations

In 2017, the Gujarat High Court called marital rape a “disgraceful offence that has shaken the conscience of the judiciary”.⁹⁴ In *Gorakhnath Sharma v. State of Chhattisgarh* (2019), the Chhattisgarh High Court applied the exception but noted its anomalous nature.⁹⁵ These observations suggest a growing judicial consensus that the exception is inherently at odds with constitutional values, even as legislative action remains elusive.⁹⁶

VI. COMPARATIVE AND INTERNATIONAL PERSPECTIVE

i. The Global Shift

Australia got rid of its marital rape exemption in 1976 starting with South Australia. By 1992 all Australian states and territories had followed. This change did not ruin marriages. Lead to many false complaints, which are common fears in India today. Australian courts found that removing the exemption actually made the law of consent clearer. They said that consent in law is about free agreement not just being married.⁹⁷ The United Kingdom also got rid of this exemption in 1991. The House of Lords said it was outdated and wrong. They believed it went against ideas of equality and consent. The House of Lords took action on its own. Did not wait for Parliament to make a

⁸⁹ *Hrishikesh Sahoo v. State of Karnataka*, 2022 Cri. L.J. 2345 (Kar. H.C.) (India).

⁹⁰ *Id.* at para. 34.

⁹¹ *Id.* at para. 41.

⁹² *Hrishikesh Sahoo v. State of Karnataka*, SLP (Crl.) No. 4063-4064/2022 (Order dated July 19, 2022) (India).

⁹³ *Id.*

⁹⁴ *Nimeshbhai Bharatbhai Desai v. State of Gujarat*, (2018) 2 G.L.R. 1102 (India).

⁹⁵ *Gorakhnath Sharma v. State of Chhattisgarh*, 2019 Cri. L.J. 4120 (Chh. H.C.) (India).

⁹⁶ Saptarshi Mandal, *The Impossibility of Marital Rape*, 42 AUSTL. FEMINIST L.J. 135, 149 (2016).

⁹⁷ Criminal Law Consolidation Act Amendment Act 1976 (SA) s 12 (Austl.); *PGA v R* (2012) 245 CLR 355, 362 (Austl.).

change.⁹⁸ They thought it was okay for judges to update the law to match present day values. This is important for India's Supreme Court to consider when thinking about what to do. The European Court of Human Rights also agreed in 1995 that not having a marital rape exemption was in line with human rights law. In countries closer to India such as Nepal made marital rape a crime in 2006 and Bhutan did the same in 2021. India still has this exemption, which puts it in a group of countries that do not punish marital rape, including Pakistan, Afghanistan, Libya and Somalia.⁹⁹ This is not a company for India to be, in.

ii. The United States

In the United States marital rape was not considered a crime in states until the 1970s. By 1993 all fifty states had made it a crime.¹⁰⁰ The way the United States changed its laws on rape is interesting for two reasons. First, the change happened slowly state by state than all at once through a federal law.¹⁰¹ This shows that making rape a crime does not have to cause big problems right away. Second, the states that changed their laws first. Nebraska in 1976 and New Jersey in 1979. Made special rules for marital rape cases.¹⁰² These rules helped prevent people from making complaints but did not let people off the hook completely. The rules included things like time limits for making a complaint requirements that complaints be made quickly and different punishments depending on the situation.¹⁰³ These rules were not meant to replace making rape a crime but to go along with it. The experience in the United States directly disagrees with what Justice Hari Shankar said in the RIT Foundation case and what the Union Government said in 2024.¹⁰⁴ They said that the risk of complaints means marital rape should not be considered a crime. In the United States, they addressed these concerns through careful procedures not by not making marital rape a crime. The concerns that people, in India have about false complaints were handled through balanced rules not by letting people off completely.

⁹⁸ *Regina v. R*, [1992] 1 A.C. 599, 610 (H.L.) (UK).

⁹⁹ *C.R. v. United Kingdom*, 21 Eur. H.R. Rep. 363 (1995); Muluki Ain (General Code) 2020, Chapter on Rape, § 1(2) (Nepal); Penal Code (Amendment) Act of Bhutan 2021, § 182 (G) (Bhutan); Saptarshi Mandal, *The Impossibility of Marital Rape*, 42 AUSTL. FEMINIST L.J. 135, 151 (2016).

¹⁰⁰ PATRICIA SEARLES & RONALD J. BERGER, *RAPE AND SOCIETY: A READINGS* 204 (1995).

¹⁰¹ Rebecca M. Ryan, *The Sex Right: A Legal History of the Marital Rape Exemption*, 20 LAW & SOC. INQUIRY 941, 945 (1995).

¹⁰² NEB. REV. STAT. § 28-319 (1976); N.J. STAT. ANN. § 2C:14-2 (West 1979).

¹⁰³ *Id.* at 947.

¹⁰⁴ *RIT Found. v. Union of India*, WP(C) No. 284/2015 (Del. H.C. May 11, 2022) (India) (Hari Shankar, J., dissenting).

iii. South Africa

South Africa's Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 explicitly criminalizes marital rape and states that “a marriage or other relationship does not constitute a defence” to charges of sexual assault.¹⁰⁵ South Africa's experience is particularly instructive given its parallel struggle with high rates of gender-based violence, demonstrating that criminalization is both legally necessary and practically achievable.¹⁰⁶

iv. India's International Obligations

India is a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”).¹⁰⁷ The CEDAW Committee, in General Recommendation No. 19, stated that “marriage shall not be considered as an irrevocable consent to sexual acts.”¹⁰⁸ In its 2014 concluding observations on India, the Committee explicitly called on the Indian government to criminalize marital rape.¹⁰⁹ The marital rape exception puts India in clear breach of these international obligations.¹¹⁰

VII. THE SOCIOCULTURAL SILENCE

i. Underreporting and Its Causes

The law is not clear about a lot of things and people are not talking about it. The NFHS-5 data shows that only 5.6% of married women who experienced sexual violence told someone about it. This is not just because women are afraid to talk about it.¹¹¹ The problem is that our society and the way it is set up makes it hard for women to speak up. Many women do not think that forced sex by their husbands is rape because the law does not say it is.¹¹² When the State says that a husband cannot rape his wife it changes how people think about what's okay and what is not okay, in a marriage. The NFHS-5 data and the law are very important here the NFHS-5 data and the law are supposed to

¹⁰⁵ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, s 56(1) (SA).

¹⁰⁶ Rashida Manjoo, *The Reality of Gender-Based Violence in South Africa*, 14 SUR INT'L J. HUM. RTS. 33, 35 (2011).

¹⁰⁷ CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN, Dec. 18, 1979, 1249 U.N.T.S. 13.

¹⁰⁸ CEDAW Committee, *General Recommendation No. 19: Violence Against Women*, U.N. Doc. A/47/38 (1992).

¹⁰⁹ CEDAW Committee, *Concluding Observations on the Combined Fourth and Fifth Periodic Reports of India*, U.N. Doc. CEDAW/C/IND/CO/4-5 (July 24, 2014).

¹¹⁰ *Id.*

¹¹¹ MINISTRY OF HEALTH AND FAMILY WELFARE, NATIONAL FAMILY HEALTH SURVEY (NFHS-5) 2019-21: COMPREHENSIVE REPORT 512 (2022).

¹¹² Flavia Agnes, *State Protection v. Private Patriarchy*, 48 ECON. & POL. WEEKLY 18, 21 (2013).

help women. They are not doing a good job. Women and the NFHS-5 data and the law needs to be looked again.

ii. Family Honour and the Culture of “Adjustment”

Indian society thinks marriage stability is very important. Women are taught to put family peace even if it means ignoring their own problems. People expect a wife to adapt to her husband's behaviour in intimate matters. If a woman speaks up about being forced into sex by her husband family members often tell her to be patient and keep the marriage, for the kids and families reputation.¹¹³ This kind of pressure works together with the laws Exception 2 which says women can't do much about it. The law says there's no solution and society say they shouldn't look for one.¹¹⁴

iii. Toxic Masculinity and the Private Sphere

The marital rape exemption supports what could be called a bifurcated masculinity: men who are responsible and law-abiding in the public sphere may behave in ways that are controlling and coercive in the home and find that criminal law is on their side.¹¹⁵ The exception is to the effect that a husband's relationship with his wife is altogether outside the reach of criminal law. It is the legal entitlement of marriage that creates the entitlement for men to demand sex, regardless of whether the wife is willing or not.¹¹⁶

iv. Media Representation

Sexual consent within marriage is seldom explored in popular media. The reigning cultural myth is that marriage is a “happy ending” in which all conflicts are solvable. The absence itself is not simply a sign of social norms - it is part of the constitution of social norms. Scholars working in the space between law and popular culture have observed that narrative representation of marriage influences what conduct within it can be publicly recognized as harmful, silence is the story, social and legal recognition is likely to follow.¹¹⁷ This near total absence of spousal sexual coercion from the Indian mainstream cinema and television has therefore exacerbated the legal vacuum created

¹¹³ UMA CHAKRAVARTI, GENDERING CASTE: THROUGH A FEMINIST LENS 89 (2003).

¹¹⁴ Upendra Baxi, *The Second Thomas Cup: Voices of Women and the Law*, 12 INDIAN J. GENDER STUD. 45, 49 (2005).

¹¹⁵ RATNA KAPUR & BRENDA COSSMAN, SUBVERSIVE SITES: FEMINIST ENGAGEMENTS WITH LAW IN INDIA 142 (1996).

¹¹⁶ *Id.* at 145.

¹¹⁷ LAW, CULTURE AND POPULAR CINEMA IN INDIA 74 (Madhava Prasad ed., 1998).

by Exception 2 i.e. the law won't call the harm rape and popular culture won't imagine it as such. These two forms of silence reinforce one another. Recent portrayals in Indian popular media, such as the 2026 Hindi drama series *Chiraiya*, have begun to reflect the realities that many victims experience particularly the expectation of spousal consent and the social pressures that discourage speaking out.¹¹⁸ While such representations do not carry legal authority, they are indicative of a broader shift in public discourse. As these issues become more openly acknowledged, the conditions necessary for meaningful legal reform begin to emerge. Breaking this cycle of silence may not, by itself, bring about change, but it is an essential step towards ensuring that any reform is understood, accepted and sustained within society.

VIII. ARGUMENTS AGAINST CRIMINALIZATION - AND WHY THEY FAIL

i. “It Will Be Misused”

This is the most common objection, raised by Justice Hari Shankar in RIT Foundation and by the Union Government in its October 2024 affidavit before the Supreme Court.¹¹⁹ The main issue or rather what scares them is that wives might file false rape charges to settle matrimonial scores as seen in in matrimonial disputes the facts are exaggerated as it becomes more of an ego battle and not about getting justice. But this concern, while not entirely baseless, is vastly overblown. Every criminal law carries a risk of false complaint such as Section 498A has faced identical criticism for decades, yet Parliament has not repealed it or amended it.¹²⁰ The possibility of misuse or exploitation is a reason for careful procedural design, not for maintaining a blanket exemption that leaves millions of women without protection. The existing criminal justice system with its requirements of proof beyond reasonable doubt, judicial scrutiny and evidentiary standards provides adequate protection against misuse but they can add some procedural technicalities that they deem fit to keep the number of false cases in check.

¹¹⁸ *Chiraiya* (Sony LIV television broadcast 2026); Sneha Vakharia, *Screening the Silence: Marital Consent in Indian OTT Narratives*, Indian Express (Mar. 14, 2026).

¹¹⁹ *In re Marital Rape Exemption*, Union of India Counter-Affidavit, ¶ 14 (S.C. Oct. 2024) (India).

¹²⁰ Law Commission of India, *Report on Section 498A of the Indian Penal Code*, Report No. 243, ¶ 4.1 (August 2012).

ii. “It Will Destroy the Institution of Marriage”

This argument assumes that marriage depends on a husband's legal right to force it on his wife. That is not a defence of marriage, it is a defence of coercion. Criminalizing marital rape does not destroy marriage rather it makes marriage a relationship between equals. The experience of countries that have criminalized marital rape clearly demonstrates that the institution of marriage has not collapsed in Australia, the United Kingdom, or the United States.¹²¹

iii. “It Is a Matter for the Legislature, Not the Courts”

This is the strongest objection, and it has genuine force in a parliamentary democracy. But it has clear limits. Parliament has had over a decade to act since the Justice Verma Committee's 2013 recommendation.¹²² The 2013 Amendment ignored it. The BNS retained the exception in 2023. And most tellingly, the Union Government filed a 49-page affidavit before the Supreme Court in October 2024 actively opposing removal meaning the executive branch is not merely inactive but is opposed.¹²³ At some point, legislative inaction shades into legislative abdication.

More fundamentally, the question before the Court is not a policy question-what penalty should apply, how evidence should be gathered those are for Parliament. The question is whether the Constitution permits the State to deny married women the protection of rape laws altogether. That is a constitutional question, squarely within the Court's jurisdiction. The Supreme Court struck down Section 377 in *Navtej*, decriminalized adultery in *Joseph Shine* and issued the Vishaka guidelines on sexual harassment in the complete absence of legislation.¹²⁴ There is no principled reason to treat Exception 2 differently.

IX. THE WAY FORWARD

i. Judicial Intervention: Strike Down, Not Read Down

Some have suggested that the Supreme Court could “read down” Exception 2 as it did in *Independent Thought* by narrowing its application rather than eliminating it.¹²⁵ This

¹²¹ Saptarshi Mandal, *The Impossibility of Marital Rape*, 42 AUSTL. FEMINIST L.J. 135, 140 (2016).

¹²² Justice Verma Committee, *Report of the Committee on Amendments to Criminal Law*, ¶ 12 (January 23, 2013).

¹²³ *Supra* note 127, at ¶ 22.

¹²⁴ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1; *Joseph Shine v. Union of India*, (2019) 3 SCC 39; *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241.

¹²⁵ *Independent Thought v. Union of India*, (2017) 10 SCC 800.

approach will not work. Reading down is appropriate when a provision is over board. Exception 2 is not over board, it is wrong in principle. It declares that marital rape “is not rape.” A court cannot interpret “is not rape” to mean “is rape in some circumstances” that is legislation, not interpretation.

The constitutionally honest approach is to strike down the exception in its entirety. This would remove the immunity without dictating the details of prosecution-penalty, evidence, procedure which would remain for Parliament to determine. The Court has done precisely this in analogous cases. It has removed the law and left the policy to Parliament. The same should happen here.¹²⁶

ii. Legislative Reform

The Parliamentary amendment is the most lasting solution. Parliament should remove Exception 2 to Section 63 of the BNS and clarify that marriage is not a defence to rape. Towards this end, Private Member’s Bills have been introduced by several MPs including Dr Shashi Tharoor but these have not been taken forward.¹²⁷ Legislative action has to be backed by government prioritization of this reform.

iii. Procedural Safeguards

Properly designed procedural safeguards can alleviate legitimate concerns about misuse without becoming escape hatches. These could include: medical examination and documentation where possible, reasonable time limits for lodging complaints, with judicial discretion in exceptional cases and provisions for the punishment of false complaints or perjury, applied with the same severity as in other criminal cases.¹²⁸ The key is balance, procedural protections should not erect insurmountable barriers to justice.

iv. Institutional Support

Criminalisation means next to nothing without support structures. The Government should fund accessible shelter homes, free legal aid and trained counsellors. Police personnel, prosecutors, judges and all authorities that get involved need gender

¹²⁶ Note, *The Marital Rape Exception: A Structural Critique*, 132 HARV. L. REV. 1432, 1438 (2019).

¹²⁷ The Women's Sexual Autonomy (Protection) Bill, 2022, Bill No. 344 of 2022 (Private Member's Bill introduced by Dr. Shashi Tharoor, Lok Sabha).

¹²⁸ See NEB. REV. STAT. § 28-320 (1976) (detailing evidentiary filters for domestic sexual offenses).

sensitive training on how to handle marital rape complaints with sensitivity.¹²⁹ Public awareness campaigns should challenge the social normalization of sexual violence within marriage. Legal reform and social reform must proceed together.

X. CONCLUSION

The marital rape exception is no mere technicality. It is a declaration of who counts. It says a married woman's body is legally available to her husband, regardless of what she wants. It says the Constitution's promises of equality, dignity and privacy are not for the one place where she is most vulnerable. It says a marriage certificate is stronger than consent.

None of this is defensible constitutionally. Marital status does not destroy consent. Marriage does not destroy a woman's person-hood nor does it make her body the property of her husband. Consent is a fluid thing that can be revoked at any time. It is not a one-time transaction that happens at the wedding altar. Consent must be present for each sexual act. To say otherwise is to deny/reject the very foundation of integrity upon which the right to life and dignity rests.¹³⁰ Constitutional morality must win. The Supreme Court's jurisprudence in *Navtej*, *Joseph Shine* and *Puttaswamy* has held that constitutional morality is not a function of popular acceptance.¹³¹ The marital rape exception is a relic of a social morality that subordinates women in marriage. Morality is not in the constitution.

We need judicial courage and legislative wisdom to move ahead. In the cases now before it, the Supreme Court has an opportunity to vindicate the constitutional rights of millions of married women by striking down Exception 2 to Section 63 of the BNS. Parliament needs to pass a comprehensive framework that criminalizes marital rape and provides meaningful support to survivors. Neither institution can claim to be unaware of the constitutional flaw. None can hide in shadows of the other indefinitely.

As students of law, we are taught that the law must change with the values of the society it governs, but more importantly, it must uphold the Constitution even when society lags behind. The question is not about criminalizing marital rape, but when the will shall be found in India's

¹²⁹ United Nations Office on Drugs and Crime, *Handbook on Effective Police Responses to Violence Against Women*, 54 (2010).

¹³⁰ *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1 (affirming bodily integrity as a core facet of Article 21).

¹³¹ *Id*; see also *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶ 114.

legal system to declare, once and for all, that a marriage certificate is not a deed of conquest. Until that day, the assurance of equality, dignity and justice for married women remains an unfulfilled constitutional command.

