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A Nine-Word Constitutional Crisis: Re-Examining the Marital Rape Exception Under the Bharatiya Nyaya Sanhita, 2023

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ABSTRACT

The marital rape exception ("MRE") enshrined as Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita, 2023 is a colonial vestige that deprives married women of comprehensive legal protection from non-consensual sexual activities perpetrated by their husbands. This article contends that the MRE is constitutionally flawed under Articles 14, 15, 19, and 21 of the Constitution of India, traces its roots to a discredited 17th-century English doctrine, examines the judicial evolution from Independent Thought v. Union of India AIR 2017 SC 4904 to the divided verdict in RIT Foundation v. Union of India (2022), and analyses the legislative inaction noted in the Union of India's own counter-affidavit submitted to the Supreme Court in Hrishikesh Sahoo v. Union of India (SLP Crl. No. 4063–64 of 2022). The paper finishes with specific reform ideas aimed at addressing both the legislative deficiencies and the institutional shortcomings that perpetuate them.

KEYWORDS

Marital Rape, Exception 2, BNS 2023, Section 63, Article 21, Bodily Autonomy and Privacy, Articles 14, 15 and 21 (Constitution of India), Independent Thought, RIT Foundation, Counter-Affidavit, CEDAW

INTRODUCTION

Exception 2 of Section 375 of the Indian Penal Code, 1860 now replaced by Section 63 of the Bharatiya Nyaya Sanhita, 2023 reads, "*Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape*"[1]. The contradiction embedded in this nine-word exception is an enigma within itself, as Section 63 itself defines rape as non-consensual penetration requirement unequivocal voluntary agreement and then exempts an entire category of perpetrators from this heinous act on the sole basis of relationship between the perpetrator and the victim.

What makes it more indefensible is that the State, in its own Counter-

[1] *Bharatiya Nyaya Sanhita, No. 45 of 2023, India Code (2023), https://www.indiacode.nic.in/handle/123456789/20062.*

Affidavit[2] acknowledged the contradiction. In the counter-affidavit filed before the Supreme Court of India in the case of *Hrishikesh Sahoo v. State of Karnataka* (SLP Crl No. 4063-64 of 2022)[3], the Union of India stated that *"the act popularly referred to as "marital rape" ought to be illegal and criminalised"*. The Central Government states that the institution of marriage does not obliterate women's rights of consent, and its violation should result in stringent penal consequences. If the State states that the act should be illegal and criminalised then Exception 2 simply cannot sustain.

HISTORICAL ORIGIN

This exception originates from Sir Matthew Hale's 1736 dictum in *History of the Pleas of the Crown* which reads as *"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."*[4] This exception was as it is picked up and stated into the Indian Penal Code, 1860[5] by Lord Macaulay's drafting committee without any deliberate debate or discussion. This dictum simply states that the legal personality of the wife merges into that of her husband upon marriage.

The doctrine was fundamentally based on the private understanding of marriage, rather than on the principle of consent. The Justice Verma Committee[6] noted in 2013 that the exclusion originates from an antiquated perception of marriage that viewed wives just as the property of their husbands. The striking irony lies in the fact that the Union of India's counter-affidavit submitted in 2024, advocates for Exception 2 by referencing definitions of marriage derived from Halsbury's Laws of England and Black's Law Dictionary, the very English common law tradition that the House of Lords disavowed in R v. R UKHL 12[7] when it abolished the marital rape exemption over three decades ago. The Bharatiya Nyaya Sanhita, 2023 India's premier criminal law reform initiative replicated Exception 2 precisely, converting a colonial legacy

[2] Preliminary Counter Affidavit on Behalf of Union of India, *Union of India v. X* (In re Marital Rape Exception), Supreme Court of India (2022), https://www.scobserver.in/wp-content/uploads/2023/03/Counter-Affidavit-by-Union-Marital-Rape.pdf.

[3] Hrishikesh Sahoo v. State of Karnataka, 2022 SCC OnLine Kar 371 (Karnataka High Court).

[4] Jill Elaine Hasday, The Marital Rape Exemption: Evolution to Extinction, 43 Clev. St. L. Rev. 351 (1995).

[5] Indian Penal Code, No. 45 of 1860, India Code (1860), https://www.indiacode.nic.in/bitstream/123456789/2263/1/aA1860-45.pdf.

[6] Justice J.S. Verma, Justice Leila Seth & Gopal Subramanium, *Report of the Committee on Amendments to Criminal Law* (2013), https://archive.nyu.edu/handle/2451/33614.

[7] R v. R, UKHL 12 (H.L.).

into a conscious modern decision.

CONSTITUTIONAL VALIDITY

The exclusion of marital rape distinctly discriminates against women based on their marital status, depriving married women of their consensual rights regarding protection against penetrative sexual acts, effectively categorising them as property of their husbands, whose consent is presumed to be granted by virtue of marriage. The legislative objective is to criminalise non-consensual penetrative activities and to provide women protection against such crimes under Section 63 of the Bharatiya Nyaya Sanhita, 2023. Marital status should not be the exclusive justification for shielding offenders who conduct such actions against their spouses under the guise of marriage. Justice Rajiv Shakdher, in *RIT Foundation v. Union of India (2022)*[8], declared that this exception is arbitrary and discriminatory classification violative of Article 14 of the Constitution.

In *Justice K.S. Puttaswamy (Retd.) v. Union of India (2017) 10 SCC 1*[9], a nine-judge Constitution Bench determined that the right to privacy constitutes a basic right under Article 21, fundamentally includes "personal intimacies" and the ability to make essential personal decisions over one's body. The right to sexual autonomy the authority to decide who may have sexual access to one's body immediately and unavoidably derives from this principle. The exception infringes upon this right at its most fundamental level, it renders a married woman's lack of consent legally inconsequential, mandating her by law to make her body sexually accessible as a condition of marriage.

The counter-affidavit seeks to use Puttaswamy against itself, referencing the judgment's recognition that the right to privacy is "not absolute" and is amenable to "reasonable restrictions." It further asserts, in paragraph 33, that the application of Section 63 to married relationships would be "unduly severe and disproportionate." This misapplies the proportionality concept, which safeguards the rights-holder the wife against excessive State limitation, rather than shielding the culprit from suitable criminal penalties. Moreover, in paragraph 49, the same affidavit claims that "in an institution of marriage, there exists a continuing expectation, by either spouse, to have reasonable sexual access from the other," a statement that is essentially equivalent to Hale's doctrine of implied matrimonial consent, and directly contradicts the government's own admission in paragraph 12 that consent is not nullified by marriage.

[8] RIT Found. v. Union of India, W.P. (C) No. 284/2015 (Del. High Ct. May 11, 2022).
[9] *Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1 (India).*

According to Article 15, the state is prohibited from discriminating against its citizens based on gender. The primary objective of the exception is to establish a patriarchal norm through the coercive mechanisms of criminal law, aimed exclusively at denying women the legal rights that are universally available to both males and unmarried women. The counter-affidavit presents a third allegation in paragraph 17, claiming that Hindu personal law regards marriage as a "sacrament" and that there exists an "intelligible link between the religious beliefs of individuals and the institution of marriage." The religious character of an institution does not influence its constitutional acceptability. A fundamental right is not abrogated by the performance of a sacrament. The Supreme Court of India, in the case of *Independent Thought v. Union of India AIR 2017 SC 4904*[10], ruled that marriage cannot supersede the protections afforded by consent-based rape statute for minor women aged 15 to 18. The counter-affidavit concedes to this ruling and proposes methods for its codification. Given that the state has acknowledged that marriage does not invalidate consent for underage wives, there is no conceptual basis for the state to deny it for adult spouses.

JUDICIAL INTERPRETATIONS

The initial formal breach in the exception's constitutional framework occurred due to the case of *Independent Thought v. Union of India*, adjudicated by the Supreme Court of India in 2017. The Court's interpretation of Exception 2, which applied to couples aged 15 to 18, was determined to violate Articles 14, 15, and 21. The Court also ruled that marriage cannot legally override the protection of a women's bodily autonomy as stipulated by the constitution. The Supreme Court did not rule on adult rape occurring inside marriage; nonetheless, it established a theoretical framework asserting that the abrogation of fundamental rights cannot be justified by marital status, a concept applicable in various settings.

The most notable judicial examination of adult marital rape in Indian legal history is the divided ruling issued by the Delhi High Court in *RIT Foundation v. Union of India (2022)*. Justice Rajiv Shakdher ruled Exception 2 invalid, determining it contravened Articles 14, 15, 19, and 21. Furthermore, he noted that it "subjects married women to subhuman treatment. "Justice C. Hari Shankar affirmed the exception is based on principles of parliamentary deference and the discernible distinction of marriage, a rationale closely reflected in the Union of India's counter-affidavit. Notably, the government's affidavit at paragraph 30 asserts that "if the legislature believes that retaining the contested Exception is essential for the preservation of the marital institution, it would be

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

inappropriate for this Hon'ble Court to invalidate the Exception. The Supreme Court of India, in *Navtej Singh Johar v. Union of India (2018) 10 SCC 1*[11], dismissed this rationale, asserting that constitutional morality cannot yield to legislative opinion where fundamental rights are concerned. The Supreme Court's consideration of the combined problems, including *Hrishikesh Sahoo v. Union of India*, renders the pending status of this matter a significant constitutional emergency."

a. Justice Verma Committee

The Justice Verma Committee report, constituted on December 23, 2012, in response to the gang rape in Delhi, was submitted on January 23, 2013. The Committee concluded that "marriage should not be regarded as irrevocable consent to sexual acts" and that "the relationship between the victim and the accused should not influence the definition of the offence," ultimately recommending the abolition of the MRE. The Committee's report, bearing the moral significance of a national tragedy and the legal expertise of a former Chief Justice of India, constituted the most authoritative professional endorsement for reform in India's post-independence history. It was the report of utmost significance.

b. Post-Nirbhaya scenario

Following the Nirbhaya incident, the Criminal Law (Amendment) Act, 2013, primarily enacted the recommendations of the Justice Verma Committee. The proposal broadened the definition of rape, enlarged the categories of aggravated rape, integrated Section 114A into the Evidence Act to presumptively negate consent, and revised Section 146 to restrict character evidence. The counter-affidavit indicates in paragraph 73 that "while other recommendations in the aforementioned report were predominantly implemented and necessary amendments were made to various statutes, the Legislature, at its discretion, deliberately chose not to eliminate the contested provision from the statute books." Consequently, Parliament selectively adopted politically acceptable provisions while disregarding the singular provision. The BNS, 2023, reiterated Exception 2 verbatim, affirming it as a contemporaneous selection rather than a residual error.

c. The Government's Declarations Concerning the Current State of Their Actions

The counter-affidavit and legislative record show five reasons the government did not criminalise the activity. Each category lacks

[11] *Navtej Singh Johar v. Union of India, (2018) 10 S.C.C. 1 (India).*

analytical depth.
The administration claims that criminalisation will harm marriage and cause major disruptions. In its 167th Report (2013), the Department Related Standing Committee on Home Affairs warned that marital rape law "has the potential to undermine the institution of marriage."

This argument claims that a marriage's stability depends on the husband's capacity to have sexual relations with his wife without her agreement. This contradicts the constitutional view of marriage as an equal relationship.

Second, paragraph 9 of the document states that the National Commission for Women advised keeping Exception 2. Criminalisation may cause "destitution and vagrancy for the wife and dependent children". The NCW stated that "a husband's coercive sexual act infringes upon a woman's personal bodily autonomy and should not go unaddressed." This argument supports welfare aid infrastructure, not legal impunity.

The Ministry of Women and Child Development articulated that the existing provisions under the Protection of Women from Domestic Violence Act, 2005[12] (PWDVA), and Section 498A of the Indian Penal Code provide "sufficient protection." This claim is refuted by the government's statutory framework, which indicates that Sections 354, 354A, 354B, and 498 are inapplicable. The maximum penalty of three years under Section 498A is inherently disproportionate to the minimum seven-year sentence for rape as stipulated in Section 64 BNS; the PWDVA is a civil statute that does not provide incarceration of offenders; and the Indian Penal Code (IPC) addresses penetrative sexual intercourse. It is the unequivocal recognition that the general regulations are insufficient for addressing marital sexual abuse, prompting Parliament to establish Section 376B of the Indian Penal Code, presently designated as Section 67 of the Bharatiya Nyaya Sanhita, 2023. This provision penalises sexual intercourse with a woman who is separated from her husband.

Fourthly, the government asserts in paragraph 65 that "the potential for misuse of the amended provisions cannot be discounted, as it would be arduous for an individual to demonstrate the presence or absence of consent." The Supreme Court's ruling in *Social Action Forum for Manav Adhikar v. Union of India (2018) 10 SCC 443*[13] asserts

[12] Protection of Women from Domestic Violence Act, No. 43 of 2005, India Code (2005), https://www.indiacode.nic.in/bitstream/123456789/15436/1/protection_of_women_from_domestic_violence_act%2C_2005.pdf.
[13] *S Soc. Action Forum for Manav Adhikar v. Union of India, (2018) 10 S.C.C. 443 (India).*

that the potential for misuse does not warrant the denial of protective legislation. The identical arguments about Section 498A of the Indian Penal Code and the PWDVA were articulated and then dismissed.

Fifth, the administration, in paragraph 6, characterises the issue as "more of a social matter than a legal one" that falls outside the scope of "judicially manageable standards." The *Navtej Singh Johar case (2018)* decisively rejected the notion that social morality supersedes constitutional morality, establishing that constitutional morality is a judicially enforceable standard that prevails in conflicts involving fundamental rights.

REFORMS PROPOSED

1. Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita, 2023 necessitates complete legislative repeal. The clause absolves a husband from rape allegations if the wife is above eighteen years of age, which has been well documented as inconsistent with Articles 14, 15, and 21 of the Constitution of India. The Oxford Human Rights Hub has deemed this exemption constitutionally unconstitutional, observing that it deprives married women of equal legal protection by using marital status as a surrogate to invalidate consent.[14] The Union's concessions in paragraph 12 of its October 2024 affidavit provide the normative basis for finalising this legislative action, having described the current framework as possibly excessive. In *Independent Thought v. Union of India, AIR 2017 SC 4904*, the Supreme Court invalidated the marital rape exemption as it pertained to female minors under eighteen years of age, deeming it arbitrary, unfair, and in violation of Articles 14, 15, and 21.

2. The wife-controlled prosecution procedure established under Section 198B of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS)[15], now limited to separated wives prosecuting under Section 67 BNS, should be expanded to encompass all marital rape allegations, regardless of the couples' cohabitation status. The Harvard Human Rights Journal has recognised this structural limitation as a significant legislative obstacle to the effective enforcement of married women's right to bodily autonomy under

[14] C. Samson, *Discarding the Marital Rape Exemption: From Fundamental Rights to Vulnerability Theory*, Oxford Hum. Rts. Hub (Mar. 2025), https://ohrh.law.ox.ac.uk/discarding-the-marital-rape-exemption-from-fundamental-rights-to-vulnerability-theory/.

[15] *Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, India Code (2023), https://www.indiacode.nic.in/handle/123456789/20099.*

Article 21, highlighting that the lack of a universal wife-controlled complaint mechanism results in an institutional disparity between married and unmarried complainants[16]. This expansion would concurrently mitigate the often-cited issue of prosecutorial abuse while guaranteeing that the victim, rather than the State, has authority over the commencement of criminal proceedings.

3. The presumption of non-consent established in Section 116 of the Bharatiya Sakshya Adhiniyam, 2023[17], which superseded Section 114A of the Indian Evidence Act, 1872, should be explicitly applied to prosecutions for marital rape. Under this article, if the accused's sexual intercourse is established and the prosecutrix testifies under oath that she did not consent, the court shall assume a lack of consent. The evidentiary safeguards outlined in Section 48 BSA, which parallels the provisions of Section 53A Indian Evidence Act by deeming prior sexual history irrelevant to the issue of consent, must be explicitly broadened to prevent the introduction of the parties' matrimonial sexual history as evidence of implied or ongoing conjugal consent.

4. The Protection of Women from Domestic Violence Act, 2005 should be revised to mandate that the relevant Magistrate issue an emergency ex parte protection order within twenty-four hours of a marital rape complaint being filed. The Indian Journal of Medical Ethics has reported the structural deficiencies of current emergency relief systems for survivors of sexual violence in intimate relationships, with research indicating that delays in issuing residence and protection orders constitute a significant institutional failure that exacerbates survivor vulnerability[18].

5. Survivor-specific shelters, legal aid, and structured compensation for victims of marital rape should be funded by the Nirbhaya Fund. The Nirbhaya Fund, which was established in 2013 with a non-lapsable capital of Rs. 3,000 crores, currently administers a Rs. 200 crore Central Victim Compensation Fund to State Governments and Union Territories for the benefit of rape and acid assault victims. This institutional analysis of the Fund's implementation demonstrates that the most vulnerable victims of

[16] V. Singh, Marital Rape: A Non-Criminalized Crime in India, 32 Harv. Hum. Rts. J. 1 (2019), https://journals.law.harvard.edu/hrj/2019/01/marital-rape-a-non-criminalized-crime-in-india/.

[17] *Bharatiya Sakshya Adhiniyam, No. 47 of 2023, India Code (2023), https://www.indiacode.nic.in/handle/123456789/20100.*

[18] Padma Bhate-Deosthali et al., *Five Years Post-Nirbhaya: Critical Insights into the Status of Response to Sexual Assault*, 15 Indian J. Med. Ethics 215 (2018), https://ijme.in/articles/five-years-post-nirbhaya-critical-insights-into-the-status-of-response-to-sexual-assault/.

economic destitution are inaccessible to welfare infrastructure due to the lack of criminalisation, which excludes survivors of marital rape from these mechanisms.

CONCLUSION

The marital rape exception has its roots from the colonial-era which was transplanted into the Indian legal system by Lord Macaulay's drafting committee without any reasoning, and now reproduced by a sovereign Parliament with full knowledge of its constitutional consequences and perpetrator protective nature. It is sustained by a result of institutional failure.

The government on oath before the Supreme Court has stated that "marital rape is ought to be illegal and criminalised" and that a women's consent cannot be obliterated by marriage, having made this declaration, the State has no legitimate reason to sustain exception 2. Exception 2 fails the *Anuj Garg*[19] test under Article 14, violates the sexual autonomy guaranteed under *Puttaswamy* through Article 21, perpetuates sex-based discrimination under Article 15, and is irreconcilable with the consent architecture the BNS itself articulates. The judicial path completely points towards full criminalisation of this act of marital rape that is committed upon wives of perpetrators and instead they are ones protected as other appropriate sections of cruelty and PWDVA does not treat offenders with severity as that of punishment under Section 63 of Bharatiya Nyaya Sanhita, 2023.

Marriage, in the vision of the Indian Constitution, is a union of equals, not a transfer of dominion over one person's body to another. The National Family Health Survey-5 data establishes that over 95% of sexual violence experienced by married women in India is perpetrated by their husbands,[20] a reality rendered legally invisible by a nine-word exception that the constitutional order can no longer sustain without contradiction. A Constitution that promises dignity to every person cannot, in the same breath, make the marriage certificate a licence for sexual impunity and yet that is precisely what Exception 2 to Section 63 BNS continues to do, converting the institution of marriage from a space of equal personhood into one of legally enforced silence for millions of women.

The requirement is constitutional, the international mission under CEDAW[21] is unequivocal, and the urgency is critical. The legislative

[19] Anuj Garg v. Hotel Ass'n of India, (2007) 3 S.C.C. 1 (India).

[20] Ministry of Health & Family Welfare, *National Family Health Survey-5 (NFHS-5), 2019–21: India Report*, ch. 16 (Sexual Violence) 591 (2021).

[21] CEDAW Comm., *Concluding Observations on the Combined Fourth and Fifth Periodic Reports of India*, ¶ 20(a), U.N. Doc. CEDAW/C/IND/CO/4-5 (July 24, 2014).

proposals presented in this article do not advocate for the abolition of marriage as a social institution; they just call for the removal of its existing role as a shield against criminal law. The era of legislative half-measures, judicial indecision, and the continual postponement of reform for political convenience is over. Parliament must act as a fulfilment of its constitutional duty to every married woman whose body the law now fails to acknowledge as her own.