

## Consent Within Marriage: Reclaiming Bodily Autonomy and Gender Equality in India

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### ABSTRACT

This article offers a critical evaluation of the marital rape exception in Indian law, currently codified under Section 63 of the Bharatiya Nyaya Sanhita (BNS), 2023 (previously Section 375 of the Indian Penal Code i.e. IPC). It also explores the progression of judicial interpretations, public debate, and emerging legal consciousness around spousal consent. Drawing from recent developments, including deliberations before the Supreme Court, governmental submissions, and various High Court verdicts, the article analyses India's gradual shift toward a consent-based legal framework. Finally, it proposes a structured roadmap for reform aimed at harmonizing the country's criminal justice system with the principles of gender equality and individual autonomy.

**Keywords:** Marital rape, Consent, Gender Equality, Constitutional rights, Bharatiya Nyaya Sanhita, Spousal Autonomy.

### INTRODUCTION

Marriage in India is traditionally conceived as a solemn pact of mutual love, respect, and shared life. Yet, the law paradoxically excludes non-consensual intercourse within marriage from criminal liability. Under Exception 2 to Section 63 of the BNS, 2023 (previously Section 375 of the IPC), husbands enjoy immunity from prosecution for rape if their wife is 18 or above<sup>209</sup>. This special exemption breaches core constitutional values of equality (Article 14),<sup>210</sup> non-discrimination (Article 15),<sup>211</sup> and the right to life and personal liberty (Article 21)<sup>212</sup> by undermining women's bodily autonomy and dignity.

This legal fiction contradicts timeless legal principles of "*Volenti non fit injuria*" (to a willing person, no injury is done) and "*Nemo judex in causa sua*" (no one should be a judge in their

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<sup>209</sup> Bharatiya Nyaya Sanhita, 2023, § 63, Exception 2, No. 45, Acts of Parliament, 2023 (India).

<sup>210</sup> INDIA CONST. art. 14.

<sup>211</sup> INDIA CONST. art. 15.

<sup>212</sup> INDIA CONST. art. 21.

own cause) since the law here presumes consent despite coercion. Equally, “*Salus populi est suprema lex*” (the welfare of the people shall be the supreme law) supports the notion that protecting individual dignity must outweigh the preservation of outdated marital privacy doctrines<sup>213</sup>.

By presuming consent within marriage, the exception institutionalizes gendered inequality and perpetuates the archaic notion that a husband holds inalienable sexual rights over his wife. This inconsistency of granting immunity in marriage while criminalizing similar conduct outside, fails the test of reasonable classification under Article 14<sup>214</sup>. As India moves towards a rights based constitutional morality and strengthened protections against gender-based violence, this marital rape exception remains a regressive anomaly. Its urgent reconsideration and repeal are necessary to uphold the ideals of justice, autonomy, and gender equality<sup>7</sup>.

## HISTORICAL AND LEGAL BACKGROUND

The marital rape exception embedded in Indian criminal law<sup>215</sup> is a colonial remnant derived from 17th-century English jurisprudence. Sir Matthew Hale’s infamous proposition that a husband could not be guilty of raping his wife because the marriage contract implied irrevocable consent, formed the ideological foundation for this legal immunity. This patriarchal doctrine was absorbed into Indian law through the IPC, 1860, where Exception 2 to Section 375 stated that sexual intercourse by a man with his wife,<sup>216</sup> provided she was not under fifteen years of age, would not be considered rape.<sup>217</sup>

Even as the country progressed socially and constitutionally after independence, this archaic immunity remained intact. During the massive criminal law overhaul following the 2012 Nirbhaya case, public pressure for reform intensified. The Justice Verma Committee, established to recommend amendments, categorically denounced the marital rape exception, calling it a product of outdated notions that denied a woman’s agency and right to consent.<sup>218</sup> The Committee argued that a husband’s immunity from rape prosecution within marriage

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<sup>213</sup> JUSTICE J.S. VERMA COMMITTEE, REPORT OF THE COMMITTEE ON AMENDMENTS TO CRIMINAL LAW 113 (2013).

<sup>214</sup> State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75; Joseph Shine v. Union of India, (2019) 3 SCC 39.

<sup>215</sup> Manish Kumar Sahu & Abhishek Mishra, *Criminalization of Marital Rape: A Study of Legislative Silence and Judicial Activism*, 5 INDIAN J. LEGAL REV. 367 (2025).

<sup>216</sup> Chitrash Narula & Shubhankar Gupta, *Need of the Hour: Reforming the Indian Criminal Justice System*, 3 INT’L J. SOCIO-LEGAL ANALYSIS & CONTEMP. AFF. 19 (2021).

<sup>217</sup> Indian Penal Code, 1860, § 375 Exception 2 (prior to repeal), No. 45, Acts of Parliament, 1860 (India).

<sup>218</sup> GOVERNMENT OF INDIA, COMMITTEE ON AMENDMENTS TO CRIMINAL LAW (JUSTICE J.S. VERMA COMMITTEE), REPORT 113 (2013).

violated fundamental constitutional guarantees. Despite these recommendations, the Criminal Law (Amendment) Act, 2013 left the exception untouched, citing concerns over marital harmony and potential misuse.<sup>219</sup>

In 2023, the parliament introduced the BNS aimed at decolonizing the criminal justice system. However, the re-codification did not address marital rape. Section 63 of the BNS retains the same exemption, now worded to state that a man's sexual act with his wife, if she is above eighteen years, does not amount to rape.<sup>220</sup>

## CONSTITUTIONAL CRITIQUE

The marital rape exception under Section 63 of the BNS, 2023 raises serious constitutional concerns. By shielding husbands from rape charges, it denies married women the same legal protection as others, directly affecting their rights under Articles 14, 15, and 21 of the Constitution.<sup>221</sup>

### A. Unequal Treatment – Article 14

Article 14 ensures equal protection under the law. Exempting husbands from prosecution based solely on marital status is arbitrary and lacks any reasonable basis. In *E.P. Royappa*, the Supreme Court<sup>222</sup> held that equality is violated when a law is arbitrary.<sup>223</sup>

### B. Violation of Personal Autonomy – Article 21

The right to life and liberty under Article 21 includes dignity and bodily autonomy.<sup>224</sup> The Supreme Court in *K.S. Puttaswamy v. Union of India*<sup>225</sup> recognized privacy as central to

<sup>219</sup> Press Information Bureau, "Statement of the Government on Justice Verma Committee Recommendations," Press Information Bureau (Jan. 23, 2013), <http://pib.nic.in/newsite/PrintRelease.aspx?relid=###> (last visited Aug. 10, 2025).

<sup>220</sup> Sai Ankita Senapati, *To What Extent the Legalisation of Marital Rape is Valid*, THE AMIKUS QRIAE, <https://theamikusqriac.com/to-what-extent-the-legalisation-of-marital-rape-is-valid/> (last visited Aug. 10, 2025).

<sup>221</sup> Aparna Chandra & Mrinal Satish, *Securing Reproductive Justice in India: A Casebook* (Centre for Constitutional Law, Policy & Governance, National Law University Delhi & Center for Reproductive Rights 2019), <https://reproductiverights.org/sites/default/files/2020-02/SecuringReproductiveJusticeIndia-Full.pdf> (last visited Aug. 10, 2025).

<sup>222</sup> Sonsie Khatri & Tasneem Fatma, *Editorial: Second Chances and Digital Erasure: Do Former Convicts Have the Right to Be "Forgotten" in India?*, 8 COMP. CONST. L. & ADMIN. L.J. (2024).

<sup>223</sup> *E.P. Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3.

<sup>224</sup> *Francis Coralie Mullin v. Administrator*, (1981) 1 SCC 608.

<sup>225</sup> *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

individual freedom. Forcing sexual activity in marriage without consent disregards this principle and violates a woman's right to choose.

### C. Discrimination Based on Sex – Article 15

Article 15 prohibits discrimination<sup>226</sup> on grounds of sex. Granting legal immunity to husbands perpetuates gender bias. In *Anuj Garg*,<sup>227</sup> the Court warned against laws based on outdated gender roles. The marital rape exception reflects such stereotypes.

### D. Evolving Legal Perspective

The Delhi High Court, in *RIT Foundation v. Union of India*,<sup>228</sup> issued a split decision<sup>229</sup> on this issue, sending it to the Supreme Court for final resolution.<sup>230</sup> Earlier, the Justice Verma Committee strongly opposed the exception, calling it unconstitutional.

## JUDICIAL TRENDS

A turning point came with the Supreme Court's judgment in *Independent Thought v. Union of India*, where the Court invalidated a legal provision that permitted sexual relations with a wife aged 15 to 18.<sup>231</sup> The verdict held that such an exception clashed with both the Protection of Children from Sexual Offences (POCSO) Act, 2012 and constitutional guarantees under Articles 14, 15, and 21.<sup>232</sup> While focused on child marriage, the ruling implicitly affirmed that marital status cannot override the necessity of consent.

This trajectory continued in the RIT Foundation case, where the Delhi High Court heard challenges to the constitutionality of the marital rape exception.<sup>233</sup> The judges disagreed where Justice Rajiv Shukdhakar found the exception discriminatory and unconstitutional, emphasizing

<sup>226</sup> *How the Vishaka Case Changed the Game for Women's Rights at Work in India*, LEGAL SERVICE INDIA, <https://mail.legalserviceindia.com/legal/article-16810-how-the-vishaka-case-changed-the-game-for-women-s-rights-at-work-in-india.html> (last visited Aug. 10, 2025).

<sup>227</sup> *Anuj Garg v. Hotel Association of India*, (2008) 3 SCC 1.

<sup>228</sup> *RIT Foundation v. Union of India*, 2022 SCC OnLine Del 1404.

<sup>229</sup> *"Will Destroy The Institution Of Marriage & Put Entire Family System Under Great Stress": Centre Defends Marital Rape Exception Through Its Counter-Affidavit In Apex Court*, VERDICTUM (Sept. 20, 2021), <https://www.verdictum.in/court-updates/supreme-court/marital-rape-exception-central-government-affidavit-1553646> (last visited Aug. 10, 2025).

<sup>230</sup> *RIT Foundation v. Union of India*, 2022 SCC OnLine Del 1728.

<sup>231</sup> *Independent Thought v. Union of India*, (2017) 10 SCC 800.

<sup>232</sup> Manisha, *Study on the Rights of Transgender Persons in India with Special Emphasis on Inheritance Rights* (Ph.D. thesis, Bennett University 2025), <https://lrcdrs.bennett.edu.in/bitstream/123456789/5235/1/31-01-25%20Manisha.pdf> (last visited Aug. 10, 2025).

<sup>233</sup> *RIT Foundation v. Union of India*, W.P. (C) No. 284 of 2015 (Delhi High Court).

that marriage does not grant unlimited sexual rights.<sup>234</sup> Justice C. Hari Shankar, however, upheld the current law, stating that reform in this area should come from Parliament and warning against potential misuse of legal provisions.<sup>235</sup>

With no consensus between the judges, the matter has now been placed before the Supreme Court. A Constitution Bench is expected to evaluate whether Exception 2 to Section 63 of the BNS, 2023, violates fundamental rights. While the final decision remains pending, the growing judicial engagement signals a shift away from ignoring sexual violence within marriage.

### **JUSTICE VERMA PANEL: REFORM DEFERRED, NOT DENIED**

When a horrific act of violence in Delhi shook the conscience of the nation in 2012, it prompted not only public protests but also institutional action. A special committee, led by former Chief Justice J.S. Verma, was appointed to propose immediate reforms to India's laws on sexual violence. Among its many forward-thinking observations, one recommendation stood out that rape within marriage should no longer be shielded by law.

The committee viewed this exemption as a deep contradiction of constitutional promises, particularly those relating to bodily autonomy and gender justice. Instead of framing marriage as a license for control, the report promoted a view of marriage grounded in respect and individual freedom.

Yet, when the criminal law was amended in 2013, this specific suggestion was left out.<sup>236</sup> Activists and legal scholars have since pointed out that the issue wasn't legal complexity rather it was political hesitation.<sup>237</sup> While the rest of the reform package was welcomed, this one demand remained buried under social taboo and legislative inaction.

Over the years, organizations such as the United Nations and legal thinkers like Flavia Agnes have continued to highlight the cost of ignoring this recommendation both in terms of legal

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<sup>234</sup> Ibid., Judgment of Justice Rajiv Shakhder.

<sup>235</sup> Ibid., Judgment of Justice C. Hari Shankar.

<sup>236</sup> Criminal Law (Amendment) Act, 2013, No. 13, Acts of Parliament, 2013 (India).

<sup>237</sup> Flavia Agnes, *Marital Rape and the Need for Legal Reform in India*, 48 ECON. & POL. WKLY. 35 (2013).

consistency and human rights compliance.<sup>238</sup> What remains today is not just a gap in law, but a denial of dignity to countless women bound by a law that treats forced sex in marriage as permissible.

## WHEN CONSENT ENDS WHERE MARRIAGE BEGINS: INDIA'S LEGAL DILEMMA IN A CHANGING WORLD

Many nations have steadily moved away from the belief that marital ties grant automatic sexual rights. Instead, there is growing agreement that autonomy over one's body is not suspended at the altar. The United Kingdom made this shift more than three decades ago, when its highest court ruled in *R v. R*,<sup>239</sup> that a husband could be prosecuted for rape. This decision dismantled a centuries-old presumption and inspired similar reforms in countries such as Canada, South Africa, and Nepal, each affirming that non-consensual sex within marriage is as unacceptable as outside it.<sup>240</sup>

These legislative and judicial changes are not isolated domestic events; they are anchored in shared global values. International instruments like the Universal Declaration of Human Rights (UDHR),<sup>241</sup> International Covenant on Civil and Political Rights (ICCPR),<sup>242</sup> and Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>243</sup> promote respect for dignity, gender equality, and protection from violence regardless of a person's marital status. These frameworks serve as moral and legal compasses, guiding countries toward more humane laws.

Yet India continues to protect marital rape from criminal scrutiny, preserving a colonial-era exemption that contradicts its international commitments. In 2002, Nepal set a different

<sup>238</sup> COMM. ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, GENERAL RECOMMENDATION NO. 35 ON GENDER-BASED VIOLENCE AGAINST WOMEN, UPDATING GENERAL RECOMMENDATION NO. 19, U.N. Doc. CEDAW/C/GC/35 (2017).

<sup>239</sup> *R v. R*, [1991] UKHL 12.

<sup>240</sup> Criminal Code, R.S.C. 1985, c. C-46 (Can.); Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, Act No. 32 of 2007 (S. Afr.); Penal Code Amendment Act, 2002, No. 12 of 2002 (Nepal).

<sup>241</sup> UN General Assembly, Resolution 217A (III), Universal Declaration of Human Rights, A/RES/217(III) (Dec. 10, 1948), <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (last visited Aug. 10, 2025).

<sup>242</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316, 999 U.N.T.S. 171 (Dec. 16, 1966) (entered into force Mar. 23, 1976), <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> (last visited Aug. 10, 2025).

<sup>243</sup> UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 1249 U.N.T.S. 13, U.N. Doc. A/RES/34/180 (Dec. 18, 1979), <https://www.un.org/womenwatch/daw/cedaw/cedaw.htm> (last visited Aug. 10, 2025).

example by eliminating this immunity and recognizing marital rape as a crime.<sup>244</sup> India's reluctance to do the same stands in contrast to the wave of global reform, making its laws appear outdated and inconsistent with modern notions of justice.<sup>245</sup>

## SUGGESTIONS FOR REFORMING MARITAL RAPE LAWS IN INDIA

### 1. Legal Reforms

The first and most urgent step is to remove the marital rape exception in Section 63 of the BNS.<sup>246</sup> This clause contradicts constitutional values such as equality, dignity, and personal liberty. There should be a clear statutory definition of "consent," affirming that non-consensual sex constitutes rape, regardless of marital status. In addition, personal laws across religions must be reviewed and amended to reflect the principle that marriage does not grant permanent sexual consent.

### 2. Judicial Measures

The Supreme Court should examine the constitutional validity of the marital rape exception under Articles 14, 15, and 21. A judicial declaration can set a precedent affirming that bodily autonomy continues within marriage. Courts should adopt a progressive interpretation of marriage, similar to rulings like *Joseph Shine v. Union of India*,<sup>247</sup> where outdated patriarchal notions were rejected.

### 3. Institutional Reforms

Institutional mechanisms must be strengthened. Police, judiciary, and healthcare professionals should receive proper training to handle spousal rape cases sensitively and without bias. Confidential reporting systems are essential to protect victims from retaliation. Standardized medical and forensic protocols should be adopted to handle cases of intimate partner sexual violence effectively.

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<sup>244</sup> WORLD REPORT 2023: NEPAL, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2023/country-chapters/nepal>.

<sup>245</sup> HUMAN RIGHTS COUNCIL, REP. ON DISCRIMINATORY LAWS AND PRACTICES AND ACTS OF VIOLENCE AGAINST WOMEN, U.N. Doc. A/HRC/20/5 (Apr. 2, 2012).

<sup>246</sup> Aryan Bhushan, *Lacunae in Indian Law: Ambiguity of Marital Rape and Gaps in the Bharatiya Nyaya Sanhita (BNS) and Domestic Violence Act*, 7 INT'L J. MULTIDISCIPLINARY RES. 367 (2025).

<sup>247</sup> *Joseph Shine v. Union of India*, (2019) 3 SCC 39.

#### **4. Victim Support**

Support systems must be expanded. One-Stop Centres, helplines, shelter homes, and access to legal aid and counseling services must be made more accessible. Fast-track courts should be set up to ensure swift justice in such sensitive matters.

#### **5. Public Awareness**

Finally, sustained public education campaigns should focus on gender equality, consent, and the idea that sexual relations within marriage must be based on mutual agreement. Schools, media, and community leaders should be actively involved in challenging harmful cultural norms and promoting respectful marital relationships.

### **CONCLUSION**

The marital rape exception embedded in Indian law reflects a deep-rooted neglect of married women's fundamental rights. It contradicts the values enshrined in the the Constitution; disregards evolving judicial interpretations, violates international human rights obligations, and goes against the recommendations of several legal experts. Eliminating this exception does not undermine the sanctity of marriage; rather, it reinforces the principle that consent must be central to all intimate relationships, including marriage. Legal reforms must affirm that every individual irrespective of their marital status has an equal entitlement to bodily autonomy, personal dignity, and access to justice. Only by dismantling this legal shield can India move closer to realizing its commitment to gender equality and the protection of human rights.