
THE MARITAL RAPE EXCEPTION UNDER THE BHARATIYA NYAYA SANHITA: CONSTITUTIONAL VALIDITY AND THE NEED FOR REFORM

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ABSTRACT

The aspects of rape, as defined in Section 63, Bharatiya Nyaya Sanhita, 2023 (BNS), are consent-centred, however, an adult wife can be seen to be taken out of the protection of the definition with regards to an alleged rapist just being her husband under Exception 2, of the section. This article challenges the exclusion from the perspectives of Article 14, 15, 19 and 21, principles of constitutional morality and transformative constitutionalism and international commitments of the State of India. It resorts to the debatable question of the explanation of the scheme of the statute in the light of the doctrine, divided decision of the Delhi High Court, material drawn from a different source and bin ready reform models. The analysis holds that consent can only be inferred from marriage and there must be a factual context to the allegation which goes beyond consent and to the harm of forced penetration. Offences of cruelty or hurt, along with protections afforded by domestic-violence laws, are not afforded the same criminal stature and thus, these do not address the equality concern. Careful procedure is all that is required for difficult questions of proof, misuse and institutional design; there is no need for immunity as such. The better answer is to eliminate Exception 2; to inculcate separated spouses under the general guise of rape; and to put in place a survivor protection rule with the ordinary promises of a fair proceeding based on a relationship neutral rule of consent.

Keywords: Bharatiya Nyaya Sanhita; marital rape; consent; constitutional equality; bodily autonomy; criminal law reform.

I. Introduction

Marriage may engender expectations of someone for companionship and intimacy, but not to an advance and permanent consent to such future sexual acts.

Hence, the challenge inside the BNS is within. Once the statute says, 'consent' is an affirmative and unambiguous agreement, to the specific act, then rape-law protection ceases to exist if the adult complainant has agreed to marry the accused.¹ This is because activity involving identical penetration, coercion, and the lack of consent gives it a different legal character when it comes to the issue of having the two parties being spouses.

This exclusion may be subject to constitutional challenge both as to the basis for excluding and as to whether any mechanism exists to effectively compensate for such exclusion. The argument made here is that Exception 2 to section 63 does not guarantee substantive equality, retains sex-based notions of marriage and does not provide protection for bodily integrity and decisional autonomy. Consideration of marriage may only be relevant when the Court considers facts and/or the sentence but would not conclusively establish consent. The approach is doctrinal. Offers an explanation of the statute as a whole, an assessment of precedent, an analysis of divergent arguments in the Delhi High Court and ideas on both judicial and legislative pathways to reform.

II. Statutory Position under the Bharatiya Nyaya Sanhita

Section 63 describes that what is rape is that act of penetration "carried out without her consent or will, or upon the vitiated consent, or in any of the circumstances mentioned in the section. Explanation 2 is an explanation that defines consent as a communication of willingness, and expressly precludes the possibility of implicating consent simply from a lack of physical resistance: The marital exception then goes off from that reasoning and says that when a woman is 18 years old the sexual intercourse or sexual act to an 18 or older woman committed by her husband is not rape.² The present age limit follows *Independent Thought v. Union of India*, which narrowed the corresponding IPC exception in relation to minor wives.³ The Protection of Children from Sexual Offences Act, 2012 also applies where the wife is below

¹ The Bharatiya Nyaya Sanhita, No. 45 of 2023, §§ 1(3), 63 expl. 2 (India).

² The Bharatiya Nyaya Sanhita, No. 45 of 2023, § 63, Exception 2 (India).

³ *Independent Thought v. Union of India*, (2017) 10 S.C.C. 800.

eighteen.⁴ In cases of separated spouses, section 67 defines a new offence and a sentence of not less than 2 years imprisonment while in the original section 64, the minimum is 10 years.⁵

Sections 85-86 concern cruelty by a husband or his relatives where the conduct causes grave injury, threatens life, limb or health, drives a woman towards suicide, or is linked to an unlawful demand. The general provisions on hurt operate only when their separate physical-injury requirements are satisfied.⁶ Section 3 of the Protection of Women from Domestic Violence Act, 2005 (PWDVA) includes sexual abuse within domestic violence and permits protection, residence, monetary and compensation orders.⁷ These measures may be valuable where sexual violence forms part of a wider course of abuse. They do not, however, necessarily recognise nonconsensual penetration as the public wrong of rape, impose an equivalent penal consequence, or activate the same procedural framework. Their existence does not repair the denial of equal criminal protection created by Exception 2.

III. Historical Basis and the Changing Meaning of Marriage

The marital exception can be traced to the common-law view associated with Sir Matthew Hale that consent to sexual relations became irrevocable upon marriage.⁸ Coverture supplied the institutional setting for that proposition by treating a wife's legal personality as absorbed into that of her husband. Eventually English law overruled the immunity that they could not be held liable for any frauds perpetrated in it as being incompatible with the independent legal character of a married woman, in *R v. R*.⁹

In the current doctrine of the Indian Constitution, the foundations of the conception of marriage are the same: marriage doesn't bestow any authority over the body of another, and the spouses are each individual holders of rights.

In many married relationships, affection and intimacy can be assumed and the ongoing denial of those can lead to consequences premised on the rules of matrimony. However, such an expectation does not exist when it comes to legally enforceable rights to penetration. Consent is for a specific act and can be revoked anytime. To view marriage as an expectation of

⁴ Protection of Children from Sexual Offences Act, No. 32 of 2012, §§ 3–6 (India).

⁵ The Bharatiya Nyaya Sanhita, No. 45 of 2023, §§ 64(1), 67 (India).

⁶ The Bharatiya Nyaya Sanhita, No. 45 of 2023, §§ 85–86, 114–117 (India).

⁷ Protection of Women from Domestic Violence Act, No. 43 of 2005, §§ 3, 18–23 (India).

⁸ Matthew Hale, *Historia Placitorum Coronæ: The History of the Pleas of the Crown* 629 (1736). ⁹ *R v. R*, [1992] 1 A.C. 599 (H.L.).

perpetual continuation is to view it as an expectation of consent of others, which in turn is to create legal privilege and ensure a hierarchy that saying "no" to is what equality law should move. *Joseph Shine v. Union of India* upholds a broader statement that marriage fails to cancel out sexual autonomy, or erase the constitutional identity of spouse.⁹

IV. Constitutional Validity of the Exception

A. Article 14: Equality and Non-Arbitrariness

Under Exception 2, the classification is at both ends of the offence. The woman is as fully protected by the rape law as men, but the adult woman is not; the man is as immune from prosecution by the wife as any other man. Marriage is clearly an explainable fact but a rational relationship is still demanded between the classification and the aim of the relation.¹⁰ If rape law protects sexual choice and bodily integrity, excluding forced penetration within marriage bears no rational relationship to that object. Preservation of marriage does not provide a better fit. Criminal law already reaches cruelty, hurt and homicide in the home, and marital continuity cannot constitutionally depend upon assigning lesser legal value to one spouse's refusal.¹¹

The arbitrariness problem is evident in the design of the BNS too. It is out of the question that trying to deal with consent in an "attended to" way is more complicated than the flowchart in Section 63 makes it sound. Obviously, it's more challenging than the flowchart in Section 63 suggests to consider consent in an "attended to" sense. What Section 67 does is exacerbate the contradiction because it will acknowledge non-consensual intercourse thereafter the separation of the spouses. Though there is separation there is no autonomy though there is cohabitation, there is no autonomy at all. Justice Shakti, however, in *RIT Foundation v. Union of India* explained that neither the harm is different nor the ingredients of the conduct if the complainant was the husband of the accuse.¹² That reasoning accords with substantive equality, which examines the effect of a rule within existing relations of power. By withholding from wives the legal description and protection available to other women, the exception reproduces the disadvantage it should address.

⁹ *Joseph Shine v. Union of India*, (2019) 3 S.C.C. 39, 59–60, 67 (Chandrachud, J.).

¹⁰ *State of West Bengal v. Anwar Ali Sarkar*, A.I.R. 1952 S.C. 75.

¹¹ *Shayara Bano v. Union of India*, (2017) 9 S.C.C. 1, 101 (Nariman, J.).

¹² *RIT Foundation v. Union of India*, 2022 S.C.C. OnLine Del. 1404, 132, 160–62, 226 (Shakti, J.).

B. Article 15: Sex-Based Discrimination

The exception is expressed through marital status, but its operation depends upon a sex-specific conception of marriage. It assumes that a wife owes sexual availability and that a husband's claim to access is legally different from that of any other person. Such a rule preserves the prescribed roles of male entitlement and female submission and therefore falls within the anti-stereotyping analysis applied in *Joseph Shine*.¹³ Article 15(3) authorises measures that advance women's equality; it cannot validate a provision that removes protection from married women. Invoking family stability does not convert the deprivation into a protective measure. Protecting marriage is not the same as protecting inequality within marriage.

C. Article 21: Dignity, Privacy and Bodily Autonomy

The constitutional protection of privacy and liberty includes control over the body, intimate decision-making and personal choice, as explained in *Justice K.S. Puttaswamy (Retd.) v. Union of India*.¹⁴ *Joseph Shine* further rejects the idea that a spouse relinquishes sexual autonomy by marrying.¹⁶ In *X v. Principal Secretary, Health and Family Welfare Department*, the Supreme Court described marital sexual violence as "rape" for the limited operation of the Medical Termination of Pregnancy framework, while leaving the criminal-law exception undecided.¹⁵ Read together, these authorities make clear that marriage does not suspend constitutional personhood.

So is marital privacy to be used to achieve the opposite. What privacy entails is a right to be left alone and a right to be free from unjustified invasion and to be free from forced intimacy; it is not a claim for insulation from the criminal law given that the home is within their own territory. Forced penetration directly involves physical security, as well as reproductive choice and the psychological integrity and basic right to refuse sexual contact. In the case of RIT Foundation, Justice Shikdher's reasoning is also linked to that refusal, and how it relates to the communicative freedom guaranteed by Art 19(1)(a).¹⁶

¹³ *Joseph Shine v. Union of India*, (2019) 3 S.C.C. 39, 44–47, 67–68 (Chandrachud, J.).

¹⁴ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 S.C.C. 1, 248, 298. ¹⁶ *Joseph Shine v. Union of India*, (2019) 3 S.C.C. 39.

¹⁵ *X v. Principal Sec'y, Health & Family Welfare Dep't, Gov't of NCT of Delhi*, 2022 S.C.C. OnLine S.C. 1321, 74–76, 98–105.

¹⁶ *RIT Foundation v. Union of India*, 2022 S.C.C. OnLine Del. 1404, 170–73, 226 (Shikdher, J.).

D. Constitutional Morality and Transformative Constitutionalism

In contrast to inherited social practices, there is something else that should be able to be applied, and that is constitutional morality, a morality of equal citizenship.¹⁷ Transformative constitutionalism does not permit courts to reconstruct every private relationship according to judicial preference; its narrower demand is that the State cease to enforce historical subordination.¹⁸ Once wives are recognised as autonomous constitutional persons, criminal law cannot consistently retain a remnant of coverture that gives their consent lesser force.¹⁹ The relevant question is therefore not which ideal of marriage a court prefers, but whether the State may attach unequal legal consequences to bodily refusal within marriage.

V. Judicial Treatment

In *Independent Thought v. Union of India*, the Supreme Court read down the former IPC exception to the extent that it covered wives between fifteen and eighteen years of age. The decision aligned rape law with child-protection legislation and with Articles 14, 15 and 21. No limits of his have been set except for the expressly stated adults: wives. Within that limitations, the judgment disapproves the thought that marriage alone is enough justification for minimum physical security for minor wife.²⁰

In the Delhi High Court, two distinct views emerged: *RIT Foundation v. Union of India*. The learned Judge, Justice Rajiv Shakdher, thus held that the relationship between the accused and complainant is irrelevant to test the exception and the same violates Article 14, 15, 19(1)(a) and 21 of the Constitution. The Asia dissenting opinion considers the exception a part of the offense itself, and invalidation of the exception would increase the scope of an existing offense (which includes speculation), rather than the creation of a new one. Justice C. Hari Shankar agreed with it and upheld a provision which stated that every wife has the right of the body. He placed greater weight on the distinct legal character of marriage, parliamentary choice, evidentiary difficulty and the risk that deletion would itself impose criminal liability. Because

¹⁷ *Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C. 1.

¹⁸ Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* 3–11 (HarperCollins India 2019).

¹⁹ *Joseph Shine v. Union of India*, (2019) 3 S.C.C. 39.

²⁰ *Independent Thought v. Union of India*, (2017) 10 S.C.C. 800, 194–95 (Gupta, J.) (clarifying that the Court did not decide the broader issue involving adult wives).

the Bench divided, neither view became a binding majority holding.²¹ Academic commentary has similarly presented the case as a contest between rights-based invalidation and institutional restraint.²²

The remaining authorities form the doctrinal setting rather than a direct ruling on Exception 2. *Navtej Singh Johar v. Union of India* rejects criminal norms derived from majoritarian sexual morality and protects intimate autonomy.²³ *Joseph Shine* dismantles marital rules based on proprietary and gendered assumptions.²⁴ *Puttaswamy* provides the broader account of privacy and decisional autonomy.²⁵ *X* shows that forced sex by a husband can be acknowledged as rape within a related statutory context.²⁶

VI. Arguments Supporting Retention of the Exception

Retention is most effectively expressed as an institutional argument, instead of a denial of a wife's autonomy. Marriage is a ongoing legal relationship, sexual conduct is typically performed in private and allegations can happen throughout a continuous marriage battle. Those in favour of the exception naturally cite 'marital stability', 'retaliatory complaints', 'overcriminalisation' and 'Parliament's duty to make sensitive social policy'. They also suggest alternative solutions to combat cruelty, hurt, and less disruptive options to combat domestic violence and divorce. Deletion of such evidence by a court would immediately bring up the conduct to a serious crime having a significant minimum sentence, without at the same time establishing any transitional, procedural or evidentiary rule. Justice Hari Shankar's opinion in *RIT Foundation* presents these separation-of-powers concerns in their most developed judicial form.²⁷

Even taken at their highest, however, concerns about privacy and credibility relate to proof rather than to the definition of the wrong. Courts routinely assess offences committed in domestic settings or without independent witnesses.

²¹ *RIT Foundation v. Union of India*, 2022 S.C.C. OnLine Del. 1404, 132–73, 226 (Shakdher, J.), 392–94, 414, 428–44, 451–53 (Hari Shankar, J.).

²² Kartik Ravindran, Analysis of the Opinion by Justice Hari Shankar in *RIT Foundation: The Case Against the Marital Rape Exception*, 3 HPNLU L.J. 66, 66–77 (2022).

²³ *Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C. 1.

²⁴ *Joseph Shine v. Union of India*, (2019) 3 S.C.C. 39.

²⁵ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 S.C.C. 1.

²⁶ *X v. Principal Sec'y, Health & Family Welfare Dep't, Gov't of NCT of Delhi*, 2022 S.C.C. OnLine S.C. 1321.

²⁷ *RIT Foundation v. Union of India*, 2022 S.C.C. OnLine Del. 1404, 392–94, 414, 428–44, 451–53 (Hari Shankar, J.).

Allegations of misuse must be examined through lawful investigation, disclosure, cross-examination, bail principles and the requirement of proof beyond reasonable doubt. They cannot justify a conclusive legal assumption that every adult wife has consented. Nor do the alternative remedies perform the same function. Cruelty may depend upon a pattern of conduct or a grave consequence; hurt provisions may not capture coercive penetration where no visible injury is proved; and relief under the PWDVA is principally civil and protective.

The separation-of-powers rationale is deserving of deeper analysis. The removal of this exception would increase the breadth of exposure of a grave offence, and may raise issues of transition and implementation. However, constitutional review often engages in invalidating an exception, giving legal protection to one and not the other. The court would have to create neither new prohibited acts nor a new mental element or a new standard of consent—both are found in section 63. Accordingly, a common defense institutional answer can be offered: The immunity could be declared unconstitutional by the courts, and the concrete substantive, procedural and transitional requirements for its functioning could be provided by Parliament.

VII. International and Comparative Position

Comparative law is relevant here as evidence that relationship-neutral liability can be administered, not as a template that India must copy. The United Kingdom abolished the common-law immunity in *R v. R*.²⁸ Its Sexual Offences Act 2003 defines consent without a spousal exemption.²⁹ In Canada, section 278 of the Criminal Code permits either spouse to be charged with sexual assault regardless of whether the couple was cohabiting.³⁰ These jurisdictions illustrate that ordinary criminal safeguards can operate after marital immunity is removed, while leaving the precise form of Indian reform to domestic constitutional and legislative judgment.

International materials point in the same normative direction. CEDAW General Recommendation No. 35 treats gender-based violence as a form of discrimination and calls for due diligence in prevention, investigation, punishment and reparation.³¹ The Declaration on

²⁸ *R v. R*, [1992] 1 A.C. 599 (H.L.).

²⁹ Sexual Offences Act 2003, c. 42, §§ 1, 74 (U.K.).

³⁰ Criminal Code, R.S.C. 1985, c. C-46, §§ 271–278 (Can.).

³¹ 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, 21–26 (July 26, 2017).

the Elimination of Violence against Women expressly includes violence occurring within the family.³² Guarantees of equality, personal security, privacy and freedom from degrading treatment under the ICCPR also support effective legal protection.³³ These instruments do not, by themselves, displace an Indian statute. Their relevance is interpretive: where constitutional guarantees permit a rights-consistent reading, they indicate the content and direction of obligations undertaken by India.

VIII. Need for Reform and Proposed Legal Model

The available responses differ in both constitutional adequacy and institutional completeness. Retaining the immunity while relying on civil remedies leaves the unequal exclusion in place. Creating a separate offence of spousal sexual assault would acknowledge the wrong, but section 67 already shows the risk of a lesser label and a lower punishment. Judicial deletion would remove the discrimination promptly, although implementation questions would remain. The best option is a mixed model involving constitutional adjudication as well as legislative repeal and fine-tuned reform of the law.

Parliament should repeal section 67 or incorporate it in the mainstream of the offences against the person of rape or discontinue Exception 2 in section 63. That statement should then be included in the statute, in relationship-neutral words, that the marital status, or engaged in cohabitation or an intimate relationship, is neither a form of consent nor a presumption for or against consent. This consent will take place on a voluntary basis and will be specific to and technical to the act and be revocable. The accused should be entitled to all the normal safeguards, including but not limited to, a right to the presumption of innocence, a requirement of proof beyond reasonable doubt, a written statement of reasons for grant of bail and the ability to test the entire evidence.

Married complainants should not face a special corroboration requirement or any artificially elevated threshold of proof.

Substantive amendment must be matched by procedures suited to intimate partner allegations. Investigation should be conducted by trained officers and should include an immediate

³² Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, arts. 1–4, U.N. Doc. A/RES/48/104 (Dec. 20, 1993).

³³ International Covenant on Civil and Political Rights arts. 2, 3, 7, 17, 26, Dec. 16, 1966, 999 U.N.T.S. 171.

assessment of risk, protection of confidentiality, access to medical, psychosocial and legal support, and measures against intimidation or economic retaliation. In-camera proceedings should remain available. The BNSS already contains provisions concerning statements recorded by a woman officer, victim-sensitive procedures, medical examination, information about investigative progress, compensation and closed trials. Those provisions provide a base from which implementation protocols can expressly address marital sexual violence.³⁴

Investigators and courts should consider the whole coercive setting rather than treating delay in reporting, continued cohabitation or the absence of physical injury as decisive. Rape proceedings should not be diverted into compulsory mediation or a forced settlement. Proceedings under the PWDVA, maintenance law and matrimonial law should be capable of continuing alongside the criminal case, without one forum conditioning relief on withdrawal from another. Training for judges and police should also make clear that marital intimacy is factual context, not continuing consent.

Placing safeguards in evidence and procedure, rather than in substantive immunity, addresses the concern about misuse without declaring autonomy to begin only upon separation. The Justice Verma Committee recommended removal of the marital rape exception.³⁵ Parliament nonetheless retained it after scrutiny of the BNS.³⁶ Legislative reform is therefore the preferable route for designing the full scheme. That preference does not remove the constitutional responsibility of courts to invalidate a classification that is incompatible with fundamental rights.

IX. Conclusion

Exception 2 to section 63 of the BNS cannot be reconciled with the constitutional status of a married woman as an equal and autonomous person. It makes the protection of bodily integrity depend upon marital status, preserves an assumption of a wife's sexual availability, and turns the home into an area of partial immunity rather than a sphere in which individual privacy continues to operate. Article 14's guarantee of equality, the anti-stereotyping principle under Article 15, and the protection of dignity, privacy and bodily autonomy under Article 21

³⁴ Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, §§ 173, 176, 184, 193, 366, 395 (India).

³⁵ Committee on Amendments to Criminal Law, Report of the Committee on Amendments to Criminal Law 72–74 (2013).

³⁶ Department-Related Parliamentary Standing Committee on Home Affairs, Rajya Sabha, Report No. 246, The Bharatiya Nyaya Sanhita, 2023 (2023).

collectively outweigh an asserted interest in preserving marriage by excluding forced sex from rape law.

Difficulties of evidence, the possibility of false accusation and the seriousness of punishment require scrupulous investigation and fair-trial guarantees. They cannot be used as grounds to treat penetration without consent in any other light than it deserves by not giving it another name because the husband is the aggressor. Reform should take place at both the constitutional and legislative levels: Immunity should be rejected, consensus recommitting section 67 to be harmonised with the general offence and consent should be expressed within a relationship neutral formulation. The change should be accompanied by trained investigation, protecting and supporting survivors, and confidentiality from compulsory settlement. Marriage may remain relevant to the facts of a case; it must never operate as a substitute for consent.

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