# MARITAL RAPE UNDER THE BHARATIYA NYAYA SANHITA, 2023: A CRITICAL STUDY OF SECTION 63 (EXCEPTION 2), CONSTITUTIONAL CHALLENGES AND THE CASE FOR REFORM IN INDIA

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**ABSTRACT**

The Bharatiya Nyaya Sanhita, 2023 ("BNS"), which replaced the Indian Penal Code, 1860 ("IPC") with effect from 1 July 2024, was presented as a decolonised and citizen-centric criminal code. Yet Section 63, Exception 2, reproduces the colonial proposition that sexual intercourse or sexual acts by a man with his own wife, she not being under eighteen years of age, is not rape. This paper examines the marital rape exception in the Indian context, with primary reference to the BNS. It traces the common law origin of the exception in Hale's theory of irrevocable matrimonial consent, follows its course through the IPC and the Criminal Law (Amendment) Act, 2013, and analyses the BNS provisions that bear on sexual violence within marriage, namely Sections 63, 64, 67 and 85. It evaluates the constitutional challenge under Articles 14, 15, 19 and 21 in light of *Independent Thought v. Union of India*, *Puttaswamy*, *Joseph Shine* and the split verdict of the Delhi High Court in *RIT Foundation*. The paper reviews the alternative remedies under the Protection of Women from Domestic Violence Act, 2005 and matrimonial law, compares the position in other jurisdictions and under international human rights law, and tests the justifications advanced by the State for retaining the exception. It also records the position as of September 2026, when the Supreme Court has agreed to examine the validity of the exception under both the IPC and the BNS. The paper concludes that the exception cannot be reconciled with the constitutional guarantees of equality, dignity and bodily autonomy, and recommends its repeal, accompanied by procedural safeguards and institutional reforms.

**Keywords:** Marital Rape; Bharatiya Nyaya Sanhita, 2023; Section 63 BNS; Exception 2; Consent; Bodily Autonomy; Article 21; Domestic Violence; Constitutional Law; India

## 1. INTRODUCTION

Marriage is widely regarded as a relationship of trust, and the home as a place of safety. For a considerable number of women in India, however, the marital home is also the place where they experience sexual coercion. Marital rape, that is, non-consensual sexual intercourse or sexual acts by a husband against his wife, is neither rare nor new. What is peculiar to India is that the criminal law, even after a wholesale legislative overhaul, continues to treat it as something other than rape when the wife is eighteen years or older.

The Bharatiya Nyaya Sanhita, 2023 (Act 45 of 2023) came into force on 1 July 2024 and repealed the Indian Penal Code, 1860.[1] The law of rape is now found in Chapter V ("Of Offences Against Woman and Child"), and Section 63 defines the offence. The definition is substantially that of Section 375 IPC as amended in 2013. Exception 2 to Section 63 provides that sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape. The only change from the old provision is the age: the IPC exception protected a husband where the wife was above fifteen, a limit the Supreme Court read up to eighteen in 2017.

The retention of the exception is significant for three reasons. First, the BNS was drafted in the wake of judicial pronouncements on privacy, sexual autonomy and gender equality, including *Puttaswamy*, *Joseph Shine* and *Navtej Singh Johar*, which had already unsettled the assumptions underlying the exception. Second, the Justice J.S. Verma Committee had in 2013 recommended its deletion, so Parliament enacted the BNS with full knowledge of the argument. Third, the exception is now under direct constitutional challenge: on 9 September 2026 a threejudge Bench of the Supreme Court headed by the Chief Justice of India, Surya Kant, agreed to examine the validity of the exception under both the IPC and the BNS.[2]

This paper analyses the marital rape exception as it stands in the BNS. Part 2 sets out the research problem and method. Part 3 develops the concept and its theoretical background. Part 4 traces the history of the exception. Part 5 analyses the BNS framework, Part 6 the judicial

[1] The Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India) (in force 1 July 2024). The companion statutes are the Bharatiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023) and the Bharatiya Sakshya Adhiniyam, 2023 (Act 47 of 2023).

[2] Supreme Court to consider constitutional validity of marital rape exception under IPC and BNS, The News Mill (9 Sept. 2026), https://thenewsmill.com/2026/09/supreme-court-to-consider-constitutional-validity-of-maritalrape-exception-under-ipc-and-bns/.

response, and Part 7 the constitutional issues. Part 8 examines the remedies presently available to a married woman, Part 9 compares other jurisdictions and international law, Part 10 tests the arguments for retention, Part 11 reviews the available data, Part 12 records the pending proceedings, and Part 13 makes recommendations before Part 14 concludes.

## 2. RESEARCH PROBLEM, OBJECTIVES AND METHODOLOGY

### 2.1 Research Problem

Does Exception 2 to Section 63 of the BNS, which withdraws the protection of the law of rape from a wife aged eighteen or above, satisfy the constitutional guarantees of equality, nondiscrimination and life with dignity, and if it does not, how should the law be reformed?

### 2.2 Objectives

The objectives are: (i) to explain the meaning, forms and theoretical basis of marital rape; (ii) to trace the historical evolution of the exception in India; (iii) to analyse Sections 63, 64, 67 and connected provisions of the BNS; (iv) to examine the case law and the pending constitutional challenge; (v) to assess the remedies available outside the law of rape; (vi) to compare Indian law with other jurisdictions and international standards; and (vii) to suggest reforms.

### 2.3 Hypothesis

The paper proceeds on the hypothesis that Exception 2 to Section 63 BNS is arbitrary and discriminatory, violates Articles 14, 15 and 21 of the Constitution, and cannot be justified by the interest in preserving marriage.

### 2.4 Methodology

The study is doctrinal. Primary sources include the BNS, the IPC, allied statutes, the Constitution of India and judicial decisions. Secondary sources include reports of the Justice Verma Committee and the Parliamentary Standing Committee, treaty body documents, books, articles and reliable news reports for developments after 2024. Citations follow a footnote style consistent with the Bluebook, adapted for Indian materials.

## 3. CONCEPTUAL FRAMEWORK

### 3.1 Meaning and Forms of Marital Rape

Marital rape refers to any unwanted sexual act by a spouse committed without consent, or by force, threat, coercion or when the victim is unable to consent. In the Indian statutory scheme the term has no place, because the BNS does not use it; the conduct in question is simply sexual intercourse or sexual acts by a husband, which Exception 2 places outside the definition of rape. Sociological literature distinguishes several patterns. Finkelhor and Yllö, in their study of marital sexual violence, described battering rape (sexual violence accompanying physical abuse), force-only rape (coercion without additional violence) and obsessive rape (sadistic or perverse sexual violence).[3] The classification is useful because it dispels the assumption that marital rape is merely an aggravated form of marital disagreement about intimacy.

### 3.2 Consent under Section 63 BNS

The central concept in the law of rape is consent. Explanation 2 to Section 63 defines consent as an unequivocal voluntary agreement, by which the woman by words, gestures or any form of verbal or non-verbal communication communicates willingness to participate in the specific sexual act. The proviso adds that a woman who does not physically resist the act of penetration shall not by that reason alone be regarded as consenting. Two features of this definition stand out. It speaks of consent to *the specific sexual act*, and it treats silence or absence of resistance as insufficient. These features are difficult to reconcile with Exception 2, which in effect assumes a general and standing consent by reason of the marital status alone.

### 3.3 Theoretical Basis: Hale's Doctrine and Coverture

The exception is not an Indian invention. It derives from the seventeenth-century statement of Sir Matthew Hale, published in 1736, that a husband cannot be guilty of rape upon his lawful wife because, by the matrimonial contract, she has given herself up to him in this manner and cannot retract.[4] The proposition was never supported by authority, but it fitted the doctrine of coverture, under which, as Blackstone put it, husband and wife were one person in law and the legal existence of the woman was suspended during marriage.[5] On this view the wife's body

[3] David Finkelhor & Kersti Yllö, *License to Rape: Sexual Abuse of Wives* (1985).
[4] Matthew Hale, *The History of the Pleas of the Crown* 629 (1736).
[5] William Blackstone, *Commentaries on the Laws of England* 430 (1765).

was a component of the marital estate, and consent was not required for something that already belonged to the husband.

Modern feminist scholarship has attacked each premise. Consent to marriage is not consent to every subsequent act of intercourse; a contract to live together cannot dispense with bodily autonomy; and to treat sexual access as an incident of marriage is to treat the wife as an object of the husband's entitlement. As MacKinnon has argued, the law of rape has historically protected the male interest in sexual access rather than the woman's interest in sexual selfdetermination.[6] Exception 2 is a surviving instance of that older approach.

## 4. HISTORICAL EVOLUTION OF THE EXCEPTION IN INDIA

Macaulay's Draft Penal Code of 1837, enacted as the Indian Penal Code in 1860, defined rape in Section 375 and exempted from it intercourse by a man with his own wife, the wife not being under ten years of age. The exemption was imported from English common law, and the age limit was an acknowledgment that girl-child marriage was prevalent and that intercourse with a child wife could be fatal.

The age limit was raised in response to public scandal, not principle. In 1889, an eleven-yearold bride, Phulmoni Dasi, died in Calcutta following intercourse with her husband, a man of about thirty-five. He could not be convicted of rape because she was above ten; he was instead convicted of causing death by a rash and negligent act.[7] The outrage led to the Age of Consent Act, 1891, which raised the age to twelve. Later amendments raised the age within marriage to thirteen and, in 1940, to fifteen, where it remained for over seven decades.[8]

The Criminal Law (Amendment) Act, 2013, enacted after the Delhi gang-rape of December 2012, substituted Section 375, widened the definition of penetration, fixed the age of consent at eighteen for non-marital cases and inserted the enhanced consent framework. It left the marital exception at fifteen. This produced an anomaly: a girl of sixteen could not lawfully consent to intercourse with any man other than her husband, and could be regarded as consenting to it with her husband. That anomaly also conflicted with the Protection of Children from Sexual Offences Act, 2012 ("POCSO") and the Prohibition of Child Marriage Act, 2006,

[6] Catharine A. MacKinnon, *Rape Redefined*, 10 Harv. L. & Pol'y Rev. 431 (2016).
[7] Queen-Empress v. Hari Mohan Maiti, (1890) ILR 17 Cal 49.
[8] The age of consent for extra-marital intercourse was raised to sixteen in 1940, the same amendment raising the marital exception to fifteen years.

both of which treat a person below eighteen as a child.

## 5. THE BNS 2023 FRAMEWORK

### 5.1 Section 63: Definition of Rape and the Two Exceptions

Section 63 provides that a man is said to commit rape if he does any of four kinds of act (penetration of the vagina, mouth, urethra or anus by penis; insertion of an object or body part other than the penis; manipulation of the body to cause penetration; and application of the mouth to the vagina, anus or urethra), or makes the woman do so with him or with another person, in circumstances falling under seven descriptions. These are: (i) against her will; (ii) without her consent; (iii) consent obtained by putting her, or a person in whom she is interested, in fear of death or hurt; (iv) consent given in the belief that he is her husband when he knows he is not; (v) consent given by reason of unsoundness of mind or intoxication without understanding its nature and consequences; (vi) with or without consent when she is under eighteen; and (vii) when she is unable to communicate consent.

Two exceptions follow. Exception 1 provides that a medical procedure or intervention shall not constitute rape. Exception 2 provides that sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape. The expression "sexual intercourse or sexual acts" is carried over verbatim from the IPC as amended in 2013, so the immunity extends to all four categories of act listed above and not merely to peno-vaginal intercourse.

It follows that on the plain terms of the BNS, a husband cannot be prosecuted for rape under Section 63 for forcing his adult wife to have sex, even where he uses violence or threat, and even though each of the first three descriptions of the offence, taken in isolation, would be satisfied. The immunity is total in the sense that it does not depend on the degree of force, on the nature of the act, or on whether the parties are still cohabiting on good terms.

### 5.2 Comparison of the IPC and the BNS

The table below compares the principal provisions of the two codes that bear on marital sexual violence.

| Subject | IPC, 1860 | BNS, 2023 |
|---|---|---|
| Definition of rape | Section 375 | Section 63 |
| Marital exception (adult wife) | Exception 2 to s. 375; wife not under 15, read up to 18 in *Independent Thought* (2017) | Exception 2 to s. 63; wife not under 18; "sexual acts" also covered |
| Punishment for rape | Section 376(1): 7 years to life, and fine | Section 64(1): 10 years to life, and fine |
| Intercourse with separated wife | Section 376B: 2 to 7 years, and fine | Section 67: 2 to 7 years, and fine |
| Gang rape | Section 376D: 20 years to life | Section 70(1): 20 years to life; s. 70(2): life or death if victim under 18 |
| Unnatural offences | Section 377 | Omitted |
| Cruelty by husband or relatives | Sections 498A | Sections 85 and 86 |
| Presumption of absence of consent | Section 114A, Evidence Act, 1872 | Section 120, Bharatiya Sakshya Adhiniyam, 2023 |

*Table 1: Comparison of IPC and BNS provisions on rape and marital sexual violence*

### 5.3 Section 64: Punishment

Section 64(1) BNS prescribes rigorous imprisonment for not less than ten years, which may extend to imprisonment for life, together with fine. This is a higher minimum than the seven years in Section 376(1) IPC. Enhanced punishments apply where the offence is committed by specified categories of persons or in aggravated circumstances. Sections 65 and 66 deal with rape of girls below sixteen and twelve years and with rape causing death or a persistent vegetative state. None of these provisions applies to a husband where Exception 2 is attracted, so the enhanced framework of the BNS does not protect a wife from her husband.

### 5.4 Section 67: Intercourse with a Wife Living Separately

The only provision of the BNS which penalises non-consensual intercourse by a husband with an adult wife is Section 67. It applies where the wife is living separately from him, whether

under a decree of separation or otherwise, and provides for imprisonment of not less than two years, which may extend to seven years, and fine. It reproduces Section 376B IPC, which had been inserted in 2013 on the recommendation of the Verma Committee in a diluted form.

Section 67 is doctrinally revealing. First, it accepts that a wife's lack of consent is a wrong worthy of criminal punishment, and thereby rejects the premise that marriage implies irrevocable consent. Second, it grades the punishment far below that for rape (two to seven years rather than ten years to life), signalling that the same act is treated as a lesser wrong merely because the victim is married. Third, it depends on separation, which places a burden on the victim, who must prove that she was living separately, and creates the odd result that a woman is protected from sexual coercion by her husband only after she has left the marriage. It also leaves without remedy women who cannot afford to leave, which is to say the women most exposed to domestic abuse.

## 6. JUDICIAL APPROACH TO MARITAL RAPE

### 6.1 Supreme Court: Building Blocks for a Right against Sexual Coercion

Although the Supreme Court has not yet ruled on the validity of the exception for adult wives, its jurisprudence has laid down principles that bear directly on the question. In *State of*

*Maharashtra v. Madhukar Narayan Mardikar*, the Court held that even a woman of easy virtue is entitled to protection of her privacy and cannot be violated at will.[9] In *Bodhisattwa Gautam v. Subhra Chakraborty*, the Court described rape as a violation of the fundamental right to life under Article 21, and as a crime against basic human rights.[10] In *Suchita Srivastava v.*

*Chandigarh Administration*, the Court recognised that a woman's right to make reproductive choices is a dimension of personal liberty under Article 21, which includes the right to refuse participation in sexual activity.[11]

*Puttaswamy* affirmed that privacy includes bodily integrity, decisional autonomy and sexual orientation, and that dignity is a constitutional value to which all persons, married or not, are entitled.[12] In *Joseph Shine v. Union of India*, the Court struck down the adultery provision,

[9] State of Maharashtra v. Madhukar Narayan Mardikar, (1991) 1 SCC 57.
[10] Bodhisattwa Gautam v. Subhra Chakraborty, (1996) 1 SCC 490.
[11] Suchita Srivastava v. Chandigarh Admin., (2009) 9 SCC 1.
[12] Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

Section 497 IPC, and repudiated the notion that a husband is the master of his wife or that marriage results in the surrender of the woman's sexual autonomy.[13] *Navtej Singh Johar* similarly emphasised the autonomy of intimate choices.[14] Taken together, these decisions dismantle the theoretical foundation of Exception 2.

### 6.2 Independent Thought (2017) and X v. Principal Secretary (2022)

In *Independent Thought*, the Court read down the exception to protect wives aged fifteen to eighteen. Its reasoning is helpful for adult wives as well: it held that the exception was inconsistent with the age of consent in the rest of Section 375, with POCSO and with India's treaty obligations, and that a classification within the class of girls below eighteen between the married and the unmarried was arbitrary. The Court also referred to the observation of the Verma Committee but stopped short of deciding on adult wives.

In *X v. Principal Secretary, Health and Family Welfare Department, Government of NCT of Delhi* (2022), the Supreme Court interpreted Rule 3B(a) of the Medical Termination of Pregnancy Rules, 2003, which permits termination between twenty and twenty-four weeks in the case of survivors of sexual assault or rape. The Court held that, for the purposes of the MTP Act and Rules, the meaning of rape includes marital rape, so that a married woman who becomes pregnant as a result of non-consensual intercourse with her husband may claim the benefit of the provision.[15] The Court emphasised that this holding was limited to the MTP context and did not decide the validity of Exception 2 to Section 375 IPC. It nonetheless is the clearest judicial acknowledgment that marital rape exists as a phenomenon in Indian law.

### 6.3 High Courts

On 11 May 2022, a Division Bench of the Delhi High Court, hearing *RIT Foundation v. Union of India* and connected petitions, delivered a split verdict. Justice Rajiv Shakdher held that Exception 2 to Section 375 IPC was unconstitutional, reasoning that the classification between married and unmarried women bore no rational nexus with the object of the law of rape, which is to protect women from sexual violence, and that the notion of implied consent was inconsistent with the Constitution. Justice C. Hari Shankar upheld the exception, holding that

[13] Joseph Shine v. Union of India, (2019) 3 SCC 39.
[14] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.
[15] X v. Principal Secretary, Health & Family Welfare Dep't, Govt. of NCT of Delhi, 2022 SCC OnLine SC 1321 (Sept. 29, 2022).

marriage constituted an intelligible differentia, that the relationship carried a legitimate expectation of sexual relations, and that the courts should defer to Parliament on a matter of policy.[16] The matter is now before the Supreme Court.

In March 2022, the Karnataka High Court in *Hrishikesh Sahoo v. State of Karnataka* held that Exception 2 does not confer blanket immunity and that a husband could be tried for rape where the allegations disclosed forced intercourse, reasoning that a man is a man and an act is an act and rape is rape whether committed by the husband or a stranger. The husband's appeal against that decision is among the matters that the Supreme Court has agreed to hear.[17] In the other direction, single-judge benches of other High Courts, such as the Chhattisgarh High Court in 2021, have discharged husbands accused of rape and unnatural offences on the ground that the law does not recognise marital rape of an adult wife. The Kerala High Court in 2022 held that marital rape, though not punishable as rape, constitutes cruelty and is a valid ground for divorce.

## 7. CONSTITUTIONAL ANALYSIS

### 7.1 Article 14: Equality and Reasonable Classification

A classification under Article 14 must rest on an intelligible differentia and bear a rational relation to the object of the statute.[18] The object of Section 63 is to protect women from nonconsensual sexual acts. Exception 2 divides women into two classes, wives and non-wives, and denies protection to the former. Marital status is undoubtedly a differentia, but it is not one that is related to the object: a woman's need for protection from non-consensual sex does not diminish because she is married. To the extent that the classification rests on an assumption of permanent consent, it is based on a stereotype that the Court has rejected in *Joseph Shine*. Furthermore, since *Shayara Bano*, a law may be struck down where it is manifestly arbitrary,[19] and a provision which permits the violation of a woman's bodily integrity on the sole ground of marriage meets that description.

The defence, articulated by Justice Hari Shankar, is that there is a difference in kind between a

[16] RIT Found. v. Union of India, W.P.(C) 284/2015 (Del. H.C. May 11, 2022) (split verdict). Leave to appeal to the Supreme Court was granted in January 2023.
[17] Hrishikesh Sahoo v. State of Karnataka (Karn. H.C. Mar. 23, 2022).
[18] State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75.
[19] Shayara Bano v. Union of India, (2017) 9 SCC 1.

marital relationship, where sexual relations are a legitimate expectation, and a relationship outside marriage. The response is that the expectation of intimacy is not equivalent to a right of access. The law already recognises that spouses have expectations of each other, such as companionship and support, none of which is enforced through physical compulsion. Even the civil remedy of restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955 is not enforceable by physical compulsion, and no one suggests that a decree for it would authorise a husband to use force.

### 7.2 Article 15: Non-Discrimination

Article 15(1) prohibits discrimination by the State on grounds including sex. Exception 2 is directed against wives, and wives are, in practice, all women. It is a rule of substantive law that applies to a woman only because of her sex and her marital status. Although Article 15(3) permits special provisions for women, it cannot save a provision that reduces protection for women. The argument that the exception discriminates on marital status, not sex, is unconvincing because marital status is not neutral, being a category which in India is overwhelmingly used to disadvantage women.

### 7.3 Article 21: Life, Personal Liberty and Dignity

Article 21 is the most potent basis of challenge. After *Puttaswamy*, there can be no doubt that the right to privacy includes control over one's body and decisions on sexual intimacy. A rule that removes the criminal law's protection for a woman's sexual autonomy on the ground that she is married intrudes on this right. Since *Maneka Gandhi*, any law that deprives a person of a right under Article 21 must satisfy the test of a procedure that is just, fair and reasonable.[20] A law that legalises coerced sex within marriage cannot meet that test, and the State has not identified a compelling interest that would justify the intrusion.

## 8. REMEDIES AVAILABLE TO A MARRIED WOMAN OUTSIDE THE LAW OF RAPE

The Protection of Women from Domestic Violence Act, 2005 ("PWDVA") is a civil law statute. Section 3 defines domestic violence to include sexual abuse, which the Explanation defines as any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates

[20] Maneka Gandhi v. Union of India, (1978) 1 SCC 248.

the dignity of the woman. On that basis an aggrieved woman may apply to a Magistrate for protection orders (Section 18), residence orders (Section 19), monetary relief (Section 20), custody orders and compensation (Section 22). Breach of a protection order is a criminal offence. These remedies are valuable, and they are available irrespective of the marital rape exception.

They are, however, an incomplete answer. The PWDVA offers no punishment for the sexual act itself; it aims at stopping violence, not at condemning it. The reliefs are preventive and compensatory and they do not vindicate the wrong that the wife has suffered. Its implementation has been hampered by limited numbers of Protection Officers, lack of shelter homes and long delays.

## 9. COMPARATIVE AND INTERNATIONAL PERSPECTIVES

### 9.1 Other Jurisdictions

In England, the House of Lords in *R v. R* (1991) declared that the supposed marital exemption was a common law fiction that no longer reflected the position of a wife in modern society, which regards marriage as a partnership of equals and not one in which the wife is the subservient chattel of her husband.[21] The European Court of Human Rights held that the abandonment of the immunity was consistent with the fundamental objectives of the Convention, namely respect for human dignity and freedom.[22] Canada removed the exemption by statute in 1983, all Australian jurisdictions had done so by the early 1990s, and every State in the United States had abolished or narrowed it by 1993. South Africa criminalised marital rape by statute in 1993 and confirmed the position in its Sexual Offences Act of 2007.

In South Asia, the Supreme Court of Nepal in 2002 held the marital immunity incompatible with the equality guarantees and the Muluki Ain was amended accordingly. Some other neighbours, for instance Bangladesh and Sri Lanka, retain a form of exemption. India therefore stands with a shrinking group of States that retain the immunity, and it is notable that the jurisdiction of origin of the exception, England, abandoned it thirty-five years ago.

[21] R v. R, [1992] 1 A.C. 599 (H.L.).
[22] C.R. v. United Kingdom, (1995) 21 E.H.R.R. 363.

### 9.2 International Human Rights Law

India ratified the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW") in 1993. The UN Declaration on the Elimination of Violence against Women, 1993, includes marital rape expressly in its definition of violence occurring in the family.[23] The CEDAW Committee's General Recommendation No. 35 (2017) calls on States to ensure that sexual offences, including marital and date rape, are defined on the basis of lack of freely given consent, and to repeal any provision that exempts a perpetrator from prosecution on account of marriage to the victim.[24] The Committee has on more than one occasion urged India to criminalise marital rape, including in its Concluding Observations of 2014.[25]

## 11. DATA AND SOCIAL REALITY

Reliable data on marital rape are scarce, in part because the National Crime Records Bureau cannot record as rape an act which the law does not treat as rape. The National Family Health Survey (NFHS-5, 2019–21) nevertheless found that approximately three in ten ever-married women aged 18 to 49 had experienced spousal violence, and that about 6 per cent reported spousal sexual violence, defined as being physically forced by the husband to have sexual intercourse or to perform sexual acts against their will.[26] Even these figures are likely to understate the true extent because of shame, dependence and the absence of a legal category in which to report the experience. Further, the NFHS data indicate that a minority of women who experience spousal violence seek help of any kind, and fewer still approach the police.

NCRB data also show, year after year, that in the vast majority of registered rape cases the accused is known to the victim, which suggests that Exception 2 removes the protection of the law from the very setting in which sexual violence is most likely to occur.

## 12. CURRENT STATUS OF THE CHALLENGE (SEPTEMBER 2026)

As of the date of writing, the constitutional validity of Exception 2 has not been finally decided. The batch of petitions comprises public interest litigations challenging the exception in Section

[23] G.A. Res. 48/104, art. 2(a), U.N. Doc. A/RES/48/104 (Dec. 20, 1993).
[24] CEDAW Comm., General Recommendation No. 35 on Gender-Based Violence against Women, U.N. Doc. CEDAW/C/GC/35 (2017), para. 29.
[25] CEDAW Comm., Concluding Observations on the Fourth and Fifth Periodic Reports of India, U.N. Doc. CEDAW/C/IND/CO/4-5 (2014).
[26] Int'l Inst. for Population Sciences, *National Family Health Survey (NFHS-5), 2019–21: India Report* (2022). The figures are stated approximately; the report should be consulted for exact values.

375 IPC and the corresponding exception in Section 63 BNS, and seeks a reading down of the provision so as to exclude non-consensual sexual acts within marriage from its protection. The matter also includes the appeal arising from the Karnataka High Court decision of March 2022.

On 9 September 2026, a Bench headed by Chief Justice Surya Kant, with Justices Joymalya Bagchi and V. Mohana, agreed to examine the validity of the exception under both codes and directed that the matters be listed for final hearing after three weeks.[27] The hearing also brought to attention the effect of Parliament having reproduced the exception in the BNS, and the implications of the husband's exception in the context of gang rape under the new Code. The Bench's observations, as reported, highlighted the Article 20(1) concern and the role of Parliament. Readers should verify the latest position on the Supreme Court website before relying on this Part, since the proceedings are ongoing.

## 13. SUGGESTIONS AND WAY FORWARD

The following reforms are proposed.

*First*, Exception 2 to Section 63 BNS should be repealed by Parliament. The preferred route is legislative, since it is prospective, allows a graded design and avoids the Article 20(1) difficulty. If Parliament does not act, the Supreme Court should declare the exception unconstitutional or read it down so that the words "sexual intercourse or sexual acts by a man with his own wife" do not exclude non-consensual acts, giving the declaration prospective effect. In either case, the law should state expressly, as the Verma Committee recommended, that a marital or other relationship between the accused and the complainant is not a defence and is not a ground for presuming consent.

*Second*, Section 67 BNS should be repealed or amended consequentially. Once the exception goes, the special and lesser offence for separated wives loses its rationale and would create an inexplicable difference in punishment. Should Parliament wish to create a graded structure, it must do so transparently and on principle, for example by adjusting sentencing ranges for all rape offences, not by carving out a lower tier for wives.

[27] Marriage, Consent & Constitutional Rights: Supreme Court Reopens the Marital Rape Debate, Lawful Legal, https://lawfullegal.in/marriage-consent-constitutional-rights-supreme-court-reopens-the-marital-rape-debate/. See also Marital Rape in India: What Does the Law Say in 2026?, The Law Communicants, https://thelawcommunicants.com/marital-rape-in-india-what-does-the-law-say-in-2026/.

*Third*, safeguards against misuse, if thought necessary, should be procedural and limited. Examples include a preliminary review by a supervisory police officer before arrest, prompt medical examination and the preservation of digital evidence and communications. These measures should not amount to preconditions that impede the reporting of genuine cases, and mandatory mediation or reconciliation should not be imposed in cases of sexual violence.

*Fourth*, the existing protective framework must be made effective. Protection Officers under the PWDVA should be appointed in adequate numbers and trained, shelter homes and one-stop centres should be strengthened, and free legal aid should be readily accessible. Police and judicial training should address stereotypes about marital sexual relations, and medical protocols should reflect the prohibition of the invasive "two-finger test" recognised by the Supreme Court.[28]

*Fifth*, NCRB and NFHS should publish disaggregated data on intimate-partner sexual violence so that reform is evidence-based, and education in consent, gender equality and respectful relationships should be expanded. The criminal law alone cannot change norms, but it can signal that the norms have changed.

## 14. CONCLUSION

The Bharatiya Nyaya Sanhita, 2023 has modernised many features of the criminal law, but in Section 63, Exception 2, it has retained a rule that is older than the Constitution and out of step with it. The rule rests on the doctrine of coverture and the fiction of irrevocable consent, both of which have been abandoned in the country of their origin and are inconsistent with the

Supreme Court's decisions on privacy, dignity, sexual autonomy and equality. The BNS is internally inconsistent: it defines consent as agreement to a specific act, punishes intercourse with a separated wife without consent, and yet denies the same protection to a wife who continues to live with her husband.

The arguments for retention, whether based on the sanctity of marriage, the difficulty of proof, the risk of misuse or the adequacy of alternative remedies, do not justify the denial of equal protection. They reflect legitimate concerns about implementation, which can be met by procedural design, but not about the principle, which is that a woman does not lose her right to

[28] *See* Lillu @ Rajesh v. State of Haryana, (2013) 14 SCC 643.

say no upon marriage. The hypothesis of this paper is therefore borne out: Exception 2 fails the tests of Articles 14, 15 and 21.

The Supreme Court has now taken up the question. Whatever the outcome, the challenge is a reminder that the responsibility for reform lies primarily with Parliament, and that the Constitution does not permit the State to treat the consent of a married woman as a matter of assumption. Repeal of the exception, coupled with safeguards and institutional strengthening, would align Indian law with constitutional values and with international standards, and would give effect to the simple proposition that marriage is a relationship of equals in which every act of intimacy requires consent.

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