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Beyond the Wedding Vows: Reassessing the Marital Rape Exception under the Bharatiya Nyaya Sanhita, 2023

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ABSTRACT

*Rape, under Indian law, means sex without consent. But there is one significant exception. If the man is the woman's husband, and she is over eighteen, the law says it is not rape at all. This rule is called Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita, 2023 ("BNS"), and it is almost a word-for-word copy of the old Exception 2 to Section 375 of the Indian Penal Code, 1860 ("IPC"). This paper asks a simple question: why did this rule survive a law that was meant to remove old colonial thinking from Indian criminal law? It looks at where the rule came from, how the Justice Verma Committee asked for it to be scrapped in 2013, and why Parliament kept it anyway. It then walks through the important court decisions on the subject: *Independent Thought v Union of India*, *Nimeshbhai Bharatbhai Desai v State of Gujarat*, the Karnataka High Court's "rape is rape" ruling in *Hrishikesh Sahoo v State of Karnataka*, the split verdict of the Delhi High Court in *RIT Foundation v Union of India*, and the Kerala High Court's ruling that marital rape is a valid ground for divorce. It ends with the petitions now pending before the Supreme Court, which has heard arguments but not yet delivered a final verdict as of 2026. The paper's conclusion is straightforward: the exception has survived mostly because lawmakers have been unwilling to touch it, not because anyone has offered a strong reason for keeping it.*

Keywords: marital rape, Bharatiya Nyaya Sanhita 2023, Section 63, Exception 2, consent, bodily autonomy, Articles 14, 15 and 21 of the Constitution of India

I. INTRODUCTION

Indian rape law has always turned on one question: did the woman consent? She can say no at any point, even after saying yes earlier, and the law is supposed to treat sex after that refusal as a crime. Section 63 of the BNS keeps this idea. It defines rape broadly, covering penetration by any body part or object, and it makes clear that staying silent or not fighting back is not the same as saying yes.

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But right after laying down this broad rule, Section 63 pulls back sharply. If the man and woman are married, and the wife is eighteen or older, the very same act is not rape, no matter how much force was used. This paper looks closely at that exception. Part II sets out what the law actually says. Part III traces the exception back to an old English idea about marriage and consent. Parts IV and V explain why this study matters and how it was done. Part VI covers the history, including the Verma Committee's call to scrap the exception. Part VII sets out the government's stated reasons for keeping it. Part VIII goes through the major court rulings, from 2017 up to the case now pending before the Supreme Court. Part IX weighs the arguments on both sides, and Part X concludes.

II. WHAT THE LAW ACTUALLY SAYS

Section 63 of the BNS defines rape mainly by the absence of consent, or by consent obtained through fear, fraud, intoxication, or when the woman cannot understand what is happening.¹ Exception 2 then says, almost word for word what the IPC said before it, that sex or a sexual act by a man with his own wife is not rape, as long as she is not under eighteen.² There is a partial carve-out in Section 67, which does punish a husband who forces himself on his wife while they are living apart under a judicial separation, though the punishment is lighter than for ordinary rape.³ Put these three provisions together and Indian law ends up treating wives in three different ways: a wife under eighteen is fully protected, a wife who is legally separated gets a reduced form of protection, and an adult wife living with her husband gets none at all. The exception, in other words, is not really about consent. It is about who the man happens to be married to.

III. WHERE THE EXCEPTION COMES FROM

This rule did not originate in India. It comes from the writings of a seventeenth-century English judge, Sir Matthew Hale, who argued that once a woman marries, she gives her husband a kind of permanent, unwithdrawable consent to sex. British India borrowed this idea when Section 375 of the IPC was drafted in 1860, and it has stayed in Indian law ever since, even though England itself dropped it long ago. In 1991, the House of Lords held in *R v R* that a husband could be convicted of raping his wife, and called Hale's old idea a legal fiction that no longer had any place in a modern understanding of marriage.⁴ India never made the same move. The

¹ Bharatiya Nyaya Sanhita 2023, s 63.

² Bharatiya Nyaya Sanhita 2023, s 63, Exception 2.

³ Bharatiya Nyaya Sanhita 2023, s 67.

⁴ *R v R* [1991] UKHL 12, [1992] 1 AC 599.

idea Hale wrote about more than three hundred years ago is still, in substance, what Exception 2 of the BNS rests on today.

IV. WHY THIS STUDY MATTERS

There are four reasons to look closely at this exception. First, the BNS was presented as a break from colonial-era thinking, so it is fair to ask whether a nineteenth-century rule about wives really belongs in a 2023 law. Second, the Supreme Court has, in the last decade, built up a strong body of case law on privacy and bodily autonomy, and that case law sits uneasily next to an exception built on the opposite idea. Third, the exception is being actively argued in court right now, so a clear account of both sides is useful to students, lawyers, and anyone following the case. Fourth, and most importantly, real women are affected by this rule every day, and this paper tries not to lose sight of that while working through the legal doctrine.

V. HOW THIS STUDY WAS DONE

This is a doctrinal paper. It works mainly from the text of Section 63 of the BNS and Section 375 of the IPC, the judgments interpreting them, and the reports of committees that have studied the question. It does not attempt to measure how common marital sexual violence is in India through original survey work; where numbers are mentioned, they come from existing published sources.

VI. HOW WE GOT HERE: THE VERMA COMMITTEE AND THE 2013 LAW

After the fatal gang rape of a young woman in Delhi in December 2012, the government set up a three-member committee under former Chief Justice J.S. Verma to recommend changes to India's rape laws. The Committee's report was blunt: marriage should never be treated as a defence to sexual assault, and the exception should go.⁵ Parliament responded with the Criminal Law (Amendment) Act, 2013, which widened the definition of rape and created new offences such as acid attacks and stalking. But it left the marital rape exception exactly where it was. The exception survived that round of reform, and it survived again in 2023, when the IPC was replaced by the BNS. The only real change across both amendments was raising the protected age of the wife from fifteen to eighteen.

VII. WHY THE GOVERNMENT SAYS IT SHOULD STAY

The government's position has shifted over the years but has never gone as far as agreeing to remove the exception. Earlier statements in Parliament suggested that the concept of marital

⁵ Ministry of Home Affairs, Government of India, *Report of the Committee on Amendments to Criminal Law* (Justice J.S. Verma Committee, 2013) paras 70–75.

rape does not translate well into the Indian context, given the country's diversity and the widely held view of marriage as a sacred bond rather than a contract. In an affidavit filed before the Supreme Court in October 2024,⁶ the government took a more careful line. It accepted that a wife does not lose her right to refuse sex just because she is married, but argued that calling this "rape", with the punishment that label carries, would be too harsh a response. It pointed instead to remedies already on the books, including the Protection of Women from Domestic Violence Act, 2005,⁷ and the offence of cruelty by a husband or his relatives, arguing that these are enough to deal with the harm without using the specific label and sentencing structure that rape carries.

VIII. WHAT THE COURTS HAVE SAID

A. *Independent Thought v Union of India* (2017)

The Supreme Court's first real intervention was narrow. It dealt only with the age of the wife, not the exception as a whole. The Court held that treating sex with a wife between fifteen and eighteen as anything other than rape made no sense next to the Protection of Children from Sexual Offences Act, 2012, which does not care whether the girl is married or not.⁸ It therefore read the exception as not applying to any wife under eighteen. The BNS later wrote this into the statute itself by raising the age in Exception 2 to eighteen. But the Court was careful to say it was not deciding anything about adult wives, so the core of the exception stayed untouched.

B. *Nimeshbhai Bharatbhai Desai v State of Gujarat* (2018)

A wife in this case accused her husband of forcing himself on her, including forced oral sex, and sought to prosecute him. The Gujarat High Court could not touch the rape charge because of the exception, but Justice Pardiwala used strong language while doing so, saying it was time to drop the idea of "implied consent" in marriage and that the law must protect the bodily autonomy of every woman, married or not.⁹ The Court still went on to hold that a husband could be prosecuted for unnatural sexual acts under a separate provision that did not carry a marital exception, giving the wife at least one route to justice even though the rape charge itself could not stand.

C. *Hrishikesh Sahoo v State of Karnataka: "Rape Is Rape"* (2022)

A husband facing rape and cruelty charges asked the Karnataka High Court to quash the case, arguing the exception gave him complete protection. Justice Nagaprasanna refused, holding that

⁶ Union of India, Affidavit filed before the Supreme Court of India in the marital rape exception petitions, 4 October 2024.

⁷ Protection of Women from Domestic Violence Act 2005.

⁸ *Independent Thought v Union of India* (2017) 10 SCC 800.

⁹ *Nimeshbhai Bharatbhai Desai v State of Gujarat* 2018 SCC OnLine Guj 732 (Pardiwala J).

the exception is not absolute and cannot be used to shield a husband in every situation. The line from this judgment that is now widely quoted is simple: a man is a man, an act is an act, and rape is rape, whether it is done by a stranger or by a husband.¹⁰ The husband appealed, and the Supreme Court granted an interim stay on the ruling in July 2022. That appeal was later combined with other pending challenges and is part of the batch now before the Supreme Court.

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

A more direct constitutional challenge came before the Delhi High Court, filed by an advocacy group along with individual petitioners. The two judges could not agree. Justice Shakti Chaudhary held the exception unconstitutional, saying it discriminated against married women for no good reason and struck at their dignity and autonomy. Justice Hari Shankar disagreed, holding that sex, consensual or not, was something the law could treat as part of what marriage involves, and that Parliament was entitled to draw that line.¹¹ Because the two judges split evenly, the exception stayed on the books, and the case moved on to the Supreme Court by agreement of both sides.

E. *X v X: Marital Rape as a Ground for Divorce* (2021)

Even where courts cannot punish marital rape as a crime, some have found ways to recognise the harm it causes. In this case, a wife who had been forced into sex while sick and bedridden sought a divorce on grounds of cruelty. The Kerala High Court agreed, holding that the fact that the penal law does not call this rape does not stop a family court from treating it as cruelty for the purpose of divorce, and that a husband has no special right over his wife's body simply because they are married.¹² The ruling does not touch the criminal exception, but it shows courts are willing to recognise marital sexual violence as real harm through whatever legal tool is available to them.

F. The Case Now Pending Before the Supreme Court

The *Hrishikesh Sahoo* appeal and the *RIT Foundation* matter, along with several other petitions, were finally argued together before a bench led by the then Chief Justice in October 2024. Senior counsel for the petitioners relied heavily on the Supreme Court's own recent rulings on

¹⁰ *Hrishikesh Sahoo v State of Karnataka* 2022 LiveLaw (Kar) 89, Criminal Petition No 2427 of 2022 (Karnataka High Court, 23 March 2022) (Nagaprasanna J); interim stay granted by the Supreme Court of India on 19 July 2022.

¹¹ *RIT Foundation v Union of India*, WP (C) No 284 of 2015, Delhi High Court, judgment of 11 May 2022 (Shakti Chaudhary and Hari Shankar JJ, split verdict).

¹² *X v X*, Mat Appeal No 151 of 2015, Kerala High Court, judgment of 30 July 2021 (Muhammed Mustaque and Edappagath JJ).

privacy, marital equality, and personal autonomy in *Puttaswamy*,¹³ *Joseph Shine*,¹⁴ and *Navtej Singh Johar*,¹⁵ arguing that these judgments had already made Hale's old idea of unwithdrawable consent impossible to defend. They also pointed out that Section 67 of the BNS already punishes a husband for non-consensual sex with a separated wife, which means Parliament itself accepts that a husband can rape his wife; striking down Exception 2, they argued, would only remove a legal fiction, not create a brand-new offence. The hearing could not be finished before the Chief Justice retired, and as of the middle of 2026 the Supreme Court has still not delivered its final verdict. Until it does, High Courts keep applying the exception as it currently stands, and rulings from 2025 and 2026 continue to apply it, so that acts which would be serious crimes if committed by anyone else remain outside the reach of rape law when committed by a husband.¹⁶

IX. WEIGHING THE TWO SIDES

A. The Case Against the Exception

The strongest argument against the exception is a simple equality argument. Article 14 of the Constitution allows the law to treat different groups differently only if there is a real, rational reason for it. Marital status does not supply that reason here; if anything, the closeness and trust that comes with marriage should make forced sex worse, not more excusable. Petitioners also point to the Supreme Court's own words in *Puttaswamy*, where bodily autonomy was recognised as part of the right to life under Article 21, and in *Joseph Shine*, where the Court rejected the old idea that a wife's sexuality belongs to her husband. The reasoning in *Navtej Singh Johar*, which grounded intimate choice in personal dignity rather than in who is making the choice, points the same way. The Supreme Court has also long recognised, in *Bodhisattwa Gautam v Subhra Chakraborty*, that rape is a violation of a woman's right to life, not merely a private wrong, which sits badly next to a rule that simply refuses to call some rapes by that name.¹⁷ India's commitments under the international convention on ending discrimination against women are also cited in support of scrapping the exception.¹⁸

B. The Case for Keeping the Exception

¹³ *K.S. Puttaswamy v Union of India* (2017) 10 SCC 1.

¹⁴ *Joseph Shine v Union of India* (2019) 3 SCC 39.

¹⁵ *Navtej Singh Johar v Union of India* (2018) 10 SCC 1.

¹⁶ *See A v State of Madhya Pradesh*, Madhya Pradesh High Court (2026); compare the approach of the Chhattisgarh High Court (2025) applying Exception 2 in a case involving serious injury to the wife.

¹⁷ *Bodhisattwa Gautam v Subhra Chakraborty* (1996) 1 SCC 490.

¹⁸ Convention on the Elimination of All Forms of Discrimination Against Women 1979, ratified by India in 1993.

Those defending the exception, including the government in its 2024 affidavit, do not really argue that a husband is entitled to force his wife. Their argument is more limited: that remedies already exist for this harm, through the Domestic Violence Act¹⁹ and the offence of cruelty, and that dropping the full weight of rape law, with its minimum sentences and lasting stigma, onto the marital bedroom risks being disproportionate and open to misuse in bitter matrimonial disputes that are hard to prove either way.²⁰ This is not really a defence of forced sex within marriage. It is an argument about which label and which remedy fit the wrong, and it is this argument, more than any principled defence of the exception itself, that has kept successive governments from agreeing to scrap it in court.

X. CONCLUSION

Looking at the whole history, Exception 2 does not look like a rule Parliament chose deliberately in 2023. It looks like something inherited and simply left alone, first in the IPC of 1860, then again in the 2013 amendment, and now again in the BNS. The Verma Committee called for its removal more than a decade ago. Meanwhile, the courts have moved a long way in the opposite direction: *Nimeshbhai Bharatbhai Desai* questioned the very idea of implied marital consent, *Hrishikesh Sahoo* declared that rape is rape regardless of who commits it, the Kerala High Court in *X v X* treated marital rape as a real and serious wrong even without a criminal label, and half of the Delhi High Court bench in *RIT Foundation* was ready to strike the exception down outright. What is left is a single, unresolved question sitting before the Supreme Court: can a rule inherited from a seventeenth-century English judge survive a constitution built on equality and personal dignity? Until the Court answers that question, Indian law will keep drawing a line found nowhere else in the BNS, where the very same act of forced sex is one of the gravest crimes in the code when done by a stranger, and no crime at all when done by a husband.

¹⁹ Union of India, Affidavit filed before the Supreme Court of India in the marital rape exception petitions, 4 October 2024.

²⁰ Protection of Women from Domestic Violence Act 2005.