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MARITAL RAPE AS AN "EXCEPTION": INDIA IS STILL OUTLIER

BY: MEENAKSHI

A law student's reading of Exception 2, Section 375 IPC / Section 63 BNS.

In my law school, I remember reading Section 375 of the Indian Penal Code for the first time. It defines rape in wide terms — non-consensual sexual intercourse, absence of consent, use of coercion, and so on. Then I reached to "Exception 2," and had to read it twice to be sure, whether I understood it correctly: sexual intercourse by a man with his own wife, is not rape in the eyes of the law — no matter how it happened, provided she is not a minor. The act of forced penetration without consent, is a serious crime when done by a stranger with a minimum ten-year sentence, and no crime at all when done by a husband. This is not any technical gap. It is one of the last places in Indian law where a woman's consent legally stops mattering the moment she signs a marriage register. This article tries to explain, in plain language, why this exception exists, what the Supreme Court has said about it, how India compares to the rest of the world, and why? despite decades of criticism — Parliament has still not removed it.

“By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything.”

RULING IN INDIA.....

Under the old Indian Penal Code, Exception 2 to Section 375 states that: sexual intercourse by a man with wife not being under eighteen years of age, is not rape. When the IPC was replaced by the Bharatiya Nyaya Sanhita (BNS), 2023, this provision did not disappear. Under Section 63 of the BNS, and Exception 2, rape is defined same marital immunity in almost identical words. A separate provision under Section 67 BNS (earlier Section 376B IPC), punishes the

husband who has non-consensual sex with a wife, who is judicially separated from him — but the punishment bracket (two to seven years) is far lower than the minimum ten-year sentence for ordinary rape. So even the sliver protection given by the law to a wife treats the same act as a lesser wrong.

In short: renaming the code from IPC to BNS did not change the substance. The marital rape exception survived the recodification.

WHAT THE SUPREME COURT HAS ACTUALLY DECIDED — AND WHAT IT HASN'T....

In *Independent Thought v. Union of India*, (2017) 10 SCC 800, decided by Justices Madan B. Lokur and Deepak Gupta on 11 October 2017, the Supreme Court has struck down part of the marital rape exception but only for narrow class of victims i.e. child brides. The petition was filed by an NGO, Independent Thought, challenging Exception 2. Justice Lokur framed the issue in the opening line of the judgment itself:

"Sexual intercourse with a girl below eighteen years of age is rape"

That is the Court's own framing of the question, and it was answered in the affirmative. The Court read down Exception 2 stating sexual intercourse with a wife under eighteen years of age is rape, bringing the exception in line with the Protection of Children from Sexual Offences Act (POCSO) and the age of consent fixed elsewhere in the IPC. The judgment only fixes the internal contradiction about minors — the Court itself noted that it had not examined the "wider issue of marital rape" of adult wives and left that question open for another day.

That "another day" arrived, but not through a final Supreme Court ruling — through a split verdict.

Later, In *RIT Foundation v. Union of India*, 2022 SCC OnLine Del 1404, a Delhi High Court division bench heard the petitions asking for the marital rape exception to be struck down for adult wives too. On 11 May 2022, Justice Rajiv Shakdher and Justice C. Hari Shankar delivered two separate, opposing opinions. Justice Shakdher held that the exception was unconstitutional, discriminatory, and violated a married woman's right to bodily autonomy and dignity under Article 21. Justice Hari Shankar disagreed, holding that striking down the exception would create a new criminal offence, a job that belongs to Parliament, not the courts. Because the two judges disagreed, the case was directly referred to the Supreme Court, as the case involved a

substantial question of law of general public importance. That appeal, along with several other similar petitions, a three-judge bench of the Supreme Court was constituted to hear the petition. During the hearings, the Union government's own affidavit argued that treating non-consensual sex within marriage as "rape" would be "excessively harsh" and could destabilise the institution of marriage. So, to be exact about where the law stands: the Supreme Court has criminalised marital rape only for wives under 18. For adult wives, the exception is still fully in force, and the constitutional challenge to it is still pending.

WHY DOES THIS EXCEPTION EVEN EXIST? A SHORT HISTORY.....

To understand why in India this exception still exist, you have to go back roughly 300 years — to English common law, not Indian tradition. In 1736, the English jurist *Sir Matthew Hale* wrote in his treatise on the criminal law that a husband could not be guilty of raping his own wife, because by marrying him she had given "irrevocable" consent to sex for life. This idea, sometimes called the "doctrine of coverture," treated a wife's legal identity as merged into her husband's as she had no separate legal personhood, and therefore no standing to refuse him. When the British codified the Indian Penal Code in 1860, they imported this doctrine wholesale into Exception 2 of Section 375, and it has survived, almost word for word, for over 160 years. The irony is sharp: England itself abandoned this rule long ago. In *R v R [1991] UKHL 12*, the House of Lords unanimously held that the "marital rape exemption" no longer formed part of English law, reasoning that a wife is not the property of her husband and can validly withdraw consent at any point in a marriage. Parliament in England and Wales formally codified this position through the Criminal Justice and Public Order Act, 1994. So, the very colonial legal system that gave India this exception discarded it more than three decades ago — while India kept it.

WHAT OTHER COUNTRIES HAVE DONE....

According to a UN Women report, India is among a shrinking group of roughly 30 to 36 countries worldwide that still do not fully criminalise marital rape, the list also includes Pakistan, China, Bangladesh, Myanmar, Sri Lanka, and several other South and Southeast Asian nations. Countries, where marital rape is treated as a crime like any other:

- United States: By 1993, marital rape had been criminalised in all 50 states, following decades of state-by-state reform through the 1970s and 80s.

- United Kingdom: As noted above, criminalised through the R v R judgment in 1991, later codified in 1994.
- South Africa: The Prevention of Family Violence Act, 1993 expressly abolished the marital rape exemption.
- Nepal: India's closest South Asian neighbour, with a broadly similar social and family structure, criminalised marital rape in 2006.
- Canada and New Zealand: Both abolished the marital exemption in the 1980s and early 1990s respectively.

WHY INDIA HAS RESISTED CHANGE: THE REAL REASONS

1. Legal reason:- Fear of a “new offence”. Justice Hari Shankar's opinion in RIT Foundation captures the government's main legal argument that courts striking down Exception 2 would be creating a new criminal offence, which is Parliament's job, not the judiciary's. This is a genuine separation-of-powers concern, not merely an excuse.

2. Policy reason:- Fear of misuse. The Union government has repeatedly told courts and Parliament that criminalising marital rape could become "an easy tool for harassing husbands," pointing to existing complaints about misuse of Section 498A IPC (cruelty by husband/relatives). A Parliamentary Standing Committee, examining this question after the Justice Verma Committee's recommendations, states that criminalising marital rape could put "the entire family system... under great stress."

3. Historical reason :- Coverture and property logic. The Justice J.S. Verma Committee, set up after the 2012 Delhi gang-rape case, examined this question in detail and recommended removing the marital rape exception entirely. Its report traced the exception directly to the old idea that a wife was:

"No more than the property of their husbands"

Even in 2013, with the whole country demanding stronger rape laws after the Nirbhaya case, Parliament accepted Verma Committee recommendation — on stalking, acid attacks, voyeurism but specifically rejected this one.

4. Social reason — Marriage as a sacred, indissoluble institution. Indian family law across religions still frames marriage as a sacred or social institution to be protected. Any legal change

within marriage, conditional on ongoing consent is seen by many lawmakers as an attack on the institution itself, rather than as a protection for one partner within it.

5. The current situation — deference back to Parliament. Even courts sympathetic to reform have, in 2024 and 2025, largely urged Parliament to act rather than deciding the issue themselves, out of institutional caution. A private member's bill, the Marital Rape Bill, 2025, introduced by MP Dr. Shashi Tharoor, seeks to amend the BNS to bring non-consensual marital sex within the definition of rape — but private member's bills in India almost never become law without government backing.

THE BURDEN OF ACTUALLY IMPLEMENTING IT....

Even law students who does not support criminalisation should be honest about the practical difficulties that would follow:

- Evidentiary difficulty: Proving absence of consent between two people who live together and have sexual relationship is genuinely harder than proving it between strangers. Courts and police would need training and new evidentiary standards.
- Institutional capacity: India's conviction rate in sexual offence cases is already low — NCRB data has repeatedly shown conviction rates for rape offences, which came out in several years. Adding a whole new category, without strengthening police training, forensic infrastructure, and fast-track courts, risks creating a law that exists on paper but rarely delivers justice in practice.
- Social enforcement gap: Even if laws exist, societal pressure to preserve marriages and family reputation often discourages women from reporting abuse at all; a problem no statute alone can solve.

They are one of the reasons to the reform, when it comes in practicality , has to be built carefully — with training, safeguards, and support systems rather than as a single clause deleted from a bare Act.

WHY THIS SHOULD MATTER TO YOU, EVEN IF YOU'RE NOT A LAW STUDENT.....

Here's the thought experiment I keep coming back to. Let's imagine two women, both aged 25 and subjected to the exact same non-consensual act on the exact same night, by same amount of force. The only difference is that one is married to the man and the other is not. Under Indian

Criminal law today, one of them has been raped ,the other has not. The law is only asking about her marital status not what happened to her body. That is the entire content of Exception 2, stripped of legal language: your legal protection from sexual violence depends on whether you are married to your attacker or not. For a country whose Constitution guarantees equality before the law under Article 14 and the right to life and personal liberty which the Supreme Court has repeatedly held includes bodily autonomy and dignity — under Article 21. As the Supreme Court itself observed while striking down the child-marriage part of this exception, the offence of rape already exists in the main part of the law; the exception simply switches it off for one category of victim, no new offence is created by removing it. Whatever the Supreme Court eventually decides in the pending batch of petitions, the debate itself has already done something useful: it has forced India to say out loud, in court and in Parliament, exactly why it still believes a woman's consent can be legally overridden by a marriage certificate. That question; once asked clearly, is very hard to answer honestly — which may be exactly why, for over 160 years, nobody in power has really tried.

Sources referenced: Independent Thought v. Union of India, (2017) 10 SCC 800; RIT Foundation v. Union of India, 2022 SCC OnLine Del 1404; Bharatiya Nyaya Sanhita, 2023; Report of the Justice J.S. Verma Committee on Amendments to Criminal Law (2013); R v R [1991] UKHL 12; UN Women report on marital rape laws globally, as reported in Indian press (2022).