MARITAL RAPE IN INDIA: A CRITICAL ANALYSIS OF LEGAL IMMUNITY, CONSTITUTIONAL RIGHTS, AND INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

A Doctrinal and Comparative Study of Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita, 2023

by

Mr. Syed Abdul Haseeb

Kristu Jayanti College of Law, Bengaluru

&

Ms. Swapna A.B

Kristu Jayanti College of Law, Bengaluru

ABSTRACT

Marital rape sits at an uneasy crossroads of criminal law, personal autonomy, and constitutional rights in India. Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita, 2023 (BNS), which carries forward Exception 2 to Section 375 of the Indian Penal Code, 1860 (IPC), continues to shield a husband from a rape charge for non-consensual sexual acts against his adult wife. This paper examines that exception through three lenses: the fundamental rights guaranteed under Articles 14, 15, 19, and 21 of the Constitution of India; the reasoning of the Supreme Court in cases such as Independent Thought v. Union of India and Justice K.S. Puttaswamy v. Union of India; and India's obligations under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Using a doctrinal and comparative method, the paper also looks at how the United Kingdom, the United States, Canada, and Australia dealt with the same question, to see what lessons India can draw. It argues for legislative reform that removes the exception while building in procedural safeguards against misuse, so that sexual autonomy within marriage receives the same statutory protection as it does outside marriage.

Keywords: Marital Rape, Sexual Autonomy, Bharatiya Nyaya Sanhita, Constitutional Rights, Article 21, CEDAW, Gender-Based Violence, Marital Rape Exception.

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1. INTRODUCTION

1.1 Background of the Study

Criminal law did not always exist to protect the person. For much of its history, it protected the state, property, and social order instead. In many legal traditions, a woman was treated as property that moved from her father's household to her husband's on marriage. Under the doctrine of coverture, a married woman's legal identity merged into her husband's, and with it went her independent rights, including control over her own body. Sexual offence law grew out of this soil: it was built less to protect a woman's bodily integrity and more to protect a man's property interest in her.

Over the past century, most legal systems have moved away from that starting point, toward individual dignity, liberty, and consent. India's criminal law has followed the same broad direction, but one colonial-era doctrine has survived every round of reform: the state still grants a husband legal immunity for non-consensual sexual acts against his wife.

1.2 Meaning and Concept of Marital Rape

Marital rape happens when a spouse forces sexual intercourse or another sexual act on the other spouse through force, coercion, threats, or an abuse of power. It differs from rape by a stranger in one important way: the survivor usually shares a home, finances, and a social circle with the person who assaulted her. That shared life adds its own layer of trauma and vulnerability. But the legal core of rape, the absence of free and voluntary consent, does not change simply because the two people are married. Retaining a marital rape exception depends entirely on a fiction: that marriage itself is a standing, ongoing consent to sex.

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1.3 Statement of the Problem

India's statute book contains a direct contradiction. Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita, 2023[1], which continues the approach of Exception 2 to Section 375 of the Indian Penal Code, 1860[2], says that sexual acts by a man with his wife, so long as she is eighteen or older, are not rape. So an act that would otherwise be treated as one of the most serious offences in the penal code, carrying a long prison term, becomes immune from prosecution purely because a marriage certificate exists. This leaves married women without the same statutory protection against forced sex that every other adult receives, and exposes them to ongoing physical and psychological harm without an equal remedy in law. The scale of the harm this immunity leaves unaddressed is considerable: government survey data collected between 2019 and 2021 recorded that six per cent of ever-married women reported having experienced sexual violence by a husband at some point in their lives, a figure that most researchers treat as an undercount given how reluctant survivors are to describe forced sex within marriage in those terms.[3]

2. **Research Questions**

- Does the marital rape exception under Section 63, Exception 2 of the Bharatiya Nyaya Sanhita, 2023, violate the fundamental rights guaranteed under Articles 14, 15, 19, and 21 of the Constitution of India?
- How have Indian courts dealt with bodily autonomy, consent, and marital privacy in recent cases?
- To what extent does keeping the marital rape exception put India in breach of its obligations under CEDAW and other international human rights instruments?
- What procedural, legislative, and institutional safeguards could accompany criminal law reform, so that the risk of evidentiary misuse is addressed without denying protection altogether?

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[1] Bharatiya Nyaya Sanhita, 2023, § 63, Exception 2.
[2] Indian Penal Code, 1860, § 375, Exception 2 (as originally enacted).

[3] International Institute for Population Sciences and Ministry of Health and Family Welfare, *National Family Health Survey (NFHS-5) 2019-21: India Fact Sheet* (IIPS 2021) <http://rchiips.org/nfhs/NFHS-5_FCTS/India.pdf> accessed 19 September 2026.

2.1 Objectives of the Study

- To trace the historical origin of the marital rape exception.
- To analyse the current statutory framework in India, comparing IPC Section 375 with BNS Section 63.
- To evaluate the key judicial decisions on bodily autonomy and marital privacy.
- To compare Indian criminal law against international human rights standards and against comparable common-law jurisdictions.
- To offer concrete legal, policy, and institutional recommendations for reforming Indian penal law.

2.2 Research Methodology

This paper follows a doctrinal method. Its primary sources are the Constitution of India, the Indian Penal Code, 1860, the Bharatiya Nyaya Sanhita, 2023, decisions of Indian courts, and international human rights instruments such as CEDAW. Its secondary sources include academic commentary, Law Commission reports, the recommendations of the Justice Verma Committee (2013), and comparative legal material from other common-law jurisdictions. The analysis throughout is comparative and evaluative rather than empirical.

2.3 Scope and Limitations

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This study is limited to the legal, constitutional, and institutional dimensions of the marital rape exception in India. It works through statutory text, constitutional provisions, case law, and treaty obligations. The social and psychological dimensions of domestic violence are discussed only as context for the legal argument, not as standalone empirical findings. The paper reflects the state of the law and of pending Supreme Court proceedings up to mid-2026.

3. HISTORICAL DEVELOPMENT AND CONCEPTUAL UNDERSTANDING OF MARITAL RAPE

3.1 Historical Origin of the Marital Rape Exception

The marital rape exception traces back to seventeenth-century English common law. Chief Justice Sir Matthew Hale set out the doctrine in his treatise, published after his death in 1736[4]: a husband could not be guilty of raping his wife, because by marriage she had given herself up to him in this respect, and that consent could not be taken back. The doctrine rested on two linked ideas. First, coverture: on marriage, a woman's legal identity was absorbed into her husband's, so she could not own property, sign contracts, or claim bodily autonomy separate from him. Second, and as a consequence, a husband could not "rape" his wife because she was, in the eyes of the law, an extension of him rather than a separate legal person capable of being wronged in that way.

3.2 Doctrine of Implied Consent

Hale's reasoning created a legal fiction: irrevocable implied consent. On this view, marriage itself was a permanent, standing consent to sex whenever the husband wanted it, a contractual obligation that could not be withdrawn while the marriage lasted. Modern contract law rejects exactly this kind of reasoning. Consent has to be free, informed, and open to withdrawal at any time. Treating marriage as a one-time, permanent waiver of bodily autonomy misapplies basic contract principles and ignores basic human rights. Sexual consent has to be given for each specific act, at the time it happens; a wedding vow cannot substitute for it.

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3.3 From Hale's Doctrine to Modern Human Rights Jurisprudence

The shift away from Hale's doctrine can be summarised as a shift along three axes. Where the old doctrine treated consent as permanent and implied by the marriage itself, modern jurisprudence treats consent as something that has to be continuous and can be withdrawn at any point. Where the old doctrine treated a wife's legal status as bound up with her husband's property, modern jurisprudence treats bodily autonomy as belonging to the individual alone. And where the old

[4]SIR MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN, VOL. 1, AT 629 (SOLLOM EMLYN ED., 1736).

doctrine gave husbands blanket statutory immunity, the direction of travel in most legal systems, and the argument of this paper, is toward equal criminal protection regardless of marital status.

3.4 Marital Rape as Gender-Based and Intimate Partner Violence

Sexual violence between intimate partners does not happen in a vacuum; it happens inside an existing power imbalance in the home. Survivors of marital rape often face repeated assault alongside physical abuse, emotional control, and financial dependence. They also carry a distinct set of burdens: fear of being isolated from family, concern for their children, and, often, nowhere else to go. Treating sexual assault inside a marriage as somehow less serious than the same act committed by a stranger ignores the particular harm of being violated inside the one place that is supposed to be safe. The scale of this pattern is borne out by research comparing official crime records with household survey data, which found that the number of women reporting sexual violence by a husband was roughly forty times the number reporting sexual violence by any other man, while fewer than one in a hundred of those marital incidents were ever brought to the police. That gap between the true incidence of the harm and its visibility to the criminal justice system is itself a consequence of a law that refuses to name the act as rape in the first place.[5]

3.5 Consent, Bodily Integrity, and Sexual Autonomy

Sexual autonomy is the right to decide, without force, coercion, or state interference, what happens to one's own body and one's own sexual and reproductive life. Bodily integrity means that a person's physical body stays free from violation without their consent. And consent, to count as consent at all, has to be given voluntarily and with full agency. When criminal law carves out a blanket exception for non-consensual sex based only on marital status, it takes away one group's control over their own bodies and treats marriage as a space where that control simply stops applying.

[5] Aashish Gupta, 'Reporting and Incidence of Violence Against Women in India' (r.i.c.e., 18 October 2014) <https://riceinstitute.org/research/reporting-and-incidence-of-violence-against-women-in-india/> accessed 19 September 2026.

4. LEGAL FRAMEWORK GOVERNING MARITAL RAPE IN INDIA

4.1 Marital Rape under the Indian Penal Code, 1860

The Indian Penal Code, enacted by the colonial administration in 1860, carried the legal assumptions of Victorian England into Indian statute law. Section 375 defined rape and set out clear statutory ingredients for non-consensual sexual acts. But the drafters wrote the common-law marital immunity directly into the statute, shielding husbands from criminal liability for non-consensual acts against their wives.

4.2 Exception 2 to Section 375, IPC

In its original form, Exception 2 to Section 375 of the IPC read[6]: "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape." This created a total exemption. Even where a husband used serious violence, threatened to kill his wife, or otherwise coerced her into sex, he could not be charged with rape. The law allowed prosecution only for lesser, related offences, such as causing hurt or using criminal force, which left the central wrong, the sexual violation itself, entirely unaddressed.

4.3 Bharatiya Nyaya Sanhita, 2023: Section 63, Exception 2

When India replaced the IPC with the Bharatiya Nyaya Sanhita, 2023, Parliament updated many definitions and procedures, but kept the marital rape exemption. Section 63 defines rape; Exception 2 provides[7]: "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 age threshold moved from fifteen to eighteen, bringing it in line with other child-protection statutes, but the core immunity for husbands of adult wives is untouched.

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[6]Indian Penal Code, No. 45 of 1860, INDIA Code (1860), § 375, Exception 2 (as originally enacted).

[5]Bharatiya Nyaya Sanhita, No. 45 of 2023, INDIA CODE (2023), § 63, Exception 2.

Provision	Textual Scope	Age Threshold	Current Status
Section 375, Exception 2 (IPC 1860)	Sexual acts by a man with his wife are exempt from a rape charge.	15 years (original text)	Repealed; superseded by the BNS 2023.
Section 63, Exception 2 (BNS 2023)	Sexual acts by a man with his wife are exempt from a rape charge.	18 years	In force; retains immunity for husbands of adult wives.

4.4 The Legal Position on Minor Wives

The age threshold in Exception 2 has moved several times: ten years in 1860, twelve in 1891, thirteen in 1925, and fifteen in 1940, where it stayed for decades. That first increase, from ten to twelve years in 1891, is generally traced by legal historians to the death of a child bride, aged about eleven, from injuries caused by her husband forcing consummation of the marriage, an episode that pushed the colonial legislature to act after three decades of complete inaction on the point. Even that early movement, however, was driven by the visible physical consequences of one case rather than by any wider acceptance that a wife's consent mattered on its own terms, and the age fixed by the exception continued to trail behind the general age of consent and the minimum age of marriage at almost every later stage of this history.[8] That created an open conflict with the Protection of Children from Sexual Offences Act, 2012[9], which treats every child under eighteen as incapable of giving legal consent. The Supreme Court resolved that conflict in Independent Thought v. Union of India (2017)[10], striking down the fifteen-year threshold and reading the age up to eighteen. Non-consensual sex with a wife under eighteen is now recognised as rape under Indian law. Wives who are eighteen or older remain outside that protection.

4.5 The Protection of Women from Domestic Violence Act, 2005

The Protection of Women from Domestic Violence Act, 2005 (PWDVA) offers civil, not criminal, remedies. Section 3 of the Act defines "sexual abuse" broadly, as any conduct of a sexual

[8] Gitanjali Ghosh and Shishir Tiwari, 'Decoding the Conundrum in Indian Legal Framework Governing Age of Consent and Age of Marriage' (2022) RMLNLU Journal 195, 196.
[9] Protection of Children from Sexual Offences Act, No. 32 of 2012, INDIA CODE(2012), § 2(d), read with §§ 3–6.
[10] *Independent Thought v. Union of India*, (2017) 10 SCC 800.

nature that abuses, humiliates, degrades, or violates a woman's dignity[11]. Under the PWDVA, a married woman can seek a protection order, a residence order, monetary relief, or compensation for sexual abuse within marriage. But the Act is civil in character. Breaching a protection order can attract criminal penalties under Section 31, yet the underlying sexual assault itself is never charged as rape under the BNS through this route.

4.6 Other Available Remedies

Beyond the PWDVA, a married woman facing sexual violence can turn to related provisions of the BNS[12]: Section 85 (cruelty by a husband or his relatives), Sections 115 and 117 (causing hurt or grievous hurt), and Section 74 (assault intended to outrage a woman's modesty). Under personal law, sexual violence within marriage is also a valid ground for judicial separation or divorce, for instance under Section 13 of the Hindu Marriage Act, 1955[13]. None of these remedies name and punish the non-consensual sexual act as rape; at best, they address its physical, mental, or matrimonial consequences. The practical reach of these alternatives is also limited by how few survivors use them at all: independent analysis of national survey data has found that as many as eighty seven per cent of married women who experience violence from a husband never approach any formal source of help, whether a lawyer, the police, or a doctor. Civil and matrimonial remedies can only assist the women who take that first step, so their availability on paper says little about how much protection they deliver in practice.[14]

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[11]Protection of Women from Domestic Violence Act, No. 43 of 2005, INDIA CODE (2005), § 3, Explanation II.
[12]Bharatiya Nyaya Sanhita, No. 45 of 2023,INDIA CODE (2023), §§ 74, 85, 115, 117; Indian Penal Code, No. 45 of 1860, INDIA CODE (1860), §§ 323, 325, 354, 498A.
[13]Hindu Marriage Act, No. 25 of 1955, INDIA CODE (1955), § 13(1)(ia).
[14] Feminism in India, 'Around 30% Of Married Indian Women Have Experienced Gender-Based Violence: Study' (Feminism in India) <https://feminisminindia.com/?p=154857> accessed 19 September 2026.

5. JUDICIAL APPROACH TOWARDS MARITAL RAPE IN INDIA

5.1 Independent Thought v. Union of India (2017)

In Independent Thought v. Union of India[15], the Supreme Court considered whether shielding sex with minor wives aged fifteen to eighteen under Exception 2 could stand constitutionally. The Court struck down that part of the exception, holding that carving girls who were married out of the general protection of rape law violated their rights to bodily integrity, equality, and health under Articles 14, 15, and 21. Justice Madan B. Lokur observed that marital status cannot strip a child of her constitutional rights[16]. The Court confined its ruling to minor wives, but its underlying reasoning, that bodily autonomy is central to personal liberty and does not disappear on marriage, reaches further than that narrow holding. Once the age threshold moved to eighteen, the exception for minor wives was closed; the exception for adult wives, and the broader constitutional question it raises, was left for another day.

5.2 Justice K.S. Puttaswamy v. Union of India (2017)

In the nine-judge bench decision in Justice K.S. Puttaswamy v. Union of India[17], the Supreme Court recognised privacy as a fundamental right under Article 21. The Court was clear that privacy is not simply a spatial idea tied to the home; it is a personal right rooted in autonomy, dignity, and bodily sovereignty[18]. That reasoning cuts directly against arguments for "marital privacy" as a shield: real constitutional privacy protects the individual inside the home, but it does not create a zone where domestic violence or forced sex can happen free of legal consequence simply because the door is closed.

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5.3 Karnataka High Court: Hrishikesh Sahoo v. State of Karnataka (2022)

In Hrishikesh Sahoo v. State of Karnataka[19], the Karnataka High Court dealt with a husband charged under Section 376 of the IPC for allegedly violent, non-consensual sexual acts against his

[15] *Independent Thought v. Union of India*, (2017) 10 SCC 800.
[16] *Independent Thought v. Union of India*, (2017) 10 SCC 800, ¶¶ 49–51 (Lokur, J.).
[17] *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1, 1; AIR 2017 SC 4161.
[18] *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1, ¶¶ 297–98 (Chandrachud, J.).
[19] *Hrishikesh Sahoo v. State of Karnataka*, 2022 LiveLaw (Kar) 89 (Karn. H.C. Mar. 23, 2022); *Hrishikesh Sahoo v. State of Karnataka*, SLP (Crl.) Nos. 4063–4064 of 2022 (India).

wife. He claimed complete immunity under Exception 2. Justice M. Nagaprasanna rejected the plea to quash the charge, holding that marital status cannot shield acts of sexual violence, and observed, in substance, that an act of rape does not stop being rape because the man who commits it happens to be the woman's husband. The High Court held that marriage does not turn a husband into a master, and does not license sexual assault. The Supreme Court later stayed the criminal proceedings, leaving the larger constitutional question pending before it.

5.4 Delhi High Court Split Verdict: RIT Foundation v. Union of India (2022)

In May 2022, a Division Bench of the Delhi High Court delivered a split verdict in RIT Foundation v. Union of India[20], a writ petition challenging the constitutional validity of Exception 2 to Section 375 of the IPC. Justice Rajiv Shakdher held the exception unconstitutional, finding it violated Articles 14, 15, 19(1)(a), and 21, and observed that marital status does not take away a woman's right to say no to non-consensual sex. Justice C. Hari Shankar disagreed, holding that criminalising marital rape was a matter of legislative policy rather than judicial intervention, and pointing to the relational dynamics of marriage and the risk of evidentiary misuse as reasons for caution. Given the split, the Court granted a certificate of fitness to appeal to the Supreme Court.

5.5 Madhya Pradesh High Court on Unnatural Sexual Acts (2024)

In Manish Sahu v. State of Madhya Pradesh (2024)[21], the Madhya Pradesh High Court quashed a Section 377 charge against a husband accused of forcing unnatural sexual acts on his wife, holding that because the amended definition of rape already covers such acts, and because Exception 2 removes the requirement of the wife's consent for those acts, the absence of consent "loses its importance" within a subsisting marriage. If anything, this shows the marital rape exception being read broadly rather than narrowly: it extends the husband's immunity beyond ordinary intercourse to unnatural sexual acts, deepening rather than narrowing the protection gap for adult wives. It underlines how fragmented and, on this reading, how wide the exception's practical reach has become.

[20] *RIT Foundation v. Union of India*, 2022 SCC OnLine Del 1404.
[21] *Manish Sahu v. State of Madhya Pradesh*, 2024 SCC OnLine MP 2603 (order dated May 1, 2024).

5.6 Pending Supreme Court Proceedings

The Supreme Court is currently examining the constitutional validity of the marital rape exception under both the IPC and the BNS[22], in a batch of matters that bring together the Delhi High Court's split verdict, the Karnataka High Court ruling, and independent public interest petitions. The central questions before the Court are whether Exception 2 to Section 63 of the BNS violates Articles 14, 15, and 21; whether the judiciary can strike the exception down without, in effect, legislating a new offence; and whether marital privacy can override bodily autonomy and dignity within a domestic partnership. The proceedings have continued to move through 2026. In September 2026, a three judge Bench led by the Chief Justice of India took up the batch for scheduling, heard preliminary submissions on the Union government's position, and indicated that the matter would be posted for final hearing shortly thereafter. Nearly a decade after Independent Thought, adult wives are therefore still waiting for an authoritative ruling on a question the Court has itself repeatedly described as going to the core of equality and bodily autonomy.[23]

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[22]See, e.g., *Marital Rape: Supreme Court to Hear Pleas on Validity of Exception to Section 375 IPC/Section 63 BNS*, W.P. (C) & Connected SLPs (Sup. Ct. India) (heard in part Oct. 2024).

[23] 'Marital Rape Case: Supreme Court to Decide Hearing Date on September 9' *Bar and Bench* (7 September 2026) <https://www.barandbench.com/news/litigation/marital-rape-case-supreme-court-to-decide-hearing-date-on-september-9> accessed 19 September 2026.

6. CONSTITUTIONAL ANALYSIS OF MARITAL RAPE

6.1 Article 14: Right to Equality

Article 14 guarantees equality before the law and equal protection of the laws[24]. The legislature may draw reasonable classifications, but any classification has to satisfy two conditions: it must rest on an intelligible differentia, and that differentia must have a rational connection to the purpose of the statute. Applying that test here, the marital rape exception splits women into two classes, unmarried women, who have the full protection of rape law, and married women, who do not have it against their own husbands. The classification fails both limbs of the test. There is no intelligible reason, tied to any legitimate state interest, to treat non-consensual sexual violence differently depending on marital status; and shielding forced sex does nothing to serve the actual purpose of a rape statute, which is to punish sexual assault.

6.2 Article 15: Prohibition of Discrimination

Article 15(1) forbids the State from discriminating against any citizen on grounds of religion, race, caste, sex, or place of birth, while Article 15(3) allows special provisions that favour women and children[25]. The marital rape exception cuts against both. It keeps alive the older idea that a woman's legal agency transfers to her husband on marriage, and instead of protecting women as Article 15(3) intends, it hands male spouses a statutory privilege that has no equivalent for wives.

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6.3 Article 19: Freedom and Sexual Agency

Article 19(1)(a) protects freedom of speech and expression[26], and modern constitutional reasoning reads personal self-expression as extending to bodily agency and sexual autonomy. Forcing a person into non-consensual sex violates that freedom of self-expression and personal agency directly. The right to control one's own physical intimacy is part of that freedom, and marriage does not switch it off.

[24] INDIA CONST. art. 14.
[25] INDIA CONST. art. 15.
[26] INDIA CONST. art. 19(1)(a).

6.4 Article 21: Privacy, Dignity, and Bodily Autonomy

Article 21 guarantees that no person shall be deprived of life or personal liberty except by procedure established by law[27]. The Supreme Court has repeatedly read this to include human dignity, bodily integrity, personal autonomy, self-determination, and privacy, most significantly through the Puttaswamy line of cases discussed above[28]. Denying a married woman criminal protection against non-consensual sex therefore sits uneasily with Article 21 on several fronts at once: it degrades dignity, violates physical integrity, and strips away bodily autonomy. Under Puttaswamy, privacy belongs to the individual and not to the marriage as an institution, so it cannot be used to shield non-consensual acts or intimate partner violence that happens to take place at home.

6.5 Constitutional Morality and the Institution of Marriage

Those who oppose criminalisation often argue that keeping the exception protects the institution of marriage and keeps the state out of domestic life. But the Supreme Court has repeatedly held that constitutional morality takes precedence over social morality where the two conflict. Constitutional morality puts individual rights, equality, liberty, and dignity ahead of social convention. A marriage held together by legal immunity for non-consensual sexual violence does not reflect the constitutional values of equal partnership, mutual respect, and dignity that the Constitution is meant to protect.

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6.6 Separation of Powers and the Role of the Judiciary

A recurring theme in the Supreme Court proceedings is separation of powers. Those opposed to judicial intervention argue that removing the exception is a policy choice for Parliament, not the courts. But the judiciary has a constitutional duty to strike down provisions that violate fundamental rights. Reading down or striking down an unconstitutional exception is not the same as writing a new offence into the criminal law; it simply removes an unconstitutional immunity and lets the existing prohibition on rape apply equally to every citizen.

[27] INDIA CONST. art. 21.
[28] *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1, ¶¶ 297–98 (Chandrachud, J.).


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7. INTERNATIONAL HUMAN RIGHTS LAW AND INDIA'S OBLIGATIONS

7.1 CEDAW and the Elimination of Discrimination Against Women

India ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1993[29]. CEDAW requires states to take every appropriate measure, including legislative action, to eliminate discrimination against women in every area of life. Article 1 defines discrimination against women as any distinction, exclusion, or restriction based on sex that impairs their human rights and fundamental freedoms. Keeping a statutory immunity for marital rape sits uneasily with that obligation, because it denies married women equal statutory protection against sexual violence.

7.2 CEDAW General Recommendations 19 and 35

The CEDAW Committee has addressed gender-based violence directly in two General Recommendations. General Recommendation No. 19 (1992)[30] treated gender-based violence as a form of discrimination that impairs women's enjoyment of their fundamental rights, and called on states to ensure their penal laws effectively punish family violence, including marital rape. General Recommendation No. 35 (2017)[31] updated that guidance, recognising the prohibition of gender-based violence as a principle of customary international law, and called on states to repeal any exemption that shields marital rape from prosecution. The Committee has pressed this point directly against India on more than one occasion. In its 2014 concluding observations on India, it urged Parliament to amend the criminal law so that marital rape is defined as a criminal offence, repeating a call it had already made in its earlier concluding observations on India in 2007. That the same recommendation has now been made twice, without legislative follow through, illustrates how far domestic law still lags behind India's own commitments under the Convention.[32]

7.3 Declaration on the Elimination of Violence Against Women

[29]Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature Mar. 1, 1980, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981); India ratified July 9, 1993.
[30]CEDAW Comm., General Recommendation No. 19: Violence Against Women, 11th Sess. (1992).
[31]CEDAW Comm., General Recommendation No. 35 on Gender-Based Violence Against Women, Updating General Recommendation No. 19, U.N. Doc. CEDAW/C/GC/35 (July 26, 2017).
[32] Committee on the Elimination of Discrimination against Women, 'Concluding Observations on the Combined Fourth and Fifth Periodic Reports of India' (2014) UN Doc CEDAW/C/IND/CO/4-5, para 11(c).

The UN General Assembly's Declaration on the Elimination of Violence Against Women (1993) defines violence against women to include physical, sexual, and psychological violence occurring within the family, and names marital rape specifically[33].

7.4 The State's Duty of Due Diligence

Under international human rights law, states owe a duty of due diligence: to prevent, investigate, punish, and provide redress for gender-based violence, whether it is committed by state officials or by private individuals. By keeping a statutory exception that blocks investigation and prosecution of non-consensual sex within marriage, India falls short of that due diligence obligation.

7.5 International Law and Indian Constitutional Rights

The Supreme Court has already shown that international conventions consistent with fundamental rights can shape domestic legal interpretation. In Vishaka v. State of Rajasthan (1997)[34], the Court relied on CEDAW to lay down guidelines on workplace sexual harassment in the absence of dedicated legislation. The same reasoning supports reading India's CEDAW commitments together with Articles 14 and 21 to support removing the marital rape exception.

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[33]Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. Doc. A/RES/48/104, art. 2(a) (Dec. 20, 1993).
[34]*Vishaka v. State of Rajasthan*, (1997) 6 SCC 241.

8. ARGUMENTS FOR AND AGAINST CRIMINALISATION OF MARITAL RAPE

8.1 Arguments Supporting Criminalisation

- Bodily autonomy and consent: sexual agency belongs to the individual and is not surrendered on marriage. Consent has to be voluntary, active, and revocable for every act.
- Equality before the law: a woman should not lose equal statutory protection against sexual assault simply because she is married.
- Protection from severe harm: intimate partner sexual violence causes lasting physical and psychological trauma that criminal law should recognise and punish.
- International standards: aligning domestic law with CEDAW and comparable global standards fulfils India's international commitments.

8.2 Arguments Against Criminalisation

- Preserving the institution of marriage: opponents argue that introducing sexual assault charges within an ongoing marriage could undermine reconciliation and push marriages toward breakdown.
- Marital privacy: some argue that intimate domestic relationships need space free from state surveillance and law enforcement.
- Legislative competence: critics argue that reforming this area of law involves complex social trade-offs that Parliament, not the courts, should weigh.

8.3 Consent and the Institution of Marriage

A central disagreement is over how consent should work inside a marriage. Opponents of reform argue that marital intimacy involves emotional dynamics that differ from non-marital relationships. Legal scholars respond that recognising a spouse's right to refuse consent strengthens, rather than weakens, marriage: a partnership built on mutual respect and voluntary consent is a sturdier foundation for a lasting relationship than one held together by an expectation of forced compliance.

8.4 Concerns Regarding Misuse and Evidence

Critics regularly point to the pattern of litigation under Section 498A of the IPC (now Section 85 of the BNS)[35] as a warning about potential misuse of criminal law in bitter matrimonial disputes, and to the practical difficulty of proving a lack of consent within an ongoing intimate relationship, where physical evidence may not exist. These are real procedural concerns and deserve careful drafting. But legal commentators point out that the possibility of misuse exists across many criminal laws and has never, on its own, been treated as a reason to withhold basic protection against serious physical violence. The ordinary standard of proof beyond reasonable doubt would apply to marital rape prosecutions exactly as it does to any other criminal charge, and that standard is itself a safeguard against false accusations.

8.5 Legislative Competence and Policy Considerations

The Union Government has told the Supreme Court that criminalising marital rape needs wide legislative consultation with state governments, legal experts, and civil society.[36] Structured legislative reform is certainly one route to build in procedural safeguards. But a long wait for Parliament to act does not, on its own, justify continuing to enforce a statutory provision that violates fundamental rights in the meantime. This is not the first time the question has gone to a specialised body for advice. The Law Commission of India, in its 172nd report on the review of rape laws in 2000, declined to recommend deleting the exception, reasoning that doing so would amount to excessive interference with the marital relationship, while the Justice Verma Committee took the opposite view in 2013 and recommended that the exception be removed. The Parliamentary Standing Committee on Home Affairs that examined the resulting Bill nonetheless sided with the more cautious position, warning that criminalisation could put the family system under strain, so Parliament has now had the question before it in one form or another for over two decades without resolving the underlying disagreement.[37]

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[35]Indian Penal Code, No. 45 of 1860, INDIA CODE (1860), § 498A; Bharatiya Nyaya Sanhita, No. 45 of 2023, INDIA CODE (2023), § 85.
[36]Preliminary Counter Affidavit on Behalf of Union of India, *Hrishikesh Sahoo v. State of Karnataka*, SLP (Crl.) Nos. 4063–4064 of 2022 (Sup. Ct. India filed Oct. 3, 2024).
[37] Vikas Pahwa, 'Marital Rape: India Lags Behind in the Law' *Bar and Bench* (25 June 2016) <https://www.barandbench.com/columns/marital-rape-india-lags-law> accessed 19 September 2026.

9. COMPARATIVE STUDY OF MARITAL RAPE LAWS

Common-law jurisdictions moved away from the marital rape exception over roughly two decades, between the mid-1970s and the early 1990s. The United Kingdom abolished it judicially in 1991; the United States did so state by state through the 1970s, 80s and into 1993; Australia began with South Australia in 1976 and completed the process across its states and territories by the 1990s; and Canada replaced its rape provisions with gender-neutral sexual assault offences in 1983. India, by contrast, still retains the exception in the BNS today.

9.1 United Kingdom

The United Kingdom, the origin of Hale's doctrine, formally abolished marital rape immunity in the House of Lords decision in R v. R (1991)[38]. Lord Keith of Kinkel held that Hale's doctrine had no place in modern law[39] and observed that marriage in modern times is a partnership of equals, not one in which the wife is subservient to her husband. Parliament later codified the judicial abolition through the Criminal Justice and Public Order Act 1994[40].

9.2 United States of America

In the United States, marital rape exceptions came down state by state between the 1970s and the 1990s, through both court rulings and legislative amendments. In People v. Liberta (1984)[41], the New York Court of Appeals struck down that state's marital rape exemption, holding that a married woman has the same right to control her own body as an unmarried woman. By 1993, every one of the fifty states had repealed its blanket marital rape exemption, though some retained narrower procedural distinctions.

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9.3 Canada

Canada reformed its criminal law in 1983, replacing the old rape provisions with gender-neutral sexual assault offences under the Criminal Code. Section 278 of the Code now makes clear

[38] *R v. R*, [1991] UKHL 12; [1992] 1 A.C. 599.
[39] *R v. R*, [1991] UKHL 12; [1992] 1 A.C. 599 (Lord Keith of Kinkel).
[40] Criminal Justice and Public Order Act 1994 (U.K.), § 142.
[41] *People v. Liberta*, 64 N.Y.2d 152, 474 N.E.2d 567 (1984).

that marriage is no defence to, and does not imply consent to, a sexual assault charge[42]. Sexual assault within marriage is judged under the same evidentiary standards as sexual assault outside it, based on whether there was voluntary agreement at the time of the act.

9.4 Australia

Australia abolished marital rape immunity through state and territorial legislative reform between 1976 and the early 1990s. South Australia was the first to change its law, in 1976, and full abolition followed across every state. That first South Australian reform was, however, only partial: it removed the immunity solely where the spouses were living apart or where other aggravating circumstances were present, so that a husband and wife still living together remained largely outside its reach for a further sixteen years. It took a second round of reform in 1992 to remove that residual requirement altogether, after which no Australian jurisdiction retained any statutory distinction between rape inside and outside marriage.[43] Today, Australian criminal codes treat non-consensual sex within marriage under the same sexual offence provisions that apply to everyone else.

9.5 Comparative Lessons for India

Taken together, these jurisdictions show a consistent global move away from colonial doctrines of marital immunity and toward protecting individual bodily autonomy. None of them saw marriage collapse as a social institution as a result, and none saw its courts overwhelmed by fraudulent litigation. What they show instead is that ordinary criminal evidentiary rules are enough to try marital rape fairly, without a separate immunity built into the statute.

[42]Criminal Code, R.S.C. 1985, c. C-46, § 278.
[43] Lisa Featherstone and Alexander George Winn, 'Marital Rape and the Marital Rapist: The 1976 South Australian Rape Law Reforms' (2018) 27 Feminist Legal Studies 57, 58.

10. CRITICAL ANALYSIS AND RECOMMENDATIONS

10.1 The Need for Legal Reform

Keeping the marital rape exception leaves Indian law pulling in two directions at once. Constitutional jurisprudence treats dignity, privacy, and bodily autonomy as fundamental rights, while the criminal statute books continue to deny married adult women protection against forced sex. Reform is needed simply to keep the statute book internally consistent, to bring domestic law in line with India's international commitments, and to give effect to the constitutional rights the courts have already recognised.

10.2 Removal or Modification of the Marital Rape Exception

Parliament should amend Section 63 of the Bharatiya Nyaya Sanhita, 2023, by deleting Exception 2 entirely. In the alternative, the Supreme Court should strike the exception down as unconstitutional under Articles 14 and 21. Removing the exception would fold marital sexual assault into the general law on sexual offences, so that consent, rather than marital status, becomes the standard that decides whether a prosecution can proceed.

10.3 Protection of Survivors and Procedural Safeguards

To meet concerns about procedural misuse without denying protection to survivors, reform should include clear procedural safeguards:

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- In-camera proceedings for marital sexual assault cases, to protect the privacy of both parties.
- A clear distinction between civil marital-dispute counselling and criminal prosecution for violent offences, so that one process is not used to substitute for the other.
- Preliminary investigation by a senior police officer, such as a Deputy Superintendent of Police, before formal charges are filed in complex domestic cases, in line with the

oversight already contemplated under Section 173 of the Bharatiya Nagarik Suraksha Sanhita, 2023.[44]

10.4 Strengthening Support Systems and Access to Justice

- Specialised medical, psychological, and legal support services for survivors of intimate partner sexual violence.
- More state-funded emergency shelters and crisis intervention centres.
- Legal aid, so that economically dependent married women can safely access judicial remedies. The institutional infrastructure that this kind of support depends on is already under strain: reporting on India's One Stop Centre scheme, the government's own flagship support service for survivors of violence, has documented chronic staff shortages and inconsistent functioning across the centres that are meant to provide exactly this kind of medical, legal, and psychological assistance. Extending criminal protection to adult wives without also addressing these gaps in service delivery would leave many survivors with a right on paper but nowhere reliable to turn in practice.[45]

10.5 Legislative and Institutional Measures

- Regular sensitivity training for police officers, prosecutors, and judicial officers on handling domestic and sexual violence cases.
- Public awareness campaigns that frame consent as a basic requirement of an equal marital partnership.
- Alignment of related statutes, including the Bharatiya Sakshya Adhiniyam, 2023, so that evidentiary and protection rules are consistent across domestic violence law and general criminal law.

[44]Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, INDIA CODE (2023), § 173.

[45] N Suresh, 'One Stop, Many Challenges: Sakhi Centres Struggle to Support Women Survivors of Violence' *IndiaSpend* (5 May 2023) <https://www.indiaspend.com/governance/one-stop-many-challenges-sakhi-centres-struggle-to-support-women-survivors-of-violence-861666> accessed 19 September 2026.

11. CONCLUSION

Marital rape remains a genuinely difficult question in Indian law, sitting at the meeting point of marriage, consent, individual autonomy, constitutional equality, and protection from sexual violence. The old idea that marriage creates a standing consent to sex has been steadily undermined by developments in constitutional and human rights law, and the recognition of privacy, dignity, and bodily autonomy as core individual rights has sharpened the debate around the exception. Indian law has already moved once, through Independent Thought v. Union of India (2017), which extended protection to wives under eighteen. But the exception still applies in full to adult wives under Section 63, Exception 2 of the Bharatiya Nyaya Sanhita, 2023, and that continuing gap raises real questions about equality before the law, personal liberty, and how much weight marital status should carry in deciding who gets criminal protection against sexual violence.

The judicial record shows competing views rather than a settled answer. The Karnataka High Court and the Delhi High Court have taken different approaches to how marriage and sexual consent should interact, and the Supreme Court's ongoing examination of the exception shows that its constitutional validity, and its consequences, are still open questions that need an authoritative answer. The Union Government's position, that reform belongs to Parliament, keeps the relationship between the legislature and the judiciary firmly in view.

From an international standpoint, CEDAW and the work of its Committee offer a useful framework for thinking about discrimination and violence against women, and the principles of due diligence, equality, and protection from gender-based violence bear directly on how India's legal framework should be assessed. Developments abroad, where several jurisdictions have removed their own marital rape exemptions, show a range of workable ways to deal with non-consensual sex within marriage.

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None of this means the arguments on the other side can simply be dismissed. Concerns about evidentiary standards, procedural safeguards, misuse of criminal law, and the effect on marital relationships deserve to be taken seriously. But those concerns have to be weighed against the need to protect the consent, dignity, and bodily integrity of married women, and existing civil and criminal remedies should be judged honestly on how far they actually reach and how accessible they really are in practice.

What this points to is a reform that combines constitutional principle, legislative action, international human rights standards, and support for survivors, rather than any one of these alone. Reform should state plainly what the legal consequences of non-consensual sex within marriage are, build in appropriate procedural safeguards, and make sure survivors can actually access justice and support. The underlying goal is a legal framework that recognises individual autonomy while taking the legitimate institutional and practical concerns around criminal law reform seriously.



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