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Marital Rape in India: A Critical Examination of the Legal Framework, Criminalisation, Constitutional Rights and the Need for Legislative Reform

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Abstract

The exclusion of non-consensual sexual intercourse by a husband with his adult wife from the general definition of rape remains one of the most contested questions in Indian criminal and constitutional law. Although the Bharatiya Nyaya Sanhita, 2023 (BNS) replaced the Indian Penal Code, 1860 (IPC), it retained the marital rape exception in section 63, Exception 2. This article examines whether that exception can be reconciled with constitutional guarantees of equality, dignity, bodily integrity, privacy and personal liberty under Articles 14, 15 and 21 of the Constitution of India. It analyses the statutory framework, including section 67 BNS and the Protection of Women from Domestic Violence Act 2005, and evaluates the split decision of the Delhi High Court in RIT Foundation v Union of India, the Supreme Court’s decision in Independent Thought v Union of India, and related constitutional jurisprudence. It also considers comparative developments in the United Kingdom, Canada and South Africa, alongside international human-rights standards. The article argues that marital status is not a principled basis for withholding the ordinary criminal-law protection of sexual autonomy. It develops a ‘consent-continuity fallacy’ critique: consent to marriage cannot be transformed into irrevocable or perpetual consent to sexual activity. At the same time, criminalisation must be accompanied by fair-trial safeguards, survivor-sensitive procedures and careful evidentiary rules. The article concludes that Parliament should remove the marital exception and adopt a consent-centred, gender-just framework, while the constitutional challenge pending before the Supreme Court makes the issue especially immediate.

Keywords: Marital rape; consent; bodily autonomy; Article 14; Article 21; Bharatiya Nyaya Sanhita 2023; domestic violence; gender justice; criminal law reform.

1. Introduction

The central question in the marital rape debate is straightforward: can a person's decision to marry be treated as advance and continuing consent to sexual intercourse, even when that person later refuses? Indian criminal law continues to answer this question differently depending on marital status. Section 63, Exception 2 of the Bharatiya Nyaya Sanhita 2023 provides that sexual intercourse or sexual acts by a man with his own wife, where the wife is not under eighteen years of age, do not constitute rape. The provision preserves a distinction between conduct outside marriage and substantially similar conduct within marriage.[1]

This distinction is difficult to reconcile with a constitutional order founded on equal citizenship and individual dignity. Marriage creates a legally recognised relationship; it does not transfer ownership of one spouse's body to the other. Nor does it extinguish the capacity to refuse sexual activity. Consent is an act-specific and continuing choice, not a status that can be permanently presumed from a marriage certificate.

The issue is not whether marriage deserves legal protection. It does. The issue is whether protecting marriage requires the State to withhold the ordinary criminal-law label and remedy from a woman subjected to non-consensual sexual intercourse by her husband. A legal system can protect family life while also recognising that violence within the family is violence. Constitutional privacy cannot become a shield for coercion.

The issue has acquired renewed urgency because the BNS, which came into force on 1 July 2024, retained the exception despite extensive debate during criminal-law reform. As at the research cut-off of 18 November 2026, the Supreme Court proceedings challenging the corresponding IPC and BNS exceptions had been listed for final hearing on 18 November 2026. The listing itself is not a final ruling; the legal position in this article therefore treats the constitutional challenge as pending unless and until an authoritative judgment is verified.

This article proceeds in five stages. It first explains the present statutory framework. It then reviews the constitutional and judicial foundations of sexual autonomy and equality. It next tests the arguments supporting retention of the exception, before comparing selected foreign jurisdictions and international standards. Finally, it proposes a reform model that recognises non-consensual sex within marriage as rape while preserving ordinary criminal-procedure protections.

2. Literature Review

1. Bharatiya Nyaya Sanhita, 2023, 45 of 2023, (India), 2023, 63, Exception 2 <https://prsindia.org/files/bills_acts/bills_parliament/2023/Bharatiya_Nyaya_Sanhita,_2023.pdf> accessed 2026-11-19.

2.1 Historical and doctrinal foundations

The marital rape exception is commonly traced to the common-law proposition associated with Sir Matthew Hale that a husband could not be guilty of raping his wife because marriage was understood to involve irrevocable consent. The proposition reflected a historical model of marriage in which a wife's legal identity and sexual autonomy were subordinated to the husband. Modern constitutionalism rejects the premise that marriage creates a proprietary entitlement over another person.

Feminist legal scholarship has criticised the separation between public violence and private family life. The public/private divide can make violence in the home less visible to criminal law, even though the home is often where a person is most vulnerable. The Indian debate also raises a question of legal recognition: a woman may obtain protection from domestic abuse, yet the law may refuse to classify forced intercourse by her cohabiting husband as rape.

2.2 Indian reform debate

The Justice J S Verma Committee, constituted after the 2012 Delhi gang rape, recommended removing the exception for marital rape. Its report rejected the idea that marriage should be treated as an irrevocable consent to sexual activity. The Committee's recommendation was not adopted in the subsequent criminal-law amendments. The continued presence of the exception in the BNS demonstrates that replacement of the IPC did not itself amount to substantive decolonisation of the law.[2]

The Union Government has previously argued that existing provisions dealing with cruelty, sexual offences in particular circumstances and domestic violence provide adequate remedies, and has expressed concern about the social consequences of criminalising marital rape. This position deserves examination, but it does not answer the constitutional question: whether the State may exclude a category of non-consensual sexual conduct from the offence of rape solely because of the relationship between the parties.[3]

2.3 Research gap and contribution

Much public discussion frames the debate as a binary choice between women's rights and protection of marriage, or between criminalisation and misuse of criminal law. This article seeks to move beyond that binary. Its contribution is threefold. First, it analyses the marital exception as a status-based rule that changes the legal meaning of the same non-consensual conduct. Secondly, it distinguishes criminal recognition of rape from the availability of other remedies, showing why cruelty and civil protection orders are not necessarily substitutes. Thirdly, it

2. Justice J S Verma Committee, Report of the Committee on Amendments to Criminal Law (23 January 2013) paras 72–73.
3. Union of India, Ministry of Home Affairs, Rajya Sabha Unstarred Question No 1825, 'Criminalisation of Marital Rape' (11 December 2024).

proposes a reform model that combines equal substantive protection with safeguards that apply to all sexual-offence prosecutions.

The article's central concept is the 'consent-continuity fallacy': the assumption that consent to the legal relationship of marriage can be treated as consent to future sexual acts, irrespective of later refusal. The fallacy is both doctrinally unsound and constitutionally problematic because it converts a relationship status into a continuing limitation on bodily autonomy.

3. Research Questions and Objectives

3.1 Research questions

- Whether section 63, Exception 2 BNS is compatible with Articles 14, 15 and 21 of the Constitution.
- Whether consent to marriage can lawfully be treated as continuing consent to sexual intercourse.
- Whether existing remedies under the BNS and the Protection of Women from Domestic Violence Act 2005 adequately address non-consensual intercourse within marriage.
- What lessons can India draw from the abolition of marital rape immunity in selected common-law jurisdictions.
- What legislative safeguards can protect survivors while ensuring due process and fair-trial rights.

3.2 Objectives

The objectives are to explain the current law accurately; assess the constitutional validity of the marital exception; examine the strengths and limitations of judicial reasoning; compare selected international approaches; and recommend a coherent, consent-based legislative framework.

4. Research Methodology

This is a doctrinal and comparative legal study. It analyses primary sources including the Constitution of India, the BNS 2023, the Protection of Women from Domestic Violence Act 2005, reported judgments of the Supreme Court and High Courts, and relevant international instruments. Secondary materials include committee reports, government statements, official statistical publications and selected legal scholarship. The comparative method focuses on the United Kingdom, Canada and South Africa because each offers a useful example of the rejection of spousal immunity or the recognition of sexual autonomy within marriage.

The study is qualitative. It does not claim to establish the prevalence of marital rape through original fieldwork. National Family Health Survey data on spousal violence are used only as contextual evidence and are not treated as a direct measurement of the prevalence of conduct legally classified as marital rape. The article distinguishes binding law from persuasive authority, government policy statements, scholarly commentary and media reports. The legal position is

time-sensitive; the Supreme Court listing dated 18 November 2026 must be checked against the Court's subsequent order before journal submission.

5. The Indian Legal Framework

5.1 Section 63 BNS and the marital rape exception

Section 63 BNS defines rape through specified sexual acts committed in circumstances including against a woman's will, without her consent, or under other legally defined conditions. Exception 2, however, excludes sexual intercourse or sexual acts by a man with his own wife where she is not under eighteen years of age. The exception is therefore not a general rule that consent is irrelevant within marriage; rather, it removes the relevant conduct from the definition of rape for the category of adult wives.[4]

The age threshold matters. In Independent Thought v Union of India, the Supreme Court read down the former IPC exception so that sexual intercourse with a wife below eighteen years of age would constitute rape. The BNS now expressly sets eighteen as the threshold. The protection of children must not be confused with the separate question concerning adult wives. The constitutional challenge discussed here concerns the continued immunity in relation to an adult wife.[5][6][7]

5.2 Section 67 BNS: wife living separately

Section 67 BNS criminalises sexual intercourse by a husband with his wife without her consent when she is living separately, whether under a decree of separation or otherwise. It carries imprisonment of not less than two years and up to seven years, together with liability to fine. This provision is significant because it recognises that marriage does not invariably neutralise the absence of consent. Yet its operation is limited by the requirement of living separately and it does not create a general offence for non-consensual intercourse within an ongoing shared marital household.[8]

5.3 Cruelty under sections 85 and 86 BNS

Sections 85 and 86 BNS address cruelty by a husband or his relatives and define forms of cruelty. Depending on the facts, conduct involving sexual violence may form part of a broader pattern of cruelty. However, cruelty is not equivalent to rape. Its elements, evidentiary focus and legal consequences differ. A prosecution for cruelty cannot fully substitute for recognition of the sexual violation itself.[9]

4. Bharatiya Nyaya Sanhita 2023 , s 63.
5. Independent Thought v Union of India (2017) 10 SCC 800.
6. Independent Thought v Union of India (2017) 10 SCC 800.
7. Independent Thought (n 8).
8. Bharatiya Nyaya Sanhita 2023 , s 67.
9. Bharatiya Nyaya Sanhita 2023 , ss 85–86.

5.4 Protection of Women from Domestic Violence Act 2005

Section 3 of the Protection of Women from Domestic Violence Act 2005 includes sexual abuse within the definition of domestic violence. The explanation includes conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of a woman. The Act enables a Magistrate to grant civil and protective relief, including protection orders, residence orders, monetary relief, custody orders and compensation, subject to the statutory requirements.[1011]

These remedies are important and should remain available. But the Act is principally a protective civil framework; it does not make every instance of sexual abuse within marriage the criminal offence of rape. The existence of a civil remedy does not logically justify withholding a criminal-law remedy where the elements of a serious sexual offence are otherwise established.

5.5 The distinction between legal remedies

The current framework is therefore fragmented. Section 67 BNS addresses non-consensual intercourse with a wife living separately. Sections 85–86 address cruelty. The Domestic Violence Act provides protective and monetary remedies for sexual abuse and other domestic violence. These provisions can overlap, but they are not interchangeable. The central reform question is whether the general offence of rape should apply without a marital-status exception, leaving the prosecution to prove the elements of the offence under ordinary evidentiary and procedural rules.

6. Constitutional Analysis

6.1 Article 14: equality and manifest arbitrariness

Article 14 guarantees equality before the law and equal protection of the laws. The marital exception creates a classification based on the relationship between the accused and the complainant. The same non-consensual sexual act may fall within the definition of rape when committed by a stranger but be excluded when committed by a husband against his adult wife. The State must identify a constitutionally adequate justification for that difference.[1213]

The argument against the exception is that marital status has no rational connection with the need to protect sexual autonomy. Marriage may create mutual rights and obligations, but it cannot make a refusal legally irrelevant. The classification also risks being manifestly arbitrary because it treats the victim's legal status, rather than the absence of consent and the nature of the act, as decisive.

The counterargument is that marriage is a distinctive institution and that the legislature may take account of its social and legal character when designing offences. That proposition does not

10. Protection of Women from Domestic Violence Act 2005 , ss 3, 18–23.
11. Protection of Women from Domestic Violence Act 2005 , s 3.
12. Constitution of India, arts 14, 15 and 21.
13. Constitution of India, art 14.

end the analysis. A classification must still be reasonable and consistent with constitutional guarantees. The existence of a special relationship may justify tailored procedures or sentencing considerations; it does not necessarily justify categorical immunity from the offence itself.

6.2 Article 15: discrimination on grounds of sex

Article 15 prohibits discrimination on grounds including sex. The marital exception operates within the class of women by withdrawing a central form of criminal-law protection from adult wives. It reflects an assumption that a wife's sexual availability is part of the marital relationship in a way that would not be accepted for an unmarried woman. The effect is gendered even though the statutory wording identifies the husband and wife relationship.

The constitutional objection is not simply that married women are treated differently from unmarried women. It is that the law gives legal effect to a patriarchal assumption about the sexual obligations of wives. A modern equality analysis should examine the substantive effect of the classification, not merely whether the text is framed in neutral or traditional language.[14]

6.3 Article 21: dignity, bodily integrity and autonomy

Article 21 protects life and personal liberty, understood to include dignity and bodily integrity. In Suchita Srivastava v Chandigarh Administration, the Supreme Court recognised reproductive choice as an aspect of personal liberty and emphasised the importance of a woman's right to refuse participation in sexual activity. In Justice K S Puttaswamy (Retd) v Union of India, the Court located autonomy, decisional privacy and control over intimate aspects of life within constitutional dignity.[15][16][17][18]

These principles do not mechanically decide the validity of the marital exception, because the constitutional question also involves the structure of criminal offences and legislative competence. They nevertheless provide a powerful foundation. If an individual's bodily integrity and intimate choices are constitutionally protected, marriage should not be treated as a blanket waiver of those rights.

6.4 Privacy and the private sphere

The defence of the exception sometimes relies on the privacy of marriage and the need to prevent unwarranted State intrusion into the marital home. Privacy is an important constitutional value, but it belongs to individuals, not only to the institution or household. A wife's privacy and bodily integrity are not less important than the privacy of the marital relationship.[19][20]

14. Constitution of India, art 15.
15. Suchita Srivastava v Chandigarh Administration (2009) 9 SCC 1.
16. Justice K S Puttaswamy (Retd) v Union of India (2017) 10 SCC 1.
17. Constitution of India, art 21.
18. Suchita Srivastava (n 12).
19. Joseph Shine (n 14).
20. Joseph Shine (n 14).

The Supreme Court's reasoning in Joseph Shine v Union of India and the broader privacy jurisprudence caution against using family or marriage as a basis for treating women as subordinate or as objects of control. The constitutional task is to protect the privacy of individuals while ensuring that the home is not treated as a rights-free zone.

6.5 Article 19 and sexual agency

The Delhi High Court's split decision also considered Article 19(1)(a), particularly the ability of a woman to express and assert her sexual agency. Although Article 19 arguments must be carefully framed and are not a substitute for the stronger Articles 14 and 21 analysis, the freedom to make intimate choices and communicate refusal is connected to individual autonomy. A legal rule that disregards a wife's refusal risks denying her agency within the most intimate sphere of life.[21]

7. Judicial Precedents

7.1 Independent Thought v Union of India

In Independent Thought v Union of India, the Supreme Court read down Exception 2 to section 375 IPC to the extent that it permitted sexual intercourse with a wife below eighteen years of age. The Court held that the distinction between a married girl child and an unmarried girl child was arbitrary and inconsistent with constitutional protection. The judgment is important because it rejected the idea that marriage can legitimise sexual intercourse with a child. Its holding, however, was confined to child wives and did not invalidate the exception as it applied to adult wives.

7.2 RIT Foundation v Union of India

In RIT Foundation v Union of India, a Division Bench of the Delhi High Court delivered a split verdict on 11 May 2022. Justice Rajiv Shakdher considered the exception unconstitutional, including under Articles 14, 15, 19(1)(a) and 21. Justice C Hari Shankar upheld the exception, reasoning that the marital relationship was a distinct legal and social institution and that the legislature could treat it differently. The split left the issue unresolved and led to appeals before the Supreme Court.[22][23]

The disagreement exposes the central interpretive conflict. One approach begins with the individual woman and asks whether the State may deny equal protection to her bodily autonomy because she is married. The other begins with marriage as a distinctive institution and gives weight to legislative choice and the potential consequences of criminalisation. A sound constitutional analysis must consider institutional concerns without allowing them to erase the rights of an individual spouse.[24][25]

21. Constitution of India, art 19(1)(a).
22. RIT Foundation v Union of India 2022 SCC OnLine Del 1404.
23. RIT Foundation (n 9).
24. RIT Foundation v Union of India 2022 SCC OnLine Del 1404 (Shakdher J and Hari Shankar J, separate opinions).
25. RIT Foundation v Union of India 2022 SCC OnLine Del 1404.

7.3 Hrishikesh Sahoo v State of Karnataka

The Karnataka High Court's decision in Hrishikesh Sahoo v State of Karnataka permitted criminal proceedings in a case involving allegations of non-consensual sexual intercourse by a husband. The matter reached the Supreme Court and became part of the wider challenge to the marital exception. The Supreme Court's September 2026 procedural directions reportedly placed the connected matters for final hearing on 18 November 2026. Those directions should not be misrepresented as a final determination of constitutional validity.[262728]

7.4 Suchita Srivastava and Puttaswamy

Suchita Srivastava supports the proposition that reproductive choice includes the choice to abstain from sexual activity. Puttaswamy recognises decisional autonomy, dignity and privacy as central to personhood. Read together, these decisions undermine any broad assumption that marriage removes a woman's authority over intimate decisions. They do not themselves create a new offence, but they provide constitutional principles against which the statutory exception must be tested.[293031]

7.5 Joseph Shine v Union of India

In Joseph Shine v Union of India, the Supreme Court invalidated the adultery offence under section 497 IPC, rejecting a legal framework that treated a wife as the property or sexual possession of her husband. The decision is relevant to the marital rape debate because it rejects patriarchal assumptions embedded in criminal law. It does not directly decide the marital rape exception, and it should be cited as a constitutional analogy rather than as a holding on marital rape.[3233]

8. Arguments Supporting Retention and Their Evaluation

8.1 Protection of marriage and family stability

It is argued that criminalising marital rape may destabilise marriage, encourage retaliatory complaints during matrimonial disputes or expose intimate family life to criminal investigation. These concerns cannot simply be dismissed. Criminal law carries serious consequences and must be administered with fairness.

26. Hrishikesh Sahoo v State of Karnataka (Supreme Court of India, SLP (Crl) Nos 4063–4064 of 2022, order dated 9 September 2026).
27. Hrishikesh Sahoo (n 11).
28. Hrishikesh Sahoo (n 11).
29. Suchita Srivastava (n 12); Justice K S Puttaswamy (Retd) (n 13).
30. Justice K S Puttaswamy (Retd) (n 13).
31. Suchita Srivastava (n 12); Justice K S Puttaswamy (Retd) (n 13).
32. Joseph Shine v Union of India (2019) 3 SCC 39.
33. Joseph Shine (n 14).

However, the stability of marriage is not an independent justification for immunising serious non-consensual sexual conduct. A marriage that can be preserved only by denying one spouse legal protection against sexual violence is not being protected on constitutionally acceptable terms. The State may design procedures that minimise unnecessary intrusion, but it cannot assume that all allegations are false because they arise within marriage.

8.2 Possibility of misuse and false complaints

The possibility of false or exaggerated complaints is raised in opposition to criminalisation. This concern should be addressed through ordinary safeguards: the presumption of innocence, the prosecution's burden of proof, judicial scrutiny of evidence, access to counsel, reasoned decisions and penalties for demonstrably false evidence where legally established. These protections apply across criminal law.[34]

The possibility of misuse cannot, by itself, justify denying an entire class of complainants access to a criminal offence. The same argument could be raised against many offences, yet the legal response is to improve investigation and adjudication rather than create categorical immunity. At the same time, reform should avoid presumptions of guilt and should not create a special reverse burden merely because the parties are married.

8.3 Evidentiary difficulty and privacy

Sexual offences often occur in private, and marital relationships may involve complex patterns of coercion, dependency and fear. These realities can make evidence difficult to gather. But the absence of independent witnesses is not unique to marriage and is not a reason to exclude the offence. Courts should assess testimony according to ordinary evidentiary principles, taking care neither to demand impossible corroboration nor to treat the allegation as automatically proved.

8.4 Legislative competence and judicial restraint

A further argument is that the definition of criminal offences is primarily a legislative matter. Courts should be cautious before rewriting a penal statute, particularly where Parliament has recently enacted a new code. This is a serious institutional point. Yet judicial review exists precisely to test legislation against fundamental rights. The appropriate balance is for courts to decide the constitutional question and for Parliament, if reform is required, to design a detailed offence and supporting procedures.

9. Comparative Legal Perspectives

9.1 United Kingdom

The House of Lords rejected the common-law marital rape immunity in R v R. The Court held that the supposed irrevocable consent rule had become an anachronistic fiction and that marriage did not grant a husband immunity from prosecution for rape. The decision is

34. R v R (n 20).

influential because it demonstrates that the common-law tradition itself can evolve to recognise consent within marriage.[35]

9.2 Canada

Canada removed spousal immunity through statutory reform in 1983. The Canadian Criminal Code now defines sexual assault without a general marital exemption. In R v JA, the Supreme Court of Canada emphasised that consent must be contemporaneous and cannot be given in advance for sexual activity while unconscious. The case is not specifically a marital rape decision, but it supports the broader principle that consent is personal, present and revocable.[3637]

9.3 South Africa

South Africa's Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 provides a modern statutory framework for sexual offences without a general marital immunity. Its approach illustrates how a legislature can define sexual offences around unlawful and non-consensual conduct rather than the formal relationship between the parties.[38]

9.4 Lessons and limits of comparison

Comparative law does not require India to copy another jurisdiction word for word. The United Kingdom demonstrates the rejection of the historical common-law fiction; Canada illustrates the importance of contemporaneous consent; and South Africa shows the possibility of comprehensive statutory reform. India must adapt these lessons to its own constitutional structure, criminal procedure, social conditions and institutional capacity.

The United States should be approached with caution because marital rape laws and exemptions have historically varied by state and have undergone uneven reform. It is therefore more accurate to describe the United States as a jurisdiction with state-level variation than to claim that it has a single uniform national rule.

10. International Human Rights Standards and Empirical Context

10.1 CEDAW and international standards

India is a party to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The CEDAW Committee's General Recommendation No 35 calls on States to ensure that sexual offences, including rape, are based on lack of freely given consent and to

35. R v R [1992] 1 AC 599 (HL).
36. Criminal Code , RSC 1985, c C-46; Criminal Law Amendment Act 1983 , SC 1980–81–82–83, c 125.
37. R v JA 2011 SCC 28, [2011] 2 SCR 440.
38. Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (South Africa).

remove discriminatory provisions and procedures. It also calls for the criminalisation of all forms of gender-based violence against women, including marital rape.[39][40][41]

International standards do not automatically determine the domestic constitutional outcome, but they are relevant interpretive context. They reinforce the proposition that the State should not treat marriage as a substitute for freely given consent.

10.2 National data and limits of measurement

The Ministry of Health and Family Welfare's publication reporting NFHS-5 data states that around 29 per cent of ever-married women aged 18–49 reported having experienced physical or sexual violence by their husband. This is a broad spousal-violence indicator. It should not be described as a direct estimate of marital rape, because the category includes physical violence and sexual violence and does not necessarily map onto the legal elements of rape.[42]

The data nevertheless demonstrate that violence within marriage is not merely theoretical. They also show why the availability of accessible support services, confidential reporting, health care, counselling and legal assistance is important regardless of the ultimate criminal-law classification.[43]

11. Findings and Critical Discussion

11.1 Marriage cannot replace consent

The first finding is that consent to marriage and consent to a particular sexual act are conceptually and legally distinct. Marriage is a continuing relationship; consent is a choice concerning a specific act at a specific time. Treating the former as proof of the latter creates the consent-continuity fallacy.

11.2 The statutory framework is fragmented

The second finding is that Indian law recognises some forms of sexual abuse and some circumstances in which a husband may be prosecuted for non-consensual intercourse, especially where the wife is living separately. Yet the general marital exception remains. The resulting framework is fragmented and may leave a serious gap for women who continue to live with their husbands.

39. Convention on the Elimination of All Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.
40. UN Committee on the Elimination of Discrimination against Women, General Recommendation No 35 on Gender-Based Violence against Women , Updating General Recommendation No 19, UN Doc CEDAW/C/GC/35 (26 July 2017) para 29(c).
41. R v JA (n 22).
42. Ministry of Health and Family Welfare, Government of India, Health and Family Welfare Statistics in India 2023 , section C.2.15.
43. Convention on the Elimination of All Forms of Discrimination against Women (n 24); CEDAW Committee, General Recommendation No 35 (n 25).

11.3 Alternative remedies are not equivalent

The third finding is that the Domestic Violence Act and cruelty provisions serve important but different purposes. Protection orders, residence relief and monetary compensation can be essential, but they do not necessarily provide the same recognition or criminal accountability as a rape offence. The existence of one remedy should not be used as a reason to deny another where the conduct meets its legal elements.

11.4 Reform must address implementation

The fourth finding is that statutory amendment alone will not guarantee effective protection. Police, prosecutors, medical professionals and courts require training on consent, trauma-informed interviewing, privacy, evidence preservation and the risk of secondary victimisation. Support services must be available without making reconciliation or continuation of marriage a condition of assistance.

11.5 Constitutional resolution and legislative responsibility

The fifth finding is that the constitutional challenge requires a careful balance between equality, autonomy, privacy, legislative choice and fair-trial guarantees. As at the stated research cut-off, the Supreme Court matter was listed for final hearing on 18 November 2026, but no final outcome is asserted here. The article's analysis is therefore a normative constitutional argument, not a claim that the Supreme Court has already struck down or upheld the BNS exception.

12. Recommendations

12.1 Remove the marital exception

Parliament should delete Exception 2 to section 63 BNS and ensure that the definition of rape applies irrespective of whether the accused is the complainant's husband. The amendment should be prospective in accordance with ordinary criminal-law principles and should clearly address commencement and transitional questions.

12.2 Use a consent-centred definition

The statutory framework should make clear that consent means an unequivocal, voluntary and communicated agreement to the specific sexual activity in question. Consent may be withdrawn at any time. A person's prior sexual history, marital status or cohabitation should not by itself establish consent.

12.3 Preserve fair-trial safeguards

The prosecution should retain the burden of proving the offence beyond reasonable doubt. The presumption of innocence, the right to counsel, disclosure obligations, judicial control of admissibility and protection against compelled self-incrimination must remain intact. No automatic presumption of guilt should arise from marriage or from the making of a complaint.

12.4 Adopt survivor-sensitive procedures

Investigation and trial procedures should protect confidentiality, prevent humiliating or irrelevant questioning, provide access to support persons and legal aid, and avoid unnecessary repetition of testimony. Medical examination should be conducted with informed consent and in accordance with established standards.

12.5 Coordinate criminal and civil remedies

The BNS, the Domestic Violence Act and matrimonial statutes should operate coherently. Survivors should be able to seek protective and monetary relief without being forced to choose between civil protection and criminal accountability. Guidance should clarify how overlapping proceedings are managed without creating inconsistent findings or avoidable delay.

12.6 Training, data and institutional capacity

The State should fund specialised training for police, prosecutors, judges, medical practitioners and protection officers. National data collection should distinguish physical violence, sexual violence, forced intercourse and other forms of abuse, while protecting confidentiality. Data should be used to improve services and policy, not to presume the truth or falsity of an individual complaint.

12.7 Public education and access to justice

Legal reform should be accompanied by public education explaining that marriage does not remove the right to refuse sexual activity. Accessible legal aid, crisis support, counselling, shelter and health services are essential, particularly for women facing economic dependence, social stigma or pressure to remain in abusive relationships.

13. Conclusion

The marital rape exception raises a fundamental question about the meaning of equality and dignity within marriage. Section 63, Exception 2 BNS continues to treat marital status as a reason to exclude non-consensual sexual intercourse from the general offence of rape when the wife is an adult. Section 67 BNS, cruelty provisions and the Domestic Violence Act provide important but limited and distinct remedies; they do not eliminate the underlying classification problem.[44][45]

The strongest constitutional objection is that the exception converts marriage from a relationship of mutual commitment into a status that diminishes one spouse's legal protection over her own body. The consent-continuity fallacy exposes the weakness in the assumption that consent to marriage can stand in for consent to future sexual acts. The principles of equality, bodily

44. Ministry of Health and Family Welfare (n 26).
45. Bharatiya Nyaya Sanhita 2023 , s 63, Exception 2.

integrity, decisional autonomy and dignity point towards a law that evaluates sexual conduct by reference to consent, not marital status.[4647]

Criminalisation should not be treated as a complete solution. It must be supported by fair procedures, reliable investigation, survivor services, judicial training and respect for the rights of the accused. These safeguards are not reasons to retain immunity; they are part of a legitimate and effective criminal justice system. Parliament should therefore remove the marital exception and adopt a consent-based framework that protects all persons equally. The Supreme Court's pending consideration makes the constitutional question immediate, but the broader task is to ensure that the law recognises marriage as a partnership between equal persons rather than a source of presumed sexual entitlement.

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Suchita Srivastava v Chandigarh Administration (2009) 9 SCC 1.

46. Bharatiya Nyaya Sanhita 2023 , s 67; Protection of Women from Domestic Violence Act 2005 , ss 3, 18–23.
47. Constitution of India, arts 14, 15 and 21.

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Research declarations

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Competing interests

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Author contributions

Arpita Chaturvedi: Research conceptualisation and topic selection; legal research and source review; doctrinal and comparative analysis; evaluation of constitutional and legislative questions; manuscript review and final approval. Contributions relating to drafting, editing and verification must be confirmed against the author's actual work before submission.

Originality and related publications

This manuscript has been prepared for submission to The Legal Gazette as part of an academic internship. The author will confirm that no substantially identical version has been published, deposited as a preprint or submitted concurrently elsewhere. All third-party ideas and materials are to be appropriately attributed, and originality is subject to final similarity and source verification.

Methods and legal currency

This research adopts a qualitative doctrinal and comparative legal methodology. It examines the Constitution of India, the Bharatiya Nyaya Sanhita, 2023, relevant legislation, judicial decisions, committee reports, international human rights instruments and selected academic literature. Comparative analysis covers the United Kingdom, Canada and South Africa. Published NFHS-5 statistics are used solely as contextual secondary evidence, not as original empirical findings or direct estimates of marital rape. The manuscript states a legal research cut-off of 18 November 2026. Subsequent judicial developments require verification before publication.

Limitations

The study primarily concerns Indian law and relies on publicly available legal and secondary research materials. It does not include original interviews, surveys or fieldwork. Comparative discussion is limited to selected jurisdictions and may not capture all differences in legal systems and enforcement practices. Secondary statistics cannot establish the precise prevalence of marital rape. Judicial developments after 18 November 2026 may affect the legal analysis.

Ethics and participant protections

Formal human-participant ethics approval was not applicable because this research is a desk-based doctrinal legal study. No interviews, surveys, experiments, identifiable personal records or animal research were undertaken. The analysis relies on published legal and secondary materials and does not disclose identifiable participant information.

Data and materials availability

The research relies on publicly accessible legislation, judicial decisions, government reports, international instruments and published secondary literature identified in the manuscript's references and bibliography. No original participant-level dataset was created. Access to third-party materials remains subject to applicable copyright, database and licensing restrictions.

AI and writing assistance

Generative AI assistance was used in preparing and structuring the research manuscript, including drafting and language development. The author is responsible for independently reviewing, verifying and approving all legal propositions, citations, factual statements and conclusions. AI tools are not credited as authors.

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