The Marital Exception as Constitutional Anomaly: A Rights-Based Reckoning

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ABSTRACT

In any modern constitutional democracy, marital rape exception is arguably the most conflicting paradox. It is self-sufficiently incorporated on law-book of colonial India as well as independent India. The concept of colonial coverture gave rise to irrevocable consent and a presumption that cannot be debated. The exception results in non-consensual sexual intercourse that is accomplished in relations to a marriage which is legally valid and thus implicates no crime. The present research looks at the exception as a constitutional paradox with reference to fundamental rights under Articles 14,[2] 15[3] and 21[4] of the Constitution of India.

KEYWORDS

Marital Rape, Constitutional Morality, Bodily Autonomy, Article 21, Equality, Consent, Gender Justice, Criminal Law Reform

INTRODUCTION

In 1736, Sir Matthew Hale, Lord Chief Justice of England, wrote a legal hypothesis that would be heard in other times and places: that a husband could not be guilty of raping his wife, because by mutual matrimonial consent and contract the wife had yielded herself in this sort to her husband, which she could not retract.[5] This suggestion, based on the fiction of unnecessary spousal consent and the principle of marital unity, which assimilated the legal identity of a wife into that of her husband, was not made a law at all. It was a dictum. But it gained the power of established common law throughout the British Empire and had an extraordinary life of transplantation into colonial Indian penal law.

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[2] INDIA CONST. art. 14.
[3] INDIA CONST. art. 15.
[4] INDIA CONST. art. 21.
[5] 1 SIR MATTHEW HALE, *HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN* 629 (P.R. Glazebrook ed., Professional Books 1971) (1736).

This marital exemption was incorporated into India's Indian Penal Code (IPC), 1860, having been drafted under the watch of Lord Macaulay under the Exception 2 to Section 375.[6] It was still being used in the IPC, virtually unchanged, as the Parliament of India in 2023 replaced it with the Bharatiya Nyaya Sanhita (BNS), simply increasing the age limit to eighteen years, instead of fifteen. The meaning of this legislative continuum is clear that in the perceived opinion of the Indian legislature, marriage has remained a juridical protection against prosecution of sexual violence by a husband against his wife.

It is pertinent to mention that a position like this is not constitutional. As a transformative document, the Constitution of India does not simply forbid discrimination, but stipulates equality. It is not just an acceptance of liberty, rather it insures dignity. A statutory text which deprives married women of the security of criminal law against non-consensual sexual intercourse, the security which all unmarried women in India have unquestionably, is the most fundamental infringement of the very fabric of constitutionally guaranteed rights in the most outrageous manner imaginable.

This pressing need is confirmed by the reality that as of October 2024, the Supreme Court of India has formed a three-judge bench to listen to a batch of consolidated petitions questioning the constitutionality of Exception 2.[7] The Government of India has submitted an affidavit against criminalisation, describing it as being "disproportionately harsh", an attribute that is critically questioned in this paper.[8] The ultimate ruling by the Supreme Court will not just answer a legal question but it will establish the constitutional position of the married woman as an independent entity in the Indian Republic.

RESEARCH PROBLEM

The main research issue the paper deals with can be formulated as follows: "Does Exception 2 to Section 63[9] of the Bharatiya Nyaya Sanhita, 2023, which immunizes husbands from prosecution for rape of their wives, amount to a constitutionally impermissible classification violative of Articles 14, 15, and 21 of the Constitution of India?"

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[6] Indian Penal Code, 1860, § 375, Exception 2, No. 45, Acts of Parliament, 1860 (India).

[7] Hrishikesh Sahoo v. State of Karnataka, Challenge to the Marital Rape Exception, Supreme Court Observer (last visited May 5, 2026), https://www.scobserver.in/cases/challenge-to-the-marital-rape-exception-hrishikesh-sahoo-v-state-of-karnataka/.

[8] Helen Regan & Esha Mitra, India's Government Opposes Criminalizing Marital Rape, CNN (Oct. 11, 2024), (https://edition.cnn.com/2024/10/11/india/indian-government-marital-rape-intl-hnk)

[9] Bharatiya Nyaya Sanhita, 2023, § 63, Exception 2, No. 45, Acts of Parliament, 2023 (India).

This issue is engrained in a wider socio-legal crisis. According to the report of the National Family Health Survey (NFHS-5, 2019-21),[10] a large proportion of married women in India have reported that they have been subjected to sexual violence by their husbands. But this violence is within a vacuum of criminal law. Although the Protection of Women against Domestic Violence Act (PWDVA), 2005[11] offers civil redress, marital rape is not criminalised in that Act. The net effect is that there is a general deprivation of equal protection of the laws to a defined group of women namely those who are married based on the marital status alone.

Such a gap exists especially in the post-BNS legislative scene. Being a wholesale modernisation of the criminal law of India, the BNS was a chance of the Parliament to bring the Indian law in line with the constitutional requirements and international standards. The conscious decision of the Legislature to maintain the Marital Rape Exception (MRE) is not an oversight, then, but a policy statement which this paper questions on constitutional, comparative, and normative basis.

SCOPE OF THE STUDY

This work is limited, in its main concern, to the law of India as it is after the promulgation of the Bharatiya Nyaya Sanhita[12] on 1 July 2024. The paper will explore the constitutional aspects of Exception 2 to Section 63 of the BNS, its origins in the IPC, and place it in the context of the overall criminal law reform in India.

To highlight the constitutional and normative incompetence of the continued exception in India, the study greatly depends on the jurisprudence of the United Kingdom, the United States of America, and the Republic of South Africa, three common law jurisdictions who have criminalised marital rape through judicial or legislative action. The paper also collaborates with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR) and the United Nations (UN) Declaration on the Elimination of Violence Against Women.

The research does not attempt an empirical study on the prevalence of marital rape, or even address any evidentiary complexities of prosecution, which, despite being of critical concern, is another and extensive area of study. It is primarily constitutional, doctrinal and comparative.

[10] Demographic & Health Surveys Program, *India National Family Health Survey (NFHS-5) 2019–21* (2022), https://dhsprogram.com/pubs/pdf/FR375/FR375.pdf.
[11] Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament, 2005 (India).
[12] Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India).

RESEARCH GAP

What limited scholarship on marital rape in India has had to offer, as it increasingly expands, is a tendency to discuss the topic in one of three main schools of thought: feminist jurisprudence and gender critique,[13] a socio-legal critique of the domestic violence paradigm[14], or a descriptive doctrinal critique of the IPC exception.[15] An analysis simultaneously considers (a) the constitutional aspects of the BNS exception in the context of developing Supreme Court doctrine on privacy, dignity and equality; (b) the constitutional implications of the position the Government has adopted in the October 2024 affidavit; and (c) the ineffectiveness of the BNS as a reform tool is conspicuously missing in the current literature.

Moreover, although the split decision of the Delhi High Court in 2022, in the case of *RIT Foundation v. Union of India (2015)*,[16] and the decision of the Karnataka High Court in the case of *Hrishikesh Sahoo v. State of Karnataka (2023)*[17] have been mentioned by a number of commentators, no scholarly examination has been pursued beyond the short term of the 2024 batch cases in front of. This paper aims to fill the given gap by offering a timely, critical, and comprehensive doctrinal analysis of the law.

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RESEARCH OBJECTIVES

The following specific objectives are followed in the present study:

1. To track the historical and colonial roots of Marital Rape Exception and discuss its transportation to Indian penal law.
2. To critically examine the exception 2 to Section 63 of the BNS, 2023, as violating Articles 14, 15 and 21 of the Constitution of India.
3. To test the judicial course on marital rape in India, since the Supreme Court partially intervened in Independent Thought, up to the constitutional challenge awaiting.
4. To analyse how India is bound under CEDAW, ICCPR, and other international human rights treaties with respect to criminalisation of marital rape.

[13] Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* 105–120 (Oxford University Press 1999).
[14] Pratiksha Baxi, *Public Secrets of Law: Rape Trials in India* (Oxford University Press 2014), https://global.oup.com/academic/product/public-secrets-of-law-9780198092988 (last visited Apr. 3, 2026).
[15] Mrinal Satish, *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India* (Cambridge University Press 2017), https://www.cambridge.org/in/universitypress/subjects/law/criminal-law/discretion-discrimination-and-rule-law (last visited Apr. 3, 2026).
[16] RIT Foundation v. Union of India, (2022) 3 HCC (Del) 572.
[17] Hrishikesh Sahoo v. State of Karnataka, 2022 SCC OnLine Kar 371.

5. To attract comparative lessons on jurisdictions that have effectively criminalised marital rape either by judicial or legislative means.
6. To develop substantial legislative, judicial and institutional proposals to criminalise marital rape in India.

RESEARCH QUESTIONS

1. Is Exception 2 to Section 63 of the BNS, 2023 the unconstitutional discrimination against married women and breach of their rights to dignity and bodily autonomy?
2. What is the traditional justification in the doctrines of marital rape exception (MRE) and is it still constitutional in the present day?
3. Does the distinction by the MRE between women who are married and unmarried meet the reasonable classification requirement of Article 14 or non-arbitrariness requirement of E.P. Royappa v. State of Tamil Nadu?
4. What is the impact of the right to privacy and the right to dignity in K.S. Puttaswamy v. Union of India on how constitutional the MRE is?
5. Will the argument by the Government that criminalisation is too severe be enough to keep the MRE?
6. What reforms can be brought in India based on the jurisprudence of UK, USA, and South Africa?

RESEARCH METHODOLOGY

The approach used in this paper is a doctrinal legal approach to law. Black-letter law analysis, also known as doctrinal analysis, is the methodical study of primary legal texts such as constitutional texts, legislation and judicial pronouncements to determine the content, coherence and validity of legal rules.

This doctrinal core is supported by a comparative methodology, which involves the review of comparable legal rules in other common law jurisdictions United Kingdom, the United States and South Africa to determine the most judicially and constitutionally justifiable way of answering the MRE question. The comparative analysis is not executed to import a foreign law but to clarify the normative unsuitability of the Indian law as compared to the rationale that is followed in similar legal systems.

Besides, the paper uses the international human rights approach to review the treaty commitments of India in relation to CEDAW, ICCPR, and other related General

Recommendations and Concluding Observations to determine the minimum international standard against which Indian domestic law shall be measured.

Primary sources used are as follows: the text of the BNS 2023 and the IPC 1860; the Constitution of India; the Protection of Women from Domestic Violence Act, 2005; decisions of Supreme and High Courts; Parliamentary debates; Reports of the Law Commission of India; the Justice Verma Committee Report 2013; and international treaty instruments. Scholarly monographs, peer-reviewed journal articles, as well as reports of the National Commission for Women are all classified as secondary sources.

HISTORICAL FOUNDATIONS TO MARITAL RAPE EXCEPTION

A. The Hale Dictum along Genealogy of Common Law

The Marital Rape Exception has its genesis in one, unreflective statement, by Sir Matthew Hale in a posthumous compilation of his Historia Placitorum Coronae (1736)[18], which stated that a wife, by marriage contract, had unconditionally agreed to sexual intercourse. It was, as the House of Lords would later decide in *R v. R (1992)*, "a common law fiction", which had no role in the modern law.[19]

The fiction was based on two overlapping systems of English law doctrines. First, the doctrine of marital unity that when a woman was married, the legal personality of the wife was absorbed in the person of the husband and second, the *doctrine of implied consent*, when a woman marries off she automatically gives consent to all sexual courses she became in the phrase of Blackstone, "a feme covert"[20] meaning legally invisible. These doctrines combined to create a juridical structure in which even the idea of rape in marriage was legally impossible.

B. Indian Penal Law Colonial Transplantation

Exception 2 of Section 375, when Lord Macaulay made the Indian Penal Code, in 1860, reproduces this common law fiction in the statutory form, but has then adjusted the age of the wife to ten years. This was later revised to fifteen years in 1949, and most recently, with the help of the Supreme Court decision in *Independent Thought v. Union of India (2017)*,[21] to

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[18] 1 SIR MATTHEW HALE, *HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN* (E. & R. Nutt & R. Gosling 1736), https://archive.org/details/historiaplacitor01haleuoft, (last visited Apr. 15, 2026).

[19] R v. R [1992] 1 AC 599 (HL).

[20] 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* (Clarendon Press 1765), (https://avalon.law.yale.edu/18th_century/blackstone_bk1ch15.asp) (last visited Apr. 15, 2026).

[21] Independent Thought v. Union of India, (2017) 10 SCC 800.

eighteen years, the BNS 2023 retained the exception unchanged. The MRE owes its origin to colonial sources, however, is no historical accident, a matter of constitutional importance, in that it demonstrates that the exception was never born of native Indian legislative inquiry but was imported wholesale a colonial penal tradition which has since been disowned even by the nation in which it originated.

CONSTITUTIONAL ANALYSIS: THE EXCEPTION AS ANOMALY

A. Article 14: The Right to Equality and Non-Discrimination

Article 14 of the Constitution of India guarantees that every individual is equal before the law and equal protection of the law in the territory of India.[22] The MRE directs an explicit classification i.e., it denies to wives over the age of eighteen years the protection of Section 63 (rape) but grants it to all other women. This classification should be evaluated concerning the two twin standards of inquiry of the doctrine, the reasonable classification test, and the arbitrariness doctrine, as to whether it is constitutional.

By the reasonable classification test, a statutory classification passes the test of Article 14 because, (a) it must be based on an intelligible differentia, i.e. a principle that is discernible and that distinguishes the class of the others; and (b) the differentia must be rationally related to the object that the legislation is intended to accomplish.[23] Intelligible in the tightest sense is the differentia of marital status of the MRE. Nevertheless, the rational nexus lacks conspicuously. Section 63 object protection against non-consensual penetration of the body and sexual autonomy. The rational nexus of the protection of sexual autonomy and the marital status of the victim is non-existent; in fact, the marital aspect of the victim, not its absence, renders the violation of sexual autonomy in it the more, rather than the less, insulting to the dignity.

According to the doctrine of arbitrariness, which is expressed in *E.P. Royappa v. State of Tamil Nadu (1974)*[24] and then confirmed in *Maneka Gandhi v. Union of India (1978)*[25], a law violates Article 14 of the constitution so far as it is evidently arbitrary. A law which informs a woman that she has no redress under criminal law to sexual violence committed by her husband, not that it is less harmful or less violent, but because it is committed by a man, is, as argued in this paper, clearly arbitrary in constitutional terms.

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[22] INDIA CONST. art. 14.
[23] M.P. JAIN, INDIAN CONSTITUTIONAL LAW 1038-45 (8th ed. LexisNexis 2018).
[24] E.P. Royappa v. State of T.N., (1974) 4 SCC 3.
[25] Maneka Gandhi v. Union of India, (1978) 1 SCC 248.

B. Article 15: Discrimination based on sex is forbidden

According to Article 15(1),[26] the State cannot discriminate solely on the grounds of sex. The MRE may appear to discriminate based on marital status and not sex, but marital status is, in this instance, not sex neutral. It operates only against married women and only in favour of married men. The categorization hence serves as a proxy to sex-based discrimination.[27] Read with Article 15(3),[28] which authorizes the State to issue special provisions to women, the constitutional requirement is fully geared towards protection of married women, rather than protection of women more generally.

C. Article 21: The Right to Life, Dignity, and Bodily Autonomy

The nine-judge bench decision on *K.S. Puttaswamy v. Union of India (2017)* by the Supreme Court recognised privacy as a fundamental right under Article 21[29] and the constitutional penumbra to privacy includes the right to personal intimacy, bodily integrity, and sexual autonomy.[30] The concurring opinion of Justice D.Y. Chandrachud clearly stated that right to privacy is the right of a person to decide what is to be done to his or her own body, a right that is not abolished by marriage.

The MRE goes against this constitutional principle. The clause, which states that the non-consensual sexual intercourse of a husband with his wife is not rape, in effect, undermines the constitutional right of the wife to have control over her own body in marriage. The lack of consent in sexual intercourse is a crime of the highest order of bodily integrity violation and the Constitution suggests no ground to the suggestion that marriage sanctions such violation.

Moreover, the Supreme Court in the case of *State of Karnataka v. Krishnappa (2000)* ruled that sexual violence is not just a physical attack but it is a crime that constitutes "the most final violation of the self."[31] This definition of rape as a loss of selfhood cannot be applied to unmarried women only; selfhood and thus its loss, does not recognize the exception of marriage.

[26] INDIA CONST. art. 15, cl. 1.
[27] GAUTAM BHATIA, THE TRANSFORMATIVE CONSTITUTION: A RADICAL BIOGRAPHY IN NINE ACTS 121-35, 167-72 (Harper Collins India 2019).
[28] INDIA CONST. art. 15, cl. 3.
[29] INDIA CONST. art. 21.
[30] K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.
[31] State of Karnataka v. Krishnappa, (2000) 4 SCC 75.

This consistent development of Article 21 in both cases of *Navtej Singh Johar v. Union of India (2018)*[32] and *Joseph Shine v. Union of India (2018)*[33] further attests that the constitutional architecture is constantly shifting towards elimination of laws which criminalise or protect actions based on retrograde assumptions about the subordinate legal status of people involved in intimate relations. An enormous constitutional paradox exists if we assume that the State does not have the ability to make consensual homosexual activities or consensual adultery illegal because of an infringement of personal autonomy and yet assume that the State is able to legalise non-consensual sexual activity between a male and female.

JUDICIAL PRECEDENTS: A CRITICAL SURVEY

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

In a case of *Independent Thought v. Union of India (2017)*, the two judge bench of the Supreme Court ruled that a sexual intercourse with a wife between the ages of fifteen and eighteen years as a rape and therefore interpreted the exception number 2 of Section 375 IPC and omitted the clause of nineteen years to define a wife. The decision, by Justice Madan B. Lokur, is the most far-reaching Supreme Court intervention in the MRE so far. The Court found that the exception was arbitrary, capricious and contravened the rights of the girl child in Articles 14, 15, and 21.

But, Independent Thought is a narrow precedent. The ruling of the Court was strictly limited to child wives. It clearly refused to address the more general issue of marital rape of adult women, citing that the question needs an in-depth investigation. The ruling, therefore, both advanced the law and left the most challenging question of the law unanswered (a leave taken which must be finally and surely answered by the three-judge bench before the Supreme Court).

B. Delhi High Court*: RIT Foundation v. Union of India (2022)*

In *RIT Foundation v. Union of India (2022)*, the Division Bench of the Delhi High Court gave a rather divided decision as Justice Rajiv Shakdher ruled that the MRE was unconstitutional and therefore, it contravened Articles 14, 15, 19 and 21. His Lordship held that the exception was not a reasonable classification, and was unsuccessful to any legitimate legislative purpose that could not have been accomplished by some less restrictive means. He also believed that

[32] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.
[33] Joseph Shine v. Union of India, (2019) 3 SCC 39.

the exception continued the myth of implied matrimonial consent, a myth which was not based on the constitution.

Instead, Justice C. Hari Shankar affirmed the exception, arguing that marriage is a valid source of distinction under the law of rape and making criminalisation of rape would jeopardize the institution of marriage. His Lordship also believed that the right place to initiate such reform was Parliament and not through courts.

The divided decision, which is not binding, is analytical. The split in judicial opinion on a matter of core constitutional law (whether a married woman is given the same right to bodily integrity as an unmarried woman) sheds some light on the extent of the normative battle that the Supreme Court must now decide. This paper argues that the argument of Justice Shakdher is constitutionally right whereas that of Justice Hari Shankar is constitutionally wrong.

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

The case of *Hrishikesh Sahoo v. State of Karnataka (2022)* delivered by the Karnataka High Court stands out as one of the boldest judgments ever passed by any Indian court regarding marital rape.[34] The lone bench in the words that have since come to be quoted extensively stated that "A man is a man, and an act is an act, and rape is rape, whether by a husband." The Court did not present this as a judicial legislative effort but as a mere application of constitutional ideas of equality and dignity and believed that the marital status could not be used to deny the protection of the criminal law to a woman.

Although later events had an interim stay of the conviction pending appeal, the normative power of the judgment is great. It is also a demonstration of the failure by the high courts in India to consider the exception as constitutional enough when it comes to live criminal cases involving marital rape.

D. 2024 High Court Developments

In 2024, the High Court has made a number of adjudications that though not explicitly overturning Exception 2 undermined its validity. In *X v. State of Uttarakhand (2019),*[35] the High Court dealt with the cases of marital rape in the context of the Section 498A[36] IPC (cruelty) and it was acknowledged that the act was extremely dangerous even though it was

[34] Hrishikesh Sahoo v. State of Karnataka, 2022 SCC OnLine Kar 371.
[35] X v. State of Uttarakhand, 2019 SCC OnLine Utt 1097.
[36] Indian Penal Code, 1860, § 498A, No. 45, Acts of Parliament, 1860 (India).

not a rape. In *Manish Sahu v. State of Madhya Pradesh (2024)*,[37] the Madhya Pradesh High Court considered the issue of forced sexual behavior in marriage as a part of domestic violence, redefining it as cruelty under Section 498A without a direct rape accusation. All of these instances reveal that Indian courts are increasingly turning to alternative jurisprudential systems in order to offer any sort of redress to marital sexual violence, a band aid that merely highlights, but does not correct, the underlying gap in criminal law.

E. The Pending Supreme Court Proceedings (2024)

In October 2024, the Supreme Court constituted a three-judge bench to hear a batch of consolidated petitions challenging the Exception 2 of Section 375 IPC and its BNS equivalent. The hearings were postponed after the retiring Chief Justice and the case is now on the list of a newly constituted bench. The constitutional issues that need to be answered are: Is Exception 2 unconstitutional under Articles 14, 15, and 21; Does the right to privacy provided in case Puttaswamy, apply to sexual autonomy in marriage; and Whether the failure of law to act to enforce a constitutional duty to protect women is a sufficient judicial basis to invalidate the exception.

The Government of India, in the affidavit filed in October 2024, officially objected to criminalisation as the Government stated, that it would be far too harsh to criminalise marital rape; that it would upset the institution of marriage; and that it was parliamentary not a judicial question. This paper humbly argues that both of these contentions are unsustainably constitutional. The disproportionality argument is a reversal of constitutional reasoning: the victim is the one who is disproportionately harmed; the law can be troubled by the nuisance of the offender, which is not a constitutional concern. The institutional disruption argument was the very argument that had been raised against the criminalisation of marital rape in England and was overruled. The deference of Parliament is an argument that is superficially appealing, but cannot succeed where Parliament has not fulfilled a positive constitutional duty.

INDIA'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

A. CEDAW and the General Recommendations

[37] Manish Sahu v. State of M.P., 2024 SCC OnLine MP 2603.

India is a signatory to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) that was ratified in 1993.[38] Article 16 of the CEDAW expects the State parties to treat men and women equally in all aspects regarding marriage and family relations. Marital rape is specifically recognized as a type of gender-based violence against women in the CEDAW Committee General Recommendation No. 35 (2017) and State parties are urged to criminalise marital rape, implement it effectively, and abolish any discriminatory provisions to rape legislation.[39]

The CEDAW requirements of India in upholding Exception 2 are prima facie inconsistent with the same. In its periodic assessments of India in respect of compliance, the Committee has raised its eyebrows on the reason why marital rape is yet to be criminalised, and called on the parliament to take legislative measures.[40] Although not legally binding like a judgment, these concluding observations form authoritative interpretations of commitments of the treaty that India has made and cannot be ignored by legislature or by the courts.

B. The International Covenant on Civil and Political Rights

India is a signatory to the International Covenant on Civil and Political Rights (ICCPR)[41] also, which in Articles 7 and 17 outlaws torture, cruel, inhuman, and degrading treatment and safeguards privacy and family life. The Human Rights Committee has maintained that sexual violence such as marital rape, falls under Article 7 of the ICCPR and that State parties have a positive obligation to criminalise such acts.[42] This non-criminalisation of marital rape in India is thus, inconsistent with its ICCPR requirements especially in Article 26, which stipulates equal and effective protection against discrimination on all grounds, including sex.[43]

C. The UN Declaration on the Elimination of Violence against Women

The United Nations Declaration on the Elimination of Violence against Women (1993) defines violence against women to include marital rape and urges the States to take due diligence in

[38] Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

[39] CEDAW Committee, General Recommendation No. 35 on Gender-Based Violence Against Women, U.N. Doc. CEDAW/C/GC/35 (2017), (https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-recommendation-no-35) (last visited Apr. 17, 2026).

[40] CEDAW Committee, Concluding Observations on India, ¶¶ 11–12, U.N. Doc. CEDAW/C/IND/CO/4-5 (2014); CEDAW Committee, Concluding Observations on India, ¶¶ 23–24, U.N. Doc. CEDAW/C/IND/CO/6 (2020), (https://www.ohchr.org) (last visited Apr. 17, 2026).

[41] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

[42] U.N. Human Rights Committee, General Comment No. 28: Equality of Rights Between Men and Women (Article 3), ¶ 11, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), (https://www.ohchr.org) (last visited Apr. 17, 2026).

[43] International Covenant on Civil and Political Rights, art. 26.

preventing, investigating, and, as stipulated by the national laws, punishing the acts of violence against women.[44] Although a declaration is not a treaty instrument of binding nature, it depicts the norms of the customary international law and the agreement of the international community that marital rape is a form of severe gender-based violence that must be countered by the criminal law by the States.[45]

COMPARATIVE JURISPRUDENCE: LESSONS FOR INDIA

A. United Kingdom: *R v. R (1992)*

The marital rape exemption was repealed in the United Kingdom with the judical decision of *R v. R (1992)* in the House of Lords. The House believed that Hale dictum had no role in the modern law and that the common law presumption of inadmissibility of a revocation of matrimonial consent was a common law fiction which ought to be put aside. This judicial reform was later brought into law by the Criminal Justice and Public Order Act 1994. When the British Parliament introduced the Act, it was clear that no implied right of non-consensual sexual access was attached to the institution of marriage.[46]

B. United States: *People v. Liberta (1984)*

The Court of Appeals of New York discarded the marital rape exemption in the Equal Protection Clause of the United States Constitution in *People v. Liberta (1984).*[47] The Court found that it was irrational and unnecessary to make a distinction between marital rape and rape by a stranger as the injury caused, the invasion of bodily integrity, and the State interest in criminalising are the same. By 1990s, fifty American states had criminalised marital rape, either by legislation or by the court striking down the exemption.[48]

C. South Africa

In *C v. S (2006),* the Constitutional Court of South Africa affirmed that marital rape is criminalised by the Sexual Offences Act and that it is completely inconsistent with the

[44] G.A. Res. 48/104, Declaration on the Elimination of Violence against Women, arts. 1–2 (Dec. 20, 1993), (https://www.un.org/en/documents/decl_conv/declarations/violence-against-women.shtml) (last visited Apr. 17, 2026).
[45] REBECCA J. COOK, HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 150-55 (University of Pennsylvania Press 1994).
[46] Criminal Justice and Public Order Act 1994, c. 33, § 142 (U.K.), (https://www.legislation.gov.uk) (last visited Apr. 17, 2026).
[47] People v. Liberta, 64 N.Y.2d 152 (N.Y. 1984).
[48] Michelle J. Anderson, Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates, 54 HASTINGS L.J. 1465, 1470–75 (2002).

constitutional right to human dignity of Section 10 of the South African Constitution.[49] The post-apartheid Constitution of South Africa, as is the case of India, is a transformative document that expressly forbids unfair discrimination based on sex and this framework has been utilized by the Constitutional Court to abolish legislative remnants that equate married women with unmarried women as the legal equals to which they are treated.[50]

The lesson of comparison is plain enough. In common law countries across the globe, the trend has been in the same direction, either by judicial law making or by statute. The institution of marriage has not been proved to be weakened in any jurisdiction that has eliminated the MRE. The reform has in every jurisdiction reinforced the constitutional obligation of treating women as persons with their own legal personality as opposed to the property of their husbands.

WAY FORWARD

A. Legislative Reform

The most straightforward fix though admittedly not the easiest politically is legislative. Parliament needs to delete Exception 2 to Section 63 of the BNS, 2023.[51] No substitution, no half-measure, no "marital rape lite" carve-out. The general rape provision should apply to every woman in India, married or not, because that is what equality means in plain constitutional terms.

While that amendment works its way or more likely, does not work its way through Parliament, something can be done immediately. The Protection of Women from Domestic Violence Act, 2005 should be amended to explicitly name non-consensual marital intercourse as criminal domestic violence. It is, inexplicable that an Act specifically designed to protect women within her home has never been amended, to say this directly. A dedicated Parliamentary Standing Committee should also be constituted, which is how such committees are often used but with a real, judicially supervised deadline tied to the Supreme Court's forthcoming ruling on Exception 2.[52]

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[49] S v. Masiya, 2007 (5) SA 30 (CC) (S. Afr.); Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (S. Afr.), (https://www.justice.gov.za) (last visited Apr. 18, 2026).
[50] S. AFR. CONST., 1996, §§ 9–10, (https://www.gov.za/documents/constitution-republic-south-africa-1996) (last visited Apr. 18, 2026).
[51] Bharatiya Nyaya Sanhita, 2023, § 63, Exception 2, No. 45, Acts of Parliament, 2023 (India).
[52] SUBHASH C. KASHYAP, PARLIAMENTARY PROCEDURE, LAW, PRIVILEGES AND PRACTICE 412–20 (Universal Law Publishing 2016).

Training matters too. The legislature can amend every statute on the books, but if the investigating officer treats a marital rape complaint as a domestic quarrel, and if the trial judge approaches the witness box with residual assumptions about wifely duty, the law on paper means nothing. Judicial and police training on trauma-informed investigation of sexual violence within marriage is not optional it is foundational.[53]

B. Judicial Action

If Parliament continues to abdicate and the evidence of the last sixty years suggests it will then the Supreme Court must take action. Under Article 32 read with Article 142,[54] the Court has both the jurisdiction and, the constitutional obligation to strike down Exception 2 as a violation of Articles 14, 15, and 21.[55] The arguments for its invalidity are not close. They are overwhelming.

If the Court is reluctant to strike down the provision entirely and judicial restraint, however misplaced in this context, is a real institutional force it should at minimum read the exception down. A positive consent standard, derived directly from the privacy and autonomy rights recognised in *K.S. Puttaswamy v. Union of India (2017)*, would bring non-consensual marital intercourse within the ambit of Section 63 without the Court having to formally delete legislative text. That is a lesser remedy, but it is infinitely preferable to the current position, which is no remedy at all.

The Court should also direct the Law Commission to produce a comprehensive reform report within a fixed timeframe. Open-ended directions have a habit of disappearing into institutional silence. A deadline with consequences does not.[56]

C. Institutional Measures

The National Commission for Women has, over the years, issued recommendations on marital rape that have been received with polite governmental indifference.[57] A genuine national

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[53] LAW COMMISSION OF INDIA, 172ND REPORT ON REVIEW OF RAPE LAWS (2000), (https://lawcommissionofindia.nic.in) (last visited Apr. 18, 2026).
[54] INDIA CONST. art. 142.
[55] INDIA CONST. arts. 32, 142; M.P. JAIN, INDIAN CONSTITUTIONAL LAW 1890–95 (8th ed. LexisNexis 2018).
[56] LAW COMMISSION OF INDIA, CONSULTATION PAPER ON REFORM OF FAMILY LAW (2018), (https://lawcommissionofindia.nic.in) (last visited Apr. 18, 2026).
[57] NATIONAL COMMISSION FOR WOMEN, ANNUAL REPORTS (various years), (https://ncw.nic.in) (last visited Apr. 18, 2026).

consultative process one that actually reaches survivors rather than circulating amongst Delhi policy networks is long overdue. Its output should go directly to the Ministry of Home Affairs with a formal legislative recommendation, not merely a report that is noted and filed.[58]

National Legal Services Authority (NALSA) must develop a legal team dedicated for legal aid of marital rape survivors. In today's time when a woman who has been raped by her husband and wishes to pursue civil remedies under the PWDVA must navigate a legal system largely unprepared to receive her. That is a structural failure, and it is remediable.[59]

Finally, India's next CEDAW periodic report cannot continue to treat marital rape as a "matter under consideration." The CEDAW Committee has been raising this concern for over two decades. Constructive engagement means a concrete timeline, legislative commitments, and follow-through not another paragraph of aspirational language.[60]

CONCLUDING REMARKS

It is worth pausing, before the obligatory conclusion, to state plainly what this paper has been about. A man can rape his wife in India today and face no prosecution for it under the principal criminal statute. Not because what he has done is not harmful. Not because it is not violent. Not because she has, in any realistic sense, consented. But because she is his wife. That is the full extent of the legal reasoning behind Exception 2 to Section 63 of the BNS, 2023.

That reasoning if it can be called reasoning traces to a single dictum by an English judge writing in 1736, in a legal world where wives had no independent legal personality and marriage was, functionally, a property transaction. That world is gone. Its constitutional successor, the Constitution of India, 1950 guarantees equality, dignity, and the right to life to every person. It does not say "every person, except married women in the bedroom." And yet that, in effect, is what Exception 2 says.

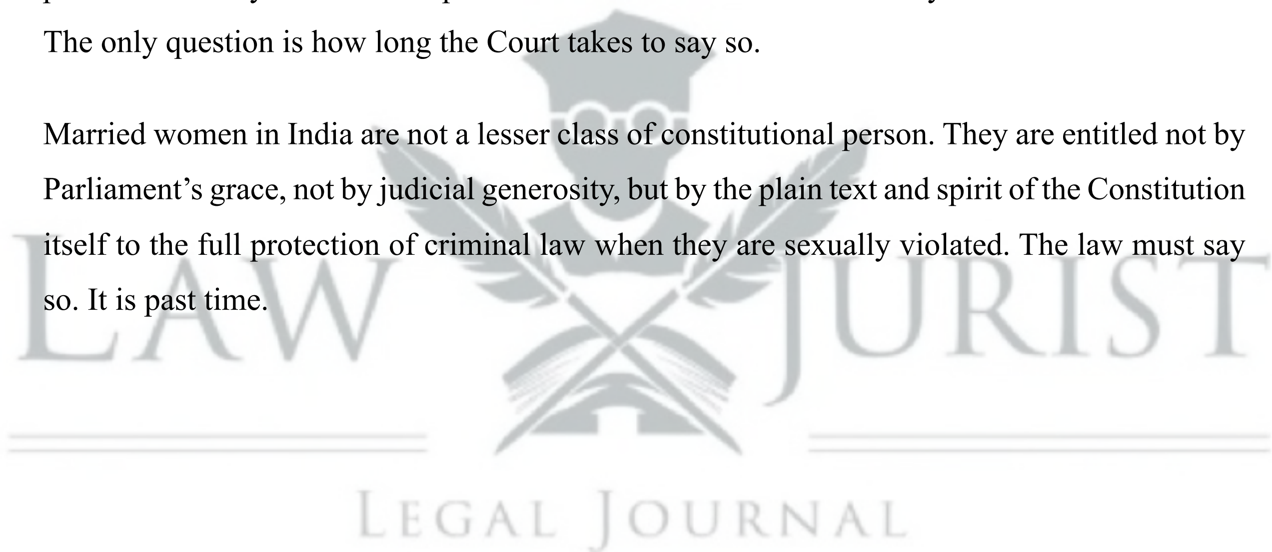
The Government's October 2024 affidavit opposing criminalisation is, with respect, constitutionally embarrassing. The argument that punishment would be 'excessively harsh'

[58] FLAVIA AGNES, LAW AND GENDER INEQUALITY: THE POLITICS OF WOMEN'S RIGHTS IN INDIA 210–15 (Oxford University Press 1999).
[59] National Legal Services Authority Act, 1987, No. 39, Acts of Parliament, 1987 (India).
[60] CEDAW Committee, Concluding Observations on India, U.N. Doc. CEDAW/C/IND/CO/4-5 (2014); CEDAW Committee, Concluding Observations on India, U.N. Doc. CEDAW/C/IND/CO/6 (2020), (https://www.ohchr.org) (last visited Apr. 19, 2026).

treats the perpetrator as the constitutional subject worthy of protection and the victim as an afterthought. The argument that marriage would be destabilised has been made in every jurisdiction that has since criminalised marital rape and in every jurisdiction, it has proved false. The argument that this is Parliament's business, not the Court's, might carry some weight if Parliament had shown any inclination, across six decades, to take up that business. It has not.

The Supreme Court is now in a position it cannot reasonably defer again. The three-judge bench constituted in late 2024 must resolve what the Delhi High Court split on, what the Karnataka High Court took a firmer line on, and what the entire constitutional architecture of this country points inexorably toward: Exception 2 is unconstitutional. It has always been unconstitutional. The only question is how long the Court takes to say so.

Married women in India are not a lesser class of constitutional person. They are entitled not by Parliament's grace, not by judicial generosity, but by the plain text and spirit of the Constitution itself to the full protection of criminal law when they are sexually violated. The law must say so. It is past time.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