

‘Reform of Sexual Offences Laws in India after the Bharatiya Nyaya Sanhita, 2023: A Critical Analysis of Marital Rape’

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Abstract : The enactment of the Bharatiya Nyaya Sanhita 2023 (BNS) represents a major restructuring of India's substantive criminal law and replaced the Indian Penal Code 1860 (IPC) with effect from 1 July 2024. The BNS reorganizes and renumbers offences against women and children and introduces certain new offences and aggravated punishments. However, one of the most controversial questions concerning sexual-offence reform remains unresolved: the criminalization of marital rape. Section 63 of the BNS defines rape in broad terms but expressly excludes sexual intercourse or sexual acts by a man with his own wife, where the wife is not under eighteen years of age, from the offence of rape. Thus, despite constitutional developments concerning dignity, privacy, bodily autonomy and sexual autonomy, the BNS continues the marital rape exception. This paper critically examines the treatment of sexual offences under the BNS, with particular emphasis on marital rape. It analyses the historical development of the marital rape exception, the constitutional principles emerging from Supreme Court jurisprudence, the decision in *Independent Thought v Union of India*, the Delhi High Court litigation in *RIT Foundation v Union of India*, and the continuing constitutional challenge before the Supreme Court. The paper argues that the marital rape exception is difficult to reconcile with Articles 14, 15 and 21 of the Constitution because it creates a classification based upon marital status and denies married women equal protection of their bodily and sexual autonomy. At the same time, criminalization must be accompanied by carefully designed evidentiary safeguards, procedural protections and institutional reforms. The paper proposes deletion of Exception 2 to section 63 BNS and adoption of a consent-based framework in which marriage is not treated as a continuing or irrevocable consent to sexual intercourse.

IndexTerms - Bharatiya Nyaya Sanhita 2023, sexual offences, marital rape, consent, bodily autonomy, Article 14, Article 21, constitutional reform.

INTRODUCTION

The criminal law relating to sexual offences occupies a particularly important position in the protection of human dignity and individual autonomy. Sexual violence is not merely an offence against physical integrity; it may also violate privacy, dignity, decisional autonomy and psychological integrity. Indian criminal law has undergone significant transformation during the last decade, particularly following the Criminal Law (Amendment) Act 2013 and subsequent constitutional decisions of the Supreme Court. The Bharatiya Nyaya Sanhita 2023 constitutes the latest legislative stage in this development. It replaced the Indian Penal Code 1860 and came into force on 1 July 2024.¹ The BNS places offences against women and children principally in Chapter V and contains provisions dealing with rape, aggravated rape, gang rape, sexual harassment, voyeurism, stalking and other forms of sexual violence.² The BNS therefore presents itself as an opportunity to reconsider whether Indian criminal law adequately protects sexual autonomy. Yet the most controversial aspect of the new law is its continuation of the marital rape exception. Section 63 defines rape by reference to specified forms of penetration and circumstances involving absence of consent, unwillingness, coercion or incapacity. Nevertheless, Exception 2 provides that sexual intercourse or sexual acts by a man with his own wife, where the wife is not under eighteen years of age, does not constitute rape.³ Consequently, the BNS has changed the statutory architecture of rape law without fundamentally changing the legal position concerning adult marital rape. The question is therefore whether the continuation of the exception is constitutionally sustainable in an era in which the Supreme Court has recognized privacy, dignity, decisional autonomy and sexual autonomy as aspects of Article 21. This paper examines that question and argues that reform of sexual-offence law remains incomplete unless the law recognizes that marriage cannot by itself constitute perpetual consent to sexual activity.

¹ Bharatiya Nyaya Sanhita 2023, Act 45 of 2023, s 1, India Code records the enactment date as 25 December 2023 and enforcement date as 1 July 2024.

² Bharatiya Nyaya Sanhita 2023, ch V.

³ Bharatiya Nyaya Sanhita 2023, s 63, Exception 2.

2. Research Objectives

The principal objectives of this research are:

1. to examine the changes introduced by the BNS concerning sexual offences;
2. to analyze the legal status of marital rape under section 63 BNS;
3. to examine the constitutional validity of the marital rape exception;
4. to analyze relevant Supreme Court and High Court jurisprudence;
5. to identify the principal arguments for and against criminalization; and
6. to propose a balanced legal framework for reform.

3. Research Methodology

The research adopts a doctrinal legal methodology. Primary sources include the Constitution of India, the BNS, judicial decisions and other statutory provisions. Secondary materials such as parliamentary materials, legal scholarship and authoritative legal commentary are used to understand the historical and policy dimensions of the issue. The analysis is principally based on constitutional and criminal-law principles, particularly equality, non-discrimination, dignity, privacy, bodily integrity and sexual autonomy.

4. Reform of Sexual-Offence Law under the BNS

The BNS retains a comprehensive framework of sexual offences. Section 63 defines rape, while sections 64 to 71 provide different punishments and aggravated forms of rape. Sections 74 to 79 deal with offences including assault intended to outrage a woman's modesty, sexual harassment, disrobing, voyeurism, stalking and insulting the modesty of a woman.⁴ The statutory definition of rape in section 63 is significant because it recognizes several forms of sexual penetration and expressly refers to consent. It covers penetration involving the penis, objects or other body parts and oral sexual acts in circumstances specified by the provision.⁵ The provision also contains an important explanation of consent. Consent must involve an unequivocal voluntary agreement communicated through words, gestures or other verbal or non-verbal communication. The provision further clarifies that failure to physically resist does not by itself constitute consent.⁶

This approach reflects the modern understanding that sexual consent is based upon voluntary participation rather than physical resistance. However, the progressive language concerning consent is immediately qualified by Exception 2 to section 63. The exception effectively creates a separate legal rule for married women. Thus, the law recognizes that non-consensual sexual conduct constitutes rape in ordinary circumstances, while preserving immunity for a husband in respect of sexual intercourse or sexual acts with his adult wife. This internal tension is at the centre of the marital rape debate.

5. Historical Development of the Marital Rape Exception

The marital rape exception has its roots in the colonial-era common law. Traditionally, the law was influenced by the doctrine associated with Sir Matthew Hale, which treated marriage as creating an irrevocable consent by the wife to sexual intercourse with her husband. This approach reflected a time when a married woman was not regarded as having full and independent legal control over her body within the marriage. In effect, marriage was seen as limiting the wife's ability to withdraw consent to sexual relations.

This historical understanding found its way into Indian criminal law through the Indian Penal Code, 1860. Section 375 contained an exception under which sexual intercourse by a man with his own wife was not treated as rape, provided that the wife was above the prescribed age. The exception therefore created a significant distinction between sexual violence committed by a stranger and sexual violence within marriage.

The Criminal Law (Amendment) Act, 2013 brought substantial changes to the law of sexual offences. The amendments expanded the definition of rape and strengthened the legal framework for dealing with sexual violence, largely in response to the widespread public concern that followed the 2012 Delhi NIRBHAYA gang-rape case. Despite these significant reforms, however, Parliament chose not to remove the marital rape exception.

The Bharatiya Nyaya Sanhita (BNS) has broadly retained this approach, although it has increased the relevant age threshold to eighteen years.⁷ Consequently, sexual intercourse by a husband with his wife who is below eighteen years of age cannot receive protection under the marital exception. This position is consistent with the Supreme Court's decision in *Independent Thought v. Union of India*, in which the Court read down the earlier exception to the extent that it protected sexual intercourse with a wife between fifteen and eighteen years of age.

The importance of *Independent Thought* goes beyond the immediate issue of age. The judgment made it clear that marriage cannot take away the legal protection available to a girl child against sexual violence. At the same time, the Court deliberately left open the broader and more complex question of whether sexual intercourse without consent within an adult

⁴ Bharatiya Nyaya Sanhita 2023, ss 63–79.

⁵ Bharatiya Nyaya Sanhita 2023, s 63(a)–(d).

⁶ Bharatiya Nyaya Sanhita 2023, s 63, Explanation 2.

⁷ Bharatiya Nyaya Sanhita 2023, s 63, Exception 2.

marriage should constitute rape.⁸ As a result, under the present criminal law framework, adult married women continue to occupy a legally different position from unmarried women and minor wives.

6. The Current Position under Section 63 BNS

Section 63 BNS provides the statutory foundation for understanding the present law. It defines rape through a combination of prohibited sexual acts and specified circumstances, including acting against a woman's will, without her consent, through coercion, where she is incapable of understanding the nature of the act, or where she is unable to communicate consent.⁹ The statutory recognition of consent is therefore strong in principle. Nevertheless, Exception 2 provides that sexual intercourse or sexual acts by a man with his own wife, provided she is not under eighteen years of age, do not constitute rape.¹⁰ The result is a legal distinction:

Situation	Legal position
Non-consensual sexual intercourse by stranger	Rape
Non-consensual sexual intercourse by non-husband	Rape
Non-consensual sexual intercourse with minor wife below 18	Rape
Non-consensual sexual intercourse by husband with adult wife	Not rape because of Exception 2
Sexual intercourse by husband with wife during judicial separation	Separately punishable under section 67 BNS

Section 67 is particularly significant because it recognizes that marriage cannot, in every circumstance, be treated as a justification for non-consensual sexual intercourse. It makes sexual intercourse by a husband with his wife, without her consent, an offence when the spouses are living separately, whether pursuant to a decree of separation or otherwise.¹¹ This provision, however, reveals an important contradiction in the legal framework. On the one hand, the law acknowledges that a husband's marital relationship does not give him an unrestricted right to have sexual intercourse with his wife against her will when they are living separately. On the other hand, where the spouses continue to live together, the marital rape exception generally prevents such conduct from being prosecuted as rape. This distinction is difficult to reconcile with the basic principle of consent. The absence of consent and the physical and psychological harm resulting from non-consensual sexual intercourse do not necessarily disappear merely because the spouses continue to share the same home. From the perspective of the person subjected to the act, the violation of bodily autonomy may be equally serious in both situations.

7. Constitutional Framework

7.1 Article 14: Equality before Law

Article 14 of the Constitution guarantees equality before the law and equal protection of the laws. Any classification made by the legislature must therefore be based on an intelligible differentia and must have a rational connection with the purpose of the law. The marital rape exception raises a serious concern in this regard because it draws a distinction between married and unmarried women. In practical terms, two women may be subjected to exactly the same non-consensual sexual act, yet the law may treat the conduct differently solely because one woman is married to the person accused of the act. This raises a fundamental constitutional question: can marital status, by itself, be considered a legitimate basis for denying a woman the same legal protection against sexual violence that is available to an unmarried woman?

The Supreme Court's evolving equality jurisprudence has increasingly moved away from legal classifications rooted in gender stereotypes and patriarchal assumptions. In **Anuj Garg v. Hotel Association of India**, the Court cautioned against laws that seek to protect women on the basis of paternalistic notions about their vulnerability or appropriate social roles.¹² Similarly, in **Joseph Shine v. Union of India**, the Court struck down the offence of adultery and placed considerable emphasis on individual dignity, personal autonomy and equality within the institution of marriage.¹³ These principles are particularly relevant to the debate surrounding marital rape. The reasoning in *Joseph Shine* makes it difficult to accept the notion that marriage transforms the legal or constitutional identity of one spouse into an extension of the other. Marriage does not erase an individual's dignity, autonomy or capacity to make personal decisions. If a married woman continues to possess an independent constitutional personality and the right to decide matters concerning her own body, it becomes difficult to justify the proposition that marriage, by itself, can be treated as a substitute for her consent to sexual activity.

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

⁹ Bharatiya Nyaya Sanhita 2023, s 63(i)–(vii).

¹⁰ Bharatiya Nyaya Sanhita 2023, s 63, Exception 2.

¹¹Bharatiya Nyaya Sanhita 2023, s 67. The BNS expressly lists 'sexual intercourse by husband upon his wife during separation' as a distinct sexual offence

¹²Anuj Garg v Hotel Association of India (2008) 3 SCC 1.

¹³Joseph Shine v Union of India (2019) 3 SCC 39.

8. Article 21: Dignity, Privacy and Bodily Autonomy

Article 21 protects life and personal liberty. Its meaning has been significantly expanded through judicial interpretation. In Justice **KS Puttaswamy (Retd) v Union of India**, the Supreme Court recognized privacy as a constitutionally protected right.¹⁴ Privacy encompasses decisional autonomy, bodily integrity and the ability of individuals to make fundamental decisions concerning their personal lives. Sexual autonomy forms an important component of personal autonomy. The right to determine whether, when and with whom one engages in sexual activity is intrinsically connected with dignity and bodily integrity. In **Suchita Srivastava v Chandigarh Administration**, the Supreme Court recognized reproductive choice as an aspect of personal liberty and held that a woman's right to make reproductive choices is an important dimension of personal liberty under Article 21.¹⁵ The constitutional logic of these cases raises a fundamental question: if an adult woman has autonomy to decide whether she wishes to engage in sexual activity, why should marriage automatically extinguish her right to refuse sexual intercourse?

The marital rape exception effectively creates a presumption that marriage constitutes continuing consent. Such a presumption is increasingly difficult to reconcile with modern constitutional doctrine.

9. Article 15 and Gender Discrimination

Article 15 of the Constitution prohibits discrimination on grounds including sex. Although marital status is not expressly mentioned as a prohibited ground, discrimination rooted in gender stereotypes can nevertheless raise serious constitutional concerns. The marital rape exception disproportionately affects women because it is based on the assumption that marriage places a wife in a different legal position, where her sexual autonomy may be restricted simply because she is married. Such an assumption risks perpetuating the patriarchal idea that marriage gives a husband some form of entitlement over his wife's body.

The Supreme Court's decisions in **Navtej Singh Johar v. Union of India** and **Joseph Shine v. Union of India** reflect a broader constitutional commitment to individual autonomy, dignity, equality and constitutional morality.¹⁶ These decisions also demonstrate the Court's willingness to question laws and social practices rooted in outdated or discriminatory notions. Viewed from this perspective, the continued existence of a marital rape exception raises an important constitutional question: whether the criminal law should continue to recognize a distinction that rests on traditional assumptions about marriage rather than on the equal dignity and sexual autonomy of both spouses.

10. Independent Thought v Union of India

The decision in **Independent Thought v Union of India** marked an important step in the development of the law relating to marital rape in India. The Supreme Court was required to address the tension between the marital rape exception under the IPC and the protection given to children under the Protection of Children from Sexual Offences Act, 2012 (POCSO). The Court held that sexual intercourse by a husband with his wife who was between fifteen and eighteen years of age could not be protected by the marital rape exception.¹⁷ In reaching this conclusion, the Court placed considerable emphasis on the need to protect children from sexual abuse and to interpret the relevant laws in a manner that avoided conflict between them.

The judgment did not, however, extend criminal liability for marital rape to cases involving adult women. Its broader significance lies in the principle that marriage cannot, by itself, justify denying a girl child protection from sexual violence. The decision therefore represented an important recognition that the institution of marriage cannot override the fundamental need to protect children from sexual exploitation and abuse. The BNS's adoption of eighteen years as the relevant age threshold under Exception 2 reflects this legal development following *Independent Thought*. At the same time, the judgment leaves an important constitutional question unresolved: if marriage cannot deprive a girl child of protection against non-consensual sexual intercourse, can marital status legitimately be used to deny the same protection to an adult woman?

11. RIT Foundation v Union of India and the Constitutional Debate

The issue of marital rape reached a particularly significant stage before the Delhi High Court in **RIT Foundation v Union of India**. The petitions challenged the constitutional validity of Exception 2 to section 375 IPC. The Delhi High Court delivered a split judgment in May 2022. Justice Rajiv Shakdher held that the marital rape exception was unconstitutional, whereas Justice C Hari Shankar upheld its constitutional validity. The division meant that the question required authoritative resolution by the Supreme Court. The case generated competing constitutional approaches. The challenge to the exception emphasized equality, dignity, privacy and sexual autonomy. According to this approach, marriage cannot create an irrevocable license for sexual intercourse. The opposing view emphasized separation of powers and legislative policy. It argued that criminalization of marital

¹⁴ Justice KS Puttaswamy (Retd) v Union of India (2017) 10 SCC 1.

¹⁵ Suchita Srivastava v Chandigarh Administration (2009) 9 SCC 1.

¹⁶ Navtej Singh Johar v Union of India (2018) 10 SCC 1; Joseph Shine v Union of India (2019) 3 SCC 39.

¹⁷ Independent Thought v Union of India (2017) 10 SCC 800.

rape could have extensive consequences for the institution of marriage, evidentiary difficulties and the possibility of misuse of criminal law.

The Supreme Court subsequently took up the broader constitutional challenge. In 2024, while hearing the petitions, the Court also raised the important institutional question of whether striking down the exception would effectively amount to judicial creation of a new criminal offence.¹⁸ That question illustrates the constitutional complexity of the issue. Courts ordinarily interpret legislation rather than legislate. If the exception is removed, however, the underlying offence of rape already exists in the statute. The debate is therefore whether invalidating an unconstitutional immunity merely restores the general operation of the offence or effectively creates a new offence.

12. Arguments in Favour of Criminalizing Marital Rape

12.1 Marriage is not Consent

The strongest argument is that marriage and sexual consent are legally distinct concepts. Consent must be specific and voluntary. A person may consent to sexual relations at one time and refuse at another. A marital relationship cannot reasonably transform a conditional and revocable choice into permanent consent.

12.2 Bodily Autonomy

Criminal law should protect the bodily autonomy of married women to the same extent that it protects unmarried women. A married woman does not lose her constitutional right to bodily integrity by entering into marriage.

12.3 Equality

The exception produces unequal protection. An unmarried woman and married woman subjected to identical non-consensual sexual conduct may receive different criminal protection. This distinction is difficult to reconcile with Article 14 when the objective of rape law is the protection of sexual autonomy.

12.4 International Human Rights Standards

International human rights law increasingly recognizes marital rape as a form of sexual violence. International instruments and human rights bodies have repeatedly emphasized equality within marriage and protection against violence against women. Although international standards do not automatically determine the content of Indian criminal law, they can assist constitutional interpretation where domestic law is ambiguous.

12.5 Marriage Cannot Confer Immunity from Criminal Law

Other forms of violence within marriage are criminalized. A husband cannot claim immunity merely because the victim is his wife when he commits murder, grievous hurt or other offences. The same principle should apply to sexual violence.

13. Arguments against Immediate Criminalization

The principal objection concerns possible misuse of criminal law in matrimonial disputes. Critics argue that allegations of marital rape could be difficult to investigate because sexual activity ordinarily occurs in private. Another concern is that criminalization may increase the adversarial nature of matrimonial litigation and potentially be used as a bargaining instrument in divorce or custody proceedings. A further argument concerns the preservation of marriage as a social institution. The Union government has previously expressed concerns that criminalizing marital rape could have consequences for the institution of marriage and could lead to excessive criminal litigation.¹⁹ These concerns should not be dismissed. However, they do not necessarily justify maintaining an immunity from prosecution. Every criminal offence can potentially be falsely alleged. The appropriate response is generally reliable investigation, evidentiary safeguards, prosecutorial scrutiny and judicial oversight rather than complete immunity for an entire class of accused persons.

14. Existing Legal Remedies for Marital Sexual Violence

Although marital rape is generally excluded from the offence of rape where Exception 2 applies, Indian law does provide some alternative legal remedies to women facing sexual violence within marriage.

I. Section 67 of the BNS criminalizes non-consensual sexual intercourse by a husband with his wife when they are living separately.²⁰ This provision offers protection in situations where the marital relationship has effectively broken down and the spouses are living apart.

II. Section 85 of the BNS criminalizes cruelty by a husband or his relatives towards a woman.²¹ Where sexual abuse forms part of a wider pattern of physical, emotional, or matrimonial cruelty, this provision may provide an avenue for legal redress.

¹⁸ RIT Foundation v Union of India, constitutional challenge to the marital rape exception; the Supreme Court proceedings in 2024 included consideration of whether invalidating the exception would effectively amount to creation of a new offence.

¹⁹ See generally the submissions of the Union Government in the constitutional challenge concerning the marital rape exception.

²⁰ Bharatiya Nyaya Sanhita 2023, s 67.

²¹ Bharatiya Nyaya Sanhita 2023, ss 85–86

III. the Protection of Women from Domestic Violence Act, 2005 (PWDVA) recognizes sexual abuse as a form of domestic violence and provides important civil remedies, including protection orders and other forms of relief.²²

These remedies are significant, but they remain incomplete. They do not necessarily recognize or punish non-consensual sexual intercourse within marriage in the same manner as rape. A woman who is subjected to sexual violence by her husband may therefore be required to seek protection through provisions dealing with separation, cruelty, or domestic violence rather than through the law of rape itself.

The central concern is one of legal recognition and equality. Consent should remain meaningful within marriage, and the fact that the perpetrator is the woman's husband should not, by itself, diminish the seriousness of a sexual act performed without her consent. A legal framework that treats such conduct only through secondary or alternative offences risks failing to fully acknowledge the harm suffered by survivors of marital sexual violence.

15. Section 67 BNS: A Partial Recognition of Marital Sexual Autonomy

Section 67 deserves special attention because it demonstrates that Parliament has already recognized that a husband may commit a sexual offence against his wife under particular circumstances. The section applies where the spouses are living separately and sexual intercourse occurs without the wife's consent. This provision undermines the argument that marriage necessarily creates an absolute entitlement to sexual intercourse. If marriage created irrevocable consent, section 67 would be unnecessary. At the same time, section 67 creates a geographical or relational distinction based upon separation. The same conduct may be criminal when the parties are separated but excluded from the offence of rape when they continue to live together. From the standpoint of sexual autonomy, the distinction is difficult to justify.

16. Reforming the Marital Rape Exception

A comprehensive reform should begin with deletion of Exception 2 to section 63 BNS. Once the exception is removed, the ordinary definition of rape would apply irrespective of the marital relationship between the accused and victim. However, legislative reform should not end there. Several safeguards are necessary.

16.1 Consent-Based Definition

The law should clearly establish that consent must be voluntary, specific and continuing. Marriage should never be treated as conclusive evidence of consent.

16.2 Evidentiary Safeguards

Courts should apply the existing principles of sexual-offence jurisprudence regarding consent and credibility. The law should avoid creating an automatic presumption of guilt merely from the existence of an allegation.

16.3 Protection against Secondary Victimization

Police, prosecutors and courts should receive specialized training concerning sexual violence within marriage. Victims should not be subjected to humiliating or stereotypical questioning.

16.4 Procedural Confidentiality

The identity and privacy of victims must be protected. Section 72 BNS already restricts disclosure of the identity of victims of specified sexual offences.²³ Similar confidentiality principles should continue to apply to marital sexual violence.

16.5 Protection against Misuse

If criminalization is introduced, false complaints should be dealt with under ordinary criminal-law safeguards. However, mere acquittal should not automatically be treated as proof that the complaint was malicious.

16.6 Gender-Neutral Protection

A broader reform could consider whether sexual violence legislation should eventually provide comprehensive protection to all persons irrespective of gender, while retaining specific provisions addressing the disproportionate vulnerability of women and children.

17. Comparative Perspective

A large number of jurisdictions have abolished marital rape exemptions. The comparative trend reflects a movement away from the historical assumption that marriage creates permanent sexual consent. The United Kingdom, for example, abolished the marital rape immunity judicially in *R v R*.²⁴ The House of Lords held that the common-law fiction of irrevocable matrimonial consent had ceased to form part of modern law. The comparative experience demonstrates that criminalization does not

²²Protection of Women from Domestic Violence Act 2005, ss 3, 18–23.

²³ Bharatiya Nyaya Sanhita 2023, s 72.

²⁴ *R v R* [1992] 1 AC 599 (HL).

necessarily require destruction of the institution of marriage. Instead, it establishes that marriage is a relationship between two autonomous individuals rather than a transfer of sexual ownership. India may draw from this experience while designing safeguards suited to its constitutional and social context.

18. Separation of Powers and Judicial Review

One of the most difficult issues is institutional: should the Supreme Court invalidate the marital rape exception, or should Parliament itself amend the law? The question is especially significant because criminal offences and punishments are generally matters of legislative policy. However, judicial review exists precisely to determine whether legislation violates constitutional rights. If an exception is found to be manifestly discriminatory or inconsistent with fundamental rights, courts may invalidate it. The difficulty is determining the appropriate remedy. Striking down the exception could make the ordinary definition of rape applicable to marital conduct. Alternatively, the Court could declare the exception unconstitutional but suspend the effect of its judgment to allow Parliament to legislate. The latter approach could preserve institutional comity while ensuring that constitutional rights are not indefinitely denied.

19. Critical Evaluation of the BNS

The BNS has undoubtedly modernized and reorganized India's criminal law relating to sexual offences. Its express treatment of consent and its continuation of stringent punishment for aggravated rape are significant. Nevertheless, in relation to marital rape, the reform is incomplete.

The BNS preserves a colonial-era conceptual distinction between sexual violence committed by strangers and sexual violence committed by husbands. The fact that the statutory age has been increased to eighteen is a positive development, but it does not resolve the adult woman's constitutional claim. The contradiction is particularly visible when the BNS is read alongside modern constitutional jurisprudence. The Supreme Court has repeatedly emphasized dignity, privacy and autonomy. Yet section 63 continues to permit marriage to operate as a legal barrier to prosecution for rape. The law therefore appears to contain two competing conceptions of marriage: one based upon equality and individual autonomy, and another based upon implied sexual entitlement. The constitutional direction of Indian law increasingly supports the former.

20. Recommendations

The following reforms are recommended

1. Exception 2 to section 63 BNS should be deleted.
2. The statutory definition of consent should expressly state that marriage does not constitute consent to sexual activity.
3. Section 67 should be reconsidered so that the criminality of non-consensual sexual intercourse does not depend upon physical separation.
4. Specialized protocols should be created for investigation and prosecution of sexual violence within marriage.
5. Judicial training should focus on eliminating stereotypes such as the assumption that a wife is under a continuing obligation to provide sexual access to her husband.
6. Victims should have access to counselling, legal aid, medical assistance and protection from intimidation.
7. Safeguards against malicious prosecution should be maintained without converting the existence of such safeguards into an argument for complete immunity.
8. Parliament should undertake a comprehensive review of all sexual offences under the BNS rather than treating marital rape as an isolated issue.

21. Conclusion

The Bharatiya Nyaya Sanhita 2023 marks an important step in the continuing reform of India's criminal justice system. Its provisions dealing with rape, sexual harassment, stalking, voyeurism, gang rape and aggravated sexual offences reflect a clear legislative recognition of the seriousness of sexual violence. At the same time, however, the continued existence of the marital rape exception leaves an important gap in this reform.

Section 63 of the BNS places consent at the heart of the offence of rape, but Exception 2 creates a significant distinction when the accused is the husband of an adult woman. In practical terms, this means that conduct which may constitute rape outside marriage is excluded from the definition when it occurs within an existing marital relationship. This creates a difficult tension within the law: consent is treated as fundamental to sexual autonomy, yet marriage continues to operate as a basis for limiting the legal recognition of that autonomy.

The constitutional understanding of individual liberty has evolved considerably through decisions such as Justice K.S. Puttaswamy v. Union of India, Suchita Srivastava v. Chandigarh Administration, Navtej Singh Johar v. Union of India and Joseph Shine v. Union of India. These decisions have strengthened the principles of dignity, privacy, equality, bodily autonomy and individual choice. In this constitutional framework, marriage cannot reasonably be understood as a permanent surrender of an individual's bodily or sexual autonomy. A woman does not cease to be an autonomous constitutional person merely because she enters into marriage.

The Supreme Court's decision in *Independent Thought v. Union of India* also provides an important illustration of this evolving approach. By refusing to allow marital status to deprive a girl child of protection against sexual violence, the Court recognized that marriage cannot, by itself, justify an exception to fundamental protections. The continuing question is whether the same constitutional reasoning should also extend to adult married women.

Concerns regarding false allegations, evidentiary difficulties and the possible misuse of criminal law in matrimonial disputes cannot simply be dismissed. These are legitimate concerns that may require careful legislative safeguards. However, such concerns should not, by themselves, provide a basis for granting complete immunity from criminal prosecution for non-consensual sexual conduct within marriage. The criminal justice system already contains safeguards relating to investigation, evidence, burden of proof and judicial determination. The possibility of misuse of a law does not necessarily justify denying legal protection to genuine victims.

The preferable approach, therefore, would be to reconsider and ultimately remove Exception 2 to Section 63 of the BNS and adopt a consent-based framework that applies irrespective of marital status. Such a reform should not be understood as an attack on the institution of marriage. On the contrary, it would reinforce the idea that marriage is a relationship between two equal individuals, founded on mutual respect, dignity and choice. Marriage should create responsibilities and mutual obligations, but it should not confer ownership or unrestricted control over another person's body.

Ultimately, the debate surrounding marital rape is not simply a question of whether the scope of criminal law should be expanded. At its deeper level, it raises fundamental questions about what equality, dignity, privacy and personal autonomy mean within marriage. A modern constitutional democracy cannot treat these values as disappearing at the threshold of marriage.

As of 5 October, 2026, the legal position remains that the BNS does not criminalize marital rape between an adult husband and an adult wife. Exception 2 to Section 63 continues to exclude such conduct from the general definition of rape, while Section 67 separately addresses non-consensual sexual intercourse by a husband with his wife when the spouses are living separately. The broader constitutional challenge to the marital rape exception remains unresolved, and recent judicial developments in 2026 continue to recognize that marital rape is not generally criminalized under the existing framework.

If the BNS is intended to represent a modern and constitutionally responsive framework of criminal law, the treatment of sexual violence within marriage will ultimately need to be examined in light of the constitutional commitment to equality, dignity and individual autonomy. The central question is therefore not whether marriage deserves protection, but whether that protection can ever require the law to disregard the bodily autonomy of one of the individuals within it.

Bibliography

Legislation

- Bharatiya Nyaya Sanhita 2023.
- Constitution of India.
- Protection of Women from Domestic Violence Act 2005.
- Protection of Children from Sexual Offences Act 2012.
- Indian Penal Code 1860.

Cases

- Anuj Garg v Hotel Association of India (2008) 3 SCC 1.
- *Independent Thought v Union of India* (2017) 10 SCC 800.
- Justice KS Puttaswamy (Retd) v Union of India (2017) 10 SCC 1.
- Joseph Shine v Union of India (2019) 3 SCC 39.
- Navtej Singh Johar v Union of India (2018) 10 SCC 1.
- RIT Foundation v Union of India 2022 SCC Online Del 1404.
- R v R [1992] 1 AC 599 (HL).
- Suchita Srivastava v Chandigarh Administration (2009) 9 SCC 1.

Secondary Sources

- Law Commission of India, 172nd Report on Review of Rape Laws (2000).
- Justice JS Verma Committee, Report of the Committee on Amendments to Criminal Law (2013).
- PRS Legislative Research, The Bharatiya Nyaya Sanhita, 2023: Legislative Brief (2023).