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# DOMESTIC VIOLENCE AND MARITAL OFFENCES: CRIMINALISATION AND JUDICIAL APPROACH UNDER THE NEW CRIMINAL LAWS

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## ABSTRACT

Domestic violence and marital offences have long challenged India's criminal justice system, reflecting deep-rooted social norms and structural inequalities. The recent criminal law overhaul through the Bharatiya Nyaya Sanhita (BNS), Bharatiya Nagarik Suraksha Sanhita (BNSS), and Bharatiya Sakshya Adhiniyam (BSA), 2023, represents a significant shift in the legislative approach to gender-based violence within the family. This paper examines how the new codes redefine, expand, or retain the criminalisation of domestic violence, cruelty, sexual offences within marriage, and related matrimonial crimes. It evaluates whether the revised provisions enhance victim protection, strengthen evidentiary standards, and ensure more efficient and sensitive justice delivery. The study further analyses judicial trends and interpretive methods adopted by Indian courts in applying the updated framework, focusing on the balance between criminalisation, due process, and marital privacy. By adopting a doctrinal methodology, the research highlights gaps, ambiguities, and areas requiring further reform to ensure that the new criminal laws effectively address the lived realities of survivors. Ultimately, the paper assesses whether the legal transformation under the 2023 criminal codes marks genuine progress in combating domestic violence and marital offences or merely reconfigures existing challenges in a new statutory language.

**Keywords:** Domestic Violence, New Criminal Justice, Bharatiya Nyaya Sanhita, Bharatiya Sakshya Adhiniyam

## Introduction

Domestic violence remains one of the most pervasive yet under-reported forms of violence globally, and India is no exception. Intimate partner abuse—whether physical, emotional, economic, or sexual—continues to affect a significant percentage of married women. Reports from national surveys and women's rights organisations consistently demonstrate that, despite advancements in constitutional interpretation, statutory frameworks, and awareness, many victims still lack access to meaningful remedies or justice. The private nature of marital relationships, embedded social conditioning, and institutional barriers contribute to a system where violence is normalised, tolerated, or invisibilised.

With the enactment of India's new criminal laws, the Bharatiya Nyaya Sanhita (BNS), 2023, Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023, and Bharatiya Sakshya Adhiniyam (BSA), 2023 a major expectation emerged: whether the reforms would modernise criminal law responses to domestic and marital violence, align them with constitutional guarantees, and close long-critiqued gender gaps.<sup>1</sup> The reforms created an opportunity to revisit colonial-era provisions, most notably the marital rape exception—one of the most debated provisions in the Indian criminal system.

However, while the new criminal framework introduced updates in terminology, offence categorisation, and procedural norms, it fell short in addressing one of the most contentious aspects: the criminalisation of non-consensual sexual intercourse within marriage. This exclusion raises serious questions regarding consistency with constitutional jurisprudence on privacy, dignity, bodily autonomy, and equality.<sup>2</sup>

This article examines how the new legal framework regulates (or fails to regulate) domestic violence and marital offenses. It explores doctrinal structure, implementation challenges, judicial interpretations, and the constitutional debate surrounding marital rape. It also proposes a reform roadmap that balances rights, enforcement realities, and policy needs.

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<sup>1</sup> Supreme Court Says Govt May Argue on Law If It Chooses Not to File a Counter to Pleas to Criminalise Marital Rape, *The Hindu* (Nov. 21, 2024), <https://www.thehindu.com/news/national/supreme-court-says-govt-may-argue-on-law-if-it-chooses-not-to-file-a-counter-to-pleas-to-criminalise-marital-rape/article68654811.ece> (last visited Nov. 29, 2025).

<sup>2</sup> Smith & Jones, *Re-evaluating Forensic Evidence in Marital Rape Cases*, *Forensic Sci. & Crim. L. J.* (2025), [https://doi.org/10.1016/S2590-2911\(25\)00422-X](https://doi.org/10.1016/S2590-2911(25)00422-X).

## Evolution of Legal Responses to Domestic and Marital Violence in India

Domestic violence as a legal, social, and human rights concern in India did not evolve linearly; rather, it developed through layered transformations driven by colonial legislation, feminist movements, international human rights norms, judicial reinterpretation of constitutional guarantees, and shifting social expectations. Historically, violence within the marital or domestic space was treated as a *private, familial matter* rather than conduct warranting state intervention. Over time, however, increasing recognition of women's rights, constitutional equality, and the role of the state in preventing interpersonal harm has led to significant reforms—though many gaps persist, particularly in the criminalisation of marital sexual violence.<sup>3</sup>

### Colonial Foundations and Continuity

The earliest formal legal framework governing marital relations and domestic violence emerged under British colonial rule. The Indian Penal Code, 1860 (IPC), codified criminal offences applicable across India but embedded Victorian patriarchal norms, including the presumption that a wife was the legal and sexual property of her husband. Marriage was conceptualised as a contract where consent to sexual relations was implied, permanent, and irrevocable. This ideology was codified in the marital rape exception under Section 375 IPC, which stated that non-consensual sexual intercourse by a man with his own wife, provided she was not under a certain age, did not constitute rape.

This exception reflected two legal assumptions:

1. **Doctrine of Covverture**—derived from English common law, treating a wife's legal identity as subsumed under her husband.
2. **Sanctity of Marriage and State Non-Interference Doctrine**—marriage as a social and religious institution not subject to state scrutiny, except in extreme criminal matters.

During the colonial period, domestic violence was legally visible only in limited circumstances, such as hurt, grievous hurt, abetment to suicide, or dowry deaths. The absence of explicit recognition of spousal abuse reinforced societal normalisation of domestic violence. Courts

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<sup>3</sup> *Marital-Rape and Law*, Manupatra (last visited Nov. 29, 2025), <https://articles.manupatra.com/article-details/Marital-Rape-and-Law>.

rarely intervened in intra-marital disputes, often advising conciliation or restoration of marital harmony rather than treating violence as a legal infraction.

However, some legislative reforms during late colonial governance began acknowledging gender-based violence as a social problem, though indirectly. The Child Marriage Restraint Act, 1929, introduced a minimum marriage age, signalling state authority over personal relations. The Hindu Women's Right to Maintenance and Separate Residence Act, 1946, allowed women to live apart if subjected to cruelty, yet still without offering criminal consequences.

Thus, colonial law institutionalised both recognition and erasure: while women's suffering was acknowledged, legal remedies remained weak, conditional, and non-criminal.

## 2.2 Post-Independence Developments Leading to PWDVA, 2005

After independence, the Indian Constitution established equality (Articles 14–15), dignity and life (Article 21), and freedom from exploitation (Article 23) as fundamental rights.<sup>4</sup> Yet, criminal law frameworks continued largely unchanged from colonial models. Section 498A IPC, introduced in 1983, was India's first explicit criminal recognition of domestic violence, enacted amid rising reports of dowry deaths and gendered abuse. It criminalised cruelty by a husband or his relatives and recognised harassment for dowry as an offence. The provision was path-breaking, but its scope was limited—it addressed only certain forms of cruelty, lacked procedural clarity, and was insufficient as a standalone remedy.

Simultaneously, international pressure and human rights movements influenced legal discourse. India ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1993<sup>5</sup>, committing to preventing gender-based violence. Judicial pronouncements, including *Vishaka v. State of Rajasthan* (1997)<sup>6</sup>, further recognised gender violence as a constitutional issue.

Despite these developments, victims lacked civil remedies such as protection orders, residence orders, financial relief, or access to shelters. Litigation remained primarily criminal in nature,

<sup>4</sup> Constitution of India, art. 23 (as amended 2025).

<sup>5</sup> Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, ratified by India, Sept. 1993.

<sup>6</sup> *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241 (India).

adversarial, and prolonged, discouraging complainants.

### 2.3 The Protection of Women from Domestic Violence Act (PWDVA), 2005

The enactment of the Protection of Women from Domestic Violence Act, 2005<sup>7</sup>, represented a landmark shift from earlier conceptualisations of domestic violence. Unlike previous frameworks, the PWDVA adopted a rights-based, gender-sensitive, and survivor-centred approach by:

- Recognising diverse forms of domestic abuse—physical, sexual, verbal, emotional, and economic.
- Extending protection not only to legally married spouses but also to women in relationships like marriage, widows, mothers, sisters, and domestic partners.
- Introducing civil relief mechanisms, such as:
  - Protection orders
  - Residence rights in a shared household
  - Monetary and maintenance orders
  - Custody arrangements
  - Compensation orders

PWDVA operationalised the understanding that domestic violence is not solely a criminal phenomenon but a pattern of coercive control requiring preventive, protective, and rehabilitative mechanisms, not just punitive ones.

However, a significant limitation persists: the Act does not criminalise domestic violence itself. Violations of the Act are enforceable primarily through civil mechanisms, although breach of protection orders constitutes a criminal offence. As a result, victims experiencing severe harm—such as grievous bodily injury or forced sexual intercourse must still rely on separate

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<sup>7</sup> Protection of Women from Domestic Violence Act, No. 43, Acts of Parliament, 2005 (India).

penal provisions for criminal punishment.

Thus, while the PWDVA was transformative in scope, inclusivity, and survivor protection mechanisms, it operates parallel to criminal law rather than serving as a substitute for criminalisation of domestic violence.

### 3. The New Criminal Laws Framework

#### 3.1 Overview of BNS Reform Intent

The Bharatiya Nyaya Sanhita, 2023 (BNS) represents one of the most significant overhauls of India's criminal law framework since the colonial period. Replacing the Indian Penal Code, 1860, the enactment signals a structural shift from a colonial-era punitive approach to a framework rhetorically anchored in *justice, victim protection, and community-centric criminal accountability*. The reform process was positioned not merely as legislative substitution but as a recalibration of the purpose and philosophy of criminal law.<sup>8</sup>

One of the stated intentions behind the BNS reforms was to modernize offence categorisation, update terminology, and incorporate contemporary forms of harm, including cybercrime, organised crime, trafficking, and gender-based violence. The law attempts to adopt a more victim-centric approach, aligning with international norms such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>9</sup> and the UN Declaration on Violence Against Women, albeit unevenly.<sup>10</sup>

Within this narrative, the treatment of domestic violence and marital offences emerged as a site of both continuity and modification. The reforms retain many IPC-era offences relating to women—such as cruelty, dowry death, and forced or deceitful marriage—but also seek to restructure categories of violence to make offences recognisable as deliberate harms rather than private familial disputes.

The BNS also attempts to simplify legal language and reduce ambiguity in application. For instance, provisions previously scattered across sections of the IPC have now been reorganised

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<sup>8</sup> *Supra note 3.*

<sup>9</sup> *Supra note 5.*

<sup>10</sup> Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. Doc. A/RES/48/104 (Dec. 20, 1993).

into thematic chapters dealing with offences affecting the human body, dignity, or family integrity. This restructuring is intended to improve legal accessibility for law enforcement, the judiciary, and victims.

Despite these structural changes, critics argue that the BNS retains core patriarchal assumptions embedded in prior criminal law frameworks. While the reforms vocalise a commitment to gender justice, some provisions, particularly the retention of the exception shielding marital rape for adult wives, demonstrate enduring reluctance to confront marriage as a space where sexual autonomy violations can occur. Thus, while the statutory architecture signals evolution, the normative foundations remain contested.

Overall, the reform intent behind the BNS represents a step toward modernisation and rights-based language, but stops short of transforming underlying power relations that shape the lived realities of marital violence.

### ***3.2 Marital Offences Recognised Under BNS***

The BNS retains, revises, and supplements several provisions from the IPC that address harms committed within marriage or the domestic sphere. Although the law acknowledges that marital relationships can be sites of coercion, abuse, and criminal conduct, its treatment of specific offences reflects partial progression.

Key categories of marital and domestic offences under the BNS include:

#### **(A) Cruelty by Husband or Relatives**

The offence historically captured under Section 498-A IPC continues under the BNS with largely similar definitional scope. It criminalises both physical and mental cruelty inflicted by a husband or his relatives. The provision remains crucial given the systemic persistence of coercive marital structures, where emotional abuse, harassment over dowry, isolation, intimidation, and threats of desertion or violence are common.

However, critiques persist regarding dual misuse narratives—where some stakeholders argue that the provision is misused, while feminist scholars maintain that under-reporting remains the overwhelming reality. The BNS retains criminal sanctions but does not introduce stronger procedural safeguards such as mandatory counselling, multi-agency response frameworks, or

integration with the Protection of Women from Domestic Violence Act, 2005, thereby continuing fragmented enforcement.

### **(B) Dowry Harassment and Death**

Dowry-linked offences remain codified under provisions relating to cruelty and homicide. Like the IPC regime, the BNS enhances punishment when death occurs under suspicious circumstances within seven years of marriage. This demonstrates continued recognition of dowry violence as a socio-legal crisis requiring special penal treatment. Yet, the law does not move toward preventative models or economic intervention addressing systemic patriarchy sustaining dowry practices.

### **(C) Deceitful or Fraudulent Marriage**

The BNS expands recognition of fraudulent and coerced marriage arrangements, including<sup>11</sup>:

- Marriages conducted under false identity
- Impersonation
- Concealment of prior marriage
- Bigamy-related deception

These provisions indicate a shift toward acknowledging marriage as a civil contract requiring informed consent rather than an unquestionable social institution. However, the framing remains limited to deception rather than broader coercion, forced marriage, or lack of meaningful marital choice.

### **(D) Sexual Assault Provisions (Excluding Adult Marital Rape)**

Perhaps the most debated element of the BNS is the continued exclusion of marital rape involving adult wives from the definition of sexual assault. The law criminalises sexual assault by husbands only when the wife is:

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<sup>11</sup> Bharatiya Nyaya Sanhita, 2023 (India).

- Below 18 years of age, or
- Living separately under judicial decree due to marital discord.

This maintains the colonial-era legal fiction that marital consent is permanent, overriding autonomy, bodily integrity, and sexual agency. The law acknowledges sexual violence in marriage yet simultaneously renders it non-criminal when occurring within a legally recognised union, signalling a contradictory legal stance where marriage becomes both a site of acknowledged harm and a legally protected exception zone.

#### **4. The Marital Rape Exception: A Legal Paradox**

The marital rape exception in India's criminal law framework represents one of the most contentious and deeply entrenched legal contradictions in contemporary constitutional jurisprudence. Despite significant expansions in constitutional protections relating to dignity, bodily autonomy, and equality, the Bharatiya Nyaya Sahita (BNS), like its predecessor—the Indian Penal Code, 1860—continues to uphold the fiction that marital intercourse is inherently consensual.<sup>12</sup> This legal position creates a paradox: while the law recognises rape as a violation of bodily integrity, consent, and sexual autonomy, it simultaneously denies married women the protection of that same legal framework when the offender is their husband.

##### ***4.1 Historical Roots of the Exception***

The marital rape exemption can be traced to colonial-era moral and legal doctrines, particularly English common law, which conceptualised marriage as a permanent sexual contract. The rationale was famously articulated by Chief Justice Sir Matthew Hale in the 17th century:

“The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself in kind unto the husband, whom she cannot retract.”

This formulation was directly imported into Section 375 of the Indian Penal Code, codified in 1860. The law framed a wife not as a person with rights and agency but as a subject under the

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<sup>12</sup> *India's supreme court to rule on new penal code permitting marital rape*, The Guardian (June 27, 2024), <https://www.theguardian.com/global-development/article/2024/jun/27/india-supreme-court-new-penal-code-permitting-marital-rape> (last visited Nov. 29, 2025).

authority of her husband. Marriage, therefore, became both a sexual entitlement and a legal defence.

While India formally abolished many colonial legal doctrines, the marital rape immunity endured—reflecting both historical continuity and the influence of patriarchal social structures that prioritise familial stability over criminal accountability within intimate relationships.

#### **4.2 Current Position Under BNS**

Section 63 of the Bharatiya Nyaya Sanhita continues this exemption almost identically, stating that sexual intercourse by a man with his own wife, provided she is over 18 years of age, shall not constitute rape. It criminalises forced sexual intercourse only in two limited circumstances:

- When the wife is below 18 (aligning with statutory rape).
- When the wife is living separately under a judicial decree.

This creates a legal dichotomy where coercive sexual intercourse is punishable when the woman is seen as legally distant from marriage but remains permissible within the marital household.

Thus, the BNS simultaneously recognises forced sex as violence and treats it as non-criminal depending solely on marital status—an inconsistency that raises profound constitutional questions.

#### **4.3 Constitutional Contradictions**

The continued validity of the marital rape exception is at odds with several fundamental rights guaranteed by the Constitution of India.

##### **(A) Right to Equality (Article 14)**

The exception creates two classes of women—married and unmarried—granting only the latter full protection against rape. This legal distinction has no rational nexus with the purpose of rape law, which is the protection of bodily autonomy and sexual consent. Courts in recent jurisprudence have held that marriage cannot be a basis for differential legal treatment when fundamental rights are at stake.

## (B) Right to Life and Personal Liberty (Article 21)

The Supreme Court has repeatedly affirmed that *personal liberty includes bodily integrity, decisional autonomy, and sexual autonomy*, as seen in:

- *Puttaswamy (Right to Privacy)*<sup>13</sup>
- *Joseph Shine (Adultery Judgment)*<sup>14</sup>
- *Navtej Singh Johar (Decriminalisation of Section 377)*<sup>15</sup>

These decisions emphasise consent as central to sexual relations. Yet the marital rape exception functions as a statutory denial of consent, implying that a married woman has no right to refuse sexual intercourse.

## (C) Right Against Violence and Degrading Treatment

The Constitution and international law recognise freedom from violence and degrading treatment as non-negotiable rights. The marital rape exception denies women remedies for severe violations, including sexual torture, forced intercourse during pregnancy, marital sodomy, and reproductive coercion.

### 4.4 Judicial Attitudes and Pending Litigation

India's judiciary has taken incremental steps acknowledging the problem. In *Independent Thought v. Union of India* (2017)<sup>16</sup>, the Supreme Court removed the marital rape immunity for wives aged 15–18, holding that child marriage cannot override dignity and constitutional liberty. The Court described the exception as "arbitrary, capricious and discriminatory."

However, the larger question—criminalising marital rape for adult women—remains unresolved, pending adjudication before the Delhi High Court and ultimately expected to reach the Supreme Court.

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<sup>13</sup> K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

<sup>14</sup> Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

<sup>15</sup> Joseph Shine v. Union of India, (2018) 10 SCC 1.

<sup>16</sup> AIR 2017 SC 4904

The judiciary faces a constitutional crossroads: whether to preserve marriage as a site of exceptional legal immunity or to align criminal law with modern constitutional morality rooted in equality and bodily autonomy.

#### **4.5 International Legal Position**

Globally, more than 70 countries have criminalised marital rape, including jurisdictions with comparable socio-cultural contexts such as Nepal, Bhutan, South Africa, and Sri Lanka. International frameworks, including:

- CEDAW (Convention on the Elimination of All Forms of Discrimination Against Women)
- UN Declaration on the Elimination of Violence Against Women (1993)
- Beijing Platform for Action (1995)

explicitly call for the criminalisation of marital rape as an essential component of gender justice. India, as a signatory, remains legally and morally obligated to harmonise its domestic laws with these commitments.

#### **4.6 The Social Argument: Marriage, Culture, and Fear of Misuse**

Opponents of criminalisation argue:

1. Marriage is a private space, and criminal law should not enter the bedroom.
2. Criminalisation may destabilise families and increase litigation.
3. The law could be misused in marital disputes, similar to debates around Section 498-A.

These arguments rest on a patriarchal conception of marriage as a space where sexual access is implied and where maintaining the institution takes precedence over the autonomy of the individual.<sup>17</sup>

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<sup>17</sup> *Independent Thought v. Union of India*, (2017) 10 SCC 800.

However, framing rape as a matter of privacy rather than violence shifts blame onto survivors and protects perpetrators under the guise of cultural preservation. Marital relationships, like all relationships, must exist within the boundaries of individual dignity and consent.

#### **4.7 The Central Paradox**

The marital rape exception exposes a profound contradiction in India's legal landscape:

- A married woman is recognised as a citizen with rights in constitutional law.
- Yet, in criminal law, she remains partially unprotected because marriage is treated as a perpetual state of consent.

Thus, while India's constitution guarantees dignity, autonomy, and equality, criminal law continues to privilege marital status over bodily rights.

The persistence of the exception reflects not merely legislative inertia but a deeper institutional struggle to reconcile modern constitutional values with historic patriarchal legal structures. Ultimately, the marital rape exception stands not only as a legal anomaly but as a challenge to India's democratic commitment to equality, justice, and human rights.<sup>18</sup>

The question now is not whether India can criminalise marital rape but whether a constitutional democracy can justify not doing so any longer.

### **5. Judicial Developments and Current Litigation**

The question of whether the marital rape exception is compatible with India's constitutional framework has increasingly become a subject of judicial scrutiny. Over the last decade, a wave of public interest litigation, survivor testimonies, legal scholarship, and comparative constitutional analysis has pushed courts to confront the unresolved legal and moral tension between marital autonomy and individual bodily rights. While Parliament has thus far declined to remove the marital rape exception, the judiciary—particularly High Courts and the Supreme Court—has emerged as the central arena where the constitutionality of this provision is being

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<sup>18</sup> Shuchismita Ghosh, *A Scoping Review on Exploring the Urgency of Criminalising Marital Rape in India*, 12 *Soc. Scis. & Humanit. Open* 101694 (2025), <https://doi.org/10.1016/j.ssaho.2025.101694>.

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### **5.1 Early Judicial Attitudes: Reluctance and Doctrinal Restraint**

Historically, Indian courts viewed marital rape as a private marital matter rather than a violation capable of judicial intervention. Earlier judgements maintained the line that criminalisation of marital rape fell within the domain of legislative policy rather than judicial determination. This approach reflected a larger cultural narrative in which marriage was perceived as a sacrosanct institution shielded from criminal scrutiny.

For instance, courts often upheld the immunity because marital stability, social cohesion, and family privacy outweighed criminal intervention. However, this jurisprudential stance began eroding as constitutional rights jurisprudence expanded, particularly through the lens of dignity, autonomy, and equality.

### **5.2 Landmark Turning Point: *Independent Thought v. Union of India (2017)***

A significant breakthrough emerged in *Independent Thought v. Union of India*<sup>19</sup>, where the Supreme Court struck down the marital rape immunity for wives aged 15–18. The Court held that the exception violated rights under Articles 14, 15(3), and 21, particularly emphasising that forced sex with a minor wife could not be legitimised through the institution of marriage.<sup>20</sup>

While the judgement did not address adult marital rape, it marked a conceptual shift:

- Marriage does not give a man absolute sexual rights over his wife.
- Bodily autonomy and dignity apply irrespective of marital status.
- Constitutional morality takes precedence over social morality.

This decision effectively signalled that the marital rape exception was constitutionally vulnerable.

### **5.3 The Delhi High Court Split Verdict (2022)**

The most significant constitutional challenge unfolded before the Delhi High Court in RIT

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<sup>19</sup> *Independent Thought v. Union of India*, (2017) 10 SCC 800 .

<sup>20</sup> *Ibid.*

Foundation & Others v. Union of India. Petitioners argued that the exception violates:

- Article 14 (Right to Equality)
- Article 15 (Non-discrimination on grounds of sex)
- Article 21 (Right to dignity, bodily integrity, and privacy)

The arguments were grounded in constitutional precedent, international law, and comparative jurisprudence. The government, however, argued that criminalising marital rape could destabilise the institution of marriage and lead to misuse of the law.

The Court ultimately delivered a split verdict:

- Justice Rajiv Shakdher held the exception *unconstitutional*, stating that consent remains central to sexual autonomy irrespective of marital status
- Justice C. Hari Shankar upheld the exception, reasoning that marital relations cannot be equated with sexual assault between strangers and that legislative judgment must prevail.

This split ensured that the issue moved to the Supreme Court for final determination.

#### **5.4 Constitutional Developments Influencing Judicial Approach**

Recent landmark constitutional rulings indirectly strengthen arguments against the marital rape exception:

Case	Legal Principle	Relevance
<b>Puttaswamy (2017)<sup>21</sup></b>	The right to privacy includes bodily autonomy and decisional control.	Consent cannot be assumed in marriage.
<b>Navtej Johar (2018)<sup>22</sup></b>	Equality and dignity override societal norms.	Social morality cannot justify criminal immunity.

<sup>21</sup> K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

<sup>22</sup> Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

<b>Joseph Shine (2018)<sup>23</sup></b>	Marriage cannot impose ownership or control over a spouse.	Reinforces personal autonomy in marriage.
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Collectively, these decisions shift judicial interpretation toward recognising individuals—not institutions—as the primary rights holders.

### ***5.5 Judicial Trend: Recognising Bodily Integrity Within Marriage***

Across various High Courts—including Karnataka, Gujarat, and Kerala—courts have acknowledged:

- Marriage does not extinguish a woman's agency or bodily rights.
- Consent is an ongoing process, not a status-based presumption.
- The legal system cannot legitimise violence simply because it occurs within a marital relationship.

Some courts have, while not striking the exception, allowed prosecutions under other provisions such as cruelty, sexual assault under POCSO (where minor wives were involved), grievous hurt, or domestic violence statutes—revealing judicial discomfort with absolute immunity.

### ***5.6 Legislative Hesitation and Judicial Expectation***

While debates in Parliament and in committees such as the Parliamentary Standing Committee on Home Affairs acknowledge the issue, the legislative stance remains cautious. Concerns cited include:

- Potential misuse of criminal law
- Overburdening the criminal justice system
- Impact on family structures

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<sup>23</sup> Joseph Shine v. Union of India, (2018) 10 SCC 1.

However, the courts increasingly signal that legislative silence cannot override constitutional guarantees when rights violations are systemic.

The judiciary repeatedly emphasises that while legislative reform is ideal, constitutional adjudication becomes necessary when a statutory provision appears incompatible with fundamental rights.<sup>24</sup>

### **5.7 Current Status: Pending Before the Supreme Court**

The matter now rests before a Constitution Bench of the Supreme Court, marking the most crucial stage in the legal battle. The Court's eventual ruling will determine whether:

- Marriage can legally override individual bodily consent
- Criminal law can justify differentiated treatment based solely on marital status
- India will align with evolving global norms, recognising sexual autonomy as a universal right.

The decision will have far-reaching implications not only for criminal law but also for the conceptual understanding of marriage, autonomy, and constitutional morality in India.

## **6. Implementation Barriers Beyond Statutory Text**

While legislative reforms play a critical role in defining and criminalising domestic and marital offences, the law on paper alone does not guarantee protection or justice. The gap between legal frameworks and lived realities is often shaped by systemic, cultural, economic, and institutional barriers that limit access, enforcement, and accountability. Even where legal provisions exist—including those addressing cruelty (Section 85 BNS), dowry-related violence, or civil protections under the Protection of Women from Domestic Violence Act (PWDVA)—their effectiveness is hindered by entrenched social norms, weak enforcement infrastructure, and inconsistent judicial implementation.<sup>25</sup> Understanding these barriers is essential for assessing whether the new criminal law regime genuinely strengthens protection

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<sup>24</sup> *Supra not 1.*

<sup>25</sup> Kansal & Sharma, *Analyzing Domestic Violence Laws for Married Women Under Bhartiya Nyaya Sanhita*, 2023

or merely reorders statutory language without changing outcomes.

### ***6.1 Social Stigma and Family Pressure***

Domestic violence remains heavily stigmatised within Indian society, particularly when incidents occur within marriage. For many survivors, reporting abuse is perceived as an act that threatens family honour, marital stability, and social acceptance. Women across socio-economic backgrounds face pressure from family members, neighbours, community leaders, and religious bodies to "adjust", "tolerate", or "preserve the marriage".

This stigma is compounded by gendered expectations that valorise obedience, endurance, and silence as virtues for married women. Many survivors internalise these norms, believing abuse is either normal or justified. As a result, early warning signs—psychological manipulation, coercive control, sexual coercion, or financial deprivation—often go unreported until violence escalates into severe physical harm.

### ***6.2 Normalisation of Spousal Control and Coercion***

One of the most significant obstacles to legal implementation is the normalisation of coercive marital dynamics. Social perceptions continue to define marriage through patriarchal hierarchies that grant husbands authority and decision-making power. Practices such as forced sex, monitoring movement, restricting communication, or controlling finances are often mistakenly seen as marital rights rather than forms of abuse.

Sexual violence in marriage is especially trivialised. Surveys, including the National Family Health Survey (NFHS-5), reveal that a considerable proportion of women themselves believe that husbands are justified in demanding sex, even without consent.<sup>26</sup> This internalised conditioning weakens reporting patterns and reinforces silence.

### ***6.3 Lack of Trained Investigators and Gender-Sensitive Procedures***

Even when survivors decide to report abuse, the institutional architecture of policing and investigation presents additional challenges. Police personnel often lack specialised training in

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<sup>26</sup> Padma-Bhate Deosthali, Sangeeta Rege & Sanjida Arora, Women's Experiences of Marital Rape and Sexual Violence Within Marriage in India: Evidence from Service Records, 29(2) Sex Reprod. Health Matters 2048455 (2021), <https://doi.org/10.1080/26410397.2022.2048455>.

handling domestic violence complaints, leading to:

- Minimisation of allegations
- Efforts to "mediate" rather than record First Information Reports (FIRs)
- Victim blaming and moral judgment
- Reluctance to classify violence as criminal if occurring within marriage

In cases involving marital sexual violence, discomfort, cultural bias, and evidentiary challenges lead many officers to dismiss or misinterpret complaints. The absence of standardised, gender-responsive investigation protocols results in incomplete evidence collection, weakening prosecution.

#### ***6.4 Procedural Delays and Low Conviction Rates***

Criminal cases involving marital and domestic violence frequently face prolonged delays due to:

- Court congestion and limited dedicated judicial bodies
- Adjournments sought on behalf of the accused
- Reconciliation pressures are inserted into legal proceedings
- Challenges in producing medical or testimonial evidence

Survivors often withdraw complaints due to intimidation, social pressure, financial dependence, or lack of emotional support. The result is a persistently low conviction rate that undermines confidence in the criminal justice system. The legal process can itself be retraumatising, with cross-examination techniques frequently humiliating survivors and treating them as untrustworthy or vindictive.

#### ***6.5 Limited Access to Legal Aid, Shelter, and Support Services***

For many women, leaving abusive marital environments is not simply a legal decision—it is a socioeconomic risk. A lack of safe housing, financial independence, childcare options, and

accessible legal services forces survivors to remain in violent situations. Although government and civil-society-run shelter homes exist, they are often overcrowded, underfunded, or poorly regulated.<sup>27</sup>

Legal aid services remain inconsistent across states and frequently lack specialised expertise in domestic or marital violence litigation. Survivors may also face bureaucratic hurdles when attempting to access rights under PWDVA, such as residence orders or protection orders.

### **6.6 Intersectional Barriers: Class, Caste, Disability, and Rural Marginalisation**

Implementation challenges are intensified for women belonging to socially and economically marginalised identities. Dalit, Adivasi, Muslim, LGBTQ+, migrant, and disabled women encounter disproportionate barriers due to:

- Discrimination within state institutions
- Limited mobility
- Language or literacy gaps
- Geographical distance from formal justice mechanisms

Structural inequalities intersect with marital vulnerability, making reporting and pursuing justice significantly more difficult.

### **6.7 Institutional Fragmentation Between Civil and Criminal Mechanisms**

The coexistence of civil mechanisms under PWDVA and criminal sanctions under BNS creates a fragmented enforcement ecosystem. Survivors may have to navigate multiple forums—police stations, protection officers, family courts, and criminal courts—each with different evidentiary standards and timelines. Lack of coordination between these mechanisms leads to duplication, delays, and procedural conflict. Without systemic integration, the burden falls on

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<sup>27</sup> A. Clough, *Having Housing Made Everything Else Possible: Affordable, Safe and Stable Housing for Women Survivors of Violence*, 13(5) *Qual. Soc. Work* 671 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4196210/>.

survivors to navigate institutional complexity—often without adequate support.<sup>28</sup>

Due to these combined barriers—cultural, institutional, procedural, and logistical—many domestic violence cases never progress beyond the complaint stage. Survivors are frequently left with symbolic statutory protections rather than meaningful access to justice. Laws may deter violence in theory, but without systemic investment in implementation infrastructure—training, monitoring, public awareness, survivor-centred support structures, and legal integration—they remain aspirational rather than transformative.

## Conclusion

The marital rape exception in Indian criminal law stands at a critical intersection of constitutional morality, societal norms, and gender justice. While the legal framework has made significant strides in recognising women's rights and autonomy over the past decades, particularly through the jurisprudence of privacy, dignity, and bodily integrity, the continued existence of the exception positions marital rape as a tolerated form of violence. This contradiction signals a deeper tension within the Indian legal and cultural structure: the struggle between traditional conceptions of marriage as a space beyond state scrutiny and modern constitutional values that affirm individual liberty regardless of personal relationships.

At its core, the marital rape exception represents a legal fiction grounded in centuries-old patriarchal ideology. The historical premise—rooted in Sir Matthew Hale's doctrine that a wife gives irrevocable sexual consent upon marriage—has long been abandoned by many legal systems worldwide. Over 100 countries have criminalised marital rape, recognising that marriage cannot justify forced sexual access to one's body. Yet in India, the persistence of this exception suggests a structural reluctance to acknowledge women as autonomous legal subjects within marriage fully.

Judicial developments offer both progress and hesitation. Courts have increasingly emphasised that marriage does not extinguish fundamental rights, nor does it authorise coercion. The Right to Privacy judgement, the decriminalisation of same-sex relations, and recognition of sexual autonomy in abortion rights jurisprudence reflect a consistent constitutional trajectory: consent

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<sup>28</sup> Thada & Associates, *How Can a Victim of Domestic Violence Seek Legal Protection and Financial Relief in India?* (Sept. 9, 2025), <https://thadaassociates.in/how-can-a-victim-of-domestic-violence-seek-legal-protection-and-financial-relief-in-india>.

is indispensable in all sexual relationships. These decisions affirm that autonomy over one's body is not conditional on marital status, social expectations, or religious norms. However, the judiciary has stopped short of finally striking down the marital rape exception, preferring to defer to the Legislature—illustrating judicial restraint in matters deemed socially sensitive.

Meanwhile, litigation before the Supreme Court now places the issue on the brink of historic transformation. One of the central constitutional questions is whether the marital rape exception violates Articles 14 and 15 by discriminating against married women and Article 21 by denying them bodily integrity, dignity, and the right to live free from violence. The answers supported by evolving jurisprudence, international law, expert reports, and survivor testimonies increasingly reveal that the exception fails constitutional scrutiny. It creates an artificial legal divide between married and unmarried women, treating marital status as a legitimate basis for unequal protection against sexual violence.

The legislative stance remains cautious and slow-moving, shaped by competing pressures, political hesitation, cultural conservatism, and influence from religious institutions. Opponents of criminalising marital rape often raise concerns relating to the misuse of the law, destabilisation of families, and the interference with personal relationships. Yet such arguments are neither legally persuasive nor empirically supported.<sup>29</sup> Criminal law already addresses misuse through evidentiary safeguards; moreover, marriage cannot be a legal justification for human rights violations. Protecting bodily integrity does not destroy marriage; it strengthens it by demanding mutual respect and consent.

Social attitudes form another layer of complexity. Deep-rooted gender norms often normalise forced sex within marriage as a marital duty rather than sexual violence. Many women lack the economic and social independence to seek legal recourse, even if criminalisation were achieved. Therefore, any reform must move beyond the legal text to include awareness campaigns, support mechanisms, judicial sensitisation, and gender-inclusive education to shift cultural attitudes.

In conclusion, the marital rape exception is not merely a statutory anomaly—it is a reflection of the historical inequality embedded in the institution of marriage. Its continued existence stands in direct conflict with India's constitutional values and global human rights

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<sup>29</sup> Raveena Rao Kallakuru & Pradyumna Soni, *Criminalisation of Marital Rape in India: Understanding Its Constitutional, Cultural and Legal Impact*, 11 NUJS L. Rev. 1 (2018).

commitments. The legal system is now positioned at a decisive moment: either reinforce outdated patriarchal frameworks or affirm women's equal status as autonomous individuals with rights that survive marriage.

For India to uphold dignity, freedom, and equality as constitutional guarantees rather than rhetorical ideals, the marital rape exception must be abolished. Criminalisation alone will not resolve the issue, but it will establish a clear legal and moral principle: no marriage contract can override consent, and no woman forfeits her right to bodily autonomy by marrying. The path ahead requires legal reform, social change, and sustained institutional commitment. Still, the direction is unmistakable: the future of gender justice demands recognition that rape is rape, irrespective of marital status.