

**BETWEEN BEDROOM AND COURTROOM: THE UNRESOLVED CONSTITUTIONALITY OF
THE MARITAL RAPE EXCEPTION IN INDIA**

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ABSTRACT

Indian criminal law presents a singular paradox: while Section 375 of the Indian Penal Code — now re-enacted as Section 63 of the Bharatiya Nyaya Sanhita, 2023 — penalises sexual assault in its most expansive form, Exception 2 to that very provision immunises a husband who commits the same act upon his wife. This article argues that the marital rape exception is constitutionally indefensible on three grounds. First, it creates an arbitrary and irrational classification that fails the twin test under Article 14 by granting the husband a privileged legal status as perpetrator. Second, it negates the wife's right to bodily autonomy, dignity, and privacy under Article 21 — rights that the Supreme Court has progressively expanded through Puttaswamy, Suchita Srivastava, and Navtej Singh Johar. Third, it silences the survivor's legal voice in a manner inconsistent with Article 19(1)(a)'s guarantee of self-expression. The 2022 split verdict of the Delhi High Court in RIT Foundation v. Union of India has left the question unresolved, and Parliament's deliberate re-enactment of the exception in the BNS, 2023 constitutes a legislative abdication of constitutional duty. This article dissects each fault line, examines the judicial deadlock, critiques the legislative inaction, and addresses the principal counterarguments — including the misuse thesis and the availability of alternative remedies — to conclude that a marriage certificate cannot constitute a licence for non-consensual sexual intercourse under any constitutionally coherent framework.

Keywords: Marital rape, Exception 2, BNS 2023, Article 14, Article 21, RIT Foundation, bodily autonomy, consent.

I. INTRODUCTION

Indian law has, for over a century and a half, drawn a peculiar distinction that would perplex any first-principles constitutional thinker: the very statute that defines and penalises rape carves out a categorical immunity for the husband of the survivor.

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Exception 2 to Section 375 of the Indian Penal Code, 1860 — re-enacted without material alteration in Section 63 of the Bharatiya Nyaya Sanhita, 2023 — states with clinical simplicity that sexual intercourse by a man with his own wife, the wife not being under eighteen years of age, is not rape.³

The provision is not a colonial relic that Parliament forgot to repeal. It is, as the legislative records of 2013 and 2023 both demonstrate, a consciously reaffirmed policy choice. The Justice Verma Committee, constituted in the wake of the December 2012 gang rape in Delhi, unequivocally recommended the abolition of the marital rape exception; Parliament rejected that recommendation and enacted an amended Section 375 IPC that left the immunity intact.⁴ A decade later, the Bharatiya Nyaya Sanhita re-enacted the exception in substantially identical terms.⁵

The constitutional challenge to this exception has been sharpened — though not resolved — by the Supreme Court's expanding jurisprudence on fundamental rights. The right to privacy including sexual autonomy was recognised as a fundamental right under Article 21 in *K.S. Puttaswamy v. Union of India*;⁶ the right to make reproductive choices was held protected in *Suchita Srivastava v. Chandigarh Administration*;⁷ and the right to intimate choice was declared a core constitutional entitlement in *Navtej Singh Johar v. Union of India*.⁸ Each of these decisions erodes the philosophical foundations of the marital rape exception without formally overruling it. The 2022 split verdict of the Delhi High Court in *RIT Foundation v. Union of India* encapsulates this tension: two judges, identical provisions, diametrically opposite constitutional conclusions.⁹

This article advances the thesis that the marital rape exception is constitutionally unsustainable. The argument unfolds across three constitutional fault lines — Articles 14, 21, and 19(1)(a) — before turning to the judicial deadlock, the legislative abdication, and the principal counterarguments. The conclusion is that, when the Supreme Court

³Bharatiya Nyaya Sanhita, 2023, § 63 (Exception) (India); Indian Penal Code, 1860, § 375 (Exception 2) (India) (repealed 2023).

⁴Justice J.S. Verma et al., *Report of the Committee on Amendments to Criminal Law* 107–110 (2013), [available at PRS India](#) (last visited June 14, 2026).

⁵Bharatiya Nyaya Sanhita, 2023, § 63 (Exception) (India).

⁶*K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1 (India).

⁷*Suchita Srivastava v. Chandigarh Admin.*, (2009) 9 SCC 1 (India).

⁸*Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (India).

⁹*RIT Found. v. Union of India*, 2022 SCC OnLine Del 1941 (India).

finally decides the question, it will find no constitutionally defensible basis for the exception's survival.

II. THE LEGAL ARCHITECTURE OF THE EXCEPTION

The marital rape exception traces its genealogy to Sir Matthew Hale's dictum, articulated in his posthumously published *History of the Pleas of the Crown* (1736): *by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract*.¹⁰ The Hale Doctrine rests on the feudal fiction of implied, irrevocable consent — the idea that by entering the marital contract, a wife surrenders her bodily autonomy to the husband for the duration of the marriage. This doctrine was transplanted into Indian law through colonial codification of the IPC and has survived every subsequent legislative revision.

Section 375 IPC defined rape through six descriptions of non-consensual or coerced sexual intercourse. Exception 2 provided that sexual intercourse by a man with his own wife was not rape if the wife was not under a specified minimum age. The age threshold was judicially read up from fifteen to eighteen years by the Supreme Court in *Independent Thought v. Union of India* (2017), which held that the exception could not protect a husband who had intercourse with a minor wife.¹¹ However, for adult wives, the exception was left entirely undisturbed. The Bharatiya Nyaya Sanhita, 2023, which comprehensively replaced the IPC, re-enacted the marital rape exception in Section 63 with the eighteen-year threshold — but otherwise preserved the immunity in full.

What the exception immunises is more than an absence of criminal liability; it is the legal erasure of the act itself. A husband who uses force, threats, or deception to compel his wife into sexual intercourse commits no offence under Section 63 BNS. The wife cannot register a First Information Report for rape; she cannot seek criminal prosecution under the primary rape provision; the law — at least in terms of its dominant criminal remedy — renders her experience invisible.

The Justice Verma Committee (2013) squarely addressed this invisibility and recommended that the exception be removed, so that the marital relationship would

¹⁰1 Matthew Hale, *History of the Pleas of the Crown* 629 (1736).

¹¹*Independent Thought v. Union of India*, (2017) 10 SCC 800 (India).

not operate as a valid defence to rape. The government declined, citing concerns about the family institution and the purported availability of alternative civil and criminal remedies. The Criminal Law (Amendment) Act, 2013 left Exception 2 untouched.¹² The Standing Committee on Home Affairs, which examined the BNS Bill in 2023, received submissions on the issue and recorded dissenting voices, but the re-enactment proceeded without modification.¹³

III. THE CONSTITUTIONAL CHALLENGE: THREE FAULT LINES

A. ARTICLE 14 — THE EQUALITY VACUUM

Article 14 of the Constitution guarantees equality before the law and equal protection of the laws to every person. It does two things: it prevents the state from acting in an unfair and discriminatory manner, and it ensures equal treatment for all. The Supreme Court's foundational equality jurisprudence, developed in *Anwar Ali Sarkar v. State of West Bengal*¹⁴ and refined in *Budhan Choudhry v. State of Bihar*,¹⁵ requires that any legislative classification must satisfy two conditions: first, the existence of an intelligible differentia distinguishing the class of persons grouped together from those left outside; and second, a rational nexus between that differentia and the object sought to be achieved by the legislation.

The marital rape exception creates a classification of perpetrators based solely on matrimonial status. A husband who commits the identical physical act as a stranger rapist is placed in a categorically protected class. The classification must therefore be tested against the *Anwar Ali Sarkar* standard: is the marital relationship an intelligible differentia for the purpose of rape law? Is there a rational nexus between the husband's identity as perpetrator and the object of Section 63 BNS, which is to penalise non-consensual sexual intercourse?

The answer to both questions is negative. The marital relationship does not alter the nature, gravity, or harm of non-consensual intercourse. The physical and

¹²The Criminal Law (Amendment) Act, 2013, No. 13, Acts of Parliament (India); Statement of Objects and Reasons, The Criminal Law (Amendment) Bill, 2013 (India).

¹³Parliament, Standing Comm. on Home Affairs, *246th Report on the Bharatiya Nyaya Sanhita Bill, 2023* (2023) (India), [available at Sansad.in](https://sansad.in) (last visited June 15, 2026).

¹⁴*State of W. Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75 (India).

¹⁵*Budhan Choudhry v. State of Bihar*, AIR 1955 SC 191 (India).

psychological trauma suffered by a wife who is raped by her husband is not categorically different from — and may in many cases be more severe than — that suffered by a victim of stranger rape, given the intimacy of the domestic environment, the cohabitational compulsion, and the cyclical nature of intimate-partner violence. The act is identical; the legal consequence is radically and arbitrarily different. No empirical or principled basis exists for treating the husband as a protected perpetrator.

The constitutional framework maintains protective classifications for vulnerable groups — scheduled castes, scheduled tribes, women, children — and those classifications exist for their empowerment. The marital rape exception inverts this logic entirely: it confers protection upon a class of perpetrators who hold power, not upon those who are vulnerable. Such an immunity is directly contradictory to the spirit and text of Article 14.

The Supreme Court's landmark judgment in *Shayara Bano v. Union of India*¹⁶ invalidated Triple Talaq because it gave Muslim husbands a power not available to Muslim women, producing arbitrary and discriminatory outcomes. The marital rape exception carries identical reasoning and is equally vulnerable to this constitutional challenge. Moreover, Exception 2 defeats the very object of Section 63 BNS: its purpose is to protect women and punish those who commit rape; by exempting husbands, it directly contradicts that objective.¹⁷

Protecting the family institution by permitting non-consensual intercourse does not bear a rational nexus to any legitimate legislative aim. The Supreme Court's decision in *Joseph Shine v. Union of India* is directly instructive: striking down the adultery provision, the Court held that a legal framework premised on the wife being the husband's property, rather than an autonomous legal subject, is constitutionally impermissible.¹⁸ Furthermore, the principle of non-arbitrariness embedded in Article 14 jurisprudence following *E.P. Royappa v. State of Tamil Nadu* renders a provision that immunises criminal conduct on the sole basis of the perpetrator's marital status arbitrary in the deepest constitutional sense.

B. ARTICLE 21 — BODILY AUTONOMY AND DIGNITY WITHIN MARRIAGE

¹⁶*Shayara Bano v. Union of India*, (2017) 9 SCC 395 (India).

¹⁷Sarthak Makkar, *Marital Rape: A Non-Criminalized Crime in India*, Harv. Hum. Rts. J. (Jan. 1, 2019).

¹⁸*Joseph Shine v. Union of India*, (2019) 3 SCC 39 (India).

The most compelling constitutional ground against the marital rape exception lies in Article 21's guarantee of the right to life and personal liberty. Article 21 of the Constitution provides that no person shall be deprived of 'life or personal liberty' except according to procedure established by law.¹⁹ 'Life' does not mean mere animal existence — it means the right to live with dignity. And dignity cannot exist without control over one's own body. The ability to reject unwanted sexual contact cannot rationally depend on a woman's marital status if physical autonomy is a component of the right to live. On the day a woman signs a marriage registration, her body does not become spousal property — yet this is essentially what Exception 2 presupposes: that marriage entails a standing, irrevocable agreement to sexual intercourse.

In *Maneka Gandhi v. Union of India*,²⁰ the Court held that Article 21 protects not merely physical survival but the right to live with human dignity. In *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*,²¹ the Court held that this right to dignity extends to the full range of conditions required for a meaningful human existence.

The nine-judge bench in *K.S. Puttaswamy v. Union of India* recognised the right to privacy as a fundamental right intrinsic to Article 21, encompassing individual autonomy including choices about sexuality. The body was identified as the most intimate zone of privacy. A provision that immunises non-consensual intrusion into that zone on the sole basis of matrimonial status is a direct negation of *Puttaswamy*'s constitutional logic.

In *Suchita Srivastava v. Chandigarh Administration*, the Court held that reproductive autonomy — the right to decide whether, when, and how to bear children — is an inseparable component of a woman's right to privacy, dignity, and bodily integrity under Article 21. If a woman's right to decide whether to reproduce is constitutionally protected, it is logically incoherent to hold that the same woman's right to decide whether to engage in sexual intercourse is not. The marital relationship cannot dissolve this constitutional entailment.

¹⁹India Const. art. 21.

²⁰*Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 (India).

²¹*Francis Coralie Mullin v. Adm'r, Union Territory of Delhi*, (1981) 1 SCC 608 (India).

Navtej Singh Johar v. Union of India added the dimension of intimate choice. The five-judge bench held unanimously that the right to intimate association — including the choice of sexual partner and the terms of sexual engagement — is protected under Articles 21, 19, and 14. Consent must be ongoing, specific, and revocable; it cannot be a single, perpetual waiver extracted at the moment of marriage. Marriage is a civil contract — it is not, under any constitutionally coherent reading, a mechanism for the transfer of the wife's bodily sovereignty to the husband.

C. ARTICLE 19(1)(A) — THE SILENCED VOICE

Article 19(1)(a) guarantees every citizen the right to freedom of speech and expression. While the primary constitutional case against the marital rape exception rests on Articles 14 and 21, Article 19(1)(a) adds a further dimension that addresses the symbolic harm of the law's silence.

The marital rape exception inflicts what may be characterised as epistemic harm: it not only permits the husband's act, it legally erases the wife's experience of it. The wife cannot name the act as rape in law. She cannot seek criminal redress under the primary rape provision. The legal architecture communicates to her, and to society at large, that what she experienced was not rape — that the law does not recognise her bodily autonomy as an interest worthy of criminal protection within marriage. This silencing is itself a constitutional harm, inconsistent with the dignity and self-expression values that Article 19(1)(a), read with Article 21, protects.²²

IV. THE JUDICIAL DEADLOCK: DELHI HIGH COURT AND ITS AFTERMATH

The constitutional challenge reached the Delhi High Court in *RIT Foundation v. Union of India*, decided in May 2022 through a split verdict that crystallised the deep disagreement within the judiciary on this foundational question.²³

Justice Rajiv Shukdhakar held that Exception 2 was unconstitutional. The exception violated Article 14 by creating an arbitrary classification — the marital status of the perpetrator bore no rational nexus to the object of penalising non-consensual intercourse. It violated Article 21 by denying the wife her right to bodily autonomy,

²²*Vishaka v. State of Rajasthan*, (1997) 6 SCC 241 (India).

dignity, and sexual agency. And it was incompatible with the constitutional framework illuminated by *Puttaswamy*, *Navtej Singh Johar*, and *Joseph Shine*.

Justice C. Hari Shankar, in a detailed dissent, upheld the exception.²⁴ His reasoning rested on three propositions: that marriage creates a unique institution with distinct legal rights that the legislature is entitled to recognise; that the Constitution does not require identical treatment across all categories of persons; and that Parliament's deliberate retention of the exception reflected a considered policy judgment that the court ought not to second-guess.

With respect, each limb of the dissent's reasoning is contestable. The uniqueness of the marital institution does not provide a constitutional licence to negate a spouse's fundamental rights — *Joseph Shine* and *Navtej* confirm that constitutional protection of intimacy must extend to partners within intimate relationships. A partial crack in the exception's wall had appeared in *Independent Thought v. Union of India* (2017), where the Court held that sexual intercourse by a husband with his minor wife constituted rape. The Court's reasoning — that a minor girl's right to dignity could not be suspended by marriage — is constitutionally indistinguishable from the case for adult wives.

The Supreme Court, at the time of writing, has tagged the matter for hearing following the split verdict, but the apex court's adjudication remains pending. Every day the exception survives is a day in which married women are denied the protection of the primary criminal law against rape — not because the law cannot reach their situation, but because it deliberately chooses not to.

V. THE LEGISLATIVE ABDICATION: BNS 2023 AS A MISSED OPPORTUNITY

The enactment of the Bharatiya Nyaya Sanhita, 2023 presented Parliament with an unambiguous opportunity to correct the constitutional infirmity of the marital rape exception. The Standing Committee on Home Affairs, which examined the BNS Bill, received submissions recommending removal of the exception. Parliament declined.

The deliberate re-enactment of the exception in Section 63 BNS forecloses any argument that it is a colonial relic awaiting attention. Parliament has, in 2023,

²⁴*RIT Found. v. Union of India*, 2022 SCC Online Del 1941 (Hari Shankar, J., dissenting) (India).

considered and reaffirmed the exception with full awareness of the constitutional challenges, the Verma Committee's contrary recommendation, and the Delhi High Court split verdict. This is not legislative inadvertence; it is legislative abdication of constitutional duty.

The contrast with international legislative reform starkly illuminates the isolation of the Indian position. The United Kingdom abolished the marital rape exception in 1991 through the House of Lords in *R v. R*, subsequently codified in the Sexual Offences Act 2003.²⁵ South Africa and Nepal have similarly criminalised marital rape. India stands in increasingly conspicuous contrast to a broad international consensus that matrimonial consent to intercourse cannot be permanent, irrevocable, or immune from the ordinary operation of criminal law.

The democratic legitimacy argument — that Parliament's choice reflects majoritarian will — has constitutional limits that the Supreme Court has repeatedly articulated. Fundamental rights are counter-majoritarian by design.²⁶ Parliament is competent to structure criminal law; it is not competent to structure it in a manner that extinguishes fundamental rights. The BNS's re-enactment of the exception does not immunise it from constitutional scrutiny; if anything, it sharpens the urgency of that scrutiny.

VI. COUNTERARGUMENTS AND THEIR LIMITS

A. THE MARRIAGE AS SOCIAL INSTITUTION ARGUMENT

The most commonly advanced defence is that marriage creates obligations and rights distinct from those between strangers, and that the criminal law should be sensitive to this distinction. The argument has surface plausibility but is constitutionally empty. It would, taken to its logical conclusion, equally justify immunising a husband from assault or wrongful confinement. The question is not whether marriage creates a distinct legal framework — it does — but whether that framework can constitutionally exclude the wife's bodily autonomy from criminal protection. After *Puttaswamy*, *Navtej*, and *Joseph Shine*, the answer is plainly that it cannot.

B. THE MISUSE ARGUMENT

²⁵*R v. R*, [1992] 1 AC 599 (HL) (UK); Sexual Offences Act 2003, c. 42, § 1 (UK).

²⁶Uppendra Baxi, *Constitutionalism as a Site of State Formative Practices*, 21 Cardozo L. Rev. 1183, 1190 (2000).

A recurring concern is that criminalising marital rape will expose husbands to widespread false allegations. However, the potential for misuse does not constitute a constitutional justification for the categorical immunisation of an otherwise criminal act. The Supreme Court acknowledged misuse concerns under Section 498A IPC in *Arnesh Kumar v. State of Bihar*²⁷, yet those concerns led to procedural guidelines, not abolition of the provision. The answer to misuse is adequate procedural safeguards — heightened evidentiary standards or judicial oversight — not the elimination of criminal liability.²⁸

C. THE ALTERNATIVE REMEDIES ARGUMENT

A third line of defence argues that married women are not without recourse: the Protection of Women from Domestic Violence Act, 2005 provides civil remedies, and Section 498A IPC (Section 85 BNS) addresses matrimonial cruelty.²⁹ These remedies are, however, structurally inadequate substitutes for criminalisation of marital rape. The PWDVA provides civil reliefs that do not carry imprisonment commensurate with the gravity of rape. Section 85 BNS addresses cruelty in general and does not capture the specific harm of non-consensual sexual intercourse. Redirecting a survivor of marital rape to provisions designed for different harms is a constitutional evasion, not a constitutional answer.³⁰

VII. CONCLUSION

The marital rape exception is not merely socially regressive. It is constitutionally indefensible. Under Article 14, it creates an irrational, unprincipled classification of the husband as a protected perpetrator, bearing no rational nexus to any legitimate legislative objective. Under Article 21, it extinguishes the wife's right to bodily autonomy, dignity, and privacy — rights that the Supreme Court's expanding jurisprudence has placed beyond legislative abridgement. And it inflicts an epistemic harm on the survivor inconsistent with the dignity and self-expression values underlying Article 19(1)(a).

²⁷*Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273 (India).

²⁸Flavia Agnes, *Protecting Women Against Violence? Review of a Decade of Legislation, 1980–89*, 27 Econ. & Pol. Wkly. WS19, WS22 (1992).

²⁹Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament (India); Bharatiya Nyaya Sanhita, 2023, § 85 (India).

³⁰Ratna Kapur, *The Tragedy of Victimisation Rhetoric: Resurrecting the 'Native' Subject in International/Post-Colonial Feminist Legal Politics*, 15 Harv. Hum. Rts. J. 1, 14 (2002).

Parliament has twice in 2013 and in 2023 chosen not to act. The responsibility now lies with the apex court to do what the legislature will not: align the criminal law with the Constitution it purports to serve.

The pending adjudication is more than a case about one legal provision. It is a constitutional moment of the kind that *Navtej Singh Johar* represented for sexual minority rights — an opportunity to declare, without equivocation, that fundamental rights do not dissolve at the threshold of the matrimonial home. A marriage certificate is a document of civil union; it is not, and cannot constitutionally be, a licence for sexual violence.

