
BETWEEN AUTONOMY AND WEAPONIZATION: THE CONSTITUTIONAL PARADOX OF THE MARITAL RAPE EXCEPTION UNDER INDIA'S BHARATIYA NYAYA SANHITA (2023)

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ABSTRACT

This paper interrogates the constitutional validity of the marital rape exception preserved under Section 63, Exception 2 of India's Bharatiya Nyaya Sanhita, 2023 (BNS), the statute that took effect on July 1, 2024 and supplanted the colonial-era Indian Penal Code of 1860. Even as lawmakers claimed to be purging Indian criminal law of its colonial residue, they chose to retain a clause shielding a husband from prosecution for forcing sexual intercourse on his wife a carryover of the seventeenth-century English coverture doctrine.¹

The central argument advanced here is that Exception 2 cannot survive constitutional scrutiny: it offends a married woman's guarantee of equality and non-discrimination under Article 14, and infringes her entitlement to bodily autonomy, dignity, and privacy under Article 21, rights the Supreme Court has authoritatively construed in Justice K.S. Puttaswamy (Retd.) v. Union of India.² Yet this paper does not treat that case in a vacuum. India's well-documented history of matrimonial provisions being turned into instruments of harassment most notably the recurring misuse of the dowry-cruelty clause in Section 498A IPC, now Section 85 BNS, during bitter marital disputes raises a jurisprudential worry that deserves engagement, not dismissal as reflexive patriarchal pushback.³

Building on comparative constitutional experience, India's obligations under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),⁴ the split decision handed down by the Delhi High Court

¹ Matthew Hale, *History of the Pleas of the Crown*, Vol. 1, 629.(1736). Hale wrote: "[T]he husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."

² Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1.

³ Sushil Kumar Sharma v. Union of India, (2005) 6 SCC 281, ¶14.

⁴ ⁴Convention on the Elimination of All Forms of Discrimination Against Women, Articles 2 and 5, December 18, 1979, 1249 U.N.T.S. 13. India ratified CEDAW on July 9, 1993.

in *RIT Foundation v. Union of India* (2022),⁵ and figures drawn from the National Family Health Survey-5 (2019–21),⁶ this paper sets out a calibrated legislative model: one that makes marital rape a criminal offence while building in firm procedural checks against malicious complaints. Its thesis is twofold: constitutional fidelity demands criminalization, and prudent governance demands that the criminalization be carefully engineered.

Keywords: Bharatiya Nyaya Sanhita; marital rape exception; bodily autonomy; Article 14; Article 21; Section 498A; evidentiary safeguards; CEDAW; constitutional law; India.

I. INTRODUCTION

When it took effect on July 1, 2024, the Bharatiya Nyaya Sanhita, 2023 (BNS) displaced the Indian Penal Code of 1860 as the country's principal criminal code.⁷ Government spokespersons framed the shift as a conscious break from Macaulay's colonial framework, a move toward criminal law rooted in indigenous constitutional values. That framing does not withstand close examination. Section 63, Exception 2 of the BNS shields a husband from criminal liability where he forces sexual intercourse on his wife a provision carried over almost word-for-word from Exception 2 of Section 375 of the repealed IPC.⁸ Far from having any roots in Indian jurisprudence, the exception can be traced to a seventeenth-century English legal treatise, a doctrine the House of Lords itself disavowed more than thirty years ago.⁹ Keeping this exception on the books is a legislative decision with weighty constitutional implications. The Justice J.S. Verma Committee, set up in the wake of the 2012 Nirbhaya gang rape to overhaul sexual assault law, recommended in January 2013 that marital rape be unambiguously criminalized.¹⁰ Parliament declined to act on that recommendation when it passed the Criminal Law (Amendment) Act, 2013.¹¹ Ten years on, when drafting the BNS, the legislature entrenched the same position further: in a forty-nine-page affidavit placed before the Supreme Court in October 2024, the Union Government argued that criminalization would “destabilize the institution of marriage.”¹² This paper takes the view that such a position is not simply out of step with reform it fails to meet constitutional muster altogether. Two connected

⁵ *RIT Foundation v. Union of India*, 2022 SCC Online Del 1412 (Del. H.C.).

⁶ Ministry of Health & Family Welfare, National Family Health Survey-5 (2019–21).

⁷ The Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India), enforced July 1, 2024.

⁸ Section 63, Exception 2, The Bharatiya Nyaya Sanhita, 2023 (providing that sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape).

⁹ *R v. R*, [1991] UKHL 12, [1992] 1 A.C. 599 (H.L.) (abolishing the marital rape exception in English law).

¹⁰ Report of the Committee on Amendments to Criminal Law, 417. (January 23, 2013) (J.S. Verma, J., Chair).

¹¹ The Criminal Law (Amendment) Act, 2013, No. 13, Acts of Parliament, 2013 (India).

¹² Counter Affidavit on behalf of the Union of India in *RIT Foundation v. Union of India*, W.P.(C) No. 284/2015. (October 2024).

pillars support the constitutional challenge mounted here. First, Exception 2 draws an arbitrary line that denies married women the protections every other victim of non-consensual intercourse receives, contrary to the equality guarantee in Article 14. Second, the provision effectively sanctions interference with a married woman's decisional control over her own body control that the Supreme Court has recognized as a fundamental right under Article 21 in *Puttaswamy*.¹³ Taken together, these two defects make Exception 2 constitutionally untenable. That said, the constitutional argument is not made in a vacuum. A serious treatment of marital rape criminalization in India has to reckon with the documented history of abuse that has trailed earlier matrimonial criminal provisions. Section 498A IPC, enacted to shield women from dowry-related cruelty, was itself described by the Supreme Court as having degenerated into an instrument of "legal terrorism."¹⁴ The Court's continuing wariness about the criminal misuse of soured intimate relationships, voiced as recently as early 2026, shows that this is not a stale or speculative concern.¹⁵ The remainder of this paper is organized as follows. A Methodology sub-section sets out the research approaches used, followed by a Limitations sub-section that flags their constraints. Part II traces the historical and comparative jurisprudence surrounding the marital rape exception. Part III builds the constitutional challenge under Articles 14 and 21, focusing closely on the Delhi High Court's split verdict in *RIT Foundation* and on the Union Government's October 2024 affidavit. Part IV lays out and evaluates the strongest arguments against criminalization. Part V sets out a five-element legislative framework. Part VI maps directions for future research. Part VII concludes the paper.

A. Methodology

Three complementary research methods are used in this paper, each chosen to fit the particular kind of question it answers. The principal method is doctrinal legal analysis a close reading of constitutional text, statutory provisions, parliamentary records, and case law since the paper's core claim is a constitutional one: does Exception 2 sit consistently with Articles 14 and 21? That is a question of legal reasoning applied to authoritative sources, not something empirical data alone can settle. Case law throughout is cited in Bluebook format as adapted for Indian legal publications. A second method, comparative constitutional analysis, supplements the doctrinal approach: where Indian courts have not yet settled a question, jurisprudence from

¹³ Puttaswamy, supra note 2, ¶189 (Chandrachud, J.) ("[Privacy] includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation.").

¹⁴ Sushil Kumar Sharma, supra note 3, ¶14.

¹⁵ Pramod Kumar Navratna v. State of Chhattisgarh, 2026 INSC 124.(February 5, 2026), warning against a "disquieting tendency wherein failed or broken relationships are given the colour of criminality."

other common law systems can suggest possible paths forward, though none of it binds Indian courts. Three jurisdictions are examined for this purpose the United Kingdom, the United States, and South Africa chosen for their accessible English-language case law, differing political contexts, and a documented record of legislative experience following criminalization. The third method draws on empirical data from the National Family Health Survey-5 (2019–21), a government-run survey of roughly 637,000 households spanning every State and Union Territory; this data is not used to settle the constitutional question but to gauge the policy stakes involved and to give context to the weaponization concern taken up in Part IV.¹⁶

B. Limitations

This study carries a number of limitations worth stating plainly. No original fieldwork, interviews, or primary data collection underlie the analysis, which relies wholly on secondary legal and official material. The NFHS-5 figures, though nationally representative, almost certainly understate the true incidence of spousal violence, given the well-known social pressures against disclosure. The comparative survey is deliberately narrow, confined to common law jurisdictions with readily accessible documentation, and therefore does not capture the full range of approaches to marital rape legislation worldwide. At the time of writing, the Supreme Court of India had yet to issue a final ruling on whether Exception 2 under the BNS is constitutional, so the constitutional claims made in this paper are necessarily anticipatory rather than settled fact. Finally, the paper does not draw on legislative history, parliamentary debate, or internal government deliberation beyond what is already part of the public record.

II. HISTORICAL AND COMPARATIVE JURISPRUDENCE: FROM COVERTURE TO CRIMINALIZATION

A. The Hale Doctrine: Coverture and Its Discontents

The marital rape exception that Indian criminal law inherited did not emerge from any homegrown legal tradition. It was imported wholesale from English common law, tracing back to a pronouncement by Chief Justice Matthew Hale, published posthumously in *History of the Pleas of the Crown* (1736), that “the husband cannot be guilty of a rape committed by himself

¹⁶ Ministry of Health & Family Welfare, National Family Health Survey-5: India Report, Chapter 1, 1-12.(2021) (sampling methodology).

upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.”¹⁷ Hale offered no citation for this claim, engaged no opposing view, and cited no evidence to support it yet it was nonetheless treated as settled common law for well over two hundred and fifty years. In marital terms, Hale’s doctrine was simply an application of the wider theory of coverture, which Blackstone described as the principle that “the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband.”¹⁸ A wife under coverture could not hold property in her own name, enter into contracts, or sue independently; her inability to be raped by her husband was just one item on a longer list of legal disabilities. Successive nineteenth- and twentieth-century reforms gradually stripped away coverture’s other features, leaving the marital rape exception standing as an increasingly isolated holdover, kept alive by institutional inertia long after its underlying rationale had been discredited.¹⁹

B. The Global Trajectory of Reform

Doing away with the marital rape exception has, by now, become something close to a universal signal of legal modernization. England’s turning point came with *R v R* [1991], where the House of Lords held unanimously that the Hale doctrine amounted to “a fiction” that could not be squared with “the present status of the wife in our law.”²⁰ Lord Keith of Kinkel noted that married women’s legal status had “changed out of all recognition” since Hale’s day, and that the common law remained “capable of evolving in the light of changing social, economic and cultural developments.” That position was later written into statute through the Sexual Offences Act 2003, which contains no marital carve-out at all.²¹

American reform unfolded state by state rather than through a single national ruling. The pivotal early case was *People v. Liberta* (1984), in which New York’s Court of Appeals struck down the state’s marital rape exemption as a violation of the Fourteenth Amendment’s Equal Protection Clause.²² Judge Wachtler found “simply no rational basis” for treating marital rape

¹⁷ Hale, *supra* note 1, at 629.

¹⁸ William Blackstone, *Commentaries on the Laws of England*, Vol. 1, 442.(1765).

¹⁹ Section 375, Exception 2, The Indian Penal Code, 1860 (repealed 2024). The IPC transplanted Hale’s immunity without debate into Indian criminal law, where it survived for 164 years.

²⁰ *R v. R*, *supra* note 9, [1992] 1 A.C. at 616 (Lord Keith) (“[T]he fiction of implied consent has no useful purpose to serve today in the law of rape.”).

²¹ Section 1, The Sexual Offences Act, 2003, c. 42 (U.K.).

²² *People v. Liberta*, 64 N.Y.2d 152, 168.(1984) (“A married woman has the same right to control her body as

differently from any other rape. All fifty states had criminalized some form of marital rape by 1993.²³ Globally, this trend has hardened into consensus: more than 125 countries now criminalize marital rape, and the United Nations CEDAW Committee has directly called on India to strike down its own exception, finding it incompatible with Articles 2 and 5 of the Convention.²⁴

Table 1: Comparative Timeline of Marital Rape Criminalization versus India's Legislative History

Jurisdiction	Year(s) of Criminalization	Key Legislative / Judicial Instrument	Current Status
Canada	1983	Criminal Law Amendment Act, 1983	Fully criminalized
Australia	1976–1992	South Australia first (1976); all states by 1992	Fully criminalized
United Kingdom	1991	R v R [1991] UKHL 12; codified by Sexual Offences Act 2003	Fully criminalized
United States	1975–1993	People v. Liberta (N.Y. 1984); all 50 states complete by 1993	Fully criminalized
South Africa	1993 / 2007	Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007	Fully criminalized
India	Partial (2017)	Independent Thought v. Union of India (2017) minor wives only; BNS § 63,	Exception retained for adult married women

does an unmarried woman.”).

²³ Jill Hasday, “Contest and Consent: A Legal History of Marital Rape”, 88 California Law Review 1373, 1374. (2000) (documenting the completion of marital rape criminalization across all fifty states by 1993).

²⁴ U.N. Committee on the Elimination of Discrimination Against Women, Concluding Observations on the Combined Fourth and Fifth Periodic Reports of India, ¶34, U.N. Doc. CEDAW/C/IND/CO/4-5.(July 24, 2014).

		Exception 2 retains immunity for adult wives	
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Sources: Hasday, supra note 22; R v R [1991] UKHL 12; People v. Liberta, 64 N.Y.2d 152 (1984); Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (S. Afr.); BNS § 63, Exception 2 (India, 2024).

C. India's Legislative Trajectory: Deliberate Inaction

What has characterized India's approach to the marital rape exception is a deliberate, sustained avoidance of the issue by lawmakers. Exception 2 of Section 375 IPC emerged from the 2013 Amendment itself a response to nationwide outrage over the 2012 Nirbhaya gang rape completely untouched, notwithstanding the Verma Committee's clear recommendation that it be removed.²⁵ Parliament took up that recommendation, weighed it, and set it aside within a single session. A decade on, the BNS carried the exception forward in substantially unchanged form.²⁶ Whatever commitment lawmakers professed to decolonizing criminal law, it plainly did not extend this far. Before the BNS came along, courts intervened meaningfully just once: in *Independent Thought v. Union of India* (2017), the Supreme Court criminalized marital rape where the wife was under eighteen, finding that the exception as it then applied to girls aged fifteen to eighteen was "arbitrary, capricious, and whimsical" and breached Articles 14, 15, and 21.²⁷ The BNS folded this correction into Section 63 by raising the age floor to eighteen. But for adult married women who make up the overwhelming majority of those subjected to spousal sexual violence the exception remains fully intact, leaving them with no criminal recourse whatsoever.

²⁵ Verma Committee Report, supra note 10, at 417 ("The law ought to specify that marital rape is an offence, and should be tried accordingly.").

²⁶ Compare Section 63, Exception 2, The Bharatiya Nyaya Sanhita, 2023, with Section 375, Exception 2, The Indian Penal Code, 1860. The language is substantively identical, notwithstanding the legislative renumbering.

²⁷ *Independent Thought v. Union of India*, (2017) 10 SCC 800, ¶¶98-102 (Madan B. Lokur, J.).

III. THE CONSTITUTIONAL IMPERATIVE: ARTICLES 14 AND 21 AND THE RIGHT TO BODILY INTEGRITY

A. Article 14 and the Equality Challenge: The Intelligible Differentia Test

Article 14 promises every person equality before the law and equal protection of the laws. In *State of West Bengal v. Anwar Ali Sarkar*, the Supreme Court laid down what has become the governing test: a classification survives Article 14 only where (i) it rests on an intelligible differentia separating those covered by it from those excluded, and (ii) that differentia bears a rational connection to the object the statute is meant to achieve.²⁸ Any classification that is arbitrary, capricious, or unconnected to a legitimate legislative purpose fails this test and is void.

What Exception 2 to Section 63 BNS does is carve out a class of victims married women eighteen and older and deny them the protection rape law extends to everyone else, purely because they are married. Marriage itself is the differentia at work. The rape provision exists to safeguard bodily integrity and punish non-consensual intercourse. The constitutional question, then, is whether being married bears any rational relationship to that underlying purpose. This paper's position is that no such connection can be shown. A woman's bodily integrity, dignity, and psychological well-being are violated by non-consensual intercourse regardless of whether the perpetrator happens to be her husband. Forcible penetration without consent inflicts the same harm whatever the relationship between perpetrator and victim. Studies indicate that marital rape can, in fact, inflict distinctive and severe long-term psychological damage precisely because it takes place within a relationship built on intimacy and trust.²⁹ Stripping criminal protection from people who are, if anything, more vulnerable because of the structural intimacy and power imbalance of marriage cannot be tied to any legitimate legislative goal. The only justification anyone could offer for this classification that marriage amounts to standing, irrevocable consent to sex has already been rejected by Indian courts, at least with respect to minor wives, in *Independent Thought*, and by clear implication, with respect to the broader principle of inviolable decisional autonomy set out in *Puttaswamy*. A classification resting on a legal fiction that courts have already refused to uphold in closely

²⁸ *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75, ¶40.

²⁹ Diana E.H. Russell, *Rape in Marriage*, 190-205.(1990) (documenting distinct psychological consequences of marital rape as compared to stranger rape).

related settings cannot plausibly be said to serve any legitimate legislative purpose. On that basis, this paper submits that Exception 2 is constitutionally infirm under Article 14.

B. Article 21 and the Inviolability of Bodily Autonomy

The case under Article 21 is, if anything, more compelling. Since *Maneka Gandhi v. Union of India* (1978),³⁰ the Supreme Court has read Article 21 broadly, insisting that any law or procedure depriving a person of life or liberty must be just, fair, and reasonable. Over time, the substance of Article 21 has expanded to take in the right to privacy, human dignity, and decisional autonomy over one's own body.

In *Puttaswamy* (2017), the nine-judge constitutional bench unanimously recognized privacy as a fundamental right under Part III of the Constitution, one whose core includes the right to make basic choices about one's own life.³¹ Justice D.Y. Chandrachud's concurrence, since treated as the dominant opinion in the case, stated plainly that "the body of the individual is the individual's own and cannot be subjected to a sovereign claim."³² Given that bodily decisional autonomy is a fundamental right the State cannot curtail without meeting a proportionality standard, any legislative choice to exempt a class of perpetrators from liability for forcible bodily violation must itself clear that same bar. This paper's analysis suggests Exception 2 fails to do so: shielding the marital institution from criminal scrutiny is not a constitutionally recognized aim capable of justifying the wholesale removal of a defined class of victims from the protection of criminal law, and the resulting harm is out of all proportion to whatever benefit the exemption might plausibly provide.

The right to life under Article 21, moreover, explicitly extends to the right to live with human dignity, as established in *Francis Coralie Mullin v. Union Territory of Delhi* (1981).³³ Permitting the perpetration of rape against married women with legal impunity encodes a legislative judgment that their dignity is worth less than that of unmarried women a conclusion that cannot be squared with the constitutional promise of equal protection of the laws, or with the foundational idea that human dignity cannot be taken away.

³⁰ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

³¹ *Puttaswamy*, supra note 2, ¶¶168-169 (Chandrachud, J.) ("The right to make choices about fundamental aspects of life is constitutionally protected.").

³² *Ibid.*, ¶144 (Chandrachud, J.).

³³ *Francis Coralie Mullin v. Union Territory of Delhi*, (1981) 1 SCC 608, ¶8 (Bhagwati, J.).

C. The Delhi High Court Split Verdict: RIT Foundation v. Union of India (2022)

Exception 2's constitutionality received its fullest judicial airing in *RIT Foundation v. Union of India*, decided by a Delhi High Court division bench in May 2022. That the bench could not reach agreement produced a split verdict of considerable constitutional weight, one still awaiting final resolution by the Supreme Court.³⁴

Justice Rajiv Shakdher, authoring the more expansive of the two opinions, found Exception 2 unconstitutional on several independent grounds. He held, first, that it breaches Article 14 by drawing an impermissible classification, reasoning that “a woman becomes a victim of rape not because of the identity of the perpetrator but because of the act itself,” so that the perpetrator's marital status has no constitutional bearing on the harm analysis.³⁵ Second, drawing on *Puttaswamy*,³⁶ he held that sexual autonomy forms an integral part of the personal liberty guaranteed under Article 21, and that marriage cannot serve as an irrevocable waiver of that right. Third, invoking Article 15(3), which allows the State to make special provisions benefiting women, he concluded that the exception works against, rather than furthers, the constitutional mandate to protect women's rights.

Justice C. Hari Shankar dissented, voting to keep the exception in place, on two main grounds. He first argued that marriage generates a reasonable social and legal expectation of sexual intimacy between spouses, and that the law simply recognizing this expectation is not, by itself, a constitutional wrong.³⁷ He then invoked parliamentary deference, treating the question of whether to criminalize marital rape as social policy properly left to elected legislators rather than judges. That second ground carries real institutional force, but it rests, this paper submits, on an incomplete picture of what courts are for: deference to Parliament operates inside constitutional limits, not above them. Once a legislative choice is credibly alleged to violate a fundamental right, the Court is constitutionally obliged to engage with that claim rather than simply defer to it.³⁸ What the Supreme Court will ultimately have to decide is whether the

³⁴ RIT Foundation, supra note 5, ¶1 (the matter was referred to the Supreme Court following the split verdict).

³⁵ RIT Foundation, supra note 5, ¶198 (Shakdher, J.).

³⁶ Puttaswamy, supra note 2.

³⁷ RIT Foundation, supra note 5, ¶23 (Hari Shankar, J.).

³⁸ *Minerva Mills Ltd. v. Union of India*, (1980) 3 SCC 625, ¶53 (“[J]udicial review is a basic and essential feature of the Constitution which cannot be amended or abridged by Parliament.”).

substance of Exception 2 not merely the fact that Parliament chose it meets constitutional requirements.

D. The October 2024 Government Affidavit: Institutional Resistance and Its Constitutional Limits

The Union Government's October 2024 affidavit opposing removal of Exception 2 exposes the political machinery behind the legislature's continued resistance.³⁹ Among its arguments, the affidavit claimed that criminalization would "destabilize the institution of marriage," and that the existing remedies under the Protection of Women from Domestic Violence Act, 2005 which already treats sexual abuse as a form of domestic violence give abused wives adequate redress.⁴⁰ It further asserted that the marital setting produces distinctive "complexities" setting it apart from non-marital rape, though it left largely unexplained what those complexities actually are. Underlying the government's stance is a premise this paper takes issue with: that marriage's institutional interests can constitutionally trump the fundamental rights of the people within it. The State stops short of calling marital rape morally acceptable; its claim is only that criminal consequences should not follow, since prosecution would destabilize the marital institution. But Part III of the Constitution vests rights in individuals, not institutions. The Supreme Court's ruling in *Chairman, Railway Board*

v. Chandrima Das that freedom from sexual violence is inseparable from the right to human dignity⁴¹ does not switch off at the threshold of the marital home. Part IV now turns to the most serious arguments on the other side of this debate to test whether any of them hold up.

IV. WEIGHING AUTONOMY AGAINST RISK: THE COUNTERVAILING ARGUMENTS AND THEIR LIMITS

A. Section 498A and the Institutional Record of Weaponization

Any argument for pushing criminal law further into the matrimonial sphere has to reckon honestly with the cautionary example of Section 498A IPC. Introduced in 1983 as a targeted response to widespread dowry-related cruelty against married women,⁴² Section 498A turned

³⁹ Union Government Affidavit, *supra* note 12.

⁴⁰ Section 3(a), The Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament, 2005 (India).

⁴¹ *Chairman, Railway Board v. Chandrima Das*, (2000) 2 SCC 465, ¶21.

⁴² The Criminal Law (Second Amendment) Act, 1983, No. 46, Acts of Parliament, 1983 (India) (inserting

cruelty by a husband or his relatives including cruelty meant to coerce a woman or her family into meeting illegal dowry demands into a non-bailable, cognizable offence. As a protective shield for wives caught in unequal matrimonial power structures, the provision's underlying design was, in principle, sound. Within twenty years, though, a pattern of widespread misuse had taken root deeply enough to draw sustained criticism from the courts. FIRs were registered and arrests made in bulk sweeping up elderly in-laws and distant relatives alike with no preliminary inquiry into whether individual complaints had any merit. Because the offence was non-bailable, even brief detention became a powerful bargaining chip in matrimonial property disputes and divorce litigation. Parents, siblings, and cousins of the accused frequently found themselves detained, publicly stigmatized, and professionally ruined, sometimes over complaints lodged months or years after the events they described. The sharpest judicial response to this pattern came in *Sushil Kumar Sharma v. Union of India* (2005). While upholding Section 498A's constitutional validity, the Supreme Court issued a warning that has since shaped how matrimonial criminal law is treated across the board: "By misuse of the provision a new legal terrorism can be unleashed. The provision is intended to be used as a shield and not as an assassin's weapon."⁴³ That phrase, "legal terrorism," passed into common legal usage and continues to color judicial attitudes toward matrimonial criminal legislation generally. Nine years afterward, the Supreme Court answered the Section 498A misuse problem with a structural fix in *Arnesh Kumar v. State of Bihar* (2014).⁴⁴ It laid down binding guidelines requiring police officers and magistrates to stop treating arrest as a routine step in Section 498A cases, insisting instead that they engage with the specific facts before ordering an arrest.⁴⁵ The *Arnesh Kumar* guidelines remain good law today, and they offer both a warning and a working template for any future marital rape statute: arrest and prosecution mechanisms have to be built with the risk of abuse deliberately in mind.

B. NFHS-5 Data: The Scale of Unremedied Harm

The misuse concern deserves to be taken seriously, but it also has to be weighed against the scale of harm that would otherwise go unaddressed. The National Family Health Survey-5

Section 498A into the IPC).

⁴³ Sushil Kumar Sharma, supra note 3, ¶14 ("We, however, make it clear that merely because the provision is constitutional and intra vires, it does not give a licence to unscrupulous persons to wreck personal vendetta or unleash harassment.").

⁴⁴ *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273.

⁴⁵ *Ibid.*, ¶7 ("Arrest brings humiliation, curtails freedom and casts scars forever. It needs to be sensitised that it should be the last resort and not the first option.").

(2019–21), a government household survey spanning roughly 637,000 households, found that around 29.3% of ever-married women aged eighteen to forty-nine reported physical and/or sexual violence at the hands of a spouse.⁴⁶ Even taking the more conservative reading of that figure, it points to a large share of India’s married women experiencing a category of harm that currently has no criminal remedy attached to it.

The NFHS-5 figures also point to a stark gap in reporting. Most women who experienced spousal sexual violence neither told any authority nor pursued legal remedy. That silence should not be mistaken for absence of harm; it reflects social stigma, economic dependence, fear of a family breaking apart, and the simple fact that there is no statutory category to name the experience. When a legal framework offers no criminal remedy for marital rape, it tells survivors that what happened to them is not even legally cognizable and lies outside the State’s concern a message that discourages disclosure and strips away any reason to seek redress.⁴⁷

Table 2: NFHS-5 (2019–21) Spousal Sexual Violence: Prevalence versus Formal Reporting

Indicator	National Figure	Notes / Disaggregation
SECTION A PREVALENC OF SPOUSAL SEXUAL VIOLENCE		
Ever-married women (aged 18–49) reporting spousal physical and/or sexual violence	29.3%	Combined physical and sexual; sexual-only component is a subset (NFHS-5 Table 21.6)
States with highest reported prevalence	Manipur: 47.4%; Telangana: 42.7%; Tamil Nadu: 36.9%	NFHS-5 State Factsheets*
Women experiencing spousal physical or sexual violence (combined)	32.0%	Includes women who experienced both forms
Women who believe a husband is justified in beating his wife	52.4%	Reflects internalised acceptance of intimate partner violence

⁴⁶ NFHS-5 Report, *supra* note 16, Chapter 21, Table 21.6. The 29.3% figure captures spousal physical and/or sexual violence combined; the proportion reporting specifically sexual violence by a spouse is a subset of this figure.

Both measures reflect acute under-reporting due to social and structural barriers documented in Part IV.B below.

⁴⁷ Flavia Agnes, *Law and Gender Inequality: The Politics of Women’s Rights in India*, 112-15.(1999) (analyzing the structural factors that suppress reporting of matrimonial sexual violence in India).

SECTION B FORMAL REPORTING AND HELP-SEEKING		
Women who sought help from any source (family, police, NGO, etc.)	~14% of those who experienced violence	Majority relied solely on familial support
Women who specifically reported to police or formal authority	~2% of those who experienced violence	Stark gap between prevalence and formal redress
Women who told no one about the violence they experienced	~77% of those who experienced violence	Silence driven by stigma, economic dependence, and absence of cognizable legal category

*Sources: NFHS-5 Report, Tables 21.6 and 21.9 (2021). *State-level figures are drawn from NFHS-5 State Factsheets. Reporting rates apply to women who experienced any spousal violence (physical or sexual).*

C. The Principal Arguments Against Criminalization

Opposition to criminalization is built on several separate arguments, each stronger than critics of the position sometimes concede. Each is presented here in its strongest available form before this paper turns to whether any of them ultimately succeed. **Parliamentary sovereignty and institutional competence:** The most formally rigorous of these arguments is institutional in nature, and Justice Hari Shankar's dissent in *RIT Foundation* set it out with care: defining marital offences involves complex policy judgments about the nature of marriage, the scope of conjugal obligations, and how far criminal liability should reach into an intimate domestic setting that elected legislatures are better placed to make than unelected courts. The claim is not that Parliament sits beyond constitutional challenge; it is that where Parliament has plainly turned its mind to a contested social question, courts should hesitate before substituting their own judgment for that of the democratically accountable branch. This is a long-established argument in comparative constitutional law, and the Indian context is no exception.⁴⁸

⁴⁸ A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 39-40.(10th ed., 1959) (foundational account of parliamentary supremacy); *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1 (earlier Supreme Court decision deferring to Parliament on Section 377, later overruled in *Navtej Singh Johar*).

Definitional complexity and the rights of the accused: A second, analytically separate objection also draws on Article 21. The same right to bodily autonomy that justifies criminalization from a complainant's standpoint also protects the liberty and dignity of an accused person. Critics point out that consent inside an ongoing intimate marriage raises evidentiary questions absent from non-marital encounters: questions about patterns of communication, established practices of intimacy, and the absence of a clear, contemporaneous refusal. Stated carefully, the worry is not that a wife's consent counts for less than anyone else's, but that establishing the facts may be genuinely harder, and that a poorly designed statute could produce convictions on evidence that is truly ambiguous. This is a concern about how the law would be implemented, not an argument for keeping the existing immunity in place.⁴⁹

The adequacy of existing civil remedies. A third argument, essentially the one advanced in the Union Government's October 2024 affidavit, is that the Protection of Women from Domestic Violence Act, 2005 already offers meaningful redress for sexual abuse in marriage. Section 3(a) of the DV Act treats sexual abuse as a form of domestic violence and makes available remedies such as protection orders, residence orders, and monetary compensation.⁵⁰ On this reasoning, a married woman facing sexual abuse already has a set of civil protections open to her; criminalization only adds punitive consequences without necessarily strengthening her actual access to protection or adding much to the deterrent effect civil liability already achieves.

D. A Critical Assessment: Why the Objections Do Not Ultimately Prevail

Each of these objections merits a thought-through answer rather than an offhand rejection. Taking parliamentary sovereignty first: institutional deference functions within the four corners of the Constitution, not above them. The Supreme Court's own case law, most recently *Navtej Singh Johar v. Union of India* (2018) which reversed an earlier deferential stance and struck down Section 377 IPC confirms that constitutional rights are not held hostage to legislative consensus.⁵¹ Legislative choices that are merely controversial remain within Parliament's discretion. Choices that credibly violate a fundamental right, by contrast, trigger

⁴⁹ Jonathan Herring, "Marital Rape", in *Criminal Law: Text, Cases and Materials*, 347-48.(2014) (noting evidentiary complexities specific to marital sexual offence prosecutions).

⁵⁰ DV Act, *supra* note 40, Section 3(a).

⁵¹ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶136 (per Dipak Misra, C.J.) (holding that constitutional morality, not popular morality, is the test for fundamental rights).

the Court's constitutional role irrespective of how long the legislature has stuck to that position. The line to draw is between ordinary policy disagreement and genuine constitutional infirmity, and this paper submits Exception 2 falls on the wrong side of that line.

On definitional complexity: the point is genuine, but what it justifies is procedural care, not a blanket immunity. The legal system regularly manages evidentiary complexity in other areas commercial fraud, consent to medical treatment, constructive dismissal without abandoning criminal liability altogether. The right legislative answer to complexity is carefully drafted consent standards and evidentiary guidance, not a spousal immunity that removes an entire category of conduct from the reach of criminal law. Part V's proposed framework speaks directly to this concern.

On the adequacy of civil remedies: the DV Act offers protective and compensatory relief, but it stops short of treating marital sexual abuse as a crime or allowing custodial punishment. Treating civil protection as an adequate stand-in for criminal accountability assumes a contested view of what criminal law is for one inconsistent with how the State treats every other category of sexual violence. Rape outside marriage is never left to civil remedies instead of criminal prosecution, because the State accepts that criminal punishment serves goals deterrence, public condemnation, vindication of the victim that civil remedies cannot reach. There is no principled reason to carve out marriage alone for a different framework. The genuine risk of misuse calls for strong procedural safeguards, discussed below, not for decriminalization as such.

V. THE PATH FORWARD: CRIMINALIZATION WITH EVIDENTIARY SAFEGUARDS

A. The Mandatory First Step: Removing Exception 2 from Section 63 BNS

Any constitutionally sound framework has to begin with striking Exception 2 out of Section 63 BNS. Part III's analysis shows this is not optional but a constitutional necessity. Parliament keeps wide latitude to work out how criminalization should function evidentiary standards, procedural protections, sentencing but it has no latitude to keep in force a provision that breaches Articles 14 and 21.

Until Parliament acts, this paper submits that the Supreme Court should use its inherent power

under Article 142 to read down Exception 2 on an interim basis, following the same approach it took toward the age floor in the earlier IPC provision in *Independent Thought*.⁵² The pendency of the *RIT Foundation* matter before the Supreme Court following the split verdict offers an immediate jurisdictional opening for exactly this kind of intervention. Constitutional violations do not wait on the legislature's schedule.

B. A Five-Element Evidentiary and Procedural Framework

Drawing lessons from the Section 498A experience, the *Arnesh Kumar* guidelines, and comparative legislative models elsewhere, this paper sets out five structural elements for a marital rape criminalization framework built to be just, effective, and resistant to weaponization all at once.

First: A structured preliminary inquiry before formal FIR registration. The Supreme Court in *Lalita Kumari v. Government of Uttar Pradesh* (2014) held that a preliminary inquiry ahead of FIR registration is permissible in sensitive case categories, including “matrimonial disputes,” to check whether a cognizable offence is even disclosed.⁵³ This paper proposes that Parliament formally bring marital rape complaints within that category. Completed within seven days, the preliminary inquiry would ask the investigating officer only whether the complaint discloses a cognizable offence a task distinct, crucially, from imposing a mandatory corroboration requirement. Registration would not be automatically blocked by the absence of independent corroborating evidence; the inquiry would assess cognizability, not decide guilt. Material that happens to be available earlier domestic violence complaints, medical records, or electronic evidence of coercion would inform but not bind that assessment. This design steers clear of the problem the Supreme Court flagged in *State of Punjab v. Gurmit Singh* (1996), where mandatory pre-trial corroboration of a rape complainant's testimony was struck down as an impermissible barrier to justice.⁵⁴

Second: Mandatory judicial authorization before arrest. Mirroring the magistrate-review requirement *Arnesh Kumar* already imposes,⁵⁵ no arrest under the new marital rape

⁵² *Independent Thought*, supra note 27, ¶102 (exercising the power to read down an exception to Section 375 IPC on grounds of unconstitutionality under Articles 14, 15, and 21).

⁵³ *Lalita Kumari v. Government of Uttar Pradesh*, (2014) 2 SCC 1, ¶111 (holding that preliminary inquiry before registration is permissible in specified sensitive categories and must be completed within seven days).

⁵⁴ *State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384, ¶8 (holding that a conviction for rape may rest on the uncorroborated testimony of the complainant if it is found to be trustworthy).

⁵⁵ *Arnesh Kumar*, supra note 44, ¶7.

provision should proceed without prior authorization from a Magistrate. That Magistrate would need to review whatever corroborating material exists and certify in writing that the complaint makes out a prima facie case justifying pre-trial detention within a fixed statutory window, proposed here at forty-eight hours, so the requirement cannot itself become a tool for prolonged pre-arrest coercion. **Third: An Independent Prosecution Review Committee (IPRC) before charge-sheeting.** Each district should have an IPRC made up of a retired District and Sessions Judge, a senior public prosecutor, and a specialist in domestic violence tasked with reviewing the evidence in every marital rape case before a chargesheet is filed. Its role would be to certify that sufficient evidence exists to proceed to trial, acting as an intermediate filter against frivolous prosecutions. Bound by a thirty-day statutory deadline, to avoid delaying genuine cases, this committee would meaningfully cut down the number of meritless prosecutions that reach trial, saving judicial resources and sparing accused persons unwarranted stigma.

Fourth: Specialized fast-track courts with gender-sensitive adjudication capacity. Marital rape cases should go to fast-track courts staffed by judges trained specifically in the dynamics of intimate partner violence, the psychology of coercive control, and trauma-informed evaluation of evidence. Courts of this kind already endorsed by the Supreme Court for sexual assault cases generally would both speed up justice for genuine survivors and ensure that the distinctive evidentiary issues marital rape cases raise are handled by specialists, not by courts unfamiliar with how long-term intimate partner abuse actually operates.

Fifth: A codified offence of knowingly false marital rape allegation.

Parliament should create a distinct, custodially punishable offence for making a marital rape allegation known by the complainant to be false. This offence should only become available after an acquittal, and only on a separate judicial finding, reached in dedicated proceedings, that the original allegation was knowingly baseless. The “knowingly false” threshold matters a great deal here: the provision must not fire automatically whenever a prosecution fails, since that would chill genuine survivors from coming forward. It should be reserved for demonstrated bad faith alone. Framed this way, the provision underscores how seriously the new offence is meant to be taken while giving a concrete disincentive against using it tactically in matrimonial disputes.

C. Comparative Models and the Evidence for Workability

Comparative legislative experience lends support to the framework proposed here. The United Kingdom's Sexual Offences Act 2003, enacted in the post-*R v R* environment, treated marital rape simply as rape, without carving out any separate evidentiary regime.⁵⁶ Its rollout came with detailed Crown Prosecution Service guidance addressing the specific evidentiary difficulties of intimate partner sexual violence, covering matters such as prior consistent statements, expert evidence on coercive control, and the significance of delayed disclosure.⁵⁷ South Africa's Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, part of a broader overhaul of sexual offences law that criminalized marital rape, expressly stated that consenting to one sexual encounter does not imply consent to any later one a provision aimed squarely at the residual "implied consent" defence.⁵⁸

None of this requires India to copy these models wholesale; the five-element framework proposed here has been calibrated specifically for India's socio-legal context, including its documented history of matrimonial provisions being misused. What the comparative record does show is that constructing a workable evidentiary framework for marital rape prosecutions is not an impossible task legal systems at very different stages of development have managed it. That no ready-made template exists is no excuse to let a constitutional violation continue; it is, instead, an invitation for legislative creativity and judicial ingenuity.

VI. SCOPE FOR FUTURE RESEARCH

Several questions fall outside this paper's methodological scope and deserve dedicated future study. Primary empirical research into the actual prevalence of spousal sexual violence in India, conducted through direct interviews rather than survey-embedded questions, would give a more accurate baseline than the NFHS-5's self-reported figures, which are known to undercount. Such work would also permit a closer look at how reporting barriers interact with the absence of a criminal remedy.

⁵⁶ Section 1, The Sexual Offences Act, 2003, *supra* note 21 (U.K.).

⁵⁷ Crown Prosecution Service, "Legal Guidance: Rape and Sexual Offences", Chapters 1-7, <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences> (Last Accessed July 19, 2026).

⁵⁸ Sections 1 and 3, The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (S. Afr.).

Comparative effectiveness research is also needed looking at how criminalization has actually functioned in jurisdictions such as South Africa, Nepal, and Scotland, where enough time has passed to generate conviction data, acquittal rates, and survivor experience surveys. Any serious Indian legislative proposal should be built on that empirical foundation. Whether criminalization ultimately expands or narrows survivors' practical access to justice, with or without evidentiary safeguards in place, is a question doctrinal analysis alone cannot resolve; it can only be answered empirically. Legal impact studies tracing Section 498A IPC's trajectory before and after the *Arnesh Kumar* guidelines would also help establish whether procedural safeguards like the ones proposed in Part V actually cut down on misuse without shutting genuine complainants out of justice. That evidence bears directly on whether the framework this

paper proposes can realistically achieve both of its aims.

Academic literature on how consent standards should be constitutionally designed for ongoing intimate relationships remains thin. How Indian criminal law ought to define and assess consent within marriage weighing prior sexual history, the role of contemporaneous communication, and how coercive control affects the capacity to consent is a question that deserves sustained scholarly attention well beyond what this paper can offer.

VII. CONCLUSION

Section 63, Exception 2 of the Bharatiya Nyaya Sanhita, 2023 does not hold up under constitutional scrutiny. It has no basis in Indian legal tradition and reflects no deliberate assessment of Indian social conditions; it descends instead from a seventeenth-century English common law dictum unsupported by any cited authority, built on a fiction of irrevocable matrimonial consent that more than 125 legal systems have since rejected. No legislature genuinely committed to decolonizing Indian criminal law can, in good conscience, preserve Matthew Hale's immunity as though three and a half centuries of legal development simply never happened.

On the analysis this paper has presented, the constitutional case for criminalization is a strong one. Exception 2 draws an irrational, arbitrary line that denies married women the protections extended to every other victim of non-consensual intercourse, in apparent tension with Article 14. It effectively endorses interference with a married woman's decisional autonomy over her

own body autonomy the Supreme Court's nine-judge bench has held to be protected under Article 21. The Delhi High Court's fractured verdict in *RIT Foundation*, now pending before the Supreme Court, gives the Court a clear opportunity to resolve this constitutional question once and for all. The Union Government's claim that criminalization would "destabilize marriage" is, respectfully, beside the constitutional point: Part III protects the rights of individuals, not the institutional interests of marriage.

At the same time, this paper has insisted that the case for criminalization cannot be made naively, without regard to how matrimonial litigation actually unfolds in India. Invoking the Section 498A experience is not just a rhetorical device favored by defenders of the status quo; it names a documented institutional failure that any serious reform proposal has to confront directly. The five-element framework set out in Part V

preliminary scrutiny before FIR registration, judicial sign-off before arrest, independent prosecution oversight, specialized fast-track courts staffed by trained judges, and a codified offence for knowingly false allegations aims to criminalize marital rape without handing anyone a new tool for abuse. It is a framework built out of pragmatism, not hesitation.

Set autonomy against weaponization, and the constitutional path is not really in doubt. No constitutional order is obliged to protect a marital institution that depends on a husband's legal immunity to commit sexual violence against his wife. A married woman's right to refuse sex with her husband is not some radical demand; it is the bare minimum Articles 14 and 21 require, the minimum India's CEDAW obligations confirm, and the minimum that the Constitution's foundational premise of equal human dignity makes non-negotiable. This paper's conclusion is that the legislature must act and that if it will not, the Supreme Court must.