
MARITAL RAPE IN INDIA - A VOW OR A WAIVER?

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ABSTRACT

India occupies a paradoxical legal position: it imposes some of the world's most stringent criminal sanctions for sexual offences against children under the Protection of Children from Sexual Offences Act, 2012 (POCSO), yet simultaneously permits a husband to engage in non-consensual sexual intercourse with his adult wife with near-total legal impunity under Exception to Section 375 of the Indian Penal Code, 1860 (retained as Exception to Section 63 of the Bharatiya Nyaya Sanhita, 2023). This article interrogates that paradox. Drawing on constitutional doctrine, Supreme Court jurisprudence, comparative law, and National Family Health Survey-5 (2019-21) data, it argues that the marital rape exception violates Articles 14, 15, 19 and 21 of the Constitution and must be struck down. The article further contends that the POCSO framework anchored in the recognition that no age or relationship exempts a perpetrator from accountability furnishes the correct normative template for a universal, relationship-neutral rape law applicable to all women irrespective of marital status.

KEYWORDS: Marital rape, POCSO Act, Section 375 IPC, Bharatiya Nyaya Sanhita, Article 21, bodily autonomy, sexual violence, constitutional law.

I. INTRODUCTION

Does a woman's fundamental right over her own body dissolve upon marriage?

India's answer, embedded in law since 1860, is an uncomfortable *yes*. Exception to Section 375 of the Indian Penal Code, 1860 now replicated verbatim in Section 63 of the Bharatiya Nyaya Sanhita, 2023 (BNS) decrees that "sexual intercourse or sexual acts by a man with his own wife" does not constitute rape, provided the wife has attained the statutory minimum age. The age threshold was 15 under the IPC and has been raised to 18 under the BNS, yet

the structural immunity survives: within an adult marriage, the concept of marital rape does not legally exist.

Against this backdrop, Parliament enacted the Protection of Children from Sexual Offences Act, 2012 (POCSO), a statute specifically designed to protect minors from sexual abuse. POCSO imposes stringent, mandatory minimum sentences up to rigorous imprisonment for life on those who commit penetrative sexual assault against a child. Crucially, The Act adopts a zero-tolerance approach to sexual offences against children. It does not provide any exception based on the relationship between the offender and the victim. Whether the perpetrator is a parent, guardian, teacher, relative, or any person in a position of trust, the law treats the offence with the same seriousness and, in many cases, even considers such relationships as aggravating factors leading to stricter punishment.

This reflects a crucial legal principle: proximity does not justify violation. In fact, the closer the relationship, the greater the responsibility to protect not exploit. The law recognizes that abuse within trusted relationships is often more harmful because it involves betrayal, coercion, and psychological control.

In simple terms, POCSO clearly establishes that:

No relationship can be used as a shield against accountability for sexual violence.

This is what makes the contrast with marital rape laws so striking. While POCSO acknowledges that consent cannot be assumed merely because of a relationship, the marital rape exception under Indian Penal Code Section 375 does the opposite it assumes that marriage itself implies consent, thereby granting immunity to the husband.

This contradiction exposes a deeper inconsistency in the legal system:

- In one context (children), the law says relationship increases responsibility
- In another (marriage), the law treats relationship as immunity

Such inconsistency raises serious constitutional concerns under Articles 14 and 21, because it creates unequal protection and undermines bodily autonomy.

This article poses a pointed question: *if the law correctly holds that no relationship can excuse sexual violence against a minor, on what principled basis does it hold that the marital relationship wholly immunises sexual violence against an adult woman?* There is none. The

contrast is not merely a policy inconsistency; it is a constitutional contradiction that strikes at the core of Articles 14, 15, and 21 of the Constitution of India.

Part II places the marital rape exception in its historical context. Part III analyses the relevant constitutional provisions and Supreme Court jurisprudence. Part IV examines the POCSO framework as a normative comparator. Part V presents empirical evidence of the scale of the problem. Part VI surveys comparative international law. Part VII addresses counter-arguments. Part VIII concludes with legislative and judicial recommendations.

II. HISTORICAL ORIGINS AND LEGISLATIVE EVOLUTION

A. The Hale Doctrine and Colonial Transplant

The marital rape exception in Indian law did not originate from indigenous legal tradition. It was transplanted from Victorian English law through the IPC, which was drafted by Lord Macaulay's First Law Commission in 1837 and enacted in 1860. Its intellectual ancestor is Sir Matthew Hale's seventeenth-century proposition that "the 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." This doctrine premised on the legal fiction of implied, irrevocable, perpetual consent was already contested in England by the 1990s, and was conclusively abolished by the House of Lords in *R v. R* [1991].

At the time the IPC was drafted, married women in colonial India had no independent legal identity. They could not own property, enter contracts, or seek divorce. The "Doctrine of Coverture" under which husband and wife became a single legal person upon marriage rendered consent a conceptual nullity within matrimony. That legal architecture has long since been dismantled; yet the exception it spawned endures.

B. The BNS 2023: Reform That Was Not

Parliament enacted the Bharatiya Nyaya Sanhita, 2023 to replace the colonial IPC. Despite widespread calls from the Law Commission, the Justice Verma Committee, and civil society to delete the marital rape exception, Section 63 of the BNS retains it. The only change is cosmetic: the age threshold for the wife has been raised from 15 to 18 years, in conformity with the Supreme Court's direction in *Independent Thought v. Union of India* (2017). The Union government, in a 49-page affidavit filed before the Supreme Court in October 2024, actively opposed striking down the exception, arguing it would destabilise the institution of marriage.

This legislative choice to reform the penal code wholesale, yet deliberately retain one of its most regressive provisions is telling. It signals not oversight but intention; and that intention demands constitutional scrutiny.

III. THE CONSTITUTIONAL FRAMEWORK

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

Article 21 of the Constitution guarantees that "no person shall be deprived of his life or personal liberty except according to procedure established by law." The Supreme Court has progressively expanded the right to life to encompass the right to live with dignity, the right to health, and critically the right to bodily autonomy. In *Bodhisattwa Gautam v. Subhra Chakraborty* (1996), the Court held that rape is a violation of the victim's right to life and the right to live with human dignity. In *State of Karnataka v. Krishnappa* (2000), it was held that sexual violence is an unlawful intrusion upon the right to privacy and sanctity of an individual.

The most expansive judicial affirmation of privacy as a fundamental right came in *Justice K.S. Puttaswamy (Retd.) v. Union of India* (2017) a nine-judge bench judgment that unanimously declared privacy to be an intrinsic part of the right to life and personal liberty under Article 21. Crucially, the judgment recognised that the right to privacy includes decisional autonomy the right to make intimate choices about one's own body without interference. Justice D.Y. Chandrachud, in his concurring opinion, specifically warned against the State permitting constitutional rights to be violated within the private sphere of the family.

In *Joseph Shine v. Union of India* (2018), the Supreme Court struck down the law on adultery, holding that "familial structures cannot be regarded as private spaces where constitutional rights are violated." The bench relied on Puttaswamy and *Navtej Singh Johar v. Union of India* (2018) to underscore that constitutional rights do not dissolve within the institution of marriage. The petitioners in the pending marital rape cases before the Supreme Court *Hrishikesh Sahoo v. State of Karnataka* and *RIT Foundation v. Union of India* have expressly relied upon Joseph Shine to argue that marriage cannot be a constitutional safe-harbour for perpetrators of sexual violence.

B. Article 14: The Equality Guarantee

Article 14 guarantees equality before the law and equal protection of the law. Any legislative classification must satisfy a two-part test: (i) it must be founded on an intelligible differentia;

and (ii) the differentia must have a rational nexus to the object sought to be achieved by the legislation.

The marital rape exception creates a binary: an unmarried woman who is subjected to non-consensual sexual intercourse is a victim of rape, protected by the full force of criminal law; a married woman subjected to the same act by her husband is offered no criminal remedy. The classification is based solely on marital status. The object of Section 375/63 is the protection of women from sexual violence. The exception frustrates not advances that object. The differentia therefore has no rational nexus to the legislative purpose and violates Article 14.

C. Article 15: Discrimination on the Ground of Sex

Article 15(1) prohibits the State from discriminating against any citizen on the grounds of sex. The marital rape exception discriminates against married women on account of their sex and marital status. A man cannot be the subject of this exception only a woman can. The denial of criminal protection is directly contingent upon the sex and the marital status of the victim. This is discrimination of the kind Article 15 was designed to eliminate.

D. Pending Constitutional Reference: Status (2024–2026)

The Supreme Court of India, through a three-judge bench comprising CJI D.Y. Chandrachud, Justice J.B. Pardiwala, and Justice Manoj Misra, commenced hearing a batch of petitions challenging Exception to Section 375 IPC / Section 63 BNS in October 2024. Senior Advocates Karuna Nundy, Indira Jaising, and Colin Gonsalves argued that the exception is violative of Articles 14, 15, 19 and 21. The Delhi High Court had earlier returned a split verdict in May 2022: Justice Rajiv Shukdhher held that the exception was unconstitutional; Justice C. Hari Shankar dissented. As of the time of writing, the Supreme Court has not yet pronounced its final judgment, making this one of the most consequential pending constitutional questions in Indian law.

IV. THE POCSO PARADOX: A LEGISLATIVE DOUBLE STANDARD

A. The POCSO Framework

The Protection of Children from Sexual Offences Act, 2012 represents India at its legislative best in the domain of sexual offences. POCSO defines "child" as any person below the age of 18 years and creates a comprehensive regime of offences including penetrative sexual assault, aggravated penetrative sexual assault, sexual assault, and sexual harassment. Section 4 prescribes a minimum of 7 years' rigorous imprisonment for penetrative sexual assault; Section 6 prescribes a minimum of 20 years for aggravated offences, extendable to life

imprisonment.

Critically, POCSO does not recognise any relationship-based exception. A parent, step-parent, grandparent, teacher, employer, or spouse of a child all are equally liable. The law operates on the correct normative premise that no relationship, however intimate, can extinguish the requirement of consent. POCSO thus embodies the constitutional principles of dignity and bodily autonomy that the marital rape exception denies to adult married women.

B. The Structural Contradiction

The juxtaposition of POCSO and the marital rape exception reveals a profound contradiction in Indian criminal law. Under POCSO:

Parameter	POCSO Act (Minors)	IPC/BNS (Married Adult Women)
Relationship	None — relationship irrelevant	Full immunity for husband

Exception		
Consent Recognition	Absolute — child cannot consent	Implied/irrevocable upon marriage
Minimum Sentence	7–20 years	No criminal liability
Constitutional Basis	Arts. 21, 15 — dignity of child	Arts. 14, 21 — violated for wife
Burden on Victim	Minimum — special courts, child-friendly	No criminal forum available

Table 1 illustrates that the law protects a child from sexual assault by anyone including family members, while affording a married woman no criminal protection at all from assault by her own husband. This is not merely inconsistency; it is a legal absurdity. If the State's rationale for POCSO is that the severity of sexual violence warrants the most stringent possible legal response regardless of relationship, that rationale cannot be abandoned the moment the victim turns 18 and marries.

The physical pain, psychological trauma, and violation of dignity suffered by a raped adult woman are identical to those suffered by a child victim the law's different responses to each represent nothing more than the continuation of the same patriarchal logic that the POCSO Act itself purports to reject.

V. THE EMPIRICAL REALITY: DATA ON MARITAL SEXUAL VIOLENCE IN INDIA

A. NFHS-5 (2019–21): Key Findings

The National Family Health Survey-5 (NFHS-5), the largest nationally representative household survey of its kind, provides the most authoritative empirical evidence on the prevalence of marital violence in India. Its findings are as follows:

Table 2: Key NFHS-5 Indicators on Marital Violence in India (Source: NFHS-5, Ministry of Health & Family Welfare, 2022)

Indicator (NFHS-5, 2019-21)	Statistic
Married women (18–49) experiencing domestic/sexual violence	29.3%
Married women experiencing sexual violence specifically	6.1%
Pregnant women experiencing physical violence during pregnancy	3.1%
Married women who do NOT seek help for marital violence	87%
Women who sought help from police (formal source)	7%
Men/women justifying wife-beating in some circumstances	44–45%

These figures are almost certainly underestimates. NFHS-5 records that 87 percent of women who experience marital violence do not seek help. The social stigma, economic dependence, fear of familial breakdown, and critically the absence of any criminal legal remedy,

collectively produce a culture of silence. As a peer-reviewed study published in *Discover Public Health* (2025) based on NFHS-5 data confirms, the sensitive nature of sexual violence leads to significant underreporting, affecting the accuracy of prevalence estimates.

At 6.1% sexual violence prevalence among approximately 63,851 surveyed ever-married women, the study captures an estimated exposure of nearly 3,895 women. Extrapolated nationally, with India's 2021 census recording approximately 485 million married women, the scale of unaddressed marital sexual violence is staggering and legally invisible.

VI. INTERNATIONAL AND COMPARATIVE LAW

India is an outlier among democracies. More than 150 countries have criminalised marital rape. The United Kingdom abolished the marital rape immunity in *R v. R* [1991]; Canada and South Africa did so through statute. In each jurisdiction, the reforming argument was identical to that advanced here: marriage is a relationship of partnership, not ownership; consent is continuous and revocable; and the State's criminal law must protect every citizen's bodily integrity regardless of marital status.

At the international level, the Committee on the Elimination of Discrimination Against Women (CEDAW), in General Recommendation No. 35 (2017), expressly calls upon State Parties to ensure that marital rape is criminalised without exception. The UN Special Rapporteur on Violence Against Women has similarly recommended that all forms of marital sexual violence be treated as criminal offences under domestic law. India has ratified CEDAW without reservations relevant to this issue. Its continued maintenance of the marital rape exception is inconsistent with its treaty obligations.

VII. COUNTER-ARGUMENTS EXAMINED

A. "Marriage Will Be Destabilised"

The Union government's October 2024 affidavit argued that criminalising marital rape would destabilise the institution of marriage and invite misuse. This argument conflates the protection of marriage as an institution with the protection of a particular spouse's impunity to commit sexual violence. The Constitution does not protect institutions at the cost of individual rights. As the Supreme Court held in *Joseph Shine*, "familial structures cannot be regarded as private spaces where constitutional rights are violated." A marriage that survives only upon the legal incapacitation of a wife's right to say no is not an institution worth protecting.

B. "Existing Laws Are Sufficient"

It is argued that the Protection of Women from Domestic Violence Act, and Section 498A IPC (cruelty by husband) already address the problem. They do not. PWDVA provides civil remedies protection orders, residence orders, maintenance not criminal punishment for the sexual act itself. Section 498A addresses cruelty broadly but does not criminalise the specific act of forced sexual intercourse. The absence of a specific criminal provision targeting marital rape leaves an accountability gap that civil remedies cannot fill.

C. "Difficulty of Proof"

Evidentiary challenges are not a constitutional justification for denying a class of citizens the protection of criminal law. Other jurisdictions have addressed marital rape through evidence law reforms corroboration requirements, in-camera proceedings, special evidentiary standards rather than by simply removing the offence from the statute books. The correct response to evidentiary difficulty is procedural reform, not substantive immunity.

D. "Misuse of Law"

The possibility of false complaints applies to every criminal law. The criminal justice system addresses this through procedural safeguards investigation, trial, presumption of innocence, standard of proof beyond reasonable doubt not by pre-emptively excluding an entire class of victims. The POCSO Act, the Domestic Violence Act, and every other criminal provision is equally susceptible to misuse; this has never been accepted as justification for their deletion.

VIII. RECOMMENDATIONS

A. For the Legislature

- (1) Amend Section 63 of the Bharatiya Nyaya Sanhita, 2023 to delete Exception entirely. The offence of rape must be defined in relationship-neutral terms, covering all non-consensual sexual acts irrespective of the marital or other relationship between perpetrator and victim.
- (2) Adopt a graduated sentencing framework for marital rape analogous to POCSO, with minimum sentences and aggravated provisions where the violence occurs in conditions of coercion, pregnancy, disability, or repeated commission.
- (3) Enact procedural safeguards in-camera trials, victim anonymity, sensitivity trained special courts to ensure that married women can access the criminal justice system without fear of re-traumatisation or public exposure.

B. For the Judiciary

(4) The Supreme Court should, in the pending batch of petitions, hold that Exception to Section 63 BNS violates Articles 14, 15, and 21 of the Constitution and is void to that extent. This is within the Court's power under Articles 32 and 142 and is compelled by the Court's own growing privacy and dignity jurisprudence.

IX. Until legislative reform, courts should interpret exceptions narrowly and recognize that existing provisions, Section 498A IPC, PWDVA, and the general law on assault do not provide an adequate substitute for criminal liability for the sexual act itself.

X. CONCLUSION

The marital rape exception is the legal residue of an era in which a married woman was her husband's property, not a rights-bearing individual. That era has ended everywhere except in the text of India's penal code. The Constitution guarantees dignity, equality, and bodily autonomy to every person. These guarantees are not conditional on marital status. The POCSO Act demonstrates that India's Parliament is capable of enacting stringent, relationship-neutral laws to protect victims of sexual violence when the political will exists. The question is whether that it can be extended to the largest class of sexual violence victims in the country: married women.

The POCSO paradox is ultimately a mirror held up to the law's selective humanity. A child below 18 receives the full protection of the criminal law regardless of who violates her. A woman above 18, upon marriage, loses even the right to name what is done to her. This is not law; it is legislated injustice. The Constitution requires that it be corrected by the legislature if Parliament chooses to act, or by the Supreme Court if it does not.

Pain does not diminish because it occurs within marriage. Trauma does not become lawful because it is inflicted by a husband. And constitutional rights do not expire at the threshold of the marital home.

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