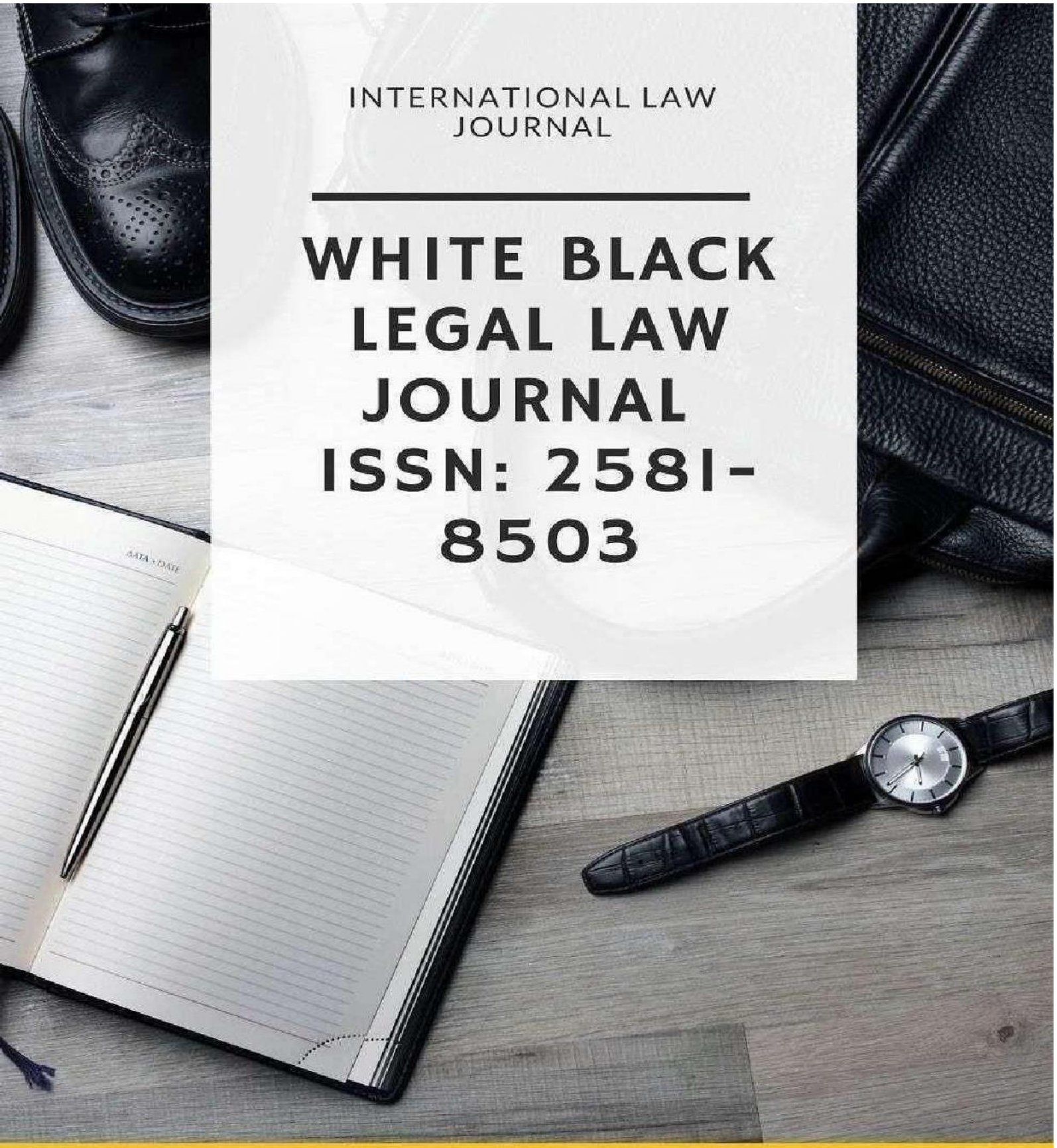


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# "MARITAL IMMUNITY VS. BODILY AUTONOMY: A CRITICAL STUDY OF SECTION 63(EXCEPTION2) AND SECTION 67 OF THE BHARATIYA NYAYA SANHITA, 2023"

AUTHORED BY - POORVA SHARMA

## ABSTRACT

Indian rape law is built around consent, but the marital rape exception creates a significant gap in that framework. Section 63 of the Bharatiya Nyaya Sanhita, 2023 (BNS) identifies circumstances in which sexual penetration amounts to rape, including when it takes place against a woman's will or without her consent. Exception 2, however, states that sexual intercourse or sexual acts by a man with his wife, where she is at least eighteen years old, do not constitute rape. Section 67 addresses non-consensual intercourse by a husband with a wife who is living separately, making it an offence punishable by a substantially lower sentence than rape. Read together, these provisions raise a basic question: if consent is central to the definition of rape, why does a woman's marital status determine whether her refusal receives legal recognition? Using doctrinal and comparative analysis, this paper examines the relationship between Sections 63 and 67, the constitutional arguments under Articles 14, 15 and 21, and relevant decisions including Independent Thought v. Union of India (2017) and the split verdict in RIT Foundation v. Union of India (2022). It argues that the exception rests on an outdated assumption of permanent marital consent and is difficult to reconcile with modern constitutional protections for privacy, dignity and bodily autonomy. The paper recommends removing the exception and aligning Section 67 with a coherent framework for addressing sexual violence within marriage.

## INTRODUCTION

### Background and Context

The law of rape in India emphasizes consent, defined under Section 375 of the Indian Penal Code, 1860 (IPC). Rape can be charged if a man engages in specified sexual acts without a woman's consent. Exception 2 excludes marital intercourse from being classified as rape if the wife is above the specified age. The Bharatiya Nyaya Sanhita, 2023, maintains this framework with the age set at eighteen. It differentiates legal protections based on marital status, allowing

non-consensual intercourse to be classified as rape for unmarried victims while cohabiting wives are excluded from this definition. This exception traces back to historical legal doctrines that merged a wife's identity with her husband's, and despite reforms, the BNS retains the marital exception without reevaluating the status of adult wives.

**Statement of the Research Problem**

This paper investigates an inconsistency in the BNS regarding the criminalization of marital rape. It notes that Section 63 centers on absence of consent, yet Exception 2 exempts sexual acts by a husband toward his adult wife. In contrast, Section 67 treats non-consensual intercourse by a husband with a separated wife as a criminal offense. The analysis questions the reconciliation of these provisions and explores potential constitutional issues under Articles 14, 15, and 21, as well as the appropriate legal response to this conflict.

**Significance of the Study**

This study is significant for legal, social, and academic reasons. Legally, it addresses challenges to the marital rape exception, influencing constitutional review and the interaction between courts and Parliament, particularly concerning Sections 63 and 67 of Indian criminal law. Socially, NFHS-5 data indicates that husbands largely perpetrate sexual violence against married women, highlighting the need for a specific rape offence for cohabiting wives to improve access to justice. Academically, current debates often focus on this exception within the IPC, while this analysis examines its function alongside Section 67 of the BNS, providing insights into the new Code's statutory framework.

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**Research Questions**

- To what extent is Exception 2 to Section 63 of the BNS internally consistent with the consent-based definition of rape in the same section and with the related offence created by Section 67 of the BNS?
- Does Exception 2, as retained in the BNS, withstand scrutiny under Articles 14, 15 and 21 of the Constitution in light of the Supreme Court's jurisprudence on privacy, autonomy and manifest arbitrariness?
- What lessons do comparative and international legal frameworks offer for reforming the Indian position, and how can the misuse concerns raised by opponents of criminalisation be addressed in the design of any reform?

**Research Objectives**

The objectives of this study are to analyse the wording and relationship of Sections 63 and 67 of the BNS; assess the constitutional validity of the marital rape exception in light of relevant judicial decisions; consider selected comparative jurisdictions and international obligations; and develop practical recommendations for legislative or judicial reform.

**Central Proposition**

The paper argues that Exception 2 to Section 63 reflects an outdated view of marital consent, conflicting with the consent-based definition of rape and Section 67. It examines the exception's viability under constitutional scrutiny, especially regarding manifest arbitrariness, and points out that Section 67 already criminalizes a type of non-consensual intercourse in marriage. The discussion suggests that abolishing the exception may be more akin to removing immunity than establishing a new offense, while acknowledging ongoing debates about the boundaries of judicial intervention.

**Scope and Limitations**

The study focuses on Indian law, with comparative references to England and Wales, selected United States authority, South Africa and Nepal. It considers the IPC up to its replacement by the BNS and the BNS from its commencement on 1 July 2024, alongside relevant developments discussed in the paper. This is a doctrinal study, not an empirical field study; statistical material is drawn from published surveys. The main focus is on adult wives. The legal position of minor wives, including the effect of the POCSO Act and Independent Thought, is outside the core analysis. Questions concerning same-sex and transgender spouses raise separate issues of statutory drafting and are noted but not examined in detail.

**Research Methodology**

This paper uses doctrinal, analytical and comparative methods. Its primary sources include the BNS and IPC, the Constitution of India, the Bharatiya Nagarik Suraksha Sanhita, relevant Supreme Court and High Court decisions, selected foreign legislation and judgments, and international instruments such as CEDAW and the UN Declaration on the Elimination of Violence against Women, 1993. Secondary sources include the Law Commission of India's 172nd Report, the Justice J.S. Verma Committee Report, NFHS-5 data, and academic commentary. No interviews, surveys or original fieldwork were undertaken.

**Chapterisation**

The paper proceeds in ten chapters. Chapter 2 reviews the literature and identifies the gap addressed by the study. Chapter 3 explains the relevant concepts and legal framework, including consent, bodily autonomy and coverture. Chapter 4 examines the relationship between Section 63, Exception 2 and Section 67. Chapter 5 considers the constitutional arguments and relevant case law. Chapter 6 discusses comparative law and international obligations, while Chapter 7 evaluates the framework and the principal arguments against reform. Chapter 8 sets out the findings, Chapter 9 makes recommendations, and Chapter 10 concludes.

## LITERATURE REVIEW

**The Historical–Doctrinal Strand**

One strand of scholarship examines the exception to Hale's Pleas of the Crown and coverture, suggesting that this immunity emerged from the historical subordination of wives to their husbands rather than contemporary views on consent or harm. It also references the IPC's drafting history and the case RIT Foundation v. Union of India, indicating the exception was placed within a context that recognized non-consensual intercourse as rape. However, historical perspectives alone do not address modern issues regarding evidentiary challenges, potential misuse, and separation of powers, which necessitate independent analysis.

**The Constitutional Strand**

A second strand examines constitutional principles such as equality, privacy, and personal liberty, highlighting the impact of K.S. Puttaswamy v. Union of India (2017) which asserts that decisional autonomy and bodily integrity are safeguarded under Article 21, even within marriage. Independent Thought v. Union of India (2017) provided important reasoning regarding minor wives, although it did not address adult women's rights. The split verdict in RIT Foundation reflects ongoing disagreements: Justice Rajiv Shakdher deemed the exception unconstitutional, while Justice C. Hari Shankar supported it, citing separation-of-powers. This paper analyses this debate and explores if Section 67 addresses claims of judicially creating a new offence by removing the exception.

**The Comparative Strand**

Comparative scholarship records the removal of marital rape immunity in several jurisdictions.

In R v. R [1992] 1 AC 599, the House of Lords rejected the common-law exception in England and Wales. In People v. Liberta (1984), the New York Court of Appeals struck down a marital exemption on equal-protection grounds. South Africa later abolished the immunity through legislation, and Nepal also criminalised marital rape. These examples show that legal systems have adopted different routes to reform. They do not, by themselves, establish that every foreign model can be transferred directly to India. Questions about enforcement, family structures, evidence and misuse therefore remain relevant to the comparison.

### The Socio-Legal Strand

A fourth strand examines the social realities of sexual violence within marriage. NFHS-5 data reveals current husbands as reported perpetrators, with under-reporting attributed to stigma, financial dependence, and limited legal remedies. Discussions also include concerns over potential misuse of criminal provisions, referencing cases like Arnesh Kumar v. State of Bihar (2014). The literature shifts focus from criminalization to the design of offences and procedures; however, recommendations tend to be broad. This study specifically investigates the interaction between Sections 63 and 67 of the BNS and its constitutional implications.

## CONCEPTUAL AND LEGAL FRAMEWORK

### Consent as the Organising Concept of Rape Law

Consent, as defined in Explanation 2 to Section 63 of the BNS, is an unequivocal and voluntary agreement expressed through various forms of communication, emphasizing that a lack of physical resistance does not imply consent. This definition highlights that consent must be specific to each act and cannot be assumed from previous agreements, which presents a conflict with the notion that marriage implies ongoing consent. The critical issue arises regarding the exemption of married women from this requirement.

### Bodily Autonomy, Privacy and the Constitutional Person

In K.S. Puttaswamy v. Union of India (2017), the court recognized privacy as encompassing decisional autonomy and bodily integrity under Article 21. In Joseph Shine v. Union of India (2018), the Supreme Court annulled the adultery offence and affirmed women's constitutional agency within marriage. Suchita Srivastava v. Chandigarh Administration (2009) emphasized reproductive choice as essential to personal liberty. Collectively, these rulings underscore that marriage does not strip women of their constitutional rights. The central issue is whether the

marital rape exception can be justified under equality protections in Articles 14 and 15.

**Coverture and the Doctrine of Irrevocable Consent**

The exception's basis is rooted in coverture, where a married woman's legal identity is subordinate to her husband's. Hale argued that marriage implies permanent consent, granting husbands special claims over their wives' bodies and protecting the marital home from criminal law. These assumptions are now challenging to justify, as current laws treat consent as specific, acknowledge women's bodily autonomy, and address spousal violence. Thus, the exception requires contemporary legal rationale beyond historical precedent.

**The Architecture of Chapter V of the BNS**

Chapter V of the BNS addresses offences against women and children, focusing primarily on rape and sexual offences. It includes definitions, general punishments, and aggravating circumstances such as the victim's age and severe outcomes. It criminalizes non-consensual intercourse by a husband with a separate wife, highlights issues like deceptive intercourse, gang rape, and protection of victim identity, while noting a specific exception for adult wives in certain context.

**The Statutory Conflict: Section 63 (Exception 2) and Section 67 Text of the Provisions**

Section 63 sets out the facts and circumstances that constitute rape, including acts committed against a woman’s will or without her consent, as well as other specified circumstances involving consent, capacity and age. Exception 2 states that sexual intercourse or sexual acts by a man with his own wife, where the wife is not under eighteen, do not constitute rape. Section 67 takes a different approach: it criminalises sexual intercourse without consent by a man with his wife when she is living separately, whether under a decree of separation or otherwise, and provides for imprisonment of two to seven years along with a fine.

The **Incoherence**

The relationship between these provisions presents an interpretive problem regarding consent within marriage. Section 67 allows a wife to refuse consent, making non-consensual intercourse criminal, yet Exception 2 excludes cohabiting wives from this definition of rape. This raises questions about the legal significance of consent, as a wife's lack of consent under circumstances like being asleep or coerced does not offer protection if the couple lives together. Consequently, legal protections depend on living arrangements rather than consent itself.

Additionally, punishment for rape under Section 64 is significantly harsher than for nonconsensual acts under Section 67 for separated wives, highlighting a discrepancy in legal protection based on relationship dynamics. Exception 2's broad wording, covering "sexual intercourse or sexual acts," raises concerns about its potential to exclude severe acts of sexual violence from legal scrutiny, necessitating careful examination of its implications in ongoing constitutional challenges.

### The IPC Continuity and the Missed Opportunity of 2023

The BNS replaced the IPC to modernize and decolonize India's criminal laws, but it retained the marital rape exception despite previous recommendations for its removal. Notably, the Justice Verma Committee in 2013 and the Law Commission's 172nd Report considered addressing non-consensual intercourse in certain contexts. Legislative history indicates prior discussions on the topic, and while the retention may suggest judicial restraint, it lacks a contemporary justification, undermining the notion that it was a reasoned policy decision.

### Section 67 as Evidence, not Anomaly

Section 67 indicates that the BNS acknowledges a wife's right to withhold consent from her husband, despite establishing a lesser punishment for a separate offense. This raises questions about the justification for different legal treatments of non-consensual intercourse in cohabiting versus separated spouses, as it challenges the rationality of Exception 2 and could be subject to scrutiny for manifest arbitrariness.

## THE CONSTITUTIONAL CASE AGAINST EXCEPTION 2

### Article 14: Classification and Manifest Arbitrariness

Exception 2 differentiates between married and unmarried women, which raises questions about rationality under Article 14. It argues that protecting sexual autonomy and bodily integrity should not vary based on marital status, as the harm from non-consensual acts persists regardless of marriage. The concept of manifest arbitrariness, illustrated in Shayara Bano v. Union of India (2017), critiques legal rules lacking rational justification, particularly regarding cohabitation's relevance to the law’s intent.

### Article 15(1): Sex Discrimination

The exception raises concerns under Article 15(1), as it treats a husband's sexual conduct

towards his wife differently than towards another woman. This suggests a belief that a wife's consent is less essential due to marriage, reinforcing stereotypes of a universally consenting wife. The case of Independent Thought provides constitutional guidance, though it did not address adult wives, leaving the applicability of its reasoning to adults as an open question for future determination.

### Article 21: Autonomy, Dignity and Bodily Integrity

Article 21 allows for challenging exceptions related to privacy, bodily integrity, and women's rights within marriage. Key cases indicate that marriage does not exempt women from constitutional protections, while opposing views express concerns about judicial overreach. However, existing laws already address non-consensual intercourse in marriage, suggesting that courts can adjust statutory exceptions to align with constitutional standards. The extension of this reasoning to adult wives is pending Supreme Court deliberation.

### The Judicial Landscape

The discussed judicial decisions indicate a division regarding constitutional issues and the courts' roles. The Gujarat High Court criticized but did not annul a legislative exception in Nimeshbhai Bharatbhai Desai v. State of Gujarat (2018). Contrastingly, the Karnataka High Court advanced rape charges against a husband in Hrishikesh Sahoo v. State of Karnataka. The Delhi High Court's split in RIT Foundation (2022) highlighted the debate: Justice Shakdher deemed the exception unconstitutional, while Justice Shankar supported it. The Supreme Court is set to review the case, with the Union emphasizing that criminalization could have broader social implications, citing existing legal provisions as sufficient remedies

## COMPARATIVE AND INTERNATIONAL PERSPECTIVE

### England and Wales: R v. R

In R v. R [1992], the House of Lords determined that a husband can be convicted of raping his wife, thereby abolishing the common-law immunity of irrevocable marital consent. This landmark ruling illustrates a shift away from the outdated principle that marriage negates the need for consent. The case holds significance for India, as it contrasts with the statutory nature of the Indian exception and highlights the Supreme Court's narrow interpretation in Independent Thought.

**United States: People v. Liberta**

In People v. Liberta, (1984), the New York Court of Appeals considered a law that treated marital rape differently depending on whether the spouses were living together. The court struck down the exemption under equal-protection principles, rejecting the idea that marital status justified giving wives less protection. The case is useful for the Indian debate because it directly addresses a distinction similar to the one drawn by Section 67 and Exception 2. Arguments based on marital privacy, the preservation of marriage and evidentiary difficulty were not considered sufficient to justify the unequal treatment.

**South Africa and Nepal: Statutory Abolition**

South Africa and Nepal have both criminalized marital rape through legislative reforms, with South Africa's amendment in 2007 and Nepal's inclusion in its 2017 Muluki Criminal Code. These examples show that statutory reform is achievable across different social contexts, though they do not guarantee straightforward implementation or applicability to India. They do indicate the need for supportive procedures and victim services alongside criminalization efforts.

**International Obligations**

India is a party to CEDAW. Article 16 addresses discrimination in marriage and family relations, while General Recommendation No. 19 treats gender-based violence, including violence within the family, as a form of discrimination. The 1993 UN Declaration on the Elimination of Violence against Women also includes physical, sexual and psychological violence within the family in its understanding of violence against women. The ICCPR prohibits torture and cruel, inhuman or degrading treatment and guarantees equal protection of the law. These instruments inform the broader context for reform, although the precise domestic legal effect of each instrument must be assessed separately. The continued exception sits uneasily with the stated international commitment to eliminating violence and discrimination against women.

**Lessons and Transferability**

Three key lessons emerge from the comparative analysis:

1) Various jurisdictions have eliminated marital immunity through different legal means, indicating that its retention is not certain;
2) Reform must tackle practical issues like evidence, sentencing, and victim support instead of solely relying on criminalization;

3) The examples presented illustrate distinct institutional models, such as judicial change in England and Wales, constitutional invalidation in New York, and legislative reform in South Africa and Nepal. These cases can guide India's constitutional arguments and legislative design, while the ultimate decision rests with Indian institutions.

## CRITICAL EVALUATION

### Does the Existing Framework Achieve Its Objectives?

The BNS aims to be a citizen-focused code that protects life and liberty, but Exception 2 undermines this goal by offering adult wives less protection against non-consensual sexual acts compared to other women. It also differentiates between cohabiting and separated wives, highlighting inconsistencies in the framework. The significance of this issue is amplified by NFHS-5 data on sexual violence among ever-married women, though survey data alone cannot dictate the legal remedy.

### The 'Alternative Remedies' Defence Assessed

One argument from the Union suggests that wives have existing remedies under Section 84 BNS and the Protection of Women from Domestic Violence Act, 2005, which address cruelty and provide civil protections, respectively. However, these provisions tackle different issues: Section 84 defines cruelty, while the Domestic Violence Act offers civil relief. Importantly, neither explicitly recognizes non-consensual intercourse as rape, raising concerns about whether a wife's sexual autonomy warrants equal criminal-law protection.

### The Misuse Objection Assessed

The debate on criminalizing marital rape highlights concerns over false allegations, but this does not warrant removing legal protections. Similar issues are managed in other offenses through investigative standards. Key safeguards include clear definitions, law enforcement training, and fair evaluation processes. Moreover, measures against false complaints should conform to standard criminal law, striving for a balance between protecting complainants and ensuring fairness for the accused.

### Distinguishing the Law As It Is, As It Is Interpreted, and As It Ought to Be

It is important to distinguish the current law from the interpretations in this paper. Exception 2 of Section 63 currently exempts non-consensual intercourse by a husband with his cohabiting

wife from being classified as rape, while Section 67 pertains to wives living separately. The paper advocates that Exception 2 should be considered unconstitutional under Articles 14 and 21, or revised for a clearer statutory framework regarding marital sexual violence, reflecting a proposed legal stance rather than an actual legal change.

## FINDINGS

1) Exception 2 sits uneasily with the consent-based definition in Section 63 and with Section 67. Section 67 recognises that a wife living separately may withhold consent, while Exception 2 excludes a cohabiting adult wife from the rape provision. The difference based on living arrangements is difficult to connect to the harm caused by non-consensual intercourse.
2) The punishment scheme creates a significant difference in protection. Section 64 provides a minimum sentence of ten years for rape in the general case, Section 67 provides two to seven years for the specified offence involving a separated wife, and Exception 2 excludes the corresponding conduct involving a cohabiting adult wife from Section 63.
3) The enactment of the BNS offered an opportunity to reconsider the exception, but it retained the provision apart from the age threshold already addressed in Independent Thought. Earlier recommendations for reform had been made, yet the position of adult wives remained unresolved.
4) The exception raises substantial constitutional concerns under Articles 14, 15(1) and 21, particularly in light of the case law on equality, autonomy and bodily integrity. The separation-of-powers objection remains important. Section 67 supports the argument that Parliament has already recognised a form of nonconsensual intercourse within marriage as criminal, although whether this is sufficient to justify judicial invalidation remains contested.
5) Section 84 BNS and the Protection of Women from Domestic Violence Act provide remedies for cruelty and domestic violence, but they do not specifically address non-consensual intercourse as rape. They therefore do not fully replace the protection at issue under Section 63.

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## SUGGESTIONS

1) Parliament should eliminate Exception 2 to Section 63 to create a clear offence framework for sexual violence in marriage. This framework would address aggravating circumstances and repeat offenses in sentencing, ensuring that nonconsensual intercourse is recognized regardless of marital status, thereby closing the gap for cohabiting wives and maintaining proportionate sentencing.
2) Section 67 should be reconsidered alongside any new offence. If Parliament creates a comprehensive framework covering non-consensual intercourse within marriage, Section 67 may become unnecessary and could be repealed. Alternatively, a transitional provision should be aligned with the revised framework so that the difference in punishment does not depend arbitrarily on whether spouses live together or apart.
3) While legislative reform is pending, the Supreme Court must evaluate the constitutionality of Exception 2. If deemed a violation of fundamental rights, the Court should provide a remedy and elucidate the implications of its ruling. The case of Independent Thought illustrates judicial interpretation of the exception, but the adult-wife issue requires independent consideration.
4) Any reform should include safeguards that protect both complainants and accused persons. These may include clear investigative protocols, training for police and prosecutors, access to counselling and support services, and careful application of existing law on false accusations. Procedural safeguards should not become barriers that prevent genuine complaints from being registered or investigated.
5) Criminal-law reform should be accompanied by practical support. Existing One Stop Centres and other services could provide specialised assistance to survivors of sexual violence within marriage. Police, prosecutors and relevant support staff should receive training, and official data collection should better capture the prevalence and handling of spousal sexual violence. These steps would help assess whether the law is working in practice.
6) India should review its policy and reporting on violence against women to ensure that sexual violence within marriage is addressed consistently with its international commitments, including under CEDAW. A national action plan could set out responsibilities for law enforcement, support services and data collection.

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## CONCLUSION

This paper began by examining a tension within the BNS: Section 63 defines rape with reference to consent, but Exception 2 excludes sexual intercourse or sexual acts by a man with his adult wife from that definition. Section 67, meanwhile, criminalises non-consensual intercourse with a wife who is living separately. The analysis suggests that this distinction is difficult to justify by reference to consent or the harm caused. It also reflects the survival of the older common-law idea that marriage amounts to continuing consent, an idea carried into the IPC and retained in the BNS. The paper has argued that the exception raises serious concerns under Articles 14, 15(1) and 21, while recognising that the question of judicial power remains contested. Comparative examples indicate that reform is possible, but effective implementation will require careful drafting, fair procedures and adequate support for survivors.

The wider lesson is that replacing a criminal code does not necessarily remove the assumptions embedded in it. The BNS was introduced as a modernising reform, yet the marital rape exception preserves a distinction that limits the legal recognition of a wife's refusal. Whether the change comes through judicial review, legislation or a combination of both, the central issue is whether bodily autonomy and consent are to receive meaningful recognition within marriage. A legal system that treats consent as essential in other contexts must explain why marriage should alter that principle.

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