

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed

www.ijlra.com

DISCLAIMER

No part of this publication may be reproduced, stored, transmitted, or distributed in any form or by any means, whether electronic, mechanical, photocopying, recording, or otherwise, without prior written permission of the Managing Editor of the *International Journal for Legal Research & Analysis (IJLRA)*.

The views, opinions, interpretations, and conclusions expressed in the articles published in this journal are solely those of the respective authors. They do not necessarily reflect the views of the Editorial Board, Editors, Reviewers, Advisors, or the Publisher of IJLRA.

Although every reasonable effort has been made to ensure the accuracy, authenticity, and proper citation of the content published in this journal, neither the Editorial Board nor IJLRA shall be held liable or responsible, in any manner whatsoever, for any loss, damage, or consequence arising from the use, reliance upon, or interpretation of the information contained in this publication.

The content published herein is intended solely for academic and informational purposes and shall not be construed as legal advice or professional opinion.

**Copyright © International Journal for Legal Research & Analysis.
All rights reserved.**

ABOUT US

The *International Journal for Legal Research & Analysis (IJLRA)* (ISSN: 2582-6433) is a peer-reviewed, academic, online journal published on a monthly basis. The journal aims to provide a comprehensive and interactive platform for the publication of original and high-quality legal research.

IJLRA publishes Short Articles, Long Articles, Research Papers, Case Comments, Book Reviews, Essays, and interdisciplinary studies in the field of law and allied disciplines. The journal seeks to promote critical analysis and informed discourse on contemporary legal, social, and policy issues.

The primary objective of IJLRA is to enhance academic engagement and scholarly dialogue among law students, researchers, academicians, legal professionals, and members of the Bar and Bench. The journal endeavours to establish itself as a credible and widely cited academic publication through the publication of original, well-researched, and analytically sound contributions.

IJLRA welcomes submissions from all branches of law, provided the work is original, unpublished, and submitted in accordance with the prescribed submission guidelines. All manuscripts are subject to a rigorous peer-review process to ensure academic quality, originality, and relevance.

Through its publications, the *International Journal for Legal Research & Analysis* aspires to contribute meaningfully to legal scholarship and the development of law as an instrument of justice and social progress.

PUBLICATION ETHICS, COPYRIGHT & AUTHOR RESPONSIBILITY STATEMENT

The *International Journal for Legal Research and Analysis (IJLRA)* is committed to upholding the highest standards of publication ethics and academic integrity. All manuscripts submitted to the journal must be original, unpublished, and free from plagiarism, data fabrication, falsification, or any form of unethical research or publication practice. Authors are solely responsible for the accuracy, originality, legality, and ethical compliance of their work and must ensure that all sources are properly cited and that necessary permissions for any third-party copyrighted material have been duly obtained prior to submission. Copyright in all published articles vests with IJLRA, unless otherwise expressly stated, and authors grant the journal the irrevocable right to publish, reproduce, distribute, and archive their work in print and electronic formats. The views and opinions expressed in the articles are those of the authors alone and do not reflect the views of the Editors, Editorial Board, Reviewers, or Publisher. IJLRA shall not be liable for any loss, damage, claim, or legal consequence arising from the use, reliance upon, or interpretation of the content published. By submitting a manuscript, the author(s) agree to fully indemnify and hold harmless the journal, its Editor-in-Chief, Editors, Editorial Board, Reviewers, Advisors, Publisher, and Management against any claims, liabilities, or legal proceedings arising out of plagiarism, copyright infringement, defamation, breach of confidentiality, or violation of third-party rights. The journal reserves the absolute right to reject, withdraw, retract, or remove any manuscript or published article in case of ethical or legal violations, without incurring any liability.

THE MARITAL RAPE EXCEPTION AS A THRESHOLD BARRIER: VICTIM COMPENSATION AND RESTORATIVE JUSTICE IN INDIA

AUTHORED BY - UTKARSH MISHRA

Research Scholar, Lucknow University

Abstract

India has, over three decades, developed a layered architecture of victim compensation and restorative-style relief for sexual offences: a statutory victim-compensation scheme under Section 396 of the Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023; a pan-India model scheme framed by the National Legal Services Authority (NALSA) pursuant to *Nipun Saxena v Union of India*; and judicial recognition of interim relief independent of conviction. None of this architecture is, in practice, available to an adult wife subjected to non-consensual sexual intercourse by her husband, because Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita (BNS), 2023 provides that such conduct does not constitute rape. Restorative justice and victim compensation presuppose that the conduct in question has first been legally recognised as a wrong; the marital exception operates at that prior, recognitional stage, foreclosing the ordinary criminal-compensatory response before it can be triggered. This article examines that foreclosure at a moment of particular significance, with the constitutional validity of the exception presently before a three-judge Bench of the Supreme Court. It traces the statutory and judicial architecture of victim compensation for sexual offences in India, explains why the marital exception functions as a threshold rather than an implementation barrier, and analyses the substituted relief available under the Protection of Women from Domestic Violence Act, 2005, arguing that it is structurally different and, in key respects, lesser. Drawing on the House of Lords' 1991 abolition of the equivalent English common law immunity and the design of the United Kingdom's criminal injuries compensation tariff, the article argues that criminalisation, if it occurs, need not require an entirely new compensatory scheme, and proposes interim reforms to narrow the gap in the meantime.

Keywords: Marital rape; victim compensation; restorative justice; Bharatiya Nyaya Sanhita; Domestic Violence Act; sexual offences; comparative criminal law.

I. Introduction

Restorative justice and victim compensation share a logical precondition that is easy to overlook precisely because it is so rarely contested: before either can operate, the conduct in question must first be recognised by law as a wrong. Where that recognition is withheld, questions of how best to repair the harm, compensate the victim, or reintegrate the offender simply do not arise, because the legal system has not yet acknowledged that there is a harm of the relevant kind to repair. India's law on sexual offences against wives supplies a stark illustration of this precondition at work. Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita, 2023, carried forward from Exception 2 to Section 375 of the Indian Penal Code, 1860, provides that non-consensual sexual intercourse or other sexual acts by a man with his own wife do not constitute rape, provided she is not under eighteen years of age. The consequence is not merely that such conduct escapes the specific offence of rape; it is that the entire compensatory and quasi-restorative architecture this article traces in Part III—State compensation schemes, the NALSA model scheme, interim relief independent of conviction—never comes into play at all, because that architecture is triggered by the commission of a recognised sexual offence, and no such offence has, in law, occurred.

This asymmetry has taken on particular contemporary significance. A three-judge Bench of the Supreme Court, headed by the Chief Justice of India, considered a batch of petitions challenging the marital exception—under both the former Indian Penal Code and the Bharatiya Nyaya Sanhita—on 9 September 2026, indicating that final arguments would commence after approximately three weeks. The public debate surrounding that litigation has understandably centred on the criminalisation question: should marital rape be an offence at all? This article does not attempt to resolve that debate, which turns on contested questions of constitutional equality, marital privacy and legislative competence that others have addressed at length. Its narrower purpose is to show that the criminalisation question and the compensation question, though logically connected, have received very unequal attention—and that whichever way the constitutional challenge is resolved, the compensatory dimension of the problem deserves explicit attention in its own right.

Part II situates the argument within restorative justice theory, distinguishing threshold barriers to restorative and compensatory response from the implementation barriers that affect sexual offences generally. Part III traces the statutory and judicial architecture of victim compensation that the marital exception forecloses. Part IV examines the exception itself—its history, its partial erosion for child brides, and its retention for adult wives. Part V examines the substituted remedy available under the Protection of Women from Domestic Violence Act,

2005, and explains why it is not equivalent to the foreclosed criminal compensation route. Part VI traces the current constitutional challenge. Part VII draws a comparative lesson from the United Kingdom's experience of judicially abolishing the equivalent common law immunity in 1991. Part VIII offers recommendations, and Part IX concludes.

II. Theoretical Framework: Threshold Barriers and Implementation

Barriers

Restorative justice theory conventionally asks how a legal system should respond, once a wrong has occurred, to repair the harm done to victims, offenders and communities. The United Nations Office on Drugs and Crime's guidance on extending restorative approaches to serious and gender-based violence proceeds on the same assumption: that the underlying conduct has already been classified as a criminal wrong, and the remaining question is how best to respond to it. This body of theory, in other words, is calibrated to what might be called implementation barriers—obstacles that arise after a wrong has been recognised, in translating that recognition into effective compensation, supervision, or dialogue. The barriers examined in the wider literature on India's sexual-offence compensation architecture—interstate disparity in scheme design, underutilisation of dedicated funds, and delay in disbursal—are all, in this sense, implementation barriers: the underlying wrong is recognised as rape, and the difficulty lies in delivering the response the law already promises.

The marital exception operates differently, at what this article terms the threshold or recognitional stage. It does not create friction in the delivery of a promised remedy; it withholds the classification that would trigger any remedy of the criminal-compensatory kind in the first place. This distinction matters because the two kinds of barrier call for entirely different reforms. Implementation barriers are addressed by better administration—clearer rules, better-funded schemes, more efficient disbursal. Threshold barriers can be addressed only by changing the underlying legal classification itself, or, short of that, by building a genuinely equivalent alternative remedy for the conduct that remains unclassified. As Parts IV and V show, India has done neither with any completeness for adult marital rape.

III. The Compensation Architecture That the Exception Forecloses

For a sexual offence recognised as such under the Bharatiya Nyaya Sanhita, India's compensatory architecture is, on paper, comparatively progressive. Section 396 of the Bharatiya Nagarik Suraksha Sanhita, 2023 requires every State Government, in coordination

with the Central Government, to prepare a scheme for providing funds for the purpose of compensation to the victim or the victim's dependents who have suffered loss or injury as a result of a crime and who require rehabilitation. The provision further empowers the District Legal Services Authority or State Legal Services Authority to decide the quantum of compensation on the recommendation of the Court, and to award adequate compensation after due enquiry, including in cases where no trial takes place because the offender is not traced or identified. The State or District Legal Services Authority may also order immediate first-aid or medical benefits free of cost, and any other interim relief it deems fit.

Pursuant to the Supreme Court's 2018 decision in *Nipun Saxena v Union of India*, the National Legal Services Authority settled a uniform, pan-India Compensation Scheme for Women Victims/Survivors of Sexual Assault/Other Crimes, prescribing structured compensation amounts for various categories of sexual offences, payable independently of whether the prosecution results in conviction, and empowering legal services authorities to act on their own motion. Even before trial concludes, a victim may be entitled to interim compensation, a principle the Supreme Court recognised in *Bodhisattwa Gautam v Subhra Chakraborty*, where it held that a rape victim could be awarded interim maintenance during the pendency of criminal proceedings. Where the victim is a child, Section 33(8) of the Protection of Children from Sexual Offences Act, 2012 supplies a further, specialised compensation route for medical treatment and rehabilitation—a route that, following *Independent Thought v Union of India*, now extends in principle to a child bride subjected to marital sexual violence where the offence occurred when she was below eighteen years.

This architecture, whatever its practical shortcomings in delivery, rests on a categorical premise: that the conduct in question has been classified as a criminal sexual offence. It is precisely that premise which Exception 2 to Section 63 denies in the case of an adult wife. Because the conduct is not legally recognised as rape, the ordinary triggers for Section 396 BNSS schemes and the NALSA model scheme do not operate in her favour. She is not, in law, a "victim of rape" or a "victim of sexual assault" within the meaning of those instruments, even though the physical act may be identical to conduct that would attract full compensation if committed by a non-spouse.

IV. The Marital Exception: History, Partial Erosion, and Present Scope

The marital exception has a long and largely unbroken history in Indian law, traceable to the seventeenth-century English jurist Sir Matthew Hale's proposition that a wife's marriage vows constituted an irrevocable, standing consent to intercourse with her husband—a proposition

England and Wales itself abandoned by judicial decision in 1991, discussed further in Part VII below, but which has persisted in India, with only incremental modification, since the enactment of the Indian Penal Code in 1860.

The exception has been narrowed once, and only once, and only for children. In *Independent Thought v Union of India*, the Supreme Court held that the exception could not consistently be read to permit sexual intercourse with a wife between fifteen and eighteen years of age when the same act, outside marriage, would be treated as statutory rape under the Protection of Children from Sexual Offences Act—a disparity the Court found irrational and violative of Articles 14, 15(3) and 21 of the Constitution. That reform has since been absorbed directly into statutory text: the Bharatiya Nyaya Sanhita's Exception 2 to Section 63 now sets the age threshold at eighteen years, rather than the fifteen years fixed by the unamended Indian Penal Code. Beyond that incremental gain for child brides, however, the exception for adult wives has survived entirely intact through the 2013 post-Nirbhaya reforms, through the drafting of the Bharatiya Nyaya Sanhita itself, and into the law as it stands today.

That the exception was retained in the Bharatiya Nyaya Sanhita despite an avowed legislative ambition to modernise and decolonise India's criminal law has attracted sustained criticism, including from within Parliament itself. A private member's bill introduced in the Rajya Sabha proposes to replace the exception with an express statement that the subsistence of a marriage shall not operate as a mitigating factor for the offence of rape. That bill has not been enacted, and the exception, for an adult wife, remains fully in force as this article is written.

V. The Substituted Remedy: Relief under the Domestic Violence Act

Because the conduct is not a criminal offence when committed by a husband against an adult wife, none of the criminal compensation architecture traced in Part III is available to her in that capacity. The remedy Indian law does provide lies instead in the Protection of Women from Domestic Violence Act, 2005, which defines “sexual abuse” as a form of domestic violence and empowers a Magistrate, on application, to grant protection orders, residence orders, monetary relief for matters such as medical expenses and loss of earnings, and compensation for injury including mental torture and emotional distress.

This substituted remedy is not equivalent to the criminal compensation route in at least four respects. First, it is a proceeding for civil and protective reliefs before a Magistrate, resolved on a civil standard of proof, rather than a claim against the State activated by the commission of a recognised public wrong. Second, monetary relief and compensation under the Act depend significantly on the Magistrate's assessment of the respondent husband's means and conduct,

rather than on a State-funded, no-fault scheme of the kind Section 396 of the BNSS and the NALSA model scheme provide for other sexual offences. Third, although Section 23 of the Domestic Violence Act empowers the Magistrate to pass interim and ex parte orders, including interim monetary relief, such relief is framed within a private-law proceeding between the parties and does not replicate the interim, non-conviction-linked relief that Bodhisattwa Gautam and the NALSA scheme make available to victims of other sexual offences through the criminal justice system. Fourth, and most fundamentally, the Act nowhere uses the language of rape or sexual assault to describe what has occurred: the same physical act that would be prosecuted, and compensated, as rape if committed by a stranger is recorded, when committed by a husband, only as an instance of “domestic violence” for which the wife may seek a protection order or monetary relief. This is more than a semantic difference. It reflects, and reinforces, the legal system’s refusal to recognise the wrong in the register—criminal, public, compensable by the State—in which it recognises the identical act committed by anyone other than a husband.

The practical consequence of this gap remains under-studied. Existing survey evidence suggests that the substantial majority of women who experience spousal sexual violence do not disclose it to anyone, for reasons including stigma, fear of reprisal, and economic dependence on the spouse. Ongoing doctoral research has specifically identified the operation of the Domestic Violence Act’s civil remedies in cases of marital sexual violence as a significant, comparatively unexamined gap in the socio-legal literature.

VI. The Pending Constitutional Challenge

The marital exception is presently the subject of live constitutional litigation. Proceedings arise from two directions: a Karnataka High Court order permitting a rape prosecution against a husband to proceed despite the exception, stayed by the Supreme Court in July 2022 pending final disposal, and a split verdict of the Delhi High Court, in which one judge held the exception unconstitutional as a violation of a wife’s bodily autonomy and equality, while the other took the view that the exception reflected a legitimate expectation attaching to the institution of marriage, resulting in a certificate permitting appeal to the Supreme Court.

That appeal, together with a further challenge to Exception 2 of Section 63 of the Bharatiya Nyaya Sanhita, came before a three-judge Bench headed by the Chief Justice of India on 9 September 2026. The Bench indicated that final arguments would commence after approximately three weeks, after hearing the Union Government’s stand, which has opposed removal of the exception on the ground that the question carries wider social and legal

implications for the institution of marriage. Public commentary on this litigation, understandably, has concentrated overwhelmingly on the criminalisation question. What has received comparatively little attention is that a decision recognising marital rape as an offence would not, without more, automatically extend the compensation architecture traced in Part III to its victims; as the experience of Nipun Saxena itself shows, Indian courts have in the past needed to give separate, express directions to build a functioning compensation mechanism even after the underlying wrong was recognised in principle. A future judgment that criminalises marital rape without addressing this second-order question would risk repeating that same sequence, leaving newly recognised victims without a clear compensatory route for a further, indeterminate period.

VII. A Comparative Lesson: The United Kingdom's Abolition of the Marital Exemption

England and Wales offer the clearest comparative precedent for how a legal system can move from a marital exception to full criminalisation without a lengthy compensatory interregnum. In *R v R*, the House of Lords held that the common law fiction of a wife's irrevocable marital consent to intercourse no longer represented the law, thereby abolishing the marital rape immunity by judicial decision, without waiting for Parliament to legislate. Because the United Kingdom's Criminal Injuries Compensation Scheme awards its tariff to any blameless victim of a crime of violence, without regard to the relationship between victim and offender, the effect of *R v R* was to bring spousal rape victims within an already-existing compensation architecture immediately upon recognition of the offence, without requiring the design of any new, marriage-specific compensation track.

The comparative lesson for India is precise and limited, but useful. It is not an argument for how the constitutional question now before the Supreme Court ought to be decided. It is, instead, a lesson in institutional design: because the United Kingdom's compensation scheme is drafted to turn on the criminal-law classification of the conduct rather than on any additional certification of the relationship between the parties, criminalisation and compensation moved together, automatically. India's Section 396 scheme and the NALSA model scheme are, in principle, capable of the same automatic extension, since neither instrument contains language limiting its application by reference to the relationship between victim and offender. The risk, illustrated by the sequence of separate litigation required to build the present scheme following Nipun Saxena, is that this capacity for automatic extension will not be treated as self-executing,

and that a further round of directions will be needed to confirm what the existing statutory language should already make clear.

VIII. Recommendations

1. Anticipatory clarification of scheme applicability. Should the Supreme Court read down or strike Exception 2 to Section 63, either the judgment itself or a prompt follow-up direction to NALSA should expressly confirm that Section 396 of the BNSS and the existing NALSA model scheme extend, without further legislative or administrative amendment, to victims of marital rape—avoiding the delay that followed recognition of the underlying wrong in other contexts. Such clarification should make clear that the term “victim of sexual assault” or “victim of crime” in these instruments includes a wife subjected to non-consensual sexual intercourse by her husband once the exception is removed.
2. Strengthening the interim civil remedy regardless of the constitutional outcome. Independently of how the criminalisation question is resolved, Parliament could amend the Domestic Violence Act’s compensation provisions to draw more closely on the criminal compensation model—for instance, by establishing a State-funded interim relief mechanism for survivors of severe intimate-partner sexual violence, modelled on the interim compensation principle recognised in *Bodhisattwa Gautam*, rather than leaving monetary relief entirely dependent on a private respondent’s means. This could take the form of a dedicated fund administered by District Legal Services Authorities for cases of severe sexual abuse within domestic relationships, accessible on a prima facie showing and subject to later recovery from the respondent where appropriate.
3. Mandatory medical and forensic support irrespective of criminal classification. The free medical treatment obligation that already attaches to recognised sexual offences could be extended, as a matter of public health policy rather than criminal procedure, to any person presenting with injuries consistent with sexual violence, regardless of the survivor’s relationship to the person responsible. Such a policy would not require a change in the substantive criminal law, but would ensure that immediate medical and forensic needs are met even where the marital exception currently applies.
4. Targeted empirical research. The gap identified by ongoing doctoral research into the operation of civil remedies for marital sexual violence in India should be treated as a research priority, since policy reform in this area currently proceeds with very little systematic evidence of how existing civil remedies actually function for survivors in

practice. Empirical work should examine disclosure patterns, access to Magistrates under the Domestic Violence Act, the nature and quantum of relief granted, and the interaction between civil remedies and any future criminalisation of marital rape.

5. Drafting discipline in any future reform. Any legislative amendment removing or narrowing the exception—whether judicially prompted or, as with the pending private member’s bill, introduced independently—should be drafted with explicit attention to its interaction with Section 396 of the BNSS and the NALSA scheme, so that criminalisation and compensation are addressed as a single legislative act rather than as sequential, separately litigated questions. A simple clarificatory provision stating that, upon removal of the exception, victims of marital rape shall be treated as victims of sexual assault for all purposes under victim-compensation schemes would go a long way towards avoiding a compensatory interregnum.

IX. Conclusion

India’s compensation architecture for sexual offences has advanced a considerable distance since the constitutional compensation jurisprudence of the 1990s, and the NALSA scheme settled after *Nipun Saxena* represents a genuinely progressive model by comparative standards. None of that progress, however, currently reaches a wife raped by her husband, because the law does not yet recognise the underlying conduct as an offence at all. This article has argued that this is best understood not as a gap in implementation—the kind of administrative or institutional shortfall that better funding or clearer guidelines could fix—but as a threshold barrier operating one step further back, at the point of legal recognition itself. The comparative experience of England and Wales shows that removing such a barrier can, if the surrounding compensation architecture is properly drafted, extend an existing remedy automatically rather than requiring the design of an entirely new one.

As the Supreme Court proceeds toward a final hearing on the constitutional validity of the exception, the arguments in that litigation will, rightly, focus on equality, autonomy and the proper institutional locus for reform. This article’s narrower claim is that whatever the outcome, the question of how compensation and restorative response should follow from that outcome deserves to be addressed explicitly, and in advance, rather than left—as it has been before—to a further round of litigation after the fact.