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A COMPARATIVE STUDY OF LEGAL ARGUMENTS AND STATUTORY REFORM PROPOSALS ON THE CRIMINALISATION OF MARITAL RAPE IN INDIA

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Abstract

Marital rape remains one of the most debated and unresolved issues under Indian criminal law, as Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita, 2023, continues to exempt a husband from liability for rape when he engages in sexual intercourse with his wife, who is eighteen years of age or above, without her consent. This legal position has raised several questions in light of evolving constitutional jurisprudence regarding consent, bodily autonomy, dignity, equality and the protection of women within marriage.

This paper aims to examine the comparative legal arguments on criminalization of marital rape and statutory reform proposals suggested for addressing the existing legal position in India. The research adopts a doctrinal, and comparative research methodology. The doctrinal part examines relevant statutory provisions, judicial decisions and legal literature, and the comparative study examining marital rape provisions across jurisdictions of selected countries where marital rape has been criminalized.

It also examines arguments in favour and against criminalization, including the principle of consent, equality, privacy, dignity and bodily autonomy as well as solicitude regarding false complaints and misuse of law. The findings of the study are to assess whether the existing Indian legal frameworks are sufficient to protect the rights of the married women.

This study concludes that there is a need for careful balance between protection from non-consensual conduct and safeguard against misuse of law. It also evaluates whether removal or modification of marital rape exception, could provide a clearer legal framework in India.

Keywords Spousal sexual abuse, Marriage, Bodily autonomy, Dignity, Consent, Legal framework, Legal protection, Women's rights.

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1. INTRODUCTION

According to the Indian criminal law, a woman has the legal right to refuse having sexual intercourse with any man, except her own husband.[1] This exemption is provided under Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita, 2023, which states that a husband cannot be held liable for having non-consensual sexual intercourse with his wife if she is eighteen years of age or above. [2]This idea stems from a stereotype that marriage automatically implies permanent or continuing consent. However, this old assumption is now being questioned because it conflicts with modern constitutional values such as consent, bodily autonomy, dignity, equality, and the protection of women within marriage.

Historically, during the 19th century, marriage was often viewed as giving a husband a permanent and implied consent to have sexual intercourse with his wife[3]. Under this view, a wife was considered to have given her consent to sexual relations at the time of marriage, and therefore, sexual intercourse by a husband with his wife could not be treated as rape[4]. This historical understanding influenced the development of the marital rape exception under Section 375 of the Indian Penal Code, 1860 [5]and continues to be reflected in Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita, 2023[6]. However, constitutional law has developed over time to recognize the importance of bodily autonomy, dignity, privacy, and individual consent as aspects of fundamental rights.[7] In this context, the idea that marriage amounts to permanent consent to sexual intercourse has increasingly been questioned. The continued existence of the marital rape exception in Indian law has therefore raised significant constitutional and legal questions regarding the rights of married women.

The debate surrounding marital rape in India has not yet reached a settled legal position. The Supreme Court of India is presently considering several petitions that question the constitutional validity of Exception 2 to Section 63 of the Bharatiya Nyaya Sanhita, 2023.[8] The issue had earlier come before the Delhi High Court in 2022, where the two judges forming the bench reached different conclusions.[9] Justice Rajiv Shakdher Considered the exception to be

[1] Bharatiya Nyaya Sanhita, No. 45 of 2023, § 63, Exception 2 (India).
[2] Id.
[3] See generally 1 Matthew Hale, History of the Pleas of the Crown 629 (1st Eng. ed. 1736) (establishing the historic common law doctrine that a husband cannot be guilty of raping his wife).
[4] Id.
[5] Indian Penal Code, No. 45 of 1860, § 375, Exception 2 (India).
[6] Bharatiya Nyaya Sanhita, No.45 of 2023, § 63, Exception 2 (India).
[7] See K.S. Puttaswamy v. Union of India, (2017) 10 S.C.R. 633 (India).
[8] See, e.g., Hrishikesh Joshi, Supreme Court Agrees to Hear Pleas Challenging Marital Rape Exception Under BNS, The Hindu (2024).
[9] See RIT Found. v. Union of India, 2022 SCC OnLine Del 1459.

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unconstitutional, while Justice C. Hari Shankar found it to be legally valid and accepted the distinction drawn by law between sexual intercourse within marriage and sexual intercourse outside marriage as being supported by an 'intelligible differentia.' [10]The contrasting views in the case "RIT Foundation & Ors. v. Union of India & Ors. (2022)" itself shows the lack of uniformity in the judicial approach to marital rape. [11]Hence, the matter pending before the Supreme Court will carry great significance, as its decision might clarify the constitutional and legal position in regard to the marital rape exception.

There are two main perspectives within this discussion. Those who support criminalization argue that the exception violates the constitutional rights of married women, including the right to bodily autonomy, dignity, equality, and privacy. They further argue that being marriage does not mean that the woman cannot exercise her right to consent. argue that being marriage does not mean that the woman cannot exercise her right to consent. On the other hand, those who oppose criminalization say that there are chances of misusing the new offence and there may be false complaints. Further, criminalization will affect the institution of marriage.

However, since marital rape takes place within the domestic setting, there is no easy way to gather empirical information on this form of sexual violence. This is because marital rape is a highly sensitive issue and since such incidents take place in the privacy of the home, obtaining data through surveys or questionnaires can be difficult. Various privacy concerns may also arise when asking individuals about such personal experiences. In light of these limitations, the present study primarily relies on secondary data to analyse the issue of marital rape and the legal arguments surrounding its criminalization.

While India is debating the constitutional validity of the exception, countries such as the United Kingdom, South Africa, Canada, Australia, and New Zealand have already criminalized marital rape. [12]Therefore, examining the legal approaches adopted by these countries can help in understanding the possible ways in which India could address the issue through legal reform.

Comparison with other countries is relevant because they all follow different methods of reform. Some countries adopted changes through judicial decisions, while other countries adopted them through legislative amendments. While studying these countries, their experiences can be helpful in dealing with issues such as evidentiary standards, misuse of law and protection of married women in India. These studies can help India while framing its own statutory reforms.

[10] Id.
[11] Id.
[12] See, e.g., Criminal Law Amendment Act 1990 (UK); Prevention of Family Violence Act 116 of 1993 (S. Afr.); R. v. R., [1992] 1 A.C. 599 (H.L.) (UK); Crimes Act 1961, s 128 (N.Z.).

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This paper compares the legal arguments on criminalization of marital rape and the statutory reform proposals that reflect the current legal position in India. The methodology used in this study is doctrinal, and comparative. The paper examines whether the current legal framework is sufficient for the protection of married women in India and considers whether the amending of marital rape exception could provide greater clarity and protection under the law.

This paper follows a well-structured approach. The review of literature examines secondary data, including scholarly papers, case laws, and comparative studies on the issue of marital rape. This is followed by identifying the research gap and determining the objectives of the study. The paper then comparatively analyses the legal frameworks of selected countries and finally concludes by assessing whether India's existing legal framework is sufficient along with recommendations for statutory reform.

2. REVIEW OF LITERATURE

- **Scholarly Perspectives on Marital Rape in India**

  1. Nandini Agarwal, Salma M. Abdalla and Gregory H. Cohen, in their study "Marital Rape and Its Impact on the Mental Health of Women in India: A Systematic Review" (2022), [13]adopted a systematic review methodology. The study aimed to examine the prevalence of marital rape in India and its impact on women's mental health. The review included 11 studies and found that sexual coercion by intimate partners ranged from 9% to 80%, while reported marital rape ranged from 2% to 56%. Depression was the most commonly studied mental-health outcome, with most studies reporting a significant association between spousal violence and depression. Evidence regarding PTSD was more limited and inconsistent, although one study found a significant relationship between sexual coercion and PTSD severity. The qualitative studies further highlighted psychological distress, poor quality of life, lack of awareness, normalization of abuse, stigma and under-reporting. The authors concluded that marital rape is associated with adverse mental-health consequences and emphasized the need for further research, healthcare responses and stronger legal attention.

  2. Chandra Aditya Hari, in "Marital Rape and the Aspect of Consent in a Marital Relationship" (2023), [14]adopted a primarily doctrinal research methodology, relying on

[13] Nandini Agarwal, Salma M. Abdalla & Gregory H. Cohen, Marital Rape and Its Impact on the Mental Health of Women in India: A Systematic Review, 2 PLOS Global Health e0000601 (2022).
[14] Chandra Aditya Hari, Marital Rape and the Aspect of Consent in a Marital Relationship (Nov. 15, 2023) (SSRN Electronic Journal, Abstract No. 4634086).

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existing laws, statutes, case laws, and secondary and tertiary empirical sources. The study aimed to examine the importance of consent within marriage, the laws relating to marital rape, its impact on women, and its current legal status in India. The study found that consent is a fundamental aspect of a marital relationship and that marriage should not automatically be treated as consent to sexual relations. It highlighted the legal gap created by the marital rape exception under Section 375 of the IPC and discussed the limited legal remedies available to married women. The study also connected marital rape with violations of equality, privacy, bodily autonomy and dignity, and identified serious physical and psychological consequences for women, including depression, anxiety, fear and other trauma-related effects. The study concluded that marital status should not restrict a woman's fundamental rights and recommended legal as well as social and cultural reforms to address marital rape.

3. Dr. Yogesh Kumar, in his study "Marital Rape in India – A Socio-Legal Analysis" (2022), [15]examined the issue through a socio-legal analysis. The study aimed to examine the legal and social aspects of marital rape, including its causes, consequences and existing legal position in India. The study found that the marital rape exception leaves married women without adequate criminal-law protection and highlighted the role of patriarchal norms, social stigma, economic dependence and under-reporting in sustaining the problem. It also discussed the physical and psychological consequences of marital rape and the constitutional concerns relating to Articles 14 and 21. The study further emphasized that the absence of legal recognition makes it difficult for women to seek justice and that greater awareness and institutional support are required. It recommended criminalizing marital rape, clearly defining consent and strengthening legal and social support mechanisms for affected women.

4. Sarthak Makkar, in "Marital Rape: A Non-criminalized Crime in India" (2019), [16]examined the constitutionality of Exception 2 to Section 375 of the IPC through a doctrinal/legal analysis. The study aimed to analyze whether the marital rape exception is consistent with constitutional protections. The study found that the exception creates a distinction between married and unmarried women and denies married women equal protection from sexual violence, raising concerns under Article 14. It further found that the exception affects the rights to privacy, bodily autonomy, dignity, personal liberty and sexual choice protected under Article 21. The study concluded that the marital rape

[15] Yogesh Kumar, Marital Rape in India – A Socio-Legal Analysis, 9 Int'l J. Educ. & Sci. Rsch. Rev. 6 (2022).
[16] Sarthak Makkar, Marital Rape: A Non-Criminalized Crime in India, Harv. Hum. Rts. J. (Jan. 1, 2019).

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exception is inconsistent with these constitutional protections and requires reconsideration.

5. Palakh G, in "Why Is Marital Rape Not Criminalised in India? A Constitutional, Feminist, and Human Rights Analysis" (2026), [17]examines the continued non-criminalization of marital rape through a constitutional, feminist and human-rights legal analysis. The study aims to examine the marital rape exception under Section 63 of the Bharatiya Nyaya Sanhita, 2023 and its compatibility with Articles 14, 15 and 21. It finds that the exception continues to deny married women equal protection of law and affects their consent, bodily autonomy, dignity and privacy, while also creating difficulties in accessing criminal remedies. The study further examines the RIT Foundation v. Union (2022) of India split decision, highlighting the opposing judicial approaches to the constitutionality of the exception. It also finds that the Protection of Women from Domestic Violence Act, 2005 provides civil remedies for sexual abuse but does not criminalize marital rape, and identifies additional barriers faced by Dalit, Adivasi and rural women. The study concludes by proposing removal of the marital rape exception, procedural safeguards, awareness measures, legal aid and survivor-centered institutional support.

6. Anjali and Akanksha, in "Marital Rape and Criminal Law Reform in India: A Constitutional Perspective" (2026), [18]examined marital rape through a constitutional and comparative legal analysis. The study aimed to examine the constitutionality of the marital rape exception in light of constitutional principles, judicial developments and international human-rights standards. It found that the exception under Section 63 of the Bharatiya Nyaya Sanhita, 2023 continues to distinguish between married and unmarried women and raises concerns relating to equality, dignity, privacy and bodily autonomy. The study discussed cases such as Independent Thought v. Union of India (2017), Justice K.S. Puttaswamy (Retd.) v. Union of India (2017), Joseph Shine v. Union of India (2018) and RIT Foundation v. Union of India (2022), along with reforms in the United Kingdom, Canada, South Africa and Australia. It also identified practical challenges such as evidentiary difficulties, social stigma, under-reporting and the absence of a specific criminal-law framework. The study concluded by proposing reconsideration of the marital rape exception along with procedural safeguards, awareness, specialized training and survivor support.

7. Kartikey Mishra and Namrata Mishra, in their study "Marital Rape under the Bharatiya

[17] Palakh G., Why Is Marital Rape Not Criminalised in India? A Constitutional, Feminist, and Human Rights Analysis (June 1, 2026) (SSRN Electronic Journal, Abstract No. 6898802), SSRN eLibrary.
[18] Anjali & Akanksha, Marital Rape and Criminal Law Reform in India: A Constitutional Perspective, 9 Int'l J.L. Mgmt. & Human. 1213 (2026).

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Nyaya Sanhita, 2023: A Missed Opportunity for Gender Justice in India" (2025), [19]examined the marital-rape exception under Section 63 of the Bharatiya Nyaya Sanhita, 2023 through constitutional jurisprudence, feminist legal theory, and empirical evidence. The paper aimed to critically analyse the continuation of the marital-rape exception and its implications for gender justice. It traced the historical origin of the exception to nineteenth-century colonial jurisprudence and examined its continuation from Section 375 of the IPC to Section 63 of the BNS. The authors also discussed the gap between the legal position and the lived experiences of married women, judicial developments including the divergent views in RIT Foundation v. Union of India (2022), and the feminist criticism of the concept of implied marital consent. The paper further examined developments in Nepal, Bangladesh and Sri Lanka as part of its regional comparison. The authors concluded that retaining the marital-rape exception under Section 63 represents a failure of criminal-law reform and argued for recognition of consent within marriage.

8. Nanda Prasad, in "Criminalization of Marital Rape Law in India is Still a Taboo" (2022), [20]examined marital rape from a gender and legal perspective. The paper uses a comparative and legal analysis to examine the Indian legal position and approaches to marital rape in other jurisdictions. The objective was to examine the issue of criminalization of marital rape in India and the legal and social realities faced by women experiencing sexual violence within marriage. The major findings indicate that the marital-rape exception creates a significant gap in Indian criminal law because non-consensual sexual intercourse by a husband is not generally recognized as rape, leaving married women with inadequate criminal protection. The paper also finds that the existing framework raises concerns relating to constitutional protection and the recognition of women's rights, while social attitudes and the presumption of consent within marriage further contribute to the problem. Its comparative discussion shows different approaches to criminalization in other jurisdictions and highlights the need to reconsider the Indian position. The paper concludes that changes in the existing legal framework are necessary to provide better protection to women from marital rape.

- **<u>Judicial Developments on Marital Rape</u>**

1. In Independent *Thought v. Union of India*, **AIR 2017 SC 4904,**[21] *t*he Supreme Court

[19] Kartikey Mishra & Namrata Mishra, Marital Rape under the Bharatiya Nyaya Sanhita, 2023: A Missed Opportunity for Gender Justice in India, Indian Legal Wing (Nov. 7, 2025).
[20] Nanda Prasad, Criminalization of Marital Rape Law in India is Still a Taboo, 2 Int'l J. Legal Rsch. & Analysis 7 (2022).
[21] Independent Thought v. Union of India, AIR 2017 SC 4904.

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examined the validity of Exception 2 to Section 375 of the Indian Penal Code, 1860, which provided a marital exception to rape for wives above 15 years of age. The Court considered whether this exception could legally distinguish between married and unmarried girls below 18 years. It held that sexual intercourse by a husband with his wife below 18 years would constitute rape and read down the exception accordingly. The Court relied on constitutional principles of equality, dignity and protection of life, and observed that marriage could not reduce the legal protection available to a child. However, the Court expressly limited its decision to wives below 18 years and did not determine the legality of the marital rape exception concerning adult women. The judgment therefore provides an important judicial argument against a marital exception while leaving the broader question of criminalisation of marital rape of adult women open for further legal and legislative consideration.

2. In RIT Foundation v. Union of India, 2022 SCC OnLine Del 1404,[22] the Delhi High Court examined the constitutional validity of the Marital Rape Exception under Section 375 of the Indian Penal Code. The main issue before the Court was whether exempting a husband from prosecution for non-consensual sexual intercourse with his wife violated the fundamental rights guaranteed under Articles 14, 15, 19(1)(a) and 21 of the Constitution. The petitioners argued that marriage cannot be treated as permanent consent and that married women are entitled to the same protection against sexual violence as unmarried women. The Court delivered a split judgment. Justice Rajiv Shakdher held that the distinction between married and unmarried women was arbitrary and inconsistent with equality, dignity, bodily autonomy and the principle of consent. He therefore concluded that the Marital Rape Exception was unconstitutional. Justice C. Hari Shankar, however, took a different view and upheld the exception, emphasizing legislative policy, the institution of marriage and the limits of judicial intervention in criminal law. Thus, the case did not establish a unanimous ratio on the constitutional validity of marital rape.

- **Legislative and Law Reform Perspectives**

1. Report of the Committee on Amendments to Criminal Law (Justice J.S. Verma Committee Report, 2013) [23]is an important document in the legal development of sexual violence laws in India. The Committee examined several issues relating to violence against women and specifically considered the legal position on marital rape. It recommended that the exception for marital rape should be removed from the law. The Committee further

[22] RIT Foundation v. Union of India, 2022 SCC OnLine Del 1404.
[23] Comm. on Amendments to Crim. L., Report of the Committee on Amendments to Criminal Law (2013).

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stated that the marital relationship should not be treated as a valid defence to rape or sexual violation and that the relationship between the accused and the complainant should not determine whether valid consent existed. It also recommended that marriage should not be considered a mitigating factor while determining punishment for rape. The Committee's recommendations were based on the importance of consent, equality and protection from sexual violence within intimate relationships. However, despite this recommendation, the marital rape exception was retained in subsequent criminal law amendments. This difference between the Committee's recommendation and the legislative position became an important issue in later constitutional challenges, including *RIT Foundation v. Union of India*. Thus, the Verma Committee Report provides an important foundation for understanding the continuing debate surrounding marital rape, consent and women's bodily autonomy in India.

2. The 172nd Report of the Law Commission of India on "Review of Rape Laws" (2000) [24]is an important source for understanding the historical development of the law relating to marital rape in India. The Report examined existing provisions on rape and sexual offences and considered proposals for widening the legal understanding of sexual assault and strengthening the protection available to victims. With specific reference to marital rape, the Report considered the proposal to remove the marital rape exception. However, the Law Commission did not recommend its complete abolition, observing that such a step could amount to excessive interference with the marital relationship. Instead, it retained the exception while proposing to increase the age of the wife covered by the exception from fifteen to sixteen years. The Report nevertheless recognized the need for greater legal protection in situations where spouses were living separately. It recommended retaining a separate provision dealing with sexual intercourse by a husband with his wife during separation, thereby providing criminal protection in circumstances that were excluded from the general marital rape exception.

- **Comparative and International Perspectives**

1. Kashish Jhunjhunwala and Shashank Shekhar, in their 2023 study titled "Breaking the Chains: Exploring Marital Rape in India and its Comparative Analysis with International Jurisdictions," [25]examined marital rape through a comparative legal analysis of India and selected international jurisdictions. The study aimed to examine the historical development,

[24] Law Comm'n of India, 172nd Report: Review of Rape Laws (2000).
[25] Kashish Jhunjhunwala & Shashank Shekhar, Breaking the Chains: Exploring Marital Rape in India and its Comparative Analysis with International Jurisdictions, 6 Int'l J.L. Mgmt. & Human. (2023).

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legal position and different approaches towards marital rape, along with its impact on survivors. The major findings showed that the marital rape exception under Section 375 of the IPC creates a significant gap in the protection of married women, particularly in relation to consent and bodily autonomy. The study also found that underreporting is influenced by social stigma, cultural beliefs, patriarchal norms, economic dependence and lack of awareness, while legal systems face difficulties relating to evidence, prosecution, training and support services. Its comparative analysis highlighted legal developments in countries such as the United States, Canada, the United Kingdom and Australia, where spousal exemptions have been removed or marital rape has been criminalized. The study concluded that addressing marital rape requires legal reform together with survivor support, public awareness, stronger judicial and investigative mechanisms, and changes in social attitudes.

2. In R v R [1991] UKHL 12, [1992] 1 AC 599 (House of Lords), [26]was a landmark decision of the House of Lords concerning the marital rape exemption in English law. The case examined whether a husband could rely on marriage as a defence against an allegation of rape of his wife, based on the historical assumption that marriage amounted to irrevocable consent. The House of Lords rejected this position and held that the marital rape exemption had no place in modern English law. The Court observed that the legal understanding of marriage had developed from a relationship in which the wife was considered subordinate to one based on equality between the spouses, and therefore marriage could not amount to permanent consent to sexual intercourse. The Court dismissed the husband's appeal and upheld his conviction for attempted rape. The decision was subsequently supported by the Law Commission and later reflected in statutory law through amendments to the law on rape.

3. Ms. Arushi Sharma, Dr. Sonia Grewal Mahal, Dr. Madhuri Irene, Mr. Sourabh Batar, Mr. Yogesh Chandra Gupta and Mr. Atul Kumar, in "Evolving Jurisprudence on Marital Rape: A Comparative Legal Study" (2025),[27]employed a qualitative, doctrinal and comparative methodology supplemented by socio-legal analysis, using statutes, constitutional provisions, judicial decisions, legal literature, international instruments, policy documents and NGO reports. The objective of the study was to examine the evolving jurisprudence on marital rape across different legal systems and understand how legal, constitutional and cultural contexts influence its recognition as a criminal offence. The

[26] R v R, [1991] UKHL 12, [1992] 1 AC 599 (House of Lords).
[27] Arushi Sharma et al., Evolving Jurisprudence on Marital Rape: A Comparative Legal Study, 5 J. Informatics Educ. & Rsch. (2025).

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major findings showed significant differences in the timing, legal mechanisms and extent of criminalization across jurisdictions: Sweden and Denmark were among the early jurisdictions to criminalize marital rape, the United Kingdom relied on judicial development through R v. R (1991), South Africa adopted statutory reform, while the United States developed a fragmented state-level approach. The study found that India continues to retain the marital rape exception, with reform facing social, cultural and political resistance. It further found that criminalization by itself may not ensure protection, as effective enforcement, survivor support, public education and institutional capacity are also necessary. The study concluded that differences in legal recognition and enforcement demonstrate the need for comprehensive legal reforms supported by awareness and survivor-centered mechanisms.

4. The Committee on the Elimination of Discrimination against Women (CEDAW), in its "Concluding Observations on the Combined Fourth and Fifth Periodic Reports of India" (2014), [28]examined India's legal framework and measures concerning discrimination and violence against women. The Committee welcomed the enactment of the Criminal Law (Amendment) Act, 2013, but expressed concern that the Penal Code continued to retain an exemption from punishment where rape was committed by a husband against his wife if she was above 15 years of age. It urged India to implement the recommendations of the Justice Verma Committee and specifically recommended amending the Criminal Law (Amendment) Act to ensure that marital rape is defined as a criminal offence. The Committee further recommended gender-sensitive investigations, proper registration of complaints, victim-centered procedures, training of law enforcement and judicial personnel, and effective monitoring of legislation addressing sexual violence. Thus, the CEDAW Committee identified the criminalization of marital rape as an important legal reform necessary for strengthening protection against violence against women in India.

3. RESEARCH GAP

The above studies mainly support the criminalization of marital rape on the basis of constitutional values such as consent, bodily autonomy, equality and dignity. However, comparatively less attention has been given to the concerns raised against criminalization, particularly the possibility of false complaints and misuse of the law, although these concerns

[28] Comm. on the Elimination of Discrimination against Women [CEDAW], Concluding Observations on the Combined Fourth and Fifth Periodic Reports of India, U.N. Doc. CEDAW/C/IND/CO/4-5 (July 24, 2014).

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remain relevant to the ongoing debate, especially with the matter currently pending before the Supreme Court of India. Further, most comparative studies discuss how other countries such as the United Kingdom, South Africa, Canada, Australia and New Zealand have criminalized marital rape. However, they mainly focus on describing these legal developments without connecting them with specific statutory reform proposals suitable for the Indian context. Therefore, this study seeks to address this gap by examining both the arguments for and against criminalization, along with statutory reform proposals, to examine whether the existing legal framework in India is sufficient to protect married women.

4. RESEARCH OBJECTIVES

I. To examine the differing legal arguments on criminalization of marital rape along with the proposed legislative changes.
II. To compare India's existing legal position with selected countries that have criminalized marital rape.

5. RESEARCH QUESTIONS

I. What are the differing legal arguments for and against the criminalization of marital rape in India and what legislative changes have been proposed?
II. How does India's existing framework on marital rape differ from the legal frameworks of selected countries that have criminalized marital rape?
III. What possible statutory reforms can India consider based on the legal approaches adopted by selected jurisdictions?

6. RESEARCH METHODOLOGY

This research is based on a doctrinal and comparative methodology. This study examines the relevant statutory provisions, the Constitution of India, judicial decisions and various committee reports to understand the existing legal position relating to criminalization of marital rape. Further, research papers, journal articles, and other published legal materials are also used as secondary sources, all cited in accordance with the Bluebook 21st Edition citation style. For comparative analysis, India's existing legal framework is compared with the legal frameworks of the selected jurisdictions, such as United Kingdom, South Africa, Canada, Australia and New Zealand, where marital rape has been criminalized. However, this research is not based on primary empirical data because marital rape is a highly sensitive issue that occurs within the

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privacy of the home and questioning married respondents raises ethical and privacy concerns. The limitation of this study is its reliance on secondary data. Therefore, it does not measure public opinion directly or the practical effectiveness of these reforms in terms of reporting, prosecution, and conviction.

7. INDIAN LEGAL FRAMEWORK ON MARITAL RAPE

7.1 Historical foundation

The exception of marital rape was originated in the 17th century with Sir Matthew Hale, in his book History of the pleas of the crown. [29]He believed that marriage was a contract under which, after marriage, a wife became her husband's property and her consent was considered irrevocable throughout her lifetime.[30] That is why the husband could not be held liable for having non-consensual sexual intercourse with his wife.

The exception of marital rape was introduced into Indian law through Exception 2 to Section 375 of the Indian Penal Code and the idea came from English law. [31]Initially, the age in the exception was 10 years, but it gradually increased over time to 12, 13 and 15 years. [32]If the wife is above the age of 15, the act would not be constituted as rape. The Criminal Law (Amendment) Act, 2013 increased the age of consent to 18 years but the marital rape exception kept the age at 15 and above. [33]This contradiction led to the Independent Thought case. [34]Section 63 of the BNS, 2023 changed the age to 18 years but the exception remains same.[35]

7.2 Present Statutory Position

The Bharatiya Nyaya Sanhita (BNS), 2023 came into force on 01 July 2024, which replaced the Indian Penal Code, 1860. Section 63 of BNS, 2023, defines the offence of Rape and also provides an Exception 2, which says that a sexual intercourse by a husband with his own wife does not amounts to rape, provided that the wife is 18 years of age or above. [36]It means that the non- consensual sexual act with an adult wife is therefore outside the offence of rape. This exception only applies to the offence of rape and not to every form of domestic violence.

7.3 Other Available Remedies

Section 67 of BNS, 2023 provides punishment to a husband who had non-consensual sexual

[29] 1 Matthew Hale, History of the Pleas of the Crown 629 (1st Eng. ed. 1736).
[30] Id.
[31] Indian Penal Code, 1860, § 375, Exception 2.
[32] See Indian Penal Code (Amendment) Act, 1891 (raising the age of consent within marriage from 10 to 12 years).
[33] Criminal Law (Amendment) Act, 2013, No. 13, Acts of Parliament, 2013 (India).
[34] Independent Thought v. Union of India, (2017) 10 S.C.R. 800 (India).
[35] Bharatiya Nyaya Sanhita, 2023, § 63, Exception 2.
[36] Id.

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intercourse with his wife during separation. [37]The punishment given under Section 67, is imprisonment of minimum two years and may extend to seven years and also required to pay fine. [38]But this remedy is only provided to the wife who lives separately. Section 85 and 86 of BNS, 2023, defines the offence of cruelty and provides punishment to the husband or his relatives who treats a woman with cruelty. [39]The Protection of Women from Domestic Violence Act, 2005 includes sexual abuse in the definition under Section 3, but it only provides civil remedies such as protection order and residence order. [40]The Kerala High Court, in X v. X (2021) has also considered marital rape as a ground for divorce on the basis of cruelty. [41]However, none of these remedies treats marital rape as rape.

7.4 Relevant Judicial Decisions

In *Independent Thought V. Union of India, (2017),* the court answered the question whether the sexual intercourse by a husband with his wife between the age of 15 to 18 years could be constituted as rape. [42]The court read down the exception for the married women by limiting its application. The court did not state that this exception is also wrong for adult wives. Because of this, the decision is a partial step.

In May 2022, in RIT Foundation V. Union of India (Delhi High Court, 2022), a two-judge bench of the Delhi High Court delivered a split verdict on the constitutional validity of the marital rape exception.[43] Justice Shakdher held that exception is unconstitutional as it creates the distinction between married and unmarried woman arbitrary and it violates the fundamental right of the married woman. In contrast, Justice C. Hari Shankar upheld the exception by saying that there is an intelligible differentia between married and unmarried woman, marriage is a recognizable relationship. Since both the judges disagreed with each other, there is no final judgement. The matter subsequently taken to the Supreme Court. In the same year, in Hrishikesh Sahoo V. State of Karnataka (2022), which involves the allegation of rape and cruelty by a wife on her husband. The husband defended himself by taking the protection of the exception of marital rape. The Karnataka High Court permitted the charges of the rape to continue as the exception is not absolute and could not be used to prevent the husband from the proceedings of the case. The Supreme Court stayed the operation of the judgement of the Karnataka High Court and the petition is pending before the Supreme Court.

[37] Bharatiya Nyaya Sanhita, 2023, § 67.
[38] Id.
[39] Bharatiya Nyaya Sanhita, 2023, §§ 85–86.
[40] Protection of Women from Domestic Violence Act, 2005, § 3, No. 43, Acts of Parliament, 2005 (India).
[41] X v. X, 2021 SCC OnLine Ker 3004.
[42] Independent Thought v. Union of India, (2017) 10 S.C.R. 800 (India).
[43] RIT Found. v. Union of India, 2022 SCC OnLine Del 1459.

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7.5 Legislative and Executive Position

Justice J.S Verma Committee (2013), Following the 2012 Delhi gang rape case, the Justice J.S Verma Committee was established to suggest reforms to India's criminal law regarding sexual violence. [44]The

committee suggested to remove the exception of marital rape and emphasized that marriage should not be treated as a defense to rape. It recognized that marriage cannot be treated as permanent or automatic consent to have sexual intercourse. But the parliament did not accept this recommendation. In October 2024, the union government filed an affidavit before the Supreme Court in which it opposed the removal of the exception.[45] The petitions challenging the exception are currently being heard by the Supreme Court and no final judgement has been delivered.

8. ARGUMENTS FOR AND AGAINST CRIMINALIZATION OF MARITAL RAPE

8.1 Arguments in favour of criminalization

Those who supports the criminalization of marital rape argue that the exception is built on the old idea that marriage gives permanent consent to the husband to have sexual acts with his wife. According to them, the consent of the wife should be obtained every time before engaging in sexual intercourse and the refusal by the wife must have the same effect as that of other women. The House of Lords also accepted this in R v. R (1991) and the Kerala High Court in X v. X (2021), held that the husband and wife must be an equal partner in marriage and the husband does not have a superior authority over his wife's body. [46]

The supporters of the criminalization of marital rape argue that under Article 14 of the Indian Constitution, a classification is valid only when it has a reasonable connection with the objective of the law.[47] The purpose of rape law is to protect a woman from sexual violence. Therefore, the injury suffered by a woman is same whether the perpetrator is a stranger or her husband. This is why the discrimination between married and unmarried women is arbitrary in nature. Justice Shakdher in RIT Foundation v. Union of India (2022) had the same view. [48]They further argue that the exception affects only women and rests on the stereotype that a wife must

[44] Justice J.S. Verma Committee, Report of the Committee on Amendments to Criminal Law 115–18 (2013).
[45] Counter Affidavit on Behalf of the Union of India, Executive Response to Petitions Challenging Exception 2 to Section 375 of IPC, Writ Petition (Civil) No. 284/2015 (Supreme Court of India, Oct. 2024).
[46] R v. R, [1992] 1 A.C. 599 (H.L.) (UK); X v. X, 2021 SCC OnLine Ker 3004.
[47] India Const. art. 14.
[48] RIT Found. v. Union of India, 2022 SCC OnLine Del 1459, ¶ 112 (Shakdher, J.).

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obey her husband, which violates Article 15. [49]In K.S Puttaswamy v. Union of India (2017), the Supreme Court held that privacy and bodily autonomy are part of personal liberty under Article 21. [50]Supporters argue that marital rape exception does not protect a married women and violates their right to bodily autonomy and privacy.

They further argue that the law is inconsistent because in Independent Thought v. Union of India (2017), it was observed that marriage does not extinguish protection for girls below the age of 18 years. [51]And Joseph Shine v. Union of India, (2018), rejected the idea that a wife is the property of her husband.[52] Supporters also contend that removing the exception does not create a new offence because the definition and punishment for rape are already provided under Sections 63 and 64 of the BNS, 2023. [53]It only removes the immunity given to husbands. Section 85 of the BNS, 2023 and the Protection of women from Domestic Violence Act, 2005 do not recognize the seriousness of marital rape. Hence the available remedies are not adequate to protect married women.[54]

8.2 Arguments against criminalization

Those who are against the criminalization of marital rape argue that marriage is a special social and legal relationship. In case of RIT Foundation v. Union of India (2022), Justice Hari Shankar stated that there is an "intelligible differentia" between married and unmarried women. He viewed it as a matter of legislative policy. [55]In 2024, the Union Government stated in its affidavit that marriage does not remove a woman's consent but it argued that calling such a violation rape would be too severe, as other remedies are available for married women. [56]The government also argued that the decision to criminalize marital rape is a matter for parliament not for the Supreme Court.

The opponents argue that it may increase the chances of false complaints against husbands if marital rape is criminalized. They compared this concern with Section 498A of the IPC, 1860, now Section 85 of the BNS, 2023, which deals with cruelty by a husband or his relative towards a woman. According to them, similar allegations may also be made in cases of marital rape, which makes it difficult to differentiate between genuine and false complaints. [57]They further

[49] India Const. art. 15.
[50] K.S. Puttaswamy v. Union of India, (2017) 10 S.C.R. 633 (India); India Const. art. 21.
[51] Independent Thought v. Union of India, (2017) 10 S.C.R. 800 (India).
[52] Joseph Shine v. Union of India, (2018) 11 S.C.R. 737 (India).
[53] Bharatiya Nyaya Sanhita, 2023, §§ 63–64.
[54] Bharatiya Nyaya Sanhita, 2023, § 85; Protection of Women from Domestic Violence Act, 2005, § 3, No. 43, Acts of Parliament, 2005 (India).
[55] RIT Found. v. Union of India, 2022 SCC OnLine Del 1459 (Hari Shankar, J.).
[56] Counter Affidavit on Behalf of the Union of India, Executive Response to Petitions Challenging Exception 2 to Section 375 of IPC, Writ Petition (Civil) No. 284/2015 (Supreme Court of India, Oct. 2024).
[57] Indian Penal Code, 1860, § 498A; Bharatiya Nyaya Sanhita, 2023, § 85.

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argue that it can be difficult to prove marital rape because such acts usually take place in a private space without any witnesses. Since the husband and wife are already in a marital relationship, it may also be difficult to know whether the sexual act took place with or without the wife's consent. [58]The critics also argue that it may affect family privacy and the institution of marriage by bringing private matters into court. The 172nd Report of Law Commission of India (2000) also did not recommend the complete removal of exception.[59]

8.3 Researcher's Analysis

In the researcher's view, those who oppose the criminalisation of marital rape raise real concerns but these concerns cannot completely justify keeping the exception. Also, the belief that marriage is a special relationship confuses expectations with consent. In marriage, having a sexual expectation is one thing and the right of a wife to refuse sexual act is a different matter. Expectation alone does not give a husband the right to have sexual intercourse without the wife's consent. It is submitted that rape law protects women from sexual violence and has no connection with the harmony of marriage.

It is further submitted that the solution for misuse is procedural safeguards and not immunity. Misuse can occur under any criminal law but this does not mean that the law should not exist or that legal protection should be denied to those who need it. Similarly, the possibility of false complaints should not be the only factor considered while deciding whether marital rape should be criminalized. Married women are also entitled to the protection of their fundamental rights including right to life and personal liberty under Article 21 of the Indian Constitution.[60]

In the researcher's view, the argument regarding Parliament versus the Supreme Court is weak because the petitioners are asking the Court only whether the exception is constitutional. They are not asking the Court to create a new offence. It is further submitted that the other remedies available to a married woman do not fill the gap. Section 67 of the BNS, 2023, protects only a wife living separately and the sentence provided under this provision is not sufficient. Also, other provisions do not treat forced intercourse as rape. [61]The real question is not whether the exception should be retained but how it should be removed so that the chances of false complaints are also minimised.

[58] See generally Law Commission of India, Review of Rape Laws, Report No. 172, ¶ 3.1.2 (2000).
[59] Law Commission of India, Review of Rape Laws, Report No. 172 (2000).
[60] India Const. art. 21.
[61] Bharatiya Nyaya Sanhita, 2023, § 67.

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9. COMPARATIVE ANALYSIS OF SELECTED JURISDICTIONS

9.1 Selection of Jurisdictions

Many countries have removed the marital rape exception, but India still retains the exception. The experiences of these countries can be used to see how they removed the exception and what safeguards have been established. Therefore, this paper selects some jurisdictions for a comparative analysis.

9.2 United Kingdom

- **Law and Punishment:** In England and Wales, rape is defined under Section 1 of the Sexual Offences Act, 2003.[62] Under this provision, when a person intentionally penetrates the vagina, anus or mouth of another person with his penis, without her consent or without a reasonable belief in consent, he commits rape. [63]There is no marital rape exception provided under this section. The punishment for such offence is life imprisonment under Section 1(4).[64]No separate or lesser punishment is provided for marital rape in UK law.
- **Historical Background:** In England, the marital rape exemption came through the common law. The basis of this exemption was Sir Matthew Hale's idea that after marriage the wife gives herself up to her husband and cannot take herself back, which is called irrevocable consent. [65]This is why a husband could not be convicted for having non-consensual sexual intercourse with his wife, except in some limited circumstances, such as a separation order by the court. [66]But the legal position of married women changed with time. In Scotland, in S v. HM advocate (1989), the High Court of judiciary rejected the marital rape exemption.[67] Then the House of Lords in R v. R on 23 October 1991, held that the marital rape exemption is not a part of the law of England and gave the reasoning that in modern times marriage means an equal partnership and Hale's idea cannot be accepted anymore.[68]
- **Law Reform and Safeguards:** After the pronouncement of the judgement in R v. R (1991), the Law Commission recommended that no changes should be made to this decision, meaning that a husband cannot raise marriage as a defence. [69]The Commission reviewed

[62] Sexual Offences Act 2003, c. 42, § 1 (UK).
[63] Id. § 1(1).
[64] Id. § 1(4).
[65]1 Matthew Hale, History of the Pleas of the Crown 629 (1st Eng. ed. 1736).
[66] See R v. Clarke, [1949] 2 All E.R. 448 (P.D.A.) (UK) (recognizing non-cohabitation orders as an exception to Hale's doctrine).
[67] S v. HM Advocate 1989 S.L.T. 469 (Scot.).
[68] R v. R, [1992] 1 A.C. 599 (H.L.) (UK).
[69] Law Commission, Criminal Law: Rape Within Marriage, Law Com. No. 205 (1992) (UK).

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the opponents' arguments relating to false allegations, difficulty in proving the offence and effects on the marital relationship. The Commission stated that these cannot be reasons to keep the marital immunity. The Commission rejected some safeguards, such as applying the law only to separated couples, applying it only when violence happens, making it a lesser offence or making the consent of the Director of Public Prosecutions necessary before prosecution. [70]The reason behind this was that it may make marital rape appear less serious. The Commission recommended that the husband should get anonymity in marital rape cases so that his wife and children get extra protection. [71]Later, the change was given statutory form by Section 142 of the Criminal Justice and Public Act, 1994. [72]Today, consent is central to the offence of rape under the Sexual Offences Act, 2003.

9.2 South Africa

- **Law and Punishment:** In South Africa, rape is defined under Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007. [73]According to this provision, when a person intentionally has sexual penetration with the victim without their consent, they are said to commit the offence of rape. Section 1 of this Act provides the meaning of consent as voluntary and without coercion. [74]Therefore, consent is the central requirement. Section 56(1) of the Criminal Law Amendment Act 2007 expressly states that no marital or other relationship-related defence is available for offences under Section 3 to 7. [75]Therefore, a husband cannot claim immunity from allegations of rape on the basis of marriage. In South Africa, the punishment for rape is provided under Section 51, read with Part I of Schedule 2, of the Criminal Law Amendment Act 105 of 1997. [76]In some severe circumstances, such as when the victim is below the age of eighteen years, when the victim is or was in a domestic relationship with the accused or if there is grievous bodily injury, life imprisonment is prescribed.[77] However, according to Section 51(3)(a), the court can impose a lesser sentence if substantial and compelling circumstances exist.[78]
- **Historical Background:** Earlier in South Africa, under Common law, a husband could not be held criminally liable for having sexual intercourse with his wife without her consent, which was recognised as the marital rape exemption. The Prevention of Family Violence

[70] Id. ¶¶ 4.1–4.12.
[71] Id. ¶ 5.8.
[72] Criminal Justice and Public Order Act 1994, c. 33, § 142 (UK).
[73] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, § 3 (S. Afr.).
[74] Id. § 1.
[75] Id. § 56(1).
[76] Criminal Law Amendment Act 105 of 1997, § 51, sched. 2, pt. I (S. Afr.).
[77] Id.
[78] Id. § 51(3)(a).

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Act, 1993, bought a major change in this position. [79]Section 5 of this Act expressly provides that a husband can be convicted for raping his wife, even if other laws or common law provide otherwise. [80]The importance of this provision was that marriage should not become a defence against prosecution for rape. Later, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007, comprehensively reformed the law relating to sexual offences. This Act repealed the Common Law offence of rape and introduced an expanded statutory definition that covers non- consensual sexual intercourse irrespective of gender. Also, Section 56(1) clarified that the marital relationship between the accused and the victim cannot be a valid defence. With this provision, the legal position on marital rape was clearly established.

- **Law Reform and Safeguards:** The 2007 Act did not just define rape but also aimed to organise the law relating to sexual offences in a comprehensive statute and provide better legal protection to victims. According to Section 1(2) of the Criminal Law Amendment Act 2007, consent means a voluntary and uncoerced agreement. Section 1(3) provides circumstances in which consent is not voluntary, such as when it is obtained through force, intimidation, threats, indue influence or situations when the victim is incapable of understanding the nature of the sexual act. The objectives of Section 2 of this Act include providing maximum protection to victims of sexual offences and minimising trauma and secondary victimisation. Section 58 addresses the evidence relating to delays in reporting, while Section 60 states that the evidence of the complainant cannot be treated with caution merely because of the nature of the offence. These provisions are relevant to the treatment of victims during sexual offences trials. The Act also provides for specialised courts to deal with sexual offence cases. Section 55A provides for the designated sexual offences courts and the Act includes provisions for prioritising these cases.

9.3 Canada

- **Law and Punishment:** Canada does not have a separate offence of rape or marital rape. Non-consensual sexual intercourse within marriage is viewed as sexual assault under Section 271 of the Criminal Code, R.S.C.1985, c. C-46, and no exception for marriage is provided in this provision. [81]Section 278 expressly states that a husband or a wife can be charged under Sections 271, 272, or 273 in respect of his or her spouse, whether they are

[79] Prevention of Family Violence Act 116 of 1993 (S. Afr.).
[80] Id. § 5.
[81] Criminal Code, R.S.C. 1985, c. C-46, § 271 (Can.).

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living together or separately[82]. The punishment provided is the same as for any other sexual assault. Under Section 271, the maximum imprisonment is 10 years and in severe cases, the imprisonment is up to 14 years under Section 272 and life imprisonment under Section 273. [83]There is no separate punishment provided for marital rape.

- **Historical Background:** Before 1983, in Canadian law, a husband was excluded from the definition of rape in relation to his wife. This is why a husband could not be held liable for having non-consensual sexual intercourse with his wife. In 1982, Parliament passed a new Act, S.C. 1980-81-82-83, c.125, which came into force in 1983.[84] It removed the offence of rape and created gender-neutral sexual assault offences. A provision, now Section 278 of the Criminal Code, was also added, under which a husband can be charged with sexual assault on his wife. This reform was made through a statute and not by a court decision.
- **Law Reforms and Safeguards:** The reform did not leave the position of spouses to interpretation. An express provision was added, which is now Section 278. There are no separate safeguards for marital cases. The same general rules that govern all sexual assault cases apply. One of these rules is relevant to marital cases, Section 276 states that evidence of the complainant's sexual activity, whether with the accused or with anyone else, is not admissible to support an inference that consent was more likely.[85] The accused also has the protection. A written application is required to bring evidence related to the victim's sexual activity and the judge also recognises the accused's right to make a full answer and defence under Section 276(3)(a).

9.4 Australia

- **Law and Punishment:** In New South Wales non-consensual sexual intercourse is considered as an offence under Section 61I of Crimes Act 1900 (NSW). [86]According to Section 61I if any person engages in sexual intercourse with a known person without consent, then he is committing an offence. Marriage is not a defence to this offence; criminal prosecution can also be initiated against the husband under this provision. The maximum punishment is 14 years imprisonment under Section 61I. For aggravated sexual assault the maximum punishment is 20 years imprisonment under Section 61J.

[82] Id. § 278.
[83] Id. §§ 271–273.
[84] An Act to Amend the Criminal Code in Relation to Sexual Offences and Other Offences Against the Person, S.C. 1980-81-82-83, c. 125 (Can.).
[85] Criminal Code, R.S.C. 1985, c. C-46, § 276 (Can.).
[86] Crimes Act 1900 (NSW) s 61I (Austl.).

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- **Historical Background:** In Australia, the immunity of marital rape came from English common law. The basis of this was Sir Matthew Hale's idea that through marriage, wife has given permanent sexual consent to her husband, and she cannot withdraw it later. In 1970s women's rights movements challenges this legal assumption and demanded to criminalize marital rape. New South Wales completely removed the immunity of marital rape through the Crimes (Sexual Assault) Amendment Act 1981. In the case of R v. L (1991) 174 CLR 379, the High Court of Australia held that the common law rule is no longer a part of Australian law which gave immunity to husband for the rape of his wife.[87] In 1992 South Australia, completely abolished the immunity of marital rape through amendments in its Criminal Law Consolidation Act 1935 (SA).
- **Law Reforms and Safeguards:** After the removal of marital rape immunity in NSW, sexual offences were defined under Crimes Act 1900 (NSW) in which Section 61I covers nonconsensual sexual intercourse. Section 61J provides separate provision for aggravated sexual assault, in which higher punishment can be given based on the aggravated circumstances of the offence.[88] The Australian Law Reform Commission discussed reforms in sexual assault laws, including legal definition of consent, the treatment of complaints and procedural protection in sexual offences proceedings.[89] The objective of these reforms was to challenge the outdated assumptions in cases of sexual assault and to make the legal process less intimidating for complaints. At the same time, it was considered necessary to preserve the accused's right to fair trial and the right to challenge evidence in criminal proceedings.

9.5 New Zealand

- **Law and Punishment:** In New Zealand Marital rape is an offence, this is governed by Crimes Act 1961. Section 128 of this act defines sexual violation which includes rape. [90]According to Section 128(2) rape occurs when a person penetrates another person's genitalia with their penis without the other person's consent and accused does not have reasonable belief that consent was given, there is no exception given for marriage in this provision. Section 128(4) specifically says that one person can be convicted of the sexual violation of another person at time when they were married to each other.[91] This means that

[87] R v. L (1991) 174 CLR 379 (Austl.).
[88] Crimes Act 1900 (NSW) s 61J (Austl.).
[89] See generally Australian Law Reform Commission, Equality Before the Law: Justice for Women, Report No. 69 (1994).
[90] Crimes Act 1961, s 128 (N.Z.).
[91] Id. s 128(4).

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a husband- wife relationship does not grant immunity from criminal liability. Therefore, marital rape is illegal in New Zealand and prosecution can be initiated against a husband. Section 128B of the Crimes Act 1961 applies for the purpose of punishment. According to this, the maximum punishment for sexual violation is 20 years imprisonment. This is the maximum statutory punishment; an imprisonment term for 20 years is not automatically imposed in every case. The court determines the sentence based on the circumstance of the offence and the offender.

- **Historical Background:** Historically it was believed in common law that upon marriage, a wife has given her permanent consent for sexual relations to her husband. Under this approach a husband enjoyed immunity from criminal prosecution for the rape of his wife. This principle is known as marital rape exemption. Over time, this approach was challenged because of the recognition of women's legal rights and bodily autonomy. To reform this position New Zealand passed the Crimes Amendment Act (No3) 1985, which came into effect on 1 February 1986. This legislation replaced the rape related provisions and introduced sexual violation related provisions in the Crimes Act 1961. The significance of this reform was that marriage could no longer be used as an excuse for sexual assault. Later, the Crimes Amendment Act 2005 substituted Section 128. The current section 128(4) clearly provides that a conviction for sexual violence can occur regardless of marriage.
- **Law Reforms and Safeguards:** New Zealand's legal framework recognises that marriage in itself is not a proof of consent for sexual violence. The removal of marital immunity through the Crimes Amendment Act (No 3) 1985 was an important legal reform. The current Section 128(4) expressly recognises this principle that spouses can also be held criminally liable for sexual violation. Section 128A explains the circumstances related to consent. This addresses force, threat, fear, unconsciousness, and other situations specified in the provision. These rule helps the court to determine whether the legally valid consent was present. These provisions are not just for marital rape but form part of general legal framework for sexual offences. In New Zealand rather than creating a separate or lesser offence for marital rape, the general sexual violation framework applies. This means that the legal seriousness of an offence does not feel lesser automatically just because the parties are married. Furthermore, ordinary evidentiary requirements, applicable criminal procedure and sentencing rules are followed in criminal proceedings. Therefore, with the legal reform the importance of fair trial and proper assessment of evidence remains intact.

9.6 Comparative Analysis

After comparing the legal approaches adopted by England and Wales, South Africa, Canada,

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Australia and New Zealand, it can be observed that the selected jurisdictions have followed different legal routes to remove marital rape immunity. In England and Wales, the judicial decision in R v. R (1991) played a vital role in rejecting the marital rape exemption, whereas legislative reforms played a significant role in the other selected jurisdictions. From the comparison of these countries, it can be observed that legal reforms relating to marital rape are not limited to a particular method. The selected jurisdictions adopted changes according to their respective framework, but they rejected the approach of granting general immunity to a husband for non-consensual sexual intercourse on the basis of marriage. Therefore, it can be said that despite following different legal approaches, these countries reached a similar legal position.

An important similarity in the legal frameworks of these countries is that a marital relationship is not treated as an automatic substitute for sexual consent. In the legal frameworks of England, Wales, and Canada, the legal requirements for consent are important, while New Zealand's framework clearly recognizes that a spouse can be convicted of sexual violation against their partner. This comparison clarifies the distinction between marriage and consent is the central issue in handling marital rape legally. However, this does not mean that every country defines or assess the consent in the exact same way. There are differences in their statutory standards and legal rules. Therefore, it is important to distinguish between the common principle they share and different legal methods used to implement it.

The comparative study also shows that removing of marital immunity and establishing a complete legal framework for sexual offences, are two related but different matters. Canada uses a broader framework of sexual assault, while England and Whales rely on a specific statutory definition of rape. South Africa and New Zealand address criminal liability related to sexual offences and marital relationships through their respective statutory framework. The New South Wales framework also recognizes provisions related to sexual assault and consent. These differences indicate that it is not sufficient to compare the legal treatment of marital rape solely on whether marital rape immunity has been abolished. It is important to consider the definition of offence, the standard of consent, punishment and related legal provisions. Through this, the scope of comparative analysis extends beyond the legal recognition to the overall structure of criminal liability.

Comparing the legal frameworks of South Africa, Canada, England, and New South Wales highlights that consent and procedural safeguard in criminal proceedings are important considerations in laws relating to sexual offences. However, the nature and scope of these safeguards is not same in every jurisdiction. Therefore, it is not sufficient to rely solely on

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statutory provision to declare one country's legal model superior to another. An important distinction is that recognising an offence in law is one matter while its practical implementation is another. To draw conclusions regarding reporting, investigation, prosecution or conviction related outcome within a jurisdiction, relevant empirical evidence is required. Therefore, while comparing legal framework helps identify legal differences and possible safeguards, unsupported conclusion regarding practical effectiveness must be avoided.

A major difference appears when comparing the approaches of selected jurisdiction with India's legal position. It is observed that, In England, South Africa, Canada, New South Wales, and New Zealand marital relationship is not accepted as a general immunity for relevant sexual offences. While, in India Exception 2 to Section 63 of Bharatiya Nyaya Sanhita, 2023 retains exception for sexual acts by a husband with his wife when she is 18 years of age or above.[92] Section 67 separately covers non-consensual sexual intercourse with a wife living separately under certain circumstances.[93] This difference shows that India's existing legal approach to marital relationships and criminal liability is different from the selected jurisdictions. Consequently, the legal basis of marital rape exception and possible reforms can be critically examined. These countries provide useful comparative material to evaluate recognition of consent, the legal significance of marital status and the structure of criminal liability. However, instead of directly copying a foreign model, it is important to evaluate its suitability in Indian constitutional principle and according to legal context.

Overall, the comparison of selected jurisdictions shows that different legal approaches have been adopted to address marital rape immunity. The example of England and Wales demonstrates the importance of judicial intervention, whereas the other selected jurisdictions highlight the role of legislative reforms. The comparison of different jurisdictions also suggests that the removal of marital immunity alone is not sufficient. The definition of the offence, punishment and procedural safeguards should also be considered. For India, these comparatives approaches highlight the need to examine the existing marital rape exception and consider possible statutory reforms within the Indian criminal law framework.

[92] Bharatiya Nyaya Sanhita, 2023, § 63, Exception 2.
[93] Bharatiya Nyaya Sanhita, 2023, § 67.

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10. FINDINGS

These findings are based on the above doctrinal and comparative analysis.

10.1 No available remedy considers Marital rape as 'rape'.

The study finds that the existing remedies do not recognise marital rape as rape.[94] Section 67 of the BNS protects only wives who live separately[95] whereas, Section 85 and 86 of the BNS deal only with cruelty and domestic violence and does not include marital rape.[96] Also, the Protection of Women from Domestic Violence Act, 2005 provides civil remedies only. [97]Therefore, a legal gap exists because of the application of Exception 2 to Section 63 of the BNS to adult wives. [98]

10.2 Independent Thought (2017) gave only Partial relief.

It is found that the split verdict of the Delhi High Court and the pending petition before the Supreme Court shows that this issue is not yet settled. [99]In Independent Thought V. Union of India (2017) the Supreme Court provided partial relief by reading down the exception only for wives 15 to 18 years of age and making it still applicable to the wives above the age of 18 years. [100]

10.3 Weak Foundation of Marital Rape Exception.

In the researcher's view the marital rape exception is violative of Article 14, 15 and 21, as it is still based on Hale's old idea of 'irrevocable consent' which is inconsistent with the modern concept of marriage as an equal partnership. [101]Since the purpose of rape law is to protect women from sexual violence and not to harm the institution of marriage, the argument that marriage is a special relationship confuses expectation with consent.

10.4 The concern regarding misuse is genuine but immunity is not its solution.

Comparative analysis shows that other countries have addressed these concerns through procedural and evidentiary safeguards rather than granting immunity to husband. [102]The real concern is the fear regarding the false complaints and difficulty of proving offences committed within private space. However, the possibility of misuse exists in any criminal law.

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[94] See Bharatiya Nyaya Sanhita, 2023, § 63, Exception 2.
[95] Id. § 67.
[96] Id. §§ 85–86.
[97] Protection of Women from Domestic Violence Act, 2005, § 3, No. 43, Acts of Parliament, 2005 (India).
[98] Bharatiya Nyaya Sanhita, 2023, § 63, Exception 2.
[99] RIT Found. v. Union of India, 2022 SCC OnLine Del 1459; Counter Affidavit on Behalf of the Union of India, Executive Response to Petitions Challenging Exception 2 to Section 375 of IPC, Writ Petition (Civil) No. 284/2015 (Supreme Court of India, Oct. 2024).
[100] Independent Thought v. Union of India, (2017) 10 S.C.R. 800 (India).
[101] India Const. arts. 14, 15, 21; 1 Matthew Hale, History of the Pleas of the Crown 629 (1st Eng. ed. 1736); R v. R, [1992] 1 A.C. 599 (H.L.) (UK).
[102] See, e.g., Criminal Code, R.S.C. 1985, c. C-46, § 276 (Can.); Crimes Act 1961, ss 128A, 128B (N.Z.).

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10.5 Marital immunity is removed by all the selected jurisdictions in their own way

The comparative analysis reveals that the selected jurisdictions agreed that marriage does not implies permanent consent and therefore removed marital immunity. Although these jurisdictions chose different paths to remove it, their objective was same. The United Kingdom removed it through a judicial decision in R v R (1991), whereas South Africa, Canada, Australia and New Zealand did so largely through legislative reforms.[103]

10.6. No jurisdiction created a separated or lesser offence for marital rape.

It is observed that UK law commission believed that making an offence with lesser punishment or limiting it to only couples living separately, may make the offence appear less serious and therefore it rejected the idea.[104] Similarly, the other selected jurisdictions adopt the general sexual offence framework.[105]

10.7 Removal of immunity alone is not enough; the overall legal framework is also important.

It is observed that the comparison should extend beyond the removal of immunity, as achieving an effective legal outcome relies on the overall legal framework. The definition of the offence, the standard of consent, the punishment and the procedural safeguards collectively determine the effectiveness of the law.

10.8 Safeguards already exist within the general sexual offence framework

The comparative analysis reveals that the marital exception is not necessary to prevent misuse. For example, in Canada, Section 276 provides rules on evidence regarding the sexual history of the complainant and the accused's right of fair trial is also protected. [106]Similarly, in New Zealand, normal evidence and sentencing rules apply. [107]

10.9 Foreign Models cannot be directly adopted in India.

It emerges from the study that before bringing any reform, India should evaluate it against the Indian constitutional values, as every jurisdiction has different legal and constitutional principles. [108]Also, empirical evidence is required to understand the practical effectiveness of these laws, which is outside the scope of this paper. [109]

[103] R v. R, [1992] 1 A.C. 599 (H.L.) (UK); Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, § 56(1) (S. Afr.); Criminal Code, R.S.C. 1985, c. C-46, § 278 (Can.); Crimes (Sexual Assault) Amendment Act 1981 (NSW) (Austl.); Crimes Amendment Act (No 3) 1985 (N.Z.).
[104] Law Commission, Criminal Law: Rape Within Marriage, Law Com. No. 205, ¶¶ 4.1–4.12 (1992) (UK).
[105] See Sexual Offences Act 2003, c. 42, § 1 (UK); Criminal Code, R.S.C. 1985, c. C-46, § 271 (Can.); Crimes Act 1961, s 128 (N.Z.).
[106] Criminal Code, R.S.C. 1985, c. C-46, § 276 (Can.).
[107] Crimes Act 1961, ss 128, 128A (N.Z.).
[108] See K.S. Puttaswamy v. Union of India, (2017) 10 S.C.R. 633 (India).
[109] See generally Law Commission of India, Review of Rape Laws, Report No. 172, ¶ 3.1.2 (2000).

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11. SUGGESTIONS AND REFORM PROPOSALS

- It is suggested that Exception 2 to Section 63 should be completely removed so that a husband cannot claim this legal defence in cases of marital rape. [110]This would not create a new offence but would remove the immunity given to husband under this exception.
- Rather than leaving the matter to judicial interpretation, the researcher advises that this change be introduced through a direct amendment to the Bharatiya Nyaya Sanhita, 2023. This would ensure that the legal position is clear. As reflected in Section 278 of the Canadian Criminal Code and Section 56(1) of South Africa's Criminal Law Amendment Act, 2007, the amendment should explicitly state that marriage is not a legal defence against a charge of rape.[111]
- It is proposed that the existing definition and punishment of rape should also apply to marital rape, rather than creating a separate offence for it. [112]Providing a lesser punishment or limiting the offence to spouses living separately would make the offence appear less serious.
- It is suggested that Section 67 of the BNS should be reviewed, as it covers only separated wives and provides a lesser punishment. [113]To ensure equal rights for wives, it is proposed that this provision should either be merged with section 63 or repealed.
- It is proposed that the BNS should expressly define consent as a voluntary and uncoerced agreement, also it must clearly state that marriage does not constitute automatic consent to sexual intercourse.[114]
- It is recommended that safeguards be incorporated into the existing framework governing sexual offences to prevent potential misuse. [115]These may include proper investigation standards, fair trial procedures for the accused and appropriate evidentiary rules, such as those reflected in Section 276 of the Canadian criminal law. These safeguards do not weaken the offence, rather they ensure that the trial remains fair.
- It is suggested that proper investigation guidelines and sensitisation programmes should

[110] Bharatiya Nyaya Sanhita, 2023, § 63, Exception 2.
[111] Criminal Code, R.S.C. 1985, c. C-46, § 278 (Can.); Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, § 56(1) (S. Afr.).
[112] Bharatiya Nyaya Sanhita, 2023, §§ 63, 64; see also Law Commission, Criminal Law: Rape Within Marriage, Law Com. No. 205, ¶¶ 4.1–4.12 (1992) (UK).
[113] Bharatiya Nyaya Sanhita, 2023, § 67; India Const. arts. 14, 21.
[114] Bharatiya Nyaya Sanhita, 2023, § 63; see, e.g., Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, § 1(2) (S. Afr.).
[115] Bharatiya Nagarik Suraksha Sanhita, 2023; Criminal Code, R.S.C. 1985, c. C-46, § 276 (Can.); India Const. art. 21.

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be introduced for police officers and judges. Procedure should also be made victim-friendly, like the designated sexual offences courts in South Africa, so that complainants do not suffer secondary victimisation.[116]

- It is recommended that awareness programme be organised for married women to spread awareness of their legal rights under Article 14, 15 and 21 of the Indian Constitution [117]so that they can stand up for themselves by using legal protections.
- It is suggested that future empirical studies on reporting, prosecution and conviction data may be conducted to determine the practical effectiveness of the reforms introduced to address marital rape. However, this research does not fall within the scope of this paper.

12. CONCLUSION

It is concluded that marital rape in India remains an unresolved issue because Exception 2 to Section 63 of the BNS, 2023, grants immunity to a husband for having non-consensual sexual intercourse with his adult wife.[118] In this context, using the doctrinal and comparative method, this paper examines the arguments in favour of and against criminalisation and analyses how the selected jurisdictions have been successful in removing the marital immunity granted to a husband.

The study finds that in India, none of the existing remedy (such as Section 67, Section 85 and 86 of the BNS, 2023, and the Domestic Violence Act, 2005) treats marital rape as rape. [119]This creates a legal gap for adult wives. Moreover, the foundation of the marital rape exception is weak because it rests on Hale's outdated doctrine of irrevocable consent.[120] The Comparative study also shows that all the selected jurisdictions have abolished marital rape immunity through different pathways and have addressed the fear of misuse through safeguards.[121]

In light of the above, it is the researcher's view that marital rape should be criminalised, which means that Exception 2 to Section 63 of the BNS, 2023 should be removed. However, the concern regarding misuse is genuine, but it can be addressed through procedural and

[116] Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, § 55A (S. Afr.).
[117] India Const. arts. 14, 15, 21.
[118] Bharatiya Nyaya Sanhita, 2023, § 63, Exception 2.
[119] Bharatiya Nyaya Sanhita, 2023, §§ 67, 85–86; Protection of Women from Domestic Violence Act, 2005, § 3, No. 43, Acts of Parliament, 2005 (India).
[120] 1 Matthew Hale, History of the Pleas of the Crown 629 (1st Eng. ed. 1736).
[121] R v. R, [1992] 1 A.C. 599 (H.L.) (UK); Prevention of Family Violence Act 116 of 1993 (S. Afr.); Criminal Code, R.S.C. 1985, c. C-46, § 278 (Can.); Crimes (Sexual Assault) Amendment Act 1981 (NSW) (Austl.); Crimes Amendment Act (No 3) 1985 (N.Z.).

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evidentiary safeguards within the general sexual offence framework.[122] In addition, instead of directly copying any foreign law, India must adopt these reforms according to the Indian constitutional principles. [123]

This paper is based on secondary data and therefore does not measure the practical effectiveness of these laws in terms of reporting, prosecution and conviction. Further empirical research can be conducted to address this limitation. Moreover, the decision in the pending petitions before the Supreme Court is expected to provide clarity on the matter. Ultimately, marriage is not a substitute of consent and married women should also get the same legal protection that is given to other women.[124]

[122] See generally Australian Law Reform Commission, Equality Before the Law: Justice for Women, Report No. 69 (1994).
[123] India Const. arts. 14, 15, 21.
[124] K.S. Puttaswamy v. Union of India, (2017) 10 S.C.R. 633 (India).