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## Avinash Kumar



*Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.*

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# **MARITAL RAPE IN INDIA: A CONSTITUTIONAL AND LEGAL ANALYSIS**

AUTHORED BY - SHAHALA M  
LLM (criminal law)

## **Abstract**

Marital rape is a form of sexual violence that continues to be legally unrecognized in India. Although the Indian Penal Code (IPC) criminalizes rape, the marital rape exception provides immunity to a husband for non-consensual sexual intercourse with his wife. This exception, rooted in colonial law and patriarchal ideology, violates the constitutional guarantees of equality, dignity, and personal liberty. The failure to criminalize marital rape perpetuates gender inequality and undermines the fundamental rights of women. This paper examines the historical background, statutory framework, judicial attitude, constitutional implications, and the need for legal reform to recognize marital rape as an offence under Indian law.

## **1. Introduction**

Marriage in Indian society is often regarded as a sacred institution rather than a contract. It signifies emotional, physical, and social partnership between two individuals. However, within this sanctified institution, a dangerous assumption persists — that marriage provides the husband with unconditional sexual access to his wife's body. This belief denies the wife's autonomy and her right to consent, turning marriage into an instrument of oppression rather than companionship.

The Indian Penal Code, 1860, in Section 375, defines rape but exempts marital rape through Exception 2, which states that sexual intercourse by a man with his wife, if she is not under fifteen years of age, is not rape. This legal immunity to the husband effectively legitimizes non-consensual sexual intercourse within marriage. In doing so, it deprives women of equal protection under the law and contradicts India's constitutional and international commitments to gender equality and human rights.

The silence of the law in this regard reflects deep-rooted patriarchal values and societal reluctance to treat sexual violence within marriage as a crime. Women often face emotional, economic, and social barriers in reporting such abuse, further compounded by the absence of

legal recognition. Hence, the need to re-examine the legal and constitutional dimensions of marital rape in India becomes imperative.

#### Footnotes

1. Indian Penal Code, 1860, § 375 Exception 2.
2. Law Commission of India, *172nd Report on Review of Rape Laws* (2000).
3. Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* (OUP, 2004).

## 2. Historical Background of Marital Rape Exception

The concept of marital rape immunity originates from English common law, which treated women as the property of their husbands. The 17th-century English jurist Sir Matthew Hale declared that “the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up to her husband, which she cannot retract.” This doctrine of implied consent became the foundation for the marital rape exception.

When Lord Macaulay drafted the Indian Penal Code in 1860, he incorporated this principle without modification, reflecting the colonial mindset of the time. During the colonial era, women were viewed as subservient to their husbands, lacking independent legal status. Consequently, forced sexual intercourse within marriage was not considered a violation of the wife's autonomy but rather a husband's marital right.

After independence, India retained the same colonial laws without reforming the marital rape exception. Despite the constitutional guarantee of equality, dignity, and liberty, the exception remains in Section 375 IPC. While reforms such as the Criminal Law Amendment Acts of 1983 and 2013 expanded the definition of rape and recognized consent-based offences, they deliberately retained the marital rape exception, citing “potential misuse” and “social complexities.”

#### Footnotes

4. Sir Matthew Hale, *History of the Pleas of the Crown* (1736).
5. Indian Penal Code, 1860 (Drafted by Lord Macaulay).
6. Ratna Kapur & Brenda Cossman, *Subversive Sites: Feminist Engagements with Law in India* (Sage, 1996).
7. Criminal Law (Amendment) Act, 2013 (Act No. 13 of 2013).

### 3. The Legal Framework in India

#### 3.1. Section 375 IPC – Definition and Exception

Section 375 of the IPC defines rape as sexual intercourse with a woman without her consent or against her will. However, Exception 2 specifically excludes marital rape from its ambit, thereby granting the husband legal immunity.

This provision reflects an outdated understanding of marriage, where consent is presumed to be perpetual. It denies the fundamental right of a wife to control her body and negates her autonomy. The Supreme Court in *Independent Thought v. Union of India* (2017) held that sexual intercourse with a wife below the age of 18 constitutes rape, reading down the age limit in the exception. Yet, the Court refrained from addressing the larger issue of marital rape for adult women.

The current legal framework thus creates a paradox — while the law criminalizes sexual intercourse without consent in every context, it turns a blind eye to such acts within marriage, reducing the wife’s right to consent to a mere illusion.

#### Footnotes

8. Indian Penal Code, 1860, § 375.
9. *Independent Thought v. Union of India*, (2017) 10 SCC 800.
10. Law Commission of India, *243rd Report on Sexual Offences* (2012).

#### 3.2. Section 376B IPC – Intercourse During Separation

Section 376B IPC criminalizes sexual intercourse by a husband with his wife during separation without her consent. This section recognizes a separated wife’s right to refuse sexual relations, acknowledging her bodily autonomy. However, it offers protection only when the couple is separated under judicial or factual conditions, excluding cohabiting wives from the same right. This distinction reinforces the notion that a wife living with her husband loses her sexual autonomy. The law thus recognizes consent only when the marriage is on paper but not in practice. Such a selective application of consent violates the basic human rights of married women and contradicts constitutional guarantees.

#### Footnotes

11. Indian Penal Code, 1860, § 376B.
12. *Sakshi v. Union of India*, (2004) 5 SCC 518.

## 4. Constitutional Dimensions

### 4.1. Article 14 – Equality Before Law

The marital rape exception violates Article 14 of the Constitution, which guarantees equality before the law and equal protection of laws. The differentiation between married and unmarried women has no rational nexus with the object of rape law — to protect women’s bodily integrity and sexual autonomy. The arbitrary classification fails the test of reasonable classification established in *E.P. Royappa v. State of Tamil Nadu* and *Maneka Gandhi v. Union of India*.

#### Footnotes

13. Constitution of India, Art. 14.
14. *E.P. Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3.
15. *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

### 4.2. Article 15 – Prohibition of Discrimination

Article 15 prohibits discrimination on the grounds of sex. By providing immunity to husbands, the law discriminates against women solely based on their marital status. It reinforces patriarchal notions that a wife’s identity merges with her husband’s after marriage, thereby perpetuating gender inequality. The marital rape exception thus fails to uphold the spirit of substantive equality envisaged by Article 15.

#### Footnotes

16. Constitution of India, Art. 15.
17. *Air India v. Nargesh Meerza*, (1981) 4 SCC 335.

### 4.3. Article 21 – Right to Life and Personal Liberty

Article 21 guarantees the right to life and personal liberty, which includes the right to live with dignity, bodily integrity, and sexual autonomy. The marital rape exception directly infringes upon these rights by denying women the ability to exercise control over their bodies within marriage. In *Suchita Srivastava v. Chandigarh Administration*, the Supreme Court recognized reproductive and sexual autonomy as integral to Article 21.

Thus, the exception violates the essence of life and liberty protected under the Constitution.

#### Footnotes

18. Constitution of India, Art. 21.
19. *Suchita Srivastava v. Chandigarh Administration*, (2009) 9 SCC 1.
20. *Justice K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.

## 5. Judicial Attitude and Law Commission Reports

Indian courts have shown hesitancy in addressing marital rape directly. In *State of Maharashtra v. Madhukar Narayan Mardikar*, the Court observed that every woman, married or unmarried, is entitled to sexual privacy and dignity. However, this principle has not been extended to criminalize marital rape.

The 172nd Law Commission Report (2000) recommended deleting the marital rape exception, but no legislative action followed. Similarly, the Justice Verma Committee (2013) strongly urged the government to recognize marital rape as an offence. Unfortunately, the 2013 Amendment ignored this recommendation.

### Footnotes

21. *State of Maharashtra v. Madhukar Narayan Mardikar*, (1991) 1 SCC 57.
22. Law Commission of India, *172nd Report on Review of Rape Laws* (2000).
23. *Report of the Committee on Amendments to Criminal Law* (Justice Verma Committee Report, 2013).

## 6. International Perspective

Many countries have recognized marital rape as a crime, including the United Kingdom, United States, Canada, South Africa, and Nepal. The United Nations Committee on the Elimination of Discrimination Against Women (CEDAW) has repeatedly urged India to criminalize marital rape. India, being a signatory to CEDAW and the Universal Declaration of Human Rights (UDHR), is obligated to protect women from all forms of sexual violence, including within marriage.

Failure to criminalize marital rape places India in violation of its international commitments and weakens its human rights record globally.

### Footnotes

24. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979.
25. United Nations Human Rights Council, *Universal Periodic Review: India* (2022).
26. *R v. R*, [1991] UKHL 12 (House of Lords).

## 7. Feminist Jurisprudential Perspective

Feminist legal theory emphasizes that the law must recognize women as autonomous individuals, not as extensions of their husbands. The marital rape exception sustains patriarchal

dominance by denying a woman's capacity to refuse sexual intercourse. Scholars like Catherine MacKinnon argue that the law often mirrors male perspectives and normalizes violence within gender relations.

In India, this legal silence perpetuates the notion that marriage is a license for sex, rather than a relationship based on mutual consent and respect.

#### Footnotes

27. Catherine MacKinnon, *Feminism Unmodified* (Harvard University Press, 1987).

28. Nivedita Menon, *Seeing Like a Feminist* (Zubaan, 2012).

### 8. Conclusion and Recommendations

The marital rape exception in India stands as one of the most glaring contradictions between constitutional principles and criminal law. It undermines women's right to equality, dignity, and bodily autonomy — the core values of the Constitution.

Criminalizing marital rape is not about dismantling marriage but about ensuring that marriage does not become a shield for violence. The law must evolve to recognize that consent is an ongoing, revocable right, even within marriage.

The following reforms are essential:

- 1. Deletion of Exception 2 to Section 375 IPC.**
- 2. Comprehensive amendment** to define marital rape explicitly as a criminal offence.
- 3. Victim support mechanisms**, including counseling, shelter, and legal aid.
- 4. Awareness and education** to challenge societal myths surrounding marriage and consent.
- 5. Judicial sensitization** to ensure fair trials and victim-centered justice.

Until India recognizes marital rape as a crime, the ideals of equality and dignity enshrined in the Constitution will remain unfulfilled.

#### Footnotes

29. Justice Verma Committee Report (2013), Recommendation 73.

30. UN Women, *Progress of the World's Women* (2019–2020).