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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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# **TRACING THE HISTORY OF MARITAL RAPE EXCEPTION IN INDIA.**

AUTHORED BY - E.A. ASHWIN DATHA &

DR. AARATI TYAGI

The History of exception of marital rape can be traced back to the doctrine of coverture given by Matthew Hale who was the Lord Chief Justice of the Court of King's Bench. In one document with the title "History of the Pleas of the Crown" 1736 that was published i.e., around sixty years after the death of Matthew Hale. In the said document, it is documented that Matthew Hale has held that in a marital relationship, the husband cannot be penalized for the offence of rape if the wife is the victim of such action. The condition is that a valid marriage must exist. The justification was that in a marriage, there is mutual consent of both the husband and wife at the time of the marriage and by being married, the wife has given up her to her husband and such consent cannot be taken back as long as the marriage exists. This reasoning can also be seen in a book written by one Mr. John Frederick Archbold in a book with the title 'Pleading and Evidence in Criminal Cases' and it was published in the year 1822.<sup>1</sup> By reading the book written by John Frederick Archbold, it can be seen that during the early 19<sup>th</sup> century, there were many uncertainties regarding applying the doctrine of coverture that was given by Matthew Hale in some situations and the question remained as to whether a husband can commit rape on his own wife. It is useful to refer to the case of R. v. Clarence<sup>2</sup>. The facts of this case are that a husband who knew that he had a sexually transmitted disease called gonorrhoea still had sexual intercourse with his wife by suppressing this fact. The wife was not at all aware of this aspect. Later, when she found out, a dispute arose and he was charged and was prosecuted for an offence as defined under Sections 20 and 47 of the Offences against the Person Act, 1861. The section 20 deals with unlawfully and maliciously inflicting grievous bodily harm and Section 47 deals with the offence of assault, occasioning actual bodily harm. It was argued at the Court that if the wife knew about the disease, she would have not given consent. It was also argued at the court and the main legal question was if it was required to be

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<sup>1</sup> Criminal Pleading, Evidence and Practice by John Frederick Archbold.

<sup>2</sup> (1888) 22 Q.B.D 23

considered the wife's consent was still implied considering the fact that she would have never consented to have sexual intercourse if she had knowledge about the disease that her husband had. It was argued that the concept of implied consent to intercourse stands cancelled when the husband has a disease. The case was decided by 13 judges. The majority of the Judges ruled against the conviction of the husband. Only four Judges gave a dissenting opinion. It is important to refer to the dissenting opinion given by Justice Hawkins. The dissenting judges were filled with discomfort arising from the majority's decision, which acquitted the offending husband. Justice Hawkins expressed his reservations by stating that if the prevailing interpretation of the law were interpreted to acquit the husband, he did not want to be associated with a ruling that seemingly allowed a husband to escape punishment despite committing such a heinous act against his wife. The English courts also diluted the common legal doctrine which tells that once a female gets married, it becomes deemed that such a person has given her irrevocable consent to sexual intercourse to the husband. The law did not change fast in the United Kingdom (UK); which is considered to be the place where this doctrine has emerged. It is evident that rape was criminalized by law for the first time by passing the Sexual Offences (Amendment) Act, 1976. The English legal system gradually changed the longstanding common law doctrine that assumed a woman's irrevocable consent to sexual relations upon marriage. Surprisingly, even in the United Kingdom, where this doctrine originated, legal reform proceeded at a sluggish pace. It's important to know that the Sexual Offences (Amendment) Act of 1976 was the first law that defined the offence of rape. A careful examination of the definition of rape reveals a potential loophole related to the legal common law principle, particularly when the perpetrator is the husband and the victim is his wife. This loophole arises due to the inclusion of the term 'unlawful' alongside 'sexual intercourse' in the definition of rape. The issue came to light in a case that reached the House of Lords following a judgment by the Court of Appeal (Criminal Division) in *R. v. R*<sup>3</sup>. In the said case, the Court of Appeal had dismissed the husband's appeal against his conviction for raping his wife, effectively reading down the exception of marital rape based on the Common Law Doctrine that previously shielded husbands from being held accountable for rape within marriage based on the assumption that consent was irrevocable once entered into marriage. The decision rendered by the House of Lords in the case of *R. v. R* (supra) prompted the English Parliament to amend the existing law, specifically the Criminal Justice and Public Order Act of 1994. This amendment introduced Section 142 which deals with sexual offences. Under this new

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<sup>3</sup> 1991 UKHL 12

provision, Section 1 of the Sexual Offences Act 1956 which dealt with rape of a woman was replaced with the following section: 'Rape of woman or man.' The revised law makes it an offence for a man to rape either a woman or another man. A man is considered to have committed rape if he engages in sexual intercourse (whether vaginal or anal) with a person who does not consent to it at the time of the act. Furthermore, the man must be aware of the lack of consent or act recklessly regarding the other person's consent. Notably, this amendment made the law gender-neutral and eliminated the possibility of relying on the Common Law Doctrine as a defence by removing the term 'unlawful' that previously preceded the phrase 'sexual intercourse' in the statute.

In India, lawmakers carefully considered the impact of deviant and extreme cases when drafting the Indian Penal Code (IPC). Originally referred to as Clause 359, Section 375 of the IPC now defines rape more comprehensively than its earlier version. However, the initial draft did not adequately address the rights of girl-children who were often married at a young age. Interestingly, the use of the term 'own wife' instead of 'just wife' in the Exception clause was a curious choice. Note B in the Chapter of General Exceptions suggests that lawmakers mistakenly believed that husbands had an unrestricted right to engage in sexual activity with their wives, regardless of consent. This chapter aimed to avoid redundancy by incorporating exceptions specific to certain provisions. For instance, Clause 470 pertains solely to defamation, while Clause 359 deals exclusively with conjugal rights related to rape. Fortunately, further scrutiny led to revisions, including a report submitted by the Indian Law Commission. Paragraphs 444 and 445 of the report shed light on the impact concerning child brides. Mr. Thomas raises objections to the exception that declares sexual intercourse by a man with his own wife is never considered rape. He questions the validity of this exception, emphasizing the need for protection for child brides until they are old enough to reside with their husbands. Mr. Hudleston and Mr. A.D. Campbell share Mr. Thomas's concerns. While marriages among Mahomedans and Hindus often occur before female puberty, brides typically remain with their parents until they are fit for marriage consummation. It is presumed that parents, as natural guardians, will prevent abuse. However, there may be cases where legal intervention is necessary to prevent premature exploitation of women in the guise of marital rights. Excluding cases where the wife is under nine years of age from the exception could address such situations. Instances of husband abuse in such cases would then fall under the fifth description of rape. Consequently, the first statutory version of Section 375, enacted in

1860, modified the provision to deem consent immaterial when a man engaged in sex with his wife, who was under ten years of age, as opposed to the nine years specified in Clause 359. The Common Law Doctrine, initially found in Clause 359, laid down one exception: it would not apply if the wife was under 10 years of age. Clause 359 later evolved into Section 375 when incorporated into the Indian Penal Code (IPC) in 1860. It's relevant to consider how Section 376 was originally worded when it became part of the statute. This context is important in the context of the current 'high minimum mandatory sentence' of 10 years in Section 376(1) of the IPC. Notably, the original Section 375 did not differentiate based on age between a child subjected to forced sexual intercourse by a husband or a stranger; the age threshold, however, remained under 10 years. Subsequent amendments in 1983 raised the age threshold to 'under sixteen years of age' for children, while the threshold for child brides remained at 'under fifteen years of age. Additionally, an important change introduced by the Act pertained to the inclusion of a fifth circumstance. This provision effectively invalidated consent given by a woman due to her mental state, which could result from unsoundness, intoxication, or the administration of stupefying or harmful substances. Such circumstances would render the victim incapable of understanding the nature and consequences of the act to which she had consented. Previously categorized as the fifth circumstance, the provision dealing with the immateriality of consent granted by a child was subsequently renumbered as the sixth circumstance. Furthermore, the threshold for unmarried girl-children subjected to sexual acts was raised through an amendment in 2013, setting it at 'under eighteen years of age'. In the same vein, other relevant amendments in 2013 expanded the definition of rape by introducing Clauses (a) to (d) in Section 375. These clauses described various sexual acts that a victim could be subjected to. Additionally, the Act inserted provisions such as Explanations 1 and 2, along with an accompanying proviso and Exception 1. Notably, the exception related to marital rape was renumbered as Exception number 2. To address the history of rape law, it is essential to highlight the amendments introduced in 2018 under the Criminal Law. These amendments impacted specific provisions of the Indian Penal Code, the Evidence Act, the Code of Criminal Procedure, and the Protection of Children from Sexual Offences (POCSO) Act. A notable discrepancy arose between cases involving a girl-child subjected to sexual acts within marriage and those outside marriage. For the former, the age threshold remained "under fifteen years," while for the latter, it increased to "under eighteen years." This inconsistency persisted until the Supreme Court's ruling in the case of *Independent Thought vs. Union of India*<sup>4</sup>. In that judgment, the threshold age for child

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<sup>4</sup> AIR 2017 SC 4904.

brides experiencing sexual intercourse by their husbands was raised to “under eighteen years.” The court specifically examined the exception of marital rape, particularly in the context of child brides, considering the incongruity between the sixth circumstance and Exception 2 appended to Section 375 and the POCSO Act.<sup>5</sup>

### **CONCLUSION**

The history of marital rape exception traces back to Matthew Hale's doctrine of coverture, shielding husbands from prosecution for raping their wives. Despite early legal texts and precedents, discomfort among judges and societal evolution prompted legal reforms. In the UK, the 1976 Sexual Offences Act marked the first criminalization of marital rape, but loopholes persisted until the gender-neutral amendment in 1994. India's legal journey mirrors this evolution, with amendments addressing child brides' rights and expanding rape definitions. The landmark 2018 reforms, spurred by cases like *Independent Thought vs. Union of India*, aimed to align laws with evolving understandings of consent and equality, underscoring the on-going need for legal vigilance to protect individuals from sexual violence within marriage and ensure justice for all.

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<sup>5</sup> 2022 SCC OnLine Del 1404.