



The Indian Journal for Research in Law and Management

Open Access Law Journal – Copyright © 2026

Editor-in-Chief – Dr. Muktai Deb Chavan; Publisher – Alden Vas; ISSN: 2583-9896

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MARITAL RAPE EXCEPTION IN INDIA: A CRITICAL ANALYSIS

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ABSTRACT

Marital rape, the act of non-consensual sexual intercourse within marriage remains legally exempt in India, despite widespread advocacy, international obligations, and judicial scrutiny. While Indian law has progressively adopted a consent-based framework for sexual offences, the marital rape exception embedded in Section 375 of the Indian Penal Code, 1860, and now retained in Section 63(2) of the Bharatiya Nyaya Sanhita, 2023, creates a fundamental contradiction. This article traces the historical origins of the exception, examines the statutory and constitutional framework, analyses key judicial developments, evaluates Law Commission recommendations, compares India's position with global standards, and critically examines arguments for and against criminalisation. It argues that the continued existence of the marital rape exception is constitutionally untenable and must be urgently reformed.

Keywords: *Marital Rape, Consent, Bodily Autonomy, Constitutional Rights, Gender Justice, India.*

“Marriage cannot be a licence for sexual violence. A wife is not property – she is a person.”

THE FUNDAMENTAL PROBLEM: A LEGAL BLIND SPOT WITHIN MARRIAGE

In India, it is legally possible for a man to force sexual intercourse upon his wife without her consent and face no criminal prosecution for it. This is not a loophole or an oversight. It is an explicit legal exception embedded in the law. A woman becomes a wife after marriage but before that, she is a human being with fundamental rights and human rights guaranteed by the Constitution. Marriage does not erase those rights. A husband does not gain the authority to violate his wife's bodily autonomy simply because she married him. In 2025, we speak of women's empowerment yet the same legal system that claims to empower women is simultaneously protecting the men who violate them. This is not tradition it is discrimination.

The right to bodily autonomy, the right to say no, and the right to live with dignity are not contingent on whether a woman is married. They are guaranteed by the Constitution to every person, without exception. This article critically examines why the marital rape exception must be abolished.

BREAKING THE SILENCE ON MARITAL RAPE

Behind the walls of countless homes across India, a crime is committed every day silently, repeatedly, and legally. Women in rural areas are married without their consent, handed over to strangers, and taught from childhood that fulfilling their husband's sexual demands is their duty. No one tells them that what is being done to them has a name. No one tells them it is rape. They suffer in silence, not because they are weak, but because the law, the family, and the society have together decided that their pain does not count. The National Family Health Survey-5 found that 5.6% of married women reported being physically forced into sexual intercourse by their husbands, a figure representing millions of women across India. Yet 90 to 99% of such cases go unreported, not because the harm is not real, but because there is no law to report it under. These women are not statistics. They are daughters, sisters, and mothers who were promised safety in marriage and instead found violence. They were told to be silent. The law has been silent too and that silence must end.

“No woman deserves to be raped – whether she is married or not. No one is entitled to sex; it must always be given freely and willingly.”

INTRODUCTION

The legal treatment of sexual offences in India has changed a lot over the years, especially after the Criminal Law (Amendment) Act, 2013, which was passed after the horrific 2012 Delhi gang rape case. This law widened the definition of rape and made consent the most important factor. Yet one major contradiction survived all these changes, the marital rape exception. Under Exception 2 to Section 375 of the Indian Penal Code¹, sexual intercourse by a husband with his wife is simply not rape. The Bharatiya Nyaya Sanhita, 2023, which replaced the IPC, carries this exception forward under Section 63(2) with only a small change, raising the

¹ Indian Penal Code, 1860, § 375 Exception 2 (India).

minimum age of the wife from 15 to 18². The substance of the exception remains completely intact.

This article looks at where this exception came from, how it conflicts with the Constitution, what courts have said about it, what reform committees have recommended, how other countries have dealt with it, and why it must be removed. It argues that the marital rape exception is not just a legal gap, it is a constitutional failure that is hurting millions of women every day.

HISTORICAL BACKGROUND AND THE ORIGINS OF THE EXCEPTION

The marital rape exception was not created in India, it was imported from British colonial law and is based on three deeply outdated ideas.

1. THE HALE DOCTRINE - IRREVOCABLE CONSENT: In 1736, Sir Matthew Hale³, a former Chief Justice of England, wrote that a husband cannot be guilty of raping his wife because, by marriage, the wife has permanently given herself to her husband and “cannot retract.” This idea that a woman gives up her right to say no the moment she gets married, became the foundation of the marital rape exception. It was already abandoned in the UK in 1991. It has no place in modern law anywhere.

2. THE PROPERTY THEORY: Under old legal systems, a woman was treated as the property of her father before marriage and the property of her husband after. Since property cannot be wronged by its owner, rape within marriage was considered legally impossible. This idea reduces women to objects. It has been completely rejected by modern constitutional values and international human rights standards.

3. THE UNIFICATION THEORY: Under the old doctrine of coverture, a woman’s legal identity merged into her husband’s upon marriage. She stopped existing as a separate legal person. Therefore, it was argued, a husband could not rape “himself.” This doctrine was buried long ago in almost every country in the world, except it continues to breathe life into Indian rape law through the marital rape exception.

² Bharatiya Nyaya Sanhita, 2023, § 63(2) (India).

³ Matthew Hale, *Historia Placitorum Coronae* (1736).

All three of these theories have been firmly rejected by modern courts, constitutional values, and international human rights standards. Their survival in Indian law is not tradition, it is a historical mistake that has not yet been corrected.

STATUTORY FRAMEWORK AND CONSTITUTIONAL CONCERNS

The 2013 Criminal Law Amendment brought major improvements to rape law. It expanded the definition of rape beyond just physical penetration, shifted from a resistance-based model to a consent-based model, and defined consent as a voluntary, unequivocal agreement. Yet in the same law, Exception 2 to Section 375 was kept, directly contradicting everything the law was trying to achieve.

Section 376B IPC, which punishes non-consensual intercourse by a husband with his wife during judicial separation, shows that the law does recognise consent within marriage, but only when the couple is living separately. This creates a completely absurd situation: the same act is a crime when the spouses are separated but is not a crime when they are living together. The physical harm caused to the woman is exactly the same in both situations. The only difference is whether she is still living with her husband, and that cannot be a legally rational distinction.

From a constitutional point of view, the marital rape exception clearly violates Articles 14 and 21 of the Constitution⁴. Article 14 guarantees equality before law, but married women are denied the same legal protection from rape that unmarried women enjoy. This is arbitrary discrimination based purely on marital status. Article 21 guarantees the right to life and personal liberty, which the Supreme Court has interpreted to include bodily integrity, sexual autonomy, privacy, and human dignity. Forcing a woman into sexual intercourse violates every one of these rights. The law should not be in the business of protecting the perpetrator.

KEY JUDICIAL DEVELOPMENTS

Indian courts have steadily moved toward a more progressive understanding of consent and bodily autonomy, even though the legislature has refused to act on marital rape.

⁴ India Const. arts. 14, 15, 21.

In *State of Punjab v. Gurmit Singh* (1996)⁵, the Supreme Court held that the absence of physical injury does not mean the woman consented. In *Bodhisattwa Gautam v. Subhra Chakraborty* (1996)⁶, the Court declared that rape is a violation of Article 21 the right to life and dignity. These early judgments shifted the focus of rape law from morality to human rights.

The most important recent judgment on this issue is *Independent Thought v. Union of India* (2017)⁷, where the Supreme Court struck down the marital rape exception for minor wives (girls aged 15-18), calling it unconstitutional and a violation of Articles 14, 15, and 21. While this ruling did not cover adult wives, the Court's reasoning was powerful, it said that marriage cannot be used as a licence for sexual exploitation. That reasoning applies equally to adult women.

In *Navtej Singh Johar v. Union of India* (2018)⁸, the Supreme Court said that constitutional morality must prevail over social tradition. In *Joseph Shine v. Union of India* (2018)⁹, the Court rejected the idea that marriage gives a husband ownership over his wife. Both judgments strike at the very heart of the marital rape exception. The Delhi High Court in 2022 also directly examined the exception, and one judge held it to be unconstitutional. The legal tide is slowly turning.

LAW COMMISSION AND COMMITTEE REPORTS

India's own expert bodies have examined the marital rape exception in detail and their recommendations show a clear shift over time from protecting the institution of marriage to protecting the rights of women.

42ND LAW COMMISSION REPORT (1971)¹⁰: This report recommended criminalising marital rape only in situations of judicial separation. It treated marriage as a special institution that should be shielded from criminal law, prioritising the family unit over the woman's rights.

⁵ *State of Punjab v. Gurmit Singh* (1996) 2 SCC 384 (India).

⁶ *Bodhisattwa Gautam v. Subhra Chakraborty* (1996) 1 SCC 490 (India).

⁷ *Independent Thought v. Union of India* (2017) 10 SCC 800 (India).

⁸ *Navtej Singh Johar v. Union of India* (2018) 10 SCC 1 (India).

⁹ *Joseph Shine v. Union of India* (2018) 2 SCC 189 (India).

¹⁰ Law Commission of India, 42nd Report on the Indian Penal Code (1971).

While this recommendation led to Section 376B IPC, it ultimately reinforced the idea that a cohabiting wife has no right to refuse sex.

172ND LAW COMMISSION REPORT (2000)¹¹: Despite being a more reform-oriented report, the Commission again declined to recommend removal of the marital rape exception. It feared misuse of the law and disruption to marriages. Critics have pointed out that this reasoning is inconsistent with the Supreme Court's own principle that the mere possibility of misuse cannot justify denying fundamental rights.

JUSTICE J.S. VERMA COMMITTEE REPORT (2013)¹²: This is the most important and progressive report on the subject. Formed after the 2012 Delhi gang rape, the Committee clearly and unequivocally recommended that the marital rape exception must be removed. It said that marriage cannot be a defence to sexual violence, that consent must matter regardless of the relationship, and that the State has a duty to protect women from violence even inside the home. Despite the clarity of this recommendation, Parliament ignored it completely. That silence speaks volumes about where political will stands.

INTERNATIONAL PERSPECTIVE

India is not alone in facing this issue, but it is falling behind. Out of 185 countries in the world, 77 have clearly criminalised marital rape. India is among the 34 countries that still legally protect husbands from prosecution for raping their wives.

The United Kingdom abolished the marital rape exemption in 1991 through the landmark case *R v. R*¹³, where the House of Lords held that a wife is not property and retains the right to refuse consent at all times. The United States had criminalised marital rape in all 50 states by 1993. Canada did so in 1983. South Africa, Germany, France, and Australia have all fully criminalised it. Even Nepal, India's neighbour, criminalised marital rape in 2006.

¹¹ Law Commission of India, 42nd Report on the Indian Penal Code (1971).

¹² Justice J.S. Verma Committee, Report of the Committee on Amendments to Criminal Law (2013).

¹³ *R v. R* (1991) U.K HL 12 (United Kingdom)

India is also violating its international obligations. As a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)¹⁴, India is legally required to prevent and punish all forms of gender-based violence. CEDAW's General Recommendation No. 19 specifically identifies marital rape as a form of violence that countries must criminalise.¹⁵ India's continued refusal to do so is a breach of these commitments.

SOCIAL IMPACT AND THE CRISIS OF UNDERREPORTING

The numbers are alarming. The National Family Health Survey-5¹⁶ found that 5.6% of married women reported being physically forced into sexual intercourse by their husbands, and 2.7% were coerced into other unwanted sexual acts. These percentages represent millions of women. International organisation Equality Now estimates that 82% of all intimate partner sexual violence in India is committed by husbands, and 90 to 99% of such cases are never reported.¹⁷

The psychological damage is severe and long-lasting. Survivors of marital rape experience depression, anxiety, Post-Traumatic Stress Disorder (PTSD), and a deep sense of shame, made worse by the fact that the person who harmed them was someone they were supposed to trust completely. Yet these women have no criminal remedy under Indian law. They may seek civil relief under the Protection of Women from Domestic Violence Act, 2005¹⁸, but that Act only provides protection orders and monetary relief. It does not recognise forced sex within marriage as a crime. It does not send anyone to prison. It does not give justice.

Women stay silent because of social stigma, economic dependence, fear for their children, and the deeply held belief that what happens inside a marriage is a "private matter." The law reinforces every one of these barriers by refusing to recognise the harm.

¹⁴ Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), opened for signature Dec. 18, 1979, 1249 U.N.T.S. 13.

¹⁵ Committee, General Recommendation No. 19 (1992).

¹⁶ . National Family Health Survey – 5 (NFHS-5), Ministry of Health and Family Welfare, Government of India (2019–21).

¹⁷ Equality Now, 'Sexual Violence and the Law in India: Intimate Partner Violence Report,' available at: <https://www.equalitynow.org>

¹⁸ Protection of Women from Domestic Violence Act, 2005, § 3 (India).

ARGUMENTS FOR AND AGAINST CRIMINALISATION

ARGUMENTS IN FAVOUR OF CRIMINALISING MARITAL RAPE

- 1. IT VIOLATES THE CONSTITUTION:** The exception denies married women the equal protection of rape law (Article 14) and violates their right to bodily autonomy and dignity (Article 21). These are not negotiable rights, they cannot be taken away by marriage.
- 2. CONSENT MUST BE UNIVERSAL:** The 2013 Amendment defined consent as a voluntary, unequivocal agreement. This principle cannot apply everywhere except within marriage. That is a logical contradiction that the law cannot sustain.
- 3. INTERNATIONAL OBLIGATIONS:** India is bound by CEDAW to criminalise marital rape. The continued exception places India in violation of its international human rights commitments.
- 4. COURTS HAVE ALREADY SAID SO:** Multiple Supreme Court judgments have affirmed that rape violates human dignity regardless of the relationship between the parties. The legal foundation for criminalisation already exists.
- 5. THE WORLD HAS MOVED ON:** Over 77 countries have criminalised marital rape. None of them collapsed. None of them saw marriages destroyed. What they saw was women gaining protection.

AGAINST CRIMINALISATION - AND WHY THESE ARGUMENTS FAIL:

- 1. FEAR OF MISUSE:** Every law can be misused — the dowry law, the domestic violence law, all of them. We do not abolish those laws because of misuse fears. We add safeguards. To let lakhs of women suffer with no legal remedy because some people might misuse the law is morally indefensible. The Supreme Court in *Joseph Shine v. Union of India* clearly held that the possibility of misuse cannot be a reason to deny fundamental rights.
- 2. DIFFICULTY OF PROOF:** Rape is always difficult to prove. That does not mean it should not be a crime. Forensic evidence, medical records, and survivor testimony are all valid tools of proof.
- 3. IT WILL DESTROY MARRIAGE:** A marriage that is maintained through coercion is not sacred, it is a prison. Criminalising marital rape does not destroy marriage. It protects the dignity within it.

4. CIVIL REMEDIES ARE ENOUGH: The Domestic Violence Act provides only civil remedies. It does not punish rape. Civil relief and criminal justice are not the same thing, and one cannot substitute for the other.

CONCLUSION

The marital rape exception is not just an old law that needs updating, it is an active injustice that is happening every single day. India's rape law has moved toward consent, dignity, and bodily autonomy as its core principles. The marital rape exception directly betrays every one of these principles. It tells married women that their "no" does not count. It tells husbands that they have legal immunity for sexual violence. It tells society that marriage is a contract for sex.

The Justice J.S. Verma Committee said it must go. The Supreme Court's own judgments have repeatedly undermined its logic. The global community has moved decisively toward criminalisation. India's CEDAW obligations require it. And millions of women who are suffering in silence right now deserve it.

Criminalising marital rape is not about criminalising marriage. It is about recognising that marriage does not extinguish a woman's right to say no. It is about making sure that the Constitution's promise of equality, dignity, and personal liberty reaches every woman, including those inside a marriage. India must stop standing with archaic legal immunity and start standing with the women who need its protection.