
MARRIAGE: A CONNECTION OF HEARTS OR A LICENSE TO RAPE? A SUGGESTIVE AND COMPARATIVE ANALYSIS OF MARITAL RAPE IN THE INDIAN SOCIO-LEGAL CONTEXT

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ABSTRACT

Marital rape – the non-consensual sexual intercourse of a wife by her husband – remains uncriminalized in India under Exception 2 to Section 375 of the Indian Penal Code (IPC). This paper examines the doctrinal, constitutional, and human rights dimensions of this anomaly. It begins with an overview of the literature and international norms, tracing the historical roots of the marital rape exemption in Victorian-era coverture. We then analyze relevant statutes and case law: Section 375 IPC and its exceptions (including the narrow exception carved out by *Independent Thought v. Union of India*, which outlawed marital rape of wives under 18); ancillary statutes like Section 376B (rape during judicial separation), Section 498A (domestic cruelty), and the Protection of Women from Domestic Violence Act (2005), which recognizes forced sex as “sexual abuse” within marriage.

The constitutional analysis explores Article 14 (equality), Article 21 (life, liberty, dignity, privacy) and Article 15 (non-discrimination). We cite Supreme Court precedents (*Suchita Srivastava*, *Puttaswamy*, *Joseph Shine*, *Independent Thought*) to show that personal autonomy, bodily integrity, and privacy extend to married women. Through detailed case discussion we examine pivotal judgments: the English House of Lords in *R v R* (abolishing the spousal immunity in 1991), Indian High Courts (*Nimeshbhai Desai v. State of Gujarat*, *RIT Foundation v. Union of India* (Delhi HC, 2022 split verdict), *Karnataka HC (Hrishikesh Sahoo v. State of Karnataka, 2022)* and others).

Empirical context is discussed: violence against women in India is pervasive yet underreported; NCRB data show ~95% of reported rapes involve known assailants (often family). We address counter-arguments (risk of misuse, evidentiary issues, the sanctity of marriage) and rebut them, noting that other legal remedies (DV Act, cruelty) are inadequate substitutes for criminal justice.

Finally, we propose a model legislative amendment: repealing Exception 2

to Section 375, inserting a standalone marital rape provision, and defining “consent” clearly. A comparison table of five jurisdictions and a mermaid timeline of key developments are appended. Our conclusion urges the Parliament to criminalize marital rape in line with constitutional morality, gender equality, and India’s international commitments.

INTRODUCTION

Rape is among the most egregious violations of personal liberty and dignity. Yet, Indian law still treats sexual violence within marriage as a non-criminal act. Exception 2 to Section 375 IPC declares that “sexual intercourse by a man with his own wife, the wife not being under 18 years of age, is not rape”. Thus, a husband can legally force himself on his wife with impunity, so long as she is an adult. This doctrine of marital rape exemption (MRE) is a colonial relic underpinned by paternalistic notions of marriage: the wife was historically seen as the husband’s property, impliedly consenting to sex by entering the marital contract.

Modern legal and social developments, however, emphatically reject this view. Marriage today is understood as a partnership of equals, not a right of sexual access. This paper critically interrogates India’s refusal to criminalize marital rape. It argues that the exception undermines fundamental constitutional guarantees (equality, privacy, dignity) and violates international human rights obligations. The existing legal framework (including the Protection of Women from Domestic Violence Act, 2005) is shown to be an inadequate patch. The analysis draws on comparative perspectives and feminist scholarship to support legislative reform.

LITERATURE REVIEW AND CONTEXT

The subject has attracted considerable scholarly and policy attention in recent decades.

Commentators observe that Exception 2 is “largely influenced by the doctrine of coverture” from English law. Feminist writers note that conceiving marriage as perpetual consent stems from patriarchal ideologies. Indian academic sources and NGO reports emphasize the anomaly with consistent themes: that the exception violates Articles 14/15/21 of the Constitution and contravenes CEDAW. For example, a Harvard Human Rights Journal article (Makkar, 2019) meticulously critiques the exception under Article 14, finding the classification between married and unmarried women to be arbitrary and irrational.

The domestic violence act (2005) was hailed as a milestone for recognizing “sexual abuse”

within marriage (including forced intercourse) as a civil wrong. However, scholars caution that civil remedies (protection orders, maintenance) cannot substitute criminal sanctions, nor do they address issues of evidence or deterrence. Policy papers (e.g. Verma Committee 2013) and parliamentary reports (Home Affairs Committee 2013) have urged criminalization; yet legislative inertia persists. Internationally, bodies like CEDAW's Committee and UN Special Rapporteurs have repeatedly called on India to remove marital rape exemptions. The literature thus frames the issue at the intersection of gender justice, legal reform, and human rights.

HISTORICAL BACKGROUND

The marital rape exemption is not an indigenous Indian invention; it descends from English common law. In Hale's Pleas of the Crown (1736), Sir Matthew Hale famously asserted that "the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent... the wife hath given up herself in this kind unto her husband". This "rule" was incorporated into the IPC's drafting. Exception 2 to Sec 375 was originally framed when girls could legally marry at 10, and at that time wives had no independent legal identity. Colonial legislations, like the Child Marriage Restraint Acts (1929, 1949), gradually raised the marriage age (eventually to 18 for girls), but the rape exception persisted.

Internationally, the exemption has similarly been dismantled only recently. In England and Wales, *R v R* [1991] UKHL 12 finally recognized that marriage does not imply "advance consent". Many Commonwealth countries still retained the exemption into the 21st century (HDT, 2021). Across the globe, women's movements in the 1970s–90s successfully campaigned to criminalize spousal rape. In the US, all states abolished marital immunity by 1993 (the last were Oklahoma and North Carolina). In South Africa, the Sexual Offences Act 2007 replaced common-law rape with a gender-neutral definition covering all non-consensual penetration. Thus, the global trend has been toward recognizing sexual autonomy within marriage. India, in contrast, remains an outlier in not having caught up.

STATUTORY ANALYSIS

The Indian Penal Code

Section 375 IPC (Definition of Rape). As amended by the 2013 Criminal Law Act, Sec.375 defines rape to include various non-consensual penetrative acts. Most crucially, Clause (2)

provides: “Exception 2. Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.” Thus by statute a husband has blanket immunity for sexual violence against an adult wife. This is the very “marital rape exception” (MRE). The exception was originally drawn when the child marriage exception was up to 15 years; now after *Independent Thought v. Union of India* (2017), the exception only applies to wives of 18 or above. In other words, marital sex with wives aged 15–18 (though now above legal age of marriage) was held to be rape.

Section 376B IPC. Enacted in 1983, this provision criminalizes sexual intercourse by a husband with his wife if they are living separately by decree of judicial separation (or other lawful separation). Thus it carves out one narrow exception: a separated wife under 15 is covered by 375; a separated wife over 15 is now covered by 376B. But no provision covers non-consensual sex within a cohabiting marriage. 376B’s existence implicitly acknowledges that outside separation, marital rape is the only form of rape that remains (legally) possible but unpunished.

Section 498A IPC (Cruelty). Often invoked in domestic abuse, Sec.498A criminalizes cruelty to a married woman by husband or relatives. Cruelty includes any willful conduct likely to drive the woman to suicide or cause grave injury. In practice, some sexual harassment or forced sex has been charged under 498A as “cruelty,” but the statute is primarily intended for dowry-related torture and non-sexual harassment. It is a weak surrogate because it has no definition of consent, no specific evidentiary standard for sexual conduct, and no minimum severity threshold. Merely classifying forced sex as “cruelty” under 498A would reach only extreme cases, whereas every act of marital rape would evade penal sanction unless explicitly recognized as rape.

The Protection of Women from Domestic Violence Act, 2005

The Domestic Violence Act provides civil remedies and protection orders to women “in a domestic relationship” (which includes marriage). Crucially, Section 3 defines “sexual abuse” to include “forceful sexual intercourse and other forceful acts of sexual nature”. Thus marital rape is explicitly recognized as a form of domestic violence. However, the Act does not prescribe criminal punishment; it allows the aggrieved wife to seek injunctions, alternate accommodation, maintenance, and compensation. While valuable for protection and support, the DV Act cannot punish offenders or register a criminal record. In parliamentary debates, officials have pointed to Sec.3 as evidence that victims have some remedy, but courts have

noted it is inadequate as a substitute for criminal law. The DV Act statutes underscore the State's commitment to women's safety but also highlight the legal gap that still lets marital rapists go unpunished.

CONSTITUTIONAL AND RIGHTS ANALYSIS

The marital rape exception raises acute questions under the Constitution of India.

Article 14 (Equality before law): The exception creates a classification based solely on marital status. Unmarried women and minors are fully protected by Section 375; married adult women (18+) have less protection. This is clearly unequal treatment. As the Harvard HRJ article notes, such classification bears no rational nexus to the law's objective (protecting bodily integrity). In *Budhan Choudhary v. State of Bihar* (1962) and *Anwar Ali Sarkar v. State of W.B.* (1952), the Court insisted that classifications must have a rational basis. Here, there is none—rape in marriage inflicts the same harm as rape outside marriage, so exempting husbands defeats the statute's purpose entirely. The Delhi High Court in *RIT Foundation v. Union of India* (2022) held that the marital exemption is “manifestly unjust” and violates Article 14. Likewise, the 2018 Karnataka HC (*Sahoo v. Karnataka*, by Nagaprasanna J.) struck down Section 376B (rape on judicial separation), implicitly recognizing the equality argument (though that was separated sex).

Article 15(3)/51A(e) (Positive obligations against discrimination): India is a signatory to CEDAW (Convention on Elimination of Discrimination against Women, 1981). CEDAW's Committee has explicitly recommended criminalizing marital rape. Article 15(3) allows the State to make special provisions for women's advancement. Yet keeping the exception serves only to entrench gender inequality. The UN Human Rights Committee and CEDAW have found that marital rape laws are measures needed to ensure women's equality and dignity. India's continuing exemption is therefore contrary to its international commitment to eliminate discrimination under CEDAW (Art. 1, 2, 5).

Article 21 (Right to life and personal liberty): Article 21's guarantee of life and liberty has been expansively interpreted to include “the right to live with human dignity” (*Francis Coralie v. Delhi*, 1981) and to privacy and bodily integrity (*Puttaswamy v. Union of India*, 2017). The right to privacy includes autonomy over one's body and intimate decisions. In *Puttaswamy* the Court explicitly recognized “bodily autonomy” as a facet of privacy and dignity. Similarly,

Suchita Srivastava v. Chandigarh (2009) held that reproductive choices fall within “life and personal liberty.” By parity, sexual autonomy within marriage is protected. Forcing a wife to have sex against her will violates her right to personal liberty, dignity, and privacy under Article 21. The constitutional harm is aggravated by the State’s abdication: the law implicitly tells married women they have no choice about sex and must submit. In *Joseph Shine v. Union of India* (2019), the Supreme Court recognized sexual autonomy and equality in marriage by striking down the adultery law, holding that marriage cannot justify an intrusion on individual liberty. The rationale logically extends to the marital rape exception: marriage alone cannot vitiate consent.

As the Gujarat High Court noted in *Nimeshbhai Desai* (2018), “the law must uphold the bodily autonomy of all women, irrespective of their marital status”. The Verma Committee report (2013) likewise declared that sexual assault within marriage violates Article 21’s guarantee of dignity and life. Judicial pronouncements repeatedly affirm that the private sphere is not above the law, especially when fundamental rights are at stake.

Procedural aspects: The marital exemption also runs afoul of Article 20(1) (no ex-post facto punishment), but as the Delhi HC observed, striking down the exception does not create a “new” offence; it merely extends existing rape provisions prospectively. No Article 20 violation arises from prospective application.

LANDMARK CASE LAW

Independent Thought v. Union of India (2017) 10 SCC 800: The Supreme Court held that Exception 2 is unconstitutional insofar as it applies to girls aged 15–18 (married minor wives). It raised the marital age of consent to 18 by reading down Exception 2. The Court reasoned that Parliament has already set 18 as the minimum age for all women to consent to sexual intercourse (POCSO, marriage law). Thus to interpret an “exception” treating marital rape of a 16-year-old wife as lawful would create an absurd conflict of laws, undermining Article 21. *Independent Thought* intentionally “cautiously said that it was the job of Parliament” to criminalize adult marital rape, but it emphatically rejected the perpetuation of marital exemption for minors. This case demonstrates the Supreme Court’s awareness of the issue and its willingness to invalidate parts of the exception.

Suchita Srivastava v. Chandigarh Administration (2009) 9 SCC 1: The Supreme Court,

upholding a woman's right to terminate pregnancy, proclaimed a right to "decide if, when and how often" to bear children. The Court implicitly recognized a married woman's autonomy over her body and procreative rights as part of life and liberty. The logic supports treating nonconsensual sex as assault regardless of marriage.

Joseph Shine v. Union of India (2019) 3 SCC 39: The Court struck down Section 497 IPC (adultery) as violative of Articles 14 and 21, remarking that marriage cannot curtail sexual autonomy. It explicitly repudiated the notion that marriage means ownership of spouse's body. Shine's emphasis on equality and liberty strengthens the case against any marital immunity for rape.

NAZ Foundation v. Govt. of NCT Delhi (2009) 160 DLT 277: Though primarily an LGBTQ case, it recognized that consent and privacy are inviolable even between married persons. (Not directly on marital rape, but respect for consensual sex in marriage is implied.)

R v R [1991] UKHL 12 (House of Lords): This landmark UK case abolished the marital rape exemption in England & Wales. The defendant was convicted of raping his wife; he appealed citing the common law rule (*Hale*). The Law Lords unanimously rejected it, with Lord Lane saying: "The idea that a wife consents in advance to her husband having sexual intercourse with her... is no longer acceptable." This pronouncement dismantled the centuries-old fiction. *R v R* is often cited as the template for modernizing rape laws, showing that "marriage is no defence to rape".

Attorney General v. McGrath (Can., 1998) and *R. v. Leblanc* (Can., 1998): The Supreme Court of Canada held that consent must be present for every sexual encounter, even in marriage. Canada's Criminal Code explicitly eliminated spousal immunity in 1983. Section 278 stipulates that a spouse can be charged with sexual assault, and courts have consistently enforced this (though attempts to claim "implied consent" have been quashed).

People v. Liberta, 474 N.Y. 419 (1984): A New York Court of Appeals decision striking down the spousal rape exemption in state law. Judge Wachtler famously held that a "marriage license should not be viewed as a license for a husband to forcibly rape his wife with impunity". *Liberta* paved the way for many US states to change their laws, culminating in uniform abolition by 1993.

INTERNATIONAL LAW OBLIGATIONS

India's international commitments further undermine the justification for the exemption. Under CEDAW (ratified 1993), Articles 1 and 2 require elimination of discrimination and protection against gender-based violence. The UN Committee on CEDAW has repeatedly criticized India for not criminalizing marital rape. The 1993 UN Declaration on the Elimination of Violence Against Women defines VAW to include acts in private life (Article 4). More recently, UN Special Rapporteurs have urged criminalization as a matter of States' human rights obligations. Under Article 51(c) of our Constitution, international law norms should inform interpretation of fundamental rights.

Regional human rights law is also relevant: In *Rantsev v. Cyprus and Russia* (ECtHR 2010), though on trafficking, the Court held that Article 4 (prohibition of servitude) of ECHR implied a duty to criminalize rape within marriage. The evolving global consensus is that marital rape is a violation of human dignity and equality. While not directly enforceable, these norms add moral and jurisprudential weight to the call for reform.

SOCIO-LEGAL AND EMPIRICAL CONTEXT

Sexual violence within marriage is vastly underreported. Official NCRB statistics do not track it (since it isn't crime), but studies suggest the problem is widespread. An Indian study notes that underreporting affects virtually all forms of VAW in India. Surveys have found that while formally 33,000+ rapes were reported in 2013 (5.7 per 100,000 women), social science estimates suggest actual incidents may be orders of magnitude higher. The report cites ranges (1 in 10 to 1 in 200 rapes reported), implying millions of cases go unreported. Domestic violence is known to be prevalent: in 2013, 95% of reported rape victims were assaulted by someone known to them (often husbands or relatives).

Qualitative studies indicate that many married women are coerced into sex by husbands; family and cultural pressures silence them. The stigma of "airing dirty laundry" and the sanctity of marriage often prevent women from complaining. When exceptions are already legally recognized (custody, religion, etc.), marriage becomes a shield for sexual violence. Without criminalization, marital rape largely exists as a "private" violence invisible in law enforcement.

The psychological and societal impact is profound. As noted by UK experts, marital rape is

often part of a cycle of domestic abuse and can signal escalation to femicide. Victims suffer severe trauma – physical injury, depression, suicidal ideation – yet lack access to criminal justice remedies. This harms not only the individual women but also public health and social welfare goals.

Existing remedies: Some victims resort to charging their husbands under 498A (cruelty) or use the DV Act, but these require burden of proof (e.g. documentary evidence, testimonies) and rarely result in conviction for sexual violence. Medical examiners may be reluctant to label injuries as rape if “marital privilege” is assumed. The perception that a wife “must obey her husband” still persists in many communities, as even legislators have commented. This entrenches violence as a norm.

In sum, marital rape is a pervasive but invisible crime in India. Its recognition is urgently needed not only as a matter of law but for effective social change. Lack of data is an obstacle; one can only state that underreporting is “huge” and essentially unspecified, but numerous reports confirm the gulf between lived reality and formal recognition.

POLICY RECOMMENDATIONS

Beyond legal amendment, a multi-pronged approach is needed:

1. **Police Training:** Law enforcement personnel often dismiss marital rape complaints. Training must emphasize that refusal of consent is always rape. Special protocols (like those for rape and DV cases) should be developed. A “women’s protection cell” (like Bombay HC suggested) could focus on marital abuse cases.
2. **Judiciary Awareness:** Judges should be sensitized, as seen by wrongful acquittals when courts refuse to convict husbands. Judicial training and directives could be issued, possibly by Supreme Court guidelines (as was done for dowry/honor killing trials) to ensure marital rape is taken seriously.
3. **Victim Services:** Strengthen support systems: crisis centers, helplines, counseling, safe homes and economic assistance. For example, government schemes could offer insurance or maintenance for women who leave abusive marriages.
4. **Awareness Campaigns:** Public sensitization through media, educational curricula, and

community programs that emphasize consent in marriage. This must counter the myth “wife’s duty” and highlight legal equality. In particular, rural outreach is crucial, given most petitioners are from urban middle classes while much abuse occurs in villages.

5. Data Collection: Government and NGOs should commission surveys on marital rape incidence and help-seeking, to create a reliable statistical basis for policy. NCRB could consider an additional category (e.g., “rape by known person: spouse”) if legalized, to track the issue.

6. Inter-Agency Coordination: The DV Act machinery (Protection Officers, MDWs) could be integrated with criminal justice actors so that when a woman files a domestic violence complaint involving forced sex, simultaneous criminal investigation is triggered.

7. Legal Aid: Expand legal aid specifically for VAW cases to ensure access. Many women give up because they fear legal costs or lack knowledge of rights.

In essence, criminalization should be accompanied by institutional reforms so that married women actually get access to justice.

CONCLUSION

Marriage is a sacred bond, but never a license for abuse. The current Indian law’s refusal to punish marital rape is anachronistic and unjust. It stands in stark contrast to India’s constitutional values and its own strides in gender justice. Every day, countless women suffer sexual violence at home with no legal remedy. This violates not only their fundamental rights to equality, life, and dignity but also India’s obligations under international human rights law.

This paper has argued that the marital rape exception should be repealed. We have traced its history, analyzed laws and cases, and seen how courts both uphold and critique the exemption. Comparative law shows that India is far behind most jurisdictions in protecting wives. Practical counter-arguments do not withstand scrutiny: legitimate concerns about misuse or marital harmony cannot justify sanctioning what amounts to rape.

The way forward is clear: criminalize marital rape. Parliament should strike down Exception 2 to Section 375, or re-enact marital rape as an explicit offence with appropriate consent standards. The legislative draft provided herein offers one blueprint. In addition, state

institutions must adapt – police, courts, and society must recognise that a wife’s consent matters as much as an unmarried woman’s. Only then can we close this grave gap in India’s legal regime. Removing the exemption is a necessary step in affirming that all women, married or not, have equal claim to bodily autonomy and justice.