

**INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES**
[ISSN 2581-5369]

Volume 3 | Issue 4

2020

© 2020 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com>)

This Article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in International Journal of Law Management & Humanities after due review.

In case of **any suggestion or complaint**, please contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication at **International Journal of Law Management & Humanities**, kindly email your Manuscript at editor.ijlmh@gmail.com.

Criminalisation of Marital Rape in India - A Boon or A Bane

ATISHYA GHOSH¹

ABSTRACT

Violence in the form of marital rape is the worst kind of torture that a woman goes through during her lifetime. Even after 160 years since the genesis of the Indian Penal Code, there has been absolutely no recognition of sexual offences prevailing under the garb of marriage. In India, husbands consider their wives as their property and in the pretext of marriage overlook the concept of sexual autonomy. Over the past decades, it has become a pressing need to criminalize the offence of marital rape and make women of every Indian household realize the gravity of succumbing to their husbands and resigning to their fate to protect the institution of marriage.

Every woman deserves equal protection under the law and has the right to life and personal liberty as laid down under Article 14 & 21 of the Indian Constitution. Therefore, the government should come out of the shackles of patriarchy and should take due cognizance of the voice of the citizenry. In light of this, this article enumerates the need to criminalize marital rape by carefully analyzing the approach of the judiciary and the reasons for the delay in recognizing it as an offence. In the 21st century, it has become essential for the government to make strict laws to empower women after marriage and uphold the principles of freedom and equality.

Keywords: *violence, marital rape, marriage, sexual autonomy, personal liberty, equality.*

I. INTRODUCTION

Marital Rape or *spousal rape* is an act of sexual intercourse with one's spouse without the *consent* of the spouse either with force or with the threat of force or physical violence. It's 2020 and India remains one of the 36 countries where it is not a crime to rape a woman – as long as they are legally married.² This is not only due to the outdated Indian Penal Code dating back to the Victorian era, the religious customs and India's patriarchal society which has time and again suppressed the voices of women treating them inferior to men but also the obstinate nature of the Union Government which does not feel the need to interfere in the private sphere

¹ Author is a student at University of Petroleum and Energy Studies (UPES), Dehradun, India.

²Pallavi Prasad, *Why It's Still Legal for Indian Men to Rape Their Wives*, THE SWADDLE (Jan 20, 2020) <https://theswaddle.com/marital-rape-india-decriminalized-crime/>

of marriage.

Section 375 of the Indian Penal Code criminalizes the offence of rape and states that a man is said to commit rape when he has sexual intercourse with a woman against her will or without her consent. However, in **Exception 2**, it states that *the sexual intercourse by a man with his wife, the wife not being under fifteen years of age, is not rape*.³ This exception indicates the presumption of *implied consent* of a woman to have sexual intercourse with her husband. Correspondingly, the judiciary has managed to recognize the plight of the *minor* wives but there has been no judicial sympathy for the *major* wives till date. Even though India harps on the concept of equity it has still not acknowledged the right of a woman to control marital intercourse as a component of equality.

II. HISTORY OF MARITAL RAPE: A NON-CRIMINALIZED CRIME IN INDIA

Since times immemorial societies have been overlooking the sexual autonomy of women and have been accepting marriage as a ‘*license to rape*’ a woman. Indian laws still date back to the 1700s, where Sir Mathew Hale, Chief Justice in 17th century, England had declared that:

‘the husband cannot be guilty of rape committed by himself upon his lawful wife, for mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract’.⁴

This established that engaging in sexual intercourse was a woman’s duty within a marriage and that her body is considered as her husband’s property. The Supreme Court and High Court have repeatedly received writ petitions from individuals challenging the marital rape exception but it has been of no avail.

The **42nd Law Commission Report**, introduced the concept of marital rape based on the absence of consent when husband and wife are living apart under a decree of judicial separation or by mutual consent, to a limited extent.⁵ Likewise, the Law Commission directly faced the validity of the exception clause of §375 in the **172nd Law Commission Report**.⁶ It was further stated that when other instances of violence by a husband towards his wife was criminalized, there was no reason for rape to be excluded from the operation of law.⁷ The Law Commission rejected this argument stating that criminalization of marital rape would lead to “excessive

³ The Indian Penal Code, 1860, §375 as amended by the Criminal Law Amendment Act, 2013

⁴ *Supra*, note 1

⁵ Shivika Choudhary, *Marital Rape: An Evaluation of the Patriarchal Injustice in the Criminal Law (Amendment) Act, 2013*, 3, CHRIST UNIVERSITY LAW JOURNAL 98,103(2014)

⁶ LAW COMMISSION OF INDIA, *Review of Rape Laws*, Report No. 172 (March 2000), available at <http://www.lawcommissionofindia.nic.in/rapelaws.htm> (last visited on 20th June, 2020).

⁷ *Id.*, ¶3.3.

interference with the institution of marriage”.⁸ In light of this, **The Criminal Law Amendment Bill of 2012** replaced the word ‘rape’ with ‘sexual assault’ to widen the scope but the Bill still did not carry any provision for marital rape.⁹ Many recommendations were given but a major argument was that sufficient remedies already existed in criminal law, through the concept of cruelty as under § 498 A of the IPC.¹⁰

Not only the legislature but also the judiciary have conveniently avoided taking a stand on the constitutionality of the exception clause. Although there has been no case that explicitly upholds the constitutionality of the same, there have been instances where the court has overlooked such questions. In one such case, Gujarat High Court condemned marital rape and termed it as a ‘disgraceful offence’ but refused to acknowledge the offence and criminalize it.¹¹

III. CRIMINALISATION OF MARITAL RAPE: CLAIMS & COUNTERS

Various arguments have been advanced against the criminalization of marital rape but no one has ever given a clear answer regarding the entitlement of a man having sexual intercourse with his wife without her consent. The first is that it is against the Indian culture and will destroy the sanctity of marriage indicating that marriage is an escape for men to rape their wives. Thus, authorizing men to take away the sexual autonomy of women. Forcing the woman to indulge in sexual intercourse itself destroys the institution of marriage. The government refuses to take any action arguing that majority of marriages might fall apart as women would like to end the sexual violence by taking a legal recourse. At this point it becomes significant to ask: by placing so much value on marriages and family, pushing it for status quo, whose rights is the government protecting the husbands raping or the wives being raped?¹²

Secondly, India is a largely illiterate country where women enter into marriage while not being fully cognizant of their sexuality, hence any move towards intimacy by the husband could be construed as an absence of consent but this has an escapist approach. By educating the people on sexual offences, we will be able to spread awareness. We do not need high levels of literacy or educational degrees to respect each other’s autonomy.

Thirdly, women will misuse any law against marital rape to falsely accuse their husbands just like the laws made on Domestic Violence and Dowry Prohibition. This argument is faulty in

⁸ *Id.*, ¶3.1.2.1

⁹ The Criminal Law Amendment Bill, 130 of 2012

¹⁰ *See*, The Indian Penal Code, 1860, §498A

¹¹ Deya Bhattacharya, ‘Marital Rape a Disgraceful Offence’: Gujarat HC’s Ruling Progressive, But Mere Condemnation of Practice Rings Hollow, FIRSTPOST (India) (Nov 9, 2017)

<https://www.firstpost.com/india/marital-rape-a-disgraceful-offence-gujarat-hcs-ruling-progressive-but-mere-condemnation-of-practice-rings-hollow-4200773.html>

¹² *Supra*, note 1

the sense that women in India are uneducated even to use the law made for their protection let alone misusing the law. Moreover, it lies in the hands of the judiciary to weed out the false cases and dismiss them an appropriate penalty.

Lastly, there is no lasting evidence of marital rape. This clearly assumes that medical evidence is essential to prove the offence. The essence of rape is a lack of consent hence the testimony of the victim should be relied upon. The law itself states that the absence of signs of resistance does not imply consent. Hence, cases of marital rape are no different from other acquaintance rape cases, which form the majority of reported rape cases.¹³

IV. CONSTITUTION OF INDIA VIS-A-VIS MARITAL RAPE EXEMPTION

Marital rape is a violation of fundamental rights of a woman under Article 14 and 21 of the Indian Constitution. Even the **United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)**, of which India is a signatory, viewed that this sort of discrimination against women violates the principles of equality and respect for human dignity.¹⁴

Article 14 ensures that “The State shall not deny to any person equality before the law or the equal protection of laws within the territory of India.”¹⁵ Exception 2 violates the right to equality mentioned in Article 14 as it discriminates against married women by denying them equal protection from rape and sexual harassment thus withdrawing the protection given by § 375 of IPC. In *State of Bengal v Anwar Ali Sarkar*¹⁶, Supreme Court held that any classification under Article 14 is subject to the reasonableness test that can be passed only if the classification has some rational nexus to the objective that the act seeks to achieve.¹⁷ Exception 2 frustrates the purpose of § 375 by exempting husbands from punishment which is entirely contradictory to the objective.¹⁸ Thus, no rational nexus can be deciphered. The classification is unnecessary, irrational and is not based on an intelligible differentia violating the mandate of Article 14.

Exception 2 also violates **Article 21** of the Indian Constitution that enshrines the right to life

¹³ Mrinal Satish, *The Government Has Refused to Criminalise Marital Rape for All the Wrong Reasons*, THEPRINT (6 Sept, 2017) <https://theprint.in/opinion/marital-rape-wrong-reasons/9139/>

¹⁴ Aishwarya Mishra, *India: Law on Marital Rape – A Much Needed Reform in Our Legal System*, MONDAQ (13 April, 2018) <https://www.mondaq.com/india/crime/691482/law-on-marital-rape-a-much-needed-reform-in-our-legal-system>

¹⁵ INDIAN CONST. art 14

¹⁶ AIR 1952 SC 75

¹⁷ Sarthak Makkar, *Marital Rape: A Non-Criminalized Crime in India*, HARVARD HUMAN RIGHTS JOURNAL (Jan 1, 2019) <https://harvardhrj.com/2019/01/marital-rape-a-non-criminalized-crime-in-india/>

¹⁸ *Id*

and personal liberty.¹⁹ In various judgements, the Supreme Court has held that the rights enshrined in Article 21 include the rights to health, privacy, dignity, safe living conditions among others.²⁰ In *Suchita Srivastava v Chandigarh Administration*, Supreme Court equated the right to make choices related to sexual activity with rights to personal liberty, privacy, dignity and bodily integrity under Article 21 of the Indian Constitution.²¹ Likewise, in *Justice K.S Puttuswamy (Retd.) v Union of India*, right to privacy was recognized as a fundamental right which included the ability to make decisions related to intimate relations.²² Thus, the marital rape exemption violates a married woman's right to privacy, human dignity and good health by forcing her for sexual intercourse making the law unconstitutional.

V. CONCLUSION

In a country like India, where the vices of patriarchy and misogyny prevail, removing the marital rape exception will be a major step for the empowerment of married women. It is essential to recognize that there is a major lacuna at present that defeats the constitutional provisions which are otherwise supposed to safeguard the autonomy and dignity of women. Thus, the marital rape exception should be eliminated and a separate law of '**sexual conduct after marriage**' should be implemented.

To establish equality for women, the judiciary has to interfere in marital relationships keeping aside the stereotypes of irrevocable consent and social customs. Let's not romanticize marriage to the extent of overlooking such grave concerns. In the era of legal reforms and revolutions, criminalization of marital rape is the need of the hour. In the words of **Justice Leila Seth**, "*We have the right to equality and if you teach people the right to equality and you teach people that you don't extinguish legal or sexual autonomy of a woman after marriage then things will change.*"

¹⁹INDIAN CONST. art 21

²⁰ *Supra*, note 16

²¹ (2008), 14 SCR 989

²² AIR 2017 SC 4161