

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 4

2023

© 2023 *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 the International Journal of Law Management & Humanities after due review.

In case of **any suggestions or complaints**, kindly contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication in the **International Journal of Law Management & Humanities**, kindly email your Manuscript to submission@ijlmh.com.

Marital Rape Law in India: The Need for Social and Legislative Reform

MAHIMA JAIN¹

ABSTRACT

This paper aims to examine the gap in marital rape law in the Indian legislature. Under Section 375 of the Indian Penal Code 1860, any kind of sexual act by a man on a woman against her free will or consent would constitute rape. However, as an exception to this, it is also mentioned that sexual intercourse or sexual acts by a man with his own wife when the wife is above 18 years of age would not constitute rape.

This paper examines the invalidity of this exception in totality as per the norms of present day feminism and legislature as it violates a married woman's fundamental right to equality, the right to life with dignity and the right to self-expression. Moreover, the fact that husbands can be penally charged for other lesser crimes against their wives with the exception of rape creates an anomaly that needs to be addressed to safeguard fairness, justice and basic human rights.

Despite many horrifying instances of marital rape in judicial history, the offence of marital rape continues to hide under legal ambiguity. This breeds a culture of silence, tolerance, and violence behind closed doors as the social construct of 'marriage' conveniently continues to serve as a licence for the same.

Keywords: Marital Rape, India, Legislative Reform.

I. INTRODUCTION

The Indian Penal Code, 1860 under section 375 criminalises the offence of rape in an expansive definition which includes both sexual intercourse as well as other forms of non-consensual sexual activity. However, the exception clause 2 of section 375 excludes sexual activity between a husband and wife from the purview of this section, irrefutably insinuating the existence of presumed consent when the victim and the perpetrator are married. The evolution of the marital rape law in India since the inception of the IPC in 1860 has been inconsistent and fluctuating, occasionally gaining momentum in the wake of violent sexual crimes committed against women and the ensuing public uproar.

After the Supreme Court's judgement in the highly controversial *Mathura* gang-rape case²

¹ Author is a student at O.P. Jindal Global University, India.

² *Tukaram v. State of Maharashtra*, 1979 AIR 185.

wherein the character and morals of the victim were questioned, there were widespread protests which resulted in the enactment of the 1983 Criminal Law Amendment Act that added several important provisions to section 375. One of these was the criminalisation of a specific form of marital rape i.e. non-consensual sexual intercourse when the wife and husband are living separately on account of judicial separation or otherwise.³ The addition of this section was a clear indicator of presumed implicit consent in the case of a husband and wife living together and despite considerable expansion being brought in the rape laws of the Country through this amendment, it still failed to recognize marital rape outside the context of separation.

In 2000, the validity of the marital rape exception (MRE) was questioned directly in the consultation for the 172nd Law Commission Report where it was argued that if other acts of violence by a man towards his wife were recognised under the law, then there is no reason for marital rape to be sheltered from it.⁴ This reasoning, however, was rejected by the Law Commission on grounds of preserving the sanctity of the institution of marriage.

The second stage of development of rape laws came in the aftermath of the horrifying *Nirbhaya* gang-rape case.⁵ In light of widespread protests, former CJI Justice J.S. Verma formed a committee seeking to reinforce the Indian law against rape and sexual assault. One of the primary suggestions in the committee's report was the criminalisation of marital rape.⁶ It suggested that the exception clause must be repealed and the law must reiterate the fact that a marital relationship is not a valid or acceptable defence for the accused while establishing the existence of consent. In the Criminal Law Amendment Act, 2013, many changes were made to Section 375 which were necessary and substantive, for instance - the word 'rape' was replaced with 'sexual assault' in an attempt to widen its scope and include other forms of violation within its ambit. However, the Act did not consider the suggestions made in the J.S. Verma Report and failed to criminalise marital rape.

The only respite that has been granted in recent times in this regard is the Supreme Court's decision in *Independent Thought v. Union of India*⁷ where exception 2 of section 375 was altered to read that the exception would not apply to girls under 18 years of age in order to safeguard the modesty of child brides.⁸

³ The Indian Penal Code, 1860, §376B.

⁴ Law Commission of India, *Review of Rape Laws*, Report No. 172 (March 2000).

⁵ Mukesh and Anr. v. State (NCT of Delhi), (2017) 6 SCC 1.

⁶ Justice J.S. Verma Committee, *Report of Committee on Amendments to Criminal Law* (January 23, 2013).

⁷ *Independent Thought v. Union of India* (2017) 382 SCC.

⁸ Krina Patel, *The Gap in Marital Rape Law in India: Advocating for Criminalization and Social Change* (2019) 42(5) Fordham International Law Journal 1518.

II. WHY THE MRE NEEDS TO BE REPEALED

(A) Theoretical Foundation of MRE is Archaic and Out-Dated

The basis for continuing to distinguish between marital rape from other forms of rape can be traced to common law traditions. Early British jurists believed in the exemption of marital rape from the criminalization as rape. Most of their theories were dependent on the concept of ‘implied consent’ which stems from the idea that marriage is equivalent to a social contract in which the woman enters by agreeing to give up her autonomy in exchange for protection and general well-being guaranteed by the husband. According to this construct, the prerequisite of marriage is the woman giving her consent for sexual intercourse to the husband and this consent, once given, is irrevocable.⁹

If this idea of marriage being a ‘social contract’ is to be believed, it would mean that marriage is essentially a barter transaction in which the husband pays maintenance to the wife in exchange for sexual satisfaction. By way of this transaction, women’s sexuality is reduced to nothing but goods or ‘chattel’ and this reinforces the doctrine of coverture, an archaic belief that a husband and wife merge their identities upon marriage and become ipso facto one individual in the eyes of law. In this, the identity of the wife is believed to be consumed by that of the husband and she is viewed as ‘chattel’ always in need of protection, lacking any measure of autonomy.

This whole basis of viewing marriage as a ‘social contract’ and women as ‘chattel’ completely negates gender equality in the concept of marriage and instead, promotes gender discrimination by reducing the individual identity of the woman to nothing. It even goes against the views of the judiciary as the Supreme Court itself has recognized marriage as an association between two independent equals and held that on account of marriage, women are not converted into property, whose sexuality could be controlled by their husbands.¹⁰

(B) Violation of Fundamental Rights

The marital rape exception is in violation of the constitutionally guaranteed fundamental rights under Articles 14 and 21.

Articles 14 safeguards every citizen’s right to equality before law as well as equal protection of law. Applying the test for reasonable classification under Article 14, the law must clearly distinguish between the groups classified on an intelligible basis, and such a classification must

⁹ Raveena Rao Kallakuru & Pradyumna Soni, *Criminalisation of Marital Rape in India: Understanding its Constitutional, Cultural and Legal Impact* (2018) 11 NUJS Law Review 121.

¹⁰ *Independent Thought v. Union of India* (2017) 10 SCC 800, at 73; *Joseph Shine v. Union of India* (2019) 3 SCC 39 at 103.

have a rational correlation or nexus with the object sought to be achieved by the law.¹¹ In case of the MRE, it is evident that the provision classifies ‘married women above the age of 18’ as a separate group whose rights are reasonably restricted as compared to unmarried women. This classification has no rational basis as the object of rape laws is to punish the perpetrators of such a heinous crime, regardless of their relationship to the victim and thus, this provision is constitutionally violative of Article 14.

Article 21 guarantees the right to life and personal liberty and within it is incumbent the right to live with human dignity.¹² In *Bodhisattwa Gautam*, the Court held that the act of rape destroys the entire psychology of a woman and pushes her into a state of severe emotional and mental crisis and called ‘rape’ an act of aggression aimed at degrading and humiliating women.¹³ With this description in mind, it is plain to see that when a woman who is coerced into have sexual intercourse, it is bound to have a severe impact on her quality of life and general well-being, regardless of whether the perpetrator was a stranger or a spouse, owing to the lack of sexual choice and bodily autonomy. Clearly, the MRE is in violation of Article 21.

(C) Misuse of the Public-Private Dichotomy

It is not uncommon to come across the argument of privacy and reinforcement of the public-private divide while justifying the MRE. It is argued that the sanctity of the marital bond, more specifically the physical relationship, is an important part of the right to privacy and the State ought not to interfere in the private sphere. In this regard, the right to privacy is seen to safeguard a particular space i.e. the private sphere. However, according to the proper interpretation of the right to privacy, it seeks to protect the inherently personal zone of an individual. Denial of a right to privacy has no correlation with where the violation took place, instead it involves trespassing into an individual’s personal space and denying them their right to self-expression.¹⁴

Using the public-private divide in justifying the MRE essentially implies that sexual harassment is considered unlawful only in the context of public places like markets, offices etc. and harassment taking place within the family would continue to be shielded from any provision deeming it ‘unlawful’. According to modern feminism, affirmative action against sexual harassment needs to be taken, regardless of the place it took place in and the relationship of the victim with the perpetrator. By using this dichotomy, the right to privacy is essentially being

¹¹ State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75 at 55.

¹² The Chairman, Railway Board v. Chandrima Das, (2000) SCC 988.

¹³ Shri Bodhisattwa Gautam v. Subhra Chakraborty, 1996 AIR 922 at 10.

¹⁴ Agnidipto Tarafder & Adrija Ghosh, *The Unconstitutionality of the Marital Rape Exemption in India* (2020) 3(2) University of Oxford Human Rights Hub Journal 202.

manipulated to only protect the rights of one against the other.

Moreover, even in the context of the private sphere, there are many legislations and existing jurisprudence that venture into this sphere to protect the rights of individuals. For instance- laws against domestic violence and cruelty, laws relating to succession and inheritance etc. Similarly, sexual activities by consenting adults are often subjected to unnecessary policing by the State and many laws regulating abortion also violate this fictitious 'private sphere' of a woman. If the State can assume authority to enter the private sphere of individuals for the aforementioned reasons, protection from an act as horrifying as marital rape should certainly fall within the gambit as well.

III. MODEL FOR CRIMINALISING MARITAL RAPE

The J.S Verma Committee Report was the closest that the Indian Judiciary came to criminalising marital rape in recent times.¹⁵ In the report, the Committee recommended four measures to be taken to effectuate the same- (i) removal of the exemption clause; (ii) the law must specify that the relationship of marriage is not a defence; (iii) marriage should not entail a presumption of consent; and (iv) quantum of punishment for the offence should be the same as specified.

Clearly, removal of the exceptional clause is not enough. Mentioning the fact that marriage is not a defence to rape is important so as to ensure that the judiciary does not operate on a different framework for marital rape cases. In suggesting that one mustn't presume consent in a marital relationship, it is also equally important to delegate the burden of proving the absence/presence of consent accordingly. If consent is presumed to be present and the burden of proof lies upon the victim to prove otherwise, it will be extremely difficult to collect substantial evidence owing to the private nature of the crime. However, if consent is presumed to absent and the wife testifies in court that she was raped, the presumption of lack of consent will act against the accused.¹⁶

Due to the nature of the crime, it would not be fair to consider proof of sexual intercourse as incriminating evidence due to the implicit assumption that a married couple must have engaged in sexual activity at some point. In most cases, the only evidence would be the victim's testimony, in which case it falls upon the Court to look for other forms of corroborative evidence. For instance - the temperament and habits of the accused, etc. Although, this is not substantive evidence as per the Indian Evidence Act, in cases as delicate as that of marital rape, such considerations may help the Court in attaining a holistic view of the situation. Therefore,

¹⁵ JUSTICE J.S. VERMA COMMITTEE, *supra*, note 6.

¹⁶ The Indian Evidence Act 1872, §114A.

certain amendments need to be made in the IEA with regards to marital rape proceedings.

The sentencing policy in cases of marital rape too, should follow the provisions of Section 376 i.i. 7 years to life imprisonment. The clause providing for lesser sentence in case the accused is the husband¹⁷ clearly violates the right to equality under Article 14 by providing different sentences for the same crime on the basis of the relationship of the victim and the accused. In this vein, Section 376B of the IPC must also be repealed to ensure fairness in the justice system and equal treatment of criminals in the eyes of law.

In addition to all this, it is also equally important to ensure gender-sensitisation of the police and the judiciary so that women can feel safe while reporting sexual violation in the marital space and testifying in court for the same, without feeling a sense of the impending social stigma attached to rape victims and women who are separated from their husbands.

¹⁷ The Indian Penal Code 1860, §376B.