

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 3

2021

© 2021 *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 submission@ijlmh.com.

Marital Rape in India: Current Legal Framework and the Need for Criminalising It

NEHA NAVANEETH¹

ABSTRACT

In India, the concept of marriage is a sacred social institution in which sexual intercourse between a husband and wife is legal. But this sacred institution has also become a dangerous permit to rape. Rape is a heinous offence committed against women that violates her integrity and self-respect; and reduces them to a nothing but an object used for sexual gratification. Marital rape is the most common and repulsive type of masochism that exists in the Indian society which is hidden perfectly under the façade of a perfect marriage. Regardless of the legal meaning attributed to the term “marital rape”, it can be defined as any unwanted sexual intercourse or penetration that is brought about through the means of force, threat of force or when the wife is unable to consent. Yet, the law makers of the country are hesitant to remove the exemption under Section 375 because of the backlash they may face from the conservative section of the society while giving no regard to the cruelty inflicted upon women who suffer without recourse in law.

Through this paper, the researcher aims to compare the laws relating to marital rape in the India with that of other countries and argue that the continuance of the marital rape exemption under Section 375 of IPC is a violation of fundamental rights and therefore, is unconstitutional and struck down as noted by the Verma Committee recommendations. The data for the research was collected from secondary sources in the form of books, governmental websites and academic journals.

Keywords: *Marital Rape, Section 375, Fundamental rights, Unconstitutional, Verma Committee.*

I. INTRODUCTION

Marital rape is a very serious problem as the women are subjected to the physical violence and psychological trauma of being raped by the same person who vowed to love and honour his spouse. The origin of the definition of rape can be traced back to the sixteenth century when the Chief Justice of England, Sir Mathew Hale stated that, “a husband cannot be guilty of rape

¹ Author is a student at CHRIST deemed to be University, India.

committed by himself upon his lawful wife”² This established the common law definition of rape which was defined as “the unlawful sexual intercourse committed by a man with a woman who is not his wife, through force and against her will.”³ Rape against women was not treated as a crime against women, but instead a violation of the man’s property. This situation made it extremely hard for the women in the society to voice their concerns as they were treated as chattels to be sold; especially in a domestic setting where the perpetrator is the husband himself. Even in the 21st century where we believe the world has progressed, in India, a major chunk of the society cannot comprehend the view that a man could rape his wife as men are supposed to be reckoned as the protectors of women.

As of November 2020, only thirty- six countries in the world have not criminalized marital rape and India is one of them⁴. After the brutal gang rape⁵ of a 23 year old medical student in a moving bus in Delhi, that sparked massive nationwide protests in 2012, the legislators constituted a committee called the Verma Committee to recommend amendments that could be made to the Criminal Law of India so as to provide for faster trials and harsher punishments for the criminals accused of committing sexual assault against women. The Verma Committee submitted its detailed report on January 23rd, 2013. It said that “any non- consensual penetration of sexual nature is to be included in the definition of rape”⁶. The committee also pointed out that the I.P.C distinguishes between rape that is committed within the four walls of marriage and outside it. Non-consensual sexual intercourse is an offence under the IPC; but there is an exception to the crime of rape between a husband and wife⁷. They recommended that this exemption be removed so that marital rape is also included within the ambit of rape under Section 375 of IPC. They concluded that the relationship between the accused and the victim shouldn’t serve as an excuse while discussing consent to a sexual activity.

This paper will examine the jurisprudential and philosophical aspect of marital rape while analyzing different perceptions of marital rape. Then this article will compare the marital rape laws in other countries with that of India. And finally, this paper will conclude with the changes that need to be brought about in with respect to laws governing marital rape.

² Jiloha, R.C. *From Rape to Sexual Assault: Legal Provisions and Mental Health Implications*, Volume 31, IJSP, Pg 9 (2015), <https://www.indjsp.org/article.asp?issn=0971-9962;year=2015;volume=31;issue=1;page=9;epage=18;aulast=Jiloha>.

³ LUTZ-PRIEFERT, Megan, *A Call for a More Permanent International Definition of Rape*, Vol. 6, CICLJ, Pg 85, (2015).

⁴ Anusha Agarwal, *Marital rape is still rape*, THE LEAFLET, (April 12, 2021, 10:04 PM), <https://www.theleaflet.in/only-36-countries-have-not-criminalised-marital-rape-india-is-one-of-them/#>

⁵ Mukesh v. State (NCT of Delhi) (2017) 6 SCC 1 [famously known as the “Nirbhaya Judgment”]

⁶ Harismran Kalra, Justice Verma Committee Report Summary, PRS LEGISLATIVE RESEARCH, (Mar. 20th, 2021, 12:58 AM).

⁷ The Indian Penal Code, 1860, §375.

II. MARITAL RAPE AND LAWS IN INDIA

Marital rape is still not considered as a criminal offence in India. In India, despite reforms, law commissions, and new laws, one of the most humiliating and crippling acts is not a crime. When it comes to the choices a woman has to defend herself in a marriage, we can see that the laws are either non-existent or ambiguous, and all is left to the interpretation of the courts.

Section 375⁸ of the Indian Penal Code (IPC) states that, “Sexual intercourse by man with his own wife, the wife not being under 15 years of age, is not rape,”. This gives a very outdated perception of law.

Rape is punishable under section 376 of the Indian Penal Code. According to the clause, According to the section, the rapist should be punished with imprisonment of either description for a term which shall not be less than 7 years but which may extend to life or for a term extending up to 10 years and shall also be liable to fine unless the woman raped is his own wife, and is not under 12 years of age, in which case, he in which case, he shall be punished with imprisonment of either description for a term which may extend to 2 years with fine or with both. This section in dealing with sexual assault, in a very narrow purview lays down that, an offence of rape within marital bonds stands only if the wife be less than 12 years of age, if she be between 12 to 15 years, an offence is committed, however, less serious, attracting milder punishment.

The wife has no legal defence after she reaches the age of 15, which is in direct violation of human rights regulations. In 1983, the Indian Penal Code was revised to make spousal rape during judicial separation a crime.

In 2013, after the criminal amendment, Section 375⁹ now reads:

⁸ The section 375 of the Indian Penal Code (45 of 1860) reads: —A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions: —

First.— Against her will.

Secondly.—Without her consent.

Thirdly.— With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.— With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.— With or without her consent, when she is under sixteen years of age.

Explanation Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception. —Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape

⁹ Section 375, *The Indian Penal Code*, 1860

A man is said to commit “rape” if he—

1. penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
2. inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
3. manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
4. applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions¹:
 - i. Against her will.
 - ii. Without her consent.
 - iii. With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.
 - iv. With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
 - v. With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome Substance, she is unable to understand the nature and consequences of that to which she gives consent.
 - vi. With or without her consent, when she is under eighteen years of age.
 - vii. When she is unable to communicate consent.

(A) Explanations

1. For the purposes of this section, “vagina” shall also include labia majora.
2. Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act;

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

(B) Exceptions

1. A medical procedure or intervention shall not constitute rape.
2. Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

The Protection of Women from Domestic Violence Act, 2005 has made several remedies and considered marital rape as domestic violence¹⁰ that are available for various victims but yet, it has failed to criminalize marital rape. The law has ignored a massive violation of the fundamental right of freedom of married woman that is, the right to protect her body from any form of abuse.

In the year 2018, President of India, Ram Nath Kovind gave assent to the Criminal Law (Amendment) Act, 2018 which provided stringent punishment including death penalty for those who were convicted for the crime of raping girls below the age of 12 years. This amendment took place as a result of the brutal rape cases of Kathua¹¹ and Unnao. But this amendment too, does not mention anything about the crime of rape of a married woman. This heinous act is still not recognized as a crime in India.

III. SOCIAL CONSTRAINTS UPON REMOVING THE MARITAL RAPE EXEMPTION

It was common for men to compel their wives to have sex against their will throughout the history in most societies. In most countries, rape was traditionally described as "sexual intercourse with a female who is not his wife without her consent." This gave the husband immunity from punishment for raping their wives; almost like a license given to the husband to rape the wife.

Sir Matthew Hale, the 16th century Chief Justice of England introduced the 'doctrine of implied consent' stated that upon marriage¹², the wife upon marriage gives an implied consent to all sexual acts that was deemed to be irrevocable throughout the entire course of the marriage. This basically meant that after marriage, woman does not have the basic right to decline sex with her husband. Because of this explanation, there was always presumption of consent. The

¹⁰ The Protection of Women from Domestic Violence Act, 2005, Section 3 Explanation 1 (ii)

¹¹ Mohd. Akhtar vs. The State of Jammu and Kashmir (07.05.2018 - SC) : MANU/SC/0807/2018 2018(9)SCALE181

¹² Jiloha, R.C, *From Rape to Sexual Assault: Legal Provisions and Mental Health Implications*, Volume 31, IJSP, Pg 9(2015), <https://www.indjsp.org/article.asp?issn=09719962;year=2015;volume=31;issue=1;spage=9;epage=1;aurlast=Jiloha>.

implied consent theory generates the impression that sex is central¹³, that sexual relations are the most important part of married life, and that all else is subordinate. Further, the right to choose the time and form of such sexual experiences is entirely delegated to one party in a marital partnership, effectively negating the concept of marriage as a union of equals and giving rise to blatant gender discrimination.

Another massive social obstacle of removing the marital rape exception is the elevated position of marital union in the Indian society. This is aided by the fact that matrimony in India is seen as a marriage between two families rather than between two individuals. The traditional religious and cultural narrative of marriage adopted by the Indian government is not an adequate justification for non-recognition of marital rape as a crime.

The other, more general concern is that by eliminating the exemption, it could be abused, leading to a rash of false accusations against husbands. This problem, also known as the Vindictive Wife/Innocent Husband problem, has been at the centre of India's debate about domestic abuse laws and ordinary criminal statutes. While there is little or no empirical evidence that such laws are widely misused, they often come up in discussions about domestic abuse and marital cruelty.

Another orthodox reasoning for the exemption of marital rape from criminalization is the doctrine that a woman is the property of the husband and the legal existence of women was incorporated and consolidated into that of a husband¹⁴.

John Stuart Mill was one of the first ones who noted¹⁵ that marital rape is not something that can be expected to be accepted by women as it constitutes an utter surrender of her independence and lowers her status to a level of sex slave. This inference again ties back to the fictitious belief that the wife irrevocably consents to sexual intercourse and therefore, the husband cannot be held liable of rape.

The issue of marital rape has often been avoided by referring to other solutions available under Indian law, such as domestic violence act, which can be used in its place. Although alternatives do exist, they are in no way sufficient to justify the existence the marital rape exemption. The presence of these other remedies does not justify not calling rape what it is.

¹³ Sandra Ryder and Sheryl Kuzmenka, 'Legal Rape: The Marital Rape Exemption' Vol.24, JMLR, Pg393, 399, (1991).

¹⁴ Dailey, Anne, *To Have and to Hold: The marital rape exemption and the fourteenth amendment*, FAP, Pg. 389, https://opencommons.uconn.edu/law_papers/389

¹⁵ Mill, John Stuart, *1806-1873, The Subjection of Women*, London: Longmans, Green, Reader, and Dyer (1878).

IV. CONSTITUTIONAL ARGUMENTS FOR CRIMINALISATION OF MARITAL RAPE

The Constitution of India is the supreme law of the land. Any law passed in the country must adhere to the values and ideas that are enshrined in the Indian Constitution. In case any law or legislation fails to meet this requirement then it will be termed 'ultra vires' and would be struck down as unconstitutional by the Court of law. But, the exemption of marital rape under Section 375 of IPC does not comply with the standard of compliance that is to be met under Article 14 and Article 21 of the Constitution of India.

(A) Article 14

Every citizen of India has a constitutional right to equality before the law and equal protection under the law, as guaranteed by Article 14¹⁶. This article does not mandate that every person be treated fairly in all circumstances, but it does require that the equals within a society are not treated unequally and that the society's unequals are not treated equally. Under Article 14, the Supreme Court has laid down that the following are two essentials required for valid classification¹⁷:

- i. The classification should be founded on an intelligible differentia that distinguishes those that are grouped together from others;
- ii. The differentia should have a rational relation to the object that is to be achieved by the legislation.

The crime of rape is criminalized under Section 375 of the Indian Penal Code, which protects a woman from forced sexual intercourse against her will and without her consent. The section thus protects women from criminal attacks on her bodily integrity and demonstrates the State's interest in punishing those who do so. But, forced sexual activity in marriage is not classified as rape under Section 375 of IPC; rather it is an exception under the same. This exception removes a married woman's defence under Section 375 of IPC purely based on her marital status. Once married, it is presumed that the male counterpart shall offer protection and that the State doesn't have to offer protection from the violent sexual harassment faced by them.

This exception divides women into two groups based on their marital status and immunizes actions perpetrated by men against their wives. As a result, the exception allows married women to be victimised solely because of their marital status, while single women are protected from the same actions.

¹⁶ The Constitution of India, Article 14.

¹⁷ State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75, 80 and *Budhan Choudhary v. State of Bihar* AIR (1955) SC 191.

Since no rational nexus can be established between the classification under the exception and the Act's underlying objective, it fails to meet the reasonableness test and thus violates Article 14 of the Indian Constitution.

(B) ARTICLE 21

The marital rape exception under Section 375 of IPC is violative Article 21 of the Constitution of India as well. Article 21 states that “no person shall be denied of his life and personal liberty except according to the procedure established by law¹⁸.” In several decisions, the Supreme Court has interpreted this provision to go beyond the strictly literal guarantee of life and liberty. Instead, it has ruled that the privileges enshrined in Article 21 include, among other things, the rights to health, privacy, integrity, safe living conditions, and a healthy climate. The doctrine of marital rape exemption under Section 375 of IPC is an egregious breach of Article 21. The right to privacy, bodily self-determination, and good health, all of which have been recognised as fundamental parts of the right to life and personal liberty at different times, are all violated by the marital exception to rape.

One of the most intrinsic virtues of the right to life, which acknowledges an individual's autonomy, is the right to live with human dignity. Rape is a crime that infringes on the victim's right to life as well as her right to live with dignity¹⁹. Any law that justifies a husband's right to force his wife into sexual intercourse against her will and without her consent violates the very nature of Article 21's right to life.

The Supreme Court recognized right to privacy as a fundamental right of all citizens and held that “right to privacy includes decisional privacy reflected by an ability to make intimate decisions primarily consisting of one’s sexual or procreative nature and decisions in respect of intimate relations”²⁰ It was also held by the apex court that forced sexual cohabitation is a violation of this very fundamental right²¹.

The right to self-determination is founded on the assumption that the individual is the sole decision maker in matters involving her or his body or well-being. The marital law exception clearly violates this as this deprives a married woman of her right to bodily self-determination with respect to consent in sexual intercourse. The right to abstain from sexual intercourse for all women, regardless of marital status, has been recognised by the Supreme Court as a

¹⁸ The Constitution of India, Article 21.

¹⁹ The Chairman, Railway Board v. Chandrima Das, AIR 2000 SC 988.

²⁰ Justice K.S. Puttuswamy (Retd.) v. Union of India, (2017) AIR 2017 SC 4161

²¹ “Right to abstain” from sexual intercourse is a long recognized principle of Indian Constitutional jurisprudence. Govind v. State of M.P., AIR (1975) SC 1378; Kharak Singh v. State of U.P., (1963) AIR SC 1295

constitutional right conferred by Article 21 of the Constitution.

The marital exemption doctrine infringes on a victim's right to good health because it invariably results in substantial psychological and physical damages.

Therefore, it is clear that the exception under Section 375 of the IPC violates Article 14 and the test of reasonable classification. Further, even if the marital law doctrine clears the test of reasonable classification, it has to be a law that is “just, fair and reasonable” for it to be constitutional. With respect to Article 21, the doctrine violates various rights that come under the ambit of Article 21 of right to life and personal liberty.

Due to all these reasons and justification stated above, it is clear that the marital law exemption is unconstitutional and violative of basic and fundamental rights of women.

V. POSITION OF MARITAL RAPE IN DIFFERENT COUNTRIES

(A) Nepal

Religious personal laws have been invariably used as an argument against reforms²² in India. In Nepal, which is demographically a Hindu majority country, and similar to India in its ideology that marriage is sacrosanct²³, marital rape has been recognized as a crime. The Supreme Court of Nepal in Forum for Women, Law and Development, Thapathali v. His Majesty's Government²⁴ held that marital rape immunity was unconstitutional and that it violated that country's obligations towards the International Human rights instruments and also the evolving norms and principles in Criminal Law.

In 2002, the Supreme Court of Nepal in its landmark decision in Meera Dhungana v. Ministry of Law²⁵, Justice and Parliamentary affairs, declared sex without the wife's consent as the marital rape and that the same would be punishable by law. Affirming that Court's decision, legal provision with specific penal provisions on marital rape was introduced. But in this case, one of the biggest obstacles of these provisions was the minimal penalty awarded for marital rape. As a result, the Court challenged the logic of the lesser penalty for marital rape and the penal provision on marital rape was amended in 2016 with the perpetrator receiving a sentence ranging from three to five years in jail²⁶.

²² Tanja Herklotz, *Law, religion and gender equality: literature on the Indian personal law system from a women's rights perspective*, Vol.1, ILR, Pg.250, 251, (2018).

²³ Saloni Maheshwari, *More than laws needed*, THE KATMANDU POST, (14th April, 2021, 4:30 PM).

²⁴ Writ No 55 of the year 2058 BS (2001-2002)

²⁵ N.K.P 2052, P.NO. 462

²⁶ South Asia Regional Initiative/Equity Support Program, *Landmark judgements on violence against women and children from South Asia*, Pg. 6, file:///C:/Users/user/AppData/Local/Temp/2006_Landmark_Judgments_on_Violence_South_Asia_SARI_UNGIFT_ENG.pdf, (19th April, 2021, 5:54 PM).

(B) Australia

From 1976 to 1994, Australian jurisdictions enacted a slew of sexual harassment legislation amendments. The new laws broadened the interpretations of rape and other types of sexual harassment and rethought how victims should be treated. In South Australia, the radical Dunstan Labor government²⁷ commissioned a Special Report headed by Her Honour Justice Roma Mitchell to investigate sexual harassment, including marital rape. The Mitchell Report was blunt in its condemnation of the notion that a married woman had made a lifelong commitment to sex. However, the Mitchell Report did not recommend that the husband's immunity be revoked; rather, it recommended that cases of marital sexual harassment be treated by the Family Court.

Many people were surprised when the South Australian government refused to implement the Mitchell Report's modest amendments, instead attempted to revoke immunity – even if the partners were still living together²⁸.

All Australian jurisdictions have criminalized marital rape, beginning with a partial criminalization in South Australia in 1976 and progressing to complete criminalization in New South Wales and Victoria in 1981. In 1989, Queensland became the last state to criminalize marital rape, followed by the Northern Territory in 1994.

(C) United Kingdom

In the landmark judgement of *R v. R*²⁹, in the United Kingdom, a husband argued that marriage gave irrevocable consent to the "conviction for attempted rape." His argument was disproved, and the court found him guilty because the exception to marital rape is a "legal myth under common law." The court claimed that the relationship between the parties is irrelevant in determining whether or not an individual is guilty of rape.

There were however, several objections to the historical judgement of *R v. R* that held a husband liable for marital rape. When these appeals reached the House of Lords in 2003, they observed that "consent needs to be taken and that consent can be withdrawn as per the wife's will." Finally, marital rape was recognized as a criminal offence under the Sexual Offences Act, 2003.

²⁷ Andrew Mack, *A Rocky Road to Democracy: Don Dunstan and the Forces of Darkness — Part 2*, Vol. 80, JSTOR, Pg.9, 9-14, (2008).

²⁸ Lisa Featherstone, *Rape in marriage: Why was it so hard to criminalize sexual violence?*, AUSTRALIAN WOMEN'S HISTORY NETWORK, (April 20th, 2021, 9:45 PM).

²⁹ [1992] 1 AC 59

VI. CONCLUSION

The UN Committee on the Elimination of Discrimination Against Women have proposed that marital rapes be made illegal in India. In 2013, an amendment was passed that made rape of women between the ages of 12 and 15 illegal under the act. However, the reform remains criticised because it does not result in a significant change in the status of crime victims.

While S.375 provides an exception to marital rape, the Supreme Court of India held in *Independent Thought v. Union of India* that sexual intercourse with a girl under the age of 18 is rape regardless of whether she is married or not. The Court observed that “The exception carved out in the IPC establishes an unnecessary and artificial distinction between a married girl child and an unmarried girl child and has no reasonable nexus with any undefined goal sought to be achieved,” the court said.

The effectiveness of the law will remain suspect unless attitudinal changes follow legal amendment, as stated by the Verma Committee. However, when it comes to egregious violations of the most fundamental human values, gradual social change is not an option. Although it is true that an endogenous social transition toward a more humane and equitable society would be preferable,

The government has already penetrated the private sphere in cases of cruelty, divorce, and dowry demands then why leave the most horrendous and disgusting crime beyond the purview of the State and rules?

The state, which does not get involved during the marriage but serves as an arbitrator during the divorce, must safeguard a woman's right to her body. Man and culture have victimised women in the past and continue to do so today. It is necessary to recognize her as a human being, moving away from the outdated notion of her being a mere chattel, and to treat her with the respect and dignity she deserves. Marriage has been considered a license to approve unwilling sex by patriarchal power structures. There is a complete denial of a woman's self-worth and that needs to change.
