

INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION

[ISSN 2581-9453]

Volume 4 | Issue 6

2022

© 2022 *International Journal of Legal Science and Innovation*

Follow this and additional works at: <https://www.ijlsi.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 Legal Science and Innovation at VidhiAagaz. It has been accepted for inclusion in International Journal of Legal Science and Innovation 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 Legal Science and Innovation, kindly email your Manuscript at editor.ijlsi@gmail.com.

A Study of Marital Rape vis-à-vis Human Rights Violation

SUBHAM CHATTERJEE¹

ABSTRACT

Domestic violence in India is an entrenched problem, and it has only been exacerbated in recent years. According to the National Crime Records Bureau's (NCRB) 'Crime in India' 2019 report, about 70% of women in India are victims of domestic violence. One such manifestation of this domestic violence is Marital rape. Today, Marital rape has been impeached in more than 100 countries but, unfortunately, India is one of the only 36 countries where marital rape is still not criminalized. Even though many legal amendments have been done in criminal law for the protection of the women, the non-criminalization of marital rape in India undermines the dignity and human rights of women. Marital rape in India forces the women to compromise on several fronts. The women are subjugated to gross indignity which consequently leads to the violation of the human rights. The human rights are so intertwined with the fundamental rights that committal of marital rape is also the violation of fundamental right. It is also a threat to gender justice as the women, especially the weaker women of the society are its main victims and the issue remains unaddressed at the legal level.

This paper seeks to analyse the existing status quo of conjugal rape in India vis-à-vis the judgments of the Supreme Court of India that sets the precedent for this heinous crime.

Keywords: Marital Rape, Fundamental rights, Violation, Human Rights, Gender Justice.

I. INTRODUCTION

Conjugal rape comprises a spouse driving his significant other into having intercourse without her appropriate assent. Rape has been characterized under Section 375² as a sex by a man with a lady:

- a) Against her will,
- b) Without her assent,
- c) By strongly acquiring assent,
- d) By getting assent by deception or extortion,

¹ Author is a LL.M. student at Brainware University, Kolkata, India.

² The Indian Penal Code, 1860.

- e) By getting assent while she is in an inebriated state, or isn't of sound emotional wellness.

Having sex with a lady when she is less than 16 years old, regardless of with or without her assent will be viewed as Statutory Rape. Hence, a quintessential fixing to demonstrate the wrongdoing of rape is the shortfall of assent. Yet, an exemption for Section 375³ totally eclipses this prerequisite. It says that if a man has sex with his own better half and the spouse isn't under 15 years old, then, at that point, that will not be considered as rape. As the law stands, a man is totally resistant from arraignment under the charges of rape on the off chance that he submits something very similar with his better half.

The Supreme Court of India and various High Courts are overwhelmed with writ petitions testing the legality of this exemption, and in a new milestone judgment, the Supreme Court condemned powerful sex with a spouse somewhere in the range of fifteen and eighteen years' old which I have additionally examined in the article.

Ironically in a nation where rape is viewed as perhaps the most shocking crime, decriminalizes something similar in case there are conjugal ties between the person in question and the culprit. This is frequently called the 'conjugal rape special case statement'. It was expressed by Sir Matthew Hale that "the spouse can't be at fault for a rape submitted without anyone else upon his legal wife, for by their common wedding assent and agreement the wife hath given herself in this sort unto her better half, which she can't withdraw." The Indian laws grant the husbands to have non-consensual sex with their wives on the thought of "inferred irreversible assent". There is nothing of the sort as non-intentional sex between a spouse and a wife. Marriage gives an open permit to the spouse to participate in sex with his better half whenever he feels like it.

The UN Committee on Elimination of Discrimination Against Women (CEDAW) in 2013 and the J S Verma board of trustees set up after the fights over the Nirbhaya rape case on December 16, 2012, suggested that conjugal rape should be condemned by the Indian government. Conjugal rape has been impugned in more than 100 nations yet, unfortunately, India is one of a handful of the 36 nations where conjugal rape is as yet not condemned.

II. HISTORY OF MARITAL RAPE

Eighteenth century English law had a bunch of rules where the spouse was considered being reliant upon her significant other, unequipped for autonomous presence. A couple was set apart as one element, and every one of the privileges of the spouse (counting her sexual freedoms)

³ The Indian Penal Code, 1860.

were subsumed by those of her significant other. The exception to clause 2 of Section 375⁴ was a consequence of these sweeping principles that emerged in eighteenth century English law.

The spouse was the expert to the wife and appreciated advantages over her body and couldn't be comprehended for raping his significant other. Ladies were dealt with like property by their spouses. In eighteenth century England, ladies were bound to the home-grown circle, and the state guaranteed that they stayed subject to their male partners. It is odd to assume that this actually applies to advanced India in the 21st century where ladies have become individualistic and fit for giving consent. Ladies are as of now not reliant. They are autonomous residents under law.

III. MARITAL RAPE: INFRINGEMENT OF FUNDAMENTAL RIGHT

The conjugal rape special case encroaches Article 14⁵ and 21⁶ of the Constitution of India which ensures right to equity and equivalent insurance, and of the right to life and individual freedom separately in light of the peculiar qualification among wedded and unmarried ladies which is utilized as a pre-prerequisite for tending to rape. The above special case is subjective and nonsensical. Ladies are arranged based on their conjugal status, going about as a precondition to meet all requirements for rape. Assent has no impact in issues of abusive behaviour at home, why are the rape laws subject to a lady's conjugal status. It is too much that a lady would enthusiastically surrender to aggressive behaviour at home.

Likewise, it is strange to accept that a wedded lady would readily agree to constrained sex after marriage. There is a need to annul the conjugal rape special case. A conjugal rape special case draws back behind the contention that a marriage association is framed on the hidden guideline of expected assent. Be that as it may, a lady isn't made to disavow her sexual privileges at the hour of her wedding.

a) Doctrine of Coverture: Non-Criminalised nature of Marital rape emanates from the British era. The Marital rape largely influenced by and derived from this doctrine of merging the woman's identity with that of her husband. At the time the IPC was drafted in the 1860s, a married woman was not considered an independent legal entity. The marital exception to the IPC's definition of rape was drafted on the basis of Victorian patriarchal norms that did not recognize men and women as equals, did not allow married women to own property, and merged the identities of husband and wife under the "**Doctrine of Coverture.**"

⁴ The Indian Penal Code, 1860.

⁵ The Indian Constitution Act, 1950.

⁶ The Indian Constitution Act, 1950.

b) Violative of Article 14⁷: Marital rape violates the right to equality enshrined in Article 14⁸. The exception creates two classes of women based on their marital status and immunizes actions perpetrated by men against their wives. In doing so, the Exception makes possible the victimization of married women for no reason other than their marital status while protecting unmarried women from those same acts.

c) Defeats the Spirit of Section 375⁹: The purpose of Section 375 is to protect women and punish those who engage in the inhumane activity of rape. However, exempting husbands from punishment is entirely contradictory to that objective, as the consequences of rape are the same whether a woman is married or unmarried. Moreover, married women may actually find it more difficult to escape abusive conditions at home because they are legally and financially tied to their husbands.

d) Violative of Article 21¹⁰: According to creative interpretation by the Supreme Court, rights enshrined in **Article 21** include the rights to health, privacy, dignity, safe living conditions, and safe environment, among others. In the **State of Karnataka v. Krishnappa**¹¹, the Supreme Court held that sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female. In the same judgment, it held that non-consensual sexual intercourse amounts to physical and sexual violence. In **the Suchita Srivastava v. Chandigarh Administration**¹², the Supreme Court equated the right to make choices related to sexual activity with rights to personal liberty, privacy, dignity, and bodily integrity under Article 21¹³. In **Justice K.S. Puttuswamy (Retd.) & Ors. v. Union of India & Ors.**¹⁴, the Supreme Court recognized the right to privacy as a fundamental right of all citizens. The 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. In all these judgements the Supreme Court has recognized the right to abstain from sexual activity for all women, irrespective of their marital status, as a fundamental right conferred by Article 21¹⁵ of the Constitution. Therefore, forced sexual cohabitation is a violation of the fundamental right under article 21¹⁶.

⁷ The Indian Constitution Act, 1950.

⁸ The Indian Constitution Act, 1950.

⁹ The Indian Penal Code, 1860.

¹⁰ The Indian Constitution Act, 1950.

¹¹ 2000 (2) SCALE 610, (2000) 4 SCC 75, 2000 2 SCR 761, 2000 (2) UJ 919 SC

¹² AIR 2010 SC 235

¹³ The Indian Constitution Act, 1950.

¹⁴ Writ Petition (Civil) No. 494 of 2012, (2017) 10 SCC 1

¹⁵ The Indian Constitution Act, 1950.

¹⁶ The Indian Constitution Act, 1950.

The **United Nations Declaration on the Elimination of Violence against Women**¹⁷ defines violence against women as “any act of gender-based violence that results in, or is likely to result in, physical, sexual, or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.” In 2013, the UN Committee on Elimination of Discrimination Against Women (CEDAW) recommended that the Indian government should criminalize marital rape. The **JS Verma Committee** set up in the aftermath of nationwide protests over the December 16, 2012 gang rape case had also recommended the same. By removing this law, women will be safer from abusive spouses, can receive the help needed to recover from marital rape and can save themselves from domestic violence and sexual abuse.

IV. JUDGMENTS ON MARITAL RAPE

In a significant and leading case of *Nimeshbhai Bharatbhai Desai v. State of Gujarat*¹⁸, the Court inspected the inquiry: regardless of whether a spouse driving his significant other to enjoy oral sex would add up to rape culpable under segment 376 of the IPC?

The perspectives on the court were that the conjugal rape has still not been condemned in our nation as the Parliament fears that it might weaken the organization of marriage. A corrupt spouse might utilize it as an integral asset or weapon to torture her better half by recording bogus and negligible grievances against him. In any case, there are shields in the criminal equity framework to spot and investigate manufactured or wrong conjugal grievances, and any individual who foundations incorrect and resentful charges can be made liable under law. Conjugal rape can't be disregarded in view of this dread. Indian laws give ladies the right to life and freedom, however not her body, inside her marriage. Attack by a spouse on his better half would be established as an offense under the IPC however on the off chance that a similar husband powers his significant other to have sex, he would be at risk for attack yet not for an offense of rape simply because there is a substantial marriage.

The court examined three sorts of conjugal rape to be for the most part common in the general public:

- a) Battering rape: This is a kind of conjugal rape where ladies experience both physical and sexual viciousness in the relationship in numerous ways. A few events are those where the spouse is battered during the sexual barbarity, or the rape might follow an actually ruthless scene where the husband needs to make up and compresses his

¹⁷ 2013

¹⁸ 2018 SCC OnLine Guj 732

significant other to have intercourse without wanting to. Much of the time, the casualties fall under this expressed class.

- b) Force just rape: In this sort of conjugal rape, spouses utilize just that measure of power, as it is needed to compress their wives. In such cases, battering may not be a property, however ladies who deny sex generally need to face such attacks.
- c) Obsessive rape: In over the top rape, attacks include horrible torment as well as unreasonable sexual demonstrations and are most usually savage in structure. This sort has likewise been ordered as twisted rape.

In the case of ***Independent Thought versus Union of India***¹⁹, the issue under the steady gaze of the court was whether sex between a man and his better half being a young lady somewhere in the range of 15 and 18 years old is rape?

The exception 2 to Section 375²⁰ has a critical view in regards to this issue, yet the court presented that sex with a young lady under 18 years old is rape whether or not she is hitched. The unnatural differentiation is in opposition to the soul of Article 15(3)²¹ of the Constitution, and went against to Article 21²². Youngster relationships were condemned by establishing the Prohibition of Child Marriage Act (PCMA) in 2006 as an initial move towards this course, however there was no resulting revision made in Section 375²³, as it existed in 2006, to decriminalize conjugal rape of a young lady kid. A young lady somewhere in the range of 15 and 18 years old who is hitched could be a casualty of "irritated penetrative rape under The Protection of Children from Sexual Offenses (POCSO) Act, 2012 yet she can't be a survivor of rape under the IPC" in case she is raped by her significant other since the IPC doesn't perceive such an attack as rape.

The court coordinated to strike down Exception 2 to Section 375²⁴ to the extent that it identifies with a young lady kid under 18 years on the accompanying grounds:

- a) It is subjective, overbearing and not reasonable, just, and sensible. It abuses the freedoms of the young lady kid by encroaching Article 14, 15 and 21 of the Constitution of India;
- b) It is unfair and encroaches Article 14²⁵ and;

¹⁹ (2017) 10 SCC 800

²⁰ The Indian Penal Code, 1860.

²¹ The Indian Constitution Act, 1950

²² The Indian Constitution Act, 1950.

²³ The Indian Penal Code, 1860.

²⁴ The Indian Penal Code, 1860.

²⁵ The Indian Constitution Act, 1950.

- c) It is in opposition to the arrangements of POCSO Act.

V. CONCLUSION

The conjugal rape exemption makes an unusual qualification between rape of a wedded and an unmarried young lady. It is ideal time that the Parliament thinks about that there can be non-consensual sex between a spouse and a wife and similar should be examined as rape. This grievous wrongdoing should not be disregarded in view of the dread that it might weaken the foundation of marriage. A marriage is a holy and devout connection between two individuals that is the reason one thinks about his/her life partner their significant other. It's a bad dream to envision how damaging a marriage can become if a young lady needs to face such sort of ruthlessness in it. A young lady ought to be permitted to ensure her substantial uprightness, even in her marriage. A rape is a grievous wrongdoing. An attacker ought to be treated as an attacker, despite the fact that he is the spouse of the lady he has raped.

VI. REFERENCES

1. Network, L.N. (2018) *Marital rape is not a husband's privilege but a violent act and an injustice that must be criminalized: Gujarat HC [read judgment]*, *Live Law*. *Live Law*. Available at: <https://www.livelaw.in/marital-rape-not-husbands-privilege-violent-act-injustice-must-criminalized-gujarat-hc-read-judgment/> (Accessed: January 14, 2023).
2. Karwa, S. (2020) *'what we talk about when we talk about rape' : Countering rape stereotypes*, *Live Law*. *Live Law*. Available at: <https://www.livelaw.in/book-reviews/what-we-talk-about-when-we-talk-about-rape-155467> (Accessed: January 14, 2023).
3. *Marital rape: A grave offence that's not criminalised in India* (2018) *SheThePeople TV*. *SheThePeople*. Available at: <https://www.shethepeople.tv/blog/marital-rape-grave-offence-criminalised-indian-law/> (Accessed: January 14, 2023).
4. *The impunity of marital rape* (2020) *The Indian Express*. Available at: <https://indianexpress.com/article/opinion/columns/the-impunity-of-marital-rape/> (Accessed: January 14, 2023).
5. Jain, A. (2018) *Marital rape: Married, married but separated, & unmarried-classifying rape victims is unconstitutional: Petitioners submit before Delhi HC [read written submissions]*, *Live Law*. *Live Law*. Available at: <https://www.livelaw.in/marital-rape-married-married-separated-unmarried-classifying-rape-victims-unconstitutional-petitioners-submit-delhi-hc-read-written-submissions/> (Accessed: January 14, 2023).
6. *SC case analysis on marital rape: Independent thought v. Union of India and another by: Akanksha Yadav* (no date) *Latest Laws*. Available at: <https://www.latestlaws.com/case-analysis/sc-case-analysis-on-marital-rape-independent-thought-v-union-of-india-and-another-by-akanksha-yadav/> (Accessed: January 14, 2023).
7. Staff, S. (2019) *Plea seeking to declare marital rape a ground for divorce dismissed by Delhi High Court*, *Scroll.in*. *Scroll.in*. Available at: <https://scroll.in/latest/929959/plea-seeking-to-declare-marital-rape-a-ground-for-divorce-dismissed-by-delhi-high-court> (Accessed: January 14, 2023).
