

MARITAL RAPE

ABSTRACT¹

Marriage is an agreement between a man and a woman; it implies that both has consented to sexual intercourse and can't be otherwise. It's been long argued that consent to a marriage can't be construed as lifelong consent to sex. "The world's shame: the global Rape Epidemic" a report by Equality Now, found that India is one of only 10 out of 82 jurisdictions surveyed that still legalized rape within the marriage and protected the rapist husbands from prosecution. Ensuring that marital rape is criminalized would make justice more accessible for the women, irrespective of married or not. Also, criminalization of marital rape would send a message that a woman always has the right to choose whether and with whom she wants sexual relations.

Since, independence, Indian law has recognized husband and wife as separate and independent legal identities. Also, laws were made for the protection of women. The existence of exception creates two classes of women: married and unmarried. Women who are not married are protected from sexual harassment and rape but what about married women? Are Married women protected from the rape and sexual harassment by their husband? If the women are married or not, and if the consequence of rape is the same then why there should be an exception to the punishment.

This research paper focuses on the status of marital rape in India and how it is a crime as well as an exception. Also, it violates Article 14 and 21 of the Indian constitution.

Keywords: Marital Rape, criminalization, consent, sexual harassment, legal identity

¹Author- Amishagupta and ManasveeMalviya, BBA LLB hons. Corporate laws, (VI semester) at UPES, Dehradun.

VIEW UNDER CRIMINAL LAW:

Consent does matter in marital intercourse neither with wife who is below 15 years of age, nor wife above 15 years of age. This statement means that, our law states the sexual intercourse as rape which is with wife who is below 15 years of age even if she consents for that while on the other hand, failed to recognize rape when there is sexual intercourse between the couple where wife who is above 15 years, doesn't consented for that.

For this scenario, law specifically provided into IPC² under *section 375(2)*³ that sexual intercourse between couple will be always assumed as intended one, where the consent of both the spouses will be implied hence the husband will always free from the allegation of rape against his wife. But this provision is in controversy with the provision laid down under *protection of child from sexual offences, 2012*⁴.

As per the rule of interpretation⁵, the *special provision i.e. the POCSO* will be followed for the class which is specified under the act. Also *section 42A of POCSO*⁶ provides the overriding effect if the act is inconsistent with any act.

The act exclusively provides the protection to the child who is below 18 years of age, thus covering the class of child wife who are in between 15 to 18 years of age. It further states that all children will be protected against the sexual intercourse, where consent and marital status doesn't matter.

Before the independent thought case⁷, the age for the protection of child wife was limited to 15 years only. These controversial points were raised on the basis of discrimination with violation

² THE INDIAN PENAL CODE, 1860 ACT NO. 45 OF 1860 (6th October, 1860)

³ Exception of section 375, Rape

⁴ Act to protect children from sexual offences (Enacted on 19th June, 2012).

⁵ When two provisions are in controversy then the rules of interpretation are followed.

⁶ Additional provision which is not in derogation of the provisions of some other regulation in the interim in force

⁷ Independent thought v. union of India, 2011

of *article 14⁸ and 21⁹* of Indian constitution where children don't have the thinking capacity and they failed to determine the consequence of their actions. Therefore court in this case held that, the protection from sexual offence which includes marital rape will be extended till 18 years of age because of this light, *POCSO 2012*, contains the provision for all children who are below the age of 18 years. However, court failed to recognize the protection for the woman above 18 years.

Yet the judgment given in *independent case*¹⁰ is partial victory and there is much more left to be achieved. We need to get complete favor for the woman with the protection of woman who is above 18 years.

Legislature is much concerned for the woman who is highlighted by various provisions which are made for the extra protection of woman like *section 354 IPC*¹¹ and other provisions which give the right to protect themselves from sexual offences¹². But in the scenario of rape¹³, there is irrelevant distinguished between married and unmarried girl. Married woman cannot be treated as commodity where the need of her consent is completely extinguished.

“Rapists remain rapists even though victim is his wife only.”

WHY SECTION 375(2) IPC, WAS INTRODUCED?

Marriage is kind of contract between the parties¹⁴ where consent is given for everything which are the basic elements of the living together as husband and wife, including sexual intercourse. Before marrying everyone is aware of the fact that there will be consummation of marriage where they every spouse is supposed to fulfill his obligatory part. The concept of implied consent was first founded by *sir Mathews*¹⁵. In other words, it can be termed as under marriage, there is

⁸ Equal protection and equality before the law

⁹ Right to life

¹⁰ *Independent thought V Union of India* 2018 CRI.L.J.3541

¹¹ Assault with the intention to outrage the modesty of woman

¹² Section 375-377 IPC 1860

¹³ Section 375 IPC 1860

¹⁴ Under Muslim law, *Nikah* is recognized as civil contract.

¹⁵ *History of the pleas of the crown, 1736*

*implied consent*¹⁶ for sexual intercourse, which cannot be withdrawn back after the marriage¹⁷ and the spouse is supposed to behave in that consent only.

Judiciary believes that other than the law point, it is also immoral to interfere between the husband and wife, as the relationship and the base of the marriage gets destroyed but the truth is when there is force, grudges and disrespect in between the couple, the institution of marriage is already denoted as destroyed.

Legislature is not completely ignoring the perspective of forceful cohabitation and for ensuring the right for that, it introduced many sections *under IPC* and *protection of domestic violence act 2006* but no such right is given to woman (above 18 years) under which they can seek protection from forceful sexual intercourse from their husband. The husband is given unnecessary fully control over the woman where he can impose his demands and order on his wife.

MARITAL RAPE A CRIME AS WELL AS EXCEPTION

Sexual violence is all pervading and manifests itself in number of forms, with its existing in all institution of life including the most basic part of the human society, the family. In 1932, Poland was the first to make marital rape a criminal offence. In the seventies, Under the impact of second wave of feminism, Australia was the first common law country to pass reforms and made rape in marriage a criminal offence. Between 1970s and 1993, all the states of US made marital rape a crime. Also, Nepal in 2002 got free of the marital rape exception after the Supreme Court of Nepal held that marital rape is against the constitutional right of the equal protection and the right to privacy. Further the court said that the classification of the law that an act which is committed against a unmarried women is an offence and the same act against the married women doesn't amount to an offence is not a reasonable classification. Countries like South Africa, Ireland, Canada, the United States, New Zealand, Malaysia, Ghana, Israel and many more have already criminalized the offence of marital rape. Most of the countries have already criminalized marital rape as criminal offence but still many countries haven't and India is one of them.

¹⁶ Defined under section 9 of The Indian Contract Act, 1872

¹⁷ As per lord Halsbury

REASON WHY MARITAL RAPE IS STILL NOT CRIMINALIZED IN INDIA

- It is nowhere directly stated that marital rape can give rise to legal actions under the Indian laws whereas section 375 of the Indian Penal code, states very clearly that husbands engaging in the sexual acts with their wife not being below the age of 15 years shall not be covered under the definition of rape. Therefore, lack of laws related to marital rape.
- The other dominant reason for this is fear or social image and this evil crime is still hidden behind the sacred relationship of marriage. In the sacred relationship of marriage a woman (wife) has to have sexual intercourse with her husband irrespective of her will or consent. The concept of consent is not considered. Every woman has right to privacy and the right to protect violation of privacy, even the assassin of her mental pain, bodily injury is her own husband.
- As per Hindu law, marriage is a sacrament, once tied then the relation can never be broken. The objective behind marriage is to perform religious duties and to beget progeny. And as per Muslim law, it is a social concept and the purpose behind marriage is a mode of fulfilling sexual desires, whether a woman want or not. Hence, no focus on the human rights of the women.
- The other reason is that women have economic dependency over her husband and in-laws. In the recent times this is not the scenario, but earlier women were not supposed to move out of the house. The mind set was married women are unable to protect themselves from wrong practice and they are bound to face brutality of their husbands.

STAND OF JUDICIARY

In many judgment of Supreme Court, it indirectly indicated towards the need of marital rape for woman but failed to completely recognize it. In case *BodhisattwaGautam v. SubhraChakraborty (1995)*¹⁸, the court stated that rape is against the human rights and violation of fundamental right

¹⁸ 1996 AIR 922, 1996 SCC (1) 490

under *article 21*. This statement of court can be interpreted in a manner that they are referring to every rape and even in marital rape there is violation of *human rights*.

In another case of *State of Maharashtra v. Madhkar Narayan (1991)*¹⁹, court in its judgment talked about the privacy of woman in every area where the sexual privacy²⁰ was much highlighted. From that judgment we can infer that there must be *protection of privacy* even of the married woman.

Judicial activism is seen in many aspects but when the marital rape word popped up, judiciary takes back its step. They usually give marriage a kind of privacy which is free from all the actions of state, which can be said as controversial as state interferes between the marriage through other laws too such as dowry, bigamy, adultery etc. it is usually propounded that exclusion of specific terms out of the regulation of state regulation is leading to the protection of woman and keeping the family private which is protected by the state regulation²¹.

Even though court is agreeing partially but still we are failing in giving a proper place to marital rape in our law.

VIOLATION OF ARTICLE 14 OF THE INDIAN CONSTITUTION

Article 14 of the constitution provides, that the state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.²² Even though, the Constitution guarantees equality to all, Indian criminal law discriminates against female victims who have been raped by their own husbands.

In the 1860s, at the time the Indian penal code was drafted a married woman was considered as an independent legal entity. Rather, a married woman was considered to be the chattel of her husband²³. As a result, married women didn't possess numerous rights now guaranteed to her as

¹⁹ AIR 1991 SC 207, 1991 (61) FLR 688, JT 1990 (4) SC 169, (1991) ILLJ 269 SC, 1990 (2) SCALE 849, (1991) 1 SCC 57, 1991 (1) UJ 109 SC

²⁰ Section 377, 345C, 354A IPC 1860

²¹ Subversive sites, book by Ratna and Brenda

²² The constitution of India art. 14

²³ To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment, 99(6) Harv. L. Rev. 1255, 1256 (1986)

an independent legal entity, which also includes the right to file a complaint against another under her own identity. Section 375 Exception 2²⁴, which mainly essentially exempts actions perpetrated by the husband against their wife from being considered as act of rape. This is largely influenced by and it is derived from this preexisting doctrine of merging the woman's identity with that of her husband.

The roots of this doctrine can be followed to the British colonial rule in the Victorian era²⁵. During the 19th century India was a British colony; all the Indian laws enacted at the time were influenced by the English laws and the Victorian norms. Thus, the marital exception to the Indian Penal code's definition of rape was on the basis of the Victorian patriarchal norms that didn't recognize men and women equal, also this norm didn't allowed married women to own a property, and it merged the identity of husband and wife under the doctrine known as doctrine of Covertures.

But now the times have changed. The Indian law now provides husbands and wives a separate and independent legal identity. In the modern era is explicitly concerned with the protection of women. This concern is evident in this era and it is intended to protect women from violence and harassment. For example, "The Protection of Women from Domestic Violence Act" the "Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act."²⁶

Exception 2 of the IPC violates the right to equality enshrined in Article 14 insofar as it discriminates against married women by denying them equal protection from rape and sexual harassment. This Exception creates two classes of women based on

- The marital status and
- Immunizes actions perpetrated by men against their wives.

²⁴the Indian Penal code, 1860

²⁵Jill ElainHasday, Consent and Contest: A Legal History of Marital Rape, 88 Calif. L. Rev. 1373 (2000)

²⁶Protection of Women from Domestic Violence Act, 2005, No. 43, Acts of Parliament, 2005 (India); Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, No. 14, Acts of Parliament, 2013 (India).

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. The way exception 2 distinguishes between married women and the unmarried women, violated article 14

The supreme court In the case of BudhanChoudhary v. State of Bihar²⁷ and State of West Bengal v. Anwar Ali Sarkar²⁸, upheld that any classification which is under Article 14 of the Constitution of India is subject to a reasonableness test and that can be passed only if there is rational nexus between the classification and the objective that the act seeks to achieve. The main purpose of section 375 of the Indian penal code is to protect women and punish those who are engaged in the inhumane activity of the rape, but exception 2 of this section frustrates the purpose behind this section. Exempting husbands from the punishment for raping their wives is entirely contradicting to the objective. The consequence of rape is the same whether a woman is married or not. Moreover, a married woman might actually find it more difficult to escape abusive conditions at home because, married women is legally and financially tied to their husbands. Whereas, in reality, Exception 2 promotes husbands to forcefully enter into sexual intercourse with their wives, as their acts are not discouraged or penalized by law. As no rational nexus can be deciphered between the classification which is created by the Exception and the objective provided by the Act, it does not satisfy the test of reasonableness, and thus violates *ARTICLE 14 OF THE INDIAN CONSTITUTION*.

VIOLATION OF ARTICLE 21 OF THE INDIAN CONSTITUTION

Exception 2 is also violates article 21 of the Indian constitution. Article 21 states that no person shall be denied of his life and personal liberty except the procedure established by the law. ²⁹The Supreme Court of India has interpreted this clause in various judgments to extend beyond the literal interpretation which guarantee to life and liberty. Further the supreme court, held that the rights enshrined in Article 21 also includes the rights to health, privacy, dignity, safe living conditions, and safe environment, among others.

²⁷Budhan v. State of Bihar, AIR (1955) SC 191 (India)

²⁸State of West Bengal v. Anwar Ali Sarkar, AIR (1952) SC 75 (India)

²⁹The constitution of India art. 21

Over the last few years, the courts have begun to acknowledge the right to abstain from the sexual intercourse and to be free of unwanted sexual activity as interpreted in these broader rights to life and personal liberty. The Supreme Court in the case of *State of Karnataka v. Krishnappa*, held that the sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female.³⁰ Moreover In the same judgment, it was held that non-consensual sexual intercourse amounts to physical and sexual violence. Later, in the case of *SuchitaSrivastava v. Chandigarh Administration*, the Supreme Court stated that 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.³¹

Recently, it was explicitly recognized the right to make choices regarding their intimate relations under article 21, by the supreme court of India. In the case of *Justice K.S. Puttuswamy (Retd.) v. Union of India*, the supreme Court of India recognized the right to privacy as a fundamental right of all citizens and also held that 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.”³² Forced sexual cohabitation is a violation of this fundamental right.³³

The ruling of this case doesn’t distinguish between the rights of married and unmarried women. Further, there is no contrary ruling which states that the individual’s right to privacy is lost by the marital association/ status. Therefore, the Court have recognized the right to abstain from the sexual activity for all women, irrespective of their marital status, as conferred by article 21 of the Indian constitution.

Furthermore, Exception 2 violates Article 2, right to live a healthy and dignified life. It is well settled that the “right to life” envisaged in Article 21 is not merely a right to exist. The courts have repeatedly upheld that right to life includes right to live with human dignity. The existence of exception 2, fails to deter husbands from engaging in acts of forced sexual contact with their

³⁰*The State of Karnataka v. Krishnappa*, (2000) 4 SCC 75 (India)

³¹*SuchitaSrivastava v. Chandigarh Administration*, (2008) 14 SCR 989 (India)

³² *Justice K.S. Puttuswamy (Retd.) v. Union of India*, (2017) AIR 2017 SC 4161 (India).

³³ as “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 (India); *Kharak Singh v. State of U.P.*, (1963) AIR SC 1295 (India)

wives, adversely affects the physical and mental health of the women and also it undermines their ability to lie with dignity.

REMEDIES AVAILABLE

We cannot say that our law doesn't provide any type of security to married woman against her husband. Instead of going under section 375 which is providing relief for rape, the married woman can go for relief which is mentioned under various provisions. Some of the reliefs which are generally used by woman against her husband are:

- under domestic violence act, 2005

Protection of women from Domestic Violence Act turned into enactment in 2005 for presenting criminal protection to a female where she face any crime of home violence despite the fact that the additionally didn't recall marital rape as an offence but still beneath this act if a girl is victimized of marital rape then she can approach the court in search of judicial separation, which implies that beneath this act marital rape may be taken as a ground earlier than courtroom to acquire judicial separation from her husband. This is just a mini step made with the aid of the legislature for making recognizing of such offences. This is more which desires to in completed by parliament in this regard.

- section 376(B) of the IPC

Section 376B offers punishment for a husband who's residing one by one whether beneath a decree of divorce or otherwise, forcefully has sexual intercourse together with his wife will be punished with imprisonment of not less than two years which may additionally enlarge to seven years.

CONCLUSION

Law has not recognized *the MARITAL RAPE* yet but it still ensures protection to woman by interfering in marital relation. In various cases it was stated that it is the matter of privacy and gross violation of fundamental rights which must be considered by law but there is no specific

right enacted by legislature. Our law has own reason for not criminalizing the offence which may be change later on. As per the current judgments and the need of the society it can be said that the day is not far where Indian judiciary will also recognize marital rape as an offence as other countries are following. Under current Law system, it is not punishing husband directly under marital rape but somehow serving the justice to woman by punishing her husband for forceful sexual intercourse under various acts such as domestic violence act 2005 or IPC.

Sources:

- <https://thediplomat.com/2020/08/in-india-a-man-can-still-legally-rape-his-wife/>
- <https://theprint.in/opinion/minor-bride-rape-sc-pocso/12195/>
- <https://wcd.nic.in/sites/default/files/POCSO-ModelGuidelines.pdf>
- <https://www.firstpost.com/long-reads/marital-rape-legitimised-by-law-protected-by-courts-3401002.html>
- <https://vikaspedia.in/education/policies-and-schemes/protection-of-children-from-sexual-offences-act>
- <https://www.latestlaws.com/bare-acts/central-acts-rules/children-laws/protection-children-sexual-offences-act2012/criminal-law-amendment-act-2013-pocso-amendment/>
- <https://ohrh.law.ox.ac.uk/the-supreme-court-of-india-reads-down-the-marital-rape-exception-a-partial-victory-for-womens-rights-advocates/>
- <https://feminisminindia.com/2020/06/11/marital-rape-people-still-confused-india/>
- <https://www.equalitynow.org/marital-rape-is-not-a-crime-in-india-it-needs-to-be>