

Marital Rape

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Introduction

Rape is a heinous act of sexual intercourse committed against any natural person forcefully without the consent of such person against whom it is committed. Rape has been contained within the ambit of sexual assault, which also includes acts that fail to be regarded as intercourse, by several regimes. For a long duration of time rape was contemplated to be caused by rampant sexual impulse, however now it is considered as a pathological contention of power over a victim.

Section 375 of the Indian Penal Code defines Rape as an act committed by a man against the will and without the consent of a woman.¹

Meaning of Marital Rape

Marital rape or spousal rape means indulging in sexual intercourse with one's spouse without consent. The absence of consent is an essential element and need not include physical violence. Marital rape is deemed to be a form of domestic violence and sexual abuse. Even though, traditionally sexual intercourse within marriage was regarded as a right of spouses, involving in the act without the consent of the spouse is now broadly classified as rape by many societies across the world, renounced by international conventions and progressively criminalized.

Status of Marital Rape in India

India is amongst the thirty- six countries that still have not criminalized marital rape.²

Exception 2 to Section 375 of **IPC** states “non-consensual sexual intercourse by a man with his wife, if she is over 15 years, does not amount to rape”. Thus, coercive and non-consensual intercourse by a husband with his wife (above 15 years of age) is outside the ambit of rape. It has been presumed that a woman, on marriage gives her consent forever to her husband for an act of sexual intercourse.

In India, almost 83% of married women aged between 15 and 49 have blamed their husband for sexual violence whereas 7% have

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¹ PSA Pillai, Criminal Law, 832 (KI Vibhuti Ed., LexisNexis, 14th ed., 2019)

² Marital Rape in India: 36 countries where marital rape is not a crime, India Today, Mar. 12, 2016.

called the bygone husband an offender, according to the report of 2015-16 released by National Family Health Survey.

4% of the women were forced by the husband to enter into sexual intercourse, 2.1% to perform sexual acts and 3% were threatened when the wife did not want to or wish to perform, as per the report, NFHS-4.

In 2017, The DailyO detailed a recent report by the International Center for Research on Women and the United Nations Population Fund on 9,500 respondents in seven states of India. The report said that 17 percent of the wives announced sexual viciousness from spouses while 31 percent (one in each three) men conceded that they had submitted sexual savagery against their wives.³

In the case of the Harvinder Kaur vs. Harmander Singh⁴, The Delhi High Court held that the Constitution of India could not intervene in household matters as it would destroy the institution of marriage. The court also stated, “in the privacy of the home and married life neither Article 21 nor Article 14 of the Indian Constitution have any role to play”.

In the State of Maharashtra & Anr. vs. Madhukar Narayan Mardikar⁵, The Supreme Court asserted that every woman has the right to privacy and it must not be violated.

In Shri Bodhisattwa Gautam vs. Ms. Subhra Chakraborty⁶, the Supreme Court held that rape violates Article 21 of the Indian Constitution as it hindered fundamental human rights and breached the victim’s right to life and dignity.

After the Nirbhaya rape case in 2012, the Justice Verma Committee had suggested criminalizing marital rape and said that marriage didn’t mean an irrevocable consent to sexual activities. But the Government of India neglected the suggestion.⁷

In the case of the State vs. Vikash, 2014, Special fast track court in Delhi stated that “the petitioner and respondent (accused) being a legally married husband and wife, the petitioner being major, the sexual intercourse between the two, whether forcible, cannot be

³ Marital Rape in India, Keerthi Krishna, Krati Purwar, Investigative Project Print, Asian College of Journalism

⁴ Harmander Kaur vs. Harmander Singh AIR 1984 Delhi 66, ILR 1984 Delhi 546, 1984 RLR 187

⁵ State of Maharashtra & Anr. vs. Madhukar Narayan Mardikar AIR 1991 SC 207, (1991) 1 SCC 57

⁶ Shri Bodhisattwa Gautam vs Ms. Subhra Chakraborty, 1996 AIR 922, 1996 SCC (1) 490

⁷ Marital Rape in India, Keerthi Krishna, Krati Purwar, Investigative Project Print, Asian College of Journalism

considered as rape and no conviction can be fixed upon the accused.”

In 2015, the RIT Foundation filed a Public Interest Litigation in Delhi High Court summoning the immunization of marital rape in section 375 of the IPC on the grounds of violation of the fundamental rights i.e., Article 14, 15, 19, and 21 of the Indian Constitution.

In 2016, Maneka Gandhi, then minister for Women and Child Development stated that due to illiteracy and poverty in India the concept of marital rape could not be applied here even if it is accepted and understood globally.⁸

However, in **Independent Thought vs. Union of India**⁹, the Supreme Court was compelled to revisit into some of the theoretical suppositions on which the marital rape exception is based as it infringes constitutional rights of girls who are married between the age of 15 and 18 years. In the stage of provisions of section 375 *Sixthly*, IPC, section 3 & section 5 of the “Protection of Children from Sexual Offences Act, 2012 (POCSO Act)”, and section 3(1) of the “Prohibition of Child Marriage Act, 2006 (PCMA)” pursued with the legislative intent and silhouette of apt provisions of the “Juvenile Justice (Care and Protection of Children) Act, 2015”, the “Protection of Women from Domestic Violence Act, 2005 (DVA)” and section 2(d) of the “Protection of Human Rights Act, 1993 (PHRA)”, constitutional rectitude of *Exception 2*, so far it connects to sexual intercourse between husband and wife above 15 but below 18 years of age was doubted.

The Supreme Court ruled that *Exception 2* to section 375, IPC, need to meaningfully read as:

“Sexual intercourse or sexual acts by a man with his wife, the wife not being under eighteen years of age, is not rape.”

However, sexual intercourse with a wife, whose marriage with him is void as he was already married and had a living spouse and who was aware of the fact of the first marriage, amounts to rape.¹⁰

In the case of Nimeshbhai Bharat Bhai Desai vs. The State of Gujarat¹¹, the Gujarat High Court submitted that marital rape is not just a concept and the notion of ‘implied consent’ in marriage and

⁸ Ibid.

⁹ Independent Thought vs UOI, (2017) 10 SCC 800: AIR 2017 SC 4904

¹⁰ Bhupinder Singh v. Union Territory of Chandigarh, (2008) SCC 531

¹¹ Nimeshbhai Bharat Bhai Desai vs. State of Gujarat, 2018, Guj 732

should be collapsed. The law must provide security to every woman (married or unmarried) to protect her corporal independence.

In the case of Anuja Kapur vs. Union of India Through Secretary, 2019, a PIL was filed by Anuja Kapur asking the Court to direct the Government of India to release some guidelines and laws on marital rape. But the bench of the Supreme Court headed by Justice SA Bobde and Justice BR Gavai refused the petition and said that the work related to the formulation of the laws is of the legislature and not the judiciary and the court is more involved with the interpretation of the law rather than drafting it.

Why Marital Rape Should be Criminalized in India?

Breach of Article 14 of the Constitution of India

As per Article fourteen of the Constitution of India “the State shall not deny to any person equality before the law or equal protection of the laws within the territory of India.”¹² The Indian Penal Code operates prejudicially against those ladies who were raped by their husbands, notwithstanding the Constitution which ensures equal protection to each person.

A married woman was not contemplated as a separate or an independent legal body while documentation of the IPC in the 1860s. Instead, she was regarded as the chattel of her husband.¹³ As an outcome to this, she did not procure many rights, now guaranteed to her as an independent legal body, comprising the right to file a complaint against the accused under her own identity. *Exception 2* to section 375, IPC, which exempts sexual actions committed by husbands against their wives from being regarded as an act of “rape”, is largely persuaded by and acquired from the already existing doctrine of blending the woman’s identity with that of her husband. But with the passage of time laws prevailing in India, now consider husbands and wives as an independent & separate legal body, & sufficient justice in present times is unequivocally assiduous with the security of women. This enmesh can be witnessed in the form of a plethora of statutes premeditated to secure women from ‘violence and harassment’, passed since the turn of an era, comprising “The Protection of Women from Domestic Violence

¹² Shukla, V.N., *Constitution of India*, 201, (M.P.Singh Ed., Lucknow: Eastern Book Company, 13th Ed., 2017)

¹³ To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment, 99(6) Harv. L. Rev. 1255, 1256 (1986).

Act” & the “Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act.”¹⁴

The second exception to section 375 ultra vires the right to equality incorporated in ‘Article 14’ of the Indian Constitution as it discriminates against those women who are married by disconfirming them tantamount security from rape and sexual abuses. This exception produces two classes of women based on their marital status and exempts actions committed by men against their wives. Correspondingly, due to the marital status of women, *Exception 2* makes the exploitation of married women viable but in the case of unmarried women similar acts i.e., rape and sexual harassment have been criminalized. However, this distinction between married and single women ultra vires Article 14 hitherto as the stratification has no reasonable nexus to the elementary object of the statute. In the case of “Budhan Choudhary vs. State of Bihar”¹⁵ and “State of West Bengal vs. Anwar Ali Sarkar”¹⁶ The Apex Court upheld, ‘any stratification under Article 14 is contingent to a test of reasonableness which can be decreed only when the stratification has some reasonable relation to the object that the act sought to achieve’. However, *Exception 2* thwarts the objective of Section 375 that is, to secure women and penalize those involved in the barbaric activity of commission of rape. Immunizing husbands from the penalty is wholly contrary to that object. In simple words, the repercussions of rape are the same whether or not a woman is married or single. Furthermore, it could be more difficult for a married woman since they’re knotted with their husbands to flee the abusive situation they’re facing at home. In actuality, *Exception 2* persuades husbands to engage into sexual activities with their wives vigorously because husbands are aware of the fact that their acts are not penalized or fined by law.

Since no reasonable nexus can be construed between the stratification generated by *Exception 2* and the elementary purpose of the Act, it does not comply with the reasonableness test and therefore is violative of Article 14 of the Constitution of India.

Breach of Article 21 of the Indian Constitution

Exception 2 to section 375, IPC, also violates Article 21 of the Constitution of India (i.e.) “no person shall be denied of his life and personal liberty except according to the procedure established by

¹⁴ Protection 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).

¹⁵ Budhan v. State of Bihar, AIR (1955) SC 191

¹⁶ State of West Bengal vs. Anwar Ali Sarkar, AIR (1952) SC 75

law.”¹⁷ This clause has been interpreted by the Supreme Court of India, with time and again in several of its judgments to stretch the meaning of this clause rather than confine it within the literal meanings of life and freedom. It asserted that the rights guaranteed under Article 21 include all the aspects which are essential for living a good life for example right to privacy, health, dignity, safe environment, safe living conditions and many more.

In present times, courts are recognizing a right to refrain sexual activities and to excuse oneself from undesired sexual activity incorporated in the wider aspect of the right to life and personal liberty.

In the case of the “State of Karnataka vs. Krishnappa”, the Apex Court said that “sexual violence except being a barbaric act is an unlawful interference with the right to privacy and sanctity of a female.”¹⁸ And also held that sexual intercourse without consent amounts to physical and sexual abuse. After that, in the *Suchita Srivastava vs. Chandigarh Administration*, the Supreme Court compared the right to choose alternatives related to sexual activity with that of right to personal liberty, dignity, and bodily integrity within the meaning of Article 21 of the Indian Constitution.¹⁹ The Apex Court in its most recent judgment has expressly acknowledged the right to make choices concerning intimate relations within Article 21 of the Indian Constitution. In the case of ‘Justice K.S. Puttaswamy (Retd.) vs. Union of India’, the Apex Court of India acknowledged ‘the right to privacy’ as a ‘fundamental right of all citizens under Article 21’ & adjudged that the right to privacy embraces “decisive privacy contemplated by an ability to build intimate decisions mainly comprising one’s sexual or reproducing nature and decisions regarding intimate relations.”²⁰

Living together in any sort of coercive sexual relationship is regarded as the infringement of the fundamental right i.e., of Article 21.²¹

The aforementioned judgments don’t discriminate between the rights of married and single women & there doesn’t exist any contradictory judgment declaring that the ‘right to privacy’ guaranteed to an individual is lost after the marriage. Hence, the Apex Court has observed that the right to avert sexual activity for

¹⁷ Shukla, V.N., *Constitution of India*, 201, (M.P.Singh Ed., Lucknow: Eastern Book Company, 13th Ed., 2017)

¹⁸ *The State of Karnataka vs. Krishnappa*, (2000)4 SCC 75

¹⁹ *Suchita Srivastava vs. Chandigarh Administration* AIR [2008] 14 SCR 989

²⁰ *K.S. Puttaswamy J. (Retd.) vs. UOI*, AIR 2017 SC 4161

²¹ as “Right to abstain” from consummation is a long-established principle of the Constitutional jurisprudence of India. ‘Govind vs. State of M.P, AIR 1975 SC 1378’; ‘Kharak Singh vs. State of U.P, AIR 1963 SC 1295.

all women, notwithstanding their status of marriage, as granted by Article 21 of the Indian Constitution.

Moreover, *Exception 2* infringes the right to live a life with dignity as guaranteed by Article 21 of the Indian Constitution. As stated above, it is well established that the right to life incorporated in Article 21 is not solely a right to subsist.²²

In this stratum, the courts have time and again adjudged, “right to life” encircles a right to live dignified life.²³ Still, the significant subsistence of *Exception 2*, falls short to dissuade men from involving in acts of coerced venereal proximity with their wives affecting the corporal and psychic health of wives negatively & sabotage their right and capability to live a dignified life.

However, the Legal Service India recognized three reasons against the criminalization of marital rape.

1. Marriage is sacred and criminalization of such an act would lead to the destabilization of society.
2. There is a fear of a large number of fraudulent cases being filed against husbands.
3. To prove it medically is another lacuna that has helped the offenders to continue to molest or abuse their wives and excuse themselves from the crime.²⁴

²² Regional Director ESI Corpn. vs. Francis de Costa, 1993 Supp (4) SCC 100; 5 D.D. Basu, Commentary on the Constitution of India, 4711 (LexisNexis 2015)

²³ C.E.S.C. Ltd. vs. Subhash Chandra, AIR [1992] 1 SCC 441

²⁴ Marital Rape in India, Keerthi Krishna, Krati Purwar, Investigative Project Print, Asian College of Journalism

United Nations on Marital Rape

On 25th June 2019, the UN urged nations to discontinue marital rape & dissolve legal lacunas. The house is amongst the most perilous spots for females, the United Nations said on 25th June 2019, as examination demonstrated just four out of ten nations condemn the conjugal assault. Twelve nations permit offenders to evade indictment by tying in a marital alliance with their victims, stated by UN Women their leader yearly "Progress of the World's Women report". Phumzile Mlambo-Ngcuka, an executive director of UN Women stated in its preface "We have seen incredible improvement in taking out oppression against females, in laws, anyway it's not a mishap that family laws have been the steadiest to progress. The stunning inescapability of sexual partner viciousness implies that factually, house is amongst the most perilous spots for a woman to live."

In the year 2017, almost 60% of women casualties of deliberate murder were slaughtered by relatives, a pace of 137 women are slaughtered every day, as per the report. Almost 1 of every 5 females aged 15 to 49 internationally experienced corporal or venereal maltreatment by a previous or present accomplice or companion in the earlier year, the report likewise found, portraying brutality towards females as "genuine and universal."²⁵

Conclusion

Marital rape or spousal rape must be treated as a crime as it is nowhere a right of a husband to force or threaten his wife to enter into any sort of sexual activity. *Exception 2* to Section 375, IPC, is ultra vires the fundamental rights guaranteed by the Constitution of India i.e., Article 14 and Article 21. It is not justified to discriminate against a married woman to that of unmarried and marital status should not be a parameter to decide whether the rape has been committed or not. Marital rape restrains women from living a healthy life with human dignity and provides special privilege to husbands to act autocratically as they are well versed with the fact that no actions could be taken on the ground of marital rape as it's not penalized. It is high time now that the legislature should wake up and strike down this provision from the statute as it's the duty of the State to protect an individual whether married or unmarried from such barbaric acts. Therefore, by keeping in mind the fundamental rights of a woman and her right to be recognized as an independent

²⁵ Girls & Women, Ellen Wulffhorst, Thomson Reuters Foundation, Global Citizen, June 26, 2019

legal body notwithstanding marital status new laws should be made and imposed more effectively.