



MARRIAGE (CONSENT TO RAPE)

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INTRODUCTION

As we are on the edge of completing our 74 years of Independence, the woman in The Republic India are still not free and independent and continues to live in fear and darkness in the society. One side were the judiciary of our country making cornerstones by making glorious decisions on matters like 'Adhaar Card Case', 'Sabrimala Case' and 'Triple Talaq' and governments talk about protecting rights of woman, making various schemes and spending corers on them on the other hand they are silent on criminalizing the concept of marital rape. Rape is rape. Be it stranger rape, date rape or marital rape. The law does not treat marital rape as a crime. Even if it does, the issue of penalty remains lost in a cloud of legal uncertainty. Despite in rise of marital rape cases in India the law does not defines it and considers it to be a private matter of husband and wife and therefore such matters are dismissed by the courts But rape on the other hand is being recognized and are dealt in courts. Marital rape is the most common and repugnant form of masochism in Indian society, it is hidden behind the iron curtain of marriage.

RAPE A HINIOUS CRIME

Rape is a word originated from Latin word 'to seize', which is understood as sexual intercourse between two people where one person is against or is not willing to do it or not ready for it. Rape in simple terms is

forcefully having sexual intercourse with another person against will. Many jurist have defined Rape as situation were intercourse was without conscious and voluntary consent, i.e. when the woman was unable to give consent, or when resistance was prevented by stupor, intoxication, narcotics, etc.¹ rape is also considered as unlawful carnal knowledge, without the women's consent either by force, fear or fraud.²

Patriarchal system that governs Indian families has always considered women as mere property of her husband or guardian. So rape was considered as theft of women and wrong against husband or guardian. This ideology has influenced our legislatures in ignoring offence of spouse rape by giving it shield of matrimonial right of the husband and by this they are silently accepting that women are merely an object of sexual gratification of her husband with no will of her own over her sexuality. This perception has subsided women's right to equality and justice.³

Rape in India is defined under section 375 of the IPC as intentional and unlawful sexual intercourse with a woman without consent. And here it entitles to social and cultural perspectives.

The IPC (Indian Penal Code) defines rape vide sections 375 as :

“. Rape.—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

¹ B. KARPMAN, THE SEXUAL OFFENDER AND HIS OFFENSES 12 (1954) [hereinafter cited as KARPMAN].

² Id.

³ Articles on legal issues [ISSN: 2349-9796]



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 I—For the purposes of this section, "vagina" shall also include labia majora.

Explanation 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.

Exception I— A medical procedure or intervention shall not constitute rape.

Exception 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."⁴

In *Bodhisattwa Gautam v. Subhra Chakraborty*⁵, court held that rape is a crime against the basic human right and violation of the right to life enshrined in Article 21 of the Constitution and provided certain guidelines

for awarding compensation to the rape victim.

The judgement in the landmark case of **Chairman, Railway Board v. Chandrima Das**⁶, the Court held that rape is not a mere matter of violation of an ordinary right of a person but the violation of Fundamental Rights which is involved. Rape is a crime not only against a woman; rather it is a crime against the society in large. It is a crime against basic human rights and is violative of the victims most cherished right, namely, right to life, which includes right to live with human dignity contained in Article 21.

That a reading of the previously mentioned cases it is clear that such an exception as "marital rape:

Is violative of the basic fundamental concepts on which our entire legal system is bases and such an except damages the entitlement of women to live with dignity and encourages the society to commit crime against the women, which in itself is unacceptable and against the principle and corner stones of the Constitution of India...

MARITAL RAPE

Marital rape otherwise called as spousal rape is an immoral act where a man engages in undesired sexual intercourse with his wife. It is considered as a gravest offence which obliterate the main covenant of marriage that is, consensus. Even in consonance with religious authorities, it is reckoned as a heinous crime any sexual intercourse between a husband and wife without wife's consent amounts to the offence of Marital Rape.

Exception 2⁷ decriminalizes the offence of Marital Rape by stating "sexual intercourse

⁴ <https://indiankanoon.org/doc/623254/>

⁵ AIR 1996 SC 922

⁶ MANU/SC/0046/2000

⁷ Exception to Section 375 of the Indian Penal Code, 1860.



or sexual acts by a man with his wife where wife not being under fifteen years of age, is not Rape”⁸. But there is one specific form of marital rape that has been criminalized by the Indian Penal Code vide Section 376B, which says that “Sexual intercourse by husband upon his wife during separation : Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.

Explanation - In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375”⁹.

Understanding the concept of Marital rape in context of Indian Law can be held to be cruel to wife’s as in any case of Rape it is only the offender or the rapist who has violated the law and not the rape victim, i.e. victim has no role in the crime and the full liability lies on the offender/rapist. However, in case of wives when their husband does this crime on them they are not liable in India

In India when we talk about rape the first question that’s hits mind is who has done it. If he turns out to be husband, we say it is not rape as, marriage understood as an agreement giving consent for sexual acts between spouses.¹⁰ However, marriage does not mean consent to sex or any sexual acts as the dignity of the wife is harmed i.e. the fundamental right of her is put on stake which is guaranteed by the Indian Constitution.

Marital rape is considered as rape only if the wife is less than 15 years of age. There is no legal protection accorded to the wife after the age of 15, which is against human rights regulations. The same law that provide for the legal age of consent for marriage to be 18, protects from sexual abuse only those up to the age of 15. As per the Indian Penal Code, the instances wherein the husband can be criminally prosecuted for an offence of marital rape are as under:

- When the wife is between 12 – 15 years of age, offence punishable with imprisonment upto 2 years or fine, or both;¹¹
- When the wife is below 12 years of age, offence punishable 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;¹²
- Rape of a judicially separated wife, offence punishable with imprisonment upto 2 years and fine;¹³
- Rape of wife of above 15 years in age is not punishable.¹⁴

Violative of basic fundamentals guaranteed in part III of the Indian constitution

The Indian Constitution guarantees all citizen EQUALITY DIGNITY LIBERTY etc. where sexual privacy is an important element that needs attention or recognition and protection in India as such recognition would acknowledge the subordinating impact of sexual privacy¹⁵. As the term, Sexual Privacy serves as a corner stone for consent of the woman. As marital rape is a crime that

⁸ (2013) 382 SCC (2017)

⁹ The Indian Penal Code, 1860, section 376B

¹⁰ East’s Treatise of the Pleas of the Crown in 1803.

¹¹ Indian Penal Code (45 of 1860), Section 376(1)

¹² Ibid

¹³ Indian Penal Code (45 of 1860), Section 376A.

¹⁴ Indian Penal Code (45 of 1860), Exception to Section 375.

¹⁵ Yale Law Journal.



occurs in the private sphere between the spouses but the responsibility lies on the state to penetrate into private sphere otherwise the woman will have to suffer the offence of rape done by her husband.

Exception 2 of section 375 IPC is violative of Article 21 of the Indian Constitution¹⁶, which states, “no person shall be denied of his life and personal liberty except according to procedure established by law.” In addition, the apex court finds article 21 to be vaguer than just life and liberty and concept of rights to health, privacy, dignity, safe living conditions, and safe environment etc. are enriched within it.

Article 14 of the Constitution guarantees the *fundamental right* 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”***. Article 14 therefore protects a person from State discrimination. But the exception under Section 375 of the Indian Penal Code, 1860, discriminates with a wife when it comes to protection from rape. Thus, it is submitted, that to this effect, exception provided under Section 375 of the Indian Penal Code, 1860, is not a ***reasonable classification***, and thus, violates the protection guaranteed under Article 14 of the Constitution¹⁷.

In ***Justice K.S. Puttuswamy (Retd.) v. Union of India***, the Supreme Court recognized the right to privacy as a fundamental right of all citizens and 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 relations¹⁸.” Forced sexual cohabitation is a violation of that fundamental right¹⁹. The distinguish between whether a woman is married or unmarried was not dealt in this case, and The Supreme Court of India also found the right to abstain from sexual activity for all women, irrespective of the marital status.

Supreme Court in ***The State of Karnataka v. Krishnappa***²⁰, said sexual violence apart from being a heinous act is an unlawful and infringes the right to privacy and sancity of a woman, and recognized that non-consensual sexual intercourse amounts to physical and sexual violence. Exception 2 also harms the dignity of a married woman and the apex court has ruled that the ray of right to life extends to right to live with dignity²¹. However, the very existence of Exception 2, which fails to deter husbands from engaging in acts of forced sexual contact with their wives, adversely affects the physical and mental health of women and undermines their ability to live with dignity.

The concept of right to privacy is not mentioned in our constitution, but Supreme Court when dealing with the issue of right to privacy observed:

Kharak Singh V. State of U.P.²²; **Govind V. State of M.P.**²³; **Neera Mathur V. LIC**²⁴ etc., the SC has perceived that a right to privacy is intrinsically ensured under extent of art. 21. The right to privacy under Art. 21 incorporates a right to be allowed to sit unbothered and not aggravated. Any type of intense sex damages the right to protection,

¹⁶ The Indian Constitution Article 21

¹⁷ India Const. art. 14.

¹⁸ *Justice K.S. Puttuswamy (Retd.) v. Union of India*, (2017) AIR 2017 SC 4161 (India).

¹⁹ *Govind v. State of M.P.*, AIR (1975) SC 1378 (India); *Kharak Singh v. State of U.P.*, (1963) AIR SC 1295 (India).

²⁰ *The State of Karnataka v. Krishnappa*, (2000) 4 SCC 75 (India).

²¹ (1992) 1 SCC 441 (India).

²² 1963 AIR 1295, 1964 SCR (1) 33

²³ 1975 AIR 1378

²⁴ 1992 AIR 392



sexual security. It is presented that the teaching of marital exclusion to rape damages a wedded woman's entitlement to protection by diving her to go into a sexual relationship without wanting to.

In the landmark case of: **Vishakha V. State of Rajasthan**²⁵ the SC has extended the right of privacy in working environment also. Further, along a similar line we can translate that there exists a right of privacy to go into a sexual relationship even inside a marriage. Subsequently by decriminalizing rape inside a marriage, the marital exception is teaching damages to right of privacy of a wedded lady and is consequently illegal.

In the case of **State of Maharashtra V. Madhkar Narayan**²⁶ the SC has held that every woman is entitled to her sexual privacy and it is not open to for any and every person to violet her privacy as amd whenever he wished.

Hidden crime

Marital rape causes mental trauma to woman, it indicates that the marital rape often has serve and is long lasting consequences for woman. To harm a person mentally and physically, knowingly comes under crime. It takes place inside the four corners and most importantly between legally married man and woman, so, it generally underestimated by society and hence it become a hidden crime. The main reason men do not want to forbid marital rape is that they do not want to give them the power to say no.²⁷ When we look towards the legal perspective, unwilling sexual relationship between husband and wife is recognized as criminal offence in many countries but in India, entering in to a

marital relation is presumed to deliver consent.

marital rape is the most common and repugnant form of masochism in Indian society, it is hidden behind the iron curtain of marriage. The Hon'ble Supreme Court of India, being the last hope for reforms in outdated approach towards marital rape after Parliament, said that country is not ready to accept marital rape as a crime. It can be seen that the lawmakers have a different view and believe marital rape cannot be applied in the Indian context because of factors like "level of education and illiteracy, poverty, social customs and religious beliefs".

Article 14 of the Indian constitution²⁸ guarantees every person equality (i.e. both man & woman) but the Penal Code discriminates against woman (wives) who were raped by their own spouse. The law identifies both man and woman as separate and independent legal identities and the jurisprudence over the world in the modern era is concerned with woman protection. Exception 2 of the Section 375 is violative of Article 14 of the Indian Constitution insofar it discriminates woman on basis of marriage by denying the equal protection from the offence of rape and sexual harassment. Exception 2 also creates two different class of woman based on marital status and immunizes action perpetrated by men against their wives, and making it possible for married woman to victimized just for the reason that they are married.

Supreme Court of India, when dealing the issue in case of **Budhan Chaudhary v. State of Bihar**²⁹ and **State of West Bengal v. Anar Ali Sarkar**³⁰, stated that any

²⁵ (1997) 6 SCC 241

²⁶ AIR 1991 SC 207

²⁷ ICRW(International Centre for Research on Woman)

²⁸ India Const. art. 14.

²⁹ AIR (1955) SC 191 (India).

³⁰ AIR (1952) SC 75 (India).



classification under Article 14 of the Indian Constitution is subject to a reasonableness test, that can be passed only if the classification has some rational nexus to the objective that the act seeks to achieve. However, exception 2 disturbs the whole purpose of the section 375; protecting woman from inhuman activity of rape and punishing those who are engaged/involved in such heinous crime as husbands are exempted from the punishment that the Penal Code charges on such activity (i.e. Rape) and is contradictory to that objective. But the consequences are same in both the cases (i.e. in married woman and unmarried woman). Moreover, scenario of married woman is worse than unmarried woman as they are certain to their husband and family emotionally and financially. Additionally, exception 2 to the section 375 has developed a mind-set in society that encourages husbands to forcefully have sexual intercourse with their wives, against their consent, as they apprehend that their acts are not discouraged or penalised by law as no rational nexus may be deciphered between the exception and act's objectives.

The jurist in country have tried equating virginity with rape of a woman i.e. once woman gets married to her husband it is supposed that she gives her virginity to her spouse, and having sexual intercourse with him against the consent will not be rape. Therefore marital is more horrendous for a woman as she has to stay with her rapist/aggressor ordinary.

The Supreme Court in **Joseph Sine vs. Union of India**³¹ said, "*Wife is not a chattel*". Therefore, from the above-mentioned verdict it can be inferred that the husbands should not treat their counterparts/wife's as sexual object in order

to satisfy their sexual pleasure against their consent. The victims of such crime have become helpless and subjugated to various kinds of immoral acts.

Moreover, such acts of husband are also considered wrongdoing against the woman and covered under the ground of cruelty, as marital rape is not criminalized in republic of India that wants government attention.

Kerala high court in Sree Kumar v. Pearly Karun³² :

The court observed that the offence under Section 376A, IPC will not be attracted as the wife is not living separately from her husband under a decree of separation or under any custom or usage, even if she is subject to sexual intercourse by her husband against her will and without her consent. In this case, the wife was subjected to sexual intercourse without her will by her husband when she went to live together with her husband for 2 days as outcome of settlement of divorce proceedings which was going on between the two parties. Hence the husband was held not guilty of raping his wife though he had done so.

The judiciary seems to have completely relegated to its convenience the idea that rape within marriage is not possible or that the stigma of rape of a woman can be salvaged by getting her married to the rapist.

CONCLUSION

Any crime when is done either in public or private is crime and the person doing it should be held liable by the law of the land and when crime like marital rape is not criminalized completely then it is a wrongdoing and against the constitution principles and it reflects that Exception 2 to Section 375 of the IPC is an infringement of Articles 14

³¹2018 SCC Online SC 1676

³² 1999 (2) ALT Cri 77



and 21 of the Constitution. There are loopholes in protecting women from Domestic Violence Act, as the Act no were talks about the crime of marital rape. The country is heading towards the era of revolution and legal reforms.

As in country like India, such reforms are difficult and far to be achieved, as the judiciary, the lawmakers (parliament) are not prepared for such big reform to criminalizing marital rape but it is high time that Indian jurisprudence to understands the inhumane nature of this provision of law and strikes it down, and fill the gap between Rape and Marital Rape as both are the most heinous crimes making woman vulnerable and her life miserable and make India a country were there is no discrimination and people enjoy their rights in real sense.

- Section 376-A of the Indian Penal Code, 1860
- http://www.supremecourtcases.com/index2.php?option=com_content&itemid=1&do_pdf=1&id=586
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- India Const. art. 21.