
MARITAL RAPE: A FALLACY OR REPREHENSIBLE REALITY

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ABSTRACT

Rape is not just an act of sexual violence but an act of degenerating the society by outraging the modesty of a woman and outseeing the dignity of mental, physical and psychological well-being of a woman. How the concept that has been instilled within the society at large remains to be a culmination of the wrong deeds not only by deviating from basic theory of symbiosis but also making everyone sustainable. The concept of marital rape to be considered in the Indian Penal Code has been a matter of discussion since long. The Article looks into the concept of marital rape in India, the provisions being violated by the same. Marital Rape cannot be allowed to exist as an implied consent for the parties that are involved in the marital relationship and in no way, it implies any perpetual consent from the side of woman.

INTRODUCTION

“When a stranger does it, he doesn’t know me, I don’t know him. He’s not doing it to me as a person, personally. With your husband, it becomes personal. You say, this man knows me. He knows my feelings. He knows me intimately and then to do this to me – it’s such a personal abuse.”¹

It's the 21st century, the world is moving ahead, new technologies, new ideas, new opinions but why Marital Rape is still a non-criminalized crime in India? Can any kind of Rape be legal?

The Section 375 of IPC, includes all forms of sexual assault involving nonconsensual intercourse with a woman². Under normal circumstances, any person would refer to such incident as heinous and against the norms of the society. But instead The Indian Penal Code, 1860, covered the term of marital rape which is one of the most common and repugnant form of despotism under the iron curtain of marriage.

According to Exception 2 to Section 375, sexual intercourse between husband and wife over 15 years of age doesn’t come under the purview of rape and thus immunizes such acts from prosecution. While non-consensual sexual act between husband and wife is considered as a criminal offence in almost every part of the world, India is still one of the thirty-six countries where the wife is presumed to deliver perennial sexual consent to her husband after entering into marital relations.

Marital Rape refers to the unconsented sexual intercourse where the spouse is the victim and the other one is supposed to have the right to violate the dignity of the other. It could be by the use of force, coercion or even by toxicity of the spouse. The working of the conjugal rights has been established in various religious books where the husband may misuse his dominant position.

STATUS OF MARITAL RAPE IN INDIA

Marital Rape in India is an ingrained problem and over the years it has only worsen. It exist

¹ ‘License To Rape: Sexual Abuse Of Wives’ by D Finkelhor and K Yllo (1987) Criminal Justice Policy Review

² Indian Penal Code § 375, No. 45 of 1860, India Code.

de-facto but no de-jure. With the changing times and people realizing the rights that needs to be given to the wife, Supreme Court of India and the various high courts are flooded with the writ petitions challenging the constitutionality of the Exception 2 to Section 375 of Indian Penal Code. In a landmark judgment of *Independent Thought v. Union of India*³ the Supreme Court criminalized unwilling sexual contact with a wife between fifteen and eighteen years of age. This in turn led to an increase in the filing of writ petitions challenging the constitutionality of this exception.

VIOLATION OF ARTICLE 14 OF THE INDIAN CONSTITUTION

Article 14 of the Indian Constitution ensures 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.”⁴ The constitution of India was designed to ensure equality to all, but still the Indian Penal Code discriminates against the women who have been raped by their husbands.

In 1960s, when the Indian Penal Code was first drafted, married women were not considered an independent legal identity. She was considered as a belonging of her husband so much so that she was not given any of her own rights. Exemption 2 of the act is thus largely influenced by this act of merging the woman’s identity with her husband’s.

It was drafted on the basis of Victorian patriarchal norms under the ‘Doctrine of Coverture’, which merged the identities of men and women and didn’t recognize them as equals.

But with the changing time, wives are acknowledged with separate legal identity as of the husband and now much jurisprudence is majorly concerned with the protection of the women.

Exception 2 of the act violates the right to Article 14, i.e. the Right to Equality as it discriminates the rights of married women by not providing them equal protection from marital rape and day-to-day sexual harassment while protecting unmarried women from those same heinous acts. Supreme Court of India in the cases of *State of West Bengal v. Anwar Ali Sarkar*⁵ and *Budhan Choudhary v. State of Bihar*⁶ held that any classification under Article 14 of the Indian Constitution is subject to a reasonableness test that can be passed only if the

³ (2013) 382 SCC (2017) (India)

⁴ India Constitution article 14

⁵ *State of West Bengal v. Anwar Ali Sarkar*, AIR (1952) SC 75 (India)

⁶ *Budhan v. State of Bihar*, AIR (1955) SC 191 (India)

classification has some rational nexus that is linked to the objective which the act seeks to achieve.

The main purpose of Section 375 is to protect the integrity of women and punish those who are involved in such inhuman act of rape. Exempting husbands from this punishment is highly contradictory to this objective which has been stated in the exemption 2 of the act. But married or not, the consequences of rape are the same. And more so, married women might find it more difficult to escape such an abusive relation, being legally as well as financially tied to their husbands. Moreover, it also give husbands free permit to forcefully enter into sexual relationship with their wife as they know they won't be held liable for the same. Thus, no further relation can be interpreted between the act and the exception and doesn't satisfy the test of reasonableness and thus violates the Article 14 of the Indian Constitution.

VIOLATION OF ARTICLE 21 OF THE INDIAN CONSTITUTION

Article 21 of the Indian Constitution states that “no person shall be denied of his life and personal liberty except according to the procedure established by law.”⁷ Marital Rape clearly violates the woman's right to live with dignity and hence Exception 2 of the act is clearly violative of the same. The Supreme Court of India instead of guarantying full life and liberty, it limited it to the rights to health, privacy, dignity, safe living conditions, and safe environment, among others.

Supreme Court of Indian in the case of *The State of Karnataka v. Krishnappa*⁸ held that “sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female.” It was also held that non-consensual sexual intercourse contributes to physical and sexual violence. In the case of *Suchita Srivastava v. Chandigarh Administration*⁹ Supreme court identified the right to make individual choices related to sexual activity with rights to personal liberty, privacy, dignity, and bodily integrity under Article 21 of the Constitution. The Supreme Court recognized the right to privacy as a fundamental right of all citizens in the case of *Justice K.S. Puttuswamy (Retd.) v. Union of India*¹⁰ and held that the right to privacy includes “decisional privacy reflected by an ability

⁷ Article 21 of the Indian Constitution

⁸ *The State of Karnataka v. Krishnappa*, (2000) 4 SCC 75 (India)

⁹ *Suchita Srivastava v. Chandigarh Administration*, (2008) 14 SCR 989 (India)

¹⁰ *Justice K.S. Puttuswamy (Retd.) v. Union of India*, (2017) AIR 2017 SC 4161 (India)

to make intimate decisions primarily consisting of one's sexual or procreative nature and decisions in respect of intimate relations.”

The above mentioned ruling doesn't distinguish between rights given to either married or unmarried women. Thus, recognizing the right to abstain from all sexual activities as their right under Article 21 of the Constitution of India. Besides, Exception 2 violates Article 21's right to live a healthy and dignified life. For example, there can be no dispute that every citizen of India has the right to receive healthcare or that the state is required to provide for the health of its constituents.¹¹ It has been repeatedly held by courts that 'Right to life' ensures the right to live with human dignity.

LAWS ON THE MARITAL RAPE: NEED OF THE HOUR

Under the Indian Penal Code as well the Prevention of Women from the domestic violence Act, 2005 sexual assault is one of the grounds for the divorce along with imprisonment for a term of 7 years. However, the major question that arises is whether this term is sufficient and if so, the situation that the wife has been put into, is the marriage not being put into question. The situation where wife is not even asked for the consent before sexual intercourse, questions the dignity of the woman but also how a crime in India is not yet properly recognized.

Marriage is considered to be such a pious relation and is also a bond of trust and affection. However, because of the outdated patriarchal context, it is believed that woman is dependent on man financially or otherwise and thus the relationship takes the curve of coercive potential. Marital Rape in turn is destructive as it threatens the elementary roots of the marital relationship where the wife may feel deceived, humiliated and perplexed. It questions the very essence of the relationship in which the man can no longer be trusted and a woman cannot turn to him to seek any comfort or gain reassurance.

A change needs to be brought about in the Indian society to help recognize the concept of Marital Rape and the consequences that follow it. The concept need to be introduced in which the wife is powerful enough to walk out of the marriage and that she should be free to make her own choices.

¹¹ *Regional Director ESI Corpn. v. Francis de Costa*, 1993 Supp (4) SCC 100; 5 D.D. Basu, Commentary on the Constitution of India, 4711 (LexisNexis 2015).

CONCLUSION

Rape is rape and it is the end of the sentence. No condition, no situation, whatsoever can deny the fact that the perpetrator of his monstrous conduct. Indian society is progressing dynamically over time economically, socially and legally. This growth and development will in turn result in requirement to change and adequate amendments to help and bring equality among people of the country.

A proper recognition needs to be brought about for the marital rape with the requirement to bring certain legislations into the country. Age, gender, race, religion, sex and marital status of the victim don't matter. Some of the most absurd penal codes have been adopted from the '*British Raj*' and it is disheartening to know that they haven't been touched ever since. If the implementation of the law cannot be brought into action with the idea of not being able to destroy the institution of marriage, then it should be declared void and should continue with process of rape and give them due recognition properly.

Indian law now recognises husband and wife as separate legal identity and much of the jurisprudence in modern India is concerned with the exploitation of the women. Therefore, it is high time to take cognizance of this legal infirmity and bring marital rape under the purview of rape laws under The Indian Penal Code, 1980.