

**PARADOXES OF MARITAL RAPE LAWS IN INDIA**

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**ABSTRACT**

The law in India does not criminalise marital rape, i.e. the Indian Penal Code, 1860 does not recognise that it is a crime for a husband to rape his wife (as provided under exception 2 of section 375 of the Indian Penal code). The reasons for this are manifold and can be found in various reports of the Law Commission, Parliamentary debates and judicial decisions, and even tracing the history of the sociological views of lawmakers when the Indian Penal Code was drafted. The reasons range from protecting the sanctity of the institution of marriage, giving a private space to the marital institution and following the Doctrine of Coverture, which has been discussed in the paper. In this research paper, we depict how these arguments advanced to not criminalise marital rape are erroneous. Through an analysis of Article 14 of the Constitution of India, we argue that the marital rape exception clause found in the Indian Penal Code, 1860 is wholly unconstitutional. Even we have discussed how the exemption of marital rape laws from the purview of criminal law has violated the right to life under Article 21 (right to life with human dignity, right to privacy). Further, we noted the suggestive measures for criminalizing marital rape. We conclude on the note that the criminalisation of marital rape is wholly necessary, for the wholesome development of society and for protecting the basic human rights and fundamental rights of married women.

**MARITAL RAPE: AN INTRODUCTION**

“When two peoples are living as husband and wife, however brutal the husband is, can the act of sexual intercourse between them be called rape ? “, this is a recent statement made by the Honourable chief justice of India SA Bobde while adjudicating a matter on marital rape. It shows that the laws regarding marital Rape in India are quite perplexed. Domestic violence in India is a common problem of the country. As per the National Crime Record Bureau (NCRB) report, 2019, 70 per cent of women in India are the victim of domestic violence, and marital rape is a part of domestic violence. In 2013 the United Nation Committee on Elimination of Discrimination Against Women (CEDAW) recommended that the Indian Government should criminalize marital rape. Despite all these reports and recommendations, no law has been made against marital rape. Today marital rape has been criminalized in more than 100 countries but India is one of the 36 countries where marital rape is still not

criminalized. The main justifications which these countries provided for not to criminalize marital rape are, the wife are considered to be subservient of the husband. The identity of the women after marriage merges with the identity of the husband. Women were considered as chattel to their husband, in such a situation it is not possible to consider it rape, since the husband was master to the wife and also enjoys privileged over her body<sup>1</sup>. Therefore the law did not provide any independent personality out of her husband. Another justification taken by these countries is that criminal law should not interfere in any marital relationship between the husband and wife. The marital relationship is a private sphere and respecting such privacy, the law should not penetrate the privacy of both husband and wife.

Presently in the 20th century though we consider ourselves as equal, though our constitution empowers us with the fundamental rights of equality, regarding a married woman a big question mark lies on it. The patriarchal outlook of our society, considers women to be the property of men post marriage. In some aspects of life, women are still not free and independent. They continue to be camouflaged under the realm of darkness and fear. Marriages in India are considered to be a license for sexual intercourse or sexual fantasies for the husband with or without the consent of the wife. The dogmatic view on marital rape can be inferred from what we call “Implied Consent”. People have a perception that a marriage between a man and a woman provides implied consent for sexual activities.

Marital rape refers to rape when the perpetrator or the offender is the victim’s spouse or husband. Rape is rape irrespective of the entity and status of the perpetrator or offender. A woman who is raped by an unknown person will be traumatized and will live with a memory of horrible attacks her whole life and the same way a married woman who is raped by her husband between the four walls will also cause the same mental trauma. The act of forcing one’s spouse or wife to engage in sexual activities without proper consent is not only unjust but degrades the stand of empowerment of women. It is quite prudent that a married woman has the same right to liberty and to control her body just like that of unmarried women.

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<sup>1</sup> To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment, 99(6) HARVARD LAW REVIEW, 1256 (1986)

**STATUS OF MARITAL RAPE IN INDIA**

The substantive definition of rape is codified in section 375 of the Indian Penal Code (IPC), which includes all forms of sexual assault involving non-consensual intercourse with a woman. Non-criminalization of marital rape in India is provided under exception 2 of section 375 IPC.

According to section 375, “A man is said to commit rape if he –

1. Penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her do so with him or any other person; or
2. Inserts, to any extent any object or a part of the body, not being the penis into the vagina, the urethra or anus of a woman or makes her do so with him or any other person; or
3. Manipulates any part of the body of the women to cause penetration into the vagina, urethra, anus or any part of the body of such women or makes her do so with him or any other person; or
4. Applies his mouth to vagina, anus, urethra of a woman or makes her do so with him or any other person, under the circumstances falling under any of the following seven descriptions –

First – Against her will.

Secondly – without her consent.

Thirdly – with her consent, when her consent has been obtained by putting her or 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, because 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 eighteen years of age.

Seventhly – when she is unable to communicate consent.

Exception 1- A medical procedure or intervention shall not constitute rape.

Exception 2- Sexual intercourse or sexual acts by a man with his wife, the wife not being under fifteen years of age, is not rape.

Thus exception 2 provides immunity to the husband from any kind of prosecution of raping his wife, until and unless the wife is under fifteen years of age. This present law thus draws a presumption of perpetual consent to sex with her husband after entering into marital relation. While codification of the law, the legislature would have intended that criminalizing marital rape would amount to excessive interference in the institutional sanctity of marriage. Marriage is considered to be a sacred institution that forms the bedrock of society, which is deeply personal and the state is hesitant to interfere in such private space. Thus to maintain the privacy of the citizens especially to the relationship of husband and wife such immunity is provided to the husband.

Furthermore, the said exception for married women aged between fifteen and eighteen continued until 2018 when the Supreme Court of India, in a landmark decision in case *Independent Thought vs. Union Of India*<sup>2</sup> held that a man is said to commit rape if he engages himself in any form of sexual intercourse or sexual activities with his wife if she is aged between fifteen and eighteen. This was the first time that any legal recognition is provided to the fact that sexual activities on a girl below the age of eighteen by any man, though he is her husband, will amount to rape.

This however does not protect women above the age of eighteen years, who may be subjected to marital rape by their husband, and it will go unnoticed or will not be considered as an offence as the law does not penalize it. Thus there is no legal recourse for women victim of rape whose age is more than eighteen years if the man who has committed the act is her husband, which is quite paradoxical. It thus defeats the spirit of section 375 of the Indian Penal Code. The purpose of the provision is to give protection to women against all kind of sexual activities and to punish those offenders who engage themselves in the inhumane activity of rape. However providing immunity to the husband from punishment against rape is entirely contradictory to the object of the provision, because the consequences of rape are the same, irrespective of the fact that the women are married or unmarried. Moreover in India, married women (especially housewives) may find it more difficult to escape such inhuman and abusive conditions at home because they are legally and financially attached to their husband.

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<sup>2</sup> (2013)382 SCC (2017)

Discussing one of the most horrific cases of marital rape, The Phulomoni Das case or Queen-Empress vs Hari Mohan Maiti is the gruesome one, which shooked the conscience of the society. In this case, Phulomoni Devi, who was an eleven-year-old child bride, died due to excessive bleeding caused by forceful consumption by her husband, Hari Mohan, a man of thirty years of age. The autopsy report concluded that the cause of death was a ruptured vagina, but the husband was acquitted of the charge of rape on the ground that marital rape is exempted from the law of rape in penal laws.

### **DOCTRINE OF COVERTURE AND MARITAL RAPE**

The non-criminalization of marital rape can be traced since the British era. Indian Penal Code was drafted by the Britishers, so it mainly followed the principles of common law. The concept of marital rape was also largely influenced by the Doctrine of coverture, which is based on principles of common law. It means the doctrine of merging the women's identity with that of her husband. When the Indian Penal Code was drafted, married women were not considered as an independent entity, they do not have any independent rights. The interest of both husband and wife was considered to be one. Thus the marital exception to the definition of rape under section 375 of the Indian Penal Code was based on patriarchal norms, that did not allow married women to have separate interest and rights. Their rights and identities were merged with their husband under the Doctrine of Coverture.

### **VIOLATIVE OF ARTICLE 14 OF INDIAN CONSTITUTION**

Article 14 of our Indian Constitution provides that “the state shall not deny to any person equality before the law or equal protection before law within the territory of India”. Thus our Indian constitution guarantees us the right to equality among all citizens of India, whereas the Indian criminal law discriminates against the female victims who are raped by unknown perpetrators and the ones who are raped by their husband. Thus the law itself created a gap between two classes of women based on their marital status and discriminated between the two groups of the same sex (married women and unmarried women). The absurdity of the law lies here that, the unmarried women or married women below fifteen years of age are granted protection by the law against all kinds of sexual violence, whereas at the same time the law provides immunity to the husbands raping their wife, thus allowing marital rape by the law. The classification made by the criminal law thus is not a “reasonable classification”, therefore the exception clause 2 of section 375 Indian Penal Code, blatantly violates Article

14 right to equality of the Indian constitution. In *State of West Bengal vs. Anwar Ali Sarkar*<sup>3</sup>, the Supreme Court held that any classification made under article 14 of the Indian constitution will be subjected to “Test of Reasonable Classification”, which can be passed only if the classification had some rational nexus to the objective of the Act, which the legislature seeks to attend. But exception 2 of section 375 frustrates the objective of the provision, which is to protect the women against rape and to punish the offenders committing rape. In contrastingly exception 2 encourages the husband to commit forcefully sexual intercourse with their wife, as such an act is immunized by the law. Thus no rational nexus can be inferred between the classification made by the exception clause of section 375 of the Indian Penal Code and the objective of the Act, causing the violation of Article 14 of the Indian constitution.

Tracing the time when the Indian Penal Code was drafted during 1860, the status of women was not empowered. A married woman was not considered as a separate legal entity, they were considered as the chattel of her husband. These notions were based on the Victorian patriarchal norms of common law (Doctrine of Coverture), which does not recognize men and women as equal and also does not allow women to hold rights separately. But in due course of time, there is a significant change in Indian law. The law allowed both the husband and wife to be recognized as a separate legal entity, and much importance is given to the protection of women. Thus the notion of considering the women as the chattel of her husband is not relevant today in the eye of law. The constitutional jurisprudence thus favours equality between the genders. In the present context, the Supreme Court of India even moved beyond men and women by recognizing the interest of the third gender as well, in the case of the *National Legal Service Authority vs. Union of India*<sup>4</sup>. Thus the exception clause 2 of section 375 Indian Penal code allowing marital rape, does not serve equality between husband and wife, and based upon this we can also negate the contention that marriage does not give a perpetual implied consent of wife for sexual intercourse.

### **MARITAL RAPE AND RIGHT TO LIFE (ARTICLE 21)**

Article 21 of the Indian constitution states that “no person shall be denied his life and personal liberty except according to the procedure established by law”. The Supreme Court has interpreted this provision in a broad manner and in the plethora of judgments it has

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<sup>3</sup> AIR (1952) SC 75

<sup>4</sup> (2014) 5 SCC 438

extended its application beyond the purely literal guarantee to life and liberty. Thus article 21 also includes, right to health, right to privacy, right to dignity, right to live in a safe environment etc.

The right to live with human dignity is one of the most important components of the right to life under article 21 of the Indian constitution, which perceives the independent interest of a person. The Supreme Court also viewed in many cases that the offence of rape abuses the fundamental right to life and right to live with the human dignity of the victim of rape, may it be marital rape or other forms of rape.

In the case of *Bodhisattwa Gautam vs Subhra Chakraborty*<sup>5</sup>, the apex 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 Indian constitution and provided certain guidelines for awarding compensation to the rape victim. In another case of the *State of Karnataka vs Krishnappa*<sup>6</sup>, the Supreme Court held that sexual violence apart from being a dehumanizing act is also an unlawful intrusion into the fundamental right to privacy and sanctity of a female. In the same case, the court also opined that non-consensual sexual intercourse amounts to physical and sexual violence.

Similarly, in the case of *Suchita Srivastava vs Chandigarh Administration*<sup>7</sup>, the apex court has equated the right to make choices related to sexual activities or sexual acts, intending to protect the right to personal liberty, right to privacy, dignity and bodily integrity under article 21 of India constitution.

Rape is not just like that of ordinary crime. The consequence of rape makes the victim suffer rest of her life. In the landmark case of *The Chairman Railway Authority vs Chandrima Das*, the Honourable Supreme court held that rape is not a mere violation of any ordinary right of the citizens, but the violation of fundamental rights which is involved. Rape is a crime not only against the person of a woman or to the particular victim, rather it is the crime against the entire society. It is also a crime against basic human rights and is violative of the victim's most cherished right, namely the right to life, which includes the right to live with human dignity as provided under article 21. Thus on basis of such judicial pronouncements, it is clear that the exception provided under section 375 of the Indian Penal Code, allowing

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<sup>5</sup> AIR 1996 SC 922

<sup>6</sup> (2000)4 SCC 75

<sup>7</sup> (2008)14 SCR 989

marital rape, damages the basic concepts of life of the married women. It violates the fundamental right of married women to live with dignity and instigates the society to commit a crime against the women, which in itself does not solve the basic purpose of the law and is against the principles of the constitution of India.

### **RIGHT TO SEXUAL PRIVACY**

Tracing the most recent development of the fundamental right to privacy by the supreme court of India, have provided extra protection to women. Article 21 of the Indian constitution explicitly provides a right to make choices relating to intimate relationships.

In the landmark case of Justice KS Puttaswamy vs Union of India<sup>8</sup>, the Supreme Court held that the right to privacy is one of the facets of the right to life under article 21 of the Indian constitution; this is the fundamental right of all citizens. The court also opined 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 relation”.

Citizens also have a “right to abstain” from any kind of sexual activities or sexual intercourse as recognized under the case of Govind vs. State of MP<sup>9</sup>. In this case, the court held that forceful sexual cohabitation is a violation of fundamental right, irrespective of the fact that, she is married women or unmarried women and there is no contrary ruling stating that the individual’s right to privacy is lost by marital association. Thus the apex court has recognized the right to abstain from sexual activity for all women, as a fundamental right conferred under Article 21 of the Indian constitution.

In another case of State of Maharashtra vs Madhukar Narayan Mardikar<sup>10</sup>, the Supreme Court has referred to the right to privacy over one’s body. The court held that even a prostitute has the right to refuse sexual intercourse against any person. Everyone has their privacy and their own choice. But the paradox is that all the rapes by strangers have been criminalized by law in the country except marital rapes. Thus married women have not been given the right to privacy over their own body. Yes, it is true that women under a knot of marriage have some

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<sup>8</sup> AIR 2017 SC 4160

<sup>9</sup> AIR 1975 SC 1378

<sup>10</sup> AIR 1991 SC 207



obligations and must cooperate with their husband, but that does not mean that she will be devoid of her basic fundamental rights, and it is the palpable failure of the law to attain its objective.

In the year 2005, The Protection of Women from Domestic Violence Act was passed, which also have neither considered marital rape as a crime nor as a form of domestic violence. Under this Act, if a woman has undergone marital rape, she will have the right to go to court and can pray for judicial separation from her husband. However, this remedy does not entirely protect the women from the crime, which she had become a victim of. Hence forth the exception 2 of section 375 of the Indian Penal Code violates article 21 of the Indian constitution, the right to life. This fundamental right to life does not merely envisage a mere right to exist, it means to lead a healthy and dignified life by enjoying all basic requirements of life. As discussed, the court in many cases has inculcated that the right to life means the right to live with human dignity. Yet the very presence of exception 2 does not suffice the purpose of the provision, it fails to have a deterrent effect on husbands from engaging in forceful sexual activities with their wives, which adversely affect the physical and mental state of health of the married women and undervalues their chances of living with dignity. As we all know marriage is not a license to rape their wives. A husband does not owe his wife's body only on the pretext of marriage, and the wife does not in any manner become an object of ownership. Just by marrying, the wife does not surrender her intrinsic values, basic human rights and the exclusive autonomy of her body. Thus the existence of marital rape in India is a highly disgraceful offence in India, which not only have failed to protect the fundamental rights of married women but also have scarred the trust and confidence in the institution of marriage completely.

### **SUGGESTION FOR REFORM**

As we have discussed the need for criminalizing marital rape by analyzing different aspects, we propose certain suggestions for the reformation of marital rape laws.

Firstly marital rape should be recognized by parliament as an offence under the Indian Penal code. There should not be any defence of marriage against the charges of rape.

Secondly, the punishment regarding marital rape needs to be the same as what is provided for rape under section 376 of the Indian Penal Code. The mere fact that the parties are married should not make the sentence lighter.

Thirdly regarding the most important question that should we presume consent regarding marital rape, the JS Verma report says that the existence of marriage does not lead to the presumption of consent. In practicality, it is extremely difficult to ascertain consent in marital rape because the nature of such offence happens within the four walls in private. Thus the court need not apply the strict sense of ascertaining consent. Certain other consequential factors like cruelty, harassment, domestic violence by husband against wife should be given importance and shall be relevant while determining, whether the husband has committed marital rape or not.

Fourthly, just like rape under section 375 of the Indian penal code, the mere proof of the existence of sexual intercourse or penetration should not be ground in case of marital rape. The reason behind this is the underlying assumption that it is expected that married couples will engage in sexual intercourse with each other.

Fifthly, while considering the case of Narendra Kumar vs. State (NCT of Delhi)<sup>11</sup>, it was held that past sexual activities of women are not required to establish the existence of consent regarding rape. However, in the case of marital rape, the past sexual history of the victim can be taken into consideration to determine whether the women have had a sexual relationship with her husband or not, to ascertain the consent. If the victim has an active sexual relationship with her husband, it will be prudent for the court to presume that the wife had consent for such sexual activities with her husband.

### **CONCLUSION**

The debate on marital rape is a crucial topic to establish equality for married women, who are mostly confined to homemaking. It became extremely difficult for married women to question the very family or her husband with whom she is a part. But it is crucial to recognize the major lacunas in criminal law, which defeats the constitutional provisions granting women equality and autonomy.

The social condition has undergone a tremendous change since the inception of the Indian Penal Code. Our penal laws were drafted by the Britishers, and they had been remained

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<sup>11</sup> (2012) 7 SCC 1

untouched for a long stretch of years, but in due course of time English laws have been amended and marital rape was criminalized way back in 1991. Though Indian law now recognizes husband and wife as separate and independent legal entities and is concerned more about the protection of women. But the continuous exemption of marital rape from the criminal law jurisprudence creates the assumption of the fact that the wife is the exclusive property of the husband. Till yet no Indian government has shown any kind of active interest in remodifying the problem. Already laws have been made and amended related to cruelty, divorce, dowry demands etc, so why leave one of the most crucial parts of criminal law. So it is the need of the hour to make an amendment to the Indian Penal Code and criminalize marital rape.