



## **MARITAL RAPE: VIOLATION OF FUNDAMENTAL RIGHTS**

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### **ABSTRACT**

Rape is a heinous crime which is considered graver than murder. It is a crime of violence that not only damages the body but which also leaves a permanent scar in the mind of the victim. In India rape is a penal offence under S.375 and 376 of IPC. Surprisingly, it unequivocally avoids marital rape from the ambit of conviction. Marital rape is sex by a husband with his wife without her assent by compulsion or threat.

S.375 of IPC, mentions in its exception clause that - "Sexual intercourse by a man with his own wife, the wife not being under 15 years of age is not rape." The exception prima facie violates Art.14 as it creates a classification between consent given by a married and unmarried women. In India marriage is one of the most conventional forms of livelihood for women where the frequency of undesired intercourse she has to give in to is in all probabilities higher than that endured by a prostitute. The concept of marital rape goes beyond the virtues of Article 21 i.e. right to live with human dignity. However women in Indian setting do not make it an issue of complaint because it is against social norms and it is considered acceptable for men to force their wives to provide sex as and when they wish. It may be argued against marital rape as an offence that consequent to marriage between the spouses, there lies the theory of implied consent where the husband acquires an unquestionable right to have intercourse with his wife and it is her duty to submit before his wishes. Though, the Indian law considers domestic violence against women as an offence but it is mainly confined to physical harm or torture rather than the sexual abuse of wife. Marital rape though a scar on the face of civilized society has not been criminalised in India whereas, US and other civil western countries have criminalised them. This paper significantly focuses on the violation of the fundamental rights guaranteed by the Constitution of India and the status of marital rape in different countries of the world.

### **INTRODUCTION**

The word 'rape' which is derived from the Latin term 'rapio' means 'to seize'. Rape, in its simplest form, signifies 'the ravishment of a woman against her will or without her consent or

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with her consent obtained by force, fear, fraud or the carnal knowledge of a woman by force against her will.’<sup>2</sup>

The term ‘marital rape’ refers to the unwanted intercourse by a man on his wife obtained by force, threat of force or physical violence or when she is unable to give consent. The words ‘unwanted intercourse’ refers to all sorts of penetration (whether anal, vaginal or oral) perpetrated against her will or without her consent. According to the Indian Penal Code, 1860, rape is defined under section 375.<sup>3</sup>

According to Morton Hunt, “The typical marital rapist is a man who still believes that husbands are supposed to “rule” their wives. This extends, he feels, to sexual matters: when he wants her, she should be glad, or at least willing; if she isn’t, he has the right to force her. But in forcing her he gains far more than a few minutes of sexual pleasure. He humbles her and reasserts, in the most emotionally powerful way possible, that he is the ruler and she is the subject.”

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<sup>2</sup> Bhupinder Sharma v .State of Himachal Pradesh ,A.I.R 2003 S.C 4684

<sup>3</sup> [375. Rape.—A man is said to commit “rape” if he—

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) 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 to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to 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, 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 eighteen years of age.

Seventhly.—when she is unable to communicate consent.

Explanation 1.—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 1.—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.



## **HISTORY**

The concept of marital rape exception was originated from the idea that by marriage a woman gives irrevocable consent for her husband to have sex with her at any time he demands it. According to Sir Matthew Hale, “the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual consent and contract, the wife hath given up herself this kind unto her husband which she cannot retract.” A concept of ‘implied consent’ was introduced by him and it established that once married, a woman does not have the right to refuse sex with her husband. In ancient societies, American wives were considered to be the property of their husbands, with only slightly greater rights than beasts of burden. Under the English common law, marriage came with a meta-physical oddity, known as coverture. At Common law, coverture was the protection and control of a woman by her husband that gave rise to various rights and obligations. This rule stipulated that a married woman does not have a separate legal existence from her husband and upon marriage, a woman’s legal rights were subsumed by those of her husband. A married woman was a dependent, like an underage child or a slave, and could not own property in her own name or control her own earnings. It can be inferred from the coverture rule that once unified by marriage, a spouse could no longer be charged with raping one’s spouse, any more than be charged with raping oneself. Kirchberg v. Feenstra (1981) a U.S Supreme Court Case, which marked an end of this rule and the court held a Louisiana Head and Master law, which gave sole control of marital property to the husband, unconstitutional.

## **MARITAL RAPE LAWS IN INDIA**

While in other countries either the legislature has criminalized marital rape or the judiciary has played a crucial role in recognizing it as an offence, whereas in India Marital rape is not an offence. In India marital rape exists de facto but not de jure. In Bodhisattwa Gautam v. Subhra Chakraborty<sup>4</sup> the SC held that” rape is a crime against basic human rights and a violation of the victims” most cherished of fundamental rights, namely the right to life enshrined in Article 21 of the Constitution. Yet it negates this very pronouncement by not

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<sup>4</sup>(1996) 1 S.C.C. 490 (India).



recognizing marital rape.<sup>5</sup> Though there have been some advances in Indian legislation in relation to domestic violence, this has mainly been confined to physical rather than sexual abuse.

The exception 2 of section 375 of Indian Penal Code states that non-consensual sexual intercourse by a man with his own wife, if she is over 15 years does not amount to rape. It, thus keeps outside the ambit of ‘rape’ a coercive and non-consensual sexual by a ‘husband’ with his ‘wife’ (above 15 years of age) and thereby allows a ‘husband’ to exercise, with impunity, his marital right of (non –consensual or undesired) intercourse with his ‘wife’. It is believed that the husband’s immunity for marital rape is premised on the assumption that a woman, on marriage, gives forever her consent to the husband for sexual intercourse. The husband has the right to have sexual intercourse with his wife, whether she is willing or not, and she is under obligation to surrender or submit to his will and desire. It also aims at the preservation of family institution by ruling out the possibility of false and fabricated and motivated complaints of ‘rape’ by ‘wife’ against her ‘husband’ and the pragmatic procedural difficulties that might arise in such a legal proceeding.<sup>6</sup>

Further, non- consensual sexual intercourse, in terms of the acts mentioned in sec 375 (a) to (d), IPC by a person with his own wife who is under a decree of separation or otherwise, is living separately is made an offence under IPC.<sup>7</sup> The punishment provided for non-consensual sexual intercourse by a man with his wife living separately is, however compared to that is provided for consensual or non-consensual sexual intercourse with his own wife when she is below the age of fifteen years of age, which, by virtue of exception 2 of section 375 of the IPC, amounts to rape, is very mild. No court is empowered to take cognizance of the offence of sexual intercourse by husband upon his wife during separation where the persons are in a marital relationship, except upon *prima facie* satisfaction of the facts which

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<sup>5</sup> Tandon, N. & Oberoi, N., Marital Rape – A Question of Redefinition, Lawyer’s Collective, March 2000, P.24.

<sup>6</sup> Dr. K I VIBHUTE, P S A PILLAI’S CRIMINAL LAW, 723(12<sup>TH</sup> ed. 2014).

<sup>7</sup> 376B. 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.



constitute the offence upon a complaint having been filed or made by the wife against the husband.<sup>8</sup>

The exception 2 of section 375 of IPC, 1860 violates the fundamental rights guaranteed by the constitution of India. The concept of marital rape goes beyond the virtues of art.21 of the constitution of India i.e. right to live with human dignity .The exception *prima facie* violates art 14 of the constitution as it creates a classification between married and unmarried women and denies the equal protection of criminal legislation to the former.

According to the UN Population fund, more than two- thirds of married women in India, aged 15 to 49 years, have been beaten or forced to provide sex. Bertrand Russell in his book ‘Marriage and Morals’ stated that marriage is one of the most conventional forms of livelihood for a women where the frequency of undesired intercourse she has to give in to is in all probabilities higher than that endured by a prostitute.

The concept of marital rape goes beyond the virtues of article 21 of the constitution of India i.e. right to live with human dignity. Marital rape exception *prima facie* violates Article 14 of the constitution as it creates a classification between married and unmarried women and denies equal protection of the criminal legislation to the former.

Article 14 guarantees a fundamental right of equality before the law and equal protection of laws to every citizen of India. In *Hari Ram v State of Haryana*<sup>9</sup>, it was held that equality of citizen’s right is one of the fundamental pillars on which edifice of Rule of Law rests. All actions of State have to be fair and for legitimate reasons. If the State leaves the existing inequalities untouched by its laws, it fails in its duty of providing equal protection its laws to all persons.<sup>10</sup> Every person is entitled to equality before law and the equal protection of laws where the State is bound to protect every human being from inequality<sup>11</sup>. Parliament and State Legislature cannot transgress the principle of equality enshrined in Article 14 which is the basic structure of the Constitution.<sup>12</sup> Doctrine of equality enshrined in Article 14 of the Constitution which is the basis of Rule of Law is the basic feature of Constitution.<sup>13</sup>. Article 14 forbids class legislations, but doesn’t forbid reasonable classification. But classification must not be “arbitrary, artificial or evasive”. It must always rest upon some real and

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<sup>8</sup> Dr. K I VIBHUTE, P S A PILLAI’S CRIMINAL LAW, 724(12<sup>TH</sup> ed. 2014).

<sup>9</sup> (2010) 3 S.C.C. 621

<sup>10</sup>St. Stephen’s College v. University of Delhi, (1992) 1 S.C.C. 558

<sup>11</sup>National Human Rights Commission v.State of Arunachal Pradesh, AIR 1996 S.C 1234

<sup>12</sup>IndraSawhney v. Union of India, AIR 2000 SC 498

<sup>13</sup>Raghunath Rao Ganapath Rao v Union of India , AIR 1993 S.C 1267



substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the legislation. Classification to be reasonable must fulfil the following two conditions-

(a) The classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others; and

(b) The differentia must have a rational relation to the object sought to be achieved by the legislation<sup>14</sup>.

Thus any law which makes a classification which is unreasonable or irrelevant to the purposes of the legislation is deemed to be outside the framework of the Constitution. It is essential to prevent the stereotyping based on gender in order to curtail the gender biased differential treatment. Therefore it is important when applying the test of equality that care be taken so that the stereotyping enjoined by the patriarchal ideology does not predetermine what is reasonable classification.

Section 375 of the IPC criminalises the offence of rape and protects a woman against forceful sexual intercourse against her will and without her consent. Thereby the section grants protection to women against criminal assaults on the bodily autonomy and depicts the State's interest in prosecuting those who violate this bodily autonomy. Therefore it is right to say that Section 375 of the IPC seeks to protect the woman's right of choice as autonomous individual also capable of self-expression and also regards rape as a crime of violence which disregards all such rights granted to the individual. However, Section 375 of the IPC makes a classification in terms of an exemption that does not regard a forceful sexual intercourse within a marriage as rape. The exemption withdraws the protection of Section 375 of the IPC from a married woman on the basis of her marital status. The classification and differential treatment of married women rests on the assumption that married women, unlike any other persons, have no interest in receiving protection from the State against violent and sexual assault. The assumption further stems from the fact that in a marriage, the wife is presumed to have given an irrevocable consent to sexual relationships with her husband.

Married women, exactly like men and unmarried women need protection of the law in their private spheres. While the rest of the section 375 of the IPC is interested in protecting the right of a victim from the crime of rape, such a right is withdrawn on marriage and the focus

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<sup>14</sup>State of West Bengal v. Anwar Ali Sarkar, AIR 1952 S.C 75



of the law instead shifts to protecting, the perpetrator of the crime of rape. It takes away a woman's right of choice and indeed effectively deprives her of bodily autonomy and her personhood. Thus the classification is unreasonable, unintelligible and violates the mandate of Article 14. Withdrawing the protection of Section 375 of the IPC from the victims of the crime of rape solely on the basis of their marital status is irrelevant for the purposes of legislation and thus violates the test of classification under Article 14. The Criminal Law (Amendment) Act, 2013 increased the age of consent for sexual intercourse by a girl from 16 years to 18 years. By virtue of provisions of Protection of Children from Sexual Offences Act, 2012, Parliament has recognized that a girl less than 18 years is a child and therefore, not in a physical and mental condition to take an informed decision as to sexual relationship. However, Exception 2 to Section 375 IPC still retains the age of consent from a married girl as 15 years. As a result, there is a huge gap of 3 years in the age of consent for a married girl child, vis-a-vis an unmarried girl child.<sup>15</sup>

This classification has no rationale nexus with the object sought to be achieved, it submits. The rationale for increasing the age of consent to 18 years is that a girl below the age of 18 years is considered incapable of realizing the consequences of her consent; She is treated as a minor under law and, therefore, mentally and physically not mature enough to give a valid consent.

Therefore, simply because some marriages in India are being performed at an age lower than 18 years, it is not a justification to lower the age of consent to as low as 15 years. Parliament cannot permit the exploitation [in the name of marriage] of a girl child simply because some girls are married at an age less than 18 years.”<sup>16</sup>

Article 21 of the Indian constitution enshrines in it the right to life and personal liberty. Article 21 although couched in negative language confers on all persons the fundamental right to life and personal liberty. Post the case of Maneka Gandhi v Union of India it has become the source of all forms of right aimed at protection of human life and liberty. The meaning of the term 'life' has thus expanded and can be appropriately summed up in the words of Field J. in *Munn v Illinois* where he held that life means 'something more than a mere animal existence', which was further in *Bandhua Mukthi Morcha v. Union of India* where the SC affirmed that right to live with human dignity.

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<sup>15</sup>Independent Thought v. Union of India. 2013

<sup>16</sup>Independent thought v. Union of India ,2013



In light of this expanding jurisprudence of article 21, the doctrine of marital exemption to rape violates a host of rights that have emerged from the expression ‘right to life and personal liberty’ under Article 21. The marital exemption to rape the right to privacy, right to bodily self-determination and the right to good health, all of which have been recognized as an integral part of the right to life and personal liberty at various points of time.

The concept of right to life under article 21 of the constitution includes the right to live with human dignity and all that goes along with it. The right to live with human dignity is one of the most inherent qualities of the right to life which recognizes the autonomy of an individual. The SC has held in a catena of cases that the offence of rape violates the right to life and the right to live with human dignity of the victim of the crime of rape, that it is not merely an offence under the IPC, but is a crime against the entire society. Rape is less of a sexual offence than an act of aggression aimed at degrading and humiliating the women. Thus the marital exemption doctrine is also vocative of a woman’s right to live with human dignity. Any law which legitimizes the right of a husband to compel the wife into having sexual intercourse against her will and without her consent goes against the very essence of right to life under article 21.

Though the constitution does not expressly recognise the right of bodily self-determination, such a right exists in the larger framework of the right to life and personal liberty under article 21. The right of self-determination is based on belief that the individual is the ultimate decision maker in matters closely associated with his/her body or well-being and the more intimate the choice, the more robust is the right of the individuals to be the authors of their own fate. Consent to sex is one of the most intimate and personal choice that a women reserves from herself. It is a form of self-expression and self-determination and a law that makes away the right of expressing and revoking such consent definitely deprives a person the constitutional right of bodily self-determination.

The marital rape exemption violates the right to good health of the victim of such a crime. The right to good health has been recognised as a part of the right to life under the article 21. Such a right is necessary for the continuous intellectual and spiritual well-being of a person. The marital exemption doctrine violates to right to good health of a victim as it inevitably cause serious psychological as well as physical harm in the process. It destroys the psychology of a women and pushes her into a deep emotional crisis. A more compelling argument can be made in case where forceful sexual intercourse in a marriage leads to the





communication of a sexually transmitted disease to the victim of a crime of rape. The marital exception effectively deprives a married women of her right to good health.

In a series of cases the SC has recognized that a right to privacy is constitutionally protected under Article 21 of the Indian Constitution. Justice K.S Puttaswamy and Anr. v. Union of India and Ors is a landmark judgment of the Supreme Court of India, which holds that the right to privacy is protected as a fundamental constitutional right under Articles 14, 19 and 21 of the Constitution of India.<sup>17</sup> The right to privacy under Article 21 includes a right to be left alone. Any form of forceful sexual intercourse violates the right of privacy. The exemption to marital rape violates a married woman's right to privacy by forcing her to enter into a sexual relation against her wish. The Supreme Court in the case of State of Maharashtra v. Madhukar Narayan<sup>18</sup> has held that every woman was entitled to sexual privacy and it was not open for any person to violate her privacy as an when he wished or pleased. In the case of Vishaka v State of Rajasthan<sup>19</sup> , the Supreme Court extended this right to privacy in workplaces. Further, along the same line, there exists a right to privacy to enter into a sexual relationship even within a marriage. By decriminalizing rape within a marriage, the marital rape exemption violates the right to privacy of a married women.

### **LEGAL POSITION IN OTHER COUNTRIES**

*In United States* marital rape was considered as a crime since 1993. A minority of the States have abolished the marital rape exemption in its entirety, and that it remains in some proportion or other in all the rest. In most American States, resistance requirements still apply. In seventeen States and also in the District of Columbia, there are no exemptions from rape prosecution which is granted to husbands. However, in the rest thirty-three American States, there are still some exemptions to rape given to husbands which are: When his wife is most vulnerable and is legally unable to consent, a husband is exempted from prosecution in many of these thirty-three States. The existence of some spousal exemptions in the majority of the American States indicates that rape in marriage is still treated as a lesser crime when compared to other forms of rape. The existence of any spousal exemption indicates an acceptance of the

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<sup>17</sup> Bhandari, Vrinda; Kak, Amba; Parsheera, Smriti; Rahman, Fiza.” An analysis of Puttaswamy :The Supreme Court's Privacy Verdict “

<sup>18</sup> A.I.R. 1991 S.C 207

<sup>19</sup> A.I.R. 1997 S.C. 3011



bygone understanding that wives are the property of their husbands and the marriage contract is entitlement to sex.

*In England*, earlier as a general rule, a man could not have been held to be guilty as a principal of rape upon his wife, for the wife in general is not able to retract to the consent for sexual intercourse, which is a major part of the contract of marriage. However, the marital rape exemption was abolished in its entirety in the year 1991. The House of Lords in *R. v. R* held that the rule which says a husband cannot be held guilty of raping his wife if he forced her to have sexual intercourse against her will was an outdated and offensive common-law fiction, which no longer represented the position of a wife in present-day society, and that it should no longer be applied.

*In Mexico*, the country's Congress ratified a bill that makes domestic violence punishable by law. If convicted, marital rapists could be imprisoned for 16 years.

*In Sri Lanka*, the recent amendments to the Penal Code recognize marital rape, but only with regard to the partners who are judicially separated, and there exists a great reluctance to pass judgment on rape in the context of partners who are actually living together. However, some countries have started to legislate against the offence of marital rape, refusing to accept the marital relationship as a cover for violence in home.

Today there are many States that have either enacted marital rape laws, repealed marital rape exceptions or have laws that do not distinguish between marital rape and ordinary rape. These States include Albania, Algeria, Australia, Belgium, Canada, China, Denmark, France, Germany, Hong Kong, Ireland, Italy, Japan, Mauritania, New Zealand, Norway, the Philippines, Scotland, South Africa, Sweden, Taiwan, Tunisia, the United Kingdom, the United States, and recently, Indonesia. Turkey criminalized marital rape in 2005, Mauritius and Thailand did so in 2007. The criminalization of marital rape in these countries both in Asia and around the world indicates that marital rape is now recognized as a violation of human rights. In 2006, it was estimated that marital rape is an offence punished under the criminal law in at least 100 countries and India is not one among them. Even though marital rape is prevalent in India, it is hidden behind the sacrosanct curtains of marriage.

### **CONCLUSION**

Rape is a brutal offence which is worse than a cold blooded murder. It is an assassination of a woman's dignity. She should not be considered as a property of the husband to do as he please.



It is immaterial whether a woman is raped by her husband or by a complete stranger. Though marital rape is the most common and repugnant form of masochism in the Indian society, it is well hidden behind the iron curtain of marriage. The concept of marital rape violates Article 14 and 21 of the Constitution of India, i.e. the right to equality and right to life and personal liberty. When a woman gets married she does not waive her rights as an individual, nor does she become a second class citizen. Further, she should not be denied the protection of law and be submitted to the defiling of her body by her husband. When a woman is being forced to submit herself to the whims of her husband, she is being denied the right to self-determination and sexual autonomy. The basic difference between rape and consensual sex is whether the woman consented to the act itself. When a man forces himself on a woman, irrespective of the relationship they share, the lack of consent from the woman should be given due weightage and the act must be seen for the offence it is.