



INTERNATIONAL LAW  
JOURNAL

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**WHITE BLACK  
LEGAL LAW  
JOURNAL  
ISSN: 2581-  
8503**

**Peer - Reviewed & Refereed Journal**

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

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## **CRIMINALIZATION OF MARITAL RAPE IN INDIA**

AUTHORED BY - SHIVANGI SINGH & TOSNIM FERDOUS CHARLEE.

Education: 4th Year, B. A., LL.B (H).

Institution: Amity Law School, Amity University, Kolkata.

### **ABSTRACT**

When the protector becomes the predator, the golden thread that binds a family gets tattered. It is a travesty that our society and our esteemed legislative body don't recognize this aspect which is manifesting in today's society. Unfortunately, violence against women has a wide range that is the ultimate result of gender inequality and a barrier to the development of a nation.

Sexual intercourse with a female, while her consent is not taken into account, is considered to be rape. Rape covers all forms of sexual harassment except for sexual intercourse happening between spouses without the consent of the wife, as stated in Section 375 of IPC, 1860, Exception 2.

During the pre-independence period, a woman was considered as a personal possession of her husband and not an independent legal entity. However, with the introduction of the Constitution of India in 1950, granting every citizen Right to Equality (Article 14) and Protection of Life and Personal Liberty (Article 21), the fact that marriage is considered as sacrosanct in Hinduism and criminalizing marital rape will destabilize the society, is unfounded and irrational. Women who are being raped by men in the guise of their husbands go through psychological and mental trauma as they have to live with the assailant all the time, making it necessary to penalize marital rape in India.

**Keywords:** marital rape, sexual intercourse, consent, marriage, crime.

### **INTRODUCTION**

“Her friends used to tell her it wasn't rape if the man was your husband. She didn't say anything, but inside she seethed; she wanted to take a knife to their faces.” ~ F. H. Batacan

When the protector becomes the predator, the golden thread that binds a family gets tattered. It is a travesty that our society and our esteemed legislative body don't recognize this aspect which is manifesting in today's society. Unfortunately, violence against women has a wide range that is the ultimate result of gender inequality and a barrier to the development of a nation.

Rape as defined under Section 375 of the Indian Penal Code, 1860 is the sexual intercourse with a female without her consent and is a crime. But shockingly, the same section provides that sexual intercourse by a husband with his wife without her consent, whereby the wife is not below the age of 15 years, is not considered rape in the eyes of Indian law. Only if the wife is below the age of 15 years, it will be viewed as rape but the seriousness of punishment is not severe.

While many countries have recognized and penalized marital rape, India is still considering whether or not to criminalize marital rape. In the pre-independence period, woman was not considered an independent individual and was regarded as the chattel of her husband. Due to the patriarchal norms prevailing at that time, women and men were not considered equal and they were regarded as a single identity. But with the change in time and introduction of the Constitution of India post-independence, the Indian citizens were granted Fundamental Rights and everyone is recognized as independent legal individuals.

Although marital rape has become a common act in the Indian society, it is covered by the iron curtain of marriage as marriage is viewed as a sacrament and criminalizing marital rape will destabilize the idea of the sacrosanct institution of marriage. The assumption that in a marriage a wife gives consent to all the matrimonial obligations including sexual intercourse is illogical in today's world. Moreover, if Acts like Protection of Women from Domestic Violence Act, 2005 and the principle of divorce do not affect the sanctity of marriage, then it is pointless to claim that criminalizing marital rape will destroy the values of marriage.

## **VIOLATION OF THE CONSTITUTIONAL RIGHTS**

### **VIOLATION OF ARTICLE 14 – RIGHT TO EQUALITY**

Article 14 of the Constitution of India states 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.*”

Where Article 14 of the Constitution of India ensures equality to all, on the other hand, Exception 2 of Section 375 of the Indian Penal Code, 1860 discriminates against the married women by denying them justice when they are raped or sexually harassed by their spouses. The discrimination so created by the aforementioned exception is based on two classes – first, the marital status of the woman and the other being protecting the man who committed such a heinous act with his wife. While the section protects those female who are raped by someone else other than their spouse, it discriminates by excluding those married women who are being raped by their husbands and thereby victimizing them and denying access to justice only

because of their so-called marital status.

The purpose of Section 375 of the Indian Penal Code, 1860 is to protect the modesty of women and punish those who try to destroy their modesty and engage in the grievous act of rape. The classification made between a married woman and an unmarried woman under Exception 2 of this section has no rational relation to the purpose of the section. In the case of **Budhan Choudhury v. State of Bihar**<sup>1</sup>, the Supreme Court of India held that to make any classification under Article 14 of the Indian Constitution, there must be a rational relation between the classification and the object that the statute seeks to achieve. But the exception discriminating against married women is frustrating the purpose of the section by exempting husbands who indulge themselves in the inhumane act and is contradicting the purpose of the section. Rape is rape. No matter if it happens with a married woman or an unmarried woman. It is more painful for a married woman as she has to face the abuse every day being socially and legally tied to her husband. Exempting husbands from this crime encourages them as their act is not penalized under the Indian criminal law and thus this exclusion of married women is violative of the very essence of section 375 of Indian Penal Code, 1860 as there exists no rational nexus between the classification under the exception and the objective of the section.

## **VIOLATION OF ARTICLE 21 – PROTECTION OF LIFE AND PERSONAL LIBERTY**

Article 21 of the Constitution of India states that “*no person shall be deprived of his life or personal liberty except according to a procedure established by law.*”

Article 21 of the Constitution of India has been interpreted by the Supreme Court of India in numerous cases and held that the ambit of the Article is wide and includes within itself the rights to live with dignity, sexual privacy, bodily self-determination, safe environment, and health, among others.

### **RIGHT TO LIVE WITH DIGNITY**

Article 21 of the Indian Constitution embodies the right to live with dignity in it and other minimum essentials of life. The right to live with dignity is the most important amongst all other rights incorporated in Article 21 of the Indian Constitution. The State must ensure that every citizen lives with dignity. Any form of violence against a woman is a violation of her right to live a dignified life.

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<sup>1</sup> *Budhan Choudhury v. State of Bihar*, AIR 1955 SC 191.

In the case of **the Chairman, Railway Board v. Chandrima Das**<sup>2</sup>, it was observed by the Supreme Court of India that rape is a crime against the State and not just an offence under the Indian Penal Code, 1860. Thus, in this regard Section 375 Exception 2 of the Indian Penal Code, 1860 is violative of the right to live with human dignity as it is permitting the husband to have sexual intercourse with the wife without her will and is violative of her entitlement to live a dignified life.

### **RIGHT TO SEXUAL PRIVACY**

The right to sexual privacy is increasingly gaining recognition around the world. Although the Constitution of India does not mention the right to sexual privacy the Supreme Court of India in several cases has held that the right to sexual privacy comes within the scope of Article 21. This right allows a person to have her choice, to be left and not to be forced with aggravated overtures without her consent. The exclusion of married women under Indian criminal law is damaging her right to sexual privacy.

The Supreme Court of India in the case of **State of Maharashtra v. Madhukar Narayan**<sup>3</sup> held that every woman has the right to sexual privacy and no one can violate their right to sexual privacy whenever and wherever they wish to do so. From this judgment, we can deduce that women who are tied in wedlock are also entitled to this right and thus excluding them under the Indian criminal law is a violation of their rights.

### **COMPARATIVE ANALYSIS – INDIA AND OTHER COUNTRIES**

#### **INDIA**

India is one of the 36 countries left to criminalize marital rape. In India, although rape is defined under Section 375 of the Indian Penal Code, 1860 it excludes married women from the extent of the section under Exception 2 to the section. If the married woman is below the age of 18 years, it is to be regarded as rape, being stated by the Apex Court in a landmark judgment. But there is no law when the married woman is above the age of 18 years and thus it exempts the husbands of such women from the punishment.

#### **U.S.A.**

In the U.S.A., all the states have criminalized marital rape and incorporated laws to penalize the same. The strong influence of Christianity has contributed to penalizing marital rape. The

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<sup>2</sup> *The Chairman, Railway Board v. Chandrima Das*, (2000) 2 SCC 465.

<sup>3</sup> *State of Maharashtra v. Madhukar Narayan*, (1991) 1 SCC 57.

offender is liable to either punishment or fine or both.

### **U.K.**

In the U.K., marital rape is penalized and is punishable from 4 to 19 years of imprisonment, which may also extend to life imprisonment. In the case of **R v. R**<sup>4</sup>, the House of Lords held that any non-consensual sexual activity within a marriage will be considered as rape and also a husband can rape his wife.

## **JUDICIAL PERSPECTIVE**

In **Independent Thought v. Union of India**<sup>5</sup>, the petitioner, Independent Thought, which was a registered society, mainly worked for the welfare of the child rights. The petitioners challenged the constitutional validity of exception 2 of Section 375 of Indian Penal Code (IPC), 1860, stating if a girl below the age of 18 years is married and has sexual intercourse with her husband, it does not amount to rape. It is further stated that even if intercourse is non-consensual, it does not amount to rape. However, the petitioner argued that regardless of the consent, sexual intercourse between a man and his child bride (between the ages of 15 to 18 years), amounts to rape.

Section 375 of the IPC sets out three circumstances relating to 'rape'. First of all, rape is defined as sexual intercourse with a girl under the age of 18. Additionally, and by way of exception, if a woman is between the age of 15 and 18, then sexual intercourse with her is not rape if he is her husband. Under this situation, her desire or agreement is meaningless. Thirdly, sexual intercourse with a woman over the age of 18 is rape if it falls under any of the seven descriptions given in Section 375 of IPC.

According to the Petitioner, Section 375 of the IPC prescribes the age of consent for sexual intercourse as 18 years, meaning that any man who has sexual intercourse with a girl under the age of 18 would be legally guilty of rape even if the sexual activity was with her consent. Nearly every statute in India recognizes that a girl under the age of 18 is a child, and that is why the law penalizes sexual intercourse with a girl under the age of 18. Grievously, under Exception 2 to Section 375 of the IPC, if a woman is married between the age of 15 and 18, her spouse may have non-consensual sexual intercourse with her without being penalized under the IPC, only because she is married to him and for no other purpose. Since the right of a girl

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<sup>4</sup> *R v. R*, [1991] 3 WLR 77 (U.K.).

<sup>5</sup> *Independent Thought v. Union of India*, WRIT PETITION (CIVIL) NO. 382 OF 2013.

child to bodily integrity and to decline to have sexual intercourse with her spouse has been legally taken away and therefore, non-consensual sexual intercourse with her husband is not an offence under the IPC.

There have been several decisions rendered by the Court highlighting the horrors of rape. In **State of Karnataka v. Krishnappaan**<sup>6</sup>, an 8-year girl was raped and it was held:

"Sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honor and offends her self-esteem and dignity - it degrades and humiliates the victim and where the victim is a helpless innocent child, it leaves behind a traumatic experience."

Though the Apex Court while deciding the present case observed that it would not deal with the wider issue of "marital rape", but it will be regarded as a precursor to future cases on marital rape as it deals with one aspect of marital rape i.e., child marital rape. However, the court read down Exception 2 to Section 375 of IPC bringing it within the four corners of law and make it consistent with the Constitution of India. Therefore, Exception 2 to Section 375 of IPC is read down as follows:

"Sexual intercourse or sexual acts by a man with his wife, the wife not being 18 years, is not rape".

In the case of **RIT Foundation v. Union of India**<sup>7</sup>, RIT Foundation along with the All India Democratic Women's Association filed a Public Interest Litigation (PIL) challenging the constitutionality of section 375 of Indian Penal Code (IPC), failing to protect the rights of married women from being sexually assaulted by her spouse. They pleaded for the criminalization of marital rape in India. However, Men Welfare Trust, an NGO opposed the plea of making marital rape as an offence on the ground that a wife is already been protected from sexual violence in marriage under the Domestic Violence Act, 2005 and therefore, by criminalizing marital rape as a separate offence will affect the rights of several men who are victimized by the hands of women who file false cases of rape, sexual harassment and other such charges against them. They argued for the protection of the legal and constitutional rights of every men in the country. However, the bench disagreed with the submissions made by the Men Welfare Trust providing that the definition of rape is completely different today and stated that in a relationship like marriage, both men and women have a right to say 'no' to physical relations, therefore, expanding the scope of rape to non-consensual sex within marriage. The

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<sup>6</sup> *State of Karnataka v. Krishnappaan*, (2000) 4 SCC 75.

<sup>7</sup> *RIT Foundation v. Union of India*, WRIT PETITION (CIVIL) NO. 284/2015.

bench observed that striking down the protection offered under Section 375 of IPC, to men for having sex with his spouse would result in the creation of a new offence which, therefore, does not fall within the authority of the court but is a matter of Legislation.

In the case of **Nimeshbhai Bharatbhai Desai vs. State of Gujarat**<sup>8</sup>, the facts of the case were that both the spouses were two doctors who married each other in May 2014. After six months, an FIR was filed by the wife against her husband and her in-laws under Section 376, Section 377 and Section 498A of Indian Penal Code (IPC). She alleged that her husband would force her to have sexual intercourse with her i.e., raping her vaginally. The High Court of Gujarat observed:

“Marital rape is in existence in India, a disgraceful offence that has scarred the trust and confidence in the institution of marriage. It is a non-consensual act of violent perversion by a husband against the wife where she is abused physically and sexually.”

Since there is no penalty provision on marital rape in the country, the court dismissed the case by recommending that a charge of 354 (outraging the modesty of women) be added to the FIR and thus quashed the FIR against the in-laws while the court quashed the charges of 375 and 377 concerning the husband.

In **K. S. Puttuswamy vs. Union of India**<sup>9</sup>, although the issues do not concern with the aspects of marital rape but are the landmark judgment where privacy is considered as the constitutionally protected right in India. Justice K. S. Puttuswamy, a retired judge, filed a petition in the Supreme Court challenging the constitutional validity of Aadhar's link on the ground that it violates the right to privacy guaranteed under Article 21 of the Constitution of India. The Centre, referring to the case of **M. P.Sharma vs. Shatish Chandra**<sup>10</sup>, stated that there is no constitutional right to privacy. The case was brought before a three-judge bench but was later on transferred to a bench of nine-judge where it was held that the right to privacy is secured as part of the right to life and fundamental liberty under Article 21. The case was referred back to the original bench three judges for a decision on the merits. This case was referred to provide a proper verdict on marital rape in India in the case of **Independent Thinking v. Union of India**<sup>11</sup>.

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<sup>8</sup> *Nimeshbhai Bharatbhai Desai v. State of Gujarat*, R/SPECIAL CRIMINAL APPLICATION NO. 7083 of 2017.

<sup>9</sup> *K. S. Puttuswamy v. Union of India*, WRIT PETITION (CIVIL) NO. 1002 OF 2017.

<sup>10</sup> *M. P.Sharma v. Shatish Chandra*, AIR 1954 SCR 1077.

<sup>11</sup> *Independent Thought v. Union of India*, WRIT PETITION (CIVIL) NO. 382 OF 2013.

## **STEPS TAKEN AHEAD**

Advocate Anuja Kapur submitted a petition at the Apex Court on 29 March 2019, asking the Centre to formulate the necessary guidelines along with relevant marital rape laws and by-laws as a divorce ground. The following are the main points to be considered by the court:

1. It is stated in the petition that proper guidelines for the registration of FIRs against marital rape should be provided.
2. In our legal system, it has been claimed that there is no law to stop marital rape.
3. It argued that the dignity of women in marriage should be maintained.

The Supreme Court, however, directed the complainant to refer her request to the Delhi High Court for relief and obtain guidance from the Union to formulate the necessary rules along with relevant laws to recognize marital rape as a ground for divorce.

It was found that one out of seven married women had been raped by their husband at least once as per a study conducted by an NGO called the Joint Women Program. The reasons are given for not making marital rape a criminal offence is it will ruin family, risk of false prosecution, the difficulty of proving it, etc. But none of these reasons justify not making marital rape a criminal offense, as any marriage in which the husband rapes his wife has already been destroyed.

A private bill was also presented by Congress MP (Member of Parliament) Dr. Shashi Tharoor in the Lok Sabha to declare marital rape as an offence. The bill was titled Women's Sexual, Reproductive and Menstrual Rights Bill, 2018. He stated in this bill that the existing laws do not recognize 'woman' as a person capable of making their own choices, in particular, their sexual choices as a wife and their reproductive choices while pregnant. His bill dealt with issues related to women's dignity, including the concept of marital rape. This recommends the abolition of Exception 2 of Section 375 of the Indian Penal Code (IPC), which specifies that a man's sexual intercourse with his spouse is not rape. But the bill is still pending in the Parliament for its assent.

## **CONCLUSION**

Article 14 of the Constitution of India guarantees equality before the law and equal protection of the law to each citizen. Such protection of the law was further strengthened in Article 15, which imposes a higher level of scrutiny on the State not to discriminate against its citizens on the grounds of race, religion, caste, sex, and place of birth. Every unfair treatment of an individual (in this case, victims of rape) must be based on an intelligible distinction that has a

fair connection with the purpose that the Statute aims to address with such distinctions. The right to sexual autonomy, bodily integrity and the established right to reproductive choice include the right not to be raped under Article 21.

The State has failed to show any reasonable object concerning the status and rights of women in the twenty-first century by discriminating against women raped by their husbands as opposed to women raped by a man, not their husband. Moreover, by nullifying their right to withhold or consent to sexual relations with their partner, the State failed to delegates married women their status of lawful objects and second-class citizens. The statute discriminates against married women who are "separated" from their husbands by providing separate punishment for rape committed by a husband against his wife separated from him versus rape by any man of any woman. The tradition of legislation throughout the world permitted men to treat their wives as property, where even spousal murder was allowed, and the history of gender equality was a step toward full recognition of the individual identity of women.

Therefore, in refusing to recognize or criminalize rape within marriage, the Statue seeks to violate the dignity and equality of millions of victims of marital violence, granted under the Constitution as a fundamental right. Today, marital rape is Indian society's most prevalent and repugnant form of masochism, concealed behind the iron curtain of marriage. It is common but due to the absence of related laws, it is an under-reported crime. Hence, the myth that prevails in the country that rape by one's spouse is inconsistent needs to be acknowledged and challenged, and the changes should, therefore, be made in the law.

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