

Marital Rape and Violation of Constitutional Provisions

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ABSTRACT:

Today almost all the countries of globe are working for the betterment and upliftment of their nationals. These nationals includes the weaker sections of society like; minorities, children and women. Therefore, these countries have passed many legislations or sponsored various schemes for the welfare of these inferior parts of the society. This Article is specially concerned with the common problem of women throughout the globe. Rape is such an offence, which had been criminalized since time immemorial. But forceful sexual intercourse by a husband with his wife is still exempted from the categories of offences in many countries. Although, there are many countries which have passed legislation for the protection of women's rights and even some of them have also criminalized the forceful intercourse by husband with his wife, but in India we are still waiting for such legislation. India which is the largest Democracy of the world and which have lengthiest Constitution in the world, which contains an provisions providing authority to make special provisions for women, did not criminalized the Marital Rape. In this Article it has been discussed what provisions of Indian law are being violated and also the steps take by the Indian Courts and the Legislature in this regard. This Article as a summarized research paper have discussed all relatable matters with the Marital Rape and the position of women.

Keywords- Marital Rape, Constitution of India, Indian Penal Code, 1860.

I. INTRODUCTION

In India Marital rape has been debated for so long. India did not criminalized it yet unlike other developed nations like USA, UK. Marital rape activists and Indian Media endorse the opinion that it is necessary and imperative to criminalize marital rape. There are numerous causes for the marital rape in India but the primary cause is the position of Indian women in the society. For a long period of time women were suppressed and treated as inferior. They were never allowed to raise their position in society.

Marital rape were not easily recognized as an offense because it is believed that marriage refers to the wife giving her consent to all the matrimonial obligations including sexual intercourse. Courts have various methods to identify marital rape and to provide punishments for it. But due to the lack of specific legislature or provisions the courts are also unable to define forceful intercourse of husband upon wife as marital rape. The judiciary in alone is not sufficient and it require help from Legislature.

]The government stated two reasons for not criminalizing marital rape: First, that marriage in Indian context is a sacred institution and criminalizing the act may lead to destabilization of society. Second, it should not be declare as crime because it will lead to the filing of fraudulent cases against husbands. But there are numerous laws to protect a married woman from domestic violence and it does not affect marriage as an institution therefore marital rape should also be treated as domestic violence.

II. DEFINITION OF RAPE

Whenever any person without free consent of his or her partner or mate create or tries to create sexual relationship is known as rape. The definition of rape as defined in Indian Penal Code 1860 is as follow:

“Section 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.

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.
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.

The definition of rape under Section 375 was substituted by Act 13 of 2013. The definition is divided into three parts, first when it will be said to committed a rape, second the explanation and third exception. All parts of the section are any how in accordance with the law but Exception 2 of the Section violates the fundamental rights of a woman. It infringes the Equality before the law and Right to dignified and healthy life of a woman.

III. VIOLATION OF FUNDAMENTAL RIGHTS: ARTICLE 14 AND 21

The term Rape is defined under section 375 of Indian Penal Code, 1860. It includes all forms of sexual assault involving non-consensual intercourse with a woman. The Section 375 also have an exception. Exception 2 exempt unwilling intercourse between a man and wife who is of age between fifteen to eighteen years. But as per current law sexual intercourse without mutual consent after marital relations are treated as criminal offense. Though India is one of thirty six countries that still have not declared through law, marital rape as a criminal offense. In *Independent Thought v. Union of India*, the Supreme Court through Justice Madan B. Lokur held “the sexual intercourse between a man and his wife who is between 15 and 18 years of age is rape.” Exception 2 to Section 375 creates an unnecessary and artificial distinction between a married girl child and an unmarried girl child and has no rational nexus. The artificial distinction is arbitrary and discriminatory and is definitely not in the interest of girl child.

No criminalization of marital rape is leading to the violation of the Right to Equality guaranteed under Constitution of India. Article 14 of Indian Constitution ensures that “the state shall not deny to any person equality before law and equal protection of the law.” This Article in Constitution provides protection of law to every person but the criminal law of India discriminates female victims who have been raped by their own husbands and it violates the Constitutional provision. When IPC was drafted, a married woman was not considered to be an independent entity, rather she was considered to be the chattel of her husband. Therefore she did not has many rights as an independent legal entity. The doctrine of merger of women’s identity with husband is the base idea of the exception 2 of Section 375. The roots of this doctrine are found in British

colonial rule in India. The exception to the IPC definition of rape was drafted on the basis of English law (Victorian patriarchal norms) that did not recognize men and women as equal. But times have changed and now Indian law treats husband and wife as separate and independent legal entity. And to protect women from sexual harassment and violence “ The Protection of women from Domestic violence Act 2005” and the “Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013” are enacted by the Parliament.

Exception 2 violates Article 14 by discriminating married women by denying them equal protection from rape and harassments. It also distinguish between married and unmarried women. In *Budhan Chadhary v. State of Bihar*¹ and *State of West Bengal v. Anwer Ali Sarkar*², the Hon’ble Supreme Court held that “any classification under Article 14 of the Constitution of India is subject to a reasonableness test that can be passed only if the classification has some rational nexus to the objective.” The exception 2 exempt husband from such is totally contradictory to objective. It is much more difficult for a married woman than unmarried woman to escape out from abusive conditions because they are bound to, financially and legally and it provides an opportunity to husband enter in a forceful sexual relation.

Article 21 of the Constitution of India provides Right to Life and Personal Liberty. It states that “no person shall be deprived of his life and personal liberty except according to procedure established by law.” The Article 21 has been interpreted in widest manner that it contains all the rights. The Hon’ble Supreme Court in various cases like *Maneka Gandhi v. Union of India*³, *A.K. Gopalan v. Union of India*⁴, *Kharak Singh v. State of U.P.*⁵, etc. have expended the scope of Article 21. The Supreme Court has held that the term “ life” under Article 21 is restricted to merely animal existence but it is much more than that.

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 decision in respect of intimate relations.”

The courts in recent years have acknowledged the right to abstain from forceful sexual intercourse and unwanted sexual activity by husband under right to life. The Punjab and Haryana High Court in *Surjit Singh Thind v. Kanwaljit Kaur*⁶, has held that allowing medical examination of a woman for her virginity would amount to violation of her right to privacy and personal liberty enshrined under Article 21. In the case of State

¹ [2016] Cr. Mis. No. 10610

² AIR [1952] p.p.75

³ AIR [1978] p.p.597

⁴ AIR [1950] p.p.27

⁵ AIR [1963] p.p.1295

⁶ AIR [2003] P.P.353

of Karnataka v. Krishnappa⁷, the Hon'ble Supreme Court held that "sexual violence intrusion of the right to privacy and sanctity of a female." It also held that "non-consensual sexual intercourse amounts to physical and sexual violence." But in its another judgment the scope of 21 expended more. In Suchitra Srivastava v. Chandigarh Administration⁸, the Supreme Court has held that personal liberty in Article 21 includes the right to make reproductive choice (to produce child or not to produce).

The rulings of the cases do not differentiate between married or unmarried women, it is not related to their marital status. In view of these women's right to privacy, dignity, and bodily integrity should be respected. Thus, it is a fundamental right of a woman to have sexual relation with her husband and forced cohabitation is the violation of her fundamental right.

Exception 2 of Section 375 violates the provisions of Article 21. It infringes right to live with human dignity, right to privacy, right to healthy life, right to choice of making sexual relations or to participate in sexual activity. Due to the existence of exception 2, law fails to deter husband from making forceful sexual relations.

IV. CONCLUSIVE REMARKS

The above discussion shows that the Indian Courts are much serious about such domestic violence than the Indian Legislature. The above precedents show that the Supreme Court has recognized the right of a woman to abstain from sexual activity irrespective of her marital status. Forceful sexual contact of husband with their wives adversely affects the physical and mental health of women and undermines their ability to live with dignity. The exception 2 of section 375 violates the Articles 14 and 21 of the Constitution of India. It violates the equal protection of law and a life with dignity and privacy.

The constitution of India provides protection to the weaker sections of the society. Under Article 15(3) special protection for women and children are given. Article 15 clause 3 states as: Nothing in this Article shall prevent State from making any special provision for women and children. The women and children needs special treatment, women's physical strength becomes an object to treat them specially and similar children. Under Article 42, women workers are given maternity relief and a law to give effect will not infringe Article 15(1). Due to such reasons Section 497 of the IPC, 1860, only man used to get punished for the adultery. Similarly in the protection of the Article 15(3) the Juvenile Justice (Care and Protection of Children) Act, 2000 fixed the upper age of a child to be 18 years.

Such legislation are proof that if central government can make special provisions for women. The government of India needs to take serious concerns related to marital rape. It needs to introduce a new legislation, for

⁷ 2000 CriLJ 1793

⁸ 2009 9 SCC 1

protection of women form such forceful sexual intercourse by husband with her wife, under the provisions of Article 15 clause 3. Such law will be constitutional and in favor of a better society for women.