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Marital Rapes in India Disharmony between Laws and Fundamental Rights

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ABSTRACT

Marriage is a union between a man and a woman for love and respect. It has great cultural and societal importance and is considered a basis for the formation of a civilized society. However, its importance and relevance diminish when the husband treats this relationship as a license for sex. Marriage does not authorize the husband to commit an act that is similar to the offence of rape with his wife. This research paper focuses on the issue of marital rape in India. It explains that laws that are connected to the act of marital rape directly or indirectly and would try to show how these laws are not only inconsistent with the other local laws but also violates the fundamental rights provided under the Constitution. The paper discusses Exception 2 of Section 375 of the Indian Penal Code, 1860, and its insufficiency to counter the act of marital rape and how it is not in accordance with the Constitutional principles. This paper also examines Sec.376B of the Indian Penal Code, 1860 in the context of marital rapes. It further analyzes some provisions of the Domestic Violence Act, 2005 which provides statutory protection in the form of remedies of the civil nature to victims of domestic abuse. Such domestic abuse implies the act of marital rape. After exploring various laws this paper finally analyzes the split verdict in the judgment of RIT Foundation v. UOI which is related to marital rapes in India.

Keywords: *Marital Rape, Constitution, Fundamental Rights, Hindu Marriage Act, Domestic Violence.*

Rape is considered as one of the most grave and heinous crimes in India. It is a violation of the basic human rights of a woman. Marital rape is an act of rape which is committed within the institution of marriage. It is an act which is done by the husband against his wife. However, the irony is that the husband who commits such an act gets immunity from the offence of rape just because of his marital status. Legal or public institutions always try to avoid interfering in it because marriage is seen as a sacrosanct knot between two families. In 2011, a study revealed that one out of five men commits this act. It is true that when any issue related to marital relations comes out then legal institutions should avoid it. However, no institution can withdraw its responsibility to enforce the basic principles of the Constitution on everyone. No law prevails

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upon Art.14², Art.19,³ and Art.21⁴ in general circumstances. Marital rape is a very serious act and violates these articles. It affects the dignity of a woman. It infringes right to equality also. Such acts can be seen as a black spot in every provision of the Constitution or any law that talks about the protection and advancement of women.

The Convention on the Elimination of all Forms of Discrimination Against Women, 1979 which has been ratified by India also dealt with all kinds of discrimination against women on any basis including gender-based violence. Such gender-based violence may be any one of the acts that may harm a woman physically, mentally, or sexually. Art.2 of this Convention imposes a duty upon the States to eliminate all kinds of discrimination which are perpetrated not only by the State or its agency or instrument but also by any individual or organization. The act of marital rape is a violation of the right to life which is a basic human right provided by all international treaties and international laws.⁵

The problem of marital rape has parallels to the problem of child abuse and parental violence, which was until very recently, debated as a domestic family matter not requiring any legislation because parents always had the best interests of their children at heart, even when they acted violently. Marital rape may be committed in the following ways:

- **Social coercion-** In such a situation a social force is used where the wife is told by society that she has a duty as a wife to submit herself sexually to her husband irrespective of her will.
- **Physical Force-** As the term expresses, the husband engages in sexual intercourse with her wife by using his physical force without the consent of her wife.
- **Obsessive Rape-** It may involve the force or aggression of the husband to gain sadistic pleasure through sexual intercourse or any other sexual act.⁶

The Criminal Law Amendment Act, 2013 made various changes to the laws or provisions related to the offence of rape and sexual violence by adopting more stringent measures however, the issue of marital rape has not been addressed by the Act of 2013. The law continued to give immunity to the husband who commits the act of marital rape, and such immunity is given on the ground that an implied and irrevocable consent for cohabitation is given by the wife at the

² The Constitution of India, 1950

³ The Constitution of India, 1950

⁴ The Constitution of India, 1950

⁵ Krina Patel "The Gap in Marital Rape Law in India: Advocating for Criminalization and Social Change" 42 FORDHAM INT'L L.J. 1519 (2019)

⁶ Prof.Kshitij Naikade & Dr.Garima Pal, "Issues & Challenges Related To Marital Rape in India" 7 INTERNATIONAL JOURNAL OF HUMANITIES AND SOCIAL SCIENCE INVENTION, 58, 65 (2018)

time of the marriage. Unfortunately, the above-mentioned ground is similar to the notion of the “Doctrine of Hale” which does not consider a husband as a rapist of his wife. It must not be forgotten that the “Doctrine of Hale” had been propounded in 1736. There have been a lot of socio-cultural changes in society. Now male and female are equal in the eyes of law therefore, the notion given in Doctrine of Hale should not be of any relevance.⁷

Law is not static, and it changes according to the socio-cultural perspectives of society. The Constitution is considered the supreme law of this country. Every action of any person or every act of the government must be in accordance with the related law of that action. Further, every law which includes statutory laws, rules, regulations, ordinances, or any precedent delivered by the high court of any state/union territory or Supreme Court must be within the framework of the basic principles of the Constitution. However, some laws create some loopholes and therefore may be misused by anyone. Additionally, there are some issues in this society that any law does not recognize, and which must be recognized otherwise the object of the Constitution would remain unfulfilled and its basic principles shall not be followed. The criminalization of marital rape is an issue that is though discussed by the various legal institutions of India yet still there is no proper law exists related to it. Here are some legislations and precedents which are connected to the issue of marital rape:

Exception-2 of Sec.375, Indian Penal Code,

The definition of rape is provided by Sec.375 of IPC. **Exception 2** of this sec. provides an exemption to a married man from the punishment of rape by stating that sexual intercourse is not rape if the act is done by a husband with his wife without her consent and the age of the wife is not less than 15 years.

In the case of **Independent Thought v. U.O.I.**⁸ in which the issue was related to the conflict between Exception-2 of Sec.375 of IPC and Sec.3 of the Protection of Children from Sexual Offences Act, 2012⁹, the Supreme Court held – “If a husband commits sexual intercourse without the consent of his wife who is more than of 15 years of age and less than of 18 years of age then the husband shall be guilty of the offence of rape.” However, this ratio shall not apply to a married woman who is 18 years or more. It was further observed by the court that the classification of children on the grounds of marriage is not reasonable due to a lack of intelligible differentia. Additionally, being a special law Protection of Children from Sexual

⁷ Padma-Bhate Deosthali & Sangeeta Rege & Sanjida Arora, “Women’s experiences of marital rape and sexual violence within marriage in India” 29 *SEXUAL AND REPRODUCTIVE HEALTH MATTERS*, 127, 134 (2021)

⁸ (2017) 10 SCC 800

⁹ Sec. 3 of the Protection of Children from Sexual Offences Act, 2012 deals provide punishment if any person uses any child for pornographic purposes.

Offences, 2012 has an overriding effect on any provision of the Indian Penal Code, 1860. The court also held the exemption clause of Sec.375 as a violative of Art.21. Thus, Court held that to harmonize the system of law, Exception 2 to Section 375 of IPC will now be read as stating that sexual intercourse with a wife who is not below 18 years is not rape.¹⁰

This marital rape exemption (MRE) clause violates the basic principles of the Constitution. This law infringes many fundamental rights of the constitution which can be discussed in the following way –

Art. 14 of the Constitution and Exception 2 of Sec.375 of IPC:

In a case, Karnataka High Court in 2022 observed that when a serious offence like rape is considered, the classification of perpetrators as married men and unmarried men and the classification of the victim as a married woman and unmarried woman is not fair. Rape is rape. It is irrelevant whether it is committed by the husband or not.

The exception clause of Sec.375 of IPC treats the wife as a subordinate to the husband. This law provides total discretion to commit any sexual act with her wife without considering her consent. Therefore, such a law is a clear violation of the right to equality provided under Art.14.

Art.21 of the Constitution and Exception 2 of Sec.375 of IPC:

Article 21 safeguards a woman's rights to life, dignity, and bodily privacy. She is free to make her own reproductive decisions, hence she is allowed to decline any form of sexual activity by exercising her right of personal liberty. This was observed in *Suchita Srivastava v. Chandigarh Administration*¹¹ which was further observed in *K.S. Puttaswamy*¹² case.

*D.K Basu's case*¹³, also states that people are shielded against all types of torture as well as other cruel, brutal, or degrading treatment under Article 21. Thus, Art.21 of the Constitution implicitly recognizes the freedom of a married woman to decide whether to engage in or refrain from having sexual contact with her spouse.

MRE being Unreasonable, Violates Other Fundamental Rights as well. By limiting the autonomy, bodily sovereignty, and legal protections provided to every woman, Article 15(3)¹⁴ of the Constitution is also infringed. Article 19(1)(a), which safeguards the right to free speech

¹⁰<https://www.latestlaws.com/case-analysis/sc-case-analysis-on-marital-rape-independent-thought-v-union-of-india-and-another-by-akanksha-yadav/>

¹¹ (2009) 14 SCR 989

¹² (2017) 10 SCC 1

¹³ *D.K. Basu vs. State of West Bengal* 1997 (1) SCC 416

¹⁴ Art.15 (3) of the Constitution enables the State to make any provision for the advancement of women and children.

and expression, is also violated When an act of marital rape is committed. Art.19 (1)(a) includes engaging in intimate sexual activity or private sexual behavior.¹⁵

RIT Foundation vs. U.O.I.¹⁶

A split verdict has been delivered by the High Court of Delhi challenging Section 375(2) of the IPC, which prevents married women from filing rape charges against their husbands. The judgment was pronounced by Justices Rajiv Shakti and C. Hari Shankar. While Justice Rajiv Shakti held the provision unconstitutional and ordered that the exemption be struck down, Justice Harishankar found the provision constitutional and based on an "intelligible differentia".

Observations by Justice Harishankar: The following were the observations made by him:

- He was of the firm opinion that it cannot be argued that the parliament acted unconstitutionally in dealing with sexual acts of a married couple, whether with consent or not.
- It was observed by him that Sec.375 does not prohibit a woman from saying no to sexual intercourse, the language of the section clearly states that sexual activity between a married couple is not rape.
- He said that if the exemption clause is removed as inconsistent with Article 14 because it is arbitrary, the arbitrariness must therefore relate to the way in which it distinguishes the persons or things present, otherwise it must be the same.

Justice Shakti's Observations: Justice Shakti ruled that exception 2 of Sec.375, IPC is violative of the Constitution. The important observations by him are following-

- Marital rape exception (MRE) in every way infringes Article 14 of the Constitution by taking away the right of equal protection of law of ½ population of this nation.
- MRE is against Article 21 of the Constitution. "Regardless of who the perpetrator is, forced sex physically, psychologically, and emotionally disturbs the female victim." He spoke. The right of the woman to withdraw her consent is an essential part of the right implied in this Article.

¹⁵Ishita Chandra, *Why Exception II of Section 375 Of the Indian Penal Code Needs to be Declared Unconstitutional*, Manu Patra Articles (Nov 17, 2022) <https://articles.manupatra.com/article-details/WHY-EXCEPTION-II-OF-SECTION-375-OF-THE-INDIAN-PENAL-CODE-NEEDS-TO-BE-DECLARED-UNCONSTITUTIONAL>

¹⁶2022 SCC Del 1404

- The judge further observed that the continuation of MRE in the law violates Article 15 of the Constitution because it promotes discrimination on the grounds of marriage while Art.15 (3) is for the advancement of women.
- The Marital rape exemption clause also violates Article 19(1)(a) by restricting a female's freedom to express her sexual autonomy.¹⁷

Thus, the above-mentioned Split verdict of the Delhi High Court provides two different perspectives by two judges. One favors the exemption clause of IPC and the second considers this exemption clause as unconstitutional. I think for a woman against whom the act of the worst form of sexual abuse has been committed, it would not be fair to say that a different remedy is provided for that woman especially when such remedy is not enough. In his judgment, Justice Sakdhar rightly says that if we take a case of Gang Rape where the husband of the victim is also involved with the other co-accused then in such a case all accused other than the husband of the victim will be prosecuted according to the rape law. Such non-prosecution for the rape of the offending husband does not seem fair because the same act has been done by him.

The observation of Justice Shakhdar seems right when he says that the basic fault of the Exception marital clause of IPC is that protection is provided to an unmarried female who is a victim of rape while if a female who is married and is the victim of the same act which is done by her husband then the same laws do not protect that woman. Additionally, it is not understandable that a married woman is protected against the act of his husband under Section 354, IPC however if the same person commits a worse act like rape, then she is not protected under the rape law. The Supreme Court has decided to hear the pleas related to this issue. So, the case will now be dealt with by the Supreme Court.

Section 376B of the Indian Penal Code, 1860

Under the Criminal Law (Amendment) Act, 2013, this provision has been amended. Section 376B punishes a person if the following conditions are fulfilled-

Essentials of Section 376B:

- 1) Sexual intercourse is done by the husband against his spouse's consent.
- 2) Such an act must be done only for the duration of the separation period.
- 3) The meaning of "sexual intercourse" shall be the same as given under Section 375

¹⁷ Zeb Hasan, *Delhi HC's Split Verdict on Marital Rape: Highlights of What the 2 Judges Said*, THE WIRE, (May 12, 2022) <https://thewire.in/law/delhi-hcs-split-verdict-on-marital-rape-highlights-of-what-the-2-judges-said>

4) The punishment provided to the husband for this offence is a minimum imprisonment of 2 years which can be extended up to 7 years and/or a fine can be imposed.

Here, though the act abovementioned is punished yet it is not considered as grave as the offence of rape. Such an act is criminalized here; however, one condition is given that the wife must be separated from her husband in any way which expresses that the relations between the husband and wife are very stressful and in such a situation sexual intercourse by the husband without the consent of wife would be very traumatic for her. A marriage is at its weakest point when a woman lives separately from her husband and her husband becomes more than a stranger for her in some circumstances. In such a situation if the husband commits such an act with her then sometimes it becomes more traumatic than the committal of rape in situations given under Sec.375, IPC.

Thus, the conduct as given under Sec.376B, IPC is a pure conduct of rape and a very clear violation of Art.14, Art.15, Art.19 and Art.21. However, under IPC it is not termed even as “RAPE” and punishment also is very less comparatively. This provision and the punishment under it must be amended and termed it a kind a marital rape.

Option of Puberty under Muslim Law and its Connection with Marital Rape

Option of Puberty (Khayal-ul-Bulug) -

A person, under Muslim Law, is capable of marrying if he fulfills the following conditions - 1. The person should be sound-minded. 2. That person should be the major. However, the marriage of a child or lunatic is possible in Muslim law if the guardian of that child or lunatic gives his assent for the solemnization of such marriage. Islam mandates that for a nikah (marriage contract) to be effective, both parties' consent is required. As a result, when any of the parties i.e., wife or husband reaches puberty, the Shari'ah permits both the husband and the woman to end their childhood marriage. This right of dissolving marital relation is called “Khayal-ul-Bulugh”. If a girl wants to exercise this right, then the condition is that after attaining puberty marriage must not be consummated with her consent otherwise, she will lose this right.¹⁸ In Muslim Law, a person of 15 years of age is considered a major generally. A Similar right has been given to a Muslim woman to take divorce through court under Sec.2 (vii) of the Dissolution of Muslim Marriage Act,1939¹⁹.

¹⁸ Shagufta Omar, “Dissolution of Marriage: Practices, Laws and Islamic Teachings” 4 Policy Perspectives, 91, 108 (2007)

¹⁹ Sec. 2 (vii) of the Dissolution of Muslim Marriage Act, 1939 says that a girl can get a decree of dissolution of marriage if the girl has been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years: Provided that the marriage has not been consummated.

The United Nations Convention on the Rights of the Child defines the child as a person under the age of 18 years. Thus, the marriage of such a child would be a child marriage which national and international laws try to prevent. Section 2(a) of the Prohibition of Child Marriage Act, 2006 also says - “A child is a person who has not completed 21 years in case of male and 18 years in case of female.” This Act punishes the persons who encourage child marriages. The condition of consummation of marriage also does not exist in this Act.²⁰

The age of majority is different in any other law from the Muslim law. Thus, a girl who is considered as “major” for marriage in Muslim law may be a “minor” under any other legislation of India like the Prohibition of Child Marriage Act, 2006²¹, Indian Penal Code, 1860, or Prevention of Children from Sexual Offences, 2012²² which does not consider such child mature enough to give her consent for consummation. Thus, on the one hand, other general or specific legislations mention that a girl of fewer than 18 years of age is not mature enough to give consent for cohabitation while on the other hand under the Muslim Shariya law and Dissolution of Muslim Marriage Act, 1939, a minor, for example, a 16 years old Muslim married girl who can be enticed or pressurized for the consummation of marriage, cannot take divorce under the principle of the option of puberty or *Khayal ul Bulugh* if the consummation of marriage has taken place with her consent after attaining the age of puberty. So, a clear case of rape or marital rape according to any other law does not provide even a right to divorce to that girl. In a situation where the consent of a minor girl has been taken through force by her husband, how a type of law can snatch a right for divorce or declaration of marriage as void from the girl based on consummation in place of punishing the person who is responsible for it? Such kind of marriages in any religion or sect promotes marital rape because consummation in such marriages is an act of rape. If the consent of a girl who is less than 18 years of age for such things can be questioned, then to expect resistance by such a girl against such an act would be very illogical. Additionally, the removal of the right of the option of puberty makes it worse.

Such criteria of majority must be based on some logic. The classification of the age of majority should not be based on religion for any purpose. There is no difference between girls and boys who are less than 18 years of age in any religion. They all are the same biologically or on a mental level. So, such classification is not a reasonable classification therefore it is a violation of Art.14 of the Constitution. Where a case of rape must be filed, the law takes away a right

²⁰ Apoorva Mandhani, *Can An Under-18 Muslim Girl Be Married? HC Verdict Puts Focus Back On Child Marriage*, The Print, (February 13, 2021, 11:30 A.M.) [lawhttps://theprint.in/judiciary/can-an-under-18-muslim-girl-be-married-hc-verdict-puts-focus-back-on-child-marriage-law/604032/](https://theprint.in/judiciary/can-an-under-18-muslim-girl-be-married-hc-verdict-puts-focus-back-on-child-marriage-law/604032/)

²¹ To define ‘minor’, the Prohibition of Child Marriage Act, 2006 adopts the definition provided under Sec.3 of Majority Act, 1875 which says a person becomes major when he attains the age of 18 years.

²² Prevention of Children from Sexual Offences, 2012 defines the “Child” as any person under the age of 18 years.

from that girl. It manifestly encourages marital rape. Such a law impedes the advancement of a woman thus, violates Art.15. This law also infringes Art.19 because it prevents a woman from expressing her sexual autonomy. It is also an attack on the dignity of women so a clear violation of Art.21.

Domestic Violence Act, 2005

This Act protects a woman against mental or physical harm committed by her husband or his relatives. In *Ishpal Singh Kahai v. Ramanjeet Kahai*²³, the Court observed that the object of the Act is to provide statutory protection to victims of domestic abuse. The Act is per various provisions of international treaties, protocols, and standards.

The Act of 2005²⁴ safeguards women from all types of physical and psychological violence, including sexual assault. This Act provides remedies of a civil nature to the victims. Legislatures of India provided this remedy as the only remedy to the victims of the marital rape in all statutory laws. Under the 2005 Act, the magistrate has the authority to appoint protection officers to protect wives or live-in partners from domestic abuse.²⁵ Judicial separation from a husband may also be sought by a victim of domestic violence.²⁶

The Act of 2005 does not criminalize the act of marital rape²⁷, though it accepts this act as wrong and tries to go following the basic principles of the Constitution. So, it can be said that this Act shows that despite sticking to the non-criminalizing marital rape, the approach of the State has been shifted from non-interfering in marital relations to protection of women in their domestic relations. However, marital rape is not a wrong only which can be compensated by giving some civil remedy. It is the act of rape that is considered a grave offence. Thus, the protection given under the Domestic Violence Act, of 2005 is not enough to protect the rights of a woman enshrined under the Constitution.

Conclusion and Suggestions

Marital rape is a serious concern, and this issue must be taken seriously. In this nation, where there is no punishment for a man who commits a pure act of rape with his wife, we cannot say that there are sufficient laws to protect a woman against any harm committed against her. What is the significance of the promotion of women's empowerment if a woman is being raped by her husband and the law allows it. Under the Constitution, every person has a right to equality.

²³ 2011 SCC Online Bom 412

²⁴ Sec. 3 defines domestic violence and Sec.4 provides the penalties for not complying with protection orders.

²⁵ Sec.8 of the Domestic Violence Act, 2005

²⁶ Sec.20 of the Domestic Violence Act, 2005

²⁷ Sec.19 of the Domestic Violence Act, 2005

However, in existing circumstances, a husband is allowed to use his wife as a property for sexual purposes and that woman's consent does not matter. Our Constitution guarantees a fundamental right i.e., the right to reproduction or the right to have sexual autonomy to every female citizen of this country however, a married woman has a "no say" in private sexual behavior with her husband and her husband has all discretion in this regard. Thus, it is not in line with this constitutional guarantee. These conflicting situations must be resolved as early as possible.

To tackle this issue, Criminalization of marital rape is very much required. Making it an act of domestic violence and giving some civil remedy is not enough. The legislature should make strict separate legislation. Any amendment in any law to solve this issue may not be enough and there are chances of some loopholes in it. A separate class of "Fast Track Courts" must be established so that victim gets justice in time. If legislatures do not take any step towards it, then the Indian Judiciary should look into this matter. Supreme Court as a guardian of the Constitution must take some steps and should establish a precedent regarding the criminalization of marital rape. Although this issue has been raised by the courts yet there is still no established precedent or law related to this issue. In January 2023, the Chief Justice of India D.Y. Chandrachud decided to hear a petition related to marital rape. We are expecting a positive decision which can provide a solution to this issue.
