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The Unconstitutional Immunity to Marital Rape: Judicial Perspective

SREENATH.M.S¹ AND VENNILA.T²

ABSTRACT

Marital rape is one of the most gruesome decriminalized practices in India which results in plethora of human rights violations against married women. The sad reality behind such a cruel practice is the stereotypical society that accepts sexual violence against married women as just another part of the marriage and does not provide solution to such problems. This stereotypical society rather than punishing the perpetrating husband, expects the wife to adjust to the needs of the husband in order to carry forward the social institutions of marriage and marriage and family at the expense of her basic human rights. India is one of the 36 countries around the world where marital rape is not illegal. The exception to marital rape is enshrined in the Indian law through Exception 2 to Section 375 of Indian Penal Code. The UN Population Fund found that more than two-thirds of married women in India, between the ages of 15 to 49 have beaten, rape, or forced to provide sex. This paper discusses the various rights of women recognized by the judiciary through plethora of judicial pronouncements and the judicial stand on the issue of marital rape.

Keywords: Marital rape, women rights, constitutional violation, reproductive rights.

I. INTRODUCTION

Marital rape is still non criminalized in India, a heinous and inhumane act that has scarred the trust and confidence in the institution of marriage. A major section of the female population has faced the negative impacts of the non-criminalization of the practice. Marital rape refers to unwanted nonconsensual intercourse by a man with his wife obtained by force, threat of force, or physical violence, or when she is unable to give consent. It is a non-consensual act of violent perversion by a husband against the wife where she is abused physically and sexually³. This horrid practice of marital rape stems from the notions of patriarchal society which just considers women as a property of men especially in the institution of marriage. The last decade

¹ Author is a L.L.M (Criminal law and Criminal Justice Administration) student at Dr. Ambedkar Government Law College, Pattaraiperumpudhur, India.

² Author is a L.L.M (Business Law) student at Dr. Ambedkar Government Law College, Pattaraiperumpudhur, India.

³Nimeshbhai Bharatbhai Desai v. State Of Gujarat 2018 SCC Online Guj 732

saw a monumental response from the society and legislature against the sexual offences against women and children which are clearly reflected in the passing of Protection of Children from Sexual Offences Act, 2012⁴ and the Criminal Amendment Acts of 2013⁵ and 2018⁶. This is mainly due to the horror rape incident of Nirbhaya at the national capital which questioned the safety of women in the nation and also resulted in severe backlash from the society. It's not fair on the part of Legislature and the Judiciary to wait for another similar horrific incident in the case of marital rape.

Marital Rape is included within the definition under Section 375 of Indian Penal Code, 1860 but the Exception 2 to Section 375 decriminalizes sexual intercourse of sexual acts by a man with his own wife, the wife not being under eighteen years of age.

II. INDIAN JUDICIARY ON MARITAL RAPE

The Indian Judiciary has always had an important role to play while protecting women rights and establishing gender justice in a country where gender disparity is prevalent in almost all sectors of society. The legislature cannot alone by itself empower women in such a male dominated patriarchal society. The legislature can draft the legislations with beneficial provisions but it is the judiciary that must implement the laws in such a way that it can give justice to every individual with the principles of equity, justice and good conscience in mind. The work of the judiciary is to interpret and apply the laws laid down in the constitution. The main objective of the laws is to provide justice to the aggrieved. The judiciary examines all the provisions of legislation, interprets them in such a way that the object of the legislation is achieved and then implements them in the proper places for the development of society. The Indian Judiciary through its judicial decisions has helped women to get her what is due to her as a matter of right and has shown that discrimination against married women in Indian society won't be tolerated at all.

Though the Indian Judiciary has played an enormous role in protecting the rights of women in society like providing them with property rights, rights against sexual harassment at workplace, it has often been cautious about the rights of a woman in a family especially in marital relationships. The Indian Judiciary has even taken a back step while coming to the issue of marital rape over the years.

⁴ Act no. 32 of 2012

⁵ Act no. 13 of 2013

⁶ Act no. 22 of 2018

(A) Rights of Women Recognized by Judiciary

The Indian Judiciary has been a pioneer of women rights in India through its several judicial pronouncements. Through a catena of judgments, the Indian Judiciary has recognized and protected various rights of women from all walks of life. Some rights of women are even brought under the purview of the fundamental rights laid down by the Constitution, thereby making those rights almost impossible to be taken away from them. As per Article 13 of the Indian Constitution even if legislation is made ripping women off these rights, it is very much within the power of the courts to declare those legislations as unconstitutional and it is the duty of the court to do so. The following rights are recognized by the courts in various judgments and it gives a better understanding to the issue of marital rape.

(B) Right to Life and Personal Liberty

Right to life and personal liberty is enshrined in Article 21 of the Indian Constitution. Article 21 although iterated in negative language confers on all persons the fundamental right of life and personal liberty. Post the case of *Maneka Gandhi v. Union of India*⁷, Art.21 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 progressively, and can be appropriately summed up in the words of Field J. in the landmark judgment of *Munn v. Illinois*⁸ where he held that life means 'something more than mere animal existence', which was further reiterated by the Supreme Court of India in the famous case of *Bandhua Mukti Morcha v. Union of India*.⁹

In the world 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. There cannot be a more blatant and heinous violation of Article 21. The doctrine of marital exemption to rape violates the right to privacy, right to bodily self-determination and right to good health, all of which have been recognized by judiciary as an integral part of the right to life and personal liberty at various points of time.¹⁰

(C) Right to Live with Human Dignity

In the celebrated judgment of *Francis Corallie Muin v. Union Territory of Delhi*,¹¹ the apex court held that the concept of right to life under Article 21 of the Constitution includes the right to live with human dignity and everything that goes along with it, namely, the bare necessities

⁷ AIR 1978 SC 597

⁸ 94 US 113 (1877).

⁹ AIR 1984 SC 802, 811.

¹⁰ Dr. Bhavish Gupta & Dr. Meenu Gupta, Marital Rape: - Current Legal Framework in India and the Need for Change, Galgotias Journal of Legal Studies 2013 GJLS Vol. 1, No. 1 ISSN. 2321-1997 pg.27

¹¹ AIR 1981 SC 802.

of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and mingling with fellow human beings. The right to live with human dignity is one of the most basic and inherent qualities of the right to life which recognizes the autonomy of an individual. The Supreme Court has held in a catena of cases including the landmark judgment of *The Chairman, Railway Board v. Chandrima Das*,¹² 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.

The Supreme Court, in the case of *Bodhisattwa Gautam v. Subhra Chakraborty*,¹³ while discussing the need for creation of a Criminal Injuries Compensation Board and guidelines for victims of sexual assault held that rape is not merely an offence under the Indian Penal Code, but is a crime against the entire society. It also held that rape is less of a sexual offence than an act of aggression aimed at degrading and humiliating the women. Thus the marital exemption doctrine of rape is also violative of a woman's right to live with human dignity. Any legislation 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 notion of right to life under Article 21 and is hence should be declared unconstitutional.

(D) Right to Sexual Privacy

Right to privacy is not explicitly mentioned in the Indian Constitution. However, through a series of cases like *Kharak Singh v. State of U.P.*,¹⁴ *Govind v. State of Madhya Pradesh*,¹⁵; *Neera Mathur v. LIC*,¹⁶ the Supreme Court has recognized that a right of privacy is constitutionally protected under Article 21. The Supreme Court of India in the case of *Justice K.S. Puttuswamy v. Union of India*,¹⁷ went one step further and held that the right to privacy is not a right bestowed by the State through the Constitution but, a right naturally inherited by a person by virtue of being a human being and the Constitution only recognizes such right in a person. It also held that like right to life and personal liberty, right to privacy is not an absolute right but can be invaded only through fair, reasonable and just procedure established by law.

The right to be let alone is also included in right of privacy under Article 21. Any form of forceful sexual intercourse even by a spouse violates the right of privacy. It is clearly understood that the exemption to marital rape violates the right to privacy of a married woman

¹² AIR 2000 SC 988

¹³ AIR 1996 SC 922 : 1996 SCC (1) 490

¹⁴ AIR 1963 SC 1295

¹⁵ AIR 1975 SC 1378

¹⁶ (1992) 1 SCC 286

¹⁷ (2017) 10 SCC 1

by forcing her to enter into a sexual relationship against her wishes. The Supreme Court in the landmark case of *State of Maharashtra v. Madhkar Narayan*¹⁸ has held that every woman was entitled to sexual privacy and it was not open to for any and every person to violate her privacy as an when he wished or pleased. In the case of *Vishakha v. State of Rajasthan*,¹⁹ the Supreme Court extended this right of privacy to workplaces. Further, on extension of the same principle, there must exist a right of privacy to enter into or avoid a sexual relationship even within a marriage. By not criminalizing rape within a marriage, the exemption to marital rape under S.375 of IPC violates this right of privacy of a married woman and is hence, unconstitutional.

(E) Right to Bodily Self-Determination

The right to bodily self-determination has neither been expressly recognized by the Indian Constitution nor by the Indian Judiciary. But, the right has been made to exist in the larger framework of the right to life and personal liberty under Article 21 through an implied understanding of the catena of judgments which have been discussed earlier. The right of self-determination is based on belief that the individual is the ultimate decision maker in matters closely associated with her/his 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 sexual intercourse is one of the most intimate and personal choice that a woman reserves for herself. It is a form of self-determination and self expression and a law that rips a person of the right of expressing and revoking such consent definitely deprives a person the constitutional right of bodily self-determination. It is submitted that the exemption to marital rape under S.375 of IPC effectively deprives a married woman her right to bodily self-determination in respect of one of the most intimate and personal choice, i.e., consent to sexual intercourse, and is hence, unconstitutional.

(F) Right to Good Health

Another important argument against the exemption to marital rape under S.375 of IPC is that it violates the right to good health of the victim of such crime. The right to good health has been recognized as a part of right to life under Article 21 in plethora of judicial decisions like *CESC Ltd. v. Subhash Chandra*,²⁰; *Regional Director, ESI Corpn. v. Francis de Costa*,²¹ etc.,. Such a right is necessary for the continuous spiritual and intellectual well being of a person. The exemption to marital rape violates the right to good health of a victim as it inevitably

¹⁸AIR 1991 SC 207.

¹⁹AIR 1997 SC 3011.

²⁰(1992) 1 SCC 441

²¹1993 Supp (4) SCC 100

causes serious psychological harm such as Depression, Post Traumatic Stress Disorder, and various other psychological issues and it also causes various physical harms starting from minor injuries and even sometimes causing grave injuries which also results in the death of the victims. It destroys the mental stability of a woman and pushes her into a deep emotional and psychological crisis. A more compelling argument can be made in case where forceful marital rape leads to the communication of a sexually transmitted disease (STD) to the victim of crime of rape. The exemption to marital rape under S.375 of IPC effectively deprives a married woman of her right to good health and is hence, unconstitutional.

III. JUDGMENTS RELATING TO MARITAL RAPE IN INDIA

Though the Indian Judiciary has shown lack of intent to criminalize marital rape, the court has come up with the issues similar to marital rape or marital rape itself. In such cases, the courts have taken different stands and some even can be considered as the first step towards criminalization of marital rape. The dissenting opinion of judges in a judgment and the ratio decidendi in overruled judgments may not have the legal enforcement value of regular judgment but they can and should be viewed as an alternate thinking and the way forward if it proves to protect the Constitution and basic human rights.

(A) Judgments against Doctrine of Coverture

Doctrine of Coverture is the doctrine that states that the husband and wife are considered as a single person in the eye of the law and hence an action cannot be taken on one for the offence committed by one on the other. This directly states a spouse is incapable of committing a crime against another. This doctrine is the principle at helm as the major reason why the act of marital rape was not criminalized. However, with time this doctrine has been eroded by a series of judicial pronouncements, change in the jurisprudence and the minds of the people in the society. Though eroded, the traces of this ideology still exist in certain legislations like the exception to marital rape under S.375 of IPC.

On tracing the history of judicial pronouncements on infliction of serious injury by the husband on the wife the court in *Queen Empress v. Haree Mythee*,²² observed that in case of married women, the law of rape does not apply between husband and wife after the age of fifteen; even if the wife is over the age of fifteen, the husband has no right to disregard her physical safety, for instance, if the circumstances be such that sexual intercourse is likely to cause death of the wife. In the present case, the husband was convicted under Section 338, Indian Penal Code, for

²² (1891) ILR 18 Cal. 49

rupturing the vagina of his eleven-year old wife, causing hemorrhage leading to her death. Though the offence committed in the present case is clearly rape by the husband and it does not fall within the exception, the court has convicted the accused husband only under S.338 of IPC which is the offence of causing grievous hurt by act endangering life or personal safety of others by rash and negligent act. However taking into consideration that the time period is 19th century, the very conviction of the husband is appreciable and can be considered as the first step against doctrine of coverture.

In the case of *Emperor v. Shahu Mehrab*,²³ the husband was convicted under Section 304A Indian Penal Code for causing death of his child-wife by rash or negligent act of sexual intercourse with her. The decision in this case can be seen as an improvement from the previous case as the court has convicted the husband under a more serious offence under S.304A of IPC which deals about Causing Death by Negligence than the offence under S.338 of IPC.

In the overruled landmark judgment of *Saretha v. T. Venkata Subbaih*,²⁴ the Andhra Pradesh High Court held: “*There can be no doubt that a decree of restitution of conjugal rights thus enforced offends the inviolability of the body and mind subjected to the decree and offends the integrity of such a person and invades the marital privacy and domestic intimacies of a person*”. If State enforced sexual intercourse between husband and wife is a violation of the right to privacy, then surely in case of non-consensual sexual intercourse with the husband equally violates a woman’s right to privacy. Rights and duties in a marriage, like its creation and dissolution are not the terms of a private contract between two individuals. The right to privacy is not lost by marital association.

The Supreme Court, in *State of Maharashtra v. Madhukar Narayan Mandikar*,²⁵ has made reference to the right of privacy over one’s body. In this case it was decided that a prostitute has the right to say no to sexual intercourse. The sad reality is that all stranger rapes have been criminalized and all females, other than wives, have been given the right of privacy over their bodies thereby providing the right to withhold consent and refuse sexual intercourse. The fact that the right available for even a prostitute is not available to a married woman shows how less the society thinks and treats a married woman.

In *Sree Kumar v. Pearly Karun*,²⁶ the High Court of Kerala observed that because the wife was not living separately from her husband under a decree of separation or under any custom or

²³ AIR 1917 Sind 42

²⁴ AIR 1983 AP 356

²⁵ AIR 1991 SC 207

²⁶ 1999 (2) ALT Cri 77 <http://indiankanoon.org/doc/486164/>

usage, even if she is subject to sexual intercourse by her husband against her will and without her consent, offence under Section 376A, IPC will not be attracted. In the present case, there was an ongoing dispute on divorce between the parties. Thereafter, a settlement was reached between the spouses and parties agreed to continue to reside together. The wife stayed at the husband's house for two days during which she alleged that she was subject to sexual intercourse by her husband against her will and consent. However the husband was held not guilty of raping his wife though he was *de facto* guilty of having done so.

The judiciary seems to have completely relegated to its convenience the idea that rape within marriage is not possible or that the stigma of rape of a woman can be salvaged by getting her married to the rapist. The trouble is that it has been accepted that a marital relationship is practically sacrosanct. Rather than, making the wife worships the husband's every whim, especially sexual, it is supposed to thrive, mutual respect and trust. It is much more traumatic being a victim of rape by someone known, a family member, and worse to have to cohabit with him.²⁷

(B) Judgment on Age Limit for Marital Rape Exception

In the landmark judgment of *Independent Thought v. Union of India*,²⁸ the Apex Court read down Exception 2 of Section 375 which now reads as "Sexual intercourse by a man with his wife, the wife not being 18 years". Previously, the age was 15 years but now it has been changed to 18 years after the 2018 amendment. The Supreme Court stated that for the best interest of the girl child and society as a whole, early marriage and sexual intercourse adversely affects the health of the girl child and so, the traditional practice of early marriage should be given up very soon. The Apex Court also added that, a girl child also has a life to live with dignity under Article 21. The girl child subjected to sexual abuse loses her self-esteem. Due to early marriage and regular sexual intercourse, there is a great probability that she becomes pregnant though her body is not quite ready for procreation. The child born out of premature marriage is more likely to be malnourished. The Court also found that the marital exception only to married women under the age of 16 years is in direct violation of the provisions of POCSO Act which prohibits sexual acts below the age of 18 years. Hence, the Court made a harmonious interpretation of POSCO Act (which would prevail over other law, being a special Act) and Indian Penal Code and therefore, the Supreme Court narrowed Exception 2 of Section

²⁷ Ms. Bhavya choudhary & Mr. Nitish chandra, Wake up before it's too late: Marital rape and Criminal law, Law Audience Journal Volume 1 Issue 4 June 2019 ISSN (o): 2581-6705 at <https://www.lawaudience.com/wake-up-before-its-too-late-marital-rape-and-criminal-law/>

²⁸ (2017) 10 SCC 800

375 by changing the age limit to 18 years.

It is to be noted that even in this case, the consent of the married woman has been utterly disregarded. The amendment has been made only on the grounds of danger to physical health of the wife due to early sexual intercourse and early pregnancy. However, the court has failed to take note of the damage to physical, psychological and emotional health a married woman has to undergo as a direct result of being a victim of marital rape. It is quite ironic to note that the age of consent in most cases (18 years) is set as the age limit where the consent of the married woman is taken for granted. The classification of woman who are victim of rape based on the marital status is a gross violation of Article 14 for want of reasonable classification and the classification made here among married woman based on their age for the reason of physical health also lacks proper reasoning as physical health can be damaged in marital rape irrespective of the age of the victim.

(C) Government's Stand on the Issue of Marital Rape

In the case of *RTI Foundation v. Union of India*,²⁹ the Government pleaded before the Delhi High Court that:

1. Marital Rape should not become a phenomenon to harass the husbands which may imbalance the institution of marriage (as there is rampant misuse of Section 498A of IPC which deals about Cruelty done by Husband or his Relatives)
2. If all sexual Acts with the wife of one will become marital rape, then it will be very difficult to prove it and to rely upon any evidence as there will be no lasting evidence of rape between a man and his own wife.
3. 172nd Law Commission Report and in 167th Parliamentary Standing Committee on Home Affairs, have examined the matter thoroughly and did not recommend criminalization of marital rape. Adding to this, for the criminalization of marital rape, there must be moral and social awareness to stop the Act. There must be a change in the attitude of society.
4. The mere fact that various other Countries have criminalized marital rape does not mean that India should also criminalize it. The population, condition, literacy rate, poverty, the mindset of society differs from Country to Country.

²⁹ W.P. (C) No.284/2015 (India)

(D) The First Step towards Criminalization of Marital Rape

The recent judgment by the Gujarat high court in *Nimeshbhai Bharatbhai Desai v. State of Gujarat*³⁰ (2017) elaborately dealt with the issue of marital rape, and stated that, “[m]aking wife rape illegal or an offence will remove the destructive attitudes that promote the marital rape”; however, due to non-recognition of marital rape as a crime under the Indian legal framework, the court held that the husband is liable only for outraging her modesty and unnatural sex. The Honble court also opined that marital rape should be criminalized and the also stated that the apex court had avoided the question of criminalization of marital rape in the case of *Independent thought v. Union of India*³¹. In this judgment, various arguments and facets of marital rape were detailedly discussed and the court recommended the criminalization of marital rape.

IV. CONCLUSION

Non Criminalization of Marital Rape has various impacts such as Violation of Constitutional guarantees, National Legislations and obligations to International Treaties like CEDAW, DEVAW, UDHR, ICCPR, ICESER, etc. and Patriarchal Mind set of our society has been attributed as one of the major reasons for non-criminalization of marital rape. The absence of legal enforcement against marital rape may influence the minds of the husbands that these heinous acts are socially acceptable which in turn results in the so called patriarchal mindsets thereby creating a vicious cycle against married women. The very “Justice Verma Committee” which was constituted after the horrific incident of Nirbhaya had clearly emphasized on the Criminalization of Marital Rape in India. All Societal Reform Legislation like Abolition of Sati, Dowry Prohibition Act, Child Marriage Restrain Act, etc., were also against the then traditional mindset of the society. It is the responsibility of the government to curb out the discriminatory practices in our society rather than taking the societal mindset as an excuse.

³⁰ 2018 SCC Online Guj 732

³¹ (2017) 10 SCC 800