

Independent Thought vs. Union of India: An evaluation of the judgement and its repercussion in the field of marital laws.

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Abstract: Marital rape is defined as the act of sexual intercourse with one's spouse without the consent of the other spouse. It is a form of sexual abuse and domestic violence. The Indian society is too hypocritical to acknowledge the fact that marriages can be potentially disharmonious and dangerous sites of human interaction. According to National Family Health Survey, 2005-06, almost one in every ten married women aged 15-49 years in India have been forced to have sex with their husband against their will. Out of 9% of the women who reported sexual assault, 94% suffered it at the hands of their husbands. Historically husbands have been given the right to use their wives as property that they owned. There was no concept of wife's consent. Until 1983, the Criminal Law Amendment Act, stated that "Sexual intercourse by a man with his own wife, the wife not being 15 years of age, is not rape." The government officials argued that criminalizing marital rape would weaken family values as contract of marriage presumes wife's consent to have sexual intercourse with her husband. The marital rape victims had to take recourse to Protection Of Women From Domestic Violence Act, 2005 which offered only civil remedy. However, the present scenario of marital rape changed by the coming of recent Supreme Court Judgement in 2017.

Keywords: Marital rape, Consent, Criminal law, SC landmark Judgment.

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I. INTRODUCTION TO AND SIGNIFICANCE OF THE JUDGEMENT

The petitioner is a registered society working in the area of child rights which filed a petition under Article 32 of the Constitution with a view to draw attention towards the violation of girls married between the ages of 15 to 18 years¹. Section 375 of IPC prescribes age of consent for sexual intercourse as 18 years meaning thereby that any person having sexual intercourse with a girl child below 18 years of age shall be statutorily guilty of rape even if the sexual activity was with her consent. However, by virtue of Exception 2 to Section 375 of IPC, if a girl child between 15 to 18 years of age is married, her husband can have non consensual sexual intercourse with her without being penalized under the IPC, only because she is married to him. Such an exemption is not only arbitrary but also contrary to the basic structure of the Constitution. The dangers of early marriage were studied. It was held that early marriage can adversely affect the health of the girl child, education impeded and economic autonomy restricted. Early marriage also increases the risk of HIV infection. Neo-natal deaths are one of the results of early marriage. Criminalization of marital rape by this judgment will be a symbolic start for sure. The move is expected to go a long way in discouraging the practice of child marriage in India. This judgment has been declared to be prospective in nature meaning thereby that the prosecution for an offence of marital rape of a girl child can only be initiated after the date of the judgment². Therefore the law as it stands now is that, notwithstanding consent, sexual intercourse with a minor girl would constitute the offence of rape under Section 375 of the IPC.

II. AIMS AND OBJECTIVES OF THE RESEARCH PAPER

- a. To analyze the judgment.
- b. To examine the legal provisions of marital rape in Indian Legal Scenario.
- c. To study the status of marital rape in other countries.

¹ Independent Thought vs Union Of India and Anr. Writ Petition (Civil) No. 382 of 2013.
http://supremecourtindia.nic.in/supremecourt/2013/17790/17790_2013_Judgement_11-Oct-2017.pdf

² http://www.huffingtonpost.in/2017/10/11/what-the-sc-judgement-on-sex-with-minor-wives-means-for-the-child-brides-of-india_a_23239875/

- d. To analyze the detrimental consequences suffered by the girl child due to early marriage.
- e. To examine the long term implication and application of this landmark judgment.

III. TYPES OF MARITAL RAPE

The three types of marital rape that are generally prevalent in our society are as follows:

- a. Battering Rape** –In this type of rape, women in their marital relationship are battered during the sexual violence act and on the other hand they have to face the physical violence after the rape. Majority of marital rape victims fall under this category.
- b. Force only rape-** In this type of rape, only that amount of force is used by the husband of the wife which is necessary to coerce them into the sexual intercourse .Battering is not a characteristic of such kind of rape. This type of assault takes place when the wife refuses to have sexual intercourse.
- c. Obsessive rape** –In this type of rape, torture and perverse sexual acts takes place which are physically abusive.

IV. LAWS PREVALENT IN OTHER COUNTRIES

Countries which were early to criminalize marital rape were Poland (1932), Czechoslovakia (1950), the Soviet Union (1960), Denmark (1960), Sweden (1965) and Norway (1971).³ Few examples of countries that have abolished marital rape exemption provided to husbands are : Australia, Canada and South Africa which have followed the England system and have abolished the marital rape law exemption. Also, in South Africa the exemption provided to husbands with regard to marital rape has been repealed. Section 5 of The Family Violence Act, 1993 in South Africa states ” Notwithstanding anything to the contrary contained in any law or in common law; a husband may be convicted of rape of his wife.”⁴ Thus making marital rape a punishable crime.

Similarly in Australia, under Section 73(4) of the Criminal Law Consolidation Act,1953 “ No person shall , by reasonably of the fact that he is married to some other person , be presumed to have consented to an indecent assault by that other person .”

Further, Canada has also repealed the exemption clause in marital/spousal rape in 1983.

As per a report named “ The World’s Shame: The Global Rape Epidemic” published by Equity Now which surveyed lawyers from 82 jurisdictions across the world reveals that there are few countries that have criminalized marital rape .Most countries either didn’t explicitly address marital rape as a crime, or saw it as a crime only if the people involved were separated. In at least 12 countries, marital rape is decriminalized, and in at least nine countries, rapists can marry the survivor to avoid punishment. Some of the findings of the Report are as follows⁵:

1.1A case study of **Singapore** suggest that, if a married woman is sexually assaulted by her husband and she attended the hospital , then apart from treatment of her bruises there is no mention of any medical examination to assess if she has been sexually assaulted. The Singapore law has no provisions for criminalizing marital rape and the cases are considered as cases of minor family violence.

1.2In **Ghana**, the law has contradictory provisions.,On one side it says under Sec 42(g) of the Criminal Offences Act 1960(Use of Force in Case of Consent of the Person Against who it is used) reads: “The use of force against a person may be justified on the ground of his consent, but- (g) a person may revoke any consent which he has given to the use of force against him, and his consent when so revoked shall have no effect for justifying force; save that the consent given by husband or wife at marriage, for the purposes of marriage, cannot be revoked until the parties are divorced or separated by a judgment or decree of a competent Court.”. So, a consent given at the time of marriage cannot be taken back until the spouse gets separated while on the other hand the Domestic Violence Act states that the use of violence in domestic setting is not justified on the basis of consent , so cases of marital rape can be brought even if the survivor and rapist are not divorced or separated . But whether justice will be delivered is a big question.

1.3In **India**, under Sec 375 of the IPC ,sexual intercourse with a wife of age less than eighteen years is considered rape. Moreover under Sec 376 B of the IPC ,a forced sexual intercourse by a man with his wife who is separated is a criminal offence. Under Sec 498 A of the IPC a husband can be charged for subjecting his wife

³ https://en.wikipedia.org/wiki/Talk%3AMarital_rape%2FCountry_lists

⁴ <https://www.lawctopus.com/academike/marital-rape-need-criminalisation-india/>

⁵ A report by International Human Rights Organization Equity Now : The World’s Shame: The Global Rape Epidemic, Page No. 13.

https://www.equalitynow.org/sites/default/files/EqualityNowRapeLawReport2017_Single%20Pages.pdf

to cruelty .But still a lot of confusion prevails in the laws that leads to impending cases and hence justice remains undelivered.

1.4In **Lesotho**, marital rape is only explicitly criminalized if the parties are separated and there are no provisions of violence committed by men against their wives.

1.5 Again in **Singapore**, under Sec 375(4) of the Penal Code, a married man cannot commit the offence of rape against his wife unless she is under 13or she was living apart from him.

1.6In **Sri Lanka**, the husband can be guilty of raping his wife only when he is judicially separated from his wife. Article 363(e) of the Penal Code defines rape as sexual intercourse with a woman when : sexual intercourse with or without consent if the woman is under 16 years of age unless the woman is the accused man's wife, she is over 12 years of age, and she is not judicially separated from the accused. There is no provision in the law that a girl child , whether Muslim or otherwise, over 12 years of age is protected from rape under the Penal code.

1.7In **Kosovo** the law is silent on marital rape cases of women who are in the age group of 16 to 18 years.

1.8In **Indonesia** , in cases of marital rape , a time limit of 3 months is given for filing the complaint within which the case will terminate if the survivor or his/her family withdraws the complaint . Because of the victim being socially blamed for the crime , it is the women who withdraw their cases generally. That leads to setting the criminal free.

The above findings go on to show that marital rape is still legal in many countries. This should be amended as the repercussions are detrimental for the victims well being.

V. LEGAL PROVISIONS IN INDIA

The Indian Penal Code (IPC) is a legacy of the British Raj that was brought into force in 1860 to consolidate various penal statutes that were prevalent then due to the diversity of the nation. The IPC was based on the prevalent customs and norms as it existed in those days. However, it has failed to keep up with the evolution of society that has resulted in certain archaic and socially abhorrent provisions used till date.

Section 375 of IPC⁶ defines “rape”. It provides that a man is said to commit rape if he has sexual intercourse with a woman under the seven circumstances mentioned in the section. Among the seven descriptions is the sexual intercourse against the will of the woman-is rape. This is known as statutory rape. However, Exception 2 to section 375 of the IPC provides that it is not rape if a man has sexual intercourse with a girl who is above 15 years of age and is his wife. Hence, it is not rape under IPC regardless of her willingness or consent. Therefore, Section 375 of the IPC provides for three circumstances namely: First, sexual intercourse with a girl below 18 years of age is rape (statutory rape), Second, by way of an exception, sexual intercourse with girl between 15 and 18 years of age is not rape. Her willingness/consent is irrelevant. Third, sexual intercourse with a girl above 18 years of age is rape if it falls under the seven circumstances of section 375 of the IPC. From these three situations it is clear that the husband of a girl child between 15 to 18 years of age has

⁶ K.D Gaur *The Indian Penal Code* ,4 th edition , Chapter XVI ,Offences affecting the human body, **Section 375** Rape—A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following 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 sixteen years of age. Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

full liberty to have non-consensual sexual intercourse with his wife without the fear of being punished for rape under the IPC.

Law Commission of India 42nd Report⁷, this report by the law commission recommended that criminal liability should attach to the husband for sexual intercourse with his minor wife. However, this recommendation was rejected stating that a husband cannot be punished for raping his own wife as sexual intercourse is a part of marriage which the wife consents to during the marriage. However when this report was published in June 1971 then women had recourse to section 376-B of Indian Penal Code, which made sexual intercourse with one's own wife without her consent under a decree of judicial separation was made punishable by up to 2 to 7 years of imprisonment.

The National Charter for Children, 2003 was notified on 9th February, 2004. Clause 11 reads: "The State and community shall ensure that crimes and atrocities committed against the girl child, including child marriage, discriminatory practices, forcing girls into prostitution and trafficking are speedily eradicated."

Apart from the above, the first step towards curbing the practice of child marriage in India was the passing of the **Prohibition Of Child Marriage Act, 2006 (PCMA)** but no corresponding amendment was made in Section 375 of the IPC. Section 3 of the PCMA provides that a child marriage is voidable at the option of either of the parties to the child marriage. Hence, as per this act, child marriage is voidable but not void.

Another important statute passed in this regard was the **Protection of Children from Sexual Offences Act, 2012(POCSO)**. The Preamble to the POCSO Act states that "the law should operate in the manner that the best interest and well being of the child are regarded as being of paramount importance at every stage, to ensure the healthy, physical, emotional, intellectual and social development of a child"

Article 16.2 of **The Convention on Elimination of All Forms of Discrimination against Women (CEDAW)**⁸ to which India became a signatory on 30th July, 1980, provides "the betrothal and the marriage of a child shall have no legal effect, and all necessary action including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

The Criminal Amendment Act, 2013 satisfies some of the recommendations of the Law Commission of India 172nd Report. Further, by addition of Section 376A, 376B, 376C and 376D, rape laws were made more stringent.

Juvenile Justice (Care and Protection) of Children Act, 2015 also states "a child who is at imminent risk of marriage before attaining the age of marriage and whose parent's family members, guardian and any other person are likely to be responsible for solemnization of such marriage"

In 2013, Justice Verma Committee stated in its report that the Exception under Sec 375 of the IPC needs to be repealed immediately. Even Cruelty under 498A of IPC only confines its domain to Mental and Physical abuse, the incidences of Sexual Abuse tends to go unpunished. This was a major recommendation made by any committee on marital rape laws in India.

The exemption clause to Section 375 infringes the Fundamental Rights enshrined in our Constitution. For instance, Article 14⁹ provides for equality before law and equal protection of law within the territory of India and prohibits discrimination on ground of sex, religion, place of birth or any of them. But the exemption under Section 375 discriminates a wife when it comes to marital rape and disables the State to make special provisions under Article 15¹⁰ for the betterment of women and children. Similarly, Article 21¹¹ guarantees right to personal life and liberty. However the exemption clause takes away the personal liberty of a woman to have her say in the marital relation. Such cohabitation not only becomes immoral but also unconstitutional.

Fundamental duties under Article 51 A¹² also states that it is the duty of every citizen to denounce practices that are derogatory to the dignity of women.

In **Bodhisatwa Gautam vs. Shubra Chakraborty**¹³, the Supreme Court held "rape is a crime against basic human rights and a violation of the victim's most cherished of fundamental rights, namely, the right to life enshrined in Article 21 of the Constitution.

⁷ <http://lawcommissionofindia.nic.in/1-50/report42.pdf>

⁸ <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article16>

⁹ **Article 14** : Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

¹⁰ **Article 15**: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth

The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

¹¹ **Article 21**: Protection of life and personal liberty: No person shall be deprived of his life or personal liberty except according to procedure established by law

¹² **Article 51A: Fundamental duties**: (e) to renounce practices derogatory to the dignity of women.

The Law Commission of India in its 172nd¹⁴ Report on Review of Rape Laws that was submitted in March 2000 had not recommended criminalization of marital rape. The Parliamentary Standing Committee on Home Affairs also presented its 167th Report on the Criminal Amendment Bill, 2012 in Rajya Sabha in March 2013.

In England, according to Sir Mathew Hale , Chief Justice of England, “the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract , the wife hath given herself in kind unto the husband ,whom she cannot retract.” Hence, the laws in England bestowed an absolute immunity on the husband in respect of his wife, solely on the basis of their marital relationship. This view was changed when the concept of marital rape was first time discussed in the appellate court of England in **R vs. Clarence**.¹⁵ Although the defendant was acquitted of the rape charge but the case became a precedent for the wives to protect themselves from non consensual sex as opposed to Sir Mathew Hale ‘s statement.

Later in **R vs. R**¹⁶ ,it was held that the marital rape exemption provided to husbands is illogical and that “the fiction of implied consent had no useful purpose to serve today in the law of rape”. As a consequence, R’s appeal was dismissed and he was convicted of rape. This case marked the beginning of criminalization of rape laws in England.

In New York Court of Appeal, in *People vs. Liberta* ¹⁷;it was stated that “a state arguably has no interest in protecting marital privacy or promoting marital reconciliation where a marriage involves domestic violence and where the marriage has decayed to a point where the sexual relations of the spouses are no longer consensual and sexual abuse has occurred.”

Some of the relevant observations made in this ruling are:

1.1 Not reporting of spousal rape can also lead to breakdown of marriage. A marital rape victim is psychologically more traumatized than a stranger rape victim. The safe and protective environment that marriage promises is not provided in such cases. The sense of trust deficit, isolation and fear felt by a rape victim, if forced to continue with status quo, can lead to the breakdown of the entire family,

1.2Just because many crimes without witnesses are difficult to prove and are time taking yet this is no reason for making a crime “unprosecutable”,

1.3Labeling all wives as potentially vindictive is also not correct and backed by no evidence. Even in India, Section 498A (which criminalises dowry and cruelty as “perverse sexual conduct”) has been diluted due to claims that it is used as a harassing tool by vindictive wives.”

Hence, by this Judgment of the Supreme Court which has removed the Exemption Clause provided to husbands , it has ensured that women rights are protected and women have equal say in marriage as men who can’t use them as their owned property.

VI. SOCIETAL CONSTRAINTS AND CONSEQUENCES OF EARLY MARRIAGE

Marriage has been , since ancient times, one of the most important social institutions in all societies. In India, marriage is regarded as a sacrosanct event in an individual’s life.¹⁸ In India, for every person who has a daughter, marrying off their daughter when they reach the marriageable age is regarded as one of the religious duties. Wearing clothes that provoked the men or stepping outdoor after sunset are the reasons held responsible for crimes against women. Hence, it’s the women who have been blamed. This view is to an extent altered after the judgement.

Under the **Hindu Marriage Act, 1955** certain conditions are laid down for a valid marriage under Section 5 and 7.¹⁹ Similarly, under the **Muslim Law** marriage is regarded as a contract. A Muslim who is of sound mind and attained puberty is qualified to marry.

The Special Marriage Act, 1954, is meant for any person in India and Indian nationals abroad, irrespective of

¹³ 1996 AIR 922, 1996 SCC (1) 490

¹⁴ <http://www.lawcommissionofindia.nic.in/rapelaws.htm>

¹⁵ (1888) 22 QBD 23

¹⁶ (1992) 94Cr App R 216

¹⁷ 90 A.D.2d 681 (1982)

¹⁸ Sir Dinshah Fardunji Mulla, ‘Principles of Hindu Law’, edn. by Satyajeet Desai, 21st Edition.

¹⁹ **Section 5 Hindu Marriage Act, 1955**: “A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:- 1. Neither party has a spouse living at the time of the marriage which means Hindu law propounds for monogamy. 2. At the time of marriage, neither party should be unsound mind due to which they cannot give valid consent, or are suffering from mental disorder due to which they are unfit for marriage or procreation of children or is subject to recurrent attacks of insanity or epilepsy. 3. The bridegroom must have completed the age of 21 years and the bride must be of 18 years of age at the time of marriage, 4.The parties should not within the degrees of prohibited relationship, unless otherwise the custom or usage governing them permits such marriage. 5. The parties should not be sapindas (one is lineal ascendant or descendant of the other), unless the custom or usage permits such marriage.

the faith that the individual may profess. The Section 4(a)²⁰ of the Act has provisions identical to the Section 5(ii) of Hindu Marriage Act as conditions for solemnizing marriage. Similarly, Section 27 lists identical provisions in respect to ground for divorce as in Section 13 of the Hindu Marriage Act.

Marital rape is not only traumatic but also leads to a lot of physical and psychological damage as well. It degrades and humiliates the victim and leaves her helpless. Forced marriage and child marriages are very much prevalent in our society. A forced marriage is one in which both the spouses marry each other without their free consent whereas a child marriage is one in which both or any one of the parties to the marriage is below 18 years of age. These types of marriages are associated with higher rate of domestic violence including marital rape.

In many countries, the concept of marital rape is not recognized and is something to be dealt with privately. This belief holds true in India also. The Minister Of State for Home Affairs Haribhai Parthibhai Chaudhary once said in April 2015 "The concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context due to various factors, including levels of education, illiteracy, poverty myriad social customs and values, religious beliefs and the mindset of the society to treat the marriage as sacrament"

The Bible at 1 Corinthians 7:3-5²¹ also states" The wife does not have authority over her own body, but the husband does. And likewise the husband does not have authority over his own body, but the wife does. Do not deprive one another except with consent for a time that you may give yourselves to fasting and prayer; and come together again so that Satan does not tempt you because of your lack of self-control." The religion of Christianity teaches that having sexual relations with someone other than the spouse is adultery which is a sin whereas sex within marriage is a duty. This makes marital rape an impossibility.

However, the ill effects of marital rape cannot be ignored. Here are some effects a marital rape victim may have to live with-

- 1.1 Anxiety, depression and stress leading to suicide.
- 1.2 A number of bodily injuries to vaginal areas including bruising.
- 1.3 Miscarriage, bladder infections, STDs and infertility.
- 1.4 Long lasting effects like insomnia, eating disorders, sexual dysfunction, and negative self image.

VII. LOOPHOLES IN THE CURRENT LAWS AND RECOMMENDATIONS

The judgment has criminalized marital rape yet there is also the need to sensitize the public (civilians, police, judges, medical personnel) on the importance of consent, timely medical care and rehabilitation, skill development and employment for facilitating economic independence of victims. The individual rights are not supposed to be sacrificed at the altar of privacy and both the partners are to be treated equally then only survival of a healthy marriage as an institution is possible. In a country which has many misconceptions of rape, deeply rooted cultural and religious stereotypes, criminalization of marital rape by the Supreme Court will go a long way in curbing the ill practice of child marriage prevalent in society. As a marriage does not thrive on sex and the fear of time consuming litigation and other societal constraints should not deter the victim from filing a complaint against the husband. Women so far have had recourse only to section 498-A of the IPC, dealing with cruelty, to protect themselves against "perverse sexual conduct by the husband. But now with this judgment, marital rape has been declared illegal and hence the protection of women rights has been well recognized.

Around the world, marital rape and other forms of sexual assaults are common occurrences. However, it is observed that due to insufficient, inconsistent and not systematically enforced laws, such crimes are promoted. Gender based violence, including sexual violence are being inflicted on girls and women in large proportions. Some of the recommendations that can curb sexual violence including marital rape are as follows:

- 1.1 Laws allowing the perpetrator to walk free on reaching some form of settlement including marrying the victim must be abolished considering the psychological and physical damage that is done on the victim.
- 1.2 Certain laws even fail to recognize the fact that true consent is impossible in situations of extreme dependency and vulnerability because of which the girl child has to bear the detrimental effect of the marital rape.
- 1.3 Certain laws require witness corroboration and overly burdensome evidence to prove for a charge of marital rape. This requires an amendment to change the stringent laws.
- 1.4 Laws that explicitly permit rape in marriage like that in Afghanistan needs to be repealed.
- 1.5 All such laws that inhibit prosecution of sexual assault needs to be amended.

²⁰ **Section 4(a) Special Marriage Act, 1954.**

²¹ https://en.wikipedia.org/wiki/Marital_rape

- 1.6 Amending these laws will send a strong message that marital rape and any form of sexual violence against women will not be tolerated and if they occur they shall be prosecuted as a serious crime by a competent court to the full extent of law.
- 1.7 As said by the UN “Educating boys and men to view women as valuable partners in life, in the development of society and the attainment of peace are just as important as taking legal steps protect women’s human rights”. This step will also go a long way in curbing marital rape cases.

VIII. CONCLUSION

Even today, the idea of spousal rape in marriage is an anomaly. It is believed that if the girl has consented for marriage then she has automatically consented for having sexual intercourse with her husband at his will. Most of the rape cases go unreported in India due to variety of reasons. As shown by the latest National Family Health Survey, husbands commit the majority of the acts of sexual violence in India. Out of the total number of rapes reported to NFHS, 97.7% were committed by spouses of the victim. Sexual consent is the right of every woman whether married or unmarried as that of men. If the sexual intercourse is without consent, the same should be penalized regardless of the relationship of the perpetrator to the victim. This judgment is a landmark judgment in the field of curbing child marriage and hence marital rape.

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