



MARITAL PRIVACY V. SEXUAL AUTONOMY: AN ANALYSIS IN THE LIGHT OF CRIMINALISATION OF MARITAL RAPE

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Abstract: Rape is a heinous crime which destroys the very existence of women. It is worst when the same is committed by the one who is considered as the protector of women i.e. her husband. It has long term effect as it affects the psyche of women. There is no official data as the same has not been recognized as an offence. The exemption to partner rape/ wife rape / marital rape has found its origin in Common law system and India being its colony has inherited the same. In India, marital rape is exempted by Exception 2 of Section 375 of IPC which provides that the husband where wife is above 15 years is not liable for raping his wife. Thus Indian law has partially recognized the marital rape and can convict husband for rape if the age of wife is less than 15 years. The law has changed in countries like UK, USA, MEXICO, South Africa, Canada others. And a time has come to bring that change in India to nip the bud before it becomes a real challenge.

1. Introduction

Marriage is the most sacrament institution of society and is the nucleus of this world. It is an intimate relationship between two individuals who come together to experience the worldly affairs, together as one entity. This relationship is the one which is based on love, trust and partnership in which both partners have equal but distinct role. It is the relation where both parties come together voluntarily and with free consent. That's why in few parts of the world, it is considered as "contract". Legally also, it is governed by the principles of contract. It persists till the 'consent' subsists. Thus the bond of marriage can be broken easily merely by revoking consent by either partner.

India is diverse as it is a blend of various distinct cultures and religions. The concept of 'marriage' is governed by personal laws. But there is uniformity with regard to the nature of marriage irrespective of great diversity. Marriage was not a destructible union in India as it is not merely a contract but a sacramental union where husband is considered as natural guardian of his wife. As it is believed that he can protect her from all evils.

In Ancient times, it was believed that God has created 'man' and 'woman' so that they can come together and procreate and cast this world. Thus the ultimate aim is to beget children and to establish a civilised society. But unfortunately, it has been linked with "sexual pleasures". This results into commodification of "woman". Wife becomes the property of man and he has all rights over wife's body & mind. Sexual gratification is regarded as the right of the husband and duty of the wife. Any act against the sexuality of wife is not considered as an offence against wife but an offence against husband.

2. Concept of Marital Rape

“A man is a man; an act is an act; rape is a rape, be it performed by a man the ‘husband’ on the woman ‘wife’.”

- Karnataka High Court¹

The term “Marital Rape” has not been used under Indian Penal Code, 1860. The reference of the term can be found in Domestic Violence Act, 2005 and various judgements. It is covered under Exception 2 of Section 375 of code, 1860 which provides that husband cannot be punished for committing rape of wife if she is not below 15 years of age. But the exception does not define it. Thus the “marital rape” means rape committed by husband with his own wife against her consent. Husband is immune from punishment provided wife should be above 15 years of age. In the case of **Independent Thoughts v/s UOI**², the court observed that in India, the age for marriage and for giving consent for sexual intercourse is 18 years. Thus to bring uniformity in law and to remove anomaly, the apex court has held that the age in exception two of section 375 of IPC, 1860 will be read as 18 years.

England has ruled number of countries of the world during 15th to 19th century. India was also one of its colonies for a period of 200 years and got independence only after a struggle for a long period on 15th August 1947. The impact of the colonial rule can be witnessed on the historical and power structure of the colonized countries. Even in post-colonial period, the cultural and societal norms of colonial country have impacted the modern day legislation of the colonized. Indian law either its civil, criminal or family or other has been greatly influenced by the English law. Even after 75 years of independence, we still follow the law formulated by Britishers and our courts follow the rulings of English courts.

The exemption with regard to spousal rape has been adopted from common law and is in existence in Indian Penal Code, 1860 since the date of its enactment.

In England, immunity to marital rape is based on the theory propounded by **Lord Hale** where he observed that there is an implied consent of wife for sexual intercourse which is given at the time of marriage. As marriage, being a contract, continues, the consent will also continue. Wife cannot retract it. But the court in the case of **R v. Clarke**³ for the first time prosecuted husband for raping his wife and it was provided that wife is not bound to co-habit with her husband and she is also entitled to retract her consent and thus can refuse to have sexual intercourse. In later decisions, court also developed other exceptions where husband can be convicted for raping his wife such as when wife obtains injunction against her husband for molesting her or on obtaining a decree nisi of divorce. Thus, Husband can only be held liable for rape when wife has obtained a decree of divorce or has retracted her consent by living separately from her husband.⁴

¹ Hrishikesh Sahoo v. State of Karnataka, 2022 SCC OnLine Kar 371, decided on 23-03-2022

² (2017) 10 SCC 800

³ [1949] 2 All ER 448

⁴ KD Gaur, *Criminal Law: cases and materials*, (Lexis Nexis, Gurgaon, 8th ed./2015)

In the year 1991, House of Lords has made a remarkable change in common law in **R v. R**⁵ as they abolished the immunity to the husband and recognized marital rape as an offence.

Post-Independence, Constitution of India becomes the grundnorm and all laws were made in accord with it. Article 372 grants constitutionality to all the pre-independence laws which has been adopted without any change. Section 375 of IPC is also constitutionally valid as Article 15(3)⁶ allows legislature to make law in favor of women.

The Constitution of India has does not grant any inferior or subordinate status to the women as contrary to pre independence period. . It also treats wife equivalent to husband and institution of marriage as an institution where both husband and wife plays an equal role. No one is hold superior to the other. In all aspects, it treats women with equality to that of man and guarantees all rights and protection equally to women such as right to dignity, right to freedom of speech and expression, right to equality and sexual autonomy. Rather, efforts were made to ameliorate the position of women in society resultantly, number of laws were enacted such as –

- a) Reservation of Seats in local government⁷
- b) Dowry Death⁸
- c) The Dowry Prohibition Act, 1961
- d) Subjecting women to Harassment and cruelty by husband or his relatives⁹
- e) Provisions with regard to miscarriage¹⁰
- f) The National Commission for Women¹¹
- g) The Indecent Representation of Women (Prohibition) Act, 1986¹²
- h) The Hindu Succession (Amendment) Act, 2005¹³
- i) The Protection of Women from Domestic Violence Act, 2005

But exception 2 of Section 375 of the Code is in violation of the two fundamental rights of the women:

1. Right to Equality

Article 14¹⁴ of the Constitution provides that all persons are equal before law. Thus, this right is available to all irrespective of gender or sex.¹⁵ This Article strikes also at inequalities which arises either due to economic or social factors.¹⁶

Due to diversification, it is impossible to opt the concept of “absolute equality” as in that case it will cause more harm than benefit. Thus, to achieve the objective behind Article 14 of the Constitution, it is necessary that

⁵ [1992] 1 AC 599

⁶ Nothing in this article shall prevent the State from making any special provision for women and children.

⁷ Art. 243T of The Constitution of India, 1950 - . Reservation of seats

⁸ Section 304B of IPC, 1860

⁹ Section 498-A IPC, 1860.

¹⁰ Of the causing of Miscarriage, of Injuries to unborn Children, of the Exposure of Infants, and of the concealment of Births – Section 312-318 of IPC, 1860

¹¹ The National Commission for Women was set up as statutory body in January 1992 under the National Commission for Women Act, 1990 (Act No.20 of 1990 of Govt.of India).

¹² An Act to prohibit indecent representation of women through advertisements or in publications, writings, paintings, figures or in any other manner and for matters connected therewith or incidental thereto.

¹³ Act No. 39 of 2005

¹⁴ Equality before law

¹⁵ National Legal Services Authority v. UOI, AIR 2014 SC 1863

¹⁶ Secretary, H.S.E.B. v. Suresh, AIR 1999 SC 1160

“reasonable classification” should be allowed. The criteria to classify people into categories is said to be “reasonable” if –

- a) Classification is on the basis of intelligible differentia and
- b) The differentia should have direct nexus with the object.

Thus, both conditions must be fulfilled only then it is called a “reasonable classification”. Marital rape is made a separate category and is exempted from the purview of Section 375 of the Code, 1860. The basis of classification is marital relationship between the accused and the victim. Section 375 of the Code punishes an offence against body which affects her physically and mentally and violates her fundamental right of privacy, human dignity and sexual autonomy. Thus the classification does not have any rational with the objective of the provision as rape committed by stranger or by husband has similar effect on the body and mind of the victim. Rather rape by husband has more adverse effect on the mind of the woman as husband is considered as protector of wife and both shared relationship based on trust. Thus when husband rapes his wife then not only it affects her body but also betrays her trust. Thus, it is more personal in nature and had long term negative impact.

2. Right to Sexual Autonomy

Article 21 of the Constitution provides Right to life and personal liberty which is the foundation of human existence and heart of the constitution. It has been widely construed to enable an individual to develop fully and dwell on its worth and potential. Under Article 21, numerous rights of person have been recognised such as human dignity, privacy and sexual autonomy. All these rights are available to all individuals irrespective of gender, sex, status or religion. No restriction or exemption is made with regard to its application.

But the access of these rights is denied to married women on the pretext of marriage and social obligations. It is believed that woman surrenders all her rights to her husband at the time of marriage and becomes the slave of the husband.

Recently, in the case of **Jospeh Shine v. UOI**¹⁷, the apex court has struck down the provision of adultery given under Section 497 of IPC on the pretext that husband can't be considered as the master of the wife. Hence, her decision to indulge sexually shall be the sole decision of the woman and it must not be decided by the husband. As under proviso of Section 497, the offence of adultery is not an offence if the act of the lady is approved or permitted by her husband. This proviso contravenes the right of dignity and sexual autonomy of the woman.

2.1 Prevalence of marital rape in India

In India, marital rape is not recognised as an offence. Thus, no data is available with regard to reporting of commission of such offence. But the data collected by National Family Health Survey¹⁸ has bring out in light the horrendous truth which is committed in the darkness of four walls. NFHS is a survey conducted country wide by Ministry of Health and Family Welfare, GOI. It was started in the year 1992-93 with the aim of collecting vital

¹⁷ 2018 SCC OnLine SC 1676

¹⁸ National Family Health Survey-5, 2019-2021, Ministry of Health and Family Survey, http://rchiips.org/nfhs/NFHS-5_FCTS/India.pdf

information on certain aspects such as population, fertility, infant and child mortality rate, family planning methods, health and violence. Till today, NFHS conducted five rounds.

The data collected by National Family Health Survey during the year 2015-16 is the fourth round in the series. It has unveiled the alarming data on spousal rape such as:

- Nearly, 7% of women who were ever married had faced **sexual spousal violence**¹⁹ with 5% in the past 12 months.
- Out of ever married women in the age group of 15-49 years who undergone sexual violence in their lifetime reported their current husband in 83% case and former husbands in 9% cases as perpetrators.
- 6% women disclosed that their husbands use physical violence to obtain sexual intercourse whereas 4% women reported that their husbands use some type of threat or other means to obtain sexual acts.
- 3% women revealed that their husband forced them to indulge in other forms of sexual acts.
- The rate of spousal sexual violence is high in rural area (5.8%) than in urban area (4%) in the past 12 months preceding the survey.

2.2 Worldwide Prevalence of Marital Rape

There is an immense contrast cross culturally with regard to the exemption of marital rape all over the world. At some places, it is regarded as “wifely unquestioned duty” and at some it is considered as the aggravated form of rape. In countries like India, the exemption is extended only to the legally wedded husband whereas in other, the same covers husband as well as intimate partners. Irrespective of criminality or the offender, the women in an intimate partner violence struggle with emotional and health aspect including forced sex, degradation, HIV infection, cuts, bruises, dislocation and other.

- The country which took the first step in the criminalisation of spousal/intimate partner rape was Soviet Union in the year 1922.²⁰
- There are nearly 52 countries globally which criminalised marital rape.
- As per 2018 data, nearly 13% of women (i.e 1 in 7 women) between age 15-49 years in the past 12 months has faced spousal physical or sexual violence from an intimate partner.
- Whereas one in five women aged 15-49 years experienced physical or sexual abuse in the previous year.

2.3 Types of Marital Rape

Studies show that the victims of marital rape feel pressurised to have sex as they are financially dependent on their husbands and due to social constraints. The plight of this offence is that it is committed within the four walls of the house which is considered as the safest abode of any person. As a result, it is recognised only by few as others take it

¹⁹ Sexual spousal violence: physically force you to have sexual intercourse with him even when you did not want to; physically force you to perform any other sexual acts you did not want to; force you with threats or in any other way to perform sexual acts you did not want to.

²⁰ <https://indianexpress.com/article/research/a-history-of-the-movement-to-criminalise-marital-rape-across-the-world-7753164/>

as their marital duty. In majority cases, marital rape is accompanied with physical abuse and force. On the basis of abuse, marital rape can be categorised as following: -

2.3.1 Battery Rape

The term ‘battery’ means beating or of giving blows. Thus this form is evident from the name itself. In this kind of rape, husbands beat and injure his wife at the time of sexual intercourse. The extent of abuse is so high that it causes serious harm and in few cases it results into mutilation. This is accompanied with tongue lashing and verbal abuse. This is also known as ‘‘anger rape’’.²¹

The NFHS-4 has revealed that spousal sexual violence is accompanied with physical injuries such as cuts, bruises, broken bones, dislocation, burns and other injuries. It is utterly shocking that rate of injuries while committing spousal sexual violence is high in urban areas (42.4%) than rural areas (40.6%)

2.3.2 Obsessive Rape

This form of marital rape is uncommon but more noxious. This occurs when husband derives pleasure or feel aroused when sex is accompanied with violence and force. Thus, husband seeks contentment from wife’s pain and sufferings. This is in addition to use of objects for rape, taking lewd and lascivious photographs of the victim and maintaining written record of the acts executed. In few cases, the accused lacerate private parts of the victim to seek more pleasure. The whole scenario is cruel, traumatic, gut-wrenching and intolerable.

2.3.3 Force-only Rape

This form is less gruesome but more prevalent form of rape. In this case, husband uses only such amount of force which is necessary to overpower the resistance of wife. This can be achieved by taking advantage of their physique such as body size, weight and strength. This is committed to feel authoritative and dominant as it is all about power struggle. This is also known as ‘‘power rapes’’.

It is arduous to penalise husband for this kind of rape due to absence of any kind of marks of injury.

3. Section 376B²² of IPC, 1860 - Partial recognition of marital rape

Section 376B penalises the action of forced sex of the husband against his wife during the period of separation observed either under a decree of court or otherwise. The term ‘‘otherwise’’ includes all customs and mutual agreements. It is based on the notion that during the period of separation, the consent given by the wife during marriage has been withdrawn. Thus, it recognises marital rape as an offence but partially that is if committed during separation only and not otherwise. Thus, the plight of the wife has not been addressed appropriately.

The Section was not a part of the Code (IPC,1860) when it was originally enacted. Thus, husbands enjoyed complete immunity for a period of 120 years irrespective of separation undergone by couples. Only in the year 1983, it has been added as an offence under Section 376A but the punishment for the offence was very less as husband can be

²¹ Marital Rape, Kersi Yllo, Ph.D, 1996, Battered Women’s Justice Project, *available at:*

²² Sexual intercourse by husband upon his wife during separation

imprisoned only for a period of maximum 2 years and with fine. At that time, the mode of separations was precisely defined in the Section that is either under a decree of court or custom or usage. In the year 2013, by the Criminal Law Amendment Act, 2013, Section 376A has been renumbered as Section 376B. It not only amended Section number but also introduced certain changes. The mode of separation has been confined to decree of court or otherwise. By using the term “otherwise”, they give wide discretion to the court. Further the punishment has been enhanced as 2 years of imprisonment has been made the mandatory punishment and which can be extended up to 7 years.

The term used in Section 376B is “Sexual assault” which has same meaning as given to the term “rape” under Section 375 of the IPC, 1860. The reason behind using an alternative term to rape is not to put the act of the husband parallel to rape and to keep it out of the ambit of section 375 of the IPC, 1860. The objective of the legislature to put the act of the husband under Section 376B on different stand is evident from the huge gap in the punishment prescribed under the two Sections. The punishment for rape is minimum 10 years of rigorous imprisonment up to life imprisonment and fine whereas the punishment under Section 376B is merely of 2 years to seven years and fine.

The legislature is circumspect to make husbands accountable for their acts as it fails to back Section 376B with rationality. The reason behind the immunity to marital rape was based on the concept of “implied consent” given by the women during marriage. This “implied consent” is deemed to be retreated when women separated from her husband either temporarily (under a decree of separation or otherwise) or permanently (divorced). Hence, when there is no consent for sexual intimacy during separation then why legislature is giving benefit to the husband and not treating them same as other offenders.

4. Offences by husband against wife/ other recourses available with wife to redress her grievance

The act of sexual assault by the husband against his wife is not recognised as an offence under Section 375 IPC if the wife is not below 15 years (now 18 years). As discussed earlier, the reason for the immunity is the consent given by the wife at the time of marriage which deems to be continued till the marriage subsists. The reason given by the legislature for not criminalising the act of the husband is the non-interference or non-intrusion by the law/government in the institution of marriage. Thus, the law is trying to uphold the sanctity and privacy within marriage at the cost of sexual autonomy and dignity of the women. But the stand of the lawmakers is dubious as there are number of provisions under civil and criminal law where the law interferes in the most intimate and private matters of the marriage. Some of the provisions are-

4.1 Section 354 of IPC

It penalises outraging the modesty of women. The term modesty is linked with sexuality of the women and thus cover acts like kissing violently in public, raising skirt, taking off her clothes and stripping her naked. For imposing liability under Section 354 IPC, 1860, it is essential that the act must be committed without the consent of the women. Thus, consent being an essential element of the offence, it raises an issue that whether husband can be held guilty for outraging the modesty of his wife as in the institution of marriage, consent of wife is implied for sexual acts.

The issue has been dealt in one of the Burmese case of **Mi Hla So v. Nga Than**²³, where the man pulled the hair and hand of the woman publicly. The court refused to hold the man liable for outraging the modesty of the woman on the ground that the man and woman are in “conjugal terms” and thus further observed that the man cannot be held guilty of outraging the modesty of his wife if the act is an act of love and affection contrary to cruelty or infidelity.

Section 354 of IPC, 1860 has used the expression “any women” which encompasses even the legally wedded wife of the person. But to demarcate the act of affection and outraging the modesty of women, the following position has been culled out:-

- a) Firstly, it is to be found out whether the act has been done in public or in private.
- b) If the act is done in public, then the nature of the act is another important criteria. If the act is found to be affectionate and loving such as hugging, holding hands and neither go against public morality nor fall within the ambit of indecent behaviour then the same does not amount to outraging the modesty of the woman. If the act is highly affectionate that the same may objected by wife to be committed in public and might go against public morality then in that case it will fall under Section 354 of IPC, 1860.
- c) If certain acts are done in private by the husband who might not be acceptable in public, then they shall not fall within Section 354 as these might considered significant for a healthy conjugal relationship provided wife has not objected for the same.²⁴

Thus, husband can be held equally guilty for the offence of outraging the modesty of his wife like any other offender and there is not exemption carved out in favour of husband.

4.2 Section 377 of IPC

It penalises unnatural carnal acts which are against the order of nature. This section is applicable to all irrespective of gender. Thus, male, female, and transgender, all fall within its ambit.

Its application on inter-spousal relationship can be studied under two time periods – before 2013 and after 2013.

Before the passing of the Criminal Law (Amendment) Act, 2013, section 375 penalises only acts of sexual intercourse committed under any one of the circumstances enumerated thereunder. The meaning of the term “sexual intercourse” was restricted only to penile-vaginal intercourse. Exception 2 of Section 375 gives immunity to the husband against indulgence in such act provided the wife is above 15 years of age. For the offence of rape, consent is an essential ingredient and in case of marital rape, consent for sexual act is implied on the part of the wife. The other forms of sexual acts such as oral sex, insertion of any other body part or foreign object into the vagina, urethra or anus of the woman were considered unnatural and fall within the ambit of Section 377 of the IPC, 1860 and no immunity was carved out in favour of inter-spousal relationships. As a result, if the husband indulges in any act against the order of nature then he could be penalised under Section 377 of the Code. Consent in the matter of Section 377 is irrelevant.

²³ Mi Hla So v. Nga Than (1912) 13 Cri.L.J. 53 (Burma)

²⁴ Surendra Chaher, “*Outraging The Modesty Of A Woman: Inter-Spousal Perspective*”, Indian Law Institute, 1990, vol.32, No. 4, <https://www.jstor.org/stable/43951283>

After the enactment of the Criminal Law (Amendment) Act, 2013, the definition of rape under Section 375 has been widened to include all sexual acts, such as penile-vaginal, oral sex, insertion of foreign objects or any other body parts, committed either against the will of the woman or without her consent. As a result, acts which used to come within the ambit of Section 377 not fall with the definition of rape. Now the core or crucial question arises that whether husbands can be prosecuted under Section 377 of the IPC or they can take the benefit of exception 2 of Section 375 of the IPC.

The issue has been cropped up in the case of **Nimeshbhai Bharatbhai Desai v. State of Gujara**²⁵ and **Hrishikesh Sahoo v. State of Karnataka**²⁶, where both the Gujarat and Karnataka High courts respectively answered it in affirmative and observed that no express exception is carved out in favour of husband under Section 377 of the Code. Thus, if the case is made out under Section 377 of IPC then husband can be prosecuted for the same irrespective of the fact that for the same act, husband is immune from the charges of rape.

4.3 Section 498A of IPC

The provision is added way back in the year 1983 under Chapter XX-A of the code. The provision showed the keenness of the parliament to enact a law to terminate the sufferings and agony of the married women in her matrimonial house. Thus, it penalises the acts of cruelty or harassment committed against the woman by her husband or his relatives. The term cruelty is defined as any act which either causes or likely to cause injury to the life or limb of the woman or such acts which forced wife to commit suicide. Thus, it covers both physical as well as mental cruelty. With respect to harassment, the acts are limited to one which are related to unlawful demand of dowry.

The issue arises whether the indecent, perverted and deviant sexual demands or acts on the part of the husband can be called cruelty under Section 498A of the IPC. The issue has been dealt by the Gujarat HC in the case of **Nimeshbhai Bharatbhai Desai v. State of Gujarat**²⁷ and held that healthy sexual relation is the foundation of the strong marital relation but when the act leads to physical or psychological trauma or demand has been made for such sexual acts which cannot be approved by the wife then it would definitely amounts to physical as well as mental cruelty under Section 498A of IPC. Thus, marital rape irrespective of age of the wife amounts to cruelty and is punishable under 498A of the code.

4.4 The Protection of Women from Domestic Violence Act, 2005

The Act has been enacted by the parliament to prevent violence committed within the four walls of the house. It is applicable on persons who are related either by consanguinity, by marriage or are in a relationship in the nature of marriage or has lived together as a family. The term “domestic violence” has been given a wider meaning under Section 3 of the Act as it includes all forms of abuse such as economic, physical, sexual, verbal and emotional abuse. It also covers dowry demand as form of domestic violence. The Act provides number of remedies to prevent and

²⁵ 2018 SCC OnLine Guj 372

²⁶ 2022 SCC OnLine Kar 371

²⁷ *Supra* note 25

protect the women from domestic violence as the magistrate can pass Protection orders, Residence orders, Monetary reliefs, Custody orders and Compensation orders.

The Act has compassed the aspect of marital rape within its sweep. As the same is form of sexual abuse as defined in Explanation 1 (ii) of Section 3 of the Act. The Act does not criminalises the act of marital rape but merely provided a civil remedy. Apart from its various loopholes, the Act has been appreciated as it took step to curb the instances of abuse and trauma and showed the bent of the parliament to recognise the sufferings of the woman in the institution of marriage instead of following the policy of non-interference.

From the above provisions, it is evident that the stand of the legislature for not criminalising marital rape on the policy of non-interference is fallacious/ distorted as there are number of provisions where the husband is made punishable or held liable for committing sexual acts against the wishes of the wife. Thus, this paradox led to violation of the fundamentals rights of the married woman and profuse the sufferings of women and left her remediless. Therefore, the change regarding marital rape is inevitable and the legislators should recognise it.

5. Recommendations of Various Committees

5.1 The 42nd Law Commission Report²⁸ has been submitted in June 1971. The report reviewed the provisions of IPC, 1860 in length. The commission while going through the provisions of rape has found that the husband can be punished for rape only if the wife is under 15 years of age and not otherwise. At that time, the age for statutory rape was 12 years thus the husband can be penalised for statutory rape if the wife is below 12 years and be given the same punishment but if the wife is above 12 years and less than 15 years then in that case, husband gets the benefit of the exception and the punishment is merely upto 2 years or fine or both. The commission recommended that the offence of raping wife below 15 years shall be taken out of the ambit of Section 375 and be made a separate offence.

Further, the commission examined that the husband is entitled to take the benefit of the exception even if the rape is committed by him at the time of judicial separation or when parties are living separately by mutual agreement as even at that time also, they are technically married in the eyes of law. This approach has been doubted by the commission and thus it recommended that the same should be considered as rape and be made punishable.

5.2 The 84th Law Commission Report²⁹ has scrutinised the provisions of rape and allied offences in the year 1980. The Report discussed the recommendations of 42nd Law Commission report and held that the provision of rape does not need restructuring due to wide change taken place after that report. The report recommended certain changes in the provision of Section 375 which were considered necessary to make it alive with the current scenario. Thus, the commission recommended that the age of the wife given under exception shall be raised from 15 to 18 years to make it in consonance with other laws.

²⁸ Law Commission of India, 84th Report on Indian Penal Code (1971)

²⁹ Law Commission of India, 84th Report on Rape and Allied Offences: Some Questions of Substantive Law, Procedure and Evidence (April 1980)

5.3 As per 172nd Law Commission Report³⁰, “Sakshi” recommended that the absolute and partial immunity given to husbands under Section 375 and 376 A should be taken back as rape committed by husband should be taken equivalent to any other offence committed by husband against his wife and is punishable either under IPC or any other law. Justice Leela Seth, being representative of NCW has also recommended on similar lines and added that to overcome the misuse of this provision, what can be done is that the burden of proving a fact that there was no consent for sexual act may be placed on the wife.

The commission after perusing the above suggestions, recommended -

- a) That the exemption in favour of husbands must not be disturbed as it might lead to overindulgence in marital relationship.
- b) They merely suggested to raise the age of the wife from “fifteen” to “sixteen” as it brings uniformity with regard to age of the victim of rape.

5.4 The Justice Verma Committee Report³¹ submitted in 2013 has analysed the stand of various countries on marital rape along with its historic background and observed that the countries from which the immunity has been taken has itself criminalised it way back in the year 1991. The committee thus recommended that the rapist should be treated as rapist irrespective of the relation it has with the victim. The committee has taken the support from the decision of the European Commission of Human Rights which give primacy to the fundamental human rights of the individual such as dignity and freedom.³² Secondly, they referred the judgement of the Canadian Supreme Court delivered in the case of **R v. J.A.**³³, where the court emphasised that the consent for sexual activity should not be implied on the ground of relationship between the perpetrator and the victim and thus it should not be a ground of defence.

The committee further accentuated that mere legal prohibition on marital rape will not serve the purpose as data of other countries revealed the fact that ever after criminalising it, the number of reported cases are very less as people does not considered it as serious offence. Thus, repeal of exemption must be accompanied with awareness of public with regard to sexual autonomy, dignity and other rights of the woman.³⁴

6. Why Marital Rape should not be criminalized?

The stand of those who oppose criminalisation of marital rape is that it will affect the sanctity of the relation of husband and wife and hence will break the institution of marriage. Secondly, like other woman oriented provisions (Section 498A), it will also be misused and will be used as weapon to harass the men. Thirdly, the legislators are

³⁰ Law Commission of India, 172nd Report on Review of Rape Laws (March 2000)

³¹ Justice Verma Committee Report, *Amendments to Criminal Law*, (January 2013)

³² Our view is supported by the judgment of the European Commission of Human Rights in *C.R. v UK*, which endorsed the conclusion that a rapist remains a rapist regardless of his relationship with the victim. Importantly, it acknowledged that this change in the common law was in accordance with the fundamental objectives of the Convention on Human Rights, the very essence of which is respect for human rights, dignity and freedom.

³³ [2011] SCJ NO 28 (QL)

³⁴ In South Africa, despite these legal developments, rates of marital rape remain shockingly high. A 2010 study suggests that 18.8% of women are raped by their partners on one or more occasion.⁹⁴ Rates of reporting and conviction also remain low, aggravated by the prevalent beliefs that marital rape is acceptable or is less serious than other types of rape.⁹⁵ Changes in the law therefore need to be accompanied by widespread measures raising awareness of women’s rights to autonomy and physical integrity, regardless of marriage or other intimate relationship. This was underlined in *Vertido v The Philippines*, a recent Communication under the Optional Protocol of the Convention on the Elimination of Discrimination Against Women (CEDAW), where the CEDAW Committee emphasised the importance of appropriate training for judges, lawyers, law enforcement officers and medical personnel in understanding crimes of rape and other sexual offences in a gender-sensitive manner.

shirking from deleting this provision because the grievance of the woman is adequately addressed under other provisions as marital rape is a ground of divorce and is also punishable under 498A as well as under DVA. Hence, no concrete change will come with the removal of this exception. Rather, dire consequences will ensue.

On the other hand, feminist protests against this exception on the ground that this immunity gives right to the man to ignore the wishes or consent of the wife and to indulge in sexual intercourse. Thus, this provision not only provides immunity to the husbands but also gives them right over their wives. The protection under others laws cannot be equated to the one given under Section 375 of the Code as it has higher punishment and in the procedural aspect, certain rights or safeguards are given such as recording of the statement by the judicial magistrate, camera trial and others. thirdly, the fundamental right if sexual autonomy, reproductive rights, right to dignity and health and other are inconsistent with this exception.

7. Judicial Perspective

7.1 *Harishikesh Sahoo v. State of Karnataka*³⁵

This case arises out of bail application filed by the petitioner as FIR was lodged against him for sexual assaulting and abusing his wife and a minor daughter. He was also accused of cruelty and harassment as he physically and mentally tortured them. After the filling of charge sheet, he was charged under Section 376, 504, 506, 498A of IPC and Section 5 & 6 of POCSO by the court for trial. He approached the court on the context that he cannot be tried for the offence of raping his wife as he is immune under the breadth of exception 2 of Section 375 of IPC.

The peculiar facts which forced the complainant to move against her husband were that he ashamed her in front of everyone on the pretext that she does not offer sex to him including relatives. to its contrary, he treated her as sex slave and forced her to indulge even in unnatural sex and this remain continues even at the time of her pregnancy and has not stopped even after termination of it. The bestiality was to an extent that he forces her to do all such acts in front of their daughter and even indulged sexually with her as well.

The legal issues which were raised in the petition were whether the husband can be tried for the offence of rape of his wife subject to exception 2 of section 375 of ipc and whether prosecution needs to prove initial facts in the light of presumption created under Section 29 & 30 of POCSO.

The court after making reference to laws of various countries over the aspect of marital rape has recommended that the exception be removed and the fact of relationship must not be a relevant factor either for the purpose of conducting inquiry or for mitigating sentence of the accused. Further, keeping in view the vicious facts of the case, the court found no error in the act of session court of taking cognizance of the case under Section 376 of the Code and thus, refused from interfering the same.

With regard to second issue which talks about the presumption created under Section 29 of the Act that an accused is presumed to have committed the act and the burden to disprove the charges levelled is upon him. The court after

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placing reliance on various Supreme Court judgements has observed that the presumption under Section 29 is the rebuttable one and hence, the initial burden to prove the primary facts is upon the prosecution. Once the prosecution has satisfied the court with regard to the existence of primary facts, then only the presumption comes into play.

7.2 *RIT Foundation v. UOI & Others*³⁶

In this case, a petition has been filed by two NGOs and two individuals regarding the striking of exception 2 of Section 375 of IPC which imparts immunity to husband against the offence of rape committed against women. The Petition of NGOs is a PIL based on pro-bono whereas one filed she is the victim of marital rape but failed to take redress against such act due to prevailing immunity under exception 2 and the other person is farhan who challenged it on the ground of it being contrary against Muslim law. The last issue has not been taken up in the petition and the whole focus was on the constitutionality of exception 2. Two Amicus Curie has been appointed by the court. They also supported the petition. The exception is closely connected with Section 376B of IPC and 198 of CrPC. There is also a prayer that these sections should also be struck down along with the exception.

The petition has been argued on the grounds of constitution validity of Exception as it is in violation of Article 14 and 21 of the Constitution as treating married women separately lacks nexus with the object of the provision and it is merely an anarchic law followed blindly from the era of British rule. The philosophy behind the provision lacks its sanctity in the contemporary times where the exclusive rights of women such as right to life, dignity, health, sexual autonomy and other got due recognition. Secondly, the number of cases is rising tremendously and the victims are suffering due to absence of law.

On the other hand, the petition has been opposed by an NGO named Hridiya and Men Welfare Trust (MWT) on the ground that the aspect of marital rape is adequately criminalised under various provisions such as DVA, 2005 & Section 498A of IPC. Secondly, criminalising any act is the sole function of the legislature as they represent the will of the people and have modes to make reference to various stakeholders. To its contrary, judiciary does not have power as well as means to deal with the same. Hence, the court is not empowered to struck down the impugned provisions and if the court decides to take up the matter and granted the relief than it would result in breach of the principle of separation of power which has far reaching consequences. Further, the provision has far reaching social and legal effects which the court is not competent to regulate.

The petition has been heard by division bench of Justice Rajiv Shakhder and Justice Hari Shankar of Delhi High Court. Both gave separate judgement as they split over the main issue. Justice Rajiv Shakhder after making through analysis of the rape law along with its brief history has discussed the principle of separation of power which prevents court from exercising its power under Article 226 of the constitution and to strike down the exception. After referring the 2018 judgement of the apex court, Justice Rajiv observed that India has adopted the principle of separation of power but has not applied it with absolute rigidity as there are number of provisions where legislature exercises the power of executive and judiciary and vice versa. Further he set aside the second blockage of “self -restrain” which comes in the path of the court to exercise its power. The court discussed the ambit of Article 13 of the constitution which authorises the court to declare any law void which is either inconsistent or in contravention of the law

³⁶ 2022 SCC OnLine Del 1404

prevailing before independence or after respectively and observed that it empowers the court to deal with whole domain of law prevailing in the country except any amendment made under Article 368. The argument that the matter has social consequences on various stakeholders and hence need wide consultations has also been refuted by the court as the issue before the court is legal and hence the court is competent to address the same. Thus, he gave decision in favour of petitioner and held that:

- a) The MRE is violation of fundamental rights enumerated under Article 14, 15, 19(1)(a) and 21 of the Constitution and hence, the same has been struck down.
- b) The provision of presumption of consent culled under Section 114A of India Evidence Act is not applicable on husband.

Whereas Justice Hari Shankar rejects the contention of the petitioners and upholds the arguments of the respondents as he observed that

- a) The experience of the lady with the forceful sex against her consent and will by the stranger stands on different podium than the one committed by the husband as in the former case the partner is not of her choice and thus she is giving up her independence, choice and sexual autonomy which is not the case when husband forces himself upon the wife as husband is the one with who she enters into relationship willingly and had sex on occasions. Thus, the ill effect of the act of the husband cannot be equated with that of the stranger. Though he admitted that the act of husband is condemnable.
- b) To declare any act as an “offence” needs meticulous approach and power of the legislature hence the same can be done by it only and the court should refrain itself from entering into that sphere.
- c) It is unpersuasive that it violates Article 14 of the Constitution as right to equality demands that a provision can be applied differently provided there must be some rational between the distinction and the object it seeks to achieve. In this case exception², the distinction is regarding sexual acts committed between strangers and between husband and wife and the object this distinction sought to achieve is to preserve the sanctity of marriage and thus it is an intelligible differentiate which is permitted under Article 14 and hence MRE is not in violation of right to equality. Rather he opined that treating a husband equal to a stranger is doing more injustice than the justice as it is like treating unequal as equal which is contrary to the mandate of Article 14.

7.3 *X v. The Principal Secretary of Health and Family Welfare Department & Anr*³⁷

The appeal has been filed against the decision of the Delhi High Court which refused to grant relief to the appellant. The appellant filed petition before the Delhi HC for termination of her pregnancy under MTP Act³⁸ and Rules³⁹. Appellant is unmarried and became pregnant out of consensual relationship. She filed petition as she was twenty two weeks pregnant and don't want to continue her pregnancy as her partner refused to marry her and single headedly she

³⁷ 2022 SCC OnlineSC 1321

³⁸ Section 3(2)(b) of the Medical Termination of the Pregnancy Act, 1971

³⁹ Rule 3B(c) of the Medical Termination of the Pregnancy Rules, 2003

can't raise her child due to financial factors and also being unmarried mother is a stigma and lead to social ostracization.

Under MTP Act⁴⁰, pregnancy can be terminated after 20 weeks and up to 24 weeks only under given circumstances as enumerated under Rule 3 of MTP Rules 2003. As per these rules, only married woman is allowed to terminate pregnancy and unmarried or single mothers were kept out of its sphere. The court observed that

a) The distinction between married and unmarried woman has no nexus with the object sought to be achieved by the provision i.ee safety of the mother. Hence, the provision is arbitrary and biased and hence violates Article 14 of the Constitution.

b) One of the ground under which pregnancy can be terminated is injury to the mental health of the woman. The court opined that unwanted pregnancy also amounts to injury to mental health under the given circumstance.

c) A considerable stigma attached with sexual offences and it becomes manifold if victim becomes pregnant. Thus, under MTP Act, a woman can undergo termination even after 20 weeks if pregnancy is the result of sexual assault or rape because women are generally not conscious of the fact that pregnancy can be one of the consequences of assault. And also due to fear of social assassination, they do not come out in open regarding the commission of an offence. Hence, it all adds to the delay. Thus, delayed termination of pregnancy is recognised under the Act. The court observed that the married woman can also go for termination under that provision. rape is committed when consent is absent and the aspect of consent does not undergo reformation after marriage. It remains constant. And hence if the husband indulges sexually with his wife against her will or consent then it amounts to rape and women is entitled to terminate her resultant pregnancy. Thus, rape includes marital rape under MTP Act but it does not dilute or have any impact on exception 2 of Section 375 of IPC.

d) Another ground of termination is change in marital status from married to divorcee or widow. Under this ground, the unmarried woman should also be allowed to claim relief when her partner leaves her as the provision should be interpreted in the light of the purpose it seeks to achieve and not narrowly.

8. Conclusion and Suggestions

It has been concluded that the immunity to rape has lost the significance in the contemporary times as they are no more chattels or property of the husband and have their own fundamental right of sexual autonomy and dignity. Hence, the times have come to struck down the exception. But despite years' demand, the law still remains the same.

The immunity in case of marital rape provided under exception 2 of section 375 of IPC should be deleted. Also, the relationship of marriage or any intimate relationship between parties should not be a mitigating factor at the time of deciding the quantum of sentence. It should also be expressly provided that consent shall not be presumed irrespective of relationship, either marital or any other intimate relation, between the parties unless the same is expressly given.

⁴⁰ Section 3 (2)(b)

After removal of this exception, people should also be made aware that marriage does not give licence to the husband to take away sexual autonomy of the wife. Moreover, the police personnel, prosecutors and judges should be guided by the spirit of law and not by orthodox stereotypes.

