

“Wedlock and Consent are the two sides of one coin- Critical study of Legal Provisions available for Marital Rape in India”

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Abstract

*“Shunning her opinion, he leaped on her like a beast,
and pounced on her tired body, caring the least,
she now hated her existence and cursed her life”*

Brutal but the true reality of the Indian woman is that they cannot refuse to have sexual intercourse with their husbands only on the pretext of marriage. Marital rape is the decriminalized offence of the Indian society. This affects their psychology and mental health to such an extent that they live a death every time they face such brutality. Section 375 of the Indian Penal Code defines Rape with an exception that sexual intercourse with wives is not rape. In this article I have analysed the provisions of law and case laws to establish that exception 2 of the section 375 is unconstitutional and marriage doesn't give implied consent for “sexual intercourse”.

Keywords: Marital rape, Unconstitutional, Consent, Marriage.

1.INTRODUCTION

The heinous crime of Rape has been discussed in section 375 of the Indian Penal Code, 1860. Section 375 of the Indian Penal Code defines rape as "sexual intercourse with a woman against her will, without her consent, by coercion, misrepresentation or fraud or at a time when she has been intoxicated or duped, or is of unsound mental health and in any case if she is under 18 years of age." The exception 2 of this section however, doesn't criminalize forced sex when the lady is married to the man unless she is less than 15 years of age. The 172nd law Commission report has also stated that the clause decriminalizing marital rape should be deleted from the section 375 of the Indian Penal Code, 1860¹.

The Criminal Law (Amendment) Act, 2013 made several changes in relation to the offences against women also including other penetrating act except reproductive organ in the definition of Rape. This law was passed by the Parliament after the disgraceful and atrocious incident commonly known as “Nirbhaya rape case” took place in the December, 2012. This Act made significant changes and introduced the concept of the punishment even in the rarest of the rare occasions of the offences against women. This Act was enacted after the recommendations of Justice Verma Committee, and is widely criticized for not implementing

¹ 172nd Report of Law Commission of India on Review of Rape Laws , March 2000, para 3

the recommendations of the committee which includes criminalizing of Marital Rape². Justice Krishna Iyer in the case of ***Rafiq v. State of U.P.***³ made a remark that, “*a murderer kills the body, but a rapist kills the soul*”. In this Light a women who is raped by the man she married dies every time she is forced to have sex. The Supreme Court in the case of ***Bodhisattwa Gautam v. Subhra Chakraborty***⁴ has described rape as deathless shame and gravest crime against human dignity”. The justice to one Indian Daughter was administered on 20th March, 2020 almost 7 years after the crime but lot of women live devastating and undignified life in the veil of marriage. As per the Indian Penal Code, the instances wherein the husband can be criminally prosecuted for an offence of marital rape are as under:

- 1) When the wife is between 12 to 15 years of age. (section 376 of Indian Penal Code)
- 2) When wife is below 12 years of age (section 376 of Indian Penal Code)
- 3) Rape of judicially separated wife. (section 376A of Indian Penal Code)

The Supreme Court in the case of ***Independent Thought v. Union of India***⁵, has criminalized forced sexual contact between husband and wife who is in the age gap of 15 to 18 years This Judgment has led to the filing of writ petitions challenging the Constitutionality of the exception 2 of the section 375 of the Indian Penal Code, 1860. Even though a women can get judicial separation if she is being subjected to marital rape under the Protection of Women against Domestic Violence Act, 2005. This humiliating and traumatizing crime is still not an offence under Indian law. This article critically analyses the Constitutional validity of the exception 2 of the section 375 of the Indian Penal Code, 1860.

1.1 LITERATURE REVIEWED

- 1) Shauni, Hindu Marriage: Aims, Ideals and Types, available at: <http://www.yourarticlelibrary.com/marriage/hindu-marriage-aims-ideals-and-types/47617> last accessed on 7th May,2020
- 2) Sumedha Choudhary, Why Criminalization of Marital Rape is still a Distant Dream in India, Bussiness Standard, October 28, 2018 available at: https://www.business-standard.com/article/current-affairs/why-criminalisation-of-marital-rape-is-still-a-distant-dream-in-india-118102900084_1.html Last accessed on 7th May, 2020
- 3) Maithili Shaan Katari Libby, Marital Rape: it’s all about respect, available at: <https://www.indialegallive.com/viewpoint/marital-rape-its-all-about-respect-74354> last accessed on 7th May, 2020
- 4) Priyanka Rath, Marital Rape and it’s Legal Scenario, available at: https://www.indialawjournal.org/archives/volume2/issue_2/article_by_priyanka.html last accessed on 7th May, 2020

² “Ordinance bypasses all vital recommendations of Verma panel” available at <https://www.thehindu.com/news/national/ordinance-bypasses-all-vital-recommendations-of-verma-panel/article4372835.ece> accessed on 26th April,2020

³ 1981 SCR (1) 402

⁴ AIR 1996 SC 992

⁵ 382 SCC (2017)

- 5) Dr. Bhavish Gupta, Dr. Meenu Gupta, Marital Rape:- Current Legal Framework in India and the Need for Change available at: <https://www.galgotiasuniversity.edu.in/pdfs/issue2.pdf> last accessed on 7th May, 2020
- 6) Sarthak Makkar, Marital Rape: A Non criminalized Crime in India, available at: <https://harvardhrj.com/2019/01/marital-rape-a-non-criminalized-crime-in-india/> last accessed on 7th May, 2020
- 7) Vidhan Maheshwari, Article 21 of the Indian Constitution: the expanding Horizon, available at: <http://www.legalserviceindia.com/articles/art222.htm> last accessed on 14th May, 2020
- 8) Rahul Gupta, Expanding and ever evolving: Article 21 of the Constitution of India ‘Right to Life and Personal Liberty’, available at: <https://www.latestlaws.com/articles/expanding-ever-evolving-article-21-of-the-constitution-of-india-right-to-life-personal-liberty/> last accessed on 17th May, 2020
- 9) Eshan Pandit, Article 14 of the Indian Constitution an analysis, available at: https://www.academia.edu/8025396/Article-14_of_Indian_constitution_a_analysis_-_Eshan_pandit_BA_hons_LL_B_hons_4th_semester last accessed on 14th May, 2020
- 10) Shrey Atrey, Through the looking glass of intersectionality: making sense of Indian Discrimination Jurisprudence under Article 15, available at: <https://www.equalrightstrust.org/ertdocumentbank/Through%20the%20Looking%20Glass%20of%20Intersectionality%20Making%20Sense%20of%20Indian%20Discrimination%20Jurisprudence%20under%20Article%2015.pdf> last accessed on 22nd May, 2020
- 11) Raja Muthirulandi, Article 15(3) of the Constitution of India: Fertile Ground for Pro-Women Jurisprudence, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2831288 last accessed on 17th May, 2020
- 12) Krishnadutt Chavali and D.B. Gupta, New Section 375 Indian Penal Code(IPC) Confusion and controversies, available at: https://www.researchgate.net/publication/301741183_New_Section_375_Indian_Penal_Code_IPC_Confusion_and_Controversies last accessed on 24th May, 2020
- 13) P.S Thakur, Jayanti Yadav, Arneet Arora, Criminal Amendment Act 2013 and issue of Age, available at: <http://medind.nic.in/jal/t15/i4/jalt15i4p422.pdf> last accessed on 24th May, 2020
- 14) Varun Kumar, Does Section 375 of IPC include Marital Rape?, available at: <http://www.legalservicesindia.com/article/2500/Does-Section-375-of-IPC-Include-Marital-Rape.html> last accessed on 3rd May, 2020
- 15) Krishnadas Rajgopala, Sex with Minor Wife Despite Consent is Rape, available at: <https://www.thehindu.com/news/national/sex-with-minor-wife-is-rape-says-supreme-court/article19838085.ece> last accessed on 25th May, 2020
- 16) Manav, Whether exception II of section 375 of the IPC, 1860 Constitutionally Valid or Not, available at: <http://www.legalserviceindia.com/legal/article-958-whether-the->

exception-ii-of-sec-375-of-ipc-1860-constitutionally-valid-or-not.html last accessed on 26th May,2020

1.2OBJECTIVITY:

This research paper aims to establish:

- 1) How de-criminalization of marital rape is in violation of Fundamental Rights.
- 2) How marital rape doesn't allow women to stand on equal footing with men.
- 3) How the Indian criminal law on marital rape hampers the objective and purpose of justice.

1.3HYPOTHESIS:

This research paper is based on the hypothesis that by decriminalizing Marital Rape Indian Criminal law has not violated any Fundamental Right and protected under the "procedure established by law."

1.4RESEARCH QUESTIONS:

Issues raised for analysis are:

- 1) Whether marrying a man equivalent to giving consent to sex?
- 2) Whether decriminalizing of the marital rape in violation of Article 14 and article 15(3) of the Indian Constitution?
- 3) Whether dignity of women and her personal liberty as protected under Article 21 of the Constitution not affected by the Marital Rape?
- 4) Whether reluctance to criminalize marital rape is harming the inherent principle of justice enshrined in the preamble of the Constitution?

1.5STATEMENT OF PROBLEM

Violation of the personal space of any human being without their consent is an offence on the face of it. Everyone has an intrinsic right to be free and not entangled under any person. Indian history states that the purpose of the marriage are dharma, praja and rati, where praja means progeny or child birth and rati means sexual pleasures⁶. The source of the offence of marital rape lies in the fact that sexual intercourse is a considered as a compulsion post marriage. Union of two souls and promise to love and stay together are forgotten except during sexual intercourse.

1.6 METHODOLOGY:

A Research work cannot be accomplished without adopting a proper method of methodology. In this research paper analytical and doctrinal method of research is followed. Analytical

⁶ Shauni, Hindu Marriage: Aims, Ideals and Types, available at: <http://www.yourarticlelibrary.com/marriage/hindu-marriage-aims-ideals-and-types/47617> last accessed on 7th May,2020

method is followed in terms of analysing and scrutinizing the present scenario. The data for this work has been collected from various statutory provisions, journals, seminar papers, newspapers, reporters, magazines and web sites. By analysing the secondary data a conclusion has been established.

1.7 LIMITATION

The scope of the research is limited to the country of India. The study will mostly focus the Constitutionality of the decriminalization of marital rape under the Indian Constitution.

1.8 IMPORTANCE OF STUDY

The Indian Criminal law doesn't recognize marital rape as an offence which violates the dignity of the woman, kills her soul and reduces her body as an "sexual object". The present Government's reactionary stands that criminalization of marital rape would destabilize the institution of marriage⁷. The argument given is: the act that appears as rape to one woman may not be rape to other woman. This argument stems from the criminal law principle of "reasonable person being the judge". However in the Indian Patriarchal Society, reasonable person is always held to be a male and his perspective as a correct opinion. This paper aims to establish how marital rape is in gross violation of the basic dignity of woman and it definitely is violative of Constitutional Principles.

PROPOSED CHAPTERS

1. INTRODUCTION

(AS MENTIONED ABOVE)

2. THE DEFINITION OF CONSENT NOWHERE INCLUDES THAT MARRYING A MAN MEANS "CONSENTING" TO SEXUAL ACTIVITY.

On analysing the definition of consent and the essentials of consent in the definition it cannot be established that marriage solely can be considered as a woman's consent to have sexual intercourse.

3. NON-RECOGNITION OF MARITAL RAPE IS IN VIOLATION OF FUNDAMENTAL RIGHT OF EQUALITY BEFORE LAW AS ELUCIDATED IN ARTICLE 14,15 OF THE CONSTITUTION.

Article 14 guarantees equality before law and equal protection of law to every citizen. It allows reasonable classification based on the reason and its relation with the object of the law. However, decriminalizing provision of the marital rape is in violation of the object of law against rape.

⁷ Sumedha Choudhary, Why Criminalization of Marital Rape is still a Distant Dream in India, Business Standard, October 28, 2018 available at: https://www.business-standard.com/article/current-affairs/why-criminalisation-of-marital-rape-is-still-a-distant-dream-in-india-118102900084_1.html Last accessed on 7th May, 2020

Article 15(3) is an enabling provision which allows discrimination against men in favour of men but not vice versa.

4. THE OFFENCE OF MARITAL RAPE IS IN VIOLATION OF THE RIGHT TO LIFE AND PERSONAL LIBERTY GAURANTEED UNDER ARTICLE 21 OF THE INDIAN CONSTITUTION.

Supreme Court has given birth to plethora of rights under right to life and personal liberty. Non recognition of marital rape as a crime violates right to live with human dignity, right to sexual privacy, right to good health and right to not live a forced life.

5. DECRIMINALIZING OF MARITAL RAPE HAMPER THE BASIC PRINCIPLE OF JUSTICE ENSHRINED IN THE CONSTITUTION.

Constitution has put the principle of Justice above the principles of equality, liberty and fraternity. Social Justice is granted when the law adapts to the changing society. The need of the time is to consider marital rape as crime in India.

6. CONCLUSION AND SUGGESTION

Concluding the research and suggesting that Marital Rape should be Criminalised in the light of greater Justice.

CHAPTERS IN DETAILS.

2.THE DEFINITION OF CONSENT NO WHERE INCLUDES THAT MARRYING A MAN MEANS “CONSENTING” TO SEXUAL ACTIVITY.

Consent has been defined under explanation 2 of the Section 375 of the Indian Penal Code. From the reading of the definition it can be established that consent must be unequivocal, voluntary and willing and the willingness must be communicated either directly or indirectly.

In the case of *State of Uttar Pradesh v. Chotte Lal*⁸, the court held that the expression against her will means that a sexual intercourse was done even when the woman opposed or resisted it. The court approved the Judgment of *State v. Schwab*⁹, wherein it was held that “no lexicographer recognizes consent as a synonym of willingness.” A woman might be willing to have sexual intercourse but that just doesn’t mean she has consented to the act. In this light, even if the woman is willing to have sexual intercourse with her husband, she might not consent to it because of numerous issues.

In the case of *Rao Harman Singh, Sheo ji Singh v. State*¹⁰, the Supreme Court has clearly established the distinction between the term “consent” and “submission” as follows:

⁸ (2011) 2 SCC 550

⁹ 143 N.E. 29

¹⁰ AIR 1958 Punj 123

Submission of her body under the influence of fear or terror is no consent. Although consent involves submission, the converse is not true. Thus, marriage can lead to submission by the woman for sexual intercourse in certain cases without the consent.

In the case of *Navtej Singh Johar v. Union of India*¹¹, Indu Malhotra J. said that “Consent must be free consent, voluntary and devoid of any duress or coercion.” If a woman get right to choose not to have sexual intercourse with the man she is not married to then why not with the man she is married with.

Section 39 of the Indian Penal Code defines voluntarily as “a person is said to cause an effect ‘voluntarily’ when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it.”

The expression voluntarily is used to define the mens rea and this cannot be applied to ascertain women’s willingness to participate in the sexual act. In the case of *Gurdeep singh v. State (Delhi Administration)*¹², the court held that voluntary means according to one’s own free will accompanied by the conscience.

It just cannot be established that a women has consented to sexual activity on the basis of her marital status. The consent has to voluntary and must be unequivocal. The exception 2 of the section 375 of the Indian Penal Code is violative of the definition of consent in the explanation 2 of the same section and thus, opens door for violation of plethora of Fundamental Rights enshrined under the Constitution.

3. NON-RECOGNITION OF MARITAL RAPE IS IN VIOLATION OF FUNDAMENTAL RIGHT OF EQUALITY BEFORE LAW AS ELUCIDATED IN ARTICLE 14 OF THE CONSTITUTION.

The concept of not including forced sexual acts within the ambit of the definition of ‘Rape’ is based on the ancient notion of merging woman’s identity with that of her husband.¹³

Article 14 of the Constitution mandates that the State shall not deny to any person equality before the law or equal protection of laws. The Constitution has guaranteed equality to all however, the Indian criminal law discriminates against women who are raped by their own husbands. Even though reasonable classification is permitted¹⁴, class legislation is not. In the case of *I.R. Coelho v. State of Tamil Nadu (Judgment dated Sept 15, 2010)*, the Supreme Court held that law would be violative of Article 14 if it treated equal people or people of the same class unequally. The judgement found that a person is said to be treated unequally if that person is treated worse than others who are similarly situated to the complainant. The

¹¹ W.P. (Crl.) No. 76 of 2016

¹² 2000 (1) SCC 498

¹³ “Marital rape: a non criminalized crime in India” by Sarthak Makkar available at <https://harvardhrj.com/2019/01/marital-rape-a-non-criminalized-crime-in-india/> accessed on 27th April,2020

¹⁴ State of W.B. v. Anwar Ali, AIR 1952 SC 75

forceful sexual act is same and harms the body and soul of every woman in the same way irrespective of the fact that she is married to the person raping her or not.

The Supreme Court, in ***R.K.Dalmia v. Justice S.R. Tendolkar***¹⁵, held that the main test for a reasonable classification would be that the classification has to be based on an intelligible differentia and the same must bear a rational nexus with the object sought to be achieved by the law in question. The purpose of article 375 is to protect women against the ghastly act of rape and to punish the culprit however; exception 2 of the section bears no connection to the object of the law against rape but also tends to tamper with the purpose of granting justice.

While, good faith and sufficient knowledge is to be presumed on the part of the Legislature¹⁶, the presumption should not be carried so far that the Court holds that there must be some undisclosed or unknown reasons for forcing some individuals or corporations to undergo arbitrary and discriminatory legislations.¹⁷ Here, even if the good faith is presumed on the part of legislation, the fact that a woman is being discriminated from other based solely because she is married to the man forcing her is gross violation of Article 14 of the Constitution.

The scope of Article 14 has now widened a lot more due to several liberal interpretations in various Supreme Court judgements. In ***E.P. Royappa v. State of Tamil Nadu***¹⁸, the Supreme Court declared that Article 14 should not be subjected to “a narrow pedantic and lexicographic approach”. In ***Mohd. Shujat Ali v. Union of India***,¹⁹ a Supreme Court Constitution Bench warned that the doctrine of classification should not be carried to the point wherein instead of becoming a useful servant, it would become a dangerous master. The Court further went observed that “an anxious and sustained attempt to discover some basis for classification may gradually and imperceptibly deprive the guarantee of equality of its spacious content”. In the case of ***L.I.C. of India v. Consumer Education and Research Centre***,²⁰ the Supreme Court ruled that the doctrine of classification was only a subsidiary rule evolved by the Courts to give practical content to the doctrine of equality. It has now been held in the case of ***Dev Dutt v. Union of India***,²¹ that rules of natural justice form an essential part of Article 14 and therefore now, classification need not only be reasonable but also just and fair. Rape of a married woman by her husband is as much a crime as rape of a woman by any man, thus, exclusion of the marital rape which is not just physical assault but is destructive of the whole persona of the human being, as a crime in Indian Criminal Law is unjust, unfair and in grave violation of Fundamental Right guaranteed under Article 14.

¹⁵ AIR 1958 SC 538

¹⁶ This rule was brought about by the Supreme Court of the USA in *Middleton v. Texas Power & L. Company*, 248 US 152, and was quoted in the case of *Government of Andhra Pradesh v. P.L.Devi*, AIR 2008 SC 1640

¹⁷ *A.P.B.C. Sangh v. J.S.V.F.*, AIR 2006 SC 2814

¹⁸ AIR 1974 SC 555

¹⁹ AIR 1974 SC 1631

²⁰ AIR 1995 SC 1811

²¹ AIR 2008 SC 2513

3.1 Indian Constitution permits discrimination in favour of women but not against them

Article 15 of the Constitution states that State cannot discriminate against any person only based on caste, sex, race, religion and place of birth. However, Article 15(3) of the Constitution states that: “Nothing in this article shall prevent the State from making any special provision for women and children.” This clause enables the state to confer special rights upon women since women are a well defined class. In the case of *Anjali Roy v. state of West Bengal*²² the Court held that the word “for” in clause (3) signifies that special provisions can be made in favour of women and not against them. Thus, state can discriminate against men in favour of women but not against women in favour of men.

In the case of *Government of Andhra Pradesh. v. P.B. Vijayakumar*²³ the Apex court explained the object of insertion of clause (3) into Article 15 of the Constitution is to recognize the fact that for centuries women of this country have been socially and economically handicapped and were prevented from participating in socio economic activities on an equal standing. In order to remove this backwardness and to improve the status of women in society the clause was inserted. In the case of *Vijay Laxmi v. Punjab University*²⁴ and in *State of M.P. v. G.D. Trithani*²⁵ the above mentioned object was upheld.

The decriminalization of marital rape not only violates the Fundamental Right under Article 14 but also hampers the object of Article 15(3) i.e., to uphold the position of women in society. Woman cannot stand on equal footing in the society unless their consent in closed room is given value to the fullest.

4. THE OFFENCE OF MARITAL RAPE IS IN VIOLATION OF THE RIGHT TO LIFE AND PERSONAL LIBERTY GAURANTEED UNDER ARTICLE 21 OF THE INDIAN CONSTITUTION.

Article 21 of the Indian Constitution guarantees right to life and personal liberty to every individual. The Supreme Court has in the case of *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi and others*²⁶ held that: Article 21 requires that no one shall be deprived of his life or personal liberty except by procedure established by law and this procedure must be reasonable, fair and just and not arbitrary, whimsical or fanciful.

The term life has been described by the field J. in the case of *Munn v. Illinois*²⁷ where he held that “life means something more the mere animal existence”. The Supreme Court of India has also affirmed the same in the case of *Bandhua Mukti Morcha v. Union of India*²⁸.

Right to Life means the right to lead meaningful, complete and dignified life. It does not have restricted meaning. Right to personal liberty and privacy is an integral part of life. This is a

²² AIR 1952 Cal. 825.

²³ AIR 1995 SC 1648

²⁴ AIR 2003 SC 3331

²⁵ AIR 2003 SC 2962

²⁶ AIR 1978 SC 597

²⁷ 94 US 113 (1877)

²⁸ AIR 1984 SC 802

Constitutional value and it is important that human beings be allowed domains of freedom that are free of public scrutiny unless they act in an unlawful manner as has been upheld in the case of **Ram Jethmalani v. Union of India**²⁹.

The Supreme Court of India has given birth to the host of rights under the “right to life and personal liberty.” Non recognition of marital rape as a crime violates right to life with human dignity, right to privacy, right to good health and right not to live a forced life.

4.1 Right To Live with Human Dignity

The scope of Right to life has been expanded and given a wider connotation by the Supreme Court of India to include a series of rights as to form the jurisprudence of Human Rights. Dignity refers to one’s worth, merit, quality or reputation. Dignity can be ensured when every person has a feeling that he or she is a respectable member of the society, and no one can humiliate, harass, exploit and insult them³⁰.

The word dignity is derived from the Latin word “digitas” which means state worthy of esteem. The Supreme Court of India has interpreted Article 21 to include Right to live with dignity and all that goes along with it³¹. The Supreme Court has in the case of **State of Maharashtra v. Public concern of Governance Trust**³², right to good reputation is also a part of right to life and personal liberty. In the case of **Indian Young Lawyers’ Association v. State of Kerala**³³, Constitutional morality was said to include the dignity of women.

The Apex Court has held in the case of **Chairman, Railway Board v. Chandrima Das**³⁴, the offence of rape violates the right to life and the associated right to live with human dignity of the victim. Further in the case of **Bodhisattwa Gautam v. Subhra Chakraborty**³⁵, the court has held that rape is less of a sexual offence than an act of aggression aimed at degrading and humiliating the woman. The Indian criminal law which allows the husband to force his wife to have sexual intercourse against her will or without her consent is definitely in violation of the Article 21 of the Constitution.

4.2 Right to Sexual Privacy

In the several cases like **Kharak Singh v. State of U.P.**³⁶, **Govind v. State of Madhya Pradesh**³⁷, **Neera Mathur v. LIC**³⁸, Supreme Court has included right to privacy as an integral part of the right to life and personal liberty. In the case of **R. Rajgopalan v. State of**

²⁹ (2011) 8 SCC 1: JT 2011 (7) SC 104: (2011) 6 SCALE 691

³⁰ Dr. N.K.Chakrabarti, Dr. ShachiChakrabarti, “Gender Justice” vol.II, first Edition 2006, pub, R. Cambray and Co. Private Ltd, Kolkata, P. 339

³¹ Francis Corallie Muin v. Union Territory of Delhi, AIR 1981 SC 802

³² 1989 AIR 714

³³ 2018 SCC OnLine Ker 5802

³⁴ AIR 2000 SC 988

³⁵ AIR 1996 SC 992

³⁶ AIR 1963 SC 125

³⁷ AIR 1975 SC 1378

³⁸ (1992) 1 SCC 286

*Tamil Naidu*³⁹, it was held that right to privacy includes right to be left alone. The exception 2 of the section 375 of the Indian Penal Code violates the right to privacy of the woman when is she forced to enter into sexual relations without her consent.

In the case of *State of Maharashtra v. Madhkar Narayan*⁴⁰, the court held that every woman is entitled to sexual privacy and it is not open to any person to violate her privacy as and when he wished or pleased. This right to privacy has been extended to the workplaces in the case of *Vishakha v. State of Rajasthan*⁴¹. In the similar fashion woman have right to sexual privacy within marriage as well and the Indian Criminal law of decriminalization of marital rape violates this intrinsic right.

4.3 Right to Good Health

While interpreting Article 21, Supreme Court of India has in the case of *CESC Ltd. v. Subhash Chandra*⁴² has included right to good health as a part of right to life. This holding was also reiterated in the case of *ESI corp. V. Francis De Costa*⁴³. In the case of *Vincent Panikurlangara v. Union of India*⁴⁴ it was held that healthy body is the very foundation of all human activities. In the case of *Bandhua Mukti Morcha v. Union of India*⁴⁵ the court held that right to good health includes right to good mental health as well.

Invasion of woman's sexual privacy destroys the psychology of woman and pushes her into deep emotional crisis. Further forced sexual relationships can also lead to communication of sexually transmitted diseases also.

4.4 Right not to live a forced life

In the case of *P. Rathinam v. Union of India*⁴⁶ Supreme Court held that right to life also includes right not to live forced life to his detriment, disadvantage or disliking. Even though this case was over ruled in the matter of suicide, the essence remains the same. The exception to the rape clause decriminalizing marital rape thus, forces a woman to live a life of her disliking and disadvantage.

Even if the argument is established that right to life and personal liberty can be compromised subject to the "procedure established by law" and exception 2 of the section 375 of the Indian Penal Code falls under the procedure established by law. In the case of *Maneka Gandhi v. Union of India*⁴⁷ the court has held that procedure established by law has to "just, fair and reasonable and not arbitrary, whimsical or fanciful". The decriminalization of marital rape under Indian Criminal Law is fanciful, whimsical, unjust, unfair and unreasonable.

³⁹ 1995 AIR 264

⁴⁰ AIR 1991 SC 207

⁴¹ AIR 1997 SC 3011

⁴² 1992 (1) SCC 411

⁴³ 1993 Supp(4) SCC 100

⁴⁴ 1987 AIR 990

⁴⁵ AIR 1984 SC 802

⁴⁶ 1994 AIR 1844

⁴⁷ 1987 AIR 597

5. DECRIMINALIZING OF MARITAL RAPE HAMPER THE BASIC PRINCIPLE OF JUSTICE ENSHRINED IN THE CONSTITUTION.

Our Constitution provides justice as; social justice, legal justice and economic justice based on the needs of society and the changing environment. The term Justice is derived from the Latin term “Justitia” which means righteousness and equity. The preamble of Indian Constitution puts ideal of Justice on the high pedestal as other principles of equality, fraternity and liberty. Immanuel Kant has defined Justice as “the aggregate of those conditions under which the will of other person can be conjoined with the will of another in accordance with the universal law of freedom”⁴⁸

Social Justice is not defined anywhere in the Constitution, social Justice is a concept which is changeable according to the circumstances. Social Justice involves equality along with liberty. In the modern times when women are expected to be treated equally in society, they still don’t have the liberty to say “no” for sexual intercourse based on the only reason of marriage. Women are still left as a “sexual object” in the Indian Society.

The Supreme Court has held that “court should do justice and in doing such justice any technicality of law will not stand in its way”⁴⁹. Thus, exception 2 of the section 375 of the Indian Penal code, 1860 is unconstitutional and against the basic principle of Justice. Indian women should be given justice for violation of their privacy by removing this exception.

6. CONCLUSION AND SUGGESTION

When someone mentions the word the “rape” the tendency is to think of stranger, malicious person. Usually we don’t think of rape in the context of marriage and because of this thinking and Indian Criminal Law decriminalizing marital rape has debarred women from opening up about the inhumane behaviour that they are tormented with, by their own husbands inside the closed rooms. Decriminalization of marital rape has given the males the “license to rape their wives without their consents”. Women are still treated as an object to satisfy the sexual needs of the man. This article has aimed to establish how marriage doesn’t imply consent to sexual activity, and how marital rape is Unconstitutional. The concept of judicial activism is to fight the odds and to give social justice. Social justice is definitely not based upon the ancient principles but is administered only by adapting with the changing circumstances. The need of the hour is to decriminalize marital rape in India and to give justice to all those women living the forced lives.

BIBLIOGRAPHY

The primary Sources referred for the research are as follows:

- A) List of Statutes or Legislation
 - a) The Constitution of India

⁴⁸ Priyanka Kansara “ Theories of Justice and Constitution of India” available at: http://ijlljs.in/wp-content/uploads/2015/06/International-Journal-of-Law-and-Legal-Jurisprudence_submission-short-article.pdf accessed on 30th April, 2020.

⁴⁹ Sadhuram Bansal v. Pulin Behari Sarkar and ors., 1984 AIR 1471

- b) The Indian Penal Code, 1860
- B) List of case laws
- 1) Rafiq v. State of U.P. – 1981 SCR (1) 402
 - 2) Bodhisattwa Gautam v. Subhra Chakraborty – AIR 1996 SC 992
 - 3) Independent Thought v. Union of India – 382 SCC (2017)
 - 4) State of Uttar Pradesh v. Chotte Lal - (2011) 2 SCC 550
 - 5) State v. Schwab – 143 N.E. 29
 - 6) Rao Harman Singh, Sheo Ji Singh v. State – AIR 1958 Punj 123
 - 7) Navtej Singh Johar v. Union of India- W.P. (Crl.) No. 76 of 2016
 - 8) Gurdeep Singh v. State(Delhi Administration) – 2000 (1) SCC 498
 - 9) IR Coelho v. State of Tamil Naidu – Judgment dated 15th September, 2020
 - 10) R.K. Dalmia v. Justice S.R. Tendolkar - AIR 1958 SC 538
 - 11) A.P.B.C. Sangh v. J.S.V.F- AIR 2006 SC 2814
 - 12) E.P. Royappa v. State of Tamil Naidu- AIR 1974 SC 555
 - 13) Mohd. Sujat Ali v. Union of India – AIR 1974 SC 1631
 - 14) LIC of India v. Consumer Education Research Centre – AIR 1995 SC 1811
 - 15) Devdutt v. Union of India- AIR 2008 SC 2513
 - 16) Anjali Roy v. State of West Bengal – AIR 1952 Cal. 285
 - 17) Government of Andhra Pradesh v. P.B. Vijaykumar- AIR 1995 SC 1648
 - 18) Vijay Laxmi v. Punjab University- AIR 2003 SC 3331
 - 19) State of M.P. v. G.D. Trithani- AIR 2003 SC 2962
 - 20) Francis Coralie Mullin v. The Administrator, Union Territory of Delhi and Ors.- AIR 1978 SC 597
 - 21) Munn v. Illinois- 94 US 113 (1877)
 - 22) Bandhua Mukti Morcha v. Union of India- AIR 1984 SC 802
 - 23) Ram Jethmalani v. Union of India- (2011) 8 SCC 1
 - 24) State of Maharashtra v. Public Concern of Governance Trust- AIR 1989 SC 714
 - 25) India Young Lawyers’ Association and Ors v. State of Kerala- 2018 SCC OnLine Ker. 5802
 - 26) Chairman, Railway Board v. Chandrima Das- AIR 2000 SC 988
 - 27) Kharak Singh v. State of UP- AIR 1996 SC 125
 - 28) Govind v. State of Madhya Pradesh- AIR 1975 SC 1378
 - 29) Neera Mathur v. LIC- (1992) 1 SCC 286
 - 30) R. Rajgopalan v. State of Tamil Naidu- 1995 AIR 264
 - 31) State of Maharashtra v. Madhkar Narayan- AIR 1991 SC 207
 - 32) Vishakha v. State of Rajasthan- AIR 1997 SC 3011
 - 33) CESC Ltd.v. Subhash Chandra- (1992) 1 SCC 411
 - 34) ESI Corp. v. Francis De Costa- 1993 Supp(4) SCC 100
 - 35) Vincent Panikurlangara v. Union of India- 1997 AIR 990
 - 36) P. Rathinam v. Union of India- 1994 AIR 1844
 - 37) Maneka Gandhi v. Union of India- 1987 AIR 597
 - 38) Sadhuraman Bansal v. Pulin Behari Sarkar and Ors.- 1984 AIR 147

The secondary Sources referred for the research are as follows:

A) Websites

- 1) <http://www.yourarticlelibrary.com/marriage/hindu-marriage-aims-ideals-and-types/47617>
- 2) https://www.business-standard.com/article/current-affairs/why-criminalisation-of-marital-rape-is-still-a-distant-dream-in-india-118102900084_1.html
- 3) <https://www.indialegallive.com/viewpoint/marital-rape-its-all-about-respect-74354>
- 4) https://www.indialawjournal.org/archives/volume2/issue_2/article_by_priyanka.html
- 5) <https://harvardhrj.com/2019/01/marital-rape-a-non-criminalized-crime-in-india/>
- 6) <https://www.galgotiasuniversity.edu.in/pdfs/issue2.pdf>
- 7) <http://www.legalserviceindia.com/articles/art222.htm>
- 8) <https://www.latestlaws.com/articles/expanding-ever-evolving-article-21-of-the-constitution-of-india-right-to-life-personal-liberty/>
- 9) https://www.academia.edu/8025396/Article-14_of_Indian_constitution_a_analysis_-_Eshan_pandit_BA_hons_LLB_hons_4th_semester
- 10) <https://www.equalrightstrust.org/ertdocumentbank/Through%20the%20Looking%20Glass%20of%20Intersectionality%20Making%20Sense%20of%20Indian%20Discrimination%20Jurisprudence%20under%20Article%2015.pdf>
- 11) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2831288
- 12) https://www.researchgate.net/publication/301741183_New_Section_375_Indian_Penal_Code_IPC_Confusion_and_Controversies
- 13) <http://medind.nic.in/jal/t15/i4/jalt15i4p422.pdf>
- 14) <http://www.legalservicesindia.com/article/2500/Does-Section-375-of-IPC-Include-Marital-Rape.html>
- 15) <https://www.thehindu.com/news/national/sex-with-minor-wife-is-rape-says-supreme-court/article19838085.ece>
- 16) <https://indiankanoon.org/doc/623254/>
- 17) <https://ohrh.law.ox.ac.uk/the-supreme-court-of-india-reads-down-the-marital-rape-exception-a-partial-victory-for-womens-rights-advocates/>
- 18) <https://www.jagranjosh.com/current-affairs/section-375-of-ipc-what-is-it-1565761636-1>
- 19) <http://www.legalserviceindia.com/legal/article-958-whether-the-exception-ii-of-section-375-of-ipc-1860-constitutionally-valid-or-not.html>

B) Books:

- 1) Dr. Kailash Rai, The Constitutional Law of India (Central Law Publications) (Eleventh Edn. Reprint) 2015
- 2) Dr. J.N.Pandey, Constitutional Law of India (Central Law Agency) (Fifty-first Edn.) 2014

C) Database

- 1) www.indiankanoon.org

2) www.manupatrafast.com

3) www.lexisnexis.com