
HRISHIKESH SAHOO CASE: A STEP FORWARD TO VOICING MARITAL RAPE

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ABSTRACT

Marriage is a sacramental bond between two people and their families in India. Consent plays a significant role in marriage. Like consent is necessary for a valid marriage to take place, similarly, it is required for a marriage to survive. Non-consensual sex is an abusive act that takes away the mental and physical peace of the woman. Indian criminal laws recognize appropriate punishments for offenses against women but shockingly keeps marital rape outside the purview of offence of rape. This paper covers a sensitive issue about marital rape not being recognized as a crime in the Indian Penal Code, 1860. Marital rape means rape or sexual violence by a husband of his wife without the consent of the wife. India till now has not been able to acknowledge the brutality of rape which Indian wives face in their own house by their better halves. It is important to recognise women's right to bodily integrity and bodily autonomy but all we do is debate and debate about it. Further this paper tries to cover various rights which are available to women by virtue of articles 14 and 21 of the Indian constitution in Part III against marital rape. Despite of the fundamental rights being available to women and constitutional remedy under article 32 of the Indian Constitution, wives are not able to protect them against such sexual abuse. Only because of the Criminal law of India. When constitution prevails over the statutory laws then why does exception 2 of the section 376 of the Indian penal code 1860 still exists in the statutory book. This paper also attempts to cover the rights available to women in inhumane cases of Marital rape during the years and why now it is required to be clearly defined and criminalized under Indian Laws.

Introduction

Marital rape is the cohabitation of a person with one's own wife without her consent or against her will or by coercion. It is a form of sexual abuse committed against women. India is among the thirty-two countries such as Pakistan, China, Bangladesh, Haiti, Laos, etc. which fail to criminalize undesired and non-consensual sexual intercourse with one's own wife who has attained majority.

Constitutional safeguards against marital rape

Article 14 of the Indian Constitution

The right to equality is safeguarded by article 14 of the Indian constitution ensuring both equalities before the law as well as equal protection of them. Although it is a fundamental right enshrined in the Constitution of India, Indian criminal law discriminates against female victims who have been raped by their own husbands. Section 375 of the Indian Penal Code, 1860 in its exception 2¹, excludes sexual intercourse by a man with his own wife from the definition of rape.

In the 2017 case of *Independent Thought v. Union of India*², the Apex court gave a significant ruling in the history of the Indian judiciary which changed the age of women from fifteen to eighteen. It was held that despite the exception to marital rape under section 375 of the Indian Penal Code, sexual intercourse with a girl below the age of eighteen years is rape even if she has married with full heart and soul.

Article 21 of the Indian Constitution

Article 21 of the Indian Constitution gives the right to life and personal liberty to all persons except according to the procedure established by law. The Apex court-recognized right to privacy as a fundamental right in *K.S. Puttuswamy v. Union of India*³. It has been widely interpreted so to include the right to sexual autonomy, bodily integrity, and sexual privacy within itself. The nine-judge bench recognized decisional privacy in respect of intimate relations as a fundamental choice protected by the right to privacy.

¹ Sexual intercourse by a man with his wife, the wife not being under fifteen years of age, is not rape.

² *Independent Thought v. Union of India*, (2017) 10 SCC 800.

³ *K.S. Puttuswamy v. Union of India*, (2017) 10 SCC 1.

There has been a failure in the legal machinery to take notice of the sufferings of married women. Despite safeguards provided by the Constitution, the exception to the provision of section 375 of the Indian Penal Code 1860 continues to exist.

The criminalizing of the offense of marital rape was one of the recommendations of the Justice Verma Committee which was formed after the Nirbhaya gang rape⁴ in Delhi in 2013. The report stated that the law ought to specify that the marital bond between the perpetrator and victim is not protected against the crimes of rape. It was a progressive thought towards the issue which pokes the lawmakers to remake laws according to the changing society. However, it was not given much weightage and as a consequence, it was not a part of the Criminal Law Amendment Act, 2013. Parliament chose not to discard the marital rape exception and rather proposed extra-legal solutions such as reconciliation to solve issues between the couple through members of the household.

After years of disregard for the issue of marital rape, the time has arrived when Government has tried to touch on such a sensitive topic before the Parliament. In January 2022, the Central Government gave its opinion that criminalizing marital rape would defeat the marriage institution and become easier for the men to harass their wives. There is a continuous opposition to it by the Union Government with Smriti Irani as Union Minister for women and child development commenting recently before the parliament not to condemn every marriage as a violent marriage and every man as a rapist.

Earlier Decisions

In *Nimeshbhai Bharatbhai Desai v. State of Gujarat*⁵, wife accused the husband of coercing her to have carnal, oral, and unnatural sex and mentally torturing her. It was argued that it had violated her dignity and bodily integrity by virtue of articles 14 and 21 of the Indian Constitution and therefore the husband was amenable to punishment under section 376 and section 377 of the Code, 1860. The bench held that according to the law, marital rape is just a concept still not recognizable by the statute. The wife can initiate proceedings against the accused under section 377 of the Indian Penal Code 1860 but all other sexual perversions apart from buggery, sodomy, and bestiality cannot fall within the ambit of this section. Justice J.B Pardiwala stressed that it is time to discard the notion of implied consent in marriage.

4 Mukesh and Anrs. V. NCT Delhi, 4 (2017) 6 SCC 1.

5 *Nimeshbhai Bharatbhai Desai v. State of Gujarat*, 5 (2018) SCC OnLine Guj 732, [128] 65

In *Dilip Pandey v. State of Chhattisgarh*⁶, the bench of Justice N.K. Chandravanshi noted that cohabitation by the husband of his legally wedded wife not being below the age of eighteen years does not constitute rape. Therefore, the court dropped charges under section 376 of the Indian Penal Code, 1860 considering it against the law mentioned in the Code.

Recent decision supporting marital rape victim

*Hrishikesh Sahoo v. State of Karnataka*⁷

On the 23rd day of March, 2022, there came a pivotal moment where a single-judge bench of Justice M Nagaprasanna in *Hrishikesh Sahoo v. State of Karnataka* passed an order recognizing marital rape exception to be violative of the right to equality.

A complaint was filed against the husband on the 21st day of March of 2017 for the offenses punishable under Sections 506, 498A, 323, 377 of the Indian Penal Code, 1860, and Section 10 of the Protection of Children from Sexual Offences Act, 2012. A charge sheet was filed after the investigation by the police in which the accused was charged with offenses punishable under Sections 498A, 376, 354, 506 of the IPC and Sections 5(m) and (l) read with Section 6 of the Protection of Children from Sexual Offences Act, 2012.

The court found that the charge sheet against the accused depicted details of his lust to have unnatural sex with his wife every time for which he used to force his wife and torture her. Also, he had injured their daughter. The husband's petition was rejected by the Karnataka High Court.

It was observed by the court that Exception 2 of section 375 of the Indian Penal Code 1860 cannot be absolute so as to give a license to the husband to commit such a brutal crime. Also, it was said that this exemption to marital rape is regressive in nature as it confers special privilege to husbands over their wife's body, mind and soul.

The Constitution of India is the paramount source of law in the country which depicts equality but the Indian Penal code practices discrimination. Every other man is punished for offenses like rape under sections 375, 376, 376A, 376B, 376C, 376D, and 376D, etc. against women. But a husband is not punished for rape against his own wife because of the age-old thought that

⁶ *Dilip Pandey v. State of Chhattisgarh*, CRR/117/2021.

⁷ *Hrishikesh Sahoo v. State of Karnataka*, CRR/117/2021.

husbands can rule over their wives. It is a regressive thought of treating women as subordinate to their husbands thereby against the right to equality.

The bench said, “The exemption of the husband on committal of such assault/rape cannot be absolute, as no exemption in law can be so absolute that it becomes a license for the commission of a crime against society.” The Court further said that “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”. The court said “Institution of marriage does not intend to confer any special privilege to men. If it gives punishment to a man, it should give it to the man being a husband.”

The court mentioned that there exists many American States, Australian States, New Zealand, Israel, France, Soviet Union, Sweden, Denmark, Canada, Norway, Poland, Czechoslovakia, and several others who consider marital rape illegal. The United Kingdom, through which we have derived various laws, has also deleted the exception pursuant to a judgment in the year 1991 rendered by the House of Lords in *R V. R*⁸. Furthermore, the court relied on various provisions of the law such as the Immoral Traffic (prevention) act, 1956, Dowry Prohibition Act, 1961, and articles 14,15,16, 21, 23, 39, 243D of the Indian Constitution.

Court appealed to the Legislature to consider the issue of marital rape offense or the exception to be deleted from the statute. It requests the legislature to look into the plight of the women being brutally treated by their own husbands. The complaint by one gives voice to the complaint of other women tolerating the brutal acts of their husbands for years. Dropping the charges of rape would do grave injustice to wives who find the courage to knock on the doors of the court for their right to bodily autonomy. The continuance of the archaic and preconceived notion would lead to grave consequences on the mental health of women. It would rip the heart of women.

Constitution treats women and men equally and considers marriage as a bond between two equals. The Indian Penal Code 1860 was enacted during the colonial British rule and now when they have recognized marital rape as a crime then why won't we. Why do women get a certain status and enjoy certain rights and wives get a different status?

8 R V. R, 3 WLR 767.

The criminalization of marital rape has always received opposition even from renowned judges like the Former Chief Justice of India Dipak Misra who holds an opinion that it would destroy the institution of matrimony.

Recognizing it as a crime has never been aimed at destroying the sacramental bond or giving a weapon in the hands of women to use against husbands. Rather it is all about respecting females and their right to say no to sexual intercourse. The aim is to destroy the ideology of people that women are husband's property and thus, women have no say over their bodies.

At present, RIT Foundation v. Union of India⁹ is dealing with the question of whether an exception to marital rape is constitutional or not. The case was pending before the division bench of Delhi High court till 11th of May, 2022. A split verdict was given with Justice Ravi Shikdher holding exemption 2 of section 376 of the Indian Penal Code, 1860 as unconstitutional and Justice Hari Shankar giving a dissenting opinion considering marital rape as no crime. A certificate of appeal to Supreme court has been granted under article 133 of the Indian Constitution as the case involves substantial question of law. It seeks justice for thousands of voiceless married women who have been suffering from sexual abuse by their own husbands during these years.

The Karnataka High Court judgment is the latest reminder that the exception to marital rape under section 375 of the Indian Penal Code 1860 needs to be deleted from our statute books as soon as possible. It has given voice to such victims who are afraid to come forward and share their pain before the Indian courts.

⁹ RIT Foundation v. Union of India, WRIT PETITION (C) NO. 284/2015.