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## MARITAL RAPE CANNOT BE PENALIZED- IT IS A VALID GROUND TO CLAIM DIVORCE

*-Chidige Saivarshitha, student, Damodaram Sanjivayya National Law University*

### **Introduction:**

All sexual assault kinds having nonconsensual contact with a woman are included in the definition of rape specified in Section 375 of the Indian Penal Code. Exception 2 to Section 375, on the other hand, precludes unwilling sexual contact between a husband and a wife over the age of 15 from the definition of “rape” under Section 375, and so protects such actions from prosecution. Prior to the Kerala High Court’s decision, a wife was presumed to give her husband permanent consent to have sex with her once they married. While practically every country in the world recognizes unwanted sexual contact between a husband and a wife as a crime, India is one of the 36 countries that are yet to criminalize marital rape.<sup>1</sup>

Before four years, Committee headed by Justice J.S. Verma recommended to make marital rape a crime quoting that the ‘a rapist remains a rapist and marriage with the victim does not convert him into a non-rapist.’

And finally, Kerala High court grabbed the honor by delivering as ‘Marital rape is a ground for divorce’ though did not talk about the validity of the exception.<sup>2</sup>

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<sup>1</sup> *Marital rape in India: 36 countries where marital rape is not a crime*, India Today(Mar.12,2016), <https://www.indiatoday.in/education-today/gk-current-affairs/story/marital-rape-312955-2016-03-12>

<sup>2</sup> Sarthak Makkar, *Marital Rape: A Non-criminalized Crime in India*, Harvard Human Rights Journal, <https://harvardhrj.com/2019/01/marital-rape-a-non-criminalized-crime-in-india/>

## **‘Marital Rape as a Ground for Divorce’- Kerala High Court:**

### **Facts of the Case:**

The couple married in February 1995 and has 2 children. The appellant is a licensed medical doctor who followed in real estate and construction that failed due to the appellant’s irresponsible lifestyle.

He sought financial aid from the respondent’s father (a wealthy businessman) on a regular basis, and he mentally and physically assaulted the respondent. On this basis, a divorce petition was lodged based on the persistent abuse and supply of money.

She had testified that he had mistreated her and conducted forcible sex against her even while she was pregnant, and that she had been exposed to the worst sort of sexual depravity and unnatural intercourse against her.<sup>3</sup>

### **Reasoning and Judgment of the Case:**

The Division Bench of Justice A. Muhamed Mustaque and Justice Kauser Edappagath said that the main reason for marital rape is that when the husband is of the opinion that the body of his wife solely belongs to him and he is under a presumption that he can commit sexual acts on his wife even without her will. This subordination of women under men is an Anglo-American tradition derived from Feudal Norman custom.

Court also discussed about the significance of ‘Autonomy and marital privacy’ of an individual and the possession of that right by husband as an invaluable right. And also in the Normal Conjugal life, rude behavior of husband towards the desire of money or sex is not reasonable.

Therefore, it dismissed the appeal and upheld the family court court’s decision of granting divorce.<sup>4</sup>

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<sup>3</sup> Neethu Regukumar, *Marital Rape, Although not penalized in India, is good ground for divorce: Kerala HC*, News 18 (Aug.6,2021), <https://www.news18.com/news/india/marital-rape-although-not-penalised-in-india-is-good-ground-for-divorce-kerala-high-court-4053440.html>

<sup>4</sup> Jelsyna Chacko, *Though marital rape cannot be penalized it is a valid ground to claim divorce: Kerala High Court*, Bar and Bench(Aug.06,2021), <https://www.barandbench.com/news/marital-rape-ground-for-divorce-kerala-high-court>

### **Distinct views on Marital Rape:**

After the judgment of Kerala high court, various contradictory views have arisen.

Maharashtra court gave an anticipatory bail to a man, saying that performing forcible sex with his wife was not an “illegal thing”.

Making wife rape punishable, according to the Gujarat High Court, will eliminate the damaging attitudes that encourage marital rape.<sup>5</sup>

### **Analysis and Perspectives of Other Countries:**

In USA, as of now, approximately 10-14% i.e., one third of married women are raped by their husbands. Today, marital rape is explicitly criminalized (illegal in all 50 US states).

In Finland, the law criminalizes spousal rape, and the government adopted the law in 1994.<sup>6</sup>

In Germany, the law criminalizes spousal rape, and the “Marital exemption” was removed by a revised law in 1997.<sup>7</sup>

In Qatar, Article 279 of the Penal Code criminalizes rape. Spousal rape is not explicitly criminalized, but a woman may file a complaint.<sup>8</sup>

The Soviet Union itself removed “marital exemption” from its rape laws in 1922.<sup>9</sup>

From the above analysis, it is clear that many big countries have taken the step to criminalize marital rape. But India criminalized marital rape when the rape affects the children below the age of eighteen years. Making age as the barrier is definitely a downside on the part of India. The information given further makes it clear about the situation in India.

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<sup>5</sup> Krishnada Rajagopal, *Courts in the country continue to differ on marital rape*, THE HINDHU, Aug.15,2021, at 10

<sup>6</sup> *Minister of Justice, Ms Tuija Brax at the Regional seminar: Campaign to Combat Violence against Women, including domestic violence*, Ministry of Justice, Finland(Oct.9,2007), <https://archive.ph/20130217121106/http://www.om.fi/en/Etusivu/1191397296498>

<sup>7</sup> *33<sup>rd</sup> Criminal Law Amendment act*, DIP, <https://dip.bundestag.de/vorgang/.../125463>

<sup>8</sup> *Qatar Bureau of democracy, human rights, and labor*, U.S. Department of state(Apr.20,2018), <https://web.archive.org/web/20180422124935/https://www.state.gov/j/drl/rls/hrrpt/2017/nea/277261.htm>

<sup>9</sup> Wilma Rule, Norma C. Noonan, *Russian Women in Politics and Society*, <https://archive.org/details/russianwomenpoli00noon/mode/2up>

### Case Laws Upholding Women's Rights:

In *Joseph Shine v. Union of India*<sup>10</sup>, It is undeniable that women are viewed as subordinate people to men, as the law states that there is no crime if the guy is complicit or consents. This considers the woman as a chattel.

In *Nimeshbhai Bharatbhai Desai v. State of Gujarat*<sup>11</sup>, it was ruled that a wife isn't a chattel, and a husband having sexual relations with his wife is not simply using a property.<sup>12</sup>

In a landmark judgment *Independent Thought v. Union of India*<sup>13</sup>, unwanted sexual intercourse with a wife between the ages of fifteen and eighteen was made illegal by the Supreme Court.

In *Suchita Srivastava v. Chandigarh Administration*<sup>14</sup>, It was decided that women have the right to reject sexual intercourse, and that rape is a crime not just against the victim, as well as against society.

In *State of Punjab v. Gurmit Singh*<sup>15</sup>, the court opined that "a murderer destroys that physical body of his victim; a rapist degrades the very soul of the helpless female."

### Marital Rape: Against Legal & Constitutional Rights:

#### Violation of Article 14 of the Constitution of India:

The Exception allows married women to be victimized only because of their marriage status, while unmarried women are protected from the same offences.

In *Budhan Choudhary v. State of Bihar*<sup>16</sup> and *State of West Bengal v. Anwar Ali Sarkar*<sup>17</sup>, the Supreme Court ruled that under Article 14 of the Constitution must pass a reasonableness test, with the classification passing only if it has a rational connection to the goal of the act.

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<sup>10</sup> 2018 SCC OnLine SC 1676

<sup>11</sup> 2018 SCC OnLine Guj 732

<sup>12</sup> Saba, *Marital Rape: A husband cannot be permitted to treat his wife like a chattel and violated her dignity*, SCC Online(Apr.18,2018), <https://www.sconline.com/blog/post/tag/marital-rape/>

<sup>13</sup> (2013) 382 SCC (2017)

<sup>14</sup> (2009) 9 SCC 1

<sup>15</sup> 1996 SCC (2) 384

<sup>16</sup> AIR (1955) SC 191 (India)

<sup>17</sup> AIR (1952) SC 75 (India)

However, Exception 2 defeats the objective of Section 375, which is to protect the women and penalize those who commit rape. In Simple terms, whether a woman is married or single, the repercussions of rape are same.

As no rational link can be established between the categorization formed by the Exception and the Act's underlying goal, it fails to meet the reasonableness test and so undermines Article 14 of the Constitution.<sup>18</sup>

### **Section 375 of IPC:**

The IPC's Section 375 was to protect women and punish those who commit the heinous act of rape.

Precluding husbands from punishment runs counter to that goal, because the penalties of rape are same whether woman is married or not. Also, as married women are legally and financially bound to their spouses, it is difficult for them to flee violent situations at home.

In *RTI Foundation v. Union of India*<sup>19</sup>, the Central Government argued that criminalizing marital rape would jeopardize the 'marriage' and Exception 2 would be ineffective because a man's "rape" under Section 375 of the IPC can't be same in the marital rape context. Then, sexual actions between a man and his own wife are considered marital rape, wife being the sole judge of marital rape.<sup>20</sup>

### **Violation of Article 21:**

The Supreme Court interpreted Article 21 that include, among other things, "the rights to health, privacy, dignity, safe living conditions, and safe environment."

In the *State of Karnataka v. Krishnappa*<sup>21</sup>, the Supreme Court also ruled that non-consensual sexual activity constitutes physical and/or sexual abuse.

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<sup>18</sup> Supra Note.4

<sup>19</sup> W.P. (C) No.284/2015 (India)

<sup>20</sup> Varun Kumar, *Does Section 375 of IPC include Marital Rape*, Legal Services India, <http://www.legalservicesindia.com/article/2500/Does-Section-375-of-IPC-Include-Marital-Rape.html><http://www.legalservicesindia.com/article/2500/Does-Section-375-of-IPC-Include-Marital-Rape.html>

<sup>21</sup> 2000 CriLJ 1793

In *Justice K.S. Puttuswamy (Retd.) v. Union of India*<sup>22</sup>, upheld the right to privacy as the basic right that involves “decisional privacy,” which is defined as “the ability to make intimate decisions about one’s sexual or procreative nature, as well as decisions about intimate relations.”

In *Kartar Singh v state of Punjab*<sup>23</sup> apex court held that the Article 21 needs procedure of Natural Justice for being “right, just, and fair,” not arbitrary, whimsical, or harsh. However, it is incorrect and illegal to not criminalize marital rape on the basis of an antiquated tradition.

In *Bodhisattwa Gautam v. Subhra Chakraborty*<sup>24</sup>, the Supreme Court ruled that rape is a violation of article 21 since it is a crime against fundamental human rights and an infringement of the victim’s right to life and dignity that applies same to marital rape.

The Apex court in *State of Maharashtra v. Madhukar Narayan Mardikar*<sup>25</sup> opined that no one has the authority to infringe on women Rights to sexual privacy. Even a prostitute has the freedom to refuse sexual relations.

In *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*<sup>26</sup> under Article 21, women have right to live with human dignity and when an Indian woman succumbs to her husband’s lust, this component is violated utilizing the Section 375 of the IPC exception.<sup>27</sup>

### **Suggestions and Conclusion:**

It is suggestible to make the marital rape as a crime. Many countries have followed it and got succeeded. As India is one among the most traditional nations, it is stepping back to make Marital rape as a crime though many organizations, women and welfare societies are agitating.

Finally, it can be concluded that the due respect to women is gained by the Judgment of Kerala High court. Though, the exception 2 of Section 375 of IPC is not completely looked into, a decent path was shown to the women who were suffering from marital rape. Besides this, husbands’ cruel activities towards their wives will decrease.

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<sup>22</sup> AIR 2017 SC 4161

<sup>23</sup> 1961 AIR 1787

<sup>24</sup> 1996 AIR 922

<sup>25</sup> AIR 1991 SC 207

<sup>26</sup> 1981 AIR 746

<sup>27</sup> Gazala Praveen, “Marital rape exclusion clause”– A gross transgression of Article 14, 21 of Indian Constitution – A critical analysis, Ipleaders(Jul.8,2019), <https://blog.ipleaders.in/marital-rape-ipleaders/>