



INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed Edition :

www.ijlra.com

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume 2 Issue 7 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner whatsoever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis

IJLRA

EDITORIAL TEAM

EDITORS

Megha Middha



Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshmanagarh, Sikar

Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmanagarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society

Dr. Samrat Datta

Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board



Dr. Namita Jain



Head & Associate Professor

School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC -NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.

Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India. India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi.(2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020). Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019

Mrs.S.Kalpana

Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8Articles in various reputed Law Journals. Conducted 1Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.



Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

ABOUT US

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

THE CONSTITUTIONAL VALIDITY OF THE SECOND EXCEPTION TO RAPE.

AUTHORED BY - IPSHA SHRIVASTAVA

ABSTRACT

This paper analyses the need for striking down the provision of the second exception to rape. This provision has already been challenged in various cases in the Indian judicial system and the need to provide for the penalisation of the offence of marital rape. The test of the validity of such a provision in context of fundamental rights has been examined and the patriarchal mindset behind not being amending such a provision has been criticized. A law or provision which is in violation of fundamental rights is justified to be struck down beyond any doubt. Laws are made for a social cause to benefit the people and deter someone from committing any offence. Women are equally an important part of the society, existence of both men and women are necessary for the society. In such a situation, it is necessary that even people with liberal thoughts start valuing the rights of women which are fundamental to their intellectual and physical well being. Social morality will not exist in subservience on the part of women solely. Thus this paper is a further analysis of these thoughts which tries at best to defend every argument against amending or striking down such provision.

Keywords: Marital rape, sexual intercourse, constitutional validity, consent, social morality, dignity.

INTRODUCTION

The constitutional validity of this provision had already been in question and been a topic for contentions and arguments. The second exception to rape which states sexual intercourse by a man upon his own wife under 15 years of age do not classifies as rape. This has been changed in the case of Independent Thought vs. Union of India¹ where the court held that non consensual sexual activity between the ages of 15 and 18 years with or without the consent of the girl, immaterial of the girl child being his wife or not, is illegal. Until this judgment, penetrative activity with a married girl

¹ Independent Thought vs. Union of India (2017) 10 SCC 800.

between the age of 15 and 18 years was not considered a crime. Justice Deepak Gupta gave his views where he said that the makes it is probably obvious that anyone under the age of 18 years is a child as in this age they are still developing and are not capable of understanding the repercussions of his or her actions .Therefore, under Exception 2 of Section 375² raping a married girl between the ages of 15 and 18 is a felony under Section 5(n) of the POCSO rather than the IPC because it constitutes aggravated penetrating sexual assault, which carries a penalty under Section 6³. This shows that once already the constitutional validity of the second exception to Section 375 of IPC has been held upon which brought upon amendments in this provision. This exception was held arbitrary in regards to protect the interests of the girl child and safeguard their right to bodily autonomy. Even after this amendment, the provision has been in question due to its unfair application over a certain class of people, married women above the age of 18 years. Despite, this provision has declared any sexual intercourse by a man upon a girl below the age of 18 years as illegal immaterial of married or not, it do not provide any immunity to the married women against such forced sexual intercourse. Rather, it works as an exception to rape and defends a man who had forced sexual intercourse with his married spouse. The provision of rape was created because it disregarded sexual intercourse by a man upon women without her consent. This was regarded as a social offence because men tied with women shall be loyal to her and latter should devote her body only to the men with whom her marriage will be affixed.

Marriage is viewed as being the same as consent.The body of a woman does not belong to a husband, and marriage is a social arrangement rather than a general licence for sex. Only a woman has the authority to decide whether she wishes to participate in sexual activity on her own or accepts her husband's demands for it. When there is no permission, the same offence is criminalised, but if the same offence is committed against a married woman, immunity is granted.

Do married women lose her right to consent to sexual intercourse upon being married?

The act of engaging in sexual activity like this without the wife's consent has recently come to be characterised as marital rape. Marital rape occurs regardless of the kind of marriage, age, social standing, race, or ethnicity. Marital rape occurs when a man has "unwanted intercourse" with his wife, whether by physical violence, verbal abuse, or when she is unable to consent.The phrase "unwanted

² Indian Penal Code, 1860, §375.

³ Protection of Children from Sexual Offences Act, 2012, §6.

intercourse" refers to any type of penetration (whether oral, vaginal, or anal) carried out against her will or without her agreement. Cases of unwanted and violent sexual intercourse have been up in the recent years, which have particularly raise up this concern. Women are being battered using force or threat and they are being forced to be submissive towards men. But tolerance must not to be an extent that it becomes traumatic and life threatening. The state cannot disregard this issue in the name of degradation of marital relations and family institutions falling in the private sphere. There are 34 countries which have not criminalized marital rape and India is one of them. This provision works as an exception having been justified by Lord Macaulay to protect the matrimonial or conjugal rights of a husband. There have been active parliamentary discussions and debates regarding the removal of this provision. Such criminalization has not taken place in India. As Englishmen established Indian laws while they were in power in India. The majority of the laws are therefore based on British standards. Women were not treated equally to males back then, and married women did not have their own independent legal status. So, after marriage, a woman is being viewed as a chattel owned by a man and the existence of women is being decided by men. In this predominantly male community, marital rape was seldom understood or acknowledged as a serious crime. This shows that even if is known that this provision has anti colonial origins and is violative of women's rights but as such nothing has been done in this regard to protect the victims of such violence.

The Indian Constitution's Article's 14 and 21 both forbid this provision, hence it must be repealed. The argument behind are that women have bodily autonomy and her husband cannot force his will on him. Such a provision violates a woman's dignity as specified under Article 21 and unfairly discriminates against married women as ever person has the right to be treated with equality and there must be equal application of laws. It can be compared to rape just being the status of married cannot immune the husband from such charges.

The Supreme Court ruled in the case of Bodhsattwa Gautam vs. Subhra Chakraborty that rape is a crime against not just the victim's person but also the entire society. It completely devastates a woman's psychology, causes her to suffer from significant emotional and physical trauma, and makes her more susceptible to various illnesses. As a result, it violates Article 21 of the Constitution. The right to health is emphasised in Article 21 of the Indian Constitution. Since marital rape impairs a woman's physical and mental health and causes her significant psychological and bodily injury at her husband's direction, decriminalising it has the effect of violating this fundamental right. Due to its

discrimination against married and unmarried women, this clause is in violation of Article 14 of the Indian Constitution, which upholds the rule of law.

In the case of *Chaudhary vs. State of Bihar*⁴, it was held that when any classification is made u/a 14 of the Constitution, only when a logical connection is made between the classification and the object it seeks to accomplish is discovered does a test of reasonability take place and is verified. Any reasonableness test fails to find this classification of women as justifiable with the exception of rape. This law goes against the intent of the law and unfairly makes a distinction for the sake of such patriarchal standards.

On one side the provision protects women from unwanted sexual activity but on the other side renders permission to force upon married women, such provision does not serve any social cause. Social morality exists when the people act emphatically and take into account the feelings of others but when the vulnerable groups are being disrespected and disregarded, the constitutional values comes into motion. Ambedkar has defined Constitutional morality as the Effective coordination of the numerous organisations working to achieve their goals at all costs, who may have competing objectives, and administrative collaboration to handle those conflicts amicably without any confrontation. Social morality must not prevail in such a manner that it violates the fundamental rights of people.

A woman is usually forced to be silent or adjust with what is going around with her. But adjustment must only be tolerable to an extent. She should not adjust when it becomes an atrocity for her. A man is barred to force sex upon a woman which can be rape. Similarly a married woman cannot be forced upon by his husband. The status of being a husband should not give him immunity of such grave violence. There has been disappointment that the wife every time she feels that she is being forced, she shall complain and regret the next day. Rape violations being graver can affect the family but it can be more appropriate if the penal laws are not so strict and carry compensation. If in marital rape it affects the family as a whole the same applies to an offender who commits rape. Everyone has a family to feed and not only a married man. The argument as agreed by people against criminalizing this provision, that a charge under this provision will be affecting the whole family does not hold relevance in penalizing this offence.

⁴ *Chaudhary vs. State of Bihar*(1974) AIR 1822.

There have also been concerns regarding the possibility that women may abuse any such option. Every law may be broken, but there is no justification for not passing new legislation. Several people have been wrongly charged with murder. Does this imply that murder shouldn't be made a crime? A legal tribunal has been established to consider any accusations and the supporting documentation before determining whether the defendant is guilty. Why not marital rape if we have adopted this method for all other types of crime? The state cannot disregard this issue in the name of degradation of marital relations and family institutions falling in the private sphere. Justice DY Chandrachud made an important observation in *Navtej Singh Johar vs. Union of India*⁵ where he pointed out that regardless of whether these realms are considered to be private or public, it is the responsibility of this court to dispel these myths and advance society. The judicial system has undergone significant reform, but there is one area that has not changed. The family is that element. Marriage is a fundamental social institution, and women are shackled to a life of inequality by established patriarchal norms and romantic paternalism. The differentiation between the public and private spheres loses significance when it comes to the protection of constitutional rights. So, even the most private aspects of marriage relationships are subject to constitutional examination.

In *Nimesh Bhai Bharatbhai Desai v. State of Gujarat*⁶, the court gave the observation that husbands are not allowed to forcibly without their wife's consent just because of their marital status.

In India, where there has been no recognition of this crime, it's very shameful that women were being never heard. Even where such grave offences are being inflicted upon women, the judicial system never tried to examine the provision and is more convinced of the side of arguments based on social morality. Until this provision is erased or any other alternative is placed, it is cause of concern for any young girl going to be married. The justice system of our country is not able to do justice even in the cases, where the most ideal fundamental rights are being violated. This situation seems to be really a blindfold in the eyes of lady justice and the two tray scale not in a balanced state.

⁵ AIR (2018) SC 4321

⁶ *Nimesh Bhai Bharatbhai Desai v. State of Gujarat* (2018) SCC OnLine Guj 732, 104 64 .

CONCLUSION:

It is necessary to follow the constitutional values which are up and above any social values, it is the supreme law of the land. The provision without any cause knowingly discriminates against married women. The consent of married women to sexual intercourse is as good as no consent. If the provision of rape penalizes a person to force sexual intercourse to any women without their consent, the same must be applied to in case of married women, after all everything that matters is consent. The lawmakers had never intended to push married women to such violence and non-consensual sexual activity. This needs to be answered that, are the married women really losing their right to consent to sexual intercourse after being married. Even after so many decades of our independence, holding thoughts of British era of women being a property and chattel of men is not fair. The laws are ever evolving, while it was drafted by the constituent assembly, provided a certain amount of flexibility so that the laws could be changed with the needs and situations of the society. While a husband could be punished for beating and assaulting her wife, but not for raping her. Rape is a graver offence than other offences relating to women.

In this view, the Supreme Court⁷ has recently passed a judgment where it included abortion in case of rape which also includes marital rape. This can be considered a progressive step in this regard. If the Supreme Court can be of such a view then Parliament can also take some positive step in this. If such a provision does not respect the rights of already a vulnerable class of people, then it must be amended or the abolished in an expeditious way. Any classification must be done on the basis of logical connection and it must sought to achieve the goal intended.

⁷ SC's Observations 'Welcome' But Marital Rape Still Not Illegal In India, Here Are Countries Where It Is, Outlook, Sept 30, 2022.