ISSN 2582-0311 (Print)
ISSN 2582-0303 (Online)

Volume 4
Issue I

August 2022

VIPS STUDENT LAW REVIEW

VIVEKANANDA INSTITUTE OF PROFESSIONAL STUDIES - TECHNICAL CAMPUS

ISO 9001:2015 Certified Institution
(Affiliated to GGSIP University & Approved by BCI & AICTE)
The Institute is NAAC Accredited 'A' Grade, recognized by UGC under section 2(f)
& NBA Accredited for MCA Programme

Volume 4, Issue I August, 2022 ISSN 2582-0311 (Print)
ISSN 2582-0303 (Online)

TABLE OF CONTENTS

S. No. Title of the Paper/ Author **Page No.**

1. Negative' And 'Positive' Obligations of The State – The Journey Thus Far
J. Ravindran 1

2. Clinical Legal Education and The Role of Legal Aid Clinics In India
Navjeet Sidhu Kundal 24

3. Section 115 Of Mental Healthcare Act, 2017: A Lifeline to Suicide Attempters
Deepa Kaushik 35

4. Convention On the Status of Refugees 1951: More Eurocentric Than Universal
Aroup Raton Shaha 45

5. Principal-to-principal relationship with respect to Automobile manufacturer and dealer in consumer dispute cases
Hansie Singh Nagpal 59

6. Domestic Violence During Pandemic: A Socio-Legal Analysis
Nivedita Chaudhary 70

STUDENTS SECTION

7. From Rio to Paris: What Have Developing Countries Really Achieved?
Niranjan E.V. & R. Divya Meenakshi 87

8. Intellectual Property Right: The Asset of New India
Prarthna R. Markod 100

9. The Concept of Judicial Review as A Process – An Analytical Study
Riya Jacob 119

10. Third-Party Funding in International Arbitration: The Need for India to Step It Up?
Arushi Anand 128

11. Explication On the Concept of Crowdfunding in The Indian Legal System
Saket Agarwal and Charu Agarwal 139

12. Need For Formalisation of Gig Workers: Towards A Paradigm Shift in Working Model
Kinjal Keya and Aditya Pratap Singh 151

13. The Competition Commission of India's Attitude Towards Cross Border Mergers
Ahan Gadkari 166

14. Rising religious majoritarianism in India - the impediment to minorities rights and representation
Divyanshu Dubey 184

15. Racial discrimination in sports activity
Yuvraj Sharma 201

16. Evolving Interpretations of Legal Provisions Of 'Intestate Succession' In Light of Judicial Precedents
Samrat Bandopadhyay 214

CASE COMMENTS

17. Married women: Less than Humans? RIT Foundation v. Union of India
Yashvi Aswani 222

MARRIED WOMEN – LESS THAN HUMANS?

Case Comment - RIT Foundation V. Union of India*

Yashvi Aswani**

VIPS Student Law Review
August 2022, Vol. 4, Issue 1, 222-228
ISSN 2582-0311 (Print)
ISSN 2582-0303 (Online)
© Vivekananda Institute of Professional Studies
https://vslls.vips.edu/vslr/

Abstract

Section 375 defines the offence of rape and under what circumstances can the sexual act be termed as rape. Exception 2 to Section 375 states that sexual intercourse by a man with his own wife, not under the age of 15 does not amount to rape. Thereby, creating the issue of marital rape. The issue revolving marital rape is that when a wife does not give her consent to have sexual intercourse with her husband, and the husband still has sexual intercourse with her, it does not amount to rape. Neither can the wife initiate a criminal proceeding against the husband for the same. This paper highlights the submissions and arguments given for and against the criminalization of marital rape. It emphasizes on the Hon'ble judges' point of view while adjudicating the case and criminalization of marital rape in other jurisdictions. This paper also analyses the effect of the exception of marital rape on women and the plight of women who are not able to defend themselves against this statutory protection given to husbands. The observations and recommendations of the J.S. Verma committee regarding the legality of marital rape is also discussed. The rights of women and the discrimination towards married women is the controversy revolving around this exception. In the case of RIT Foundation v. Union of India, petitions have prayed for striking down of this exception and criminalizing marital rape.

Keywords: *Marital rape, discrimination, women, legality of marital rape.*

* W.P.(C) 284/2015 & CM Nos.54525-26/2018

** Student, 5th year, Vivekananda School of Law and Legal Studies, Vivekananda Institute of Professional Studies, New Delhi, India

> *"A woman is human. She is not better, wiser, stronger, more intelligent, more creative, or more responsible than a man. Likewise, she is never less. Equality is a given. A woman is human."*
>
> *— Vera Nazarian, The Perpetual Calendar of Inspiration*

The Constitution of India, often called the mother of all laws, has the word "equality" embedded in its Preamble. Equality is one of the core values of the nation which in no case can be compromised. Numerous enactments and statutes have been constructed and amended to do justice to the word "equality" in our constitution. Among others acts to promote gender equality, acts like The Pre-Natal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994, Protection of Women from Domestic violence Act, 2005, The Indecent Representation of Women (Prohibition) Act, 1986 and Dowry Prohibition Act, 1961 are doing remarkably well. But when the question comes as to where we as a nation are lacking to protect our women, the answer that first comes to one's mind is criminalization of marital rape.

Delhi High Court passed a split verdict on criminalizing marital rape. PILs challenging the exception 2 of Section 375 IPC were filed.[1] The exception states that sexual intercourse or sexual acts performed by a man on his own wife will not amount to rape is the wife is over 15 years of age.

This exception arises out of an archaic perception of the institution of marriage which regards that marriage is a contract and that the wife gives up herself to the husband with an irrevocable consent for such sexual acts. Marital rape is not a novel point of issue, it is a long-standing concern which roots from the outdated belief that men are expected to initiate sex and therefore, they are the ones in command of the woman's body.

Since India was a British Colony for about 200 years and the laws in India were heavily colored by the English laws. The Doctrine of Coverture is a concept which was applied in common law. The exception was drafted under the influence of this doctrine which regarded man and a woman in a marriage as one entity and the legal existence of the women ceases to exist. The concept of the wife giving her consent in perpetuity is not ideal and the irrevocability of it is a grave violation of her rights.

Criminal Jurisprudence of India has undergone massive changes and certain landmark judgments have given it an entirely new shape. In the case *Tukaram v. State of Maharashtra*,

1 Indian Penal Code, 1860 S. 375.

the judgment acquitted the rapists and received a lot of criticism[2]. The court had observed that since no signs of resistance or injury were present on the body of the victim, her consent was voluntary in nature. After this judgment, in 1983, the Criminal Law (Amendment) Act was passed.[3] One of the most significant changes brought by this amendment was the insertion of section 114-A in the Indian Evidence Act, 1872.[4] Under Section 114-A, the burden of proof shifts to the accused to prove that the prosecutrix did voluntarily consent to the sexual acts. Given that the prosecutrix must depose that she did not give him the consent for sexual intercourse. This revolutionary presumption is in support of the prosecutrix but married women get no such aid. The concept of implied consent when it comes to sexual intercourse and sexual acts in the institution of marriage disintegrates the liberty of a woman. There is a distressing violation of the fundamental rights of married women.

The High Court of Delhi recently in the case of *RIT Foundation v. Union of India*[5], observed that it is exclusively the role of the legislature to pronounce whether non-consensual sex within marriage ought to be punished or not. The Court further expressed that it is only concerned with the constitutional validity of the impugned Exception 2 to Section 375 IPC. The Hon'ble Court clarifies that if the said act of marital rape is criminal in nature and should be punishable, there is still no ground to strike down the statutory provision which makes it not punishable. It is of the view that striking down of said provision would entirely obliterate the distinction that exists between the legislature and the judiciary.

The question was put before the Hon'ble High Court of Delhi, whether the effect of the exception would nullify or compromise the right of the wife to refuse to consent to sexual intercourse with her husband? It was submitted by the Counsel for the Petitioner that the Exception itself disregards the wife's right to consent to having sexual relations. It was further submitted that the Exception grants an immunity to the husband when he disregards the consent of his wife. The argument put forward by the Counsel for the petitioner focused on the inability of the wife to prosecute her husband for rape compromises the wife's right to refuse to her husband's request for sex. The Hon'ble High Court of Delhi observed that on a plain reading of the exception there is no such obligation on the wife to consent to having sex with her husband.

However, what seems to be a pertinent issue is the course of sexual relations when the wife does not give her consent. The issue is whether the said exception restrains the wife

2 Tukaram v. State of Maharashtra, 1979 AIR SC 185.

3 The *Criminal Law* (*Amendment*) *Act*, *2013*. No. 13 of 2013.

4 The Indian Evidence Act, 1872. No. 1 of 1872, S. 114-A

5 RIT Foundation v. Union of India, 2022 SCC Online Del 1404.

from prosecuting her husband for rape when her refusal is disregarded by the husband. The Hon'ble Court observed that the Counsel for the petitioner tried to imply that the Exception encourages the husband to force himself upon his wife on the purport that he is exercising his conjugal right. It is view of the Court that the exception does not encourage husbands to force sex on their wives and if some husbands choose to do so, it is *"their own perverse predilections and is certainly not the direct and inevitable effect of operation of the impugned Exception"*.

The arguments advanced against the striking down of the exception heavily focused on the separation of powers. It was argued that if the court were to go ahead and strike down the exception, it would in effect be carrying out a legislative act and therefore not letting the legislature exercise its right to examine the issue at hand. It was further argued that if the legislature if giving the protection to its citizens through the exception, the judiciary cannot take away the same by striking down the exception and creating a new offence.

The arguments advanced for striking down the exception was that the object of Section 376 IPC is to criminalize rape, and the defense that is out forward in support of the exception is to protect conjugal rights in the institution of marriage. However, the exception itself is destroying the object and purpose of the main provision.

It is the view of the Court that the impugned exception does not violate Article 14 and is based on an intelligible differentia having rational nexus with both the Exception and Section 375. It does not violate Article 21 as well and the exception cannot be struck down as unconstitutional.

The justification behind the legalization of marital rape was given by the Central Government by way of an affidavit in 2016. The Central Government stated that criminalizing "marital rape" would "destabilize the institution of marriage and become a tool for harassment of husbands."[6]

Recommendations were given by the committee headed by former Chief Justice of India, J S Verma which was constituted as an aftermath of the Nirbhaya rape case.[7] Its role was to review the criminal law related to sexual assault against women and give recommendations on strengthening those laws. The report highlighted the fact that the immunity given to husbands was widely withdrawn in many jurisdictions. It was withdrawn in England and

6 Bhadra Sinha, In 2017, *govt said criminalizing marital rape would harm marriage, Now it's reviewing stance,* The Print https://theprint.in/judiciary/in-2017-govt-saidcriminalising-marital-rape-would-harm-marriage-now-its-reviewing-stance/819853/ (last visited Feb. 3, 2022, 12:00pm)

7 Mukesh & Anr. V. State for NCT of Delhi & Ors. (2017) 6 SCC 1.

Wales in 1991. It referred to the judgment of the European Commission of Human Rights which ratified that a rapist is a rapist regardless of his relationship with the victim.[8] It has been withdrawn in several other nations such as Canada, Sweden, Denmark, Norway, Poland, South Africa, Australia and many more. In 1991, The High Court of Australia held that: 'if it was ever the common law that by marriage a wife gave irrevocable consent to sexual intercourse by her husband, it is no longer the common law'.[9] The Justice Verma committee recommended complete criminalization of marital rape. The recommendation stated that the wife is a woman and most importantly a human being who deserves the right to live a dignified life. It recommended for the exception to be removed and for the law to specify that a marital or any other relationship is not a valid defence against the charge of rape. Moreover, the marital relationship should not be seen as a factor to lower the sentence for the crime of rape.

In South Africa, marital rape was criminalized in 1993. The common law that the husband could not be found guilty of raping his wife was reversed by Section 5 of the Prevention of Family Violence Act of 1993. However, this section was repealed by combined reading of Sections 3 and 56(1) of The Criminal Law (Sexual Offences and Related Matters) Amendment Act (SORMA). Under these sections, with regard to a rape charge, the fact of an existing marriage or relationship between the accused and the complainant cannot be used as a defense.[10]

The argument against criminalizing marital rape is that women would have an unfair advantage, that it would be a biased law and could lead to multiple false charges. The concern of no lasting evidence in case of sexual intercourse between a husband and a wife also arises. There would be a complication to differentiate between the consensual and the non-consensual acts that took place between them.[11] But just to bring down the enormous number of litigations, legalization of marital rape is not justified. The rights of married men cannot be given superiority over the rights of married women. The fact that married women are being denied basic rights promised to women under the Constitution of India cannot be ignored.

The counsel for the respondents argued that whether or not the sexual act was an offence

8 C.R. v UK, Application number 00020190/92 November 22, 1995

9 R v L (1991) 174 CLR 379 at 390

10 Oyebanke Yebisi, Victoria Balogun, *Marital Rape: A tale of two legal systems*, Sabinet African Journals

11 Lachmi Deb Roy, *Why doesn't India have a law against marital rape*, Outlook https://www.outlookindia.com/national/why-doesn-t-india-have-a-law-against-marital-rape- -news-52044 (last visited Feb. 8, 2022, 9:50am)

is determined through the circumstances/context. It was further argued that consent is not the sole deciding factor whether there was a commission of offence or not. There are circumstances laid out in Section 375 IPC which help determine the illegality of the act. The counsel stated that it is impossible to establish the absence of consent due to the intimate nature of the act and the obvious absence of witnesses to it.

The High Court of Delhi, shed light on the perspective that the word "rapist" has a stigma attached to it. When the man is the husband of the woman and there is a marital relationship subsisting between the two, the exemption given to the husband from possibly being labelled as a "rapist" is the intention of the statute. The Court highlights that in fact equating the husband and a stranger who commits such an act would be violative of Article 14.

This exception is violative of the core value of "equality" and numerous provisions in our Constitution which strive to protect the same. It is depriving women who are married of their right to equality, right of personal liberty, right to life with dignity. Thus, the status being given to married women is altogether different from the status being given to women.

The Court while analyzing the premise of the counsel for the petitioner, stated that if as per its definition, non-consensual sex by a man with a woman is rape, it would be saying that every incident of taking of life of another is murder. The Court laid down that just as every such incident is not murder, "every incident of non-consensual sex of a man with a woman is not rape".

If we go by this statement of the Hon'ble Court, a lot of offences and offenders would get off scot free. However, the emphasis of the court was to focus on the circumstances under which the act happens.

The Court's verdict stressed on its inability to create offences or pass any such judgments which would result in conversion of an act which is not an offence to be rendered as an offence. It laid down that by striking down the exception, the Court would be pronouncing that the act of non-consensual sex between a husband and a wife would amount to rape; which tantamount is creation of an offence.

Authors opinion is that when it comes to the issue of recourse, women can take action under Protection of Women from Domestic Violence Act or Section 498-A of IPC and file for divorce. The exemption of husband under Exception 2 of Section 375 is regressive and encourages male privilege in a world where equality as a value is promised and idealized.

While the Hon'ble High Court of Delhi was very clear about the seriousness of this case

and the impact of the verdict, there still was no relief for married women who are still being exploited and having their consent constantly disregarded. This dependence on other provisions and statutes to grant relief to these women is inadequate as a relief. In today's world where the concept of marriage is modernizing each day, it is not acceptable to have the same archaic laws to preserve an obsolete notion of what the institution of marriage is. As the times are changing, we need our laws to be changed in accordance with the new circumstances in which we live. The argument on separation of powers between the legislature and the judiciary is well founded but women are now at the mercy of the legislature to recognize their need for criminalization of marital rape and till then they are without relief. Lastly, striking down of the exception will not lead to any inequalities or injustices towards men, it will only uplift women and allow them to have a say over their own bodies.