

Constitutionality of Section 375, Exception 2, the IPC and Effect of Marital Rape on Family

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ARTICLE INFO

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in
Law Centre-1, Faculty of
Law, University of Delhi,
Delhi, India

Dates:

Received: 27-10-2022

Accepted: 04-11-2022

Published: 28-12-2022

Keywords:

Rape, Marital Rape,
Consent, Special Law,
Human Rights, The
POCSO Act

How to Cite:

Yadav KM, Tripathi SK.
(2022) Constitutionality
of Section 375, Exception
2, the IPC and Effect of
Marital Rape on Family.
DME Journal of Law, 3(1),
8-14.

doi: 10.53361/dmejl.
v3i01.02

Abstract

'Rape' word had been derived from the Latin word 'Rapio', which denotes making sexual intercourse by force. Any action by force is the antithesis of the right to a dignified life. Any woman should not be denied basic human rights in the guise of a marital relationship. Wives think that family is the safest place in the world. She comes with a lot of hope and is under the expectation that she will start a new life. But her husband has sex with force without her consent, and she dies each and every moment. Marital rape is more heinous than rape. The most reliable person commits marital rape. Such rape not only destroys the hope and life of the wife but also affects other family members and the development of the family. Unfortunately, Indian wives under social pressure, the future of children, and economic dependency don't raise their voices against marital rape. Few wives had raised their voices against this issue. John Rideout was accused of rape with his wife, Greta. Media coverage of this case raised many questions regarding marital rape. Many countries had removed protection for husbands. The journey of marital rape from Hale to Keith had been changed.

Justice J.S. Verma recommended the abolition of protection available to husbands under Section 375. Indian Supreme Court in Independent Thought Case had modified provisions of marital rape and held that 15 years must be read as 18 years. In Mr Hrishikesh Sahoo and Ors. v. State of Karnataka and Ors High Court of Karnataka observed that the husband is not the ruler of the body of the wife, and she is not a sex slave. But it was left for legislative bodies to decide whether or not forcefully sexual intercourse between spouses should amount to marital rape.

Delhi High Court decided RIT Foundation Case and delivered split judgment regarding Section 375, Exception 2. In this paper, the author will search for the constitutional validity of this provision.

INTRODUCTION

At the initial stage, marital rape was not recognized anywhere. It was considered that declaration of a sexual relationship between husband and wife even without consent as an offence would be a 'Pandora's box' for cases. Reason of this was to protect the marriage institution. The wife had no separate legal personality. She was treated as the property of her husband and sex slave. This was a regressive view. Many jurists supported it. Sir Matthew Hale, in his book 'The History of the Pleas of the Crown' published in 1736, propounded

the 'Irrevocable Consent Doctrine'. This doctrine is also known as the 'Hale Doctrine'. The essence of rape is consent. According to him, the wife had given consent at the time of getting married. So she cannot revert from her consent. This was based on 'Unity of Personality'.

Society developed, and women got separate personalities. Many human rights, including fundamental rights, were conferred on them through international conventions, nations' constitutions, and statutes. The preamble and Article 14 of the Constitution of India clearly deal with equality. In *Maneka Gandhi v. Union of India*¹ Supreme Court observed that the right to life includes dignified life. A woman is always a woman. She must be allowed to enjoy every statutory and fundamental right. She must not be denied only in the guise of marriage.

Section 375, Exception 2 of the Indian Penal Code, 1860 (in short 'the IPC') must be read in the light of Article 15 (3) of the Indian Constitution. Parliament amended Section 375, the IPC under public pressure in 1983, 2012, and 2018 to give more protection to women. In *State of Punjab v. Gurmit Singh and Ors.*² Hon'ble Justice Anand observed that a rapist not only destroys the body but also degrades the soul of the victim. It is a violation of the victim's privacy and personal integrity.

Section 375 Exception 2, the IPC says that the husband cannot be liable for rape if the wife is above the age of fifteen years. Section 5 (n) of the Protection of Children from Sexual Offences Act, 2012 also deals with marital rape. It punishes sex with children under age 18 years. Although Hon'ble Supreme Court in *Independent Thought v. Union of India*³ observed that Section 375 Exception 2 was contradictory to the POCSO Act, 2012. The Court further said that Section 6, the IPC, read with Section 41, the IPC, it becomes clear that special law will prevail over general law. The POCSO Act is a special law. The Court said that 'Fifteen Years' mentioned under Exception 2 must be read as 'Eighteen Years'. Hon'ble Justice Lokur observed that Section 375 Exception 2 was contrary to Articles 14 and 21 of the Constitution of India. It was further observed that women have the right to bodily integrity and

reproductive choice. She is not a commodity. *Mr Hrishikesh Sahoo and Ors. v. State of Karnataka and Ors*⁴ raised many questions regarding marital rape. The Court allowed a trial of marital rape.

International Prospective

Lord Keith in *R. v. R.*⁵ observed that marriage is based on partnership in modern time, which is based on equality. A wife is not a subservient chattel of her husband. The European Commission of Human Rights also accepted this view in *C.R. v United Kingdom*⁶ in 1995 and it was observed that a rapist remains a rapist regardless of his relationship with the victim.

Marital rape is illegal in 50 American States, 3 Australian States, New Zealand, Canada, Israel, England, France, Sweden, Denmark, Norway, Soviet Union, Poland, Czechoslovakia, and several others. The IPC was enacted by the British ruler. Britishers removed protection for husbands after the judgment of *R. v. R.*⁷. But it is unfortunate that protection for husband is continue in India till now.

English Law

'Hale Doctrine' represents common-law marital rape exemption. Under this doctrine, a husband can't be liable for committing rape with his wife. This doctrine is known as the 'Theory of Irrevocable Consent'. During the eighteenth century, jurist Blackstone put forth 'Unity Theory'⁸. According to this theory, after getting married, both become one. So in such circumstances, there is no scope for marital rape. In *Commentary on the Laws of England* (1765), Blackstone wrote that husband and wife are legally one person. The legal personality of a wife is suspended during the marriage, and it vests in her husband's personality. If someone causes injury, she cannot take action without the concurrence of her husband.

4 Infra n. 16.

5 [1991] 4 All ER 481.

6 This case was discussed in *Independent Thought v. Union of India*. Justice Madan B. Lokur observed, from the judgments *C.R. v. U.K.* and *Eisenstadt v. Baird*, it becomes clear that a rapist remains a rapist, and the marriage of the accused with the victim does not convert the accused into a non-rapist.

7 Supra n. 5.

8 Bennice, J. A., & Resick, P. A. (2003). Marital rape: History, research, and practice. *Trauma, Violence, & Abuse*, 4(3), 228-246.

1 AIR 1978 SC 597.

2 (1996) 2 SCC 384.

3 (2017) 10 SCC 800.



But these theories were against the interest of women. Even wives were not competent to file civil suits against their husbands.

Under the Sexual Offences Act 1956, rape was not possible by the husband even in the case of invalid marriage if the husband had made sexual intercourse in good faith, believing that woman was his wife. But the Criminal Justice and Public Order Act, 1994 changed this position. Section 142 of the Act changed the definition of rape. It abolished the marital rape exception.⁹

The European Commission of Human Rights in *C.R. v U.K.*¹⁰ approved that rapist is a rapist regardless of his relationship. The Court observed that this change is according to the Convention on Human Rights objective.

In U.K., marital rape is a kind of rape that is punishable

Marital Rape: Differences between UK and India

There are the following differences between UK and Indian rape laws

- By Section 142 of the Criminal Justice and Public Order Act, 1994 definition of rape was changed in the UK. A man can commit rape on a man or woman. In India, the rape of a man is not possible.
- In the UK, marital rape is rape. In India, if the wife's age is above the age of 18 years, marital rape is not possible. This must be read in the light of *Independent Thought v. Union of India*¹¹

The USA

Hale Doctrine was also recognized in the USA through *Commonwealth v. Fogarty*¹² in 1857. Later on, it was rejected. In *Eisenstadt v. Baird*¹³ the US Supreme Court observed that a husband and wife both have independent personalities with hearts and minds of their own. It is an association of two individuals, each with a separate emotional and intellectual makeup.

9 J.S. Verma Committee Report, Page no.114, Available at: <https://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committe%20report.pdf> (Visited on December 1, 2018).

10 Publ. ECHR, Ser.A, No. 335-C.

11 Supra n. 3.

12 74 Mass. 489, 8 Gray 489 (1857). Massachusetts Supreme Judicial Court decided this case in September 1857.

13 1972 SCC OnLine US SC 62 : 31 L Ed 2d 349 : 92 S Ct 1029 : 405 US 438 (1972).

Indian Prospective

Exemption to the husband for rape offences is from the inception of the IPC. There are three categories of marital rape in India at the present time. Out of the three, two have been recognized by statutes and their interpretation. Regarding the third category, cases are pending in High Courts and Supreme Court.

Below 15 Years

Section 375, Exception 2 says that the husband will not be liable for rape if the age of the wife is not below the age of 15 years. It means if the husband makes sexual intercourse or sexual acts with a wife below the age of 15 years, he will be liable for rape.

Above 15 Years & Under 18 Years

Section 375, Exception 2 was challenged before the Supreme Court on the inconsistency with Article 14 of the Constitution of India. It was argued that sexual intercourse with unmarried women under the age of 18 years will amount to rape even with her consent. On the other side, sexual intercourse without the consent of a wife above the age of 15 years will not amount to rape. This was making discrimination against two women of the same period in the guise of marriage.

Supreme Court accepted this argument in *Independent Thought v. Union of India*¹⁴ and held that Exception 2 of Section 375 is arbitrary, capricious and whimsical. So, it is arbitrary to Articles 14, 15 and 21 of the Constitution of India. The Court further said that the Exception must be read with the POCSO Act. The Court said that '...under fifteen years of age...' must be read as '...under eighteen years of age...'

Above 18 Years of Age

A literal interpretation of statutes makes clear that sexual intercourse with a wife above the age of 18 years without her consent will not amount to rape. On this point, the Hon'ble Supreme Court and Karnataka High Court in *Independent Thought v. Union of India*¹⁵ and *Mr Hrishikesh Sahoo and*

14 Supra n. 3.

15 Ibid.

*Ors. v. State of Karnataka and Ors.*¹⁶ respectively observed that it is the legislative bodies that should decide whether it should come under the category of marital rape or not. In both judgments, many arguments were in favour of marital rape.

Fact of *Mr Hrishikesh Sahoo and Ors. v. State of Karnataka and Ors.*¹⁷ is a glaring example of treating wives as 'Sex Slaves'. In this case, the husband was having natural and unnatural sex against her consent. He was forcefully having anal sex in front of his biological daughter, who was nine years old. He used to make sexual harassment of his daughter, also. In this case, he was trying to create influence of his wife's mind.

Although forcefully sexual intercourse with a wife above the age of 18 years by a husband is not rape under Section 375 now. It does not mean that husband will not be liable under criminal laws for such activities. If he causes voluntarily hurt or grievous hurt during natural and unnatural sex, he may be prosecuted under Sections 323, 324, 325, 342, 354, 354A, 354B and 377, IPC. He will also be liable under the Domestic Violence Act, 2005. There is no exception under these laws for providing protection to the husband. It is an anomalous and astounding situation that a husband had not been given protection for less serious offences but had been given protection for more serious offences of rape.¹⁸

*Mr. Hrishikesh Sahoo and Ors. v. State of Karnataka and Ors.*¹⁹ was decided by Hon'ble Mr. Justice M. Nagaprasanna of the High Court of Karnataka at Bengaluru on March 23, 2022. In this case, Mr Hrishikesh Sahoo, the husband, challenged cognizance taken by Magistrate for committing a marital rape. In this case, the issue was whether cognizance taken by the Magistrate for marital rape is tenable in law.

In this case, the Court held that the trial of rape committed by the husband and sexual harassment of the daughter under the POCSO must be continued by Session Court. But at the same time,

the Court said that it is the legislative body which will decide the fate of exception 2 of Section 375. The husband is not the ruler of the body of the wife, and she is not a sex slave. The Court observed the following important points –

- **Fundamental Rights** – Indian are governed by the constitution of India. The constitution provides equality for all. It does not depict wife as subordinate to husband or anyone. Women including wives have all fundamental rights including Articles 14, 15, 19 and Article 21. These fundamental rights cover the right to a dignified life, bodily integrity, right to equality, sexual autonomy and right to reproductive choice etc. Many acts were enacted to give an equal status of women to men.
- **J.S. Verma Committee Report** – Justice Verma Committee recommended for deletion of the exception of marital rape, i.e. Section 375 Exception 2.
- **Constitution v. IPC** – Basic norm of the constitution is equality. But Section 375, exception 2 is based on inequality. Article 14 is a fountain of equality. No statute can go against this. Women and men being equal under the constitution cannot be made unequal by Exception-2 to Section 375 of the IPC. *Section 375 Exception 2 is regressive.* This provision treats the wife as subordinate to her husband. This concept abhors equality.
- **Other countries** – Marital rape is prohibited in many countries, including the USA, UK, Sweden, France, Russia, Australia, New Zealand, etc.
- **Rape committed by Husband** – A husband is also a man. A wife is also a woman. Rape is rape. A person cannot escape from the offence of commission of rape, only being the husband of the victim.
- **Only Legislative Body rather than Court** – The Court can only interpret the law. So Madras High Court cannot say that marital rape (wife above 18 years of age) should be treated as an offence. This is the work of legislative bodies to decide whether marital rape should be treated rape or not.
- **No need to drop the charge of rape** – High Court observed that the Session Judge committed no error. The Session Judge rightly took cognizance of marital rape. The High Court rejected the

¹⁶ 2022 SCC OnLine Kar 371. Karnataka High Court decided on March 23, 2022. Available at: <https://karnatakajudiciary.kar.nic.in/judgements/WP48367-18-23-03-2022.pdf> (Visited on April 7, 2022).

¹⁷ Ibid.

¹⁸ *Supra* n.3, para 77.

¹⁹ *Supra* n. 16

application to drop the charges. It was observed that this was a peculiar fact and dropping charges of marital rape will be tremendous injustice to the wife.

- *The direction of inclusion of Section 377* – High Court directed the Session Court to include Section 377 and the trial of the accused under this case. A trial of unnatural offences must be run along with Sections 498A, 354, and 506 of the IPC.
- *Old and modern era* - The age-old thought and tradition that the husbands are the rulers of wives, their body, mind and soul should be effaced. Due to such thinking, cases of marital rape, like the facts of this case, are mushrooming in this country.

Division Bench of Delhi High Court, consisting of Hon'ble Justice C. Hari Shankar and Hon'ble Justice Rajiv Shakdher, delivered a split verdict in *RIT Foundation and Another v. Union of India*.²⁰ Union Government does not favour the abolition of Section 375, Exception 2. The Central Government argued that the culture, financial empowerment of women, and mindset of society in India are different from western countries. There is a chance of a floodgate of false cases with ulterior motives. 'Rape' is a cognizable, non-bailable, and non-compoundable offence. Every chance of compromise of disputes will lose.

Hon'ble Justice Rajiv Shakdher struck down Section 375, Exception 2, based on a violation of Article 14 of the Indian Constitution. It was further observed that the husband is not allowed to have sexual intercourse without the consent of the wife.

Hon'ble Justice C. Hari Shankar disagreed with Hon'ble Justice Rajiv Shakdher. He observed that Section 375, Exception 2, i.e. marital rape, does not violate Article 14 of the Constitution of India. This exception is based on an intelligible differential.

Delhi High Court granted a certificate of leave to appeal before the Supreme Court. Now Supreme Court will decide the future of Exception 2 of Section 375 regarding marital rape where the age of the wife is above 18 years.

The Medical Termination of Pregnancy Act, 1971 (in short MTP Act) provides procedures for different

20 (2022) SCC OnLine Del 1404. Date of the Judgment: May 11, 2022.

types of termination of pregnancy at a different stage. These three stages are –

- Termination of pregnancy not exceeding 20 weeks,²¹
- Exceeding 20 weeks but does not exceed 24 weeks,²² and
- Exceeding twenty-four weeks. Abortion is allowed in such cases. Condition is that there must be the substantial foetal abnormalities diagnosed by a Medical Board.

Section 3(2) (a) & (b) says pregnancy can be terminated not exceeding 20 weeks and exceeding 20 weeks but does not exceed 24 weeks. Termination of pregnancy in case of more than 24 weeks is allowed only in case of foetal abnormalities.²³ Section 3 (2), Explanation 2 says for the purposes of clauses (a) and (b), where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by the pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman. Rule 3B of the Medical Termination of Pregnancy (Amendment) Rules, 2021²³ enumerates certain circumstances in which pregnancy can be terminated with twenty-four weeks of gestation. Among many other circumstances, survivors of sexual assault, rape and incest, minor, change of marital status during the ongoing pregnancy like widowhood and divorce etc., have been mentioned.

In *X v. The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr.*²⁴ full bench of the Supreme Court held that rape includes marital rape for the purpose of the Medical Termination of Pregnancy Act, 1971²⁵ and the Medical Termination of Pregnancy (Amendment) Rules,

21 The opinion of one Registered Medical Practitioner (MRP) is sufficient.

22 Opinion of two Registered Medical Practitioners (MRP) is sufficient.

23 Available at: <https://egazette.nic.in/WriteReadData/2021/230390.pdf> (Visited on October 01, 2022).

24 2022 SCC OnLine SC 1321. Date of the Judgment: September 29, 2022. Available at: https://main.sci.gov.in/supremecourt/2022/21815/21815_2022_2_1501_38628_Judgement_29-Sep-2022.pdf (Visited on October 01, 2022).

25 Available at: <https://www.indiacode.nic.in/bitstream/123456789/1593/1/A1971-34.pdf> (Visited on October 01, 2022).

2021.²⁶ It was clarified that this ruling is not related to Section 375, Exception 2, the Indian Penal Code, 1860. Its reason was that against the decision of Delhi High Court regarding the constitutional validity of this provision, appeal is pending.

This case was basically related to abortion of a single woman.²⁷ The Court said that there should not be made a difference between a single woman and a married woman for the purpose of abortion.²⁸

Grounds for Set Aside Section 375, Exception 2

Rape under Section 375, the IPC is making forcefully sexual intercourse by a man with a woman. The following arguments are for the declaration of Section 375, Exception 2 as an unconstitutional –

(1) Justice J.S. Verma Committee recommended removing protection for husbands on the grounds that in many countries, a husband's forcefully sexual intercourse with his wife had been declared an offence. The old concept that wives were property had been changed all over the world. (2) Preamble of the Indian Constitution provides equality of status and opportunity. A wife who has no right to prohibit her husband from having sexual intercourse by force is just against equality of status. Rape affects the physical and psychological personality of women. She cannot escape from this effect merely because she is a wife. (3) Woman is a woman. A wife is, first of all, a woman. She must be equally treated with other women. Otherwise, it will be a violation of Article 14. In *Mr. Hrishikesh Sahoo Case*, Hon'ble Mr. Justice M. Nagaprasanna said that *women and men being equal under the constitution cannot be*

made unequal by Exception-2 to Section 375 of the IPC. (4) Special law under Article 15 (3) can be enacted for the protection of a woman rather than against her interest. Law under Article 15 (3) cannot be enacted for the exploitation of women. (5) In *Suchita Srivastava v. Chandigarh Administration*²⁹ Supreme Court observed that reproducing choice is an integral part of personal life and liberty under Article 21 of the Indian Constitution. Article 21 includes the right to abstain from procreating. She has the right to refuse sexual intercourse. Forcefully sexual intercourse is a violation of Article 21. (6) Old concept has been changed all over the world. 'Hale Doctrine' had been rejected. Lord Keith in *R. v. R.* (1991) said marriage in modern times is based on equality, i.e. partnership. The wife is not a subservient chattel of the husband. European Commission of Human Rights in *C.R. v United Kingdom* (1995) also observed that rapist remains a rapist. His relation with the victim is immaterial. In *Independent Thought v. Union of India*,³⁰ Justice Lokur said that wife is not a commodity. (7) Exception 2 of Section 375 had already been modified by Supreme Court in the light of Section 5 (n) of the POCSO Act in the Independent Thought Case in the light of Article 14 of the Constitution of India. (8) There is a chance of misuse of marital rape. But merely on this basis, a wife cannot be denied basic human rights. Certain safeguards may be provided. It is not the sole responsibility of a wife to save a family. (9) In *Zahira Habibulla H. Shiekh & Anr. v. State of Gujarat and Ors*³¹ Supreme Court observed that the concept of the fair trial is triangulation. Justice must be for all i.e. accused, victim and society. Denial of a fair trial is as much injustice to the accused as to society and the victim.

26 Available at: <https://egazette.nic.in/WriteReadData/2021/230390.pdf> (Visited on October 01, 2022).

27 Appeal was filed to Supreme Court from the judgment of the Delhi High Court dated July 15, 2022. The Appellant is from Manipur. There was consensual sexual intercourse. Later on, the boy refused to get married. When she approached High Court, her gestational age was twenty-two weeks. Against the decision of the High Court, she approached to Supreme Court.

28 Ananthakrishnan G, Even single, unmarried women have the right to safe and legal abortion, rules SC, The Indian Express September 30, 2022). Available at: <https://indianexpress.com/article/india/all-women-entitled-to-safe-and-legal-abortion-supreme-court-8179879/> (Visited on October 10, 2022).

CONCLUSION

Marriage is a holy institution. But it does not give a license for marital rape. The 'Irrevocable Consent Doctrine justified marital rape'³², 'Property Theory',³³ 29 (2009) 9 SCC 1.

30 Supra n. 3.

31 (2004) 4 SCC 158.

32 'Irrevocable Consent Doctrine' in the context of marital rape means a wife who had given consent at the time of marriage cannot revoke it subsequently.

33 'Property Theory' in the context of marital rape means

and 'Unification Theory'³⁴. All these theories had been rejected by the Constitution of India, which conferred the right to equality, freedom of speech and expression, and right to life. The preamble of the constitution says equality of status and opportunity.

Unfortunately, marital rape cases are increasing day by day. We are living in a constitutional era where everyone is equal. But we are not ready to give equal protection to wives in substance. The time has come to apply equality in substance. It can

wives have been treated property of their husbands, and the husbands were authorized to use their wives as their property.

34 'Unification Theory' means the wife's personality merged into her husband's personality. So the wife cannot claim any right against her husband.

be concluded that Section 375 Exception 2 must be declared unconstitutional.

The Supreme Court in *X v. The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr.*³⁵ held that rape includes marital rape for the purpose of the Medical Termination of Pregnancy Act, 1971 and the Medical Termination of Pregnancy (Amendment) Rules, 2021. This is a good sign. However, Supreme Court clarified that this ratio is limited only to this Act and its Rule. It is not applicable to the Indian Penal Code, 1860.

Victims of sexual harassment by husbands cannot be ignored.

35 Supra n. 25.