

UPDATE

This Update has been prepared by Raveesha Gupta and Ronodeep Dutta

The troubling aspect of unbridled access and uninhibited ‘marital privilege’ of the husband, through forfeiture of the wife’s bodily autonomy, *sans* consent.

A. Background

In the case of **RIT Foundation v. Union of India**¹, the moot point which arises is whether or not Exception 2 (“**Marital Rape Exception**” or “**MRE**”) appended to S 375 of the Indian Penal Code, 1860 (“**IPC**”) should remain on the statute, whereof the impact and its ripple effect, in law, is inconceivably vast. Thus, those who support the proposition that MRE should be struck down, broadly contend that it is an archaic provision which represents the most abhorrent vestiges of colonialism. Turning to the common law, as a general proposition, a husband cannot be guilty of rape on his wife, as upon marriage the wife consents to husband’s exercising the marital right of sexual acts. The marital right of the husband in such circumstances exists by virtue of the consent given by the wife at the time of the marriage and not by virtue of consent given at the time of each sexual act as in the case of unmarried persons. For those who argue that MRE should be retained on the statute, contend that striking down the provision is fraught with the danger of disrupting marital and familial relationships, triggering misuse of law and transgression of the constitutional periphery within which the courts are obliged to function.

B. The Marital Rape Exception

S 375 of the IPC does not recognise the concept of ‘marital rape’. Hence, where the complainant is a legally wedded wife of the accused, any sexual acts by the accused-husband with the complainant-wife would not constitute an offence of rape under S 375 of IPC, even if it is done against her will and without her consent.

MRE provides that sexual intercourse by a man with his own wife, the wife not being under 15 years of age, is not rape². However, this exception has been read down by the Hon’ble Supreme Court in *Independent Thought v. Union of India*³, wherein, the Apex Court raised the age as mentioned in MRE from 15 years to 18 years. Morefully, this was in line with the general legal age of consent and age of marriage under Indian laws. However, it refrained from discussing privacy and sexual violence in detail as it would invariably involve an adjudication upon the legality of marital rape; thus women who are 18 years of age and above remained within the ken of MRE.

Even the most heinous act envisaged by the first part of S 375 of the IPC, would not amount to ‘rape’, if it does not fall within one of the circumstances stipulated in the second part, in clauses ‘*first*’ to ‘*seventhly*’ of the said section. The ones relevant in the instant case are, the ‘*First*’ and ‘*Secondly*’ clause – ‘*Against her will*’ and ‘*Without her consent*’ respectively, i.e., broadly, if it were consensual.

S 375 of IPC ubiquitously provides that any sexual act as listed in clause (a) to clause (d) of the said section by a man on a woman, against the will and without the consent of such woman, amongst other things, is said to

¹ 2022 SCC OnLine Del 1404

² IPC, Exception 2 of S 375

³ (2017) 10 SCC 800

be 'rape' by a man on the woman. If that be the intention of the legislation, then a logical question that follows is what be the wisdom behind retaining the MRE provision. Consensual relations between any two people, let alone married persons do not fall within the ambit of definition of rape, unless, it falls under the remaining five circumstances as mentioned in the second part of S 375 of IPC. Sexual acts between two consenting individuals is usually borne out of love and respect for each other and any act which is without consent is an act of violence irrespective of the relationship between the individuals. Therefore, a husband may 'expect sex' but from there to argue that he would have the right to demand sex from a woman merely because she is married to him, bereft of love, for satisfying carnal desire and procreation, is morally and legally untenable as it institutionalizes violence within the family.

In this regard, it is pertinent to note that, the 'intelligible differentia' contention is brought in by the respondents, asserting that the distinction of the same act being made punishable for unmarried persons but not so in case of married persons, has been made by the legislature on account of the complexity involved while dealing with the institution of marriage and for its protection thereby, and not on account of patriarchy.

C. *The Conundrum of 'Intelligible Differentia'*

To pass the test of Article 14 of the Constitution of India, MRE must fall within the scope of the fundamental ingredients of the said Article that, there should be intelligible differentia or distinction between the classes, i.e., married and unmarried persons in the instant case. Such distinction should have a rational nexus with the objects sought to be achieved by the legislation viz., it must be pertinent to the subject in respect of and the purposes for which MRE was made. Although, there can be no doubt that there is an intelligible differentia between married, separated and unmarried persons, what the Hon'ble Court was required to examine was whether the distinction between married and unmarried couples has a rational nexus with the object sought to be achieved, which is, to protect forced sexual intercourse within marriage.

Justice C. Hari Shankar has held that that there is an intelligible differentia between sexual acts committed within the confines of marriage vis-à-vis sexual acts committed between strangers. He has observed that *'The distinction ..., is founded on an intelligible differentia having a rational nexus to the object sought to be achieved by the impugned Exception, which fulfils not only a legal but also a laudatory object, and does not compromise any fundamental rights guaranteed by Part III of the Constitution'*⁴. Further, he adds that, *'This differentia does not stand diluted merely because the act is non-consensual. Once such a differentia is found to exist, and the differentia is predicated on the sui generis nature of the relationship between the wife and the husband, in excepting acts done within such a relationship from the rigour of rape, the impugned Exception actually fosters and furthers the object of Section 375.'*⁵ The judgement further goes on to suggest that labelling a man 'rapist' attaches a stigma that lasts to his dying day. This opinion seems to forget the stigma faced by the rape victim, where the woman is made to suffer by the society even though she is not the one at fault.

In contrast, Justice Rajiv Shakhder observes that the differentia between married and unmarried couples does not have a rational nexus with the object which the main provision seeks to achieve, that is, protecting a woman from being subjected to a sexual act against her will or consent. Therefore, he observes that *'The classification, in my opinion, is unreasonable and manifestly arbitrary as it seems to convey that forced sex outside marriage is "real rape" and that the same act within marriage is anything else but rape.'*⁶

D. *Arguments Advanced on Both Sides*

Several arguments have been raised in favour of MRE by the respondents, one being that in case of sexual violence by the husband, the woman has rights under S 354 & S 498A of IPC among other provisions, like hurt with intent to outrage her modest, subjecting the woman to cruelty by the husband or his relatives, as well as under the provisions of the Protection of Women from Domestic Violence Act, 2005.

⁴ 2022 SCC OnLine Del 1404, Para 426 of judgment per C. HARI SHANKAR, J

⁵ 2022 SCC OnLine Del 1404, Para 589 of judgment per C. HARI SHANKAR, J

⁶ 2022 SCC OnLine Del 1404, Para 232 of judgment per RAJIV SHAKDHER, J

However, as submitted by the petitioners in the RIT Foundation case, the ingredients of offences such as grievous hurt, outraging the modesty of a woman and cruelty are substantially different from that of rape. Moreover, the procedure that is applied for a rape victim, i.e. outside marriage, is not applicable in marital relationships, under Criminal Procedure Code, 1973 and Evidence Act, 1872 as the procedures and safeguards to the rape victim with respect to recording her statement, medical examination, free and immediate first aid, in camera trial, non-disclosure of the identity of the victim etc., will not be available to victims of spousal sexual violence because of the operation of the MRE.

E. Doctrine of Separation of Powers and Scope of Article 226 of the Constitution of India

The argument advanced by the respondents is that the Doctrine of Separation of Powers is not a mere transactional construct i.e., division of power between various organs of the State, but is meant to preserve the right of the Republic, meaning the people to participate in law and policymaking through the legislature. Therefore, if MRE is struck down as unconstitutional, it would have the effect of keeping the Republic from participating in law and policymaking on a sensitive social issue, thereby curtailing fundamental rights as well as empowering an 'unelected body' to undertake an exercise which is beyond its constitutional mandate and expertise. The striking down of MRE would also result in the creation of a new offence without considering its social impact.

A minute reading of Article 226 of the Constitution of India would reveal that the said Article has two parts, the first part concerns the enforcement of fundamental rights under Part III. The second part gets triggered when a litigant approaches the constitutional court for purposes other than enforcement of rights. The discretion to grant or not to grant relief, if at all, is only in respect of the second part of Article 226 of the Constitution. There is no discretion available to the court where a plea is made for enforcement of fundamental rights under Part III of the Constitution.

Although, while ruling upon economic policies and statutes having financial implications, the court should employ restraint, however, this does not hold good for statutes dealing with civil liberties or those which infringe fundamental rights. The arguments regarding judicial restraint and separation of powers have to fail when the fundamental rights of half of the population of the country are at stake. There is no discretion available to the court when concerns regarding the violation of fundamental rights are raised before it. It is obligatory on the part of the court to exercise its powers under Article 226 of the Constitution of India if the violation of fundamental rights is established.

F. The Split Decision

While Justice C. Hari Shankar has observed that a woman who is ravaged by a stranger is in a worse condition than a woman who has non-consensual sexual acts with her husband, it is but a psychological fact that people are hurt by the actions of their loved ones more than that of the strangers. Not at the cost of diminishing anyone's misery and trauma caused due to such a heinous offence but the mental trauma in being forced to have sexual acts by her own husband, in whom the woman has reposed all her faith and life, has to be at least acknowledged, if not considered greater. Further Justice C. Hari Shankar states that, '*it cannot even be assumed, ..., that the perceptions of the petitioners reflect the views of the majority of Indian women*'.⁷

Justice C. Hari Shankar has also observed that '*Unjustified denial of sex by either spouse, within a marital relationship is, even as per the petitioners, "cruelty", entitling the other spouse to seek divorce on that ground*'.⁸, while relying upon the judgement in *Rishu Aggarwal v. Mohit Goyal*⁹, passed by the Division Bench of the Hon'ble High Court of Delhi. However, it is pertinent to note here that the opinion put forth takes no notice of instances where the denial is justified, despite which the husband forces himself upon his wife.

⁷ 2022 SCC OnLine Del 1404, Para 563 of judgment per C. HARI SHANKAR, J

⁸ 2022 SCC OnLine Del 1404, Para 610 of judgment per C. HARI SHANKAR, J

⁹2022 SCC OnLine Del 1089

On the other hand, Justice Rajiv Shakdher has held that MRE is unconstitutional and violates Article 14, 15, 19(1)(a) and 21 of the Constitution of India, and upheld a woman's right to her bodily autonomy. Justice Rajiv Shakdher has observed that *'When marriage is a tyranny, the State cannot have a plausible legitimate interest in saving it. In every sense, MRE, in my view, violates the equality clause contained in Article 14 of the Constitution... MRE with one stroke deprives nearly one-half of the population of equal protection of the laws'*¹⁰.

If a marriage is considered to be an institution, it has to be protected by all the parties involved and thus the husband has as much responsibility to care and respect the will, wish and desires of his wife, rather than the presupposed right to demand sex from a woman merely because she is married to him.

The only aspect that the Hon'ble Judges in the RIT Foundation case (supra) agree on is that there is a substantial question of law involved and have granted the certificate of leave to appeal to the Hon'ble Supreme Court. Reportedly, one of the Petitioners in the RIT Foundation case has already approached the Hon'ble Supreme Court against the judgement given by Justice C. Hari Shankar, which upholds the constitutional validity of MRE.

G. *Afterthought*

MRE has already been removed from the laws of most jurisdictions of the world. Now it is time to revisit the validity of MRE in the Indian legal landscape too. It is important to highlight that after the Nirbhaya gang rape case, through the Criminal Law (Amendment) Act, 2013, several amendments were brought about in criminal law pursuant to recommendations made by the Justice Verma Committee which included a recommendation for deletion of MRE. Since then, the judicial opinion in India has moved perceptibly in the direction of recognizing the autonomy and sexual agency of an individual including that of a married woman. A day before the pronouncement of the judgement in the RIT Foundation case, on 10th May, 2022, the Hon'ble Supreme Court had issued notice¹¹ in a case filed by the husband challenging the judgement passed by the Hon'ble High Court of Karnataka which did not quash the trial in an alleged marital rape case filed against him by the wife; and also refused to stay the trial in the said case.

Further India's obligations under Convention on the Elimination of All Forms of Discrimination Against Women ("**CEDAW**")¹², adopted by the United Nations General Assembly in 1979 requires the elimination of all forms of discrimination against women, particularly, in relation to marriage. Nations that are signatories to CEDAW are required to repeal all national penal provisions that give effect to acts of discrimination directed against women.

In this day and age, the women who are vouchsafed with equal rights, should, in a way that leaves no doubt, have the right to call out the acts of sexual violence by the husband in the same manner as would a rape victim in case of a stranger. *'Rape is rape and a rapist remains a rapist'*¹³; no amount of classification and verbal jugglery can alter that reality. Morefully so, where every other woman including a sex worker is entitled to decline consent and prosecute for rape, a right which is not available to a married woman; it remains to be seen whether this judgement leads to outcomes which, if it at all, helps to protect the interest of the women within the confines of marriage.

This Update has been prepared by Raveesha Gupta and Ronodeep Dutta who can be reached at raveesha.gupta@aquilaw.com and ronodeep.dutta@aquilaw.com. This Update is only for informational purposes and is not intended for solicitation of any work. Nothing in this Update constitutes legal advice and should not be acted upon in any circumstance.

¹⁰ 2022 SCC OnLine Del 1404, Para 232 of judgment per RAJIV SHAKDHER, J

¹¹ Special Leave to Appeal (Crl.) Nos. 4064/ 2022 dated 10-05-2022

¹² CEDAW, Articles 1, 2, 5 and 16

¹³ 2022 SCC OnLine Del 1404, Para 155 of judgment per RAJIV SHAKDHER, J