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## RIT FOUNDATION V. UNION OF INDIA

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### INTRODUCTION

Marital rape is defined as the non-consensual sexual intercourse with one's spouse<sup>1</sup>. The long-standing provision under exception 2 of Section 375<sup>2</sup> of the erstwhile Indian Penal Code, 1869, commonly referred to as the Marital Rape Exception (MRE), has immunized husbands from prosecution for rape against their wives. This provision, which finds its roots in the colonial era, has been challenged by the petitioners in the case of RIT Foundation v. UOI<sup>3</sup>. While the Supreme Court has read down the provision in relation to wives under the age of 18 years in the case of Independent Thought v. UOI<sup>4</sup>, the question of its validity in the case of adult wives still remain unresolved. This case not only questioned the constitutional validity of MRE but also highlighted the importance of resolving this issue as an urgent need of the Indian society.

### FACTUAL BACKGROUND

The matter at hand arose after a series of writ petitions were filed in the High Court, challenging the constitutional validity of the MRE embodied in Section 375 of the IPC. The petitioners included RIT Foundation, All India Democratic Women's Foundation, and some individual survivors of marital rape. They contended that the MRE prevents them from approaching the courts to protect themselves from sexual harassment within their marital ties. The petitioners argued that the aforementioned provisions violate the fundamental rights

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<sup>1</sup> Randall M, Venkatesh V. The Right to No: The Crime of Marital Rape, Women's Human Rights, and International Law. Brooklyn J Int Law [Internet]. 2015. Jan 1 [cited 2022 Feb 18];41(1). Available from: <https://brooklynworks.brooklaw.edu/bjil/vol41/iss1/3> [Google Scholar]

<sup>2</sup> The Indian Penal Code, 1860, § 375, No. 45, Acts of Parliament, 1860 (India)

<sup>3</sup> 2022 SCC OnLine Del 1404

<sup>4</sup> AIR 2017 SC 4904

provided under articles 14<sup>5</sup>, 15<sup>6</sup>, 19(1)(a)<sup>7</sup>, and 21<sup>8</sup> of the Indian Constitution. The respondents, which included the Union of India, opposed the striking down of the impugned provision, stating that it would lead to the creation of a new offence and affect the stability of marriage as a sacred institution.

## **ISSUES**

The core issues before the Hon'ble Court included:

1. Whether Exception 2 of Section 375<sup>9</sup> of IPC violates Articles 14<sup>10</sup>, 15<sup>11</sup>, 19(1)(a)<sup>12</sup>, and 21<sup>13</sup> of the Constitution?
2. Whether striking down the MRE would amount to judicial creation of a new offence?
3. Whether criminalizing marital rape destabilize the institution of marriage?

## **CONTENTIONS OF THE PETITIONERS**

The petitioners contended that MRE violates the fundamental rights of married women in India. It discriminates against them and denies them the protection that is available to unmarried women. Rape is a grievous and heinous crime, regardless of where it was committed. It has adverse mental and physical consequences to the victim, married or unmarried. They argued that solely entering into marital relationship does not mean that they consented to a continuous lifelong sexual relationship with their spouses. MRE seeks to differentiate between husbands and non-husbands immunizing one over the other in committing the same offence against wives and non-wives as victims.

## **CONTENTIONS OF THE RESPONDENTS**

The respondents argued that MRE is constituted and kept intact in order to protect and safeguard the institution of marriage. They stated that the striking down of MRE would lead to the creation of a new offence which is not within the scope of judiciary. They asserted that marriage creates a legitimate expectation of conjugal rights between the parties, and that the

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<sup>5</sup> India Const., art. 14

<sup>6</sup> India Const., art. 15

<sup>7</sup> India Const., art. 19, cl. 1, a

<sup>8</sup> India Const., art. 21

<sup>9</sup> Supra note 2

<sup>10</sup> Supra note 5

<sup>11</sup> Supra note 6

<sup>12</sup> Supra note 7

<sup>13</sup> Supra note 8

exercise of such rights cannot be termed an offence so serious as rape. They also raised concerns that criminalizing marital rape would lead to a huge number of false cases being filed.

### **THE SPLIT VERDICT**

The two-judge bench of the Delhi High Court delivered a split verdict, meaning the two judges had differing opinions.

Citing various precedents, Rajiv Shakhder J. held that when the violation of fundamental rights is in question, the court can interfere and the 'Doctrine of Judicial Restraint' does not apply to such situations. A perusal of clauses (a) to (d) of Section 275 of IPC shows that every woman victim except a married woman has the option of prosecuting the perpetrator for non-consensual sex. Regarding the constitutional viability of classification between married and unmarried women, he has opined that it is unreasonable and arbitrary as it implies that forced sex outside marriage is 'real rape' while the same within the institution of marriage is anything but rape. He stated that although the Domestic Violence Act<sup>14</sup> recognizes sexual assault within households and offers protective measures, the provisions do not allow the prosecution of a husband for rape and hence falls short of criminalizing the offence. He affirmed that, by failing to recognize marital rape as a crime, the state has more or less encouraged its perpetuity and implied that a married woman is a property of her husband. The judge dismissed the claim that striking down MRE creates apprehension of huge number of false complaints by stating that false complaints exist in all areas of law and that the courts have the capacity to address them effectively. Striking down MRE does not lead to the judicial creation of a new offence as the offence of rape is already defined under section 375<sup>15</sup> of IPC. It only extends the scope and ambit of the offence to including offending husbands.

In his ruling, C Hari Shankar J. held that MRE is not violative of Art. 14 as the distinction between marital and non-marital non-consensual sex forms an intelligible differentia with rational nexus. He stated that by entering into a marital relationship with a person, the woman has given him a meaningful expectation to have a conjugal relationship with her and hence, forced sex within marriage cannot be compared with that of forced sex with a stranger. The exception is structured in such a way to exclude allegations of rape within the marital

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<sup>14</sup> The Domestic Violence Act, 2005, No. 43, Acts of Parliament, 2005 (India)

<sup>15</sup> Supra note 1

sphere. He stressed on judicial restraint and stated that just because the courts differ from the views of the legislature, it cannot overturn the legislative perception. He further reiterated his opinion by stating that if the courts strike down a law merely because it disagrees with it, it will lead to erasing the distinction between the legislature and judiciary, thereby violating the separation of powers. He further stated that the impugned provision does not make the offence condonable. It disapproves with using the term 'rape' in a marital context. The wife has other remedies available to her under the IPC as well as the Dowry Prohibition Act, 1961<sup>16</sup>. The contention of the petitioners that the exception violates articles 19(1)(a)<sup>17</sup> and 21<sup>18</sup> is misconceived and unfounded. The courts are in no position to strike down the impugned provision, even if it infringed upon fundamental rights as it would lead to the creation of a new offence.

## ANALYSIS

The case showcases the divide that exists in the society regarding marital rape. This has been rightfully embodied in the split verdict of Shankar and Shakti J.J. Justice Shakti's opinion firmly establishes that MRE is violative of Articles 14, 15, 19(1)(a) and 21 of the Constitution. His opinion sheds light on the fact that all women except for married women have a right to prosecute against rape. He emphasized that consent is non-negotiable and marriage does not negate it, reflecting progressive constitutionalism. Furthermore, the MRE, seen as an archaic provision was abolished in Britain way back in 1995 in the case of *C.R. v. United Kingdom*<sup>19</sup>.

According to the National Family Health Survey -5 conducted between 2019-2021, 32% of married women experienced physical, sexual or emotional violence from their husbands (15.6.1), and 82% of married women aged 18-49 who have experienced sexual violence reported their husbands as the perpetrators<sup>20</sup>. Considering the fact that a majority of sexual assault cases go unreported each year, the high percentage of married women being subjected to rape within their own families is alarming. Permitting marital rape also contradicts India's position in the global landscape as it has passed the Protection of Human Rights Act<sup>21</sup> in 1993

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<sup>16</sup> The Dowry Prohibition Act, 1961, No. 48, acts of Parliament, 1961 (India)

<sup>17</sup> Supra note 7

<sup>18</sup> Supra note 8

<sup>19</sup> App No 20190/92

<sup>20</sup> National Family Health Survey (NFHS-5), 2019, 15.6.1, 15.3.2, Volume I. Mumbai: IIPS

<sup>21</sup> The Protection of Human Rights Act, 1993, No. 10, Acts of Parliament, 1994 (India).

and ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>22</sup> in 1993.

Justice Shankar's opinion on the other hand provides an entirely different approach towards the issue at hand. He upheld the validity of MRE through his dissenting opinion. He stressed on the point that the concept of rape is non-existent in a marital relationship and argued that there exists intelligible differentia in marital relationships which makes it fundamentally wrong to term husbands as rapists. He agreed with the respondents' contention that striking down the MRE would lead to the creation of a new offence which is not within judicial competence. He stressed on the importance of separation of powers and upholding the sanctity of the institution of marriage. His perspective has been reflected even in the newly enacted Bharatiya Nyaya Sanhita, 2023<sup>23</sup>, which has retained the impugned provision.

## CONCLUSION

While the verdict leaves the matter at hand unresolved, it also sheds light on the dire need for legislative reforms regarding marital rape in India. Both the judges concurred in granting certificate of leave to appeal to the Supreme Court as the case involves substantial questions of law. The case reflects the division existing in the Indian society when it comes to question of marital rape. While the critics of the MRE supports striking it down on the ground of it violating the bodily and sexual autonomy of married women, the supporters turn an absolute blind eye to it stressing that husbands cannot possibly rape their wives. The case is now pending before the Supreme Court, with the people awaiting a landmark judgment in the history of Indian jurisprudence.

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1. The Indian Penal Code, 1860
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4. Protection of Human Rights Act, 1993
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<sup>22</sup> UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

<sup>23</sup> Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India).

## **CASE LAWS**

1. Independent Thought v. UOI, AIR 2017 SC 4904
2. C.R. v. United Kingdom, App No 20190/92

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