



## **INELUCTABLE ASPECT OF EXCEPTION-2 TO SECTION-375 OF IPC**

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**Cite This Article:** Darshna Garg, "Ineluctable Aspect of Exception-2 to Section-375 of IPC", International Journal of Multidisciplinary Research and Modern Education, Volume 5, Issue 1, Page Number 126-128, 2019.

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### **Introduction:**

In the era of fraternity, liberty and equality the negative aspects of marital rape are highly ignored by the law in many Countries including India. Marital rape is an offence against the female spouse where the perpetrator is the victim's spouse and as per the definition of exception-2 to section-375 of IPC it has been proclaimed that sexual intercourse by a man with her own wife which is below 18 years will be considered as rape. Despite of the understanding of the fact that marital rape dwells all ingredients of rape, law only rely on the presence of matrimonial relationship between the spouses in the context to determine rape in marriage. Author through this paper want to rely on the fact that mere the presence of matrimonial relationship doesn't means that the demand of forceful sex or sexual abuse by the husband towards her wife doesn't detriment the soul of the female whether the female is of any age and also adheres that such act towards women as well as provision of exception-2 to section-375 of IPC infringes right to equality and personal liberty of women which are guaranteed under article-14 and 21 of the constitution of India.

### **Significance of Issue:**

As we know in the past scenario it was hard to believe the existence of rape under the arena of marriage but in the current scenario it is now clearly visible that the struggle is to adhere the true enumeration of protection, respect and freedom towards women. Does the existence of marriage give right to husband to compel her women for sex? Or the lady above the age of 18 doesn't have right to constitute her dignity, emotions and consent? The answers to these questions seem to be clear but unfortunately in some countries it is tolerable and accepted. Every women whether married or not, below the age of 18 or above has the right to make choice, consent and privacy. Mere the presence of matrimonial relationship cannot decide that husband should be given ultimate power to compel her wife for sex. The fact should be understand that rape by the stranger is miserable but the same act by the own person is more painful and deterring. Husband is someone on whom the spouse has the sole trust as well as feels protective with him but, when that particular person becomes the reason for threat against her human dignity and privacy and even laws are not protecting that spouse then, how it can be consider that law is equal for all people or everyone has equal right of protection. Such prejudice act committed whether by the stranger or a spouse not only infringes the right to equality and right to life and liberty but also challenges the constitutional validity of exception-2 to section-375 of IPC.

### **How the Constitutional Validity of Exception-2 to Section-375 is Challenged?**

The consolidated prejudice thinking of not determining rape under the marriage has now become the great threat to the society. In the determination of the fact that rape can be constituted under the marriage or not, is not only blurring the society but also intimidates the legal provisions uncertainty dealing under the matter in same hand. According to CEDAW which stands for United Nation convention on Elimination of all forms of discrimination against women of which India is signatory has illustrated that such types of act are violative of right to equality and respect for human dignity. There are many countries where the provision of marital rape are unacceptable as well as are also criminalized. In America all fifty states have criminalized the provision of marital rape under one section of the sexual offence act. Marital rape has already been criminalized in countries like Sweden, Israel, Australia, England, Poland, New Zealand and including all other 42 countries. Also Human rights Commission in its twenty first session report, has recommended to criminalize marital rape.

In the famous case of *People v. MD*, English as well as American Courts has illustrated that in past scenario exemptions to marital rape were only made to sustain the subjugation of women but in current scenario, no recognition is found for the need of such rules and hence held that exemptions to marital rape will no longer hold any weight. In the dynamic era of modernity where women are getting equal space in the society as man, such laws like exemption to marital rape undoubtedly presents the existence of discrimination between man and women in the scenario of leading-edge and hence we can clearly visualize that how such laws infringes the fundamental rights of the women and if by any law fundamental rights are infringes of any individual then it can be clearly stated that such law or provision is challenging the constitutional validity.

In the landmark case of *R v. R* and *SW v. UK* England court held that husband forcing her wife for sexual intimidation is an anachronistic act and offensive common law fiction. It can be clearly foreseen that

exception-2 to section-375 infringes the fundamental rights of the women who are the citizens of India and are above the age of 18 years which are guaranteed under Article-14 and 21 of the Constitution of India.

**Infringement of Article-14 of the Constitution of India:**

Article-14 of the Constitution of India provides the right to equality. In the famous case of *Indra Swahney & others v. Union of India* Court has illustrated that Article-14 of the Constitution is recognized as one of the basic component of the Indian Constitution. Article-14 states that the state shall not deny any person equal protection of the law as well as equality before the law. In the famous case of *E.P Royappa v. State of Tamil Nadu*, Court held that Article-14 constitutes very wide concept which cannot be confined, cribbed nor can be cabined within any limits. When the issue rises in respect of marital rape then we can apparently foresee that exception-2 to sec-375 is violative of right to equality of women.

If law complies with the provision of exemptions to marital rape then it is clearly visible that discrimination is made between all ages of women. In the famous case of *State of West Bengal v. Anwar Ali Sarkar*, Court held that the concept of equality is only maintainable and applicable when equal law applies to all people in the same situation or sphere. The exemptions of marital rape are applied to the woman's who are married and are above the age of 18 years, does it mean women above the age of 18 have no equal right as unmarried women or women below the age of 18 years? Or they have no right to human dignity and privacy? Or their souls are not detriment when their husbands force themselves on them? If exemptions to marital rape are considered fit for the society then in purview of Article-14 of the constitution it is undoubtedly visible that, state is discriminating between the married women, Unmarried women, married women below the age of 18 years and married women above the age of 18 years. In the famous case of *Rubinder Singh v. Union of India*, court has illustrated that rule of law requires that no person shall be given discriminatory treatment even in the situations where the issue related to safeguarding the contingency is in consideration as well as in the landmark judgement of *Vishaka v. State of Rajasthan*, Court enumerates the essence of gender equality and has also stated that gender equality includes protection from sexual harassment and right to dignity.

Article-14 in itself is a very explicated and adaptable right which gives each and every person equal protection of law but with the contradiction to exemptions to marital rape it is discriminating a wife or married women by not giving equal protection of laws from rape by their own spouse and in regard to this it can be clearly understand that exception-2 to section-375 of the IPC is not constituting reasonable worthiness and hence it can be determine that exception-2 to section-375 violates the rights which are guaranteed under Article-14 of the Constitution of India.

**Infringement of Article-21 of the Constitution of India:**

Article-21 of the Constitution of India provides the right to life and personal liberty to the citizens of India, which also includes right to privacy and maintain human dignity in its purview. In the famous case of *Francis Coraille Muin v. Union Territory of Delhi*, Court held that Article-21 is combined with right to live with human dignity which accompanies many factors in it like adequate nutrition, shelter, facility for reading, writing and expressing one-self in diverse forms, freely moving around as well as right to mingling with fellow human beings etc.

In the landmark judgement of *Maneka Gandhi v. Union of India*, Court held that Right to live, is not merely confined to physical existence but also holds in its pace the right to live with human dignity. Any law which prevails against the right of the spouse who is entitled to live with dignity, freedom and privacy is undoubtedly unlawful. In the case of *State of Maharashtra v. Madhukar Narayan*, Supreme Court held that every woman is the heritor of their sexual privacy and it is not open, for any and every person to infringe her privacy as and whenever he wished or wanted. As well as in the case of *Suchitra v. Chandigarh Administration*, SC stated that Article-21 incorporates the right to personal liberty which includes right to women's bodily integrity, privacy and right to make reproductive choice. Exception-2 to section-375 is naturally giving enormous powers to husband to control her wife according to his wish. If husband desires to have sexual intercourse with her wife but her wife refused to do so and then to if her husband forces himself on her then it is clearly visible that there is no consent from the side of wife and without consent such act is equal to the rape done by the stranger because in both the situations human dignity, freedom and privacy is infringed of the women.

The mere status of marriage can't upheld the rights of women. The scope of Article-21 of the constitution of India has expanded in many aspects by judicial interpretation such as right to privacy and right to live with human dignity, and in regard with same; it is clearly visible that marital rape or we can say exception-2 to section-375 of Indian penal Code is violative of Article-21 of the Constitution.

**Conclusion:**

In the purview of modern era and old era many phases of changes have revolved around our society. According to the changing nature of our society, our governing authorities are also emphasizing on our laws so that prevailing laws can be consisted with the people needs but the provision of exception-2 to section-375 of IPC not only infringing the right of the women but also making push to a thoughts of superiority of the man over the women which is really forwarding a negative impact on our society as well as is also inconsistent with the current phase as well as needs of the society. The Judiciary had expanded the scope of Article-14 and 21 of the

constitution by the judicial interpretation which includes the concept of “gender equality”, “right to privacy”, “right to liberty” and “right to live with human dignity”. If we go forth with such essentials of Article-14 and 21 of the Constitution, it apparently connotes that all such rights and protection of the married wife’s are infringing in relation to exception-2 to section-375 of IPC and thus it is concluded that exception-2 to section-375 of IPC is violative of Article-14 & 21 of the constitution of India and hence, it states that exception-2 to section-375 is unconstitutional.

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