

MARITAL RAPE AND CHILD MARRIAGE: CRITICAL STUDY WITH REGARD TO PROVISION OF LAW

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Introduction:

Under the Protection of Children from Sexual Offences Act, 2012, Juvenile Justice (Care and Protection of Children) Act, Child Marriage Restraint Act, 1929, Protection of Women from Domestic Violence Act, 2005, The Majority Act, 1875, The Guardians and Wards Act, 1890, The Indian Contract Act, 1872 and many other legislations, a person below the age of 18 years is considered to be a child who is unable to look after his or her own interests. A child in its tender age require constant love, care and affection for the development of mind and body. With innocent mind they have to go a long way to build confidence and skills.

Violation of Human Rights:

Every child has universal, inalienable and indivisible human rights to life, education, protection and participation in all decisions¹. However the prevalent practice of Child marriage bluntly violate human rights putting health in serious jeopardy. The practice of child marriage has numerous dreadful inevitable negative consequences be it social, economic, psychological, physical, economical and social. The other dreadful invariably consequences of child marriage of girls include early pregnancy, denial of childhood, increase risk of HIV infection, high mortality rate during child birth, educational setbacks; lower employment and exposure to abuse. Young and less matured they are powerless, secluded and have little say in decision-making about the number of children they want, nutrition, health-care etc.

Nor the innocent little mind nor the body is ready enough to understand the institution of marriage or sexuality. Child marriage is also used as a

1 World Bank, 'Economic Impact of child marriage: Global Synthesis Report' (2017) <https://reliefweb.int/report/world/economic-impacts-child-marriage-global-synthesis-report> accessed 15th November 2019

means of trafficking of young girls.¹ Obtruding of child marriage at such a young age hinder self-discovery of one's identity.²

Pernicious Traditional Practices:

Child marriage is a reprehensible, an abhorrent practice which cannot be seriously disputed. They are innocent children, who are forced to make conjugal relations leading to post-traumatic stress and depression owing to sexual abuse. Married girls are among the world's most vulnerable people. Child Marriage perpetuates an unrelenting cycle of gender inequality, sickness and poverty.

Child brides are young, often poor and undereducated. Subordinate to their husbands and families, married girls are more vulnerable to domestic violence. Lack of self-esteem or of a sense of ownership of her own body exposes a woman to repeated unwanted pregnancies.

Right to bodily integrity and reproductive choice:

Girl child during her marriage often tend to deliver a baby even though her body is not quite ready for procreation. The results being the child born more likely to be malnourished. Reproductive choice are severely curtailed when it comes to married girl child.

Apex court has rightly recognised right of reproductive choice as a dimension of personal liberty which even include the right to abstain from procreating, her right to refuse participation in sexual activity with freedom to choose birth control methods such as undergoing sterilisation procedures. Right to bodily integrity is an important part of right to privacy. Gone are those days when women were treated as chattel having no say over her body.

Provision of law and child marriage:

The Prohibition of Child Marriage Act, 2006: (PCMA Act)

The act provides punishment for solemnising a child marriage whereby the child means a male who, has not completed twenty-one years of age, and a female who has not completed eighteen years of age. Strangely, while prohibiting a child marriage and criminalising it, a child marriage has not been declared void. The act is altogether silent as to the sexual intercourse with a girl child below 18 years of age rather it provide legitimacy of children

1 Kailash Satyarthi, 'Child marriage is a form of human trafficking' Hindustan Times (9.1.2017) <https://www.hindustantimes.com/opinion/child-marriage-is-a-form-of-human-trafficking/story-ZJ2xagwRLTd3sQe8XwNRSP.html> accessed 15.11.2019.

2 Renu Singh, 'A Statistical Analysis of Child Marriage in India based on 2011 Census' (2017)

born of such child marriages. The act makes a child marriage voidable at one end and punishable on the other hand, collaterally legitimising the pernicious practice of child marriages. Parliament recognises that although a child marriage is a criminal activity-a harmful practice, it still encourages sexual intercourse with a girl child.

Dissolution of Muslim Marriages Act, 1939:

Section 2(vii) of the Dissolution of Muslim Marriages Act, 1939 entitles a women married under Muslim law to obtain a decree of dissolution of marriage if she is given in marriage by her father or other guardian before she attained the age of 15 years and she repudiates the marriage before attaining the age of 18 years provided that the marriage has not been consummated. This provision makes mockery of situation that if the husband has forcible sex with such a girl, the marriage is consummated and the girl child is deprived of her right to get the marriage annulled.

Protection of Human Rights Act, 1993

The Protection of Human Rights Act, 1993 defines "human rights" in Section 2(d) as meaning the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in international covenants and enforceable by courts in India. There can be no doubt that if a girl child is forced by her husband into sexual intercourse against her will it would amount to a violation of her human right and violation to international conventions accepted by India such as the Convention on the Rights of the Child (the CRC. Article 34) and the Convention on the Elimination of All Forms of Discrimination Against Women (the CEDAW. Article 16.2).

Juvenile Justice (Care and Protection of Children) Act, 2015: (JJ Act)

The Juvenile Justice (Care and Protection of Children) Act, 2015 merely provide protection to the girl child below 18 years of age sought to be married. She is required to be produced before a Child Welfare Committee constituted under Section 27 of the JJ Act so that she could be cared for, protected and appropriately rehabilitated or restored to society.

The girl child is protected before she has seen herself in worse off situation after marriage where she may be subjected to aggravated penetrative sexual assault for which she might not be physically, mentally or psychologically ready.

Protection of Women from Domestic Violence Act, 2005

Section 3 of the Protection of Women from Domestic Violence Act, 2005 provides that if the husband of a girl child harms or injures or endangers

the health, safety, life, limb or well being, whether mental or physical, of his wife including by causing physical abuse and sexual abuse, he would be liable to have a protection order issued against him and pay compensation to his wife.

Explanation I (ii) of Section 3 defines 'sexual abuse' as including any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of a woman.

Protection of Children from Sexual Offences Act, 2012: (POCSO Act)

POCSO was enacted by Parliament in the year 2012 due to Article 15 of the Constitution of India requiring states to make special provision to secure the future of the children and to see they are not abused and their childhood remains protected against exploitation. The Statement of Objects and Reasons necessitating the enactment of the POCSO Act makes a reference to data collected by the National Crime Records Bureau (NCRB) which indicated an increase in sexual offences against children and recognising child marriage as being a subtle form of violence and a heinous crime.

Clause (n) of Section 5 of the Act provides that if a person commits penetrative sexual assault with a child, then that person actually commits aggravated penetrative sexual assault if that person is related to the child, inter alia, through marriage. Therefore, if the husband of a girl child commits penetrative sexual assault on his wife, he actually commits aggravated penetrative sexual assault as defined in Section 5(n) of the POCSO Act which is punishable under Section 6 of the POCSO Act by a term of rigorous imprisonment of not less than ten years and which may extend to imprisonment for life and fine.

Further it is necessary to make reference to Section 42-A which provide overriding effect of the POCSO act that is in case of any inconsistency, the provisions of POCSO Act shall have overriding effect on any other law to the extent of the inconsistency.

Marital Rape:

Rape of any form is a dehumanising act of Sexual violence involving unlawful intruding into the sanctity of a female. It is a traumatic experience that leaves a serious inevitable blow to her honour and dignity. Rape degrades the very soul of the helpless female being an insult to womanhood. It violates her right to life guaranteed under Article 21 of the Constitution of India.

The non-criminalisation of marital rape stems from a long out-dated notion of marriage which regarded wives property of their husbands. Criminalising the consummation of a marriage union with a serious offence

such as rape would not be appropriate and practical. Recognising marital rape would have the potential of destroying the tradition and sanctity attached to the institution of marriage.

Accordingly after marriage a wife is presumed to have perpetual consented to give up her body for intercourse with her husband at his whim which she could never revoke. While unwilling sexual contact between a husband and a wife is recognised as a criminal offence in almost every country of the world, India is one of the thirty-six countries that still have not criminalized marital rape.

The Apex court in a recent landmark judgment, *Independent Thought v. Union of India* and Anr. 2017 (10) SCC 800 criminalised unwilling sexual contact with a wife between fifteen and eighteen years of age provided under Exception 2 of Section 375 IPC declaring it to be in violation of Article 14, 15 and 21 of the constitution of India. The court took a detailed regard as to the changing circumstance and to how marriage institution is being involved whereby wife is no more than a subservient chattel of her husband. Status of wife in a marriage has changed, whereby marriage in modern times regarded as a partnership of equals. Marriage is an association of two individuals each with a separate intellectual and emotional makeup.

In the judgement supra the apex court refused to give comment on marital rape of adult women but took note of the absurd Exception 2 of section 375 of IPC.

Section 375 Indian Penal Code: (As stood before the *Independent Thought* judgement)

Section 375 of the IPC created three classes of victims:

- (i) The first class of victims are girls aged less than 18 years. In those cases, if the acts contemplated under Section 375 IPC are committed with or without consent of the victim, the man committing such an act is guilty of rape (Statutory Rape). This is because in India it is recognised that a girl below 18 years of age is a child.
- (ii) The second class of victims are women aged 18 years or above. Such women can consent to having consensual sex. If the sexual act is done with the consent of the woman, unless the consent is obtained in circumstances falling under clauses thirdly, fourthly and fifthly of Section 375 IPC no offence is committed. The man can be held guilty of rape (non-consensual sexual intercourse), only if the sexual act is done in absence of legal and valid consent.
- (iii) The third category of victims included married women. The exception 2 exempted a man from being charged and convicted

under Section 375 IPC for rape if the victim is his "wife" aged between 15 years and 18 years.

The third category in the form of exception 2 gave blanket liberty, a sort of free rider to husband to have non-consensual sexual intercourse with wife aged between 15 to 18 years without being penalised under the IPC, only because she is married to him and regardless of her willingness or her consent. The husband of a girl child committing sexually assault and even raping her would not be punishable as making it a punishment would amount to excessive interference with the marital relationship. The exception gave protection to the husband against criminalising the sexual activity between him and his wife.

No degree of rationality was found by the apex court in the Exception 2. The court take a strong view that merely because a girl child between 15 and 18 years of age is married does not result in her ceasing to be a child or being mentally or physically capable of having sexual intercourse or indulging in any other sexual activity and conjugal relations.

Harmonising the IPC, the POCSO Act, the JJ Act and the PCMA:

The Preamble to the POCSO Act provides for protection to children against sexual exploitation and sexual abuse. This was directly in conflict with Exception 2 to Section 375 of the IPC which effectively provided that the sexual exploitation of a girl child by her husband would not even constitute a crime but it will be a legitimate activity. Moreover the definition of rape in the terms of Section 375 of the IPC was similar to the definition of penetrative sexual assault in the terms of Section 3 of the POCSO Act.

Section 375 IPC	Section 3 POCSO Act
Definition of Rape	Definition of penetrative sexual assault
<p>A man is said to commit "rape" if he— penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or</p>	<p>A person is said to commit "penetrative sexual assault" if— (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or</p>

<p>(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person</p>	<p>(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or (d) he applies his mouth to the vagina, anus, urethra of the child or makes the child to do so to such person or any other person.</p>
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Upon combined reading of the Section 375 IPC and provision of POCSO act an anomalous state of affairs was created whereby sexual intercourse with a girl child between 15 and 18 years of age, the husband of the girl child was not punished for the offence of rape under Section 375 of the IPC but was said to have committed aggravated penetrative sexual assault in terms of Section 5(n) of the POCSO Act. This lead to an anomalous and astounding situation where the husband can be charged with lesser offences, but not with the more serious offence of rape.

Child marriages were criminalised by enacting the PCMA in 2006 but no corresponding amendment was made in Section 375 of the IPC, as it existed in 2006, to decriminalise marital rape of a girl child.

The right of a girl child to maintain her bodily integrity was effectively destroyed by a traditional practice sanctified by the IPC which was also not in consistence with Article 21 of the Constitution.

The court take a strong view that merely because a girl child between 15 and 18 years of age is married does not result in her ceasing to be a child or being mentally or physically capable of having sexual intercourse or indulging in any other sexual activity and conjugal relations.

Further since marriage with a girl below 18 years was prohibited, sexual intercourse with a girl below 18 years should also had been prohibited, but that was not the case. This apparent incongruity was required to be resolved in the best interest of the child bride.

The exception carved out an unnecessary and artificial distinction between a married girl child and an unmarried girl child with no rational nexus. It was bluntly violative to Article 14 of the Constitution of India. The Exception was also found contrary to the vision, philosophy and ethos of Article 15(3) of the Constitution which enables Parliament to make special provision for women and children but the Exception 2 to Section 375 of the IPC, was placing child at a great disadvantage. Union of India was found to

be totally oblivious to the existence of the trauma faced by a girl child who is married between 15 and 18 years of age.

To make Exception 2 to Section 375 of the IPC in consonance with the POCSO Act the Supreme Court criminalised unwilling sexual contact with a wife between fifteen and eighteen years of age to provide social justice to married young girls.

Exception 2 to Section 375 of the IPC to be now read as: "Sexual intercourse or sexual act by a man with his own wife, the wife not being under eighteen years of age, is not rape."

Conclusion:

The judgment was the first major step taken by Supreme Court in recognising child marriage and how marital rape within child marriage constitutes an attack on girls' bodily integrity and reproductive choice. Though the court had a glance at the major archives and international treaties acceded by India with regard to the ill traditional practice of child marriage, yet the apex court didn't give any direction to make child marriage void ab initio under PCMA Act as done by the State of Karnataka.

The Court further refrained itself from giving any comment on "marital rape" issue where the girl is above 18 years and married. It is worthy to mention that the reasons stated by the apex court to conclude Exception 2 as being violative of Fundamental Rights is equally applicable to a women above 18 years old whose right to dignity is also injured by the forceful sexual relation.

Nevertheless the judgment would be a great help to raise awareness that nonconsensual sex within child marriage is a crime. Meaningful implementation of the decision is required to uphold the constitutional rights to girl to bodily integrity and reproductive rights. The human rights of a girl child are very much alive and kicking whether she is married or not and deserve recognition and acceptance. Personal freedom is a fundamental tenet which cannot be compromised in the name of expediency.

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