

# **Marital Rape: A Legal Study under POCSO Act**

**Pallavi Dubey<sup>1</sup> and Dr. Sanjaya Choudhary<sup>2</sup>**

Research Scholar, Bhagwant University, Ajmer, Rajasthan, India<sup>1</sup>

Professor, Bhagwant University, Ajmer, Rajasthan, India<sup>2</sup>

**Abstract:** *India is one of the countries that treat women as a goddess but also has the largest rate of child marriages. The Prohibition of Child Marriage Act, 2006 prohibits and punishes the child marriage of girls below 18 years of age. The Act, however, legitimizes a child born out of child marriage but remains silent on forceful sexual acts due to such marriage. This recognizes the sexual relation within child marriage and does not address the issue of marital rape.*

*Marital rape is non-consensual sexual intercourse by force or physical violence by a man on his wife. Marital rape on minors can be considered even more heinous rape because the minor does not have the mental capacity to understand the crime. Unfortunately, Indian law does not recognize marital rape as an offence completely. India is one of the countries where marital rape is not considered illegal. There existed exception provisions in the Indian Penal Code to protect husband from the charges of rape on the minor wife before it was annulled by the courts. The institution of marriage supports child marriage because of its social construct and old presumptions of traditions. The husband sees marriage as a license to rape irrespective of consent by sacrificing the wife's liberty at the marital privacy. The Protection of Children from Sexual Offences Act, 2012 punishes any sexual offences on any child, who is under the age of 18 years. As per this scheme of law a person would be criminally liable under POCSO for having sexual intercourse with his wife but he would not be liable for any offence under IPC on the same facts*

**Keywords:** Marital rape

## **I. INTRODUCTION**

A brief survey of the various statutes viz. the Protection of Human Rights Act, 1933, the Protection of Child Marriage Act, 2006, the Protection of Children from Sexual Offences Act, 2012 and the Juvenile Justice (Care and Protection of Children) Act, 2015, reveals that a child is a person below 18 years of age who is entitled to the dignity; if she is unfortunately married while a child, she is protected from domestic violence, both physical and mental, as well as from physical and sexual abuse; if she is unfortunately married while a child, her marriage is in violation of the law and therefore an offence and such a marriage is voidable at her instance and the person marrying her is committing a punishable offence; the husband of the girl child would be committing aggravated penetrative sexual assault when he has sexual intercourse with her and is thereby committing a punishable offence under the POCSO Act. A girl child placed in such circumstances is a child in need of care and protection and needs to be cared for, protected and appropriately rehabilitated or restored to society. All these "child-friendly statutes" are essential for the well-being of the girl child and are protected by Article 15(3) of the Constitution of India. These child-friendly statutes also link child marriages and sexual intercourse with a girl child and draw attention to the adverse consequences of both. The only jarring note in this scheme of the pro-child legislations is to be found in Exception 2 to Section 375, IPC which provides that sexual intercourse with a girl child between 15 to 18 years of age is not rape, if the sexual intercourse is between girl child and her husband. Therefore, the question of punishing the husband simply does not arise. Her husband, for the purposes of Section 375, IPC, effectively has full control over her body and can subject her to sexual intercourse without her consent or without her willingness since such an activity would not be rape.

## **II. LEGAL PROVISION RELATED TO MARITAL RAPE**

According to Section 2(14) (xii) of the JJ Act gives a clear indication that a girl child who is in imminent risk of marriage before attaining the age of 18 years is a child in need of care and protection. It cannot be said with any degree

of rationality that such a girl child loses her status as a child in need of care and protection soon after she gets married. If this provision is ignored or given a go by, it would put the girl child in a worse off situation because after marriage she could be subjected to aggravated penetrative sexual assault for which she might not be physically, mentally or psychologically ready. The intention of the JJ Act is to benefit a child rather than place her in difficult circumstances. The girl child has right to bodily integrity and reproductive choice. She cannot be treated as a commodity having no right to deny sexual intercourse to her husband. The human rights of a girl child are very much alive and kicking whether she is married or not and deserve recognition and acceptance. However, the reproductive choices are severely curtailed as far as a married girl child is concerned. There is every possibility that being subjected to sexual intercourse, the girl child might become pregnant and would have to deliver a baby even though her body is not quite ready for procreation. There are greater chances of a girl child dying during childbirth and there are greater chances of neonatal deaths. Children born from early marriages are more likely to be malnourished. It would, therefore, not be wise to continue with a practice, traditional though it might be that puts the life of a girl child in danger and also puts the life of the baby of a girl child born from an early marriage at stake. Apart from constitutional and statutory provisions, constitutional morality forbids from giving an interpretation to Exception 2 to Section 375 of IPC that sanctifies a tradition or custom that is no longer sustainable. A few facts need to be acknowledged and accepted: Firstly, a child is a person below 18 years of age. Secondly, the age of consent for sexual intercourse is definitively 18 years and there is no dispute about this. Thirdly, Exception 2 to Section 375, IPC creates an artificial distinction between a married girl child and an unmarried girl child with no real rationale and thereby does away with consent for sexual intercourse by a husband with his wife who is a girl child between 15 and 18 years of age. An unmarried girl below 18 years of age could be a victim of rape under Indian Penal Code and a victim of penetrative sexual assault under the POCSO Act. Such a victim might have the solace (if we may say so) of prosecuting the rapist. A married girl between 15 and 18 years of age could be a victim of aggravated penetrative sexual assault under the POCSO Act, but she cannot be a victim of rape under Indian Penal Code if the rapist is her husband since Indian Penal Code does not recognize such penetrative sexual assault as rape. Therefore such a girl child has no recourse to law under the provisions of Indian Penal Code notwithstanding that the marital rape could degrade and humiliate her, destroy her entire psychology pushing her into a deep emotional crisis and dwarf and destroy her whole personality and degrade her very soul. However, such a victim could prosecute the rapist under the POCSO Act. There is no rationale for such an artificial distinction. Such an unnecessary and artificial distinction if accepted can again be introduced for other occasions for divorced children or separated children or widowed children. A rapist remains a rapist and marriage with the victim does not convert him into a non-rapist. Whether sexual intercourse that a husband has with his wife who is between 15 and 18 years of age is described as rape (not an offence under Exception 2 to Section 375 of IPC) or aggravated penetrative sexual assault [an offence under Section 5 (n) of the POCSO Act and punishable under Section 6 of the POCSO Act] the fact is that it is rape as conventionally understood, though Parliament in its wisdom has chosen to not recognize it as rape for the purposes of Indian Penal Code. That it is a heinous crime which also violates the bodily integrity of a girl child, causes trauma and sometimes destroys her freedom of reproductive choice is a composite issue that needs serious consideration and deliberation. Sexual intercourse with a girl below 18 years of age is rape regardless of whether she is married or not. The Exception carved out in IPC creates an unnecessary and artificial distinction between a married girl child and an unmarried girl child and has no rational nexus with any unclear objective sought to be achieved. The artificial distinction is arbitrary and discriminatory and is definitely not in the best interest of the girl child. The artificial distinction is contrary to the philosophy and ethos of Article 15 (3) of the Constitution as well as contrary to Article 21 of the Constitution and our commitments in international conventions. It is also contrary to the philosophy behind some statutes, the bodily integrity of the girl child and her reproductive choice. What is equally dreadful, the artificial distinction turns a blind eye to trafficking of the girl child and surely each one of us must discourage trafficking which is such a horrible social evil. There are really five options before the Court:

- (i) To let the incongruity remain as it is this does not seem a viable option, given that the lives of thousands of young girls are at stake;
- (ii) To strike down as unconstitutional exception 2 to Section 375 of IPC in the present case this is also not a viable option since this relief was given up and no such issue was raised;

- (iii) To reduce the age of consent from 18 years to 15 years this too is not a viable option and would ultimately be for Parliament to decide;
- (iv) To bring the POCSO Act in consonance with Exception 2 to Section 375 of IPC this is also not a viable option since it would require not only a retrograde amendment to the POCSO Act but also to several other pro-child statutes;
- (v) To read Exception 2 to Section 375, IPC in a purposive manner to make it in consonance with the POCSO Act, the spirit of other pro-child legislations and the human rights of a married girl child. Being purposive and harmonious constructionists, this is the only pragmatic option available. Therefore, there is absolutely no other option but to harmonise the system of laws relating to children and require Exception 2 to Section 375 of IPC to now be meaningfully read as:

"Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen of age, is not rape."

It is only through this reading that the intent of social justice to the married girl and the constitutional vision of the Framers of our Constitution can be preserved and protected and perhaps given impetus.

### **III. CASE LAWS**

#### **RTI Foundation v. Union of India**

The Central Government submitted in the case of RTI Foundation v. Union of India (2008) that criminalization of marital rape may destabilize the institution of marriage and deletion of Exception 2 of Section 375 will not serve any useful purpose. The government differentiated between the rape committed under 'marital ties; from the rape defined under 'Section 375' of IPC. If all sexual acts were to qualify for marital rape then it will singularly depend on the wife. The evidence to be considered in the circumstances is crucial as there can be no lasting evidence in such cases.

#### **Independent Thought v. Union of India**

The judgment in the *Independent Thought v. The Union of India* was a landmark and historic judgment. It ended the long debate of constitutionality of Exception 2 of Section 375 and took away the license to rape a minor in a marital relationship. The central government argued that the exception is added in accordance with the religious and socio-cultural traditions braced by marital affairs. The Court declined the argument in the view that it was arbitrarily protecting the husband and legitimizing the silent sexual abuse. The PMCA Act prevailed as the special Act, the Hindu Marriage Act, 1955 and the Muslim Marriage Act, 1939 because the Act was secular in nature. This multiplicity of laws on child marriage has created confusion and exception 2 has done injustice to the minor by legalizing sexual exploitation. The judges held that the husband might not commit rape under the IPC but it can be considered under aggravated penetrative sexual assault for the purpose of POCSO. The provisions of rape were made available to the crimes of marital rape on children less than eighteen years of age. The Court did not take cognizance of the wives over 18 years of age.

#### **Arun Kumar v. The State of U.P.**

In the case of Arun Kumar v. the State of U.P. (2018), a bail application was filed by the accused against the charges of rape of a minor who was above 15 but below 18 years of age. The question before the bench was whether the accused shall be liable for the offences under Section 3/4 of the POCSO Act within the meaning of Exception 2 to Section 375 of the IPC. The final resort left to the court was to read Exception 2 to Section 375 IPC in a purposive manner to make it in consonance with the POCSO Act. The Court upheld the decision of the Independent thought judgment and read the age of the minor as 18 years for the purpose of interpretation of Exception 2 to Section 375. The POCSO provisions are not attracted in this case as the prosecutries were both minors.

#### **Khushabe Ali v. State Of U.P.**

In the case of Khushabe Ali vs. State Of U.P. (2021), the Allahabad High Court granted bail to the accused that was charged with rape allegations against a minor. The accused also had charges of dowry, assault, criminal intimidation, and forced sex against him. The Court provided the logic that the accused Ali was in line with the Muslim Laws of marriage. The counsel of the accused took the support of Exception 2 to Section 375 that allows sex with the wife above 15 years of age. The Court did not consider the SC judgment of Independent thought.

**Ajay Jatav v. The State Of Madhya Pradesh**

The Madhya Pradesh High Court in the case of Ajay Jatav vs. The State of Madhya Pradesh (2021) categorized a physical relationship with a minor wife to be considered as rape. The accused was charged with rape with his wife who was below the age of 18. The bench refused the fifth bail application in the absence of any evidence that the victim was a major at the time of consummation. The bench relied on the judgment in the case of Independent thought case and considered the age of the minor wife to be 18 years of age.

**IV. CONCLUSION**

An untimely marriage and consummation of a minor girl, that is under 18 years of age, does not ensure her competency to give consent for it. The legislature shall strictly attract penal actions under the POCSO Act for such action. Marriage can be prevented by compulsory registration of marriage. The institution of marriage shall be abiding by the legal and moral values to build a righteous and egalitarian society.

Before the judgment of Independent thoughts, discrimination against minor wives was unreasonable violating their fundamental interest. The judgment in the case was a landmark as it flagged the issues of sexual and reproductive health harms and read down the archaic classification in the rape provisions. The problem, however, exists in the families of such marital relationships who give permission to child marriage. The social perspective must be changed in addition to legal support for the gender inequality in such critical affairs of rape. The education of families on the view of women and marital right of intercourse must be taught to restore the integrity of women. Adult literacy programme along with sexuality education on children shall be imparted for gender empowerment.

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