RIGHT TO PRIVACY VIS-A-VIS MATRIMONIAL RIGHTS IN INDIA: AN ANALYSIS OF JUDICIAL APPROACH

RAMAKANT TRIPATHI & PROF. (DR.) RAJESH BAHUGUNA

Research Scholar, Law College Dehradun, Uttarakhand University, Dehradun (U.K.), India

Dean (Law), Law College Dehradun, Uttarakhand University, (U.K.), India

ABSTRACT

Marriage is state of being united with a person of opposite sex as a husband or as a wife, in a consensual and contractual relationship recognized by law. In Hindu it is regarded as a sacred relationship. In Muslim it is contractual relationship. It is recognized almost in all sects that after marriage, the married couple gets some rights against each other. These rights include, right of cohabitation, maintenance, right to inherit spouse's property upon death, etc. Besides this marriage legalizes the sexual relations between husband and wife and the children born after marriage are legal heirs of their parents' property. Being a person husband and wife both have some legal and Constitutional rights including right to life and personal liberty under Article 21 of Indian Constitution. Right to privacy is also recognized as fundamental right under above article, which means everyone has a right to be let alone and free to make decision in relation to him. After recognition of right to privacy as fundamental right, a new debate has been started; it is about the scope of right to privacy and limit on marital rights. Many issues are raised before the courts which are related with the medical examination, phone tapping, virginity test, reproductive choices, sexual autonomy of women and marital rape. In this article the researcher would analyze the recent judicial trend on right to privacy and the effect of this right on marital status and rights of spouses against each other.

KEYWORDS: *Right to Privacy, Marriage, Marital Right, Marital Rape, Sexual Autonomy, Reproductive Choices*

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INTRODUCTION

Marriage is union of two persons through religious ceremonies. The concept of marriage is accepted in almost all religions. The purpose of marriage is almost same in all sects. Marriage is very pious relationship between husband and wife and it is based on mutual trust and cooperation of both. The marriage legalizes the sexual relations between husband and wife and the children born out of valid marriage get legal status and inherit the property of their parents. The foundation of marriage is affection and trust. Husband and wife are deemed as two sides of same coin or two wheels of a chariot. After marriage the married couple gets some rights against each other. These rights are called as matrimonial rights. These rights includes right to cohabitation, maintenance, proprietary rights etc. Though the marriage is a pious institution yet there are several drawback of this institution. Marital rape, breach of privacy of partner, forcing wife for male child etc are several drawbacks of marriage where wife's rights are violated by the husband and when she approach the court, she is refused from getting appropriated remedy due to her marital tie with husband and his family. In some places it appears that the marriage gives unlimited rights to the husband over wife. He can sexually exploit her in any manner as he likes, and the wife has very limited remedies. It is against the well accepted norms of our society. It is also not in accordance with the Constitution rights, human rights, privacy, personal liberty and dignity of women. Hence reproductive choices, sexual

autonomy, privacy of women are most important issues which need to be examined in present scenario. It is also to be examined up to which extent a husband can encroach upon the privacy of wife and vice versa what is the extent of marital rights. It is also need to be examined what are the rights and liabilities of married couples in modern period.

RIGHT TO PRIVACY

The term privacy may be referred as a situation in which one is not watched or disturbed by other persons, who are not authorized to observe him. It is the state of being alone or the right to keep one's personal matters and relationship secret.

Black's Law Dictionary defines the right to privacy as a 'right to personal autonomy'. In this sense the right of privacy may be referred as a capacity to take decision for oneself. Under this right one can prevent other from using his personal information such as his name, photograph etc.¹ Any unnecessary interference with his personal life may cause mental agony to him and affects his mental peace, family relations, his reputation and confidence.

According to Oxford Dictionary of Law, right to privacy means the right to be 'left alone'. Under this right it is the right of an individual to choose a living style for himself and to live in such a situation in which he is not observed or disturbed by others. This right includes privacy of relationship, marriage, procreation of children, privacy at residence, privacy at work place, privacy of communication using any mode of communication and right to protect his bodily integrity. Right of bodily integrity and right to reproductive choices are also included in the zone of right to privacy through judicial decisions². In *Mr. 'X' v. Hospital 'Z'*, the Supreme Court defined right as such interest which is protected and recognized by moral and legal rules and respect of such interest would be a legal duty. In this sense right of privacy of one person also imposes a duty on others and this duty is not to make unnecessary and unreasonable interference with one's personal matters. A person having legal right can seek for the protection against unjustifiable interference by other person who is bound by law for obeying his right³. It is one of the important rights which are necessary for the enjoyment of freedom given under the Indian Constitution. There are many facets of right to privacy. It would cover privacy of body, proprietary privacy, intellectual privacy, privacy of decision making, behavioral privacy and information privacy etc⁴.

Whether the right to privacy is fundamental right or not, was most debating issue after enforcement of Indian Constitution. In absence of any clear provision for recognizing right to privacy as fundamental right, court had to face many ups and down in interpreting the Constitutional provisions particularly Article 21 of the Indian Constitution⁵. In India right to privacy has been recognised through judicial decision by the courts. In *MP Sharma v. Satish Chandra*⁶ and *Kharak Singh v. State of Uttar Pradesh*⁷ the issues relating to recognition of right to privacy was raised before Supreme Court, but the court denied from recognizing it as a fundamental rights under Constitution of India. But Justice Subba Rao, in his minority opinion, in *Kharak Singh case*, recognized privacy as an important facet of right to personal liberty under Article

¹ Black's Law Dictionary 8th ed. South Asian Edition 2015, Brayan A. Garner, editor, ISBN 978-93-84746-31-5 Sai Printo Pack (P) Ltd. New Delhi 110020

² *State of Maharashtra v. Madhukar Narayan Mardikar* AIR 1991 SC 207 & *Suchita Srivastava & Anr v. Chandigarh Administration* (2009) 9 SCC 1

³ (1998) 8SCC 296

⁴ Ramakant Tripathi & Dr. Rajesh Bahuguna. (2020). Evolution Of Right To Privacy In India: National And International Perspective. *Journal Of Critical Reviews*, Vol 7, Issue 15, 708

⁵ Article 21 of Indian Constitution

⁶ (1954)SCR 1077

⁷ 1963 AIR 129

21 of the Constitution of India. Subsequently, in *Govind v. State of Madhya Pradesh*⁸, *R. Rajagopal v. State of Tamil Nadu*⁹ and *People's Union for Civil Liberties (PUCL) vs. Union of India*¹⁰ the Supreme Court recognized the right to privacy under Article 21 of Indian Constitution. Whether the right to privacy is a fundamental right or not this issue was again raised in the case of *Justice K. S. Puttaswamy (Retd.) v. Union of India*¹¹ in this case it was contented by the Central Government that right to privacy is not guaranteed by Indian Constitution because there is no any specific provision in the Constitution which recognizes it as a fundamental right. On the other hand, it was contented by the petitioners that right to privacy is protected under Indian Constitution and it is implicit in Article 21. The Supreme Court by admitting the contention of petitioner has held that right to privacy is a fundamental right under the right to life and personality liberty, freedom of speech and expression and freedom of movement. Though it is not clearly written in the Constitution yet it is implicit in it. In this case the Supreme Court overruled its previous decision given in case of *M.P. Sharma v. Satish Chandra* (1954) and *Kharak Singh v. State of Uttar Pradesh* (1962) in which the Supreme Court earlier refrained from recognizing right to privacy under Indian Constitution. The court further stated that any interference with right to privacy should be justified by law. In this case court directed the central government to appoint a committee to suggest measures for the taking, storing and processing personal information by government as well as private organizations. In this case the Supreme Court not only clarified the position of right to privacy in India but also opened a new path for the development of right to privacy in India.

MARITAL RIGHT AND RIGHT TO PRIVACY

Marital rights refers right of married couples against each other. These rights include right of cohabitation, maintenance, etc. After marriage the husband and wife are treated a family. There are various stages of married life. The first stage starts after marriage in which the husband and wife live together and perform their matrimonial obligations. If the husband is good and caring then the life of wife would be very easy and happy. But if any of them are careless and they are not performing their matrimonial obligations in proper ways then there may be chances of their separation. As for as the marital privacy is concerned, it is recognized by most to the countries of the world. In *Griswold v. State of Connecticut*¹², a law which prohibited the use of contraceptives by a couple for preventing unwanted pregnancy was challenged on the ground of violation of privacy. The U.S. Supreme Court held that statute forbidding the use of contraceptive violates the right of marital privacy which is protected under Bill of Rights. Though after marriage spouses get some rights against each other but it is well accepted that marital rights are subject to right of privacy. In *State v. Perez*¹³, husband had recorded some moment of his wife when she was bathing in bathroom. When the wife got those recording, she filed a case before the court for violation of her right of privacy by the husband. The issue before the court was raised whether a spouse has a reasonable expectation of privacy from being videotaped surreptitiously by the other spouse while alone in a shared, residential bathroom? The court by stating that the wife had a reasonable expectation of privacy from being surreptitiously videotaped by him while she was alone in their shared bathroom the court held that "A person is guilty of a gross misdemeanor who surreptitiously installs or uses any device for observing, photographing, recording, amplifying, or broadcasting sounds or events through the window or other aperture of a place where a reasonable

⁸ AIR 1975 SC 1378

⁹ 1995 AIR 264

¹⁰ AIR 1997 SC 568

¹¹ (2017) 10 SCC 1-637

¹² 381 U.S. 479 (1965)

¹³ 779 N.W.2d 105 (Minn. Ct. App. 2010)

person would have an expectation of privacy and has exposed or is likely to expose their intimate parts or the clothing covering the immediate area of the intimate parts; and does so with intent to intrude upon or interfere with the privacy of the occupant”.

Sexual intercourse is common among husband and wife during the subsistence of marriage. It is also the obligation of spouses to cooperate with each other. In sexual act the consent of the partner is necessary, if it is without the consent of any of them then it may be a reason of mental and physical pain and suffering. Section 375 of Indian Penal Code criminalized the non-consensual sex. It means a sexual act without the consent of woman is an offence. But if the parties are married and the non-consensual sexual act is done by husband with his wife, then the husband is exempted from criminal liability because marital rape is not an offence in India. It is against the right of the sexual autonomy of women. Further child bearing is also a necessary consequence of marriage. But if it is with the consent of wife then it is good but where wife is compelled to bear a child on the compulsion of her husband or other family member, then it is against the right of reproductive choices of woman. Though there are many laws for the protection of rights of women, for example Domestic Violence Act, IPC etc, but these laws cover some specific rights only. They are not able to cover all types of interests of women and women are subjected to torture in the name of matrimonial obligation. She has to involve in sexual act with husband against her will and in many places she is compelled to procreate child. She is also forced to bear male child in some cases. Though marriage is a pious institution but in present scenario the society has been changed and various technological changes affected the life of the people in almost all spheres. Recently Supreme Court has stated that husband is not the master of his wife, the relationship between husband and wife is based on mutual love and trust¹⁴. Supreme Court in many cases dealt with the issues relating to matrimonial rights and right of wife to live the dignity. Courts are flooded with the cases relating to matrimonial rights and right to privacy of women after *Justice K. S. Puttaswamy Case*¹⁵ in which right to privacy is recognized as fundamental right under Article 21 of the Indian Constitution. Any infringement of right to privacy disturbs one's feelings, emotions and confidence¹⁶. To know the correct status of matrimonial right and right to privacy it is necessary to have a look on the recent judicial approach.

JUDICIAL APPROACH

Virginity Test

Virginity test refers to check the chastity of a woman to ascertain whether she has ever engaged in sexual act or not. In *Surjit Singh Thind vs Kanwaljit Kaur*¹⁷ the issue before Punjab-Haryana High Court was whether court can pass an order for virginity test of a woman in divorce petition. The High Court by rejecting the contention of husband stated that in present case virginity of women is not an issue and the petition has been filed by the wife on the ground of impotency of her husband and there are many other ways to prove the impotency of husband. Proof of virginity of wife would not lead to the conclusion that the marriage has been consummated. The court refused from granting an order for virginity test and held that directing a woman to go for medical examination for getting her virginity tested is against the right to privacy and personal dignity enshrined under Article 21 of the Indian Constitution.

¹⁴ Joshph Shine v. Union of India, 2018SCC Online SC 1676

¹⁵ Supra note 11

¹⁶ Dr. PK Rana. (2016). Right to privacy in Indian perspective. International Journal of Law September, Volume 2, Issue 5,

¹⁷ AIR 2003 P H 353

Tapping of Conversation of Wife by the Husband Is Illegal

Mobile and telephone are very popular instruments for communication with each other. When a people talk on phone with other then in most of cases they think that no third person is hearing their conversation. During telephonic conversation they may share personal information, their emotions, their feeling. If these conversations are recorded by someone else without having any legal right to do so, it would be in contravention of the right of the others. Such un-necessary interference may cause disturbance in her/his life. If the person who is husband and recording the conversation of his wife without her knowledge and consent, then whether it would be valid or not, whether it is encroachment of her right to privacy or not and what is the evidentiary value of such recorded conversations, was raised in the case of *Rayala M. Bhuvaneswari v. Nagaphanender Rayala*¹⁸ before the Andhra Pradesh High Court. The court stated that the husband has recorded the conversation of his wife with her parents and friends without her knowledge and consent. The act of husband is clearly a breach of mutual faith and trust, which are the foundation of married life. It is also one of the obligation of married couples to give respect to legal and constitutional rights of other party and if a husband records the private conversation of his wife, which she does with her parents and friends and latter on he wants to use that recording in proceeding against his wife, it is not permitted because the husband has committed the breach of mutual trust and the same is illegal. It is also breach of right of privacy of wife and unconstitutional and husband must not be permitted to rely on such evidence. The court said that the recording of conversation of wife by husband is illegal and it is infringement of right to privacy and evidence recorded by such illegal means even if true, is not admissible. Court refused from passing an order for expert opinion of recorded conversation.

It can be said that though the marriage imposes some marital obligation of the spouses and gives some rights to each other but these rights are subject to rights of spouses. If any act of husband is contrary to the rights of wife which is expressly or impliedly given to her by the law, then she can seek legal remedy whether the wrongdoer is her husband or any other person because every citizen has the right to live with dignity and privacy.

Right to Privacy and Privileged Communications

After the marriage the married couple gets some protection from disclosure of communication made during subsistence of marriage in the form of privileged communication under Indian Evidence Act 1872. There are certain matters in which a witness cannot be compelled to disclose or even if the witness is willing to disclose, he will not be permitted to do so. Such matters are known as privileged communication. Under section 118 of Indian Evidence Act 1872 every person is competent to testify unless the court feels that he is not able to understand the questions put to him or to give rational answer to them. Section 120 provides that in a civil proceeding the parties to the suit are competent witness. It follows that the plaintiff and defendant can give evidence against each other¹⁹. Similarly in criminal proceedings against any person the husband or wife of such person shall be competent witness. But there are certain communications under which it is the policy of law that they should not be disclosed even if the parties possessing that information wish to disclose it. Section 122 of Indian Evidence Act 1872 prevents communications between man and his wife from being disclosed. It is one of the best examples of privacy of married couples and it is recognition of right to privacy of the parties because marriage inspires confidence and confidence inspires openness of heart and feelings. This enables a married person to make a clean breast of everything to his or her spouse. Therefore such matters should be free from the risk of being disclosed but this

¹⁸ AIR 2008 AP 98

¹⁹ Onkar Chand v. Jagadamba Devi, AIR 2003 NOC 124 HP

rule is subject to some exceptions. A wife can testify as to what her husband did on a certain occasion²⁰. Communication between husband and wife taking place in the presence of a third person or when overheard by a third person can be testified by the third person²¹. Evidence of privilege communication can be given by a spouse with the consent of the party who made the communication on or with the consent of his representative in interest. Tape recorded conversation between spouses has been held to be admissible in evidence but not so if recorded without knowledge of spouse²². The communication between husband and wife may be disclosed in a suit between married persons or proceedings in which one married person is prosecuted for an offence which he has committed against his wife, the wife may disclose any communication made to her by the husband and which is relevant to the matter in question²³.

Whether a Party to a Divorce Proceeding can be Compelled to a Medical Examination

In married life the competency of married couple to fulfill their marital obligation plays crucial role. If any party to the marriage is not capable to fulfill his/her matrimonial obligation then it would be very difficult to live a happy married life. The law permits a party to the marriage to approach the court for getting a decree of divorce or for getting an order for nullity of marriage on the various grounds, for example, insanity, impotency, venereal disease etc. In such cases the burden of prove of incapacity of party lies on the person who files a case. To prove it, he can give evidence and at the same time he can also request the court for medical examination. When a person can be ordered to get them self examined, it is most debating question because this issue is related with the privacy and dignity.

In *Sharda vs Dharmpal*²⁴, the issue was whether a party to a divorce proceeding can be compelled to go for a medical examination. In this case right to privacy of married couple was judged by the court in different angle. In this case husband filed a petition for divorce under section 12(1)(b) and 13(1)(iii) of the Hindu Marriage Act, 1955 against his wife²⁵. He also filed an application for medical examination of his wife by stating that his wife is mentally unfit and not able to fulfill her matrimonial obligations. The issue before the Supreme Court was when and how a person can be asked for medical examination in case filed for divorce on the ground of physical incapacity and up-to which extent a married person has right to privacy. The court stated that in matrimonial cases where the petition has been filed for granting a decree of divorce on the ground of any physical incapacity, such as impotency, schizophrenia etc, in such cases it would be very difficult to reach on any conclusion without the medical examination of a party. In such case a person can opposed medical examination on the ground of right to privacy. If his plea is accepted then it will become very difficult for court to decide a case. In such cases it is necessary to make a harmonious construction of statutory provisions. The court affirmed that right to privacy guaranteed under Article 21 is not an absolute right and it is subject to some restriction. There is a need to make a balance between two conflicting interest, otherwise some statutory rights may become futile. The court by clarifying the position on above issues stated that in matrimonial cases the court has power to pass an order for medical examination of party and such orders are not in contravention of Article 21 of the Indian Constitution. However before passing such order there should be sufficient material before the court and the applicant must have prima facie case in his

²⁰ Ram Bharose v. State of U.P. AIR 1954 SC 104

²¹ Appu v. State, AIR 1977 Mad 194

²² Vishak Kaushik v. Family Court, AIR 2015 Raj 46

²³ Narendra Nath Mukerjee v. State, AIR 1951 Cal 140

²⁴ AIR 2003 SC 3450

²⁵ Section 12(1)(b) deal with and section 13(1) (iii) of Hindu Marriage Act 1956 deal with voidable marriage and divorce respectively

favour. After considering all above factors if the court passes an order for medical examination the person who has been asked to undergo a medical examination refused from submitting himself for medical examination then the court may draw adverse opinion against such persons.

Woman's Right to Make Reproductive Choices

Reproductive choices refers to choice of women to bear or not to bear child. In *Suchita Srivastava & Anr vs. Chandigarh Administration* (2009), a different issue came before the court for consideration. It was about the right of a victim to retain her pregnancy and termination of pregnancy of a woman without her consent. The court held that a woman's pregnancy could not be terminated without her willingness. In the cases of termination of pregnancy of a woman her consent matters because being a member of human family she has right to be treated as human and she is equally entitled to all human rights²⁶. The court by recognizing the right of women to make reproductive choices stated that she can take such decisions which affect her body and this right is available to her due to Article 21 of Indian Constitution which guaranteed right to life and personal liberty which includes right to privacy also. No other persons can compel her for procreation of child because under right to privacy she has right to take decision for procreating child. It is possible only when the statute permits. So to make decision to have or not to have child, is discretion of woman. Because she is the best judge of her and she has liberty to do so due to Article 21 of Indian Constitution.

Sexual Autonomy

In India the right to sexual autonomy came up before the Andhra Pradesh High Court for consideration in *T. Sareetha v. T. Venkata Subbaiah*²⁷. In this case the constitutionality of section 9 of Hindu Marriage Act, 1955, which provides for restitution of conjugal rights was challenged on the ground that it violates the fundamental rights guaranteed under Article 21 of Indian Constitution. The court by stating that section 9 of Hindu Marriage Act is unconstitutional on the ground of violation of right to life and personal liberty held that the remedy of restitution of conjugal rights provided for by section 9 is savage and barbarous remedy, violating the right to privacy and human dignity guaranteed by Article 21 of the Constitution. A wife cannot be compelled to live with a person against her will and section 9 compels a woman to live with a person against her will which is against the dignity and personal liberty of a woman. A woman has right of personal autonomy. The court further stated that the decree of restitution of conjugal right violates the right to privacy of an individual. It also restricts a woman from exercising control over her body and choices. But the Delhi High Court in the case of *Harvinder Kaur v. Harmander Singh*²⁸ has given different opinion on section 9 of Hindu Marriage Act and not followed the decision of Andhra Pradesh High Court and upheld the constitutionality of section 9. The constitutionality of section 9 was again challenged in Supreme Court in the case of *Saroj Rani v. Sudarshan Kumar Chaudhary*²⁹ in which the Supreme Court which has upheld the constitutionality of section 9 and held that it does not violate the right to privacy.

The right to bodily integrity and the reproductive choice of any woman have been recognized by the courts³⁰. Recently a petition has been filed in Supreme Court challenging the constitutionality of section 9 of Hindu Marriage Act 1955 and section 22 of Special Marriage Act 1954, which provides for restitution of conjugal rights, on the ground of violation of fundamental right granted guaranteed under Article 21 of the Indian Constitution. Terming the court-

²⁶ Ms. Pooja Jaiswal. (2010). Women Rights vis-à-vis Human Rights, Dehradun Law Review, 2(1), Page 67

²⁷ AIR 1983 AP 356

²⁸ AIR 1984 Delhi 66

²⁹ AIR 1984 SC 1562

³⁰ State of Maharashtra v. Madhukar Narayan Mardikar AIR 1991 SC 207

mandated restitution of conjugal rights as a “coercive act” on the part of the State, the petitioner contented that in United Kingdom the provision relating to restitution of conjugal rights has been abolished in 1970 and the notion that woman is chattel of her husband is not acceptable. Section 9 of Hindu Marriage Act violets the sexual and decisional autonomy, right of privacy and dignity covered under Article 21 of the Indian Constitution³¹.

Marital Rape

Section 375 of Indian Penal Code (IPC) defines the term rape which includes all types of sexual assault involving nonconsensual intercourse with a woman. But nonconsensual sex with wife who is above 18 years of age is not covered under section 375. If we look the provisions of IPC then we finds that if sexual assault is done by man with any woman it is rape but if it is done by husband with his wife, then it is not a sexual assault due to their marital rights. Under right of privacy a woman has right to prevent other from interfering with her body³². She has right of sexual privacy. No one can infringe her rights against her will³³ and she is free to take decision in her sexual matters³⁴. The right to privacy protects the essential aspects of our selfhood. Control is an important facet of the conception of privacy. It is the right of an individual to take decision for her. The exemption relating to marital rape affects woman’s right to control on her life³⁵. The High Court of Gujarat in *Nimeshbhai Bharatbhai Desai v. State of Gujarat* defines the marital rape as an “*unwanted intercourse by a man with his wife obtained by force, threat of force, or physical violence, or when she is unable to give consent.*” Marital rape is a nonconsensual act of violence in which wife is physically and sexually exploited by her husband³⁶. Marital rape is criminalized by many countries of the world. In U.S.A. it is deemed as offence. In U.K marital rape is recognized as a crime under Sexual Offences Act, 2003. Under Section 1 of the Sexual Offences Act, 2003 “*penetration of penis into the vagina, anus or mouth of the person without their consent, is a crime and it is immaterial whether the victim is married to the accused or not*”³⁷.

In the case of *Independent Thought v. Union Of India (2017)*, the issue before the Supreme Court of India was whether sexual intercourse between a husband and his wife being a girl between 15 and 18 years of age is rape or not. The court stated that exception given in section 375 Indian Penal Code creates an unnecessary, artificial difference between the girl child who is married and the girl child who is not married. It is discriminatory and against the interest of women. The unnecessary distinction made between married and unmarried girl is not in accordance of with the constitution provision enumerated in Article 15(3) and Article 21 of Indian Constitution. It is also against bodily integrity and reproductive choices of women. The court concluded that a sexual intercourse with a girl who is below 18 years of age is rape and her marital status is immaterial. In this case up-to some extent the court clarified the nature of unwilling sexual intercourse by husband with his wife who is between fifteen to eighteen years of age but the nature of unwilling sexual intercourse done by husband with his wife who is above eighteen years of age still not clear.

³¹ The Tribune India March 18, 2019

³² Sneha Mohanty Marital Rape: Safeguarded by the Constitution of India. Retrieved from <http://www.legalserviceindia.com/legal/article-515-marital-rape-safeguarded-by-the-constitution-of-india.html>

³³ Vishaha v. State of Rajasthan, AIR 1997 SC 3011

³⁴ *State Of Maharashtra And Another vs Madhukar Narayan Mardikar* AIR 1991 SC 207

³⁵ Maria Pracher. (1981). Marital Rape Exemption: A Violation of a Woman's Right of Privacy. Golden Gate University Law Review, Volume 11 Issue 3, 740-742

³⁶ Retrieved on 28/05/2020 from www.livelaw.in/R/CR.MA/26957/2017

³⁷ Sneha Mohanty Marital Rape: Safeguarded by the Constitution of India, Retrieved on 20/05/2020 from <http://www.legalserviceindia.com/legal/article-515-marital-rape-safeguarded-by-the-constitution-of-india.html>

As it is clear from the Article 21 of Indian Constitution that every person shall have right live with dignity irrespective her/his age and if any act which is contrary to this right, then it amounts to infringement. On the contrary the definition of rape as it given in section 375 of Indian Penal Code not covers the marital rape or unwilling sexual intercourse by the husband with his wife. It is not acceptable in present era because not criminalizing marital rape is against the fundamental freedom given to all persons irrespective of their gender, who are residing in India. Sexual assault cannot be tolerated in the name of institution of marriage. Autonomy over body should be given precedent over other rights³⁸. Marital rape should also be recognized as rape³⁹. Not criminalizing marital rape is a major lacuna in law because it is in contravention of the constitutional provisions which grant women equality and autonomy⁴⁰.

CONCLUSIONS

Recognition of right to privacy by apex court has opened a new area for discussion, which is related with marital rights. Though through marriage the spouses get some rights against each other but those rights are subject to right to privacy of a person. At the same time the right to privacy is not absolute right. Some restriction may be imposed on this right on the ground of health, safety, public order, national security etc. After analyzing the case laws on different issues it can be said the right to privacy is recognized as a fundamental right under Article 21 of Indian Constitution by way of judicial interpretations. Any law which is related with the marital rights should be judged on the parameter of right to privacy.

Further the out-dated notion that a wife is no more than a subservient chattel of her husband has long been given up. The status of married woman had been undergone a tremendous change in India since independence. Marriage is in modern times regarded as a partnership of equals and no longer one in which the wife must be the subservient chattel of the husband. But some aspects of female's rights are still neglected. India still has no legislation criminalizing the marital rape. The position of right to file a suit for restitution of conjugal right is not very much clear. It appears that it is the initial stage of development of right to privacy and in future we will see various new interpretations of right to privacy which may change the entire concept of traditional marriage. It may also affect the right to inherit the property of other spouse and right to get maintenance by the husband. Right to privacy is indispensable and inalienable right necessary for both physical as well as mental development. At this stage it can be suggested that distinct provision should be inserted in Indian Constitution for right to privacy which defines the amplitude of privacy in categorical terms. With the definition of right to privacy there should also be mentioned the grounds on which it can be restricted. Criminal laws are also should be modified and for sexual offences, there should be comprehensive code, which would not only define the offences but also provides a different procedure for the trial of cases relating to sexual offences relating to women. Any kind of rape with any women should be strictly dealt with and offender must be brought to justice. The existing laws are inadequate as they do not address major issues such as women's participation in the decision making process as to whether to give birth to the child or not, whether to take contraceptive or freedom to control their bodies their sexuality and fertility and freedom to take decision regarding reproduction. There is a need to draw attention to these issues and protect women perhaps from

³⁸ Prof. Dr. Nuzhat Parveen Khan. (2017). Women's Right to Privacy: Post Justice K.S. Puttaswamy Case. *Nyaya Deep*, Vol. 18, Issue III & IV, Pages 12-17

³⁹ Anandita Bhargava 'Right to privacy within the marriage' Retrieved on 20/06/2020 from <http://rsrr.in/2018/10/27/right-to-privacy-within-marriage-in-india> (visited on)

⁴⁰ Pradyumna Soni. (2018). Criminalization of Marital Rape in India: Understanding Its Constitutional, Cultural and Legal Impact. *NUJS*, 11, 1, Rev. 1

their age-old misery⁴¹. In developing countries like India, where the population of women is decreasing day by day, women are required to be given more opportunities and favorable environment to grow and empower themselves.

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3. Budhiraja, G. (2011). *Publicity Rights of Celebrities: An Analysis Under the Intellectual Property Regime*. *NALSAR Stud. L. Rev.*, 6, 85.

⁴¹ Dr. Sushma Sharma. (2017). *Expanding Boundaries of Reproductive Rights & Women Empowerment in India*. Nyaya Deep, Vol 18 Issue III & IV,