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Presumed Matrimonial Consent: A Legal Loophole

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*A sacred bond of matrimony, which ties two people together should have no essence of dominance but the deep-rooted patriarchy in our society blows out the concept of consent in sex between married couples, smashing the rights of the women of our country. It is rightly said that a woman with a voice is a strong woman but the laws of our country, which exempt the husband from the clutches of law in cases of marital rape, leave no dignity and respect in the hands of the women of India. The stigma created by the society of male dominance has resulted in the increase in the number of marital rape and the classical conditioning of the men of India has forced the women to think that she has to be sexually available all the time, without her wish as it is her duty to fulfill each and every wish of her counterpart. Women have been given equal rights by the constitution of India and it's time that we should realize the role of women in shaping the country, which can only be done if she gets all the right to live freely with dignity. This paper aims to highlight the Violation of Fundamental Rights by Exception 2 of Section 375 of the Indian Penal Code, 1860. The term “presumed matrimonial consent” is also discussed deeply and the need to respect **NO** is also examined.*

Keywords: *marital rape, woman's rights, consent, matrimonial consent, humanity*

INTRODUCTION

The Institution of marriage: Immoral Right in the hands of the Husband

A woman is a full circle, within her is the power to create, nurture and transform. The most alluring thing that she can have is confidence, which is shattered, not only by the hands of potential threats around her but also by her own partner, with whom she has dreamt of a successful and empowering relationship. Is marriage giving a man the consent for a lifetime to have sexual intercourse with her partner, or is consent once given can be considered an acceptance for sexual acts throughout her life? The answer is a big **NO** for every empathetic person, and even though the laws of India have not criminalized marital rape, it is a burning issue in contemporary times, affecting not just the women of our country, but humanity in a broader sense. In 1922, the first country to criminalize marital rape was the Soviet Union and by the year 2019, over 150 countries have criminalized this act¹, which affects the physical as well as mental well-being of women, who have done nothing to deserve this cruel and immoral treatment from her partner. In 2017, the Union Government held that removing the marital rape exception from the Indian Penal Code, 1860 would destabilize the institution of marriage and be used by wives to punish their husbands. But it can never be justified to subject the women of India to the barbarous and brutal acts of their partners, just because the law can be misused by a very small section of the population. It would be unfair if the lawmakers of the country do not listen to the voices of the females of the country, who are personified as a goddess since ancient times, and take effective steps to help them overcome this predicament.

WHAT EXACTLY IS MARITAL RAPE AND WHY IS IT A FELONY?

Marital rape, also called spousal rape, is the act of sexual intercourse with one's spouse without their consent. It refers to the unwanted intercourse by a man on his wife obtained by force, threat of force or physical violence, or when she is unable to give consent. Section 375² of the Indian Penal Code, 1860, which deals with rape, does not include marital rape as a criminal offence and this unprincipled evil is only covered under the ambit of domestic violence,

¹ Mira Patel, 'A history of the movement to criminalise marital rape across the world' (The Indian Express, 3 February 2022) <<https://indianexpress.com/article/research/a-history-of-the-movement-to-criminalise-marital-rape-across-the-world-7753164/>> accessed 25 April 2022

² Indian Penal Code, 1860, s 375

defined in the Domestic Violence Act, 2005³, providing only civil remedies to the wife, who is trapped in the clutches of a relationship which is demeaning her moral and human rights.

VIOLATION OF FUNDAMENTAL RIGHTS BY EXCEPTION 2 OF SECTION 375 OF THE INDIAN PENAL CODE, 1860

The objective behind Section 375 of the Indian Penal Code, 1860 was to punish those who engage in the inhumane activity of rape and to protect the women of our country from being exposed to such a brutal crime. Exempting husbands from punishment under Exemption 2 is undervaluing the importance of consent in sexual activities and is out of line from the objective of the section⁴. Age of the women should never be a parameter for exempting evil-minded criminals living with them, as exemption 2 of the Indian Penal Code 1860 is discriminating married women from unmarried women, without any reasonable nexus, violating Article 14 of the Indian Constitution. Indian criminal law certainly discriminates against female victims who are raped by their own husbands, owing to the fact that rape cannot be said to be committed between married couples. In the case of *Chiranjit Lal Choudhary v Union of India*⁵, it was held that all the classifications that are made by any law must be reasonable but the classification made between married and unmarried women, taking away the rights of the married women, subjecting her to the inhumane acts of her husband, cannot be said to be a reasonable classification, as the aim and motive of Section 375 was to protect women from the cruel and sadistic acts of men, leaving her in agony and pain. All human beings are equal under the Indian constitution be it man, woman, or any other individual, any essence of inequality would fail the test of article 14⁶ of the Indian Constitution as in the case of *Maneka Gandhi v Union of India*⁷ the court clearly ruled out the room for arbitrariness, article 14 strikes at arbitrariness in state action and ensures fairness and equality of treatment. The principle of reasonableness, which logically as well as philosophically is an essential element

³ Mira Patel (n 1)

⁴ Abhayan, 'Types Of Marital Rape' (*Legal Service India*) <<https://www.legalserviceindia.com/legal/article-5571-types-of-marital-rape.html>> accessed 25 April 2022

⁵ *Chiranjit Lal Choudhary v Union of India* (1951), AIR 41

⁶ Constitution of India, 1950, art. 14

⁷ *Maneka Gandhi v Union of India* (1978) 1 SCC 248

of equality or arbitrariness, pervades article 14 like a brooding omnipresence. The exception-2 of section 375 of the India Penal code is in contravention of article 14 as there is no rational nexus or intelligible- differentia under this exception the only objective behind this section is that if the person committing rape or having sexual intercourse with a woman without her consent is her husband then he won't be booked under the section, he is enjoying the immunity from punishment just because he is associated with the woman by the wedlock, this immunity just in the name of marriage is arbitrary and irrational, without any legitimate aim and objective, because the law is means to end all the evils but by this exception, the means is failing to justify its goal. Article 21⁸ of the Indian Constitution, which is the heart and soul of the constitution, provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Life in Article 21 of the Constitution is not merely the physical act of breathing. In the celebrated case of *K.S. Puttaswamy (Retd.) vs Union of India and Other*⁹, the Supreme Court's 9 judges constitutional bench held privacy to be a fundamental right, expanding the horizons of Article 21 even more. In the case of *State of Karnataka vs Krishnappa*¹⁰, the apex court held that sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female. Fundamental rights are guaranteed to each and every individual of the country, without any discrimination but the act of marital rape is tearing down the right to privacy of women, who too are entitled to equal rights in the society. Marrying a person can never be said to be an acceptance of a violation of your human rights, which must be protected and facilitated by the laws of the country.

PRESUMED MATRIMONIAL CONSENT: THE ROOT CAUSE OF THIS EVIL

The basis for exempting husbands from being prosecuted for marital rape lies in the concept of presumed matrimonial consent. The assumption that a wife's sexuality is her husband's property is the root cause of this sinful offence. As per section 114A¹¹ of the Indian Evidence Act 1872, in rape trials, there is a presumption as to the absence of consent on behalf of the

⁸ Constitution of India, 1950, art. 21

⁹ *K.S. Puttaswamy (Retd.) v Union of India and Other* (2017) 10 SCC 1

¹⁰ *State of Karnataka v Krishnappa* (1993) 4 KarLJ 680

¹¹ Indian Evidence Act, 1872, s 114A

women and the onus is on the defence to prove otherwise. But the institution of marriage in India gives unlimited and exclusive sexual access to one's spouse, defeating the need for consent before indulging in any sexual activity. We all accept this fact boastfully in front of the society that both husband and wife are equal breadwinners of the family, they are equal in each and every sphere and have equal responsibilities and duties but inside a room, the husband is the ruler of the wife's body, and this beast ruler gets his validation from the presumed matrimonial consent. In India, a husband can be jailed for torturing her wife, but not for raping her, which breaks her physically, mentally, and emotionally.

"NO" HAS TO BE RESPECTED

We as prudent citizens of this country must understand that a woman can say no to sex with any person at any time and that "no" has to be respected by the opposite sex. We accept that marriage is a very pious institution, but no institution is above an individual's dignity, and forcing anyone, be it your wife, for sex shatters her dignity and yours too, as a person of morals and values. The hypocrisy of the world is witnessed as everyone preaches women empowerment but unfortunately is suppressing the same woman even the authority and power over her own body, marital rape is an insidious disease of our society that needs to be regulated. Each and every law in the country can be misused by a certain group of people but it cannot be an excuse for not making new laws and we have the judiciary to examine any charge, so the argument that framing laws to criminalize marital rape would be subject to misuse falls short when compared to the gross dishonour that women get to face on a daily basis, not from any stranger, but the person closest to her.

NEED OF THE HOUR: CRIMINALIZATION OF MARITAL RAPE

Mere apprehension of misuse of any law should not be a ground for violating the rights of the women of our country and if we want to establish a holistic society in the true sense, then we have to ensure that both the sexes are allowed to live with dignity and respect and dominance of any one of them can result in disastrous consequences. Article 14 and Article 21, which talk about equality and the right to live with dignity, must be facilitated by the lawmakers of the

country and we have to acknowledge this issue if we want to empower women and achieve the zenith of justice.