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Why Marital Rape should be criminalize

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ABSTRACT:

Marital rape is non-consensual sexual intercourse within marriage, Section 375 of the Indian Penal Code,1860 provide an exception for marital rape, this exception contradicts fundamental rights given under the Constitution of India, mainly Articles 14, 15, and 21, which provide equality before the law, prohibit discrimination based on sex, and protect the right to life and personal liberty. This article provides arguments on the constitutionality of the Marital Rape Exception (MRE) with modern principles of equality and justice.[1] The MRE contains gender inequality by providing exceptions for married women against sexual violence which is rape for unmarried women. The argument revolves around the violation of Article 14, which discusses equality before the law. The MRE (Marital Rape Exception) establishes a classification based solely on marital status, which does not fulfill the test of intelligible differentia and rational nexus established by judicial precedents. This classification results in unequal protection under the law by providing exemption to offenders which is based on their marital relationship with the victim.

also, the MRE discriminates against married women under Article 15, as it undermines their sexual autonomy. It also violates Article 21 by denying women the right to bodily integrity and refusing consent within marriage. In examining the societal impact, the article provides an argument regarding that maintaining the exception creates gender inequality and also against the various international law related to marital rape as a serious violation of human rights. The current legal framework and committee reports, which have repeatedly called for reforms to criminalize marital rape. This article also concerns false cases and marital privacy, this article provides the argument that criminalizing marital rape is so important for upholding human rights and ensuring justice for victims.

[1] Trisha Jagadeesan, Sacred Violence: India's Marital Rape Exception, 8, Women Leading Change © Newcomb College Institute, 60 - 65, file:///C:/Users/mishr/Downloads/Vol+8(1)_Jagadeesan.pdf

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Keywords: Marital rape, Indian Penal Code, constitutional principles, gender equality, human rights.

INTRODUCTION:

The Argument regarding criminalizing marital rape is basically against the Constitution because Under Sec. 375[2] of the Indian Penal Code 1860, non-consensual sexual intercourse within marriage is an exception to rape, this Marital Rape Exception (MRE) contradicts fundamental rights given Under Articles 14, 15, and 21 of the Constitution[3], Which provides equality before the law, prohibits discrimination based on sex, and Protects the right to life and personal liberty. The Marital Rape Exception (MRE) laid down gender inequality because it restricts married women from the same protection against sexual violence which is available for non-married women. It also undermines their autonomy, dignity, and bodily integrity, which are contradicting modern principles of equality and justice. Criminalizing marital rape is not only legal reform but is necessary for human rights and equal protection under the constitution for all married or unmarried women, In this Article various arguments are given in support of the criminalization of marital rape following:

1. It violates the fundamental rights to equality, dignity, and bodily integrity given under Articles 14, 15,19(1)(a) and 21 of the Constitution of India.[4]

The constitutionality of the exception of rape in marriage under Sec. 375 of the IPC,1860, is a violation of fundamental rights given in the Constitution of India. This exception is against the basic rights to equality, dignity, and bodily integrity given under Articles 14, 15, and 21 of the Constitution of India.[5] Art. 14 of the Indian Constitution talks about equality before the law and equal protection of the laws, held in the case of *Delhi Development Authority* v. *Joint Action Committee*[6], also, Art.14 is the heart and soul of the constitution, and Art. 14 of the constitution provides all persons in our country equality before the law and equal protection of the laws, which only means that all persons are equal and have equal protection[7].

However, this exception laid down an arbitrary classification based on the relationship of marriage between the Criminal and the victim, to determine the arbitrariness and reasonability

[2] Indian Penal Code, No. 45, Acts of Parliament, 1860 (India).
[3] INDIA CONST. art. 14, 15 & 21.
[4] INDIA CONST. art, 14, 15, 19 cl. 1 (a) & 21.
[5] INDIA CONST. art, 14, 15 & 21.
[6] Delhi Development Authority v. Joint Action Committee, AIR 2008 SC 1343.
[7] Narain v. Improvement Trust, (1973) 2 SCC 2.

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of the classification it has to fulfill the test of reasonability laid down by the Hon'ble SC in the case of Deepak Sibbal v. Panjab University[89]. The Hon'ble SC laid down two conditions, namely: -

(i) The classification should be an intelligible differentia which means understandable classification.

(ii) The differentia must have a rational nexus which means a logical relation between classification.

This classification fails the test of intelligible differentia because it gives exemption to Criminals because of marital status, and also without the rational nexus. This exception conveys the message that forced sex outside marriage is actual rape, and within marriage not rape which is a manifestly arbitrary and unreasonable classification that's why it provide unequal protection of the laws and violates the essence of Art. 14[10]. The precedent set in Kruse v. Johnson establishes the test for determining the reasonableness of classification. The MRE, by exempting marital rape from the purview of the law, is unreasonable and unjust. It involves oppressive interference with the rights of married women and cannot find justification in the minds of reasonable individuals, Also the test of Kruse v. Johnson[11] recognized by various SC judgments like *Education& Anr. v. Paritosh Bhupesh Kumar Sheth & Ors*[12] Art. 15 of the Constitution protects from discrimination on the basis of sex. However, in my view, this exception discriminates against women completely because she is married and that's why discrimination impairs their sexual agency, autonomy, and right to bodily integrity. Also, for example, Gang rape happened with the wife, and the main accused is the husband but the other accused will face the offense of gang rape and other form of rape charges but not the main accused which is the husband only because he is the husband of the victim. Also other forms of rape like Section 376A which covers the death of a victim due to rape not applicable to the husband.

Also, Art.21 Provides the right to life and personal liberty.[13] Marital rape is physical, psychological, and emotional harm to the victim, irrespective of the offender's identity.

[8] Deepak Sibbal v. Panjab University, (1989) 2 SCC 145.
[9] collegesidekick, https://www.collegesidekick.com/study-docs/5670426, (last visited Mar. 6, 2024).
[10] INDIA CONST. art. 14.
[11] Kruse v. Johnson, [1898] 2 QB.
[12] Education & Anr. v. Paritosh Bhupesh Kumar Sheth & Ors, (1984) 4 SCC.
[13] INDIA CONST. art, 21.

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Modern-day marriage is based on one quality, and consent is fundamental to marital relations. The MRE denies women the right to withdraw consent, violating their dignity, bodily integrity, and autonomy even S.C. in the case of State v. Pankaj Chaudhary[14] held that a Sex worker has the right to refuse sexual intercourse without her consent.

This exception is also against Article 19(1)(a) of the Constitution[15], which deals with freedom of expression, which also relates to married women.

2. Non-consensual intercourse within marriage constitutes rape and undermines the institution of marriage:

Marriage is fundamentally a union between husband and wife, which is recognized by law and society, and it is based on mutual respect regarding consent and autonomy of each other, That the argument is sexual intercourse by the husband without the consent of the wife is not said to as rape because of the sanctity of marriage but if we observe then find this exception is against the essence of the marriage, which revolves around respect of each other, love and mutual consent. Such a stance not only undermines the sanctity of marriage but also facilitates a culture of abuse and subjugation.

3. Marital rape exception perpetuates gender inequality:

The retention of the marital rape exception perpetuates gender inequality and contravenes the fundamental rights of women, In the popular English case[16] *"A rapist remains a rapist regardless of his relationship with his victim".* it was categorically recognized that rape, regardless of the marital status of the perpetrator and the victim, remains a heinous crime. If marital rape is not recognized as a crime, then the law reflects a woman's autonomy and consent as subordinate to her married life.

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4. Conjugal rights cannot be equivocated with the right to sex without consent:

While conjugal expectations are legitimate within the framework of a marriage, they should not be misconstrued as an entitlement to engage in sexual activities without the explicit consent of the partner. The law's recognition of conjugal rights, as seen in the issuance of decrees for

[14] State v. Pankaj Chaudhary, (2019) 11 SCC 575.
[15] INDIA CONST. art, 19 cla. 1 (a).
[16] C.R. v. United Kingdom.

restitution of conjugal rights under the HMA, does not extend to sanctioning non-consensual sexual relations. Respect for an individual's autonomy and consent is paramount and should not be compromised under the guise of conjugal expectations. also in the ***Independent Thought*** *case Supreme Court emphasized that*

(a) A woman cannot be treated as a commodity having no right to say no to sexual intercourse with her husband.

(b) The woman is not subordinate to and/or property of her husband.

(c) This Exception creates an artificial distinction between married and unmarried women.[17]

5. Invasion of private space cannot justify the denial of justice for victims:

The argument regarding prosecuting marital rape infringes on the privacy of the marital relationship fails to recognize that the law already intervenes in such private spaces to address other forms of domestic violence and abuse. Constitutional rights, including the right to privacy and bodily autonomy, do not cease to exist within the marital domain. As established in Joseph Shine,[18] *"The right to privacy depends on the exercise of autonomy and agency by individuals. In situations where citizens are disabled from exercising these essential attributes, the courts must step in to ensure that dignity is realized in the fullest sense. Familial structures cannot be regarded as private spaces where constitutional rights are violated"*[19]

6. Reevaluation of Pre-Constitutional Statutes:

The presumption of constitutionality traditionally applied to pre-constitutional statutes like the IPC has come under scrutiny in recent jurisprudence. As highlighted in Navtej Singh Johar and Joseph Shine's cases, societal changes necessitate a dynamic interpretation of laws. It is essential to recognize the evolving societal values and perspectives, which challenge the presumption of constitutionality.

7. Inadequacy of Existing Remedies:

Despite the existence of various legal provisions, including Section 498A of the IPC and the Domestic Violence Act, they fall short of addressing the gravity of sexual violence against

[17] Independent Thought v. Union of India, AIR 2017 SC 4904.
[18] livelaw.in, https://www.livelaw.in/columns/up-ordinance-criminalizing-conversion-for-marriage-is-an-assault-on-personal-liberty-166575, (last visited Mar. 6, 2024).
[19] Joseph Shine v. Union of India, 2018 SC 1676.

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women. The argument that women have alternative avenues for seeking justice disregards the unique nature of rape as an offense. Section 498A, which deals with cruelty, fails to encompass the heinous crime of rape, leaving victims without adequate legal recourse. Similarly, other provisions like Section 304B and 306[20] do not address the specific violation of bodily autonomy and dignity inherent in rape cases, Similarly, the D V act[21] provides just Civil remedies.

8. Discrepancies in Committee Reports

The findings of various parliamentary committees and expert reports underscore the urgent need for legislative reform for Marital Rape. Reports such as

- 167th Report of the Parliamentary Standing Committee of Home Affairs on the Criminal Law (Amendment) Bill, 2012
- 19th Report of the Lok Sabha Committee on Empowerment of Women (2012-2013)
- Report of Justice J.S. Verma (Retd.) Committee on Amendments to Criminal Law
- 172nd Report of the Law Commission of India on Review of Rape Laws.

9. The argument against recognition of marital rape based on the fear of lodgement false cases:

The Argument that recognizing marital rape as a crime will lead to a surge in false cases is unsupported by actual evidence. NFHS-4 data illustrates the ground reality of underreported cases of sexual violence that occurred in marriage, it debunks the myth of the potential of lodging false cases and flooding court cases. We have First, keep in mind that a vast number of women married or unmarried do not report sexual acts against them because of the societal stigma attached to it. This survey revealed the reality of aspects concerning spousal sexual violence, both, from "current husbands" as well as "former husbands"; also it gives the fact that 99% of sexual violence cases against women remain unreported.[22]

CONCLUSION:

[20] Indian Penal Code, No. 45, Acts of Parliament, 1860 (India).
[21] Protection of Women from Domestic Violence Act, 2005, Acts of Parliament, 2005 (India).
[22] livemint, https://www.livemint.com/Politics/AV3sIKoEBAGZozALMX8THK/99-cases-of-sexual-assaults-go-unreported-govt-data-shows.html, (last visited Mar. 6, 2024).

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The Marital Rape Exception (MRE) which is under Section 375 of the Indian Penal Code needs to reform as suggested by various committees also it violates fundamental constitutional rights, specifically Articles 14, 15, and 21. The MRE creates an arbitrary classification based on marital status, and also it denies married women equal protection against sexual violence which is rape for unmarried women also aggravated forms of rape within marriage are not punishable that's why it should be recognized as rape to uphold the principles of autonomy, dignity, and bodily integrity. The current exception not only undermines these principles but also contradicts international norms and lays down a culture of abuse within marriage.

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