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## **“Marital Rape: A Crime that Demands Criminalization”**

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### **INTRODUCTION:**

We all know that India is a developing country. A country where we talk about of women rights and safety of women with all our concern. Where people come out on the street for candle march and for showing their agitation as soon as a rape take place. A country where we sympathize with the rape victims and we raise our voices for their justice. But surprisingly, all those voices go silent when it comes to marital rape. Instead of becoming the voice, people start giving lectures on how a woman has to sacrifice for her husband and for her family, how “it happens and that you’ll get used to it”. Because of all this, most of the women didn’t even come up against this crime. They do exactly what people advises them, **THEY GET USED TO IT**. Marital rape or spousal rape is a sexual intercourse between a married couple without the spouse’s consent. One thing to notice here is that physical violence is not necessary to take place in marital rape. The only key element of utter importance is the consent of one’s spouse. In Indian Legal System, rape and all the other forms of sexual assault involving a nonconsensual intercourse with a woman is mentioned in section 375 of Indian Penal Code (IPC).<sup>1</sup> In section 375, there is an exception, Exception 2 which clearly says **“Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape”**. Over the years, criminal law has seen a lot of legal amendments for the protection of the women still the dignity and human rights of women are undermined because of de-criminalization of marital rape. Almost every country in the world recognizes marital rape as a crime, there exist 36 countries where it is still not criminalized and unfortunately, India is one of them.<sup>2</sup> This article specifically talks about all the articles that are violated by this exception and also mentions some voices that came forward for de-criminalizing this crime.

### **VIOLATION CAUSED BY EXCEPTION 2:**

**ARTICLE 14** – Article 14 of Indian Constitution establishes that “The state shall not deny to any person equality before the law or equal protection of laws within the territory of India”.<sup>3</sup> Yes, the article does ask the law to treat everyone equally but still, there is a distinction between the rape victims and the ones who have been raped by their own husbands.

The history of exception 2 goes back to the British colonial period and the Victorian era.<sup>4</sup> During the 19th century, when India was under the British rule, the laws of that time

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<sup>1</sup> Indian Penal Code § 375, No. 45 of 1860, India Code

<sup>2</sup> *Marital Rape in India: 36 countries where marital rape is not a crime*, India Today, Mar. 12, 2016

<sup>3</sup> India Const. art. 14.

<sup>4</sup> Jill Elain Hasday, *Consent and Contest: A Legal History of Marital Rape*, 88 Calif. L. Rev. 1373 (2000)

considered women and their husband to be a single individual. They never treated them as two different identities. The exception law of article 375 of IPC was drafted on the basis of Victorian patriarchy and so women were overshadowed by their husbands. This doctrine was named as “**Doctrine of Coverture**”.

In 1860, the time when IPC was drafted, a married woman was not given the freedom which is given to her today. She was not considered as separate legal entity. In fact, women at that time were considered as the chattel of their husbands.<sup>5</sup> Exception 2, which easily ignores the wrong done to a woman by her own husband and does not believe the act of “rape” done by a husband towards her spouse, was largely influenced and derived from the practice of merging women’s identity with her husband. Women were not even free to file a complaint against a person under her own identity.

But since the times are changed, women now are considered as a separate and independent legal identity. As rightly observed by the bench of J.B. Pardiwala, J., wife is no more a chattel to her husband and the husband is fulfilling his marital duty towards his wife with dignity by having a sexual intercourse with her. Still, exception violates the right of equality as it discriminates against women based on their marital status and hence giving a free pass to the actions done by their husband. By doing so, the exception endangers the married women and let the crime happen when the law protects the unmarried woman against such acts.

**ARTICLE 21** – Article 21 of the Indian Constitution<sup>6</sup> ensures that “No person shall be deprived of his life or personal liberty except according to procedures established by law”. The court further said that article 21 also include the rights to health, safe breathing air, privacy, dignity, safe environment etc.

In 2017, the Supreme Court gave a judgement in *Justice K.S. Puttuswamy (Retd.) v. Union of India* case stating that every individual has a fundamental right to privacy. SC also said that right to privacy includes “decisional privacy reflected by an ability to make intimate decisions primarily consisting of one’s sexual or procreative nature and decisions in respect of intimate relations”.<sup>7</sup> The above stated rule by the Supreme Court does not distinguishes between the women based on their marital status. Right to abstain from sexual activity for all women, marital status of women not taken into consideration, is enshrined in article 21 as a fundamental right.

Exception 2, very easily, defeats the aim of providing protection to women. The “right to live with dignity” is very much a part of article 21<sup>8</sup> but due to the existence of this exception, which fails to discourage the inhumane acts, the forced sexual intercourse done by a man with his wife, women are exposed to bad mental condition and are exempted from living a dignified life.

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<sup>5</sup> *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99(6) Harv. L. Rev. 1255, 1256 (1986).

<sup>6</sup> India Const. art. 21.

<sup>7</sup> *Justice K.S. Puttuswamy (Retd.) v. Union of India*, (2017) AIR 2017 SC 4161 (India).

<sup>8</sup> *C.E.S.C. Ltd. v. Subhash Chandra*, (1992) 1 SCC 441 (India).

**ARTICLE 375** – Article 375 of IPC acts as an aid for the victims of rape. It gives a sense of assurance to women that the person who has committed a wrong against her, who has touched her without her consent will be punished. But exception 2 contradicts the same article. Discriminating indirectly between the rape victims based on their marital status ruins the very idea of providing a help to the aggrieved party.

According to the studies, women are traumatized more by a rape done by one's own spouse. Such women are assaulted by the person with whom they share the same house and possibly children. The person whom they trust with their life. Marital rape victims are more likely to be exposed to multiple rape incidents. Such women suffer physical as well as psychological injuries and find it difficult to run away from such traumatizing life. Effect of this inhumane act includes fear, guilt, shame and injuries such as dark eyes and broken bones.

**CONCLUSION:**

The above article completely shows that exception 2 is contradictory to the article 375 of IPC. In the eyes of law, everyone is equal. Then according to this, there should not be any discrimination of such sort. A rape committed, either within the closed doors or in open, is a heinous crime. A woman still suffers physical and mental injuries because of it and her dignity is forsaken.

Not only this but this exception also violates article 14 and article 21. There are many writ petitions with the Supreme Court and the High Court challenging the constitutionality of this exception. It's time that this act should be criminalized and exception 2 should be struck down from the Constitution.