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Marital Rape: A Crime Stranger than Fiction

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ABSTRACT

Rape is not only an offence against the woman but also a serious threat to society at large. Considered as one of the most heinous crimes, rape excruciates women to the very core. When such an evil act occurs behind the facade of marriage, it not only affects the woman physically but also puts a distressing effect on her emotional and mental state. Yet not criminalizing marital rape shows the presence of a male-dominated orthodox society where a woman acquires the status of an object used only for sexual satisfaction. Rape is always a rape whether it is done by the husband of the woman or by any stranger. Thus marital exemption is in no way justifiable in our Indian society where women have all the right to live a free and dignified life. It also poses a great threat and impediment in accomplishing the objective of gender equality and justice in the country. But, unfortunately, the Indian Penal Code, 1860 refuses to acknowledge that it is a crime for a husband to rape his wife, implying that marital rape is not a crime in India. This research paper, henceforth, will primarily focus on the concept of marital rape, its evolution, theoretical bases, and its validity in light of constitutional provisions. It will also highlight the dire need for proper legislation to put an end to the menace of marital rapes. At the end of the paper, we arrive to the conclusion that it is utterly essential to declare marital rape unlawful and advocate changes to the criminal law as a model for the same.

Keywords: Marital Rape, Gender Equality, Right to Life, Sexual Privacy, Theoretical Bases.

I. INTRODUCTION

“Truth: Rape does indeed happen between girlfriend and boyfriend, husband and wife. Men who force their girlfriends or wives into having sex are committing rape, period. The laws are blurry, and in some countries marital rape is legal. But it still is rape.”³ – Patti Feuereisen

The concept of “marital rapes” denotes to such rapes which are committed by the victim’s husband. The definition of rape remains the same: when sexual intercourse occurs with no consent. As a result, proving the nonexistence of consent is an essential factor in proving the crime of rape. The burden of proof for absence of consent is recurrently placed on the victim. In some cases, such as with minors, consent is assumed to be absent since they are legally

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³ GOODREADS, https://www.goodreads.com/author/quotes/318514.Patti_Feuereisen (last visited Mar 28, 2023).

presumed incompetent of consenting to such sexual actions. On the other side, there are some situations in which permission is assumed. When the victim and the perpetrator are married, this presumption applies.

The intricate, personal nature of marital relationships makes it difficult for the victim to even recognise herself as a victim, which is why marital rape is one of the most under-reported violent crimes. Even those women who believe they are victims are hesitant to report the incident to the authorities because they are financially dependent on their husbands, and reporting the incident could result in their financial assistance being withdrawn, leaving them and their children without food and housing.

In India, several laws and enactments dealing with violence against women in their own homes have been established, including laws against dowry, cruelty, domestic abuse, and female infanticide. However, the most serious and humiliating wrong in a marriage, when a husband pushes himself on his wife, believing that it is his nuptial right to have sex with her (with or without her consent), which is known as ‘marital rape’, and has yet to be recognised as a crime by legislators.

II. RAPE LAWS IN INDIA

Section 375 of the Indian Penal Code, 1860, defines rape and provides several instances when the act would be considered a rape. The Section after the Criminal Law (Amendment) Act, 2013 states that:

“375. Rape.— A man is said to commit “rape” if he—

- (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or*
- (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or*
- (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or*
- (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,*

under the circumstances falling under any of the following seven descriptions:

First.— Against her will.

Secondly.— Without her consent.

Thirdly.— With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.— With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.— With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.— With or without her consent, when she is under eighteen years of age.

Seventhly.— When she is unable to communicate consent.

Explanation 1.— For the purposes of this section, “vagina” shall also include labia majora.

Explanation 2.— Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.— A medical procedure or intervention shall not constitute rape.

Exception 2.— Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape”.⁴

However, the age of 15 years in Exception 2 has been substituted with 18 years by the Supreme Court of India through its verdict in the case of **Independent Thought v. Union of India**⁵.

The rationale for the exclusion of sexual intercourse between a man and his wife from the definition of rape is not stated in Exception 2 of Section 375 of the IPC. Because the section’s main focus is consent, it’s likely that when the victim and the perpetrator are married, an insurmountable presumption of consent applies. However, considering the sanctity that married relationships have gained in our culture, it is also plausible that this was a legislative choice to exclude the functioning of this provision from marital relationships.

⁴ The Indian Penal Code, 1860, § 375, No. 45, Acts of Parliament, 1860 (India).

⁵ (2017) 10 SCC 800.

Whereas the law does not penalize marital rape, it does penalize a certain kind of marital rape, namely non-consensual sexual intercourse while the wife and husband are living apart due to judicial separation or otherwise. In this regard, Section 376B of IPC, 1860 states that:

“376B. Sexual intercourse by husband upon his wife during separation.— *Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine.*

Explanation.— In this section, “sexual intercourse” shall mean any of the acts mentioned in clauses (a) to (d) of Section 375.”⁶

After interpreting this section, we can understand that permission is presumed in section 375 of the IPC, which is not the case here because the husband and wife do not live together. Living together creates a presumption that the wife has given her agreement to the husband's sexual intercourse.

III. EVOLUTION AND CURRENT POSITION OF MARITAL RAPE

(A) Historical Evolution:

While tracing the history of marital rapes throughout the world, we found that it was until mid 20th century that most of the legislations regarding rapes had a deviation when the case was related to a married couple i.e., where the perpetrator was the husband of the victim. The rationality behind such exception was that the institution of marriage was considered as a mere contract in which the husband acquires a lifetime right to have sexual intercourse with her wife and implied consent was considered from the wife's side. The first US case which conceded this justification was **Commonwealth v. Fogarty**⁷, in which a Massachusetts court ruled that marriage was a defense to the charge of rape. In further cases also, the decision remained invariable. Also, at this juncture, the viewpoint of the Supreme Court of Virginia in the case of **Weishaupt v. Commonwealth**⁸ which can easily infuriate the mind of any prudent person becomes crucial to be mentioned. In the instant case, the court noted that *“it is hard to imagine how charging a husband with a violent crime of rape can be more disruptive than the violent act itself.”*⁹ Did this judgement give even a little deliberation to the percept of the victim here?

⁶ The Indian Penal Code, 1860, § 376B, No. 45, Acts of Parliament, 1860 (India).

⁷ (1857) 75 Mass. 489.

⁸ (1984) 315 S.E.2d 847.

⁹ *Ibid.*

As per our conscience, the answer is simply negative.

In this context, the position of India was not anomalous as the said exception of marital rapes also persisted here from a very ancient time. As it is evident from various Indian ancient texts, that society has always been patriarchal and discriminatory towards women, in consequence of which men are in the habit of possessing dominance over women. Furthermore, this ethos has also been destructively molded for ravishing women in one or another way. Marital rape has been one such way.

As the Indian Penal Code was drafted by the British for India, it also contained the same exceptional clause of marital rapes as it was there in the British Common law at that time. Section 375 of the Indian Penal Code which defines and criminalises rape, exonerates from its scope ‘sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age’¹⁰. However, several attempts have been made to remove this exception but neither had a positive outcome. Pursuant to the Law Commission’s recommendation in its 42nd Report, non-consensual sexual intercourse with a wife living separately (under a decree of judicial separation or otherwise), was excluded from the ambit of the clause.

In the case of **Sakshi v. Union of India**,¹¹ the Supreme Court gave guidance to the Law Commission of India to investigate the plausibility for amending provisions related to ‘sexual abuse’ in the Indian Penal Code. However, after due consideration, the Law Commission in its 172nd Report rejected the possibility of entirely removing the exception of marital rape on the ground that this would amount to an excessive interference with the institution of marriage and marital relationship.¹²

Afterward, in the year 2012 which witnessed the dreadful incident of Delhi gang rape and the subsequent public turmoil, Justice Verma Committee was constituted which gave the recommendation for the removal of the marital rape exemption clause.¹³ Inconsolably, the said recommendation was not executed in the Criminal Law Amendment Act 2013.

(B) Theoretical Basis

In this section, we will discuss the early theories which apparently gave support to the marital rapes and are still backing it up. The most notable theories that can be traced in the writings of

¹⁰ The Indian Penal Code, 1860, § 375, No. 45, Acts of Parliament, 1860 (India).

¹¹ (1999) 6 SCC 591.

¹² LAW COMMISSION OF INDIA, REVIEW OF RAPE LAWS (2000) Report No 172 [3.1.2.1].

¹³ JUSTICE JS VERMA COMMITTEE, REPORT OF THE COMMITTEE ON AMENDMENTS TO CRIMINAL LAW 113-117 (2013).

British jurists namely Sir Matthew Hale¹⁴ and Sir William Blackstone¹⁵ who put forward certain arguments in support of decriminalisation of marital rape which in turn led to the foundation of two theories that we are going to discuss comprehensively, viz. (i) doctrine of coverture; and (ii) implied consent and contract theory. After considering these theories, we will also attempt to cover the modern-day justification of marital rapes.

- a. **Doctrine of Coverture:** According to this doctrine, the personalities of a man and a woman become one upon marriage. In the words of William Blackstone, “*By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection and cover, she performs everything...*”¹⁶ This doctrine was mostly preceded by the view that women are a chattel or property whose ownership is in the hands of the dominant male member of her immediate family.¹⁷ Therefore, it led to the proposition that if a husband is forcibly having sexual intercourse with her wife, then it is nothing but the husband making use of his own property.¹⁸
- b. **Implied Consent and Contract Theory:** According to Sir Matthew Hale, Chief Justice in 17th Century England, there is an implied consent and contract between husband and wife. Lord Hale wrote that: “*the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual consent and contract, the wife hath given up herself this kind unto her husband which she cannot retract*”¹⁹. Thus, the marriage becomes an indicator of the fact that the wife has provided an unconditional and irrevocable consent to sexual relations with her husband. More precisely, this theory views marriage as a barter where one party pays maintenance in exchange for the satisfaction of sexual needs. This reverts to the position of women’s sexuality as chattel, negating gender equality

¹⁴ Rebecca Ryan, *The Sex Right: A Legal History of the Marital Rape Exemption*, 20 LAW & SOC. INQUIRY. 941, 947 (1995).

¹⁵ *Id.* at 943.

¹⁶ WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 442 (Clarendon Press 1765).

¹⁷ Lalenya Weintraub Siegel, *The Marital Rape Exemption: Evolution to Extinction* 43 CLEV. ST. L. REV. 351, 356-57 (1995); Jessica Klarfeld, *A Striking Disconnect: Marital Rape Law’s Failure to Keep up with Domestic Violence Law* 48 AM. CRIM. L. REV. 1819, 1826 (2011).

¹⁸ Sarah Harless, *From the Bedroom to the Courtroom: The Impact of Domestic Violence Law on Marital Rape Victims* 35 RUTGERS L. J. 305, 311-12 (2003).

¹⁹ MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 629 (E. and R. Nutt, and R. Gosling 1736).

within the marital relationship.²⁰ Thus, the implied consent theory creates the perception of the centrality of sex, of treating sexual relations as a fundamental factor in married life and all other aspects as subsidiary.²¹

- c. **Modern Day Theory – The Public-Private Debate:** It is important to discuss the public-private debate, since this constitutes the only legal justification for the continuance of the marital rape exemption that has any claim to legitimacy, howsoever weak.²² According to this contention, there is a segregation between the public and private life and any legislation can only intervene to the extent of public sphere only. Therefore, criminalizing marital rape will unwantedly permeate into the private boundaries of the married couple. ‘Privacy strategy’ is the term often used to describe this approach and it has worked well in the past and continues to be effective in resolving complex legal disputes in different jurisdictions.

(C) Present Scenario

So, after discussing the historical evolution and theories which have provided a long-term backup to marital rapes, now we will scrutinise its current status in India as well as around the world.

Society has changed extravagantly in recent years. It was once a time when women were denied their basic rights and treated as the property of males for their whole life. However, this is no longer the case. Women’s social and legal status have undergone radical changes. Nevertheless, the marital rape exception still continues to exist under Indian law. Why are we hesitating to modify the laws related to women? Laws are not designed to be inflexible, rather than they are supposed to be moulded as per the societal changes but still we are stuck with the old-aged laws based on certain stereotyped theoretical foundations. As rightly observed by William J. Brennan that “*Law cannot stand aside from the social changes around it*”²³.

One of the theories that justifies the marital rape exception, namely, doctrine of coverture, has also served as the foundation of the Section 497 of IPC, 1860 which used to criminalise adultery. This section provides that: “*Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence*

²⁰ Agnidipto Tarafder and Adrija Ghosh, *The Unconstitutionality of the Marital Rape Exemption in India*, 3 U. OXHRH. J. 202, 208 (2020).

²¹ *Ibid.*

²² *Id.* at 214.

²³ QUOTETAB, <http://quotetab.com/quotes/by-william-j-brennan> (last visited Mar. 1, 2023).

of adultery... ”²⁴ But the Supreme Court of India in the case of **Joseph Shine v. Union of India**²⁵ held this law as unconstitutional and violative of Article 14 and 21 of the Indian Constitution. The Court observed that the doctrine of coverture which states that when a woman marries, she loses her identity and legal rights, is not recognised by the Indian Constitution and is a direct violation of the fundamental rights of that woman. Then our question is why marital rape which is also somehow based on the same doctrine is still legalised? Also, Justice D.Y. Chandrachud in the instant case remarked that: “A woman has sexual autonomy within marriage. Marriage does not mean ceding autonomy of one to the other. Ability to make sexual choices is essential to human liberty. Even within private zones, an individual should be allowed her choice.”²⁶ Then why isn’t this ability to make sexual decisions taken into account when woman is subjected to marital rape?

In recent years, a large number of nations throughout the world have felt the necessity to criminalise marital rapes. Since 1976, all jurisdictions in Australia have had the marital rape immunity eliminated. In 1983, the provisions in the Criminal Code of Canada that exempted marital rape from criminal culpability were abolished.

In England, in 1991, the marital rape exception was completely eradicated. In this regard, the House of Lords observed in the case of **R. v. R.**²⁷ that the notion that a husband could not be convicted of rape if he compelled his wife to have sexual intercourse against her consent was an antiquated and obnoxious rule of common law that no longer represented the status of a woman in modern society and should be abolished. In 1993, all the 50 states in USA also criminalised marital rape.

As a result, based on current statistics, more than 104 nations throughout the world consider marital rape to be a crime. But unfortunately, India is among those 32 countries which have not yet criminalised marital rapes²⁸. Considering the data given in the latest report of National Family Health Survey (2019-21), almost 30% of married Indian women, aged 18-49 years report facing either domestic or sexual violence. Given how much remains unreported, this is most likely an underestimate. Therefore, it becomes crucially important that the issue of criminalising marital rape be considered now.

²⁴ The Indian Penal Code, 1860, § 497, No. 45, Acts of Parliament, 1860 (India).

²⁵ 2018 SC 1676.

²⁶ *Id.* at 35 (Chandrachud J).

²⁷ [1991] UKHL 12.

²⁸ A. U. Ahmed, “[Debriefed] The controversy surrounding Marital Rape: History, judicial precedents and the road ahead”, BAR AND BENCH - INDIAN LEGAL NEWS (Feb. 27, 2023, 10:30 PM), <https://www.barandbench.com/columns/just-law-controversy-around-marital-rape-part-i>.

However, in the case of *RIT Foundation v. Union of India and other connected matters*²⁹, a bench of the Delhi High Court while addressing a series of petitions demanding the need to criminalise marital rape gave a split verdict. Justice Shankdher held Exception 2 of Section 375 and, Section 376B of IPC as unconstitutional as it is in violation of Article 14 of the Indian Constitution. On the contrary, Justice C Hari Shankar holds the view that Section 375 is based on an intelligible differentia and thus does not violate the Constitution.

Recently, the batch of petitions concerning the constitutional validity of the marital rape has been listed before a bench of Apex Court comprising of Chief Justice DY Chandrachud, Justice PS Narasimha and Justice JB Pardiwala. We are hoping for a positive outcome from this.

IV. MARITAL RAPE VIS-À-VIS CONSTITUTION OF INDIA

In this segment, our main aim is to elucidate why marital rape is unconstitutional and how the State is violating the fundamental rights of married women through the marital rape exemption. For establishing these arguments, we will particularly focus onto how marital rape is in contravention of: (i) the right to equality under Article 14; (ii) the right to non-discrimination under Article 15; (iii) the right to freedom of expression under Article 19(1)(a) and; (iv) the right to life and personal liberty under Article 21.

1. Article 14

According to Article 14 of the Constitution of India, “*the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.*”³⁰ There are two tests that are used to determine if a violation of Article 14 has occurred. These are the reasonable classification test and the arbitrariness standard. After applying both the tests, we can clearly find out that the marital rape exemption contained in exception 2 of section 375 of IPC, 1860, appears to be in direct conflict with Article 14.

Firstly, the marital rape exception establishes a clear line of demarcation between women only on the basis of their marital status. As unmarried women are protected from rape by any man under S.375, but no protection is ensured to the married women if they are raped by their husbands. This type of classification on which completely distinct treatment is afforded to women cannot be said to have a reasonable rationale with the section’s purpose which is to prevent and punish the acts of rape. As elaborated by Justice SR Das in *State of West Bengal v Anwar Ali Sarkar*³¹, the law must clearly distinguish between the groups classified on an

²⁹ Writ Petition (C) No. 284 of 215.

³⁰ INDIA CONST. art. 14.

³¹ AIR 1952 SC 75.

intelligible basis, and such a classification must have a rational correlation or nexus with the object sought to be achieved by the law.³² Based on this, we can say that the classification solely on the basis of marital status is in clear violation of Article 14.

The next threshold for assessing legislation under Article 14 is standard of arbitrariness, which is a relatively new concept. While elucidating about the test of arbitrariness, Justice Nariman in the case of **Shayara Bano v Union of India**³³ stated that:

*“Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary.”*³⁴

So when it comes to the marital rape exemption, we can see that it is based on certain irrational grounds. Firstly, this legislation grants protection to married men for non-consensual sex, but it makes the same conduct illegal for unmarried couples or strangers. Secondly, the purported goal of the exception is to keep the institution of marriage intact. But prioritising the dignity of an institution over the rights of the persons concerned is blatantly arbitrary. Thus, on these grounds, we can safely place our argument that the marital rape exception is manifestly arbitrary and thus violates the Article 14 of our Indian Constitution.

2. Article 15

Article 15 of the Indian Constitution posits an obligation on the State to guarantee non-discrimination. Article 15(1) states: *“The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.”*³⁵

However, the marital rape exemption violates this anti-discrimination provision. It discriminates between husband and wife by depicting a hierarchy between them. It demonstrates that after marriage a woman is nothing more than a property to be owned by her husband.

In **Joseph Shine v. Union of India**³⁶, the Supreme Court has asserted that the stereotype of women’s sexuality being the asset of the husband after entering into a matrimonial relationship is contradictory to dignity and equal citizenship³⁷.

In the case of **Anuj Garg v. Hotel Association of India**³⁸, the Supreme Court ruled that Section

³² *Id.* at 55 (SR Das J).

³³ (2017) 9 SCC 1.

³⁴ *Id.* at 101 (Nariman J).

³⁵ INDIA CONST. art. 15, cl. 1.

³⁶ 2018 SC 1676.

³⁷ *Id.* at 213 (Chandrachud J).

³⁸ (2008) 3 SCC 1.

30 of the Punjab Excise Act 1914, which forbade women from working in establishments where alcoholic beverages or intoxicating drugs were used, was unconstitutional. Even though the ultimate purpose was to protect women's safety, the rule discriminated between sexes based on conventional gender roles, anticipating that women employees would provoke sexual assaults³⁹.

It is also pertinent to note the observation of Chandrachud J. in the case of **Navtej Johar v. Union of India**⁴⁰, where he noted that: "...discrimination will not survive constitutional scrutiny when it is grounded in and perpetuates stereotypes about a class constituted by the grounds prohibited in Article 15(1). If any ground of discrimination, whether direct or indirect is founded on a stereotypical understanding of the role of the sex, it would not be distinguishable from the discrimination which is prohibited by Article 15 on the grounds only of sex."⁴¹

Thus, the marital rape exemption is in contravention of Article 15 since it discriminates against married women only on the grounds of sex.

3. Article 19(1)(a)

Article 19(1)(a) of the Constitution of India provides to all citizens the right to freedom of speech and expression. Under the freedom of expression, every person also has the right to express their sexual desires. They are free to express and select their sexual inclinations. This perspective is expressed in a number of observations given by the Supreme Court.

In the landmark case of **Navtej Johar v. Union of India**⁴², CJ Misra asserted: "*Article 19(1)(a) which protects the fundamental right of freedom of expression including that of LGBT persons to express their sexual identity and orientation, through speech, choice of romantic/sexual partner, expression of romantic/sexual desire, acknowledgment of relationships or any other means.*"⁴³

As a result, a married woman also has the complete freedom to refuse the sexual advances made by her husband. Providing the marital rape exception essentially eliminates the prospect of such a choice being exercised, therefore violating the essence of expression. Consequently, such an exception infringes the fundamental right guaranteed to married woman under Article 19(1)(a).

4. Article 21

Article 21 of the Indian Constitution provides that: "*No person shall be deprived of his life or*

³⁹ *Id.* at 41-45.

⁴⁰ (2018) 10 SCC 1.

⁴¹ *Id.* at 438-439 (Chandrachud J).

⁴² *Supra* note 36.

⁴³ *Id.* at 38 (Misra CJ).

*personal liberty except according to a procedure established by law.*⁴⁴

In numerous decisions, the Supreme Court has interpreted this article and given it a completely contemporary and creative shape. As according to the prolific interpretation of Article 21 by the Apex Court, this right does not only guarantee the protection of life and personal liberty but also secures a dignified existence of the human being. Moreover, it also guarantees the right to health, privacy, safe living conditions and so forth. Needless to say, marital rape violates every aspect of Article 21 in one or another way.

a. Right to Live with Human Dignity:

In the case of **The Chairman, Railway Board v. Chandrima Das**⁴⁵, the Court observed that the offence of rape violates the right to life and the right to live with human dignity of the victim. Rape is less of a sexual offence than a manifestation of hostility aimed at degrading and humiliating women.⁴⁶ Thus, the marital rape clearly violates the wife's right to live with human dignity.

b. Right to Good Health:

In **CESC Ltd. v. Subhash Chandra**⁴⁷ it was held that right to good health also comes within the purview of Article 21. Then our contention is that marital rape clearly violates the right to health of the victim as well because it causes grave effect on the physical and psychological health of the women.

c. Right to Sexual Privacy:

One of the landmark cases of Article 21 is the **Justice KS Puttaswamy v Union of India**⁴⁸. In this case the Supreme Court ruled that the right to privacy is a fundamental right under Article 21. The Court observed that the 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"⁴⁹.

Similarly, in the case of **State of Maharashtra v. Madhukar Narayan**⁵⁰, the Supreme Court had observed that every woman has a right to her sexual privacy, and that no one has the authority to violate her privacy at any point.

⁴⁴ INDIA CONST. art. 21.

⁴⁵ AIR 2000 SC 988.

⁴⁶ Bodhisattwa Gautam v. Subhra Chakraborty, AIR 1196 SC 922.

⁴⁷ (1992) 1 SCC 441.

⁴⁸ (2017) 10 SCC 1.

⁴⁹ Jeel Pathak, *Marital Rape*, INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH, (Feb 28, 2023, 11:02 PM) <https://www.ijalr.in/2020/09/marital-rape.html>

⁵⁰ AIR 1991 SC 207.

Through marital rape, the sexual privacy of a woman is invaded and thus her fundamental right is clearly violated.

d. Right to Bodily Integrity:

In **Puttaswamy Case**⁵¹, Chandrachud J observed bodily integrity as one of the facets of Article 21⁵². Thus, it is the fundamental right of the woman to make any decision regarding her bodily matters including whether or not to engage in sexual activity. But through the marital rape exemption, married women's bodily integrity is jeopardised as it takes control of their bodies away from them and gives it to their husbands.

After considering the constitutional provisions and several judicial pronouncements, it can be observed that the marital rape exemption under Exception 2 of S. 375 of IPC, 1860 undoubtedly violates the fundamental rights of the married women conferred by the Indian Constitution.

V. CONCLUSION AND SUGGESTIONS

Taking everything into account, we can reasonably infer that marital rape, like any other rape, is a major threat and deterrence to India's vision of women empowerment. The several theoretical foundations and societal ethos which have backed up the marital rape exception till now are discussed in this paper. We looked at the credibility of these claims, which are loaded with ideas about family, marriage, and women's roles in society. All of the reasons against criminalising marital rape have been proved to be legally ineffectual. We also discussed how this marital rape exception is clearly violating certain fundamental rights of married women. The unconstitutionality of this antiquated law is undeniable, and the reasons for its repeal are obvious.

In this regard, we would like to propose certain suggestions relating to the criminalisation of marital rape:

- i. Exception 2 of Section 375 of IPC, 1860 should be repealed.
- ii. The accused of marital rapes must be punished in the same way as rape.
- iii. There must be no differentiation between minor and major married women in regards to their protection against marital rape.
- iv. The marital relationship between the accused and the victim must not be invoked as a defence.

⁵¹ Justice KS Puttaswamy v. Union of India, (2017) 10 SCC 1.

⁵² *Id.* at 59, 71 (Chandrachud J)

- v. For proving marital rape accusation, the victim should go through certain medical examinations to establish that there was a forceful sexual intercourse, so that any kind of prejudice against the husband could be prevented.
