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The Archaic Notions of Consent Theory: A Need to Criminalise Marital Rape in India

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ABSTRACT

Today, India comes under the category of countries being one of the most unsafe place in the world. While we extensively talk about how women are deprived of their human rights in public, work place, or home, we often neglect how the worst manifestation of violence begins from their very bedrooms; a place which is supposed to be the most protected and intimate zone in a person's life. Its more unfortunate that even our laws don't acknowledge heinous offences such as marital rape to be a crime as according to the existing jurisprudence a spouse cannot rape his wife. Further, the State has tried to justify not criminalising marital rape by giving reasonings such as how criminalising shall destabilise the institution of marriage, subsequently tarnishing the sanctity of a matrimonial sphere and to having already existing alternative remedies in law for women. This paper shall depict how these arguments against criminalisation marital rape are erroneous. Through an analysis of the inception of the marital rape exception clause and analysing Article 14 and 21 of the Constitution of India, it shall be argued that the marital rape exception clause found in the Indian Penal Code, 1860 is wholly unconstitutional. Further, it shall be duly noted that there is a the lack of existing alternative remedies for a woman to seek redress under if she is raped by her husband, thus concluding that criminalisation of marital rape is wholly necessary.

I. INTRODUCTION

Sexual violence is one of the most extreme and effective forms of control in a male dominated society, which simultaneously damages and restricts women's lives and prompts individual and collective resistance among women thereby maintaining the status-quo of gender inequality, subjugation of women and their control.² More specifically, such violence amplifies when it happens within the family. The family has been traditionally considered as a retreat, where individuals are able to find security and shelter, a private heaven where peace and harmony prevail.³ Throughout the world there are practices in the family that are violent

¹Author is student at Maharashtra National Law University, Mumbai, India.

²Dr.Vandana, *Marital Rape: An exemption under the IPC*, ILI Law Review Vol II. Winter Issue 2017.

³Radhika Coomaraswamy, *Preliminary Report submitted by UN Special Rapporteur on violence against women*,

towards women and harmful to their health. Young girls are circumcised, live under strict and prescribed dress code, given in prostitution and incestuously abused in the family. The family violence is generally hidden under the notions of intimacy of private sphere as the belief that family integrity should be protected at all costs prevent many women from seeking outside help.⁴ The law and criminal justice system generally do not recognise sexual violence occurring in the family as a separate crime, hence such cases are rarely prosecuted and the women suffer. They have no option, but to suffer in silence.

In Indian society particularly, great sanctity is attached to the institution of marriage and the husband is supposed to be the protector (read: deity) of the wife. However, in a survey conducted by International Centre for Research on Women (2011) nearly 20% of Indian men reported at least once having carried out sexual violence against a female partner.⁵ In another study by National Health and Family Survey (NFHS-4) for the year 2015-16, 5.6% women have been reported as victims under the category of “physically forced her to have sexual intercourse with him even when she did not want to”.⁶

The influence of patriarchy can be very well seen in our norms and laws these days. We have our laws made to serve the dominant class, the rich, the superior cast, the men. The inability of law and legal institutions to deal with marital rape shows that the law predominantly serves the aspirations of the dominant class, at the expense of the marginalised and weak.⁷ In a male dominated society, therefore, the struggle of women is not just limited to the existing societal structure, but also institutions which present themselves as the epitome of neutrality and reasonableness.

It is pertinent to mention that in the aftermath of the Jyoti Singh gangrape in 2012, Justice Verma Committee was constituted with an objective to strengthen the anti-rape laws in the country. The Committee strongly recommended that the exception for marital rape be removed. The Committee added that: “The fact that the accused and victim are married or in another intimate relationship may not be regarded as a mitigating factor justifying lower sentences for rape.” The Committee also highlighted the recommendations made by the CEDAW Committee in respect of India in 2007 which asked for “wide[ning] the definition of rape to reflect the realities of sexual abuse experienced by women and to remove the

its causes and consequences(1994)

⁴*Integration of the Human Rights of Women and the Gender Perspective- Violence against Women*, UN Commission on Human Rights, 9 (2003)

⁵*Supra* note 1

⁶National Family Health Survey (NFHS-4), International Institute of Population Sciences, India (2016)

⁷Sumedha Choudhury, *Why criminalisation of Marital Rape is still a distant dream in India*, Business Standard, October 29, 2018. https://www.business-standard.com/article/current-affairs/why-criminalisation-of-marital-rape-is-still-a-distant-dream-in-india-118102900084_1.html

exception of marital rape from the definition of rape”.⁸ However, though the majority of recommendation of the Verma Committee was incorporated, the suggestion to criminalise marital rape failed to find a place in the Criminal Law Amendment Act 2013.

When two people get into a matrimonial sphere, they are said to have given perpetual consent to each other.⁹ The following chapter shall categorically argue on how this entire notion is not only flawed but also is completely archaic in nature. The paper is divided into further four parts, first, wherein the author shall be rebutting all the justification that the state has given on not recognizing marital rape as crime, second, where how the exception clause doesn't conform to the international standard of human rights shall be highlighted, thirdly, the unconstitutionality of marital rape shall be elaborately discussed and lastly, in the light of gender justice that is required in India, the author shall conclude the paper.

II. THE INFINITE CONSENT THEORY

Marital rape can be defined as any unwanted sexual intercourse or penetration (vaginal, anal, or oral) obtained by force, threat of force, or when the wife does not consent. One of the very peculiar implications of the narrow and restricted definition of rape is that it cannot be committed against a particular set of women – a married woman cannot be raped by her own husband.¹⁰ The inception of the exception clause of Marital rape is given by Sir Mathew Hale, who said that “the husband cannot be guilty of rape committed by himself upon his lawful wife, for their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract”.¹¹ Contrary to his usual practices, Lord Hale cited no legal authority for this stance.¹² The premise of the statement was based upon the common law notion of marital unity that husband and wife were one and a married man could not be held liable for raping himself. In majority of the countries in the world; husbands enjoy ‘criminal law immunity’ for raping their wives. Wife rape has existed as long as the institution of marriage.¹³

Males, as a dominant class, have internalised this belief that women are their property and the value of women as a property is measured largely by their “sexual purity”. Rape, therefore, can be theorised as a property crime against a woman's husband or father. In ancient times, a raped woman was considered relatively less valuable as property, and penalties for such

⁸Supra note 1

⁹Infra note 13

¹⁰Ann Wolbert Burgess and Lynda Lytle Holmstrom, *Rape : Victims of Crisis*, 197 (1974) quoted in Dianne Herman, “*The Rape Culture*” in *Women – A Feminist Perspective*, ed. by Jo Freeman, 3rd edn., 20 (1984) at 22.

¹¹Sir Mathew Hale quoted in Rosemarie Tong, *Women, Sex and the Law*, 94 (1994).

¹²*State v. Smith*, 85 N.J. 193, 196, 426 A. 2d 38, 41 (1981).

¹³Diana E.H., *Russell, Rape in Marriage*, 2nd ed., 2 (1990).

crime often involved fines or other compensation paid not to her but rather to her husband or father.¹⁴ Marital rape exemption is evidently a legacy of this approach. Since an act against one's property is generally not considered as a crime, therefore, it is assumed that no crime is committed when a man forces intercourse upon his wife, since she is under his possession and ownership.

By the virtue of Art. 372 of the Constitution, Sec. 375 of IPC, 1860 is still prevalent in India. Although the whole of the section is not inconsistent with the Part III of the Constitution, exception 2 of this provision violates the fundamental rights of married women. Earlier, the First Law Commission did not deem fit to incorporate non-consensual sexual intercourse by a man with his own wife within the purview of rape.¹⁵ The *Victorian Patriarchies* of 1860 did not recognize men and women at par. In 1860, it was assumed by the select committees and Law Commissioners that a woman, through marriage, forgoes forever her right to refuse sexual intercourse with her husband and the husband, thereby, acquires an unconditional and unqualified licence to force sex within the *institution of marriage*.

This infinite consent theory has gotten so obsolete that even the House of Lords criminalized marital rape in *R v. R* in 1991.¹⁶ The House of Lords unanimously noted that “*nowadays it cannot seriously be maintained that by marriage a wife submits herself irrevocably to sexual intercourse in all circumstances*”. They further held that marital rape exemptions “*no longer form a part of the law of England since a husband and wife are now regarded as equal partners in marriage*.”¹⁷ This exemption is based on the mutual archaic matrimonial contract which denies a wife her ‘*right to retract*’ her marital consent to engage in sexual intercourse with her husband.

Many countries have been inspired by the Indian legislations, one of them being Nepal. Their Penal laws are very similar to ours, and even had the marital rape exception clause. However, the exception of marital rape was stuck down through their landmark case of *FWLD v. HMG*¹⁸, where they held that the “*changing norms and values in criminal law with the pace of time, it is only appropriate reasonable and contextual to define marital rape too as a criminal offence. It cannot be said that any man who commits heinous and inhuman crime of rape to a woman may be immune from criminal law simply because he is her husband. Such husband has to be liable to the punishment for the offence he has committed.*”

¹⁴*Supra* note 1

¹⁵Vibhute K.L, *Rape and The Indian Penal Code at The Crossroads Of The New Millennium: Between Patriarchist And Gender Neutralist Approach*.

¹⁶*R v. R*[1991] 3 WLR 767.

¹⁷*Id.*

¹⁸*FWLD v. HMG*, Writ No. 55/2058.

When the majority of nations are recognising marital rape as a crime (now), then what is stopping India from implementing the same? This is not a debate about getting westernised or blindly following what foreign states are doing, it is about doing the Justice which is long due to its people. With increasing offences against women in the country, it is only fair to block any channel which perpetuates such injustice.

III. JUSTIFICATIONS FOR NON-RECOGNITION OF MARITAL RAPE

While the apex court in *Independent Thought vs Union of India and Anr*¹⁹ has criminalised sexual intercourse with a minor wife aged between 15 and 18 years, but, quite interestingly, has categorically refrained from making any observation regarding the marital rape of a woman who is above 18 years of age. In *RIT Foundation vs Union of India*²⁰, which is pending before the Delhi high court, the petitioner has argued on how there's a social, moral as well as a legal need to have marital rape pronounced as a crime in India. However, the government seems to have found some bizarre correlation between saving the institution of marriage and not criminalising marital rape, which is just utterly disappointing. The three key justifications that have been given by the state in the aforementioned case are first, criminalising rape under the matrimonial sphere shall 'destabilised the institution of marriage'; second, this particular law shall perpetuate as a 'harassing tool against the husbands (read: men)' by the women and third, how there already exists 'sufficient' remedies for women.²¹

What is fundamentally wrong with such reasoning is that firstly, the entire marriage as it is gets destabilized when one spouse rapes the other. While in India, the institution of marriage is looked upon to be a sacred and harmonious institution, it instantly loses all its sanctity when such inhuman and atrocious acts are done within its paradigm. Secondly, it couldn't be stressed upon enough that rape is an assault on the individuality and inherent dignity of a woman and a crime against the whole body of a woman and the soul of the society hence, it demands just punishment from court.²² For a mere apprehension that criminalising it would further lead to it becoming a harassing tool against men and thus not recognising such an act as a crime is nothing short of being ignorant about the gravity of the issue. Under the garb of it 'might' becoming something undesired, we shouldn't deprive the affected half of the society from their basic human rights. Our patriarchal high-headedness is allowing us to safeguard our men from "future inconvenience" at the cost of our women, who already feel

¹⁹*Independent Thought v. Union of India*, (2017) 10 SCC 800.

²⁰*RIT Foundation v. Union of India* W.P. (Civil) No. 284/2015

²¹*Id.*

²²*ShyamNarain v. State*, (NCT of Delhi), 2013 (7) SCC 77.

unsafe at their own homes, to be subjected to more of such cruelty.

Lastly, we do not have adequate remedies for women of our country, and certainly not 'sufficient enough'. The legislation has exercised its discretion by enacting civil law remedy for married women when who suffers from matrimonial problems such as sexual violence, cruelty, demand for dowry *etcetera*. Notably, all personal laws recognise 'cruelty' as a ground for divorce.²³ However, there is no specific mention of 'sexual violence' as a ground for divorce. Thus, as a corollary, 'refusal to engage in sexual intercourse' falls within cruelty, specifically under 'mental cruelty'.²⁴ Further, our civil law recognises the mental as well as physical cruelty as a ground for divorce where it doesn't mention the forceful sexual intercourse within the marriage. It is also notable to see that Section 498A IPC²⁵ which incorporates the offence of cruelty in the form of criminal law is totally discriminatory when read against Section 375 in terms of sentencing to the accused husband with charges of rape and hence, he can be only charged for cruelty with a punishment of 3 years of imprisonment.²⁶

The object of the punishment is not only to prevent the wrongdoer from doing a wrong for the second time, but also to make him an example for other persons who have criminal tendencies. Salmond considers deterrent aspects of criminal justice to be the most important for control of crime.²⁷ A deterrence theory of punishment holds that the institution of criminal punishment is morally justified because it serves to deter crime. In contrast to this, the 42nd Law Commission Report suggested that marital rape be put into a separate section, and not be called 'marital rape' and also have a different punishment.²⁸ The married women are the victims of the marital rape because of unreasonable and unjustifiable religious and cultural ethos. Thus, criminalising marital rape may deter the husband from committing non-consensual intercourse within the sanctity of marriage.

IV. NON-CONFORMITY OF THE INTERNATIONAL HUMAN RIGHTS STANDARDS

When India is a party to international Charters having ratified the Declarations, it is an obligation of the Government of India and its machinery to implement the same in the proper

²³The Hindu Marriage Act, 1955, Section 13; Dissolution of Muslim Marriage Act, 1939, Section 2; Parsi Marriage and Divorce Act, 1936, Section 32; Indian Divorce Act, 1869, Section 52; Special Marriage Act, 1954, Section 27. Acts of Parliament (India).

²⁴*Shakuntala Kumari v. Om Prakash Ghai*, AIR 1983 Del 53.

²⁵ Section 498A, Indian Penal Code, 1860.

²⁶*Id.*

²⁷ Fitzgerald, *Salmond on Jurisprudence*, Twelfth ed., pp 91-100.

²⁸ 42nd Law Commission of India Report, June 1971.

and just manner.²⁹ Since the founding of the United Nations, equality between men and women has been among the most fundamental guarantees of human rights. The Charter of the United Nations which was adopted in 1945 sets out as one of its goals “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, and in the equal rights of men and women”. Also, Article 1 of the Charter of the United Nations states that one of the purposes of the United Nations is to promote respect for human rights and fundamental freedoms “without distinction as to race, sex, language or religion”. This prohibition of discrimination based on sex is reiterated in its Articles 13 (mandate of the General Assembly) and 55 (promotion of universal human rights).³⁰

The Universal Declaration of Human Rights, 1948 stipulates the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. The equality principles were reaffirmed in the Second World Conference on Human Rights at Vienna in June 1993 and in the Fourth World Conference on Women held in Beijing in 1995. India was a party to this convention and other declarations and was committed to actualise them.³¹ Further, the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), of which India is a signatory, has viewed that the discrimination against women violates the principles of equality of rights and respect for human dignity. Article 11, 22, 24, to name a few, of the CEDAW state that there should not be any violence against women. CEDAW was ratified by India on 25th June 1993.

The Commission on Human Rights, at its fifty-first session, in its Resolution No. 1995/85 of 8-3-recommended that marital rape should be criminalized.³² As per the recommendations in respect of India made by the CEDAW Committee in February 2007, the country should “widen the definition of rape in its Penal Code to reflect the realities of sexual abuse experienced by women and to remove the exception of marital rape from the definition of rape”.³³ Despite this, the retention of the Exception is a blatant violation of the Human Rights that are manifested through the international declarations and conventions.

V. VIOLATION OF THE CONSTITUTION OF INDIA

The principle of natural justice is not merely a matter of procedure, but of enormous substance and any action taken in contravention of natural justice is violative of fundamental

²⁹R.D. Upadhyay v. State of A.P., (2007) 15 SCC 337.

³⁰Women's Rights are Human Rights, UNITED NATIONS HUMAN RIGHTS, Office of the High Commissioner, New York and Geneva 2014.

³¹Charu Khurana v. Union of India, (2015) 1 SCC 192.

³²Saurabh Mishra & Sarvesh Singh, Marital Rape - Myth, Reality and Need for Criminalization, (2003) PL WebJour 12.

³³Submission to the UN COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, 58th session.

rights.³⁴The Exception clause blatantly violates Article 14, 15, 19 and 21 of the constitution and thus liable to be struck down urgently.

(A) VIOLATIVE OF ARTICLE 14

It is a settled position of law that the requirements of the validity of a provision of law by reference to Article 14 of the Constitution are namely, (i) that the classification is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) that the differentia has a rational relation to the object sought to be achieved by the impugned legislative or executive action.³⁵ Further, in the landmark judgement of *ShayaraBano*³⁶the Court observed that *manifest arbitrariness* of a provision of law can also be a ground for declaring a law as unconstitutional and manifest arbitrariness is something done by the legislature capriciously, irrationally and without adequate determining principle. As has been very well held in the *Navtej Singh Johar*³⁷ judgement, Art. 14 has a substantive content on which, together with liberty and dignity, the edifice of the Constitution is built. Simply put, in that avatar, it reflects the quest for ensuring fair treatment of the individual in every aspect of human endeavour and in every facet of human existence.

The Exception 2 of 375 IPC unreasonably differentiates between women on the basis of their marital status.³⁸ Thus, while an unmarried woman is protected against every rape under Sec. 375 and 376 of the IPC, married women are unreasonably singled out by Exception 2, by the virtue of which, the victim wife cannot seek protection against rape by the husband. Such a provision not only makes rape on a particular group of women legal, but also encourages the husbands to have forceful and non-consensual sexual intercourse with their wives. Also, as per Sec. 376B, sexual intercourse by a husband on his wife during judicial separation is a punishable offence which is categorized as rape.³⁹ Here we see three different types of categorisation of women which is not based on sound reason (unmarried, married, married but separate, judicially separated). The State has failed to satisfactorily justify the object sought to be achieved by classifying rape victims into these categories and hence, there appears a manifest arbitrariness in the Exception.

(B) VIOLATIVE OF ARTICLE 15

³⁴ Art. 14, 19(1) and 21, CONSTITUTION OF INDIA

³⁵ *Dharam Dutt v. Union of India*, (2004) 1 SCC 712; *Subramanian Swamy v. Director, CBI* AIR 2014 8 SC 682.

³⁶ *ShayaraBano v. Union of India*, (2017) 9 SCC 1.

³⁷ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

³⁸ Section 375, Indian Penal Code, 1860.

³⁹ Section 376B, Indian Penal Code, 1860.

The Constitution framers intended to apply equality amongst men and women in all spheres of life. A discrimination against a man or a woman, only on the ground of sex would be violative of Article 15(1).⁴⁰In exception 2 to Section 375, consent of women is assumed to be non- abjure under the bond of marriage. As such marital status of women may be read into 'sex', and may be recognized as a ground for sexual and gender non-discrimination.⁴¹ It was held in the celebrated case of *Anuj Garg v. Hotel Association*⁴²where the Court stated that “*in framing Articles 14 and 15 of the Constitution, the constitutional goal in that behalf was sought to be achieved. It was held that Articles 14, 15, and 16 are all equality rights, and that the scheme of equality sought to achieve real equality.*⁴³ Hence, the Exception 2 violates the gender neutrality among the men and women. The treatment given to married women under this exception which forfeit their right to say no to the husband is arbitrary and unreasonable in accordance with Article 14 and 15 of the Constitution. Thus, gender neutrality cannot be constituted due to the said provision which recognizes non-consensual within marriage is not the offence of rape.

(C) VIOLATIVE OF ARTICLE 19

The Exception does not recognize the right of a married woman to consent for the act of sexual intercourse with her husband. The said provision disregards, and in a way, takes away a married woman's ability to say 'Yes' or 'No' to sexual intercourse, making it go against the Article 19(1)(a) of the Constitution.⁴⁴ The right of married women to choose, the right to indulge or abstain from sexual intercourse with the husband cannot be far from the rights of a prisoner under law;⁴⁵ a married woman does not shed her right to choose/consent and be free from coming under the ambit of rape simply on the grounds of their marital status. There is a manifested distinction between the consent that a person gives to the state as a citizen and the consent one gives to the various social relationships they share. The most intimate relationship which is shared by a woman is with her husband and that has to be governed by consent, especially in terms of consent to sexual intercourse, which is one of the most intimate and personal choice that a woman reserve to herself.⁴⁶ There ought to be mutual consent by the husband and wife for each sexual act, for if women are to be equal marital partners, sexual intercourse must be mutually desired and not viewed as a 'wifely obligation'

⁴⁰ *Air India v. NargeshMeerza*, AIR 1981 SC 1829.

⁴¹ *NALSA vs Union of India* 2014 (5) SCC 438.

⁴² *Anuj Garg v. Hotel Association*, AIR 2008 SC 663.

⁴³ *State of Kerala v. N.M. Thomas*, (1976) 2 SCC 310.

⁴⁴ Art. 19(1), CONSTITUTION OF INDIA

⁴⁵ *D.K Basu v. State of West Bengal*, 1997 (1) SCC 416.

⁴⁶ *Asha Antony and Anushree P* (2018), *Marital Rape: Violation of fundamental rights, Legal education in Contemporary era*.

which she has no right or power to retract from.⁴⁷ In *NALSA v. Union of India*,⁴⁸ the apex court stated that “Article 19(1) (a) of the Constitution states that all citizens shall have the right to freedom of speech and expression, which include one’s right to expressions of his self- identified gender. Self- identified gender can be expressed through dress, words, actions or behaviour or any other form.” Given that the marital rape exception restricts a women’s sexual behaviour and cannot be justified under any of the heads of Article 19(1), on this ground alone the provision is liable to being struck down.⁴⁹ Therefore, very evidently, the exception clause goes against article 19 of the Constitution as well.

(D) VIOLATIVE OF ARTICLE 21

The early approach to Art. 21 which generates right to life and personal liberty was being restricted to its literal interpretation.⁵⁰ But in due course of time, the scope has expanded and the interpretation is done in a more liberal manner which is also in tune with the international understanding. The meaning of the term ‘life’ has since expanded and now can be appropriately summed up in the words of Field J. where he held that life means ‘something more than a mere animal existence’,⁵¹ which was further in where the Hon’ble Supreme Court affirmed that right to live with human dignity is crucial.⁵² Thus, protection no longer means mere protection against death or physical injury, but also an invasion of the right to “live” with human dignity.⁵³ Not recognising marital rape puts the right to life and personal liberty of women, at eminent and grave threat.

The landmark judgment of *KS Puttuswamy v. Union of India*,⁵⁴ that was given by a nine-judge bench of the Hon’ble Supreme Court in 2017, holds that the right to privacy is protected as a fundamental constitutional right under Articles 14, 19 and 21 of the Constitution of India. It also recognised the value of physical integrity and sexual autonomy and also decided that all citizens, including married women, have a right to privacy, four judges on the nine-judge bench stated: “Gender violence is often treated as a matter of ‘family honour’ resulting in the victim of violence suffering twice over – the physical and mental trauma of her dignity being violated. Privacy must not be utilised as a cover to conceal and assert patriarchal mindsets”. Further, it was observed that “Privacy recognises that we all have a right to a sphere of

⁴⁷ M.V. Sankaran, The Marital Status Exemption in Rape, *Journal of the Indian Law Institute*. Vol. 20, No. 4 (October-December 1978), pp. 594-606.

⁴⁸ *NALSA v. Union of India* (2014) 5 SCC 438.

⁴⁹ *RIT Foundation v. Union of India* W.P. (Civil) No. 284/2015

⁵⁰ *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27

⁵¹ *Munn v. Illinois*, 94 U.S. 113 (1876),

⁵² *Bandhua Mukthi Morcha v. Union of India*; (1997) 10 SCC 549.

⁵³ *Francis v. Union Territory*, AIR 1981 SC 746; *Ramsharan v. Union of India*, AIR 1989 SC 549.

⁵⁴ *Justice KS Puttuswamy v. Union of India*, (1997) 10 SCC 549.

private intimacy. Further the Supreme Court in *NALSA v. Union of India*,⁵⁵ while interpreting right to personal autonomy under Article 21, “personal autonomy includes both the negative right not to be subject to interference by others and the positive right of individuals to make decisions about their life, to express themselves and to choose which activities to take part in.” Therefore, people should be allowed to decide intelligently and choose between refraining or assenting to any act, especially when it comes to personal autonomy. Indeed, as has been held in *Joseph Shine v. Union of India*,⁵⁶ we cannot consider women as chattel.⁵⁷ Thus, irrespective of the matrimonial status, a woman has the right to privacy; especially in a private domain as intimate as her bedroom.

Lastly, there are many other aspects that a woman is deprived of when she is ‘legally’ raped in the veil of marriage. Rape is nothing short of being torturous, inhuman and a degrading treatment towards another being.⁵⁸ A women’s physical integrity flows directly from the fundamental right to life, dignity and bodily privacy; her right to sexual and reproductive autonomy flows directly from the right to liberty. Much like any other woman, even a married woman possesses the right to dignity and bodily integrity. While the crime of rape is considered to be as the highest torture inflicted upon the virginity, youth, motherhood and women hood itself. Along with the physical torture to the body that inevitably occurs, rape also adversely affects upon the mental, psychological and emotional stability of the victim which is irreparable.⁵⁹ By not recognizing non-consensual sexual intercourse within marriage as the crime of rape we are not only depriving the victim from her right to dignity and privacy but also her right to good health; all of which comes under the umbrella of Article 21.⁶⁰

VI. CONCLUSION

The acceptance of any spousal exemption from rape indicates an acceptance of the archaic understanding that wives are the sexual property of their husbands and the marriage contract is an entitlement to coerced sex. Moreover, by confining the offence to women, who are not married to the perpetrator, rape laws become discriminatory and deny equal protection to a class of persons – married women, on account of their status

Not recognising marital rape as a crime is also perpetuates gender injustice. India is one of

⁵⁵*NALSA v. Union of India* (2014) 5 SCC 438

⁵⁶*Joseph Shine v. Union of India*, 2018 SCC OnLine SC 1676.

⁵⁷*Id.*

⁵⁸*D.K Basu v. State of West Bengal*, 1997 (1) SCC 416 .

⁵⁹Pyali Chatterjee, *Jurisprudence aspect of Penal Law relating to Rape in India*

⁶⁰ Art. 21, CONSTITUTION OF INDIA

the thirty-six countries in the world where marital rape is not a crime,⁶¹ along with countries such as Afghanistan, Iran, Iraq, Saudi Arabia, United Arab Emirates, et al; countries which are known to discriminate against women, countries where their religion and culture, restricts its women to exercise human rights – today we stand along with such countries. Back in 2018, India also ranked no.1 by becoming the most dangerous country for women⁶² and surpassing all the above mentioned countries. If all of these does not call for criminalising marital rape, along with how it is phenomenally structurally wrong, then what does?

Our government has been exceptionally active in pointing out lacunas within marital practices, such as *triple talaq* and *adultery*, however it has, conveniently perhaps, failed to address the issue of gender violence in general. One such appalling example being the non-criminalisation of marital rape. The selective sympathy for one particular class of women by the government is not only unfair but also disgraceful. It is that moment in time when we question why marital rape, despite being one of the most heinous crimes one can commit against a woman, has failed to gain recognition in the eyes of the law.

⁶¹ *Marital Rape in India: 36 countries where marital rape is not a crime*, India Today, Mar. 12, 2016. <https://www.indiatoday.in/education-today/gk-current-affairs/story/marital-rape-312955-2016-03-12>

⁶² Poll ranks India the world's most dangerous country for women, The Guardian, June 28, 2018. <https://www.theguardian.com/global-development/2018/jun/28/poll-ranks-india-most-dangerous-country-for-women>