

ON SAYING NO - MARITAL RAPE AN UN-CRIMINALIZED CRIME IN INDIA

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Abstract

Human Rights have always recognized the Right to Autonomy over one's body and sexuality as one of the cardinal principles of living a life of dignity. However, the irony is a woman under Article 21 of the Constitution of India has a right to life and personal liberty but has no right of autonomy over her own body when the conjugal rights of the marriage are concerned. The statutory provisions that incorporated marital exemptions are based on the ground of implied consent, which is irrevocable until the existence of marriage. This theory gives a right of ownership over wife to the husband. In India, Section 375 of the Indian Penal Code considers the forced sexual intercourse during marriage as an offence only when the wife is below the age of 15 years. Therefore, marital rape is not a criminal offence under IPC.

In December 1993, the United Nations High Commissioner for Human Rights published the declaration on the elimination of violence against women. Article 27 of the Fourth Geneva Convention also asserts the same. Despite of many international moves, criminalization has not occurred in all UN member States, India being one of them. The Law Commission of India in its 172nd Report on Review of Rape Laws March, 2000 suggested for deletion of Exception 2 of Section 375 of the Indian Penal Code similarly in January 2019 Shashi Tharoor proposed a private member bill criminalizing marital rape. However, marital rape is still an un-criminalized offence in India.

Employing doctrinal method of research, the author through this paper attempts to explore the historical backgrounds and attempts to critically analyse the statutory status of the marital rape exemption with reference to the age of consent and the incongruity in punishment for marital and non-marital rape in the light of Human Rights of a woman over her body and sexuality.

Keywords: Marital-Rape, Dignity, Self-determination, Autonomy, Consent.

INTRODUCTION

Marital rape refers to **“unwanted intercourse by a man with his wife obtained by force, threat of force, or physical violence, or when she is unable to give consent.”**¹ The different forms of marital rape include **Battering rape**, where the women experiences both physical and sexual violence, **Force only rape**, where husbands uses only that amount of force, as it is necessary to coerce their wives who refuse sexual intercourse and **Obsessive rape** that involves brutal torture and/or perverse sexual acts.²

Rape is the gravest kind of sexual offence against a woman, be it in a matrimonial relation or otherwise has a severe and long-standing effects on women both physical as well as psychological.³ It is an act of aggression and suppression, which denies a right of determination to a woman. Section 375 of the Indian Penal Code, 1860 defines rape as an unwanted or unconsented sexual intercourse with a woman. However, the definition is of restrictive nature, as it does not protect a married woman from the sexual assault from her husband, neither has it defined marital rape; there is just a classification of rape- rape within marriage and outside marriage. Whereas rape outside marriage is punishable, rape within marriage is exempted.

The arguments put forth for not recognising it as a penal offence are - marital rape is not as heinous crime as rape otherwise, right to privacy in the matrimonial relations⁴ and that the accusation of rape might cause

¹ Nimeshbhai Bharatbhai Desai vs State Of Gujarat, R/CR.MA/26957/2017(Aug. 30, 2019, 16:56)
<https://indiankanoon.org/doc/158529176/>

² Ibid.

³ R. Thornhill & C. T. Palmer, A Natural History Of Rape-Biological Bases Or Sexual Coercion (1 Ed., 2000); R. Thornhill & N. Thornhill, The Evoluion Of Pschological Pain, In Sociology And Social Science (R. Bell N. Bell Eds., 1989).

⁴ Harvinder Kaur versus Harmander Singh (1984) stated that — **“Introduction of Constitutional Law in the home is most inappropriate. It is like introducing a bull in a china shop. It will prove to be a ruthless destroyer of the marriage institution and all that stands for. In the privacy of the home and the married life neither Art. 21 nor Art. 14 have any place. In a sensitive sphere which is at once intimate and**

irreparable damage to the institution of marriage⁵, difficulty in proving absence of consent, chances of misuse by vindictive wives in order to harass their husbands. Due to many such reasons, the offence of marital rape gets the protection under the blanket of this exemption.

Theory of Irrevocable Consent

The statutory provisions that incorporated marital rape exemptions are based on the ground of implied consent that is irrevocable until the existence of marriage. In seventeenth century, Jurist Matthew Hale laid down the foundation for the marital law exception in common law through his cryptic pronouncement where he stated, *“For the husband cannot be guilty of a rape committed by himself upon his lawful wife for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract.”*⁶

The premise of the statement is the common law norm of marital unity where husband and wife are considered as one. Other than that, it is presumed that the purpose of marriage is to procreate, therefore when a person gives consent to marry, there is an implied consent to sexual intercourse. Therefore, a man cannot be held liable for raping his own wife.

Marital Rape as a Property Crime

*“Women’s sexuality is, socially, a thing to be stolen, sold, bought, bartered or exchanged by others. But women can never own or possess it, and men never treat it, in law or in life, with the solicitude with which they treat property.”*⁷ Marxist theory assumes that men are superior to women and therefore legal, social and economic disparities between the two sexes is justified.

In order to set boundaries and ensure purity of male lineage, control on sexual access to a woman by man is required. Since ownership is considered best form of control, women were reduced to the private property of sexual nature, owned by distinct male owners.⁸ According to this theory, woman is not an independent and autonomous agent but the property of the man. In ancient times, a raped woman was considered relatively less valuable as property, and penalties for such crime often involved fines or other compensation paid not to her but rather to her husband or father. Since, it is an offence against one’s own property; the husband is not liable according to this theory as he has a right of ownership over wife and cannot be punished for the offence that is otherwise punishable if not committed on one’s own wife.

Non-consent and Force Criterion

The other arguments that are raised in opposition of marital rape criminalisation is the age-old force criterion in the cases of rape. The patriarchal perspective sees force as a matter of what *‘boys do in schoolyards.’* Force according to them is a simple matter of the straightforward use of physical strength or the use of implements of violence. However, it is not necessary that always physical force is used in the case of rape in fact most frequently used force in marital rape is mental, emotional and psychological force. If the Courts expect women to resist physical and psychological coercion in the same ways and at the same level that men do, then the Courts are in a way imposing an unreasonable expectation on the ‘reasonable’ woman. In a matrimonial relation, force might not always be in the physical form and it is highly inappropriate to consider non-consent only based on physical resistance.

The Law Commission of India in its 172nd Report on Review of Rape Laws, March 2000 suggested for deletion of Exception 2 of Section 375 of the Indian Penal Code, Justice Verma Committee Report on Amendment in Criminal Law submitted in January 2013 affirmed the same and similarly in January 2019 Shashi Tharoor proposed a private member bill criminalizing marital rape. However, Marital Rape remains as an un-criminalised offence in India. Through this paper, the author attempts to explore loopholes in the criminal law provisions pertaining to marital rape with reference to the age of consent and the incongruity in punishment for marital and non-marital rape in India and analyse them in the light of Human and Constitutional Rights to find the necessity for criminalising marital rape in India.

INDIAN PENAL CODE ON MARITAL RAPE

Definition of Rape

Section 375 of the Indian Penal Code defined rape as an unlawful sexual intercourse between a man and a woman without the consent or against the will of women under any of the circumstances enumerated under

delicate the introduction of the cold principles of Constitutional Law will have the effect of weakening the marriage bond”

⁵ Bharti Jain & Rakhi Chakrabarty, Govt Justifies Exclusion Of Marital Rape As Sexual Offence In Amended Ordinance, Times Of India, Feb. 19, 2013

⁶ Maria Pracher, The Marital Rape Exemption: A Violation Of A Woman’s Right Of Privacy, Golden Gate University Law Review, Women’s Law Forum, Volume 11, Issue 3 (January 1981)

⁷ Alexandra Wald, What’s Rightfully Ours: Towards a Property Theory of Rape, Columbia Journal of Law and Social Problems (September 17, 2019, 12:31)

<https://heinonline.org/HOL/Page?collection=journals&handle=hein.journals/collsp30&type=Text&id=473>

⁸ Dr. Vandana, Marital Rape - Exemption under Indian Penal Code: Quest For Recognition And Liability, ILI Law Review Vol. II, Winter Issue 2017.

the section.⁹ The Criminal Law Amendment Act, 2013 in order to protect the women from different kinds of sexual assaults widened this definition of Rape under said Section¹⁰, but unfortunately failed to protect women from marital rape.

Under the amended definition, rape is no more confined only to unconsented or unwanted sexual intercourse but makes unconsented and unwanted penetration in vagina, mouth, urethra or anus; insertion of any object in vagina, urethra or anus, manipulation of any of these parts done by himself or by making any other person do the same equivalent to rape. This widened definition now includes even the acts not otherwise considered natural as rape, which is in a way is a creditable amendment for the protection of women. However, it is open to the interpretation that un-amended exemption 2 has also widened the area of protection provided to the husband in case of commission of any of the above-mentioned acts.

i. Age of consent and Incongruity in punishment for marital and non-marital rape

The examination of the provisions for rape provided under 'The Indian Penal Code, 1860' gives a clear idea that the exemption 2 of the Section 375 provides a blanket of permission to the husband to violate the privacy of his wife on the pretext of matrimonial obligation.¹¹

The provision mentions the age of consent as 18 years, which means that the consent given by a woman below the age of 18 years is irrelevant as she is not capable of consenting. However, under the exemption 2 if she is a wife below the age of 18 years but above the age of 15 years, it is considered that she has given an implied consent to her husband by the virtue of marriage. Which means, if a stranger commits this act to woman below the age of 18 years it is heinous crime, however, if committed by a husband to the wife above the age of 15 years and below the age of 18 years it would not even amount to be an offence because the provision immunizes the husband.

If, the provision for punishment is analysed it says that if the act is committed on a woman below the age of 16 years, considering it to be a heinous crime the punishment that should be awarded is rigorous imprisonment minimum for 20 years and that can be extended to even life imprisonment.¹² However, since the age of consent (as per section 375 exception 2) in the matrimonial relations is 15 years; the husband is exempted from all kinds of punishment.

Almost every statute in India recognizes that a girl below 18 years of age is a child and it is for this reason that the law penalizes sexual intercourse with a girl who is below 18 years of age, which makes the exception inconsistent with the provisions of other laws. The **84th Law Commission of India in its report on Rape and Allied Offences: Some Questions of Substantive Law, Procedure and Evidence** also suggested increasing the age of wife from 15 to 18 years.¹³ However, no amended is made for far.

Again, there is leniency in punishment for raping a wife who is living separately under a decree of judicial separation under section 376B can be minimum 2 years and can be extended to 7 years¹⁴, which is unjust and illogical. There could be a presumption of consent when a husband and wife are living together, but how can one presume the consent when they are living separately? Moreover, how can raping a wife during suspension

⁹ The Indian Penal Code, 1860

¹⁰ 375. Rape.—A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following de-scriptions:—

(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 law-fully 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 stupe-fying 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 sixteen years of age. Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

(Exception) —Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

¹¹ S. 375, IPC, exception 2: reads as - Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

¹² The Criminal Law (Amendment) Act, 2018

¹³ 84th Law Commission of India Report (September. 16, 2019, 12:06) <http://lawcommissionofindia.nic.in/51-100/Report84.pdf>

¹⁴ 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. Explanations-In this section, “sexual intercourse” shall mean any of the acts mentioned in clauses (a) to (d) of section 375.

of matrimonial obligations is in any way a lesser heinous crime? In fact, it is very clear in the case of divorce and separation, the woman effectively withdraws her consent from having sexual relations with her estranged husband. **42nd Law Commission of India on its Report on Indian Penal Code** also recommended among other amendments that wife living separately or under the judicial separation should not be considered as a wife and the husband should have no legal protection if he commits the offence of raping his wife.¹⁵ However, no heed is paid to the recommendation so far. The presence of this provision just highlights the patriarchal mind-set of the Indian lawmakers that considers wife as a property and the husband as an owner.

THE CONSTITUTIONAL AND HUMAN RIGHTS OF A WOMAN

Human Rights are those rights, which are possessed by every human being, irrespective of his nationality, caste, creed, sex, etc. simply because he is a human being.¹⁶ Human rights recognises inherent human dignity and equal and inalienable rights (which includes the rights relating to life, liberty, equality and dignity) of all the members of human family.¹⁷

Human Rights are inalienable rights and cannot be altered in any of the circumstances because they are the fundamental rights required for the survival of a human being, in absence of which a human cannot live a dignified life. Human dignity means a state of worthy of honour, respect, equal status and it is inherent connected mentally with human life irrespective of caste, creed, sex, colour, status of the person.¹⁸

Marital Rape as a Violation of fundamental Human Rights

Rape is one of the atrocious kind of gender based violence that violates several basic human rights such as right to life, right to equality, right to equal protection from law, freedom from torture and degrading treatment and right to highest standard attainable of physical and mental health.¹⁹ The right to bodily integrity was initially recognized in the context of privacy in *State of Maharashtra v. Madhukar Narayan Gardikar*²⁰ wherein it was observed that no one has any right to violate the person of anyone else, including of an 'unchaste' woman.²¹ Similarly, in the case of *Bodhisattwa Gautam v. Subhra Chakraborty*²², the Supreme Court held that rape is a crime against basic human rights and a violation of the most cherished of fundamental rights of the victim, namely, the right to life enshrined in Article 21 of the Constitution.²³

Rape is condemned as one of the most heinous crime in all the societies. However, in matrimonial relations it is exempted. This marital rape exception under the provisions of criminal law classifies the woman into two groups based on their marital status. Where it protects the unmarried woman and on the other hand conveniently ignores the plight of married woman, as if the fundamental rights of a woman suspend once she gets married. This marital rape exception violates the fundamental right of equality of a married woman.²⁴ Article 14 of the Indian Constitution allows for the reasonable classification; however, any classification under Article 14 of the Indian Constitution is subject to a reasonableness test that can be passed only if the classification has some rational nexus to the objective that the Act seeks to achieve.²⁵ The present classification under this exemption when the definition of rape is so widened is unjust, illogical and irrational. It is discriminatory and arbitrary in nature and is having no logical or convincing reasons provided for exception of a husband for the non-consensual sexual act with the wife.

In the contemporary society, women are no more a dominant partner. Marriage in modern times is regarded as a partnership of equals and no longer one in which the wife must be the subservient chattel of the husband.²⁶ Therefore, the offence can also no longer be theorised as property crime against her father or husband. Justice Brennan of Australian High Court took similar approach in 1991; where he outlawed the above-mentioned

¹⁵ 42nd Law Commission of India Report (Aug. 17, 2019, 14:56) <http://lawcommissionofindia.nic.in/1-50/Report42.pdf>

¹⁶ Dr. Kapoor S. K., International Law and Human Rights, Central Law Agency (17th edition), 2009.

¹⁷ The Universal Declaration of Human Rights, 1948 : section 2(1) (d) Protection of Human Rights Act, 1993

¹⁸ Right to Life with Human Dignity: Constitutional Jurisprudence (September 9, 2019, 14: 30)

http://shodhganga.inflibnet.ac.in/bitstream/10603/89946/10/10_chapter%20-ii.pdf.

¹⁹ THE CONSTITUTION OF INDIA, Art. 21; International Covenant on Civil and Political Rights, Art. 10 Dec. 16, 1966, 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights, preamble, arts. 12, 13 Dec. 16, 1966, 993 UNTS 3; THE CONSTITUTION OF INDIA, Arts. 14, 15, 16; International Covenant on Economic, Social and Cultural Rights, preamble, arts. 3, 7, 13 Dec. 16, 1966, 993 UNTS 3; International Covenant on Civil and Political Rights, preamble, arts. 3, 14, 23, 26 Dec. 16, 1966, 999 UNTS 171; Universal Declaration of Human Rights, art. 16 .A. res. 217A (III), U.N. Doc A/810 at 71 1948.

²⁰ AIR 1991 SC 207

²¹ Ibid.

²² (1996) 1 SCC 490

²³ Ibid

²⁴ Article 14 of the constitution of India.

²⁵ State of West Bengal v. Anwar Ali Sarkar, AIR (1952) SC 75 (India).

²⁶ Independent Thought vs Union Of India, WRIT PETITION (CIVIL) NO. 382 OF 2013 (Aug. 17, 2019, 14:56) <https://indiankanoon.org/doc/87705010/>

notion and considered it as human right violation and observed, ***“The common law fiction has always been offensive to human dignity and incompatible with the legal status of a spouse”***²⁷

The fundamental idea of dignity is regarded as an inseparable facet of human personality. Dignity has been duly recognized as an important aspect of the right to life under Article 21 of the Constitution. In the international sphere, the right to live with dignity had been identified as a human right way back in 1948 with the introduction of the Universal Declaration of Human Rights. The Courts have observed that in absence of right to dignity no other rights may be realised in their complete sense.

One of the arguments put forth regarding for not making it as an offence is the conception of privacy. The conception of privacy functions on the understanding that the mandate of the State stops at the threshold of the home and family and the constitutionally guaranteed rights of equality and personal liberty to individuals do not apply within the space of home and the institution of marriage. However, with the interpretation of privacy in the judgement of Justice ***K. S. Puttaswamy (Retd.) and Anr. v. Union Of India And Ors***²⁸ the conception of privacy on which the marital rape exception rested has been swept away. The judgement places the individual at the heart of the right to privacy. It allows each human being to be left alone in a core, which is inviolable. It upheld the ‘right to privacy’ as a ‘decisional right’ over its other ‘institutional’ and ‘spatial’ forms.²⁹ Moreover, sexual autonomy is a part of sexual privacy and is not lost just because a person is married; one has a right to say no even after marriage. Marriage has nothing to do woman’s right to dignity; right to make choices inheres in this right.³⁰ In order to protect the privacy of an individual, the State has to interfere even within the institution of marriage and can in no way slip away from the responsibility of providing the constitutionally guaranteed rights of equality and personal liberty.

International Law and Due Diligence

India has signed and ratified the Declaration on the Elimination of all Forms of Discrimination against Women. The declaration defines discrimination as any distinction, exclusion or restriction made on the woman based on sex, which impairs or nullifies the recognition, enjoyment and exercise of any of the Human Right, irrespective of her marital status.³¹ Article 2 of the declaration categorically encompasses marital rape as violence against women.³² The declaration further obliges the State parties to exercise due diligence to combat violence against women which includes requiring State parties to implement effective legal measures, including penal sanctions, civil remedies and compensatory provisions, to protect women against all kinds of violence.³³

Examination of Human Right norms and the International Law demonstrated that the failure on the part of the State to criminalise sexual assault in marriage is a breach of the due diligence standard and failure to the compliance with international human right norms. While DEVAW does not impose binding obligations on States, the norms set forth in the Declaration have high persuasive value because the Declaration shows consensus that gender violence is a fundamental human rights violation that States must take specific measures to combat. The marital rape exemption permits violence against women based on their marital status, and is therefore inconsistent with Article 1. Here, the State’s failure to criminalize marital rape represent an encouragement or de facto permission for this crime, and fall foul of the due diligence obligation.

JUDICIAL TRENDS ON MARITAL RAPE

India does not have any legislation criminalising marital rape as well as the judicial activism in the cases of marital rape is inaudible. There has been situations were even the rape during separation was taken in a lighter manner.

The right to bodily integrity was initially recognized in the context of privacy in State of ***Maharashtra v. Madhukar Narayan Mardikar***³⁴ While this judgement has recognised a right of self-determination and security over body of every women, it is tragic to find that Court has totally ignored a married woman from spousal sexual violence.³⁵

In the case of ***Sree Kumar v. Pearly Karun***³⁶ the couple were going through a period of separation. However, they decided to give their marriage, a second chance. The wife came back to the husband’s house for 2 days. Meanwhile the husband raped the wife. The wife approached the court to hold the husband liable for rape but the husband was not held guilty as the wife consented to coming back to the matrimonial house and as there

²⁷ R v. L [1991] H.C.A. 48; (1991) 174 C.L.R. 379, 40, 2.

²⁸ (2017) 10 SCC 1

²⁹ Ibid.

³⁰ Joseph shine v Union of India, writ (criminal) Petition no. 194 of 2017.

³¹ Article 1 of DEDAW defines discrimination against women as “any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status”.

³² Declaration on the Elimination of all Forms of Discrimination against Women

³³ Ibid.

³⁴ AIR 1991 SC 207

³⁵ Ibid.

³⁶ 1999 (2) ALT Cri 77

remains no separation, it was presumed that she gave a consent to sexual intercourse.³⁷ This decision clearly shows how lightly our judiciary takes the issue of marital rape.

Repeatedly, the petitions to strike off the marital rape exception is turned down by many of the High Courts and only handful Judgements have to a point made passing remarks that marital rape should be recognised as an offence. The Centre too has shown a complete non-readiness to criminalise marital rape. At this juncture, it is important to discuss few of the cases where, the Courts to some extent have acknowledged it as human right violation and have proposed the need of having a legislation.

The case of *Empress v. Hari Mohan Maiti*³⁸ was the first where the Court held that husband does not have the absolute right to enjoy the person of his wife without regard to the question of her safety. Therefore, the only circumstance when this absolute right to sexual intercourse can be encroached is when it becomes extremely dangerous or a threat to the life of the woman due to some physical illness.³⁹

The Gujarat High Court in the case of *Nimeshbhai Bharatbhai Desai v. State of Gujarat*⁴⁰ showed a fair amount of judicial activism when it clarified, though Section 375 exemption 2 provides a safeguard from marital rape charges, husband can be held liable under Section 377 for unnatural intercourse. The Court in the present case elaborately dealt with the issue of marital rape and affirmed that, **“making wife rape illegal or an offence will remove the destructive attitudes that promote the marital rape.”**⁴¹ However, due to non-recognition of marital rape as a crime under the Indian legal framework, the Court held that the husband was liable only for outraging her modesty and unnatural sexual intercourse. The Gujarat High Court in this case heavily relied on Supreme Court’s decision in the case of *Suresh Kumar Koushal v. Naz Foundation & Ors*⁴² and held the husband liable for the forcing as well as actually indulging in oral intercourse. Court further clarified that though Section 375 provides a marital exception Section 377⁴³ makes the husband criminally liable. However, in the present scenario to make the husband criminally liable it is essential to prove the unconsented unnatural sexual intercourse in absence of which no liability will arise. Since, there is no other precedent of the Supreme Court available having the similar ratio, which leaves the interpretation on the Court. Talking about the age of consent, in *Independent Thought v. Union of India*⁴⁴, the Court observed, **“Marital rape of a girl child is effectively nothing but aggravated penetrative sexual assault and there is no reason why it should not be punishable under the provisions of the IPC.”**⁴⁵ After this judgement while discussing the definition wife under exemption 2 of Section 375, the age is now presumed to be above 18 years. Therefore, indirectly through this judgement the age for matrimonial consent has raised to 18 years. The Supreme Court has recognized rape of a minor wife in very loud terms and has delivered a landmark judgment suggesting the legislative formula to make child marriages void ab initio. However, the issue of an adult marital rape remained untouched.

CONCLUSION AND SUGGESTIONS

1. A rapist remains a rapist regardless of his relationship with the victim.⁴⁶ Marital rape is in a way more traumatic as compared to the rape committed by a stranger, the woman has to live with the assailant. In fact, the relation with the assailant makes it more severe and traumatic for a woman. The atrocities like this will also cause irreparable damage to the institution of marriage. Such kind of matrimonial relations are already a damaged if not destroyed relation, ignoring marital rape as an offence and forcing cohabitation in an attempt to hold together such marriages is in no way protecting and preserving the bodily integrity of a human being.
2. The sanctity of the Constitution can only be maintained when every human is treated with utmost dignity. No positive act of sex can be forced upon the unwilling persons, because nothing can conceivably be more degrading to human dignity and monstrous to human spirit than to subject a person by the long arm of the law to a positive sex Act.⁴⁷ The Criminal Law relating to marital rape is callous and has a casual view for the victims of marital rape. It is high time we recognise sexual

³⁷ Ibid.

³⁸ (1890) 18 Cal 49

³⁹ Ibid.

⁴⁰ R/CR.MA/26957/2017 (Aug. 17, 2019, 14:56) <https://indiankanoon.org/doc/185050052/>

⁴¹ Ibid.

⁴² Civil Appeal No.10974 OF 2013

⁴³ Unnatural offences.—Whoever voluntarily has carnal inter-course against the order of nature with any man, woman or animal, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation.—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

⁴⁴Independent Thought vs Union Of India, WRIT PETITION (CIVIL) NO. 382 OF 2013(Aug. 17, 2019, 14:56) available at <https://indiankanoon.org/doc/87705010/>

⁴⁵ Ibid

⁴⁶ European Commission of Human Rights in C.R. v. UK, (1992) 1A.C.599.

⁴⁷ T. Sareetha v. Venkata Subbaiah, AIR 1983 AP 356.

autonomy as the right to privacy of the woman and repel the exemption 2 from Section 375 of the Indian Penal Code.

3. The theory of implied and irrevocable consent by virtue of marriage is flawed and irrelevant in the present times. These theories have totally ignored the fundamental right of a woman to live with dignity. An intimate relationship, particularly marriage, should be a space of mutual trust and respect, the consent here is for the expression of mutual love through sexual intimacy, if women experience coercion and violence within relationships; it violates their fundamental right to live in safety, security and with dignity. The marital rape exception based on a matrimonial relation is a sheer violation of a married woman's right of privacy and autonomy over her body as well as the right to equality, liberty and security and indeed reduces women to a chattel that can be used by their husbands for their comfort and pleasure. The Justice Verma Commission also while suggesting repelling of exemption 2 noted that the exemption of marital rape reduces women to no more than a property to their husbands.
4. Marital rape is not uncommon yet unreported and many times goes unregistered. Marital rape being a serious kind of violence needs serious public attention and State intervention. When the State has an interference in the realm of matrimonial relation as far as cases of dowry, cruelty, divorce etc. then it is certainly necessary that the State and Law should interfere in the matter of such heinous crime of rape.
5. The general argument that is put forth is difficulty in prove it and chances of malicious charges. It may be difficult to prove, that does not mean should not be recognised as a crime. Just like any other criminal case, the charges can be established based on the facts and circumstances of the case (i.e. incidents and demeanour before and after the act, their matrimonial relation etc.) Since, it is hard to prove, proving a false and fabricated claim will be even more difficult. Therefore, it is highly unfair to not recognise an offence just because there is a fear of misuse.
6. Judicial activism could be an option but legislation is a solution. It is high time we outlaw the marital rape exemption and recognise it an offence.