The Unconstitutionality of the Marital Rape Exemption in India

Agnidipto Tarafder and Adrija Ghosh*

Abstract

Defined as 'non-consensual intercourse with one's own spouse', marital rape remains the third rail for most politicians, not only in India but across the world. While the data generated by the government suggests that marital rape in India is very much a reality, legislators are hesitant to remove the exemption due to the perceived unpopularity of such a measure among conservative sections of society and the consequent backlash from the electorate. This article engages with the myriad legal and social hindrances to the removal of the Marital Rape Exemption (MRE) from the Indian Penal Code. We argue that the continuance of the marital rape exemption is a violation of fundamental rights and is therefore, unconstitutional. The recent judgement by the Supreme Court of India in *Puttaswamy (I)*, read along with its decisions in *National Legal Services Authority, Navtej Johar* and *Joseph Shine*, provides the bases for challenging the MRE on firmer footing. Elaborating the problems of basing gender justice claims on the 'privacy strategy', we conclude that while the Court must certainly strike down the exemption, this must be coupled with attitudinal changes, as noted by the Verma Committee recommendations, without which the efficacy of such a judicial dictum will remain suspect.

Keywords: Marital Rape; Right to Life; Privacy; Equality; Forced Labour.

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1. Introduction

When Radhamonee found the lifeless body of her 11-year old daughter lying in a pool of blood, she could scarcely imagine the public outcry this incident would lead to. Phulmonee, her child, was married to Hari Mohan Maity, a 29-year old man who had forced intercourse with her, causing vaginal rupture and haemorrhage, ultimately leading to her death.[1] Maity was punished for causing grievous hurt by the colonial court, but the horror of the incident sparked debate about the age of consent to sexual activities within marriage, which ultimately raised the age from 10 to 12 years.[2] However, since the amendment was prospective in nature, Maity escaped punishment for the rape and murder of his child-bride.[3]

Almost 130 years after this incident, the position of women facing sexual violence within marriage has only slightly improved. In India, forced sex within marriage, remains exempt from being categorized as rape.[4] Defined as 'non-consensual intercourse with one's own spouse',[5] spousal or marital rape remains the third rail for most politicians, not only in India but across the world.[6] While the data generated by the government suggests that marital rape is very much a reality,[7] legislators are hesitant to remove the exemption due to perceived unpopularity of such a measure

[1] Ruchira Goswami, 'Child Marriage in India: Mapping the Trajectory of Legal Reforms' (*Sanhati*, 23 March 2010) <http://sanhati.com/excerpted/2207/> accessed 20 May 2019.

[2] Tanika Sarkar, 'A Prehistory of Rights: The Age of Consent Debate in Colonial Bengal' (2000) 26(3) Feminist Studies 601, 601-02.

[3] *Queens Empress v Huree Mohan Mythee* [1891] XVIII ILR (Cal) 49 cited in Law Commission of India, 'Proposal to Amend the Prohibition of Child Marriage' (2009) Report No 205 [42].

[4] Section 375(2) of Indian Penal Code 1860.

[5] Swarupa Dutta, 'Why Marital Rape Should be Criminalized' (*Rediff.com*, 12 September 2017) <https://www.rediff.com/news/interview/why-marital-rape-should-be-criminalised/20170912.htm> accessed 20 May 2019.

[6] Raquel Kennedy Bergen and Elizabeth Barnhill, 'Marital Rape: New Research and Directions' (*The National Online Resource Centre on Violence Against Women*, 2006) <https://vawnet.org/sites/default/files/materials/files/2016-09/AR_MaritalRapeRevised.pdf> accessed 20 May 2019.

[7] International Institute for Population Sciences, 'National Family Health Survey (NFHS-4) 2015-16: India' (2017) 565-71 <http://rchiips.org/NFHS/NFHS-4Reports/India.pdf> accessed 14 July 2019; Roli Srivastava, 'Marital Rape: The Statistics Show How Real It Is' *The Hindu* (Chennai, 30 June 2016) <https://www.thehindu.com/news/cities/mumbai/Marital-rape-the-statistics-show-how-real-it-is/article14410173.ece> accessed 20 May 2019; Anoo Bhuyan, 'Government Denies Marital Rape Occurs, National Survey Shows 5.4% of Married Women Are Victims' *The Wire* (New Delhi, 12 January 2018) <https://thewire.in/gender/indian-law-denies-marital-rape-exists-5-4-married-indians-claim-victims> accessed 14 July 2019.

among conservative sections of society and the consequent backlash from the electorate.[8]

In this article, we argue that the continuance of the marital rape exemption (MRE) is a violation of fundamental rights and is unconstitutional. In Section 2, we discuss the background in which the issues pertaining to the continuance of the MRE arise in India. In Section 3, we provide counters to the ostensible social and legal barriers to its removal in India and the problems of basing gender justice claims on the 'privacy strategy'. Section 4 contains our concluding observations on the issue.

2. Historical Background and Current Status of the MRE

The marital rape exemption was introduced in common law jurisdictions primarily on account of the 'impossibility' of a husband raping his lawfully wedded wife.[9] The common law origins of the MRE ensured that the penal code drafted by the British for India also contained this clause.[10] Section 375 of the Indian Penal Code which defines and criminalises rape, exempts from its ambit '[s]exual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age'.[11]

Pursuant to the Law Commission's recommendation in its 42nd Report,[12] non-consensual sexual intercourse with a wife living separately (under a decree of judicial separation or otherwise),[13] was excluded from the ambit of the clause. Rape of a spouse, while living separately, is exempt from the MRE.[14] The 172nd Report by the Law Commission rejected the possibility of entirely removing the MRE on the ground that this would be an excessive interference with the marital relationship.[15]

[8] Chhavi Sachdev, 'Rape is a Crime in India — But There are Exceptions' (*National Public Radio,* 13 April 2016) <https://www.npr.org/sections/goatsandsoda/2016/04/13/473966857/rape-is-a-crime-in-india-with-one-exception> accessed 20 May 2019.

[9] Saptarshi Mandal, 'The Impossibility of Marital Rape: Contestations Around Marriage, Sex, Violence and the Law in Contemporary India' (2014) 29(81) Australian Feminist Studies 255.

[10] Deborah Kim, 'Marital Rape Immunity in India: Historical Anomaly or Cultural Defence?' (2017) 69(1) Crime, Law, and Social Change 91, 94.

[11] Section 375, Exception 2 of Indian Penal Code 1860.

[12] Law Commission of India, 'Indian Penal Code' (1971) Report No 42 [16.115].

[13] Section 376B of Indian Penal Code 1860.

[14] Law Commission of India, 'Indian Penal Code' (n 12); pursuant to the Criminal Law (Amendment) Act 1983 which added s 376B.

[15] Law Commission of India, 'Review of Rape Laws' (2000) Report No 172 [3.1.2.1].

Much later, the Justice Verma Committee, set up in 2012 against the backdrop of the Delhi gang rape incident and the ensuing public outcry, recommended the removal of the exemption clause.[16] This recommendation was not given effect to in the Criminal Law Amendment Act 2013.[17] The Parliamentary Standing Committee on Home Affairs, while reviewing the Amendment Bill in 2012, rejected the suggestion that the MRE be removed, as this could endanger the institution of family. Removal was also deemed unnecessary as women had access to other remedies, on account of sexual abuse qualifying as cruelty within marriage.[18]

In 2015, a private member bill was introduced in the Lok Sabha, to do away with the MRE (action on this remains pending).[19] The government has consistently shown no inclination in this regard.[20] More recently, a civil society organisation, the RIT Foundation, filed a public interest litigation before the Delhi High Court, challenging the constitutionality of the MRE.[21] Not surprisingly, the government argued in favour of retaining the exemption.[22] The matter is presently being heard by a two-judge bench of the Delhi High Court. It remains to be seen if the courts in India are ready to rule against the continuance of the MRE.[23]

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[16] Justice JS Verma Committee, Report of the Committee on Amendments to Criminal Law (2013) 113-17.

[17] MR Madhavan, 'The Criminal Laws Amendment Related to Sexual Offences' (*PRS Legislative Research*, 29 March 2013) <https://www.prsindia.org/media/articles-by-prs-team/the-criminal-laws-amendment-related-to-sexual-offences-2702> accessed 10 April 2020.

[18] Standing Committee on Home Affairs, *'Report on The Criminal Law (Amendment) Bill, 2012'* (2015) Report No 167, 15th Lok Sabha [5.91].

[19] The Criminal Laws (Amendment) Bill 2014.

[20] Press Information Bureau, 'Women Subjected to Marital Rape' (2015) <http://pib.nic.in/newsite/ Print Release.aspx?relid=119938> accessed 22 May 2019; Lok Sabha Debates, 15 March 2016, Question No. 2872 'Question on Marital Rape 2016' <http://164.100.47.190/loksabhaquestions/annex/7/AU2872.pdf> accessed 22 May 2019.

[21] Legal Correspondent, 'Plea Against Marital Rape Law' *The Telegraph* (Kolkata, 3 July 2017) <https://www.telegraphindia.com/india/plea-against-marital-rape-law/cid/1521703> accessed 22 May 2019.

[22] *RIT Foundation v Union of India*, Written Submission on behalf Respondent (Union of India) WP (C) No284/2015(Delhi High Court).

[23] The Judiciary in countries such as England, France, Belgium, South Korea, Nepal intervened to eliminate the marital rape exemption.

3. The Lacunae in the Justifications for the Retention of the Marital Rape Exemption

In this section we discuss the legal and social constraints upon removing the marital rape exemption, and the perils of employing the 'privacy strategy' in arguing against it. We conclude that both the original justifications based on patriarchal notions of 'woman as property' and 'privacy of marriage' are patently illegal, insufficient, and misconstrued.

A. Common Law Exemption to Rape: Early Theoretical Foundations

The basis for continuing to distinguish between marital rape from other forms of rape can be traced to common law traditions. Early British jurists such as Sir Matthew Hale[24] and Sir William Blackstone[25] provided the rationale for exempting this category from criminalization as rape. Their arguments were based on the twin concepts of the doctrine of coverture and implied consent.[26]

The doctrine of coverture rests on the principle that the husband and wife merge their identities upon marriage and become *ipso facto* one individual in the eyes of law. The identity of the wife is subsumed within the husband. The doctrine is premised on viewing 'women as chattel', as the 'property' of the dominant male member of her immediate family.[27] The conceptualisation of 'women as chattel' in turn, is grounded in the assumption that a woman is always in need of protection.[28] Women were traditionally considered to be infant-like and thus, incapable of holding property or making contracts.[29]

Based on this assumption it was widely accepted that a woman belongs either to her father or her husband as a subordinate individual within the

[24] Rebecca Ryan, 'The Sex Right: A Legal History of the Marital Rape Exemption' (1995) 20(4) Law & Social Inquiry 941, 947.

[25] ibid 943.

[26] ibid 943-48.

[27] Lalenya Weintraub Siegel, 'The Marital Rape Exemption: Evolution to Extinction' (1995) 43 Cleveland State Law Review 351, 356-57; Jessica Klarfeld, 'A Striking Disconnect: Marital Rape Law's Failure to Keep up with Domestic Violence Law' (2011) 48 American Criminal Law Review 1819, 1826.

[28] Sarah Harless, 'From the Bedroom to the Courtroom: The Impact of Domestic Violence Law on Marital Rape Victims' (2003) 35 Rutgers Law Journal 305, 311; Stacy-Ann Elvy, 'A Postcolonial Theory of Spousal Rape: The Caribbean and Beyond' (2015) 22 Michigan Journal of Gender and Law 89, 105.

[29] Weintraub Siegel (n 27) 357.

household, lacking any measure of autonomy or agency.[30] Prior to marriage, she would belong to her father. Post-marriage, the husband acquired control over the woman and thus, would require from her, absolute fidelity.

The law of rape served as the legal framework for protecting these essentially property interests of the dominant male.[31] The woman, or more specifically, her sexuality became the object to be protected by rape law. Rape laws did not emanate from the dignity of the victim but the social value attributed to her sexual status, given that her sexuality was required to be protected as any other form of property.[32] A husband was not deemed to be capable of raping his own wife, as her chastity or fidelity was his to own. A husband raping his wife became an incongruous proposition as he was making use of his own property.[33] The proprietary interest of the husband, therefore, could only be diminished by another and not by himself.

Far more widely accepted is the theory of implied consent,[34] which proceeds by considering marriage as a social contract,[35] in which the woman willingly submits her autonomy in exchange for protection. This theory features most prominently in the writings of Hale, who established the notion that such consent, once given, is irrevocable and complete. The wife's subjugation was therefore considered a prerequisite to the marriage contract, and the primary marker of the husband's role within the marital relation, his right over her body. The theory of implied consent suffers from several inconsistencies.

First, let us consider the question of marriage as a form of social contract. In cultures where marriage is considered a contract, this argument is used to underline that the act of the wife surrendering herself in marriage to the husband is an exchange made willingly for the purpose of maintenance and general well-being to be guaranteed by the husband.[36] The proposition is both internally and externally untenable in the modern age. Internally, presuming such an exchange does take place, social

[30] Jill Elaine Hasday, 'Contest and Consent: A Legal History of Marital Rape' (2000) 88 California Law Review 1373, 1392-98.

[31] Sandra Ryder and Sheryl Kuzmenka, 'Legal Rape: The Marital Rape Exemption' (1991)24 John Marshall Law Review 393, 399.

[32] Jaye Sitton, 'Old Wine in New Bottles: The Marital Rape Allowance' (1993) 72 North Carolina Law Review 261, 265.

[33] Weintraub Siegel (n 27) 356; Harless (n 28) 311-12.

[34] Sir Matthew Hale, *The History of The Pleas of The Crown* (1st ed, E and R Nutt and R Gosling 1736) 629. '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' cited in Catharine MacKinnon, 'Rape Redefined' (2016) 10 Harvard Law and Policy Review 431, 444.

[35] ibid.

[36] Carole Pateman, *The Sexual Contract* (Blackwell Publishers 1988).

contract theory suggests the surrender of such liberties is made to a superior authority figure in exchange for protection.[37] Such a notion is completely opposed to the contemporary idea of marriage as a union between equals, being premised squarely on the patriarchal notions of superiority of the male, and his unique status as provider and protector. The social contract argument subscribes to an outdated and unequal Victorian-era understanding of marriage. The social contract analogy is also deeply flawed from an external standpoint as well, since it views marriage as a barter where one party pays maintenance in exchange for satisfaction of sexual needs. This reverts to the position of women's sexuality as chattel, negating gender equality within the marital relationship. Furthermore, the purpose of the social contract is to protect oneself from third parties, and not from the 'determinate superior'.[38] It provides no escape when the superior himself assumes the role of the oppressor. Such a formulation ensures that the wife is left powerless and completely at the mercy of the husband, which is the opposite of what the social contract is meant to achieve—a greater sense of security for those surrendering their rights.[39]

Second, the implied consent theory creates the perception of the centrality of sex,[40] of treating sexual relations as a fundamental factor in married life and all other aspects as subsidiary. This has resulted in the reshaping of the debate as one which revolves around sexual autonomy alone, rather than autonomy in general.[41] In all other respects, husbands and wives are treated as separate individuals, and only in this area they are to be considered one person. Third, the theory rests on the selective use of consent. It claims to establish consent by taking marriage as its indicator: by the virtue of her marriage, the woman is said to have provided an unconditional consent to sexual relations with her husband.[42] However, such a characterization raises two important objections. On one hand, it creates an artificial distinction between married and unmarried sexual relations and has the effect of relegating or even admonishing extra-marital sex.[43] Thus, sex before marriage becomes improper and sex after marriage with someone other than one's wife is improper. While forced sex outside marriage is clearly defined as rape, consensual sex outside marriage with another woman (adultery) is no longer a criminal offence.[44] Under these

[37] ibid.

[38] Katherine O'Donovan, 'Consent to Marital Rape: Common Law Oxymoron' (1995) 2 Cardozo Women's Law Journal 91, 97-98.

[39] ibid.

[40] Ryder and Kuzmenka (n 31).

[41] ibid.

[42] ibid.

[43] Ryan (n 24) [946]-[947].

[44] *Joseph Shine v Union of India* [2019] 3 SCC 39.

conditions, the protection given to forced sex within marriage seems illogical.

On the other hand, if consent is used to waive bodily autonomy within marriage, it should apply equally to all cases where bodily autonomy is undermined including battery.[45] If consent is used to waive only sexual autonomy but preserve the other aspects of bodily autonomy, this again elevates the sexual aspect of marriage over all else, which, as argued above, is inconsistent with the contemporary understanding of marriage as an equal partnership. The presumption seems to be that consent in marriage includes consent to sexual relations, and in that regard, it is different from consent in non-marital relationships, which may not include this by default.

In both these theories, as with all other traditional legal justifications for continuing with the MRE, the ability to determine the time and nature of such sexual encounters is completely handed over to one party within the marital relationship, which negates the proposition of marriage as a union between equals. This is clearly a case of gender discrimination. It has been argued that the gender-neutral language within the statutes could remedy this anomaly,[46] in which case the wife derives, at least notionally, the same immunity as the husband if a similar claim is raised against her. However, the idea of formal equality in this context is purely utopian, since the purpose of removing the MRE is to undo the violations faced by married women, rather than to provide legal immunity to such married women as may be guilty of the same conduct in the future. Simply put, two wrongs don't make a right. Extending immunity by couching it in gender-neutral language, while having the flavour of non-discrimination about it, is an attempt to distract from, rather than remedy the problem. It also glosses over the fact that in almost all claims of marital rape, the victim is the woman.[47]

B. Social Constraints

Apart from the foundational legal arguments discussed above, objections to criminalising marital rape often cite several social obstacles. Some of these arguments are universal, while others appeal to more indigenous cultural constructs that are used to justify the continuance of the MRE.

[45] Hasday (n 30) 1378; Reva Siegel, 'The Rule of Love: Wife Beating as Prerogative and Privacy' (1996) 105 Yale Law Journal 2117, 2148-49.

[46] Several states in the US have used this method to justify the continuance of the provision; Robin West, 'Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment' (1990) 42 Florida Law Review 45.

[47] ibid.

The most common among these culture-specific objections relates to the traditional Indian family structure, and the elevated status of the marital union within Indian society. The Indian concept of marriage as a divinely ordained union is used to distinguish it from the contemporary Western understanding, and support is drawn from the fact that daily domestic life in India continues to be governed by the religious laws of each community.[48] The matrimonial union in India being viewed as a union of two families rather than merely between the parties also adds to this notion. Many in India, including leading parliamentarians, are of the opinion that the family acts as the primary arbiter in domestic disputes.[49] Their concern seems to be that this informal alternative would be jeopardized and the possibility of amicable settlement of such disputes would be substantially reduced with the intrusion of criminal law within the familial framework.

The claim that the Indian idea of marriage as a religious sacrament is in fact quite misleading.[50] To paint the entire Indian community with their varying beliefs and customs with the same brush reeks of an attempt at cultural essentialism and nationalism, tarnishing both the plurality and cultural heterogeneity of the country. Further, to suggest that the family is the natural or best forum for domestic disputes takes away the right of victims to avail legal remedies otherwise available to all citizens. While it is doubtful that promoting the integrity of the family unit can itself be a prerogative of the State, larger questions remain. Proponents of the family privacy argument contend that they do not want the State to interfere in what is essentially a private dispute between husband and wife, while asking the State to actively promote (by refusing to remove MRE) a certain preferred informal institution to arbitrate dispute relating to human rights violations. Neither of these are valid justifications for leaving victims remediless. Incidentally, there are several remedies available even within the present legal framework, such as recourse to the domestic violence and cruelty laws,[51] which implicitly admit to the State's limited faith in informal

[48] Mandal, 'The Impossibility of Marital Rape' (n 9) 259-61.

[49] See Aarefa Johari, 'As Government Refuses to Criminalise Marital Rape, Laws on Such Assaults Remain a Muddle' (*The Scroll*, 30 April 2015) <https://scroll.in/article/724239/as-government-refuses-to-criminalise-marital-rape-laws-on-such-assaults-remain-a-muddle> accessed 22 May 2019. While discussing the Criminal Law (Amendment) Bill 2012, Lok Sabha member Sumitra Mahajan made the following statement: 'People these days get divorced over insignificant issues. Marital rape shouldn't be made into a criminal offence...Things like these should be sorted out within the family or by counselling. There is no need for a law'.

[50] Mandal, 'The Impossibility of Marital Rape' (n 9) 259-60.

[51] The Protection of Women from Domestic Violence Act 2005; Section 498A of Indian Penal Code 1860.

family systems for amicable settlement, and blow hollow the familial arbitration argument.

This objection seems even weaker when approached through a different angle. In India, religious personal laws have been consistently used as an argument against reform.[52] Even if marriage is a sacrament for Hindus, comparatively, Nepal, a demographically Hindu majority country, has already recognised marital rape to be a crime. The Supreme Court of Nepal in *Forum for Women, Law and Development, Thapathali v His Majesty's Government*,[53] held that the marital rape immunity was unconstitutional, and violated Nepal's obligations under international human rights instruments and in light of the changing norms and values in criminal law.[54] Interestingly, the Supreme Court of Nepal noted that despite religious and traditional beliefs, the law, especially that regulating familial affairs,[55] had consistently developed to align with changes in social, economic and cultural contexts.[56] The traditional religious and cultural narrative of marriage adopted by the Indian government is not an adequate justification for non-recognition of marital rape as a crime.

The Supreme Court has recognised that marriage is an association between two independent equals and that on account of marriage women are not converted into property, whose sexuality could be controlled by their husbands.[57] In fact, although the decision was in the context of the unconstitutionality of the marital rape immunity in respect of girls between the ages of 15 and 18 years, the Court admitted that rape within marriage is not a conceptual impossibility.[58] Further, marriage was deemed to be 'personal' and not 'institutional'.[59] Even though the institution of marriage, in a manner, is regulated by law, its sanctity ultimately depends on the extent of commitment of the parties and their willingness to preserve the marital relationship.[60] The institution is not separate from the parties involved. Unless the rights and autonomy of each party is protected, the spouses are not equal participants having the willingness to maintain the relationship, and thus, the sanctity of the marital union cannot be argued to have been preserved. Even if religious sanctity is in question, it cannot be sought to be protected at the cost of constitutional rights and values

[52] Kim (n 10) 97.

[53] Writ No 55 of the year 2058 BS (2001-2002).

[54] ibid [12].

[55] ibid [10] In the context of abolition of polygamy and child marriage, as well as the introduction of divorce and women's right to property.

[56] ibid.

[57] *Independent Thought v Union of India* (2017) 10 SCC 800 [73]; *Joseph Shine* (n 44) [103] (Nariman J), [174], [195]-[197] (Chandrachud J).

[58] *Independent Thought* (n 57) [73]-[75] (Lokur J).

[59] ibid [92] (Lokur J).

[60] *Joseph Shine* (n 44) [64] (Misra CJ), [91] (Nariman J).

such as equality, dignity, liberty and autonomy.[61] It has also been held that the purported aim, the preservation of the sanctity of marriage, was effectively reinforcing patriarchal stereotypes by perpetuating the idea that women have no sexual freedom or autonomy within the marital relationship.[62] These observations were made by the Supreme Court in *Joseph Shine v Union of India,*[63] where s 497 of the Indian Penal Code, criminalising adulterous relations with one's wife, was held to be illegitimate State interference for the purpose of protecting the sanctity and stability of marriage.

The other, more general concern is that the removal of the exemption may prompt its misuse, which could lead to a spate of false claims against husbands.[64] This issue, commonly referred to as the Vindictive Wife/Innocent Husband problem,[65] has been central to the debate on both domestic violence legislation and ordinary criminal statutes in India. Provisions in these laws impose strict liability on the husband and his family for any mental or physical agony the wife has to face at their hands.[66] Upon a formal complaint of violence or cruelty by the wife, the burden of proof shifts to the husband and his family, rather than the accuser, thereby ensuring that the husband is taken in custody while the veracity of the claim remains to be established upon investigation. While there remains little to no empirical evidence to suggest widespread misuse of such provisions, they regularly surface in conversations around domestic violence and marital cruelty.[67] Courts have sometimes given credence to these claims by attesting to the rampant misuse of these legal provisions by unscrupulous clients.[68] In its response to the petition before the Delhi High Court, the Union of India has also expressed similar misgivings by suggesting that the determination of marital rape must not be left to the testimony of the woman alone,[69] which flies in the face of established principles of rape adjudication.

The probability of misuse, however, pales in comparison to the social cost of women's rights violations. Such claims miss the woods for the trees

[61] ibid [123]-[124] (Chandrachud J).
[62] ibid [186] (Chandrachud J).
[63] *Joseph Shine* (n 44).
[64] Mandal, 'The Impossibility of Marital Rape' (n 9) 261-63.
[65] See Flavia Agnes, 'Protective Legislations: The Myth of Misuse' (1996) 30(16) Economic and Political Weekly 865.
[66] Section 498A of Indian Penal Code 1860.
[67] Mandal, 'The Impossibility of Marital Rape' (n 9) 262.
[68] Flavia Agnes, 'Are Women Liars? Supreme Court's Judgment Ignores Lived Reality of Married Women' (*Engage-EPW*, 31 August 2017) <https://www.epw.in/engage/article/women-are-liars-says-supreme-court> accessed 22 May 2019.
[69] *RIT Foundation v Union of India*, Written Submission on behalf Respondent (Union of India) (WP (C) No284/2015 (2015) [3] (Delhi High Court).

by diverting the conversation to potential misuse, which fails to register the need for such stringent protections in the first place. Moreover, the court's verdicts wrongly identify the cause to be unscrupulous litigants. The misuse of legal provisions for the protection of women is usually done at the behest of the lawyers rather than their clients, and could be attributed to the difficulties faced in securing legal separation or divorce.[70] In India, where awareness regarding fundamental freedoms is woefully lacking even among the elite, the lawyer often advises female clients to add a charge of domestic violence to divorce applications. It is often seen as the most efficacious manner of reaching a settlement with the husband in case of a contested divorce. The husband in fear of immediate incarceration, often decides to settle for a mutually consensual separation. Unless the process of obtaining divorce is simplified, lawyers will continue to opt for this route. The scale of this occurrence is possibly overestimated in public discourse, and in the absence of empirical data, leads to such unfortunate conclusions by judges and legislators alike.

The debate around marital rape has often been sidestepped by alluding to other remedies available under Indian law, such as the laws on domestic violence[71] which may be used in its stead.[72] While it is indeed true that alternatives exist, they by no means justify the existence of the MRE. The reasons for this are both legal and social. The criminalization of one act does not depend on the availability of criminal remedies against other acts of a similar nature. For instance, that several crimes may be committed through a single act is an established proposition of criminal law.[73] The commission of one criminal act is not dependent on another. It only depends on whether the ingredients of the crime in question were present. The presence of 'other remedies' does not explain the reluctance to call

[70] No fault divorce is not permissible in India other than by mutual consent (Section 13B of Hindu Marriage Act 1955) and the ground of irretrievable breakdown of marriage has not been included in legislation, and only the Supreme Court has powers to grant the same; Rehan Abeyratne and Dipika Jain, 'Domestic Violence Legislation in India: The Pitfalls of a Human Rights Approach to Gender Equality' (2012) 21(2) American University Journal of Gender Social Policy and Law 333.

[71] The Domestic Violence Act 2005 is civil legislation.

[72] 'Women Don't Use Marital Rape Law in 99.9% Cases: Maneka Gandhi' (*The Quint*, 18 May 2016) <https://www.bloombergquint.com/politics/women-dont-use-marital-rape-law-in-999-cases-maneka-gandhi> accessed 22 May 2019.

[73] See Frank Edward Horack Jr, 'The Multiple Consequences of a Single Criminal Act' (1937) 21 Minnesota Law Review 805; Adi Dekebo, 'Prosecution for Several Counts Resulting from a Single Criminal Act' (*Abyssinia Law*, 28 July 2015) <https://www.abyssinialaw.com/blog-posts/item/1553-prosecution-for-several-counts-resulting-from-a-single-criminal-act> accessed 22 May 2019.

rape what it is.[74] The availability of other criminal remedies against the husband and his relations within criminal and other areas of law, is an acknowledgement of the fact that cruelty within marriage is part of our social reality. To acknowledge that cruelty exists but deny a particular form of it is inconsistent and hypocritical.

Furthermore, a wife who has been subjected to rape, should be free to choose the remedies that she will avail herself of. The fact that the State makes the choice on her behalf, by denying her right to have her rapist convicted, reeks of paternalism and deprives married women equal citizenship and autonomy.

C. Potential Pitfalls of the 'Privacy Strategy': Countering the Public-Private Divide

Having undertaken a broad overview of the traditional legal and social constraints upon removing the exemption, it is important to discuss the pitfalls of the 'privacy strategy', since this constitutes the only legal justification for the continuance of the exemption that has any claim to legitimacy, howsoever weak.

The acknowledgement of an express right of privacy has historically proven to be a game-changer in agitating formal equality claims in the courtroom.[75] In the US, it has paved the way for a variety of successful claims, ranging from the decriminalization of same-sex relationships[76] and establishing the woman's right to terminate her pregnancy[77], to the use of contraceptives for both married[78] and unmarried couples.[79] While the nature of the claims vary considerably, the secret to success lies in being able to establish that in each of these cases, the exercise of a 'private right of an individual' was unnecessarily and/or excessively being interfered with by the law.[80] This approach, often called the 'privacy strategy'[81] has reaped great dividends in the past and continues to serve as a useful technique in navigating contentious legal battles across jurisdictions.

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[74] Jahnavi Sen, 'Maneka Gandhi's Altered Stance on Marital Rape Angers Activists' (*The Wire*, 12 March 2016) <https://thewire.in/politics/activists-angered-by-maneka-gandhs-altered-stance-on-marital-rape> accessed 22 May 2019.

[75] Saptarshi Mandal, '"Right to Privacy" in *Naz Foundation*: A Counter-Heteronormative Critique' (2009) 2 National University of Juridical Sciences Law Review 525, 526

[76] *Lawrence v Texas* [2003] 539 US 558 (US Supreme Court).

[77] *Roe v Wade* [1973] 410 US 113 (US Supreme Court).

[78] *Griswold v Connecticut* [1965] 381 US 479 (US Supreme Court).

[79] *Eisenstadt v Baird* [1972] 405 US 438 (US Supreme Court).

[80] *Griswold* (n 78) [485]-[486].

[81] Mandal, 'Right to Privacy' (n 75).

Employing the privacy strategy, however, comes with inherent limitations. While the *prima facie* success of this approach has led to its increasing popularity among litigants, feminists have long argued that it does not translate into the de facto realisation of liberty in most cases.[82] This is because the privacy argument is narrowly tailored: it seeks to protect individual choices from state scrutiny based on the private or personal nature of such choices.[83] In other words, so long as the impugned actions or choices are carried out in private, the law shall not interfere. This leaves open the possibility of such actions being targeted when undertaken publicly. If a gay person were to display affection towards her partner publicly, the law could potentially be invoked against them. To avoid these dangers and ensure the full realization of allied freedoms, scholars recommend such claims be based on autonomy and equality, rather than privacy.[84]

The other reservation against arguing privacy in gender justice cases relates to the reinforcement of the classical public-private divide. [85] Ironically, the same privacy argument is applied by the proponents of the MRE to decry State interference into what they perceive to be a private dispute between husband and wife. They argue that sanctity of the home and more specifically, the marital bedroom, is a crucial aspect of the right of privacy.[86] The private affairs of married couples should remain outside the purview of the law, since the State has no business regulating private conduct within marriage. This argument, which finds favour in several quarters,[87] is often considered the chief obstacle in gender-justice claims.

These misgivings arise due to a misunderstanding of the nature of privacy as a right. The public-private divide is invoked to segregate claims based on where the alleged violation takes place; the private sphere of the home or the public sphere of life outside it. This approach, however, reduces the right of privacy to one that seeks to protect certain spaces rather than individuals within those spaces. Privacy as a right protects a deeply personal zone and gives meaning to an individual's sense of self,

[82] Lauren Gambier, 'Entrenching Privacy: A Critique of Civil Remedies for Gender-Motivated Violence' (2012) 87 NYU Law Review 1918, 1934-37.

[83] ibid.

[84] ibid; See Elizabeth Sneider, 'Synergy of Equality and Privacy in Women's Rights' (2002) University of Chicago Legal Forum 137, 141-45; Richard Epstein, 'Liberty, Equality and Privacy: Choosing a Legal Foundation for Gay Right' (2002) University of Chicago Legal Forum 73, 83-5.

[85] See Frances Olsen, 'Constitutional Law: Feminist Critiques of the Public/Private Distinction' (1990) 10 Constitutional Commentary 319.

[86] Catherine MacKinnon, 'Feminism, Marxism, Method & the State: Toward Feminist Jurisprudence' (1983) 8 Journal of Women in Culture and Society 635, 641.

[87] Raveena Rao Kallakuru and Pradyumna Soni, 'Criminalisation of Marital Rape in India: Understanding its Constitutional, Cultural and Legal Impact' (2018) 11 National University of Juridical Sciences Law Review 121, 131-35.

both internally, by helping her establish how she perceives herself and externally, in terms of the 'social' expression of her personhood in relation to others. The analysis of the denial of a right to privacy should focus on the denial of self-expression, instead of reducing the question to where the violation took place. Additionally, while it is true that the privacy argument has often been key to a positive determination in formal equality cases, it would be useful to remember that such an argument has always been made in conjunction with other related claims. Privacy is often viewed as a necessary precondition to the realization of a gamut of other rights, and is in fact, an essential constituent of autonomy as well. To assert that privacy would only protect private choices whereas autonomy protects public choices as well, is based on an unnecessarily narrow view of the interrelationship between the two rights, which are essentially symbiotic in nature. Without privacy, freedom of thought and expression, and in turn, choice and autonomy would be rendered meaningless.

Similarly, the issue of State intervention in the privacy of domestic affairs is a shrewdly constructed, yet a dangerously misconceived notion. There are several reasons for this. First, as argued above, privacy does not protect spaces so much as it protects individuals within those spaces.[88] It would protect the sexual acts within the confines of the marital bedroom, from the unwanted gaze of an external agent. Where the dignity and autonomy of one of the individuals within that marital relation is jeopardised, privacy cannot be manipulated to protect the interest of one against the other. The spatial construct of privacy in the marital bedroom arises from the consensus between individual rights-holders to exclude others, and does not apply to situations when only one-party desires non-interference.[89] Second, while the right of privacy protects both individuals and to some extent, spaces, there are numerous instances of the legislature venturing into the private sphere to uphold the rights of individuals. Laws against domestic violence and cruelty are cases in point. Third, the idea of consent is central to the right of privacy. In the absence of consent from both parties, privacy of the family unit cannot be derived automatically. Privacy of the home derives its legitimacy from the privacy of the individual constituents of that home. Fourth, privacy is a limited right, the exact contours of which are usually determined in reference to other competing interests within a conflict of rights framework.[90] When an act by one party

[88] *Naz Foundation v Government (NCT of Delhi)* [2009] SCC OnLine Del 1762 [47]; Mandal, 'Right to Privacy' (n 75) 535-36.

[89] A modified form of the same idea was first articulated in *T Sareetha v T Venkata Subbaiah* [1983] AIR 1983 AP 356 (Andhra Pradesh High Court).

[90] In *Justice KS Puttaswamy v Union of India* (2017) 10 SCC 1, the Supreme Court did not elaborate on this, though in Chandrachud J's lead opinion (Nariman J and Kaul J also) certain indicators were left for future courts.

violates the autonomy and dignity of another, the right to privacy cannot be claimed as an absolute defence against such violation.

Having laid down the arguments on which the exemption is based, the above discussion was aimed at debunking each of these, often interrelated claims. None of the arguments for retaining the MRE could survive a logical assessment on merits. What follows is a constitutional assessment of the arguments for retaining the MRE. Our claim is that the MRE does not survive constitutional scrutiny since it infringes upon several fundamental freedoms. In the following section, we illustrate how the exemption runs contrary to each of these guaranteed rights, through an analysis of established precedents and legal principles.

3. The Unconstitutionality of the Marital Rape Exemption

The MRE allows a husband to violate his wife's bodily integrity. It allows him to impregnate her against her will in denial of her reproductive freedom. And perhaps most important, the exemption extinguishes a married woman's autonomy in perhaps the most personal and intimate of human interactions. The State thus violates rights of married women by allowing their husbands to rape them without fear of prosecution.[91]

The MRE is contrary to fundamental rights enshrined in the Constitution. In this section we test the MRE against the anvil of the right to equality and non-discrimination under Articles 14 and 15; the right to freedom of expression under Article 19(1)(a); the right to life and liberty under Article 21 and the protection against forced labour under Article 23. We argue that the MRE is in contravention of each of these guarantees.

For the purposes of making these arguments on the unconstitutionality of the MRE, we place substantial reliance on a set of recent judgments by the Supreme Court, beginning with its decision in *Puttaswamy.* In 2017, a nine-judge bench recognised the right to privacy as a fundamental freedom. This judgement, along with other decisions by the Court that followed in quick succession, has sparked hope and have paved the way for annulling the MRE. In *Navtej Singh Johar v Union of India*,[92] the Court read down s377 of the Indian Penal Code, which *inter alia* criminalised same-sex relationships. This was followed shortly after by its judgement in *Joseph Shine* which decriminalised adultery and denounced the

[91] Anne Dailey, 'To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment' (1986) 99(6) Harvard Law Review 1255, 1256.

[92] (2018) 10 SCC 1.

subordination of the married woman within the family. These decisions entrenched the Court's position on equality, non-discrimination, autonomy, dignity and self-expression in an unprecedented manner. Read along with the decision in *National Legal Services Authority* v *Union of India*,[93] (*NALSA*) which affirmed the rights of transgender persons as equal citizens, the post-*Puttaswamy* jurisprudence provides a firmer footing for challenging the MRE.

A. Equality and Non-Discrimination

The MRE, when tested against the guarantees of equality and non-discrimination, encapsulated within Articles 14 and 15 (1), does not pass muster.

1. Article 14

There are two tests that are applied to ascertain whether there has been an Article 14 violation. These are the *reasonable classification test* and the standard of *arbitrariness*. On the application of both of these tests MRE is contrary to the guarantee of equality under Article 14. The argument is that the distinction on the basis of marital status, instead of consent, is an unreasonable classification. Furthermore, the protection of the sanctity of the marital institution, at the cost of denying equality to married women, is an endorsement of patriarchal assumptions regarding the status of women within the family and is manifestly arbitrary.

In order to pass the test of reasonable classification, legislation must satisfy the twin standards of intelligible differentia and rational nexus. As elaborated by Justice SR Das in *State of West Bengal v Anwar Ali Sarkar*,[94] the law must clearly distinguish between the groups classified on an intelligible basis, and such a classification must have a rational correlation or nexus with the object sought to be achieved by the law.[95] Decades later, the Supreme Court in *EP Royappa v State of Tamil Nadu*[96] and *Maneka Gandhi v Union of India*,[97] expanded the understanding of equality by weaving into it the standard of arbitrariness, which in the words of Justice Bhagwati was 'antithetical to equality'.[98]

[93] (2014) 5 SCC 438.
[94] AIR 1952 SC 75.
[95] ibid [55] (SR Das J).
[96] (1974) 4 SCC 3.
[97] (1978) 1 SCC 248.
[98] *EP Royappa* (n 96) [85]; *Maneka Gandhi* (n 97) [94].

a. Reasonable Classification Test

Applying the twin standards of the reasonable classification test, it becomes evident that the MRE classifies married women as an exclusive group, whose rights are curtailed in contrast to the unmarried. This classification, based on a woman's marital status, is created with the purpose of protecting a traditional understanding of marriage detailed in Section 2. Such a classification, based on the ground of marital status, has no rational basis. The distinction between married and unmarried women is artificial as it does not have a rational nexus to the goal of criminalising rape The object of rape laws cannot be to protect the sanctity of the institution of marriage, rather it is to prevent and punish the act of rape. The purpose of rape law is to distinguish between consensual and non-consensual sexual intercourse, which serves as the basis for criminalising the latter. The wrongness of rape is no longer premised upon the unlawful taking of another's property, the husband's supposed property interest in his wife's sexuality. Rape is wrong because it is non-consensual and denies the right of autonomy and self-governance to women.

The MRE is fundamentally flawed. The lynchpin of rape law is the presence or absence of consent. That a married woman may be, and is in fact, often violated by her husband is immaterial to the crime of rape. The legal determination of whether an act of rape has been committed hinges upon the absence of consent.[99] Using marital status as a basis of classification is unreasonable. In light of this, the MRE falls foul of the guarantee under Article 14.

b. Arbitrariness

The test for reviewing legislation under Article 14, is one of recent origin - manifest arbitrariness. In his majority opinion in *Shayara Bano v Union of India*,[100] Justice Nariman explained the test of manifest arbitrariness

> *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.*[101]

[99] Section 375 of Indian Penal Code 1860.
[100] (2017) 9 SCC 1.
[101] ibid [101] (Nariman J).

The unconstitutionality of the MRE is established on the test of arbitrariness. The provision is irrational insofar as it provides immunity to married husbands for non-consensual sex, while the very same act is criminalised in case of unmarried couples or strangers. It creates an artificial hierarchy between the sexual activities within and outside marriage. In doing so, it not only defeats the purpose of rape law, which is to penalise the perpetrator of forced sex, no matter their identity, but also imposes a disproportionate burden on the married woman to obtain a legal remedy. She must prove that she faced cruelty or an allied offence against her body, when in fact what she endured was rape.

The ostensible purpose of the MRE is, to preserve the institution of family by shielding it from scrutiny amounts to enforcing archaic, Victorian morality. It is manifestly arbitrary to privilege the purported sanctity of an institution over the rights of the individuals involved. This purpose is illegitimate. The structure of the family unit and the institution of marriage are not immune from legal scrutiny.[102] When these are used to vitiate equality between spouses, they cannot be considered as adequate principles guiding State action.[103] In *Joseph Shine*, it was observed that the patriarchal underpinnings of s497, which assumed that the husband owned the sexuality of his wife, makes it manifestly arbitrary.[104] Even if the State argues that the MRE is essential for the protection of the family unit and the marital institution, this does not cure the defect inherent in the clause.

2. Article 15

The second guarantee under the equality provisions in the Constitution is the obligation on the State to ensure non-discrimination, *inter alia*, on the grounds of sex. This guarantee, encapsulated within Article 15(1) of the Constitution, has been subject to significant developments in recent times. The understanding that 'sex plus' discrimination is permitted, that is, differentiation on the basis of sex in addition to other factors, has been displaced. The MRE runs contrary to the anti-discrimination clause on an application of the anti-stereotyping principle. We also employ the language of dignity to argue that the MRE is in contravention of Article 15.

[102] Gautam Bhatia, 'The Supreme Court Decriminalises Adultery' (*Indian Constitutional Law and Philosophy Blog,* 28 September 2018) <https://indconlawphil.wordpress.com/2018/09/27/the-supreme-court-decriminalises-adultery/> accessed 27 August 2019.

[103] *Joseph Shine* (n 44) [168] (Chandrachud J).

[104] ibid [29]-[30] (Misra CJ and Khanwilkar J), [216] (Chandrachud J).

a. Anti-Stereotyping

While the anti-stereotyping principle originates from American jurisprudence,[105] it has been incorporated within the Indian constitutional landscape. In 2007, in *Anuj Garg v Hotel Association of India*,[106] the Supreme Court held that s30 of Punjab Excise Act 1914, which prohibited women from being employed in establishments where liquor or intoxicating drugs were being consumed, was constitutionally invalid. The provision discriminated between sexes on the basis of stereotypical gender roles, by assuming that women employees would 'provoke sexual assaults', even if the ultimate goal was to preserve the safety of women.[107]

The essence of the anti-stereotyping principle is that differential treatment must not be premised upon culture or tradition-based assumptions regarding the natural roles to be performed or spaces to be occupied by different genders. Subsequently, even in *NALSA*, where the Supreme Court recognised the transgender community's right to self-identification, the same principle was endorsed. The Court observed that

> *Constitution makers, it can be gathered, gave emphasis to the fundamental right against sex discrimination so as to prevent the direct or indirect attitude to treat people differently, for the reason of not being in conformity with stereotypical generalizations of binary genders.*[108]

That these decisions have established the invocation of the anti-stereotyping principle as part of the discrimination analysis under Article 15 was recognised in *Navtej Johar*.[109] Chandrachud J deployed the anti-stereotyping principle to criticise the position taken earlier in *Air India v Nargesh Meerza*,[110] where the condition barring marriage for air hostesses during the first four years of service was justified as it was considered conducive to family planning and successful marriages.[111] This stereotypical understanding that the burden of family planning and marital bliss falls only on women was deemed to be discriminatory by Chandrachud J.[112]

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[105] Gautam Bhatia, 'Sex Discrimination and the Anti-Stereotyping Principle: *Anuj Garg v Hotel Association of India*' (*Indian Constitutional Law and Philosophy Blog*, 6 September 2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3031374> accessed 1 September 2019.

[106] (2008) 3 SCC 1.

[107] ibid [41]-[45].

[108] ibid.

[109] *Navtej Johar v Union of India* (2018) 10 SCC 1 [432]-[433] (Chandrachud J).

[110] (1981) 4 SCC 335.

[111] ibid [80].

[112] *Navtej Johar* (n 109) [434]-[437] (Chandrachud J).

Further, the restrictive manner of reading Article 15 has also been rejected. In interpreting the non-discrimination guarantee of Article 15(1), the Court in *Nargesh Meerza* had ruled that a regulation would only fall foul of the provision if the distinction was made exclusively on the ground of sex.[113] If two categories of people are classified on the basis of sex along with some other factor (for example, sex and economic status), such a classification would survive judicial scrutiny. A mechanical adherence to this judgement could potentially lead to discrimination against groups with multiple identities.

Fortunately, the effect of this decision has (arguably) been undone by Justice Chandrachud's opinion in *Navtej Johar*. In that case, the Court recognised that the dominant heteronormative social order is built around the stereotypical ideas of acceptable and unacceptable sexual conduct, thereby criminalising same-sex relationships as unnatural.[114] Critiquing the narrow approach adopted by the Court in *Nargesh Meerza*, he observed that such a restrictive view of what constitutes discrimination robs the provision of its material content.[115] On the issue of determining the true content of the guarantee, he stated

> *...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.*[116]

Thus, while invoking the anti-stereotyping principle, the Court recognised that sex discrimination is intersectional.[117] Not only does sex itself result in discrimination, seemingly innocuous assumptions surrounding gender roles also result in insidious classifications that rob fundamental rights of their transformative potential.

In light of the present wider understanding of the non-discrimination clause, the MRE, which rests on the notions of hierarchy between husband and wife, stands incriminated. The status of the married woman is akin to that of a mute animal passively submitting to the whims of the husband, bereft of any measurable degree of autonomy, which clearly reflects a

[113] *Nargesh Meerza* (n 110) [65]-[70].
[114] *Navtej Johar* (n 109) [466] (Chandrachud J).
[115] ibid [438]-[439] (Chandrachud J).
[116] ibid (emphasis added).
[117] ibid [430]- [431] (Chandrachud J).

stereotypical understanding of ascribed gender roles within the marital framework. Here, patriarchy also plays the role of determining good sex and bad sex; within and outside marriage respectively, where sex within marriage is deemed to be consensual by definition and thus, proper. Such ideas of social morality must be confronted with the objective standards of constitutional morality, as the Court successfully did in *Navtej Johar*.[118] The adherence to the traditional role of women within marriage, along with the demarcation of marital sex as uniquely placed and socially sanctioned, reeks of patriarchal practices and is based on gender stereotypes. The stereotype that a married woman is required to be passive and her sexual autonomy is curtailed has already been held to be contrary to Article 15 in *Joseph Shine*.[119]

Invoking the anti-stereotyping principle and the intersectional understanding of the sex discrimination clause, we conclude that the MRE is unconstitutional as it discriminates against married women on the grounds of sex.

b. Dignity as Equality

It has been an oft-repeated refrain that constitutional adjudication has not subscribed to a single definite conception of human dignity.[120] The argument goes that human dignity has not been coherently defined or applied in any jurisdiction.[121] The same may also be said for the Indian Supreme Court's usage of the concept of human dignity in rights-based adjudication.

Initially, a dignity-based understanding of the right to life and personal liberty began to be espoused in a string of judgements by the Supreme Court,[122] wherein it identified several conditions necessary for living a dignified life.[123] Dignity however, has not only been located in Article 21 but also in the equality clause under Article 14 and within the freedoms

[118] Navtej Johar (n 109).

[119] *Joseph Shine* (n 44) [184]-[186] (Chandrachud J).

[120] Noah Lindell, 'The Dignity Canon' (2017) 27 Cornell Journal of Law and Public Policy 415, 422.

[121] Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) European Journal of International Law 655.

[122] *Francis Coralie Mullin v The Administrator, Union Territory of Delhi* 1981 AIR 746; *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545; *Subhash Kumar v State of Bihar* (1991) 1 SCC 598*; Mohini Jain v State of Karnataka* (1992) 3 SCC 666.

[123] ibid.

under Article 19.[124] The Court has also established that rape is an assault on dignity.[125]

At the same time, the content of dignity as a value underlying these different fundamental rights has never really been clarified by the Supreme Court. For conceptual clarity, we have attempted to identify a formulation of dignity that falls within the guarantee of equality. Namely, dignity as an intrinsic value requiring equal treatment and dignity as recognition of individual autonomy.[126]

Dignity as an intrinsic value or inherent dignity, as Neomi Rao puts it, is the acknowledgment of each individual's worth.[127] This implies that each individual, by virtue of being human, is entitled to a certain degree of respect on an equal basis and that dignity inheres in every individual irrespective of any external determinant.[128] Dignity is also a justification for every individual's choice and agency.[129] Thus, it may be a prerequisite for establishing individual autonomy but is not the same as autonomy itself. Reva Seigel has argued, for instance, that sex-discrimination may be seen as a denial of both the dignity content of equality and that of autonomy.[130]

The use of the language of dignity has been employed successfully in South Africa [131] and Canada, [132] for identifying analogous grounds of discrimination. [133] The Delhi High Court, in *Naz Foundation v Government (NCT of Delhi)*,[134] deemed the effect of discrimination based on sexual orientation to be an affront to human dignity contrary to Article 15(1). While the Court did not go so far as to read the list of grounds in Article 15(1) as non-exhaustive, it deemed sexual orientation as a ground analogous to sex, used to create generalisations and stereotypes about individuals based on their sexual preferences.[135]

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[124] *Puttaswamy* (n 90) [108] (Chandrachud J); *Prahlad v State of Haryana*, 2015 (8) SCC 688 [17] (Misra CJ).

[125] *Prahlad* (n124) [17]-[18] (Misra CJ).

[126] Lindell (n 120) 423.

[127] Neomi Rao, 'Three Concepts of Dignity in Constitutional Law' (2011) 86 Notre Dame Law Review 183, 196-201

[128] ibid 201.

[129] ibid 199-200; Reva Seigel, 'Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart' (2008) 117(8) Yale Law Journal 1568, 1738-41.

[130] Seigel (n 129) 1743-45.

[131] *Prinsloo v Van Der Linde* 1997 (3) SA 1012; *Harksen v Lane* 1998 (1) SA 300.

[132] *Vriend v Alberta* [1998] 1 SCR 493; *Corbiere v Canada* [1999] 2 SCR 203.

[133] Rory O' Connell, 'The Role of Dignity in Equality Law: Lessons from Canada and South Africa' (2008) 6(2) International Journal of Constitutional Law 267, 276-79.

[134] *Naz Foundation* (n 88); Shreya Atrey, 'Through the Looking Glass of Intersectionality: Making Sense of Indian Discrimination Jurisprudence under Article 15' (2016) 16 Equal Right Law Review 160, 178-79; Gautam Bhatia, 'Equal Moral Membership: *Naz Foundation* and the Refashioning of Equality Under a Transformative Constitution' (2017) 1(2) Indian Law Review 115, 138-39.

[135] *Naz Foundation* (n 88) [99]-[104].

While *Naz Foundation* has been affirmed in *Navtej Johar*, a similar analysis was not employed by the Supreme Court in the latter case. It still remains open to the Court to adopt a similar approach to hold the MRE as discriminatory and therefore, unconstitutional. Gender roles ascribed to women, as determined by marital status, deny them dignity and autonomy by requiring them to participate in coerced sex. The stereotype of female sexuality being the property of the husband upon entry into a marital relationship has already been considered as contrary to dignity and equal citizenship by the Supreme Court in *Joseph Shine*.[136] The MRE ignores the physical and psychological integrity of married women, thus, denying them the status of an individual having equal worth. It also deprives them of decisional autonomy constitutes an assault upon her dignity. Such discrimination against women based on marital status negates dignity and autonomy and is unconstitutional under Article 15(1).

B. Freedom of Expression

The MRE is also in contravention of Article 19(1)(a), the freedom of expression. The expression of one's sexual desire is part of self-expression protected under Article 19(1)(a). This expression must necessarily include the unhindered determination of the terms under which such desire may be articulated. It gives each person the right to refuse sexual encounters, alongside the right to initiate them. The liberty of choosing when to refuse and when not to is integral to the idea of free expression. This understanding finds utterance in several decisions by the Apex Court.

In *NALSA*, the Supreme Court while dealing with the status of transgender persons under the law, established gender identity as an integral aspect of personhood, and mandated its protection under Article 19(1)(a). Justice Radhakrishnan held

> *Gender identity, therefore, lies at the core of one's personal identity, gender expression and presentation and, therefore, it will have to be protected under Article 19(1)(a) of the Constitution of India... We, therefore, hold that values of privacy, self-identity, autonomy and personal integrity are fundamental rights guaranteed to members of the transgender community under Article 19(1)(a) of the Constitution of India and the State is bound to protect and recognize those rights.*[137]

[136] *Joseph Shine* (n 44) [213] (Chandrachud J).
[137] *NALSA* (n 93) [72] (Radhakrishnan J).

This judgment is critical, as it cements the idea that freedom of expression guaranteed under Article 19(1)(a) effectively encapsulates aspects of individuality and identity, into the realm of self-determination. Moving away from the traditional understanding of verbal expression, the Court laid emphasis on expressional association.[138] Each individual has the liberty to express themselves in a manner of their choosing, and this liberty extends from their choice of lifestyle, clothing, associations to sexual preferences, including gender identity.[139]

Taking the idea forward, in *Navtej Johar*, CJ Misra in his majority opinion noted that

> *[A]rticle 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.*[140]

This widened ambit of Article 19(1)(a) encompassing the question of choice as freedom more generally than expression through speech and artistic medium, as per its traditional understanding. This links expressional freedoms and the autonomy necessary to realize them. In the context of marital sex, the woman's right to sexual expression entails her right to reject or refuse sexual advances including those by her husband. By providing immunity to the husband, the MRE uproots the possibility of such choice being exercised so completely that it violates the core of expression, and by extension, suppressing her identity as an individual, and is in absolute violation of her protected freedoms under Article 19(1)(a).

C. Right to Life and Personal Liberty

Any act of rape violates the most fundamental aspects of human life—dignity, autonomy and bodily integrity—and is in breach of the right to life and personal liberty enshrined in Article 21. The encapsulation of the values of dignity and autonomy and bodily integrity within Article 21 has been quite emphatically articulated in recent Supreme Court decisions such as *Puttaswamy* and *Navtej Johar*. In this subsection, we argue that the MRE deprives married women of the right to live a dignified life. Further,

[138] ibid [69]-[72] (Radhakrishnan J), [135] (Sikhri J).
[139] ibid.
[140] *Navtej Johar* (n 109) [38] (Misra CJ) (emphasis added).

the MRE denies them the right to bodily integrity and autonomy, which are facets of personal liberty.

1. Right to Life with Dignity

Article 21 does not merely guarantee the security of life and limb but also guarantees a dignified existence.[141] The guarantee of Article 21 was construed not merely as the right to survive, but also a guarantee of certain basic conditions associated with such existence. The Supreme Court has identified several facets as prerequisites to the enjoyment of this right through an expansive understanding of this sacrosanct guarantee.[142]

Within Article 21, the language of dignity has been extended to support and further liberty claims which are expressed in less material terms, unlike cases where conditions of a decent standard of living have been identified by invoking the concept of dignity. For instance, in *Puttaswamy*, human dignity was recognised was a facet of privacy, which was in-turn construed as an aspect of liberty.[143] Further, in *Navtej Johar* dignity was deemed to be an extension of the right to liberty.[144]

As discussed previously, dignity eludes definition.[145] Different formulations of human dignity have been invoked for different purposes and it is difficult to find clarity from the Court's varied verdicts. While in *Puttaswamy*, Chandrachud J hinted at a distinction between the intrinsic value and the instrumental value of dignity,[146] there was no further exposition delineating the scope and the meaning of dignity or even the distinctions between dignity, privacy and autonomy.

In this subsection, we use dignity as a constitutional value having independent content, while also being related to the values of privacy and autonomy.[147] Here we argue that Article 21 encapsulates the instrumental value of dignity as opposed to dignity as an intrinsic value (which is pertinent in the case of equality).

We conceptualise dignity as having instrumental value when it is defined as a value which allows each individual to develop to the fullest extent possible. This notion of dignity requires the removal of obstructions

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[141] *Francis Coralie Mullin* (n 122) [7]-[8] (Bhagwati J).

[142] *Bandhua Mukti Morcha v Union of India* (1984) 3 SCC 161; *Olga Tellis* (n 122); *Mohini Jain* (n 122); *Subhash Kumar* (n 122).

[143] *Puttaswamy* (n 90) [297]-[299] (Chandrachud J).

[144] *Navtej Johar* (n 109) [150] [160] (Misra CJ).

[145] McCrudden (n 121).

[146] *Puttaswamy* (n 90) [298] (Chandrachud J).

[147] The definitions of dignity and autonomy are mired in conceptual complexities. We restrict ourselves to providing a certain degree of conceptual clarity in respect of these constitutional values. This section simply attempts to determine whether the MRE is unconstitutional, given the present constitutional landscape.

that keep individuals from enjoying other rights.[148] For the purpose of ensuring that individuals are able to live a dignified life, the State must ensure certain conditions that allow for the enjoyment of all attendant rights. It is important that conditions such as self-governance and bodily integrity are ensured such that married women are not precluded from living a full and dignified life. The instrumental value of dignity has no place in the life of a woman who is coerced into having sexual intercourse by her husband.

Rape is considered a crime that derogates not merely the right to bodily integrity of the victim but also has a severe, deleterious impact on her mental wellbeing. While these are fundamental in case of stranger rape as well, spousal rape characterizes the disintegration of sexual choice to an even a greater extent due to the element of trust reposed in the perpetrator-husband. When the same act is committed by one in whom the victim places her faith, the impact is substantially more severe. This view finds expression in several judgements of the Supreme Court. In *Bodhisattwa Gautam*, the Court called it 'the most hated crime'

> *[A] crime against the entire society. It destroys the entire psychology of a woman and pushed her into deep emotional crises. It is only by her sheer will power that she rehabilitates herself in the society which, on coming to know of the rape, looks down upon her in derision and contempt...rape is less a sexual offence than an act of aggression aimed at degrading and humiliating women. The rape laws do not, unfortunately, take care of the social aspect of the matter and are inept in many respects.*[149]

This debasing of the woman's person, constitutionally protected, demolishes the self-worth of the individual and affects one's sense of wellbeing. This kind of an existence—where a woman's everyday life is a traumatic and dehumanizing experience—is tantamount to an outright denial of the guarantees encompassed within the right to life with basic dignity.

[148] *Puttaswamy* (n 90) [118]-[119] (Chandrchud J), [407]-[411] (Bobde J); *NALSA* (n 93) [103]-[106] (Sikri J).

[149] *Shri Bodhisattwa Gautam v Subhra Chakraborty* 1996 AIR 922 [10] (Singh J).

2. Bodily Integrity and Autonomy as Facets of Liberty

In *Puttaswamy*, Chandrachud J opined that bodily integrity was an aspect of liberty under Article 21 by referring to cases[150] where sexual violence had been regarded as an unlawful transgression of Article 21.[151] Bodily integrity in the form of a woman's right to make reproductive choices, to choose abortion, to use contraceptives or to choose not to participate in sexual activities, was considered as a part of her personal liberty.[152] It appears that the Court's construction of bodily integrity in *Puttaswamy* was heavily premised on the idea of control over one's own person. The Supreme Court's exposition on bodily integrity as a facet of liberty becomes significant for our purposes. The MRE impinges upon the bodily integrity of married woman, as their control of their bodies is wrested from them and handed over to their husbands and thus, deprives her of the right to liberty under Article 21.

The related concept of individual autonomy, which enables the right-holder to negotiate the conditions essential to the enjoyment of her life and fulfilment of her desires, has also been construed as a part of personal liberty. The ingredients of autonomy were elaborated in *NALSA*, which, citing *Anuj Garg*, held that

> *[P]ersonal 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.*[153]

Intrinsic to personal autonomy is the issue of sexual autonomy and the right against intrusion with the sexual choices of a woman. In *Madhukar Narayan Mardikar*,[154] the question *inter alia* before the court was whether a woman of "easy virtue" could be entitled to the decisional autonomy afforded by the right of privacy. Ahmadi J (as he then was), speaking for the court, held:

> *Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also*

[150] *State of Maharashtra v Madhukar Narayan Mardikar* (1991) 1 SCC 57; *State of Karnataka v Krishnappa* (2000) 4 SCC 75; *Sudhansu Sekhar Sahoo v State of Orissa 2003* Cri LJ 4920.
[151] *Puttawamy* (n 90) [59], [71] (Chandrachud J).
[152] ibid [82]-[83] [248] (Chandrachud J).
[153] *NALSA* (n 93) [69] (Radhakrishnan J).
[154] *Madhukar Narayan Mardikar* (n 150).

> *it is not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish. She is equally entitled to the protection of law.*[155]

In this regard, the ideas of decisional autonomy,[156] intimate decision,[157] and the privacy of choice,[158] as ingredients of the right to privacy, become relevant. These distinct formulations, found in the separate opinions in *Puttaswamy,* overlap considerably in their content.[159] These ideas relate to the autonomy of a person over her intimate personal choices. The right to privacy is used to create a personal sphere surrounding each individual, which facilitates the exercise of intimate and personal choices or individual autonomy.[160] Imposition of coerced intimacy robs women of their agency and denies them the right to make intimate choices.[161] Such a deprivation of autonomy is also contrary to the guarantee of liberty under Article 21.

D. Forced Labour

Article 23(1) of the Constitution, which prohibits human trafficking and forced labour, reads as follows:

> *Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law....*

While the ordinary meaning of the provision is clear—the prohibition of human trafficking and forced labour—a far wider import has been accorded to it by the Supreme Court. In *PUDR v Union of India*,[162] the question before the Court was whether non-payment of statutory minimum wage would amount to forced labour. Justice Bhagwati, speaking for the Court, ruled that this was indeed a violation of the forced labour provision. On the issue of what constitutes force, he held

[155] ibid [8] (Ahmadi J) (emphasis added).
[156] *Puttaswamy* (n 90) [248].
[157] ibid [371], [374].
[158] ibid [510], [521].
[159] Gautam Bhatia, 'The Supreme Court's Right to Privacy Judgment – V: Privacy and Decisional Autonomy' (*Indian Constitutional Law and Philosophy*, 31 August 2017) <https://indconlawphil.wordpress.com/2017/08/31/the-supreme-courts-right-to-privacy-judgment-v-privacy-and-decisional-autonomy/> accessed 9 February 2019.
[160] *Puttaswamy* (n 90) [298]-[299].
[161] Seigel (n 129) 1764-65.
[162] *People's Union for Democratic Rights v Union of India* AIR 1982 SC 1473.

> *The word 'force' must therefore be constructed to include not only physical or legal force but also force arising from the compulsion of economic circumstance which leaves no choice of alternatives to a person in want and compels him to provide labour or service.*[163]

The presence of economic duress, legal or physical force which compels an individual to act in accordance with the wishes of another against her self-interest falls squarely within the *PUDR* formulation of forced labour. By including these categories of coercion, the Court dispelled the notion of force being viewed primarily in its crude, physical manifestation. It acknowledged the role of the market, legal regulations and power dynamics that contribute to the exertion (or presence) of such force.[164] This expansive reading of the guarantees against exploitation implies that systemic barriers to the exercise of free choice—such as patriarchy—could now be viewed as illegitimate interferences. In other words, the prohibition of forced labour could encapsulate a situation where meaningful exercise of free choice is denied to the woman due to prevailing social conditions.

Exploitation based on entrenched hierarchies or asymmetries of power has been addressed to an extent in India, with the introduction of the Criminal Law Amendment of 1983,[165] which introduced custodial rape as a separate and aggravated form of rape.[166] Similar asymmetries of power within marital relationships, which results in the absence of real consent, has not been addressed by the legislature.

The guarantee against exploitation contained within Article 23 applies horizontally as well. In other words, the victim may make the State liable for a violation faced by her due to the actions of a private individual. Consequently, the State is obligated to protect the victim against such acts since the rights encapsulated within this provision are made available against non-state actors. In *PUDR*, the Court addressed this in no unclear terms, when it noted 'that Article is clearly designed to protect the individual not only against the State but also against other private citizens'.[167] The State's adamant refusal to remove the MRE from the statute books robs women of control over their own person. It squarely denies sexual autonomy to the woman within the marriage and thus perfectly fits the expansive reading of force as something that denies one the ability to give free consent. Bereft of the choice to deny the husband's

[163] ibid [20].
[164] ibid.
[165] Section 3 of The Criminal Amendment Act 1983.
[166] Section 376B-376C of Indian Penal Code 1860.
[167] *PUDR* (n 162) [16].

unwelcome sexual advances, the wife is forced to comply, resulting in an absolute violation of her personhood and sense of dignity.

The question of the wife's non-retractable consent to sex by voluntarily entering into a marital union, pivotal to the argument of the retainers, can also be answered through a close reading of the same judgement. Justice Bhagwati described the issue of consent in reference to a contract of service

> *This Article strikes at every form of forced labour even if it has its origin in a contract voluntarily entered into by the person obligated to provide labour or service...The reason is that it offends against human dignity to compel a person to provide labour or service to another if he does not wish to do so, even though it be in breach of the contract entered into by him. There should be no serfdom or involuntary servitude in a free democratic India which respects the dignity of the individual and the worth of the human person.*[168]

Despite the clarity of the pronouncement, however, the characterisation of non-consensual sex within marriage as a case of forced labour raises the question of whether sex within marriage can be considered as labour. Further, the invocation of forced labour may lead unwittingly to suggest compensation to be the cure for such violations, though in the context of sexual violence, that is by no means sufficient redress. Two distinct responses are offered.

First, there is growing acceptance in favour of assigning economic value to unremunerated household work, the burden of which is disproportionately (or completely) borne by women. Based on this, scholars have argued that such household labour be considered begar or classical forced labour. However, as correctly identified by Bhatia, the essential merit in the *PUDR* formulation lay not in the idea of just compensation, but in its focus on countering exploitation inherent in such structures based on asymmetry of power.[169] The mischief sought to be remedied by this provision is the exploitation of the oppressed, and unpaid (or underpaid) work is simply a manifestation of this, as evidenced from the interpretation of 'other similar forms' by the court in *PUDR*. When viewed through this lens, the impact of the exemption reinforces the existing hierarchy within a marital home and the subjugation faced by the

[168] ibid.

[169] Gautam Bhatia, 'The Freedom to Work: *PUDR vs. Union of India* and the Meaning of 'Forced Labour' Under the Indian Constitution' (*Indian Constitutional Law and Philosophy,* 2017) <https://ssrn.com/abstract=3094640> accessed 22 May 2019.

wife under patriarchy. The MRE is symbolic of the exploitative social structure where denying agency to the wife is normalised and the husband's right over her body is entrenched. The element of force and absence of consent, as well as the gendered burden-sharing provide adequate basis for staking a claim for State intervention.

Second, in the American context, scholars like Kopelman[170] argue that the denial of reproductive autonomy or abortion rights is a case of involuntary servitude delegitimized by the Thirteenth Amendment, linking the absence of agency to systemic social coercion. Kopelman asserts that the woman's decisional autonomy is impaired by the idea of reproductive regulation, her interests become subservient to that of the foetus, and in a manner, she ends up serving it.[171] This understanding, when extended to the domain of female sexual autonomy within marriage, also holds good. The MRE runs contrary to the idea of the woman as an equal partner in the marriage by allowing her self-interest to be overpowered by male desire. In the arena of sex, it refuses to acknowledge her autonomous existence so absolutely, that her position is akin to that of a beast of burden—one without the right to refuse the load put on its back. This persistent non-recognition of her autonomy resembles neo-slavery or bonded labour, wherein the wife discharges her 'debt' to the husband, perceived as the breadwinner, through sexual gratification against her will.

Both approaches acknowledge socially sanctioned subjugation as the key feature of this construct. When viewed as a function of gender-based power relations, there remains little doubt that social coercion coupled with lack of agency serves as the framework for systemic oppression of one class by another, in many ways akin to slavery or servitude, completely contrary to the constitutional guarantees against exploitation.

It is pertinent here to point out that this argument does not wholly discount the possibility of female sexual agency within marriage. Not all marriages or sexual relationships result in the victimisation of women. However, more often than not, patriarchy controls sexuality within marriage. This is especially so in a patriarchal State where rape within marriage enjoys immunity from prosecution. There is an endorsement, within the public sphere, of the idea that an ostensibly sacred marriage implies unrestricted and unqualified access to the wife's sexuality by the husband.

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[170] Andrew Kopelman, 'Forced Labor, Revisited: The Thirteenth Amendment and Abortion' in Alexander Tsesis (ed), *Promises of Liberty: Thirteenth Amendment Abolitionism and Its Contemporary Vitality* (CUP 2010); Andrew Kopelman, 'Forced Labor: A Thirteenth Amendment Defense of Abortion' (1990) 84 Northwestern University Law Review 480, 482-84.

[171] ibid.

In such patriarchal systems, marital relationships can be characterised as what Carole Pateman calls the "marriage contract", where entry into a conjugal relationship resembles a domestic labour contract, envisaging a sexual division of labour.[172] While in modern marriages, entry into conjugal relations can be based on the consent of two equal individuals having autonomy over their own persons, patriarchy makes the marriage contract inherently lopsided.[173] Within it, women are considered subordinate to their husbands, on whom they are economically dependent and whose demands they must obey.[174] The irrevocable consent to sexual intercourse is then seen as naturally flowing from the marriage contract. This results in the denial of the status of an autonomous person.[175]

In protecting marriage as an institution, the State encourages the patriarchal construct of the same and is therefore, complicit in creating a private sphere within which the woman must provide labour for her husband, bereft of any choice in the matter. The understanding of marital rape as forced labour reveals the State's complicity in the denial of female dignity and equality through an endorsement of patriarchy. As such, this argument premised on the State's approval of asymmetry of power with the private sphere, considerably strengthens the case against the constitutionality of the MRE.

4. Conclusion

The MRE is incongruous with the lofty pronouncements on gender justice from the Parliament and judiciary alike. The hesitation of legislators, whose ultimate popularity before the electorate determines their political future is understandable, though hardly justifiable. While a direct challenge to the constitutionality of the provision has never arisen before the Supreme Court, it could be difficult to predict how the Court would have decided such a case, even for its keenest observer.

The nine-judge bench decision in *Puttaswamy* has been a watershed moment. While progressive pronouncements like *NALSA* came before it, *Puttaswamy* certainly laid the groundwork for a host of successful claims based on individual autonomy, dignity and equality. Though a relatively recent verdict, if the emerging jurisprudence on gender justice issues serves

[172] Pateman, *The Sexual Contract* (n 37) 118.
[173] Carole Pateman, The Disorder of Women: Democracy, Feminism, and Political Theory (Stanford University Press 1989) 74-75.
[174] ibid.
[175] ibid [7].

as a reliable indicator for the future, *Puttaswamy* may safely be hailed as establishing the new litmus test for rights-based adjudication in India.

This article engages with the myriad legal and social hindrances to the removal of the MRE from the Indian Penal Code. The unconstitutionality of this archaic provision is beyond debate, and the grounds for its removal clear. The only question that remains is how far the expression of judicial opinion alters prevalent social conditions. There is merit in acknowledging the expressive function of law, though doubts remain about the realization of the ultimate objective of creating an equal social order free from the clutches of paralyzing patriarchy.

It would be naïve to expect that formalistic changes to the legal order would be sufficient in ushering in social transformation which erode past prejudices and pave the way for gender equality. As noted by the Verma Committee, unless attitudinal changes accompany legal amendment, the efficacy of the law will remain suspect. That said, where the issue relates to the blatant violation of the most basic human values, judgement cannot wait upon incremental social progress. While an endogenous social transformation towards a more humane and egalitarian society would indeed be more preferable, the lives and liberties of half the population cannot be subject to the vagaries of fortune in the interim.