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# EVOLVING CONTOURS OF THE FUNDAMENTAL RIGHT TO PRIVACY IN INDIA: JUDICIAL CONSTRUCTS AND TRANSFORMATIVE CONSTITUTIONALISM

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## ABSTRACT

The role of the state is to safeguard the dignity and privacy of individuals within the institution of marriage. However, since time immemorial, the state has normatively prioritized institutional stability over the right to individual privacy. This debate was rekindled by the judicial recognition of an individual's right to decisional autonomy and privacy as an important facet of the right to life.<sup>1</sup> Yet, the diminishing scope of the right to privacy of women within the institution of marriage reveals a contradiction inherent in the Indian legal system in its assertion of these rights. To address this contradiction, the paper is grounded in an *Indian epistemological* approach for objective thinking, combined with a *doctrinal research design* and analytical and critical research techniques for case-law analysis. It aims to uncover the various ways in which the rights of individuals and the legal institutions designed to protect them may fundamentally clash, often working against those they intend to serve. The paper also seeks to highlight the relationship between the gendered body and the fundamental right to privacy in understanding the privacy jurisprudence in India. It makes a case for rethinking the constitutionality of the state-espoused conjugal right and expanding this reasoning to challenge the constitutionality of the exception of marital rape in the light of recognition of varied facets of privacy in *Justice K.S. Puttuswamy v. Union of India*<sup>2</sup>.

**Keywords:** individual autonomy, conjugal rights, decisional privacy, institutional privacy, state-espoused restitution, judicial construct, transformative constitutionalism

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<sup>1</sup> *T. Sareetha v. T. Venkata Subbaiah*, AIR 1983 AP 356.

<sup>2</sup> AIR 2017 SC 4161.

## 1. INTRODUCTION

*“Bare equality of treatment, regardless of the inequality of realities, is neither justice nor homage to the constitutional principle.”* – Justice P. Choudhary<sup>3</sup>

A matrimonial union is considered an important institution across all personal laws and this union essentially implies the living together of the spouses. The importance of marriage, the freedom to have children, the decision to start a family, and the dignity of every person are issues that impact all individuals regardless of their social status or financial situation. The quest for happiness relies on both autonomy and dignity, fundamental aspects of privacy that recognize the inherent worth of each individual, without discriminating based on superficial characteristics and gendered roles. It becomes necessary to delve into the potential for reconsidering correlation between the state and the frameworks of relationships as prerequisites for eradicating violence, particularly through instances of coerced restitution of conjugal rights.

The ancient marital laws in India did not recognize the concepts of restitution of conjugal rights and the exception of marital rape as there was no sanction or procedure for the courts to compel a wife to return against her will.<sup>4</sup> These concepts are not indigenous and have been primarily British colonial imports into India.<sup>5</sup> These impugned provisions were compatible with the premise of English common law that treated wife as the husband's personal possession and hence was neither permitted to desert her husband nor charge him for raping her. Ironically, these provisions continue to be enforced in India while the United Kingdom repealed them in 1970 as an uncivilized remedy.

As per the recent National Family Health Survey-5, the incidence of gender-based violence on married women between the ages of 18-49 years is on the rise, and those who have experienced spousal violence account for about 30%.<sup>6</sup> This indicates a rise in spousal violence from 20.6% in 2014-15 to 44.5% in 2019-2020.<sup>7</sup> This data is further corroborated by the National Crime Record Bureau's Crime in India Report 2020 which indicates that among the cases of crime against women, 30% are cases related to 'cruelty by husband or his relatives'.<sup>8</sup> It is pertinent

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<sup>3</sup> *Supra* note 1 at 38.

<sup>4</sup> *Bai Jiva v. Narsingh Lalbhai*, ILR 1927 Bom. 264, at 268.

<sup>5</sup> S. Richardson, “Marriage: A Get Out of Jail Free Card”, 34 *IJLPF* 168-190 (2020).

<sup>6</sup> Government of India, National Family Health Survey-5, available at: [http://rchiips.org/nfhs/factsheet\\_NFHS-5.shtml](http://rchiips.org/nfhs/factsheet_NFHS-5.shtml) (last visited on Feb. 22, 2023).

<sup>7</sup> Aaliya Waziri, “How Far Are We From Gender-Responsive Lawmaking”, *Live Law*, Dec. 21, 2021.

<sup>8</sup> National Crime Record Bureau, Crime in India Report, Volume I, 20 (2020).

to note that these figures may just be the tip of the iceberg and may not be reflecting an accurate reality due to under-reporting as most assaults take place in the precinct of a home. Despite these tragic figures, the provisions of restitution of conjugal rights and exception of marital rape continue to exist.

The need to enable the state to take violations of women in the domestic sphere seriously while protecting their privacy grounded in the identity of gender and liberty has been highlighted by the Supreme Court.<sup>9</sup> The recognition of the various facets of the right to privacy by the apex court in *Suchita Srivastava v. Chandigarh Administration*<sup>10</sup>, *State of Maharashtra v. Madhukar Narayan Mardikar*<sup>11</sup>, *State of Karnataka v. Krishnappa*<sup>12</sup>, *State of Punjab v. Gurmit Singh*<sup>13</sup>, *Joseph Shine v. Union of India*,<sup>14</sup> and *Justice K.S. Puttuswamy v. Union of India*<sup>15</sup> has wider ramifications on the entire question of the legality of marital rape<sup>16</sup> and restitution of conjugal rights. India needs to take 'measures to eliminate discrimination against women in all matters relating to marriage and family relations' under Article 16 of the Convention of Elimination of All Forms of Discrimination against Women to which it is a signatory and has ratified it.<sup>17</sup>

The provision of Restitution of Conjugal rights, although, is gender-neutral and allows either of the partners to seek restitution, it continues to disproportionately affect women. Wives are forced to return to their matrimonial homes and are left susceptible to coercive cohabitation without any recourse, as marital rape continues to be an exception under the Indian Penal Code. Thus both these issues are interlinked. These coercive provisions raise pertinent questions regarding the legitimacy of the state's power to compel a cohabitation for the protection of marriage over an individual's right to autonomy, dignity, personal liberty, and privacy. On these very grounds and based on the advancement of feminist jurisprudence through the recent decisions of the Supreme Court<sup>18</sup>, writ petitions have been filed in *Ojaswa Pathak v. Union of India*<sup>19</sup> challenging restitution of conjugal rights and in *RIT Foundation v. Union of India*<sup>20</sup>

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<sup>9</sup> *Supra* note 2 at 140.

<sup>10</sup> (2009) 9 SCC 1.

<sup>11</sup> AIR 1991 SC 207.

<sup>12</sup> AIR 2000 SC 1470.

<sup>13</sup> AIR 1996 SC 1393.

<sup>14</sup> AIR 2018 SC 4898.

<sup>15</sup> *Supra* note 2.

<sup>16</sup> *Independent Thought v. Union of India*, AIR 2017 SC 4904.

<sup>17</sup> United Nations General Assembly, Convention on the Elimination of All Forms of Discrimination against Women, (December, 1979).

<sup>18</sup> *Supra* note 14.

<sup>19</sup> WP (C) 250/2019.

<sup>20</sup> WP (C) 284/2015.

challenging marital rape. However, these petitions are yet to see the light of the day despite a unanimous decision of the Supreme Court by a nine-judge bench recognizing the right to privacy as fundamental to the right to dignity and autonomy in 2017. These petitions, thus, have necessitated an academic discussion to reconsider the relevance of these provisions in the age of the constitutional right to privacy.

## 2. TRACING THE CONJUGAL RIGHTS TO MARITAL PRIVACY UNDER THE INDIAN CONSTITUTION

### 2.1. Right to Individual Privacy in Ancient Indian Texts

There have been approaches in early ancient Indian texts which were more egalitarian and recognized woman's bodily autonomy, though albeit limited. They have established that women possessed an expectation of privacy in terms of their bodily integrity. Based on the limited historical records, it is plausible to infer that early prehistoric cultures indicated women's involvement in both productive and reproductive tasks without strict gender-based labor divisions. While conclusive evidence regarding gender roles in the Harappan civilization is lacking, a limited inference that there could have been acknowledgment of women's unique role in reproduction and possibly an acceptance of their sexuality can be made.<sup>21</sup> The post-Vedic literature reflects increasing constraints placed on women within a developing agricultural economy characterized by private property and patrilineal systems where the king often intervened to control women.<sup>22</sup>

Evidence of this is found in the *Yajñawalkya Samhita* which states that if multiple individuals know a woman without her consent then each of them must be fined twenty-four panas<sup>23</sup>. Furthermore, the *Arthashastra*, an important historical treatise, has given commercial sex workers the right to not be held against their will.<sup>24</sup> It says unequivocally that no one, including a commercial sex worker, can be coerced to engage in sexual activity. Women could assert a right to privacy not only against the society at large but also against her spouse. Ironically, while our current legal system does not consider marital rape to be a crime, the

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<sup>21</sup> Uma Chakravarti, "Conceptualising Brahmanical Patriarchy in Early India", 28 (14) EPW 579-580 (1993).

<sup>22</sup> *Id.* at 584.

<sup>23</sup> Manmath Nath Dutt, *The Dharmashastra- Hindu Religious Codes*, Volume 1, 103 (Chaukhamba Amarabharati Prakashan, Varanasi, 1978).

<sup>24</sup> L.N. Rangarajan, *Kautilya: The Arthashastra* 371 (Penguin Random House India Pvt. Ltd., 1992)

*Manusmriti* did. Husbands were also forbidden from glancing at their wives when they were in a state of relaxation.

This perspective further finds alignment in the Veerasaivism tradition in South India. It provided a unique space for women's self-expression and spirituality, offering an opportunity to challenge established norms of marriage and presenting a 'dual defiance' i.e., a rebellion against both the caste system and patriarchal structures.<sup>25</sup> This understanding is further enriched by exploring three levels of interaction between gender and spirituality that ultimately lead to salvation: through the sublimation of sexual desires, through expressions of androgynous transvestism, and ultimately through embracing the asexual form as a means of sexual transcendence.<sup>26</sup>

## 2.2. Right To Privacy Under the Indian Constitution

There has been no common law development of a generalized right to privacy in India. Even at the time of drafting the Constitution, there were limited examples of codification of the right to privacy. The patchwork of cases under American law and lack of clearly articulated privacy doctrine under common law<sup>27</sup> provided very limited resources on right to privacy. During the Constitutional Assembly Debates, attempts by Somnath Lahiri, Kazi, Syed Karimuddin, and Pandit Thakur Das Bhargava to include the right to privacy as a fundamental right were thwarted and the clause was quietly dropped without any substantive debate on the subject<sup>28</sup>. Thus, the Constitution of India was adopted without an explicit right to privacy under Part III.

Amidst judicial conundrum surrounding the existence of a fundamental right to privacy, constitutional courts have oscillated from a complete denial of the right<sup>29</sup> to acceptance of a restrictive right to privacy. However, the true vision of the constitution pertaining to the right to privacy can be traced from the overruled decisions of the High Courts, and dissenting and marginalized decisions of the Supreme Court of India. The visionary dissent of Justice Subba Rao in *Kharak Singh*<sup>30</sup> and the futuristic decision of Justice P. Choudhary in *T. Sareetha*<sup>31</sup> have

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<sup>25</sup> Vijaya Ramaswamy, 'Rebels, Mystics or Housewives? Women in Virasaivism' (Winter 1996) 23 (3/4), India International Centre Quarterly 190, 193

<sup>26</sup> *Ibid*, at 197.

<sup>27</sup> A.G. Noorani, Right to Privacy, 40(9) Economic and Political Weekly 802 (26-2-2005).

<sup>28</sup> Parliament of India, *Constituent Assembly Debates*, Vol. III, 30 April 1947.

<sup>29</sup> M.P. Sharma & Others v. Satish Chandra & Others, AIR 1954 SC 300; *Kharak Singh v. State of U.P. & Others*, AIR 1963 SC 1295.

<sup>30</sup> *Supra* note 29.

<sup>31</sup> *Supra* note 1.

made strides to identify the zones of privacy and their origin from the penumbras of fundamental constitutional guarantees under Articles 19 and 21.

### 2.3. Four Conceptions of Right to Privacy

Privacy has been rightly defined as ‘a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination’.<sup>32</sup> The constitutional right to privacy in India can be broadly classified into four conceptions viz. physical/spatial privacy, institutional privacy, informational privacy, and decisional privacy. Spatial privacy refers to privacy regarding those activities that are carried out within the physical confines of a home, which has often been recognized as man’s castle and is inviolable from the interference of the state and other private parties. Institutional privacy refers to the insulation of social institutions within the domestic sphere such as marriage, procreation, and family from the interference of the state and asserts ‘institution’ to be rights-bearer. Informational privacy refers to the protection and preservation of the flow of personal information of an individual against technological monitoring and interference from the state. Since the social relations such as marriage, procreation, child-rearing, and motherhood are not merely social institutions but are also a result of decisions pertaining to individuals as to how they wish their body to be used and these decisions constitute the core of individual autonomy and are often termed as Decisional privacy. It is aimed at protecting the bodily integrity and decisional autonomy of individuals against state, social institutions, and private individuals.

Indian courts have failed to recognize in *Gobind*<sup>33</sup> and in subsequent cases of privacy<sup>34</sup>, these four conceptions of privacy and clarify which of these understandings of privacy the Constitution of India is committed to. These distinct conceptions of privacy have overlap and often come into direct conflict with each other. These conceptions have an impact on the judicial decision-making with regard to standards of judicial review and these conceptual inconsistencies have plagued understanding of the right to privacy under Indian Law. Among these conceptions, institutional privacy is of significant importance in the light of challenges to the constitutionality of state-espoused conjugal rights and the criminalization of marital rape where institutional privacy is often in conflict with decisional privacy.

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<sup>32</sup> *Supra* note 2.

<sup>33</sup> *Gobind v. State of Madhya Pradesh*, (1970)1 SCC 248.

<sup>34</sup> *Mr. X v. Hospital Z*, (1998) 8 SCC 296; *R. Rajagopal v. State of Tamil Nadu*, (1994) 6 SCC 632; *Supra* note 10; *Selvi v. State of Karnataka* AIR 2010 SC 1974.

## 2.4. Conjugal Rights And Marital Privacy

The idea of conjugal rights primarily has been recognized to be two-pronged i.e. the right of the spouses to each other's society and the right to marital intercourse. The state-espoused restitution of conjugal rights can be viewed as a direct conflict between the institutional privacy of marriage versus the individual privacy of decisional autonomy. The Supreme Court in *Gobind*<sup>35</sup> while expounding the right of privacy held that any right to privacy would include and protect the 'intimacies of the home, family, marriage, motherhood, procreation, and child-rearing'<sup>36</sup>. Applying the understanding of various conceptions of privacy aforementioned, it is clear that the court expanded the understanding of privacy from spatial privacy of the home to the privacy of social institutions and thereby emphasized the need to insulate these social institutions from the state interference and culminating this understanding into a right to marital privacy.

The provisions of restitution of conjugal rights and exception of marital rape were drafted from a patriarchal notion and have been family-centric rather than individual-centric. These provisions reflect the impact of colonial values imposed on the norms of marriage. They fail to realize that a claim to 'privacy of thought can only be substantively realized when complemented by the notion of privacy with respect to bodily integrity, as corporeal existence serves as a precursor to mental well-being'. These impugned provisions were governed by a misplaced patriarchal notion that women's modesty needed to be protected and that women continue to remain the property of men, firstly of her father and then of her husband.<sup>37</sup>

## 3. EXTENT OF STATE INTERVENTION IN MARITAL PRIVACY

Among the several instances of intervention by the state in marital privacy, the two most relevant interventions viz. restitution of conjugal rights and non-criminalization of marital rape have subordinated the position and rights of women in a conjugal relation. They violate the woman's freedom to make choices that are fundamental for herself by delegating this right to the state.

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<sup>35</sup> *Supra* note 33.

<sup>36</sup> *Ibid.*, at 24.

<sup>37</sup> Ashna Ashshesh and Bhairav Acharya, *Locating Constructs of Privacy within Classical Hindu Law*, CENTRE FOR INTERNET AND SOCIETY.

### 3.1 State-Espoused Restitution of Conjugal rights

#### 3.1.1 Origin of the Restitution of Conjugal rights- Import into Indian Personal Laws

The personal laws in India govern matrimonial remedies and provide for restitution of conjugal rights along with other remedies such as judicial separation and divorce. When a partner withdraws without any reasonable cause from the society of the other then according to the doctrine of restitution the aggrieved partner is provided a matrimonial relief to file for restitution. It was aimed at restoring the marriage, maintaining societal stability as family is the most essential institution, and restoring the rights and obligations of a spouse which are the quintessence of a matrimonial union<sup>38</sup>. Despite the law being drafted as gender-neutral, allowing either of the spouses to file for restitution, the skewed socio-economic position of women has led to this doctrine being misused by husbands and question its relevance in a civilized state.<sup>39</sup> The element of coercion is evident from the application of financial sanctions by attachment and sale of property of the unwilling party in case of non-resumption of conjugal rights.<sup>40</sup>

The origin of the doctrine of restitution can be traced from the personal laws of Jews and the Ecclesiastical law of England. The basis of the doctrine can also be traced to the feudalistic England where married women were merely treated as chattel of their men without any autonomy of their own. It was through the case of *Shumsoonissa Begum*<sup>41</sup> that the doctrine was first applied in India. This state-espoused restitution is thus not indigenous and has essentially been a colonial import. This is evident from the fact that neither the Hindu ancient texts such as the Dharmashastras nor the Muslim Shariat law identified a right of this nature. Even during the codification of Hindu Law, this relief was opposed by Mr. Khardekarhad on the ground that it is 'barbaric, vulgar and uncivilized'<sup>42</sup>. This doctrine can be found in the personal laws of

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<sup>38</sup> M Gangadevi, Restitution of Conjugal rights: Constitutional Perspective, 45 Journal of the Indian Law Institute, 453 (2003).

<sup>39</sup> Agrim Jain & Abhinav Aggarwal, Restitution of Conjugal rights: Is it still relevant, International Journal of Law Management & Humanities ISSN: 2581-5369 (2018).

<sup>40</sup> The Code of Civil Procedure, 1908, Order 21, Rule XXXII, No. 5, Acts of Parliament, 1908 (India).

<sup>41</sup> *Moonshee Buzloor Ruheem v Shumsoonissa Begum* [1867] 11 Moo Ind App 551.

<sup>42</sup> Keerthi Gandreti, Restitution of Conjugal rights: Retain or Remove, 2 Jus Corpus L.J. 442 (2021).



Hindus<sup>43</sup>, Muslims, Christians<sup>44</sup>, Parsis<sup>45</sup> as well as the Special Marriage law<sup>46</sup>.

### 3.1.2 Validity of Restitution of Conjugal rights

Borrowed frameworks and justifications of rights based approach have been deceptive as they have implied the potential for significant structural transformation without acknowledging the contexts in which they are applied. The challenge to the doctrine of restitution of conjugal rights under various personal laws in India can be traced through judicial decisions.

- ***Rukhmabai***<sup>47</sup>

In 1885, a landmark decision in the domain of marital compulsion and consent was pronounced by the Bombay High Court. In this case, the validity of enforcement of a restitution petition after the lapse of eleven years by Dadaji, a nineteen-year-old who married an eleven-year-old Rukhmabai was challenged even though the parties never cohabited. Justice Pinhey noted that this relief has no foundation in Hindu law and refused to grant a decree wherein ‘a young lady would be compelled to go the house of the husband so that he may consummate a marriage which was arranged for her during her helpless infancy’<sup>48</sup>. He further held that ‘the granting of the relief would produce consequences revolting not only to civilized persons but even to untutored human beings possessed of the ordinary delicacy of feeling’<sup>49</sup>. He lamented and displayed his regret on the introduction of this provision in India as its practice in England has itself become discredited and has been rendered inoperative. This decision however was overruled by a Division Bench amidst a storm of controversy.<sup>50</sup> Reportedly, Queen Victoria signed a special royal decree to dissolve the marriage and prevent Rukhmabai from imprisonment.<sup>51</sup> The case for the first time sparked off the debate on the place of tradition in relation to women’s rights within institution of marriage.

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<sup>43</sup> The Hindu Marriage Act, 1955, § 9, No. 25, Acts of Parliament, 1955 (India).

<sup>44</sup> The Indian Divorce Act, 1869, § 32, No. 4, Acts of Parliament, 1869 (India).

<sup>45</sup> The Parsi Marriage and Divorce Act, 1936, § 22, No. 3, Acts of Parliament, 1936 (India).

<sup>46</sup> The Special Marriage Act, 1954, § 22, No. 43, Acts of Parliament, 1954 (India).

<sup>47</sup> Dadaji Bhikaji v. Rukhmabai, (1886) 10 I.L.R. (Bom) 301.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *Supra* note 47.

<sup>51</sup> H. Rappoport, *Queen Victoria: A Biographical Companion*, 430 (ABC-CLIO, 2003).

- *T. Sareetha*<sup>52</sup>

Nearly a century after Justice Pinhey's dismay at restitution of conjugal rights, it was Justice Choudhary in *T. Sareetha* who held that the 'individual privacy and decisional autonomy within the private space of family are on the pedestal of fundamental rights'<sup>53</sup>. In this case, Venkatatasubbaiah married a sixteen-year-old Sareetha and separated after having cohabited for a few months. Five years later when Sareetha became a popular movie star her husband moved to the court seeking restitution of conjugal rights. Sareetha challenged the decision of the family court that decreed in favor of the husband on the grounds that it violated her right to equality, personal liberty, dignity, and privacy. The court overruling the family court decision agreed with Sareetha and held that the impugned provision was an 'unacceptable intrusion into personal privacy, bodily integrity, and individual dignity'<sup>54</sup>. It further held that the provision violated the right to equality as it had an unequal effect on the wife though the remedy was available to both.

- *Saroj Rani*<sup>55</sup>

*Sareetha*'s decision was disagreed by the Delhi High Court in *Harvinder Kaur*<sup>56</sup> wherein the court has given primacy to institutional privacy and treated it to be a sovereign sphere where the constitutional principles had no place<sup>57</sup>. The Supreme Court finally decided on the constitutional validity of the Restitution of Conjugal rights in *Saroj Rani* by erroneously agreeing with the position of the Delhi High Court. The court recognized institution as a basic unit of the constitution and thus the right bearer rather than individual thereby overruling the decision in *T. Sareetha*. This decision needs a revisit in the light of the decision in *K.S. Puttuswamy* where the right to individual autonomy, bodily integrity, and privacy were recognized as important facets of the right to life and personal liberty of all individuals. Therefore, the arguments of the Supreme Court in upholding the doctrine of restitution are no longer tenable with the evolution of privacy jurisprudence under the Constitution of India.

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<sup>52</sup> *Supra* note 1; Sudhansu Sekhar Sahoo v State of Orissa, AIR 2003 SC 2136.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> *Saroj Rani v. Sudharshan Kumar Chadha*, AIR 1984 SC 1562.

<sup>56</sup> *Harvinder Kaur v. Harmander Singh Choudhary*, AIR 1984 Del 66.

<sup>57</sup> *Ibid.*

### 3.2 Non-Criminalization of Marital Rape

The exception of marital rape in India is provided through the Exception 2 to Section 375 of the Indian Penal Code.<sup>58</sup> It provides for a blanket exemption for all forms of sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, from the offense of rape. Though the age of consent to sexual intercourse of a woman was increased to eighteen years through the Criminal Law Amendment Act, 2013, a corresponding amendment was not carried out in the Exception 2 of Section 375. This anomaly was put to rest in *Independent Thought*<sup>59</sup> by harmoniously constructing the existing laws and raising the age to eighteen years.

#### 3.2.1 Origin of the Exemption of Marital Rape

The exception of marital rape means that the men (husband) will neither be charged nor prosecuted for committing rape against their wives and if the charge was to be made then they could raise the valid defense of marriage with the victim. The origin of the provision of exception of marital rape under formal laws can be traced to the 17<sup>th</sup> century English common law, which recognized a 'normative structure of marriage in which permanent sexual access was a constitutive part'.<sup>60</sup> Thus, it was the English law which provided men legal protection from prosecution for rape across several jurisdictions.

Marital rape finds its way into Indian Penal Code through Macaulay's Draft which for the first time explicitly exempts sexual intercourse with one's wife from definition of rape. This marks the initial instance where the issue of consent arises, confined within the 'privacy of the conjugal home', thus blurring the distinction between rape and consensual intercourse. It was an attempt to impose Victorian morality and enforce bourgeois ideals from the colonial perceptions of standards necessary for the indigenous populations.

#### 3.2.2 Validity of Exception of Marital Rape

Commonly, three theories have been attributed towards recognizing all sexual intercourses between spouses as lawful. Firstly, the Property Theory presupposes women to be the property of men and thus any non-consensual intercourse was considered to be an offense against the

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<sup>58</sup> The Indian Penal Code, 1860, § 375, No. 45, Acts of Parliament, 1860 (India).

<sup>59</sup> *Supra* note 16.

<sup>60</sup> Kersti Yllö & M. Gabriela Torres, *Marital Rape: Consent, Marriage And Social Change In Global Context*, OXFORD UNIVERSITY PRESS (2016).

husband (in the case of a married woman) or the father (in the case of an unmarried woman) rather being an offense against the woman. Thus, rape by the husband was permitted as the wife was his chattel and the husband could treat her as he deemed appropriate. It was not recognized as an offense as it would have been akin to stealing one's own property. This theory also finds support in the early Hindu society where the purity of women was a fundamental aspect of patriarchy and the caste system.<sup>61</sup> This theory is also supported by the Bhagavad Gita, a central text in Hinduism, which discusses the breakdown of societal and ethical norms caused by disruptions in marital structures.<sup>62</sup> It depicts a scenario where families disintegrate, rituals are neglected, women suffer indignities, and ultimately, caste boundaries blur. Deviation from strict caste-based norms, particularly by women in matters of sexuality, posed a challenge to established social hierarchies and was consequently regulated by complex legal frameworks enforced by the authorities.<sup>63</sup>

Secondly, the Unity Theory was based on the 'doctrine of coverture' wherein the woman's individual identity was to be abolished and unified with the husband's identity at marriage. Thus, the husband could not be charged with marital rape as that would lead to an anomaly of raping himself. Thirdly, the On-going Consent Theory, which was based on the principle that the wife had given up herself to her husband through an ongoing contractual consent during the matrimonial contract from which she could not retract.

The exception of marital rape under the Indian law is based on the abovementioned three justifications and is also an import of common law. The exception clearly violates Article 14 of the Constitution as it creates an unreasonable classification of married and unmarried women based on nineteenth-century English common law which no longer serves a legitimate state purpose. The J.S. Verma Committee on Amendments to Criminal Law in 2012 has also advocated for the criminalization of marital rape as this exception does not treat equally both the spouses to the marriage and has been withdrawn across several jurisdictions.

#### **4. UNDERSTANDING RESTITUTION OF CONJUGAL RIGHTS: A CONFLICT BETWEEN INSTITUTIONAL PRIVACY AND DECISIONAL PRIVACY**

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<sup>61</sup> cf Chakravarti, (n 23) 579.

<sup>62</sup> ibid 580.

#### 4.1. Origin of Subordination Of Individual Rights Vis-À-Vis Community

The concept of marital privacy in India has its genesis in the form of privacy enjoyed by religious institutions against the state governing the personal laws as against non-interference in the family or marital union. The importance of religious institutions as a bulwark against state interference originates from Regulating Act of 1772 wherein personal laws based on religion were made the basis to determine suits concerning marriage, inheritance, guardianship, etc. This Regulation invariably gave primacy to religion in the domain of family matters which continues till date. This development led to recognizing the religious community as a unit of legal and political recognition rather than the individual.<sup>64</sup>

With the division of the world into the public and private spheres, the matters of religion, family, and custom were considered to be aspects of the private sphere, ordinarily outside the purview of the state. Community laws were paramount and made applicable to everyone without any scope for dissent and were beyond the realm of the state. This development had a particularly drastic effect on women whose status was subordinated to that of family and community.<sup>65</sup> This development became evident during the debates over the Age of Consent Bill, 1891 which aimed at raising the age of consent for girls from ten to twelve years, and its subsequent opposition.<sup>66</sup> This further led to the subordination of women's sexuality and their control over reproduction to the control of the religious community. As a consequence, the community started exercising autonomous existence in the Indian society which was free from any state intervention.

#### 4.2 Conflict between Institutional Privacy over Decisional Privacy

The marital couple does not have a mind or heart of its own nor is it an independent entity and thus cannot assert a distinct right to privacy other than the individual privacy of the husband or wife. This conflict between institutional privacy and decisional privacy was first highlighted in *T. Sareetha*<sup>67</sup>. The court highlighted that the 'purpose of restitution decree has been to coerce through the judicial process the unwilling party to have sexual cohabitation.' The court rightly

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<sup>64</sup> Rachel Sturman, *The Governance of Social Life in Colonial India: Liberalism, Religious Law And Women's Rights* 8 (Cambridge: Cambridge University Press 2012).

<sup>65</sup> Rosalind O'hanlon, *A Comparison Between Women And Men: Tarabai Shinde And The Critique Of Gender Relations In Colonial India* 10 (Oxford University Press 1994).

<sup>66</sup> Tanika Sarkar, *A Prehistoric of Rights: The Age of Consent Debate in Colonial Bengal*, 26 (3) FEMINIST STUDIES 601 (2000).

<sup>67</sup> *Supra* note 1.

held that sex whether forced or consensual induces pregnancy and as such ‘a choice to beget and rear a child can never be excluded from the human dignity of the woman as delivering the child is the most intimate use of her body’<sup>68</sup>. In this intimate matter concerning her body, a decree of restitution totally excludes her individual choice and thereby violates her basic human dignity.

The various facets of women’s right to individual privacy even in the face of conflict with institutional privacy are incidental from an analysis of various privacy decisions of the Supreme Court. The court has upheld the right to reproductive choice<sup>69</sup>, the right of privacy of a woman of easy virtue<sup>70</sup>, the negative ramifications of sexual violence on the victim’s right to privacy,<sup>71</sup> and the right to dignity and right to sexual autonomy<sup>72</sup>. In a case involving rape of a child, the full bench of Supreme Court has highlighted the correlation between sexual offences and decisional privacy wherein the court held that sexual violence, besides its dehumanizing nature, constitutes an illegal violation of both privacy and dignity.<sup>73</sup> These facets of privacy have time and again raised questions on the relevance and legality of marital rape and restitution of conjugal rights in India. Further, the court in *Navtej Singh Johar*<sup>74</sup> reiterated that constitutional morality shall prevail over societal morality because the latter is guided by majoritarian facets whereas the former is counter-majoritarian.

## **5. A SHIFT TOWARDS DECISIONAL PRIVACY VIS-À-VIS INSTITUTIONAL PRIVACY**

### **5.1 Effect of Primacy to Decisional Privacy over Institutional Privacy**

John Stuart Mill, a feminist critique of unequal power relations in a marriage, has described the ‘position of wives as worse than slaves’.<sup>75</sup> The rationale behind state-espoused conjugal rights and non-criminalization of marital rape are based on ‘archaic notions about consent and property rights incident to marriage’<sup>76</sup>. Both of these provisions are accomplices in undermining the sexual autonomy of married women, particularly her right to choose to engage

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<sup>68</sup> *Ibid.*

<sup>69</sup> *Supra* note 10.

<sup>70</sup> *Supra* note 11.

<sup>71</sup> *Supra* note 13 and note 14.

<sup>72</sup> *Supra* note 2.

<sup>73</sup> *Supra* note 13.

<sup>74</sup> *Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321.

<sup>75</sup> John Stuart Mill, *The Subjection of Women*, 3-5 (Global Grey, 2015).

<sup>76</sup> *People v. Liberta*, 64 N.Y.2d 152 (1984).

in sexual intercourse as one coerces her to re-establish a relationship and the other excludes any forceful transgression from criminalization. This primacy of institutional privacy thus violates the fundamental rights under Articles 14 and 21 of a married woman and it undermines her decisional autonomy by a non-rights-bearing unit of ‘marriage’.

The Test of Arbitrariness under Article 14 states that an arbitrary Act is implicitly unequal as ‘equality and arbitrariness are sworn enemies’.<sup>77</sup> For a valid law, its purpose shall be based on the conception of general good whereas the impugned provisions promote no legitimate public purpose as they are the grossest form of privacy violation. The emphasis on ‘objective’ and not on the ‘effect’ of the law, even when the objective is ostensible does not further the equality clause. Further, Article 21 guarantees a right to life which includes the right to bodily inviolability, integrity, and identity including marital privacy and these impugned provisions flagrantly violate each of these aspects of the right to life.

## 5.2 A Need to Revisit *T. Sareetha*’s Transformative Decision

The Supreme Court has made a transformational shift in the recent cases of *Booz Allen*.<sup>78</sup>, *K.S. Puttuswamy*<sup>79</sup>, and *Shafin Jahan*<sup>80</sup> wherein it held that ‘individuals have a right to privacy which grants them complete autonomy over their body’. The Court has adopted the view of giving primacy to individual privacy as urged by Justice Choudhary in *T.Sareetha*. In *Booz Allen*, the court highlighted that ‘marital disputes are non-arbitrated disputes and it is solely the parties concerned who shall resolve the disputes’<sup>81</sup> rather than by imposition of the state. Again, in *K.S Puttuswamy*, the court upheld ‘the choice of an individual in matters relating to whom to live and to be what relationship’<sup>82</sup>. The court viewed that the ‘privacy of family, procreation and sexual intercourse are very important aspects of human dignity and that rights of individuals shall prevail in such matters over societal interests’<sup>83</sup>.

In this transformative decision, the court insisted on the ‘democratization of private relation, private space, and private functions’<sup>84</sup>. Among the four conceptions of privacy aforementioned,

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<sup>77</sup> E.P. Royappa v. State of Tamil Nadu, AIR 1974 SC 555.

<sup>78</sup> Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd & Ors, AIR 2011 SC 2507

<sup>79</sup> *Supra* note 2.

<sup>80</sup> Shafin Jahan v. Asokan, AIR 2018 SC 1933.

<sup>81</sup> *Supra* note 78.

<sup>82</sup> *Supra* note 2.

<sup>83</sup> *Ibid*.

<sup>84</sup> GAUTAM BHATIA, THE TRANSFORMATIVE CONSTITUTION: A RADICAL BIOGRAPHY OF NINE ACTS, 218 (Harper Collins India, 2019).

Justice Choudhary categorically held that it was the decisional privacy that the Constitution is committed to. Decisional privacy becomes imperative, especially in cases of conflict of decisional privacy with institutional privacy. The court reasoned that the Constitution neither recognizes an institution such as family 'as a primary unit of concern of the constitution' nor an 'entity capable of independent rights, independent of its constituent individuals'.<sup>85</sup> Indian Constitution, unlike other constitutions (such as Ireland) does not wish to normatively prioritize the institution of family over individual rights.<sup>86</sup> This risk of non-state institutions exercising sovereign powers over individuals was also recognized and thus rejected by the constitutional framers.<sup>87</sup>

## 6. CONCLUSION

The role of the marital laws is to maintain a balance between an individual's decisional autonomy and the state's intention to uphold the institution of marriage. This paper has demonstrated how the provisions of restitution of conjugal rights and exception of marital rape have failed to retain this balance as well as withstand the constitutional scrutiny which guarantees gender equality, life with dignity, and privacy to every individual. It illustrated how these colonial values which were enacted with the social motive of maintaining matrimonial harmony have impinged on the right to privacy of a person (especially married women) by coercing them to cohabit and have sexual intercourse against their will.

Privacy encompasses the safeguarding of personal relationships, the sanctity of family dynamics, marriage, the decision to have children, the home environment, and sexual orientation. It also entails the right to solitude and being free from unwanted intrusion. Privacy serves to protect individual independence and acknowledges one's ability to manage crucial aspects of their life. Personal choices that shape one's lifestyle are inherent to privacy. Moreover, privacy defends diversity and acknowledges the multiplicity of our society. While the reasonable expectation of privacy may shift from intimate settings to private spheres and from private to public domains, it's crucial to emphasize that being in a public space doesn't automatically negate or relinquish privacy rights.<sup>88</sup> Privacy is intrinsic to individuals as it forms an integral part of human dignity.

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<sup>85</sup> *Ibid.*, 236.

<sup>86</sup> *Ibid.*

<sup>87</sup> Sudipta Kaviraj, *Trajectories of the Indian State* (Ranikhet: Permanent Black 2010)

<sup>88</sup> *Supra* note 2.



The paper examined how a seemingly gender-neutral law continues to have adverse consequences on women as the law prefers preserving the marriage and ignores the power differentials that exist within. It makes a case that striking down of one shall necessarily lead to the striking down of the other since both these provisions have common jurisprudential origin in their subordinate treatment of married women and are interlinked. It demonstrated the need to revisit the transformative judgment in *T. Sareetha* which ushered in the beginning of constitutional recognition of the primacy of decisional privacy over institutional privacy. With several common law jurisdictions and liberal democracies abolishing these provisions and in the context of India's international commitments, it makes a case for abolition of these provisions only can restore the constitutional balance as envisaged by the Part III of the constitution.