EDITORIAL NOTE

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I. INTRODUCTION

The celebrated verdict in *Justice KS Puttaswamy* v. *Union of India*,[1] has raised two questions of relevance for gender and sexual minorities – first, the criminalisation of marital rape and second, the de-criminalisation of Section 377 of the Indian Penal Code. In the course of this section of the note, we provide a jurisprudential analysis of these two issues. In particular, we aim to analyse the complex debates on the relationship between privacy and marital rape, along with privacy and sexual freedom. Although the *Puttaswamy* verdict is being hailed as a victory for women and sexual minorities, it raises several theoretical issues that must be subject to preliminary analysis.

II. JURISPRUDENTIAL ANCHORINGS OF THE MARITAL RAPE EXCEPTION AND SECTION 377 IN INDIA: A CRITICAL EXAMINATION OF THE DISCOURSE

A. THE MARITAL RAPE EXCEPTION: MAPPING FEMINIST DEBATES

The Indian Penal Code ('IPC') defines the offence of rape under Section 375.[2] In this definition, there is an exception provided – "Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."[3] This exception has grown to be referred to as the marital rape exception. By virtue of this exception, a man who has forcible intercourse with his wife, cannot be convicted under Section 375 for the offence of rape. In a recent Supreme Court decision, it was held that if the wife is a minor who is below the age of eighteen, an act of forcible sexual intercourse with her would amount to rape.[4] Hence, the age limit to invoke this exception has been increased from fifteen to eighteen.[5]

While this is being hailed as a victory for Indian women, it is astonishing that the primary question of the rape of an adult female by her husband has been ignored, yet again. In

[1] Justice KS Puttaswamy v. Union of India, 2017 SCC OnLine SC 996.
[2] The Indian Penal Code, 1860, §375.
[3] *Id.*
[4] *See* Child Marital Rape: SC Bench Questions Exception in Penal Law, THE HINDU, September 7, 2017. "We do not want to go into the aspect of marital rape. That is for Parliament to see if they want to increase or decrease the age of consent. But once Parliament decided that we have fixed 18 years as the age of consent, can they carve out an exception like this," was the line of reasoning employed by the Court in this case).
[5] *Id.*

light of this, there is increased academic conversation on the marital rape exception and the need to criminalise the same. Though this may seem counterintuitive, the Indian women's movement in itself, is divided on the issue of the criminalising of marital rape. Thus, in this section of the paper, we examine the contradictory schools within feminist literature and argue, that there is an urgent need to criminalise forceful sexual intercourse in marriage.

Women's rights lawyer, Flavia Agnes, is a proponent of the viewpoint that the criminalising of marital rape is not the need of the hour.[6] Arguments of this school of thought, have largely, been three-fold. *First,* it is argued that the Protection of Women against Domestic Violence Act, 2005 ('PWDVA') already punishes husbands for sexual violence which includes punishment for marital rape.[7] *Second,* it is argued that Section 498-A of the IPC, that provides criminal remedies for cruelty against women in marriage, can also be used by women seeing a criminal remedy for marital rape. *Third,* and most significantly, perhaps, the argument advanced is that hierarchising sexual violence over all other forms of violence is patriarchal in itself as it endorses the idea that rape, in itself, is worse than other forms of physical violence that women face.[8] Agnes explains her objections to the deletion of the marital rape exception, in the following excerpt:

> *"How does making non-consensual penetrative sex more heinous redeem her from the continuum of brutality? The demand for deletion of this clause seems to subscribe to the patriarchal presumption that vaginal violation forms a category apart, even within marriage, than other types of brutality."*[9]

However, in response to these arguments several members of the women's movement have argued that such an approach ignores the political and legal realities of our times. In light of the fact that the Central Government recently stated that marital rape may destabilise the intuition of marriage, a nationwide uproar has commenced. Although there are is unfortunately little direct engagement between women's rights activists and academics themselves, the response to the three-fold argument presented above seems to be along the following lines.

First, and rather obviously, the PWDVA does not provide the option of criminal remedies to the wife in an abusive situation.[10] Often, a protection order, residence order or maintenance order is not enough, and women may desire criminal remedies against sexual abuse in their homes. Although the feminists have been critical of increased retributive remedies and heightened state power, there have been moments in history, where increased punishment is seen as a definite goal for the movement.[11] When marital rape is normalized by patriarchal power structures, it takes a criminal recognition of it, for the radical shift in law and morality to occur.

Second, Section 498-A is currently one of the most controversial provisions in Indian law and broadening it to include marital rape will intensify the backlash against women without providing them the remedy they deserve within the IPC. In the recent Supreme Court decision of *Rajesh Sharma* v. *State of Uttar Pradesh,* it was held that there is a statistically

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[6] *See* Flavia Agnes, *Section 498A, Marital Rape and Adverse Propaganda*, 50(23) EPW (2015).
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *See* The Protection of Women Against Domestic Violence Act, 2005.
[11] Prabha Kotiswaran, *A Bittersweet Moment: Indian Governance Feminism and the 2013 Rape Law Reforms*, 52(25-26) EPW (2017).

observable trend that women "misuse" the law and file false cases.[12] Hence, the courts ordered that Family Welfare Committees should be created in each district to check the veracity of a woman's claim before it is registered. In a clear departure from normal criminal procedure, the Court cemented the idea that women misuse Section 498-A.[13] In this context, if marital rape is pushed onto the judiciary within Section 498-A, it is unlikely that judges are likely to give legal remedies to women. Further, the very language of "cruelty" in marriage would make it near impossible for a case of non-consensual sexual intercourse, without any violence to fall within the ideas of cruelty. Hence, considering the current political climate, it seems unviable that Section 498-A will provide an effective and just criminal remedy.

Third, though this argument is crucial for its caution against "buying-in" to patriarchal notions of chastity and honour that are inherent to cases of sexual violation, this theoretical position cannot be viewed in isolation. Sexual violence and rape are hierarchised over other forms of physical violence in the public sphere – with rape meriting a higher punishment than grievous hurt.[14] This is because of the theoretical transition in the positions where rape is increasingly now seen as a crime of power as well as crime of sex- and therefore, is unique in its connotation.[15] What is the basis for having rape as a distinct offence from beating of women in the public sphere, and not extending the same logic to the private sphere? Women are subject to a myriad of emotional, physical and psychological abuses whether in the private or the public. However, a sexual violation is uniquely a crime based in both sex and power – which has been used to emphasise sexual power over women across cultural contexts. Marriage is viewed as a sexual contract that legitimises rape – and hence, the language of the "exception" is employed under Section 375. In light of this, the law commands worrying normative value when it is worded as an exception. It endorses the idea that forceful and non-consensual intercourse in a marriage is not rape, but some vague, superfluous wrong that has no concrete criminal basis.

With the recent *Puttuswamy* judgement, the marital rape question becomes relevant again. Can the decision be used to defend women's dignity and thereby, criminalise marital rape? Or are the earlier constructions of protecting the spatial limits of the household going to be upheld by the Court? A reading of the judgement in the subsequent parts of the paper will assist in answering these dilemmas.

B. SECTION 377: UNDERSTANDING PRIVACY AS A ROAD TO LIBERATION

Section 377 of the IPC states that:

> *"Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."*[16]

This provision has been used to curb free sexual expression and oppress members of already stigmatised sexual minorities. In the *Suresh Kumar Kaushal* v. *Naz Foundation* judgement, the Supreme Court overruled the Delhi High Court's judgement, and re-affirmed the

[12] Rajesh Sharma & Ors. v. State of U.P., Criminal Appeal No. 1265 of 2017.
[13] *Id.*
[14] The specific offence of rape is clearly outlined under the Indian Penal Code, §375.
[15] *See generally* Catharine A. MacKinnon, *Sex and Violence: A Perspective.* Feminism Unmodified: Discourses on Life and Law (1987), 85-92.
[16] The Indian Penal Code, §376.

constitutional validity of Section 377.[17] In light of this, there was nation-wide uproar and public protests ensued pressurizing the state to decriminalize this section. Hence, when the *Puttuswamy* decision finally stated that sexual expression was a part of the fundamental right to privacy, this was seen as a definite victory for the movement and India, as a whole. In the course of this portion of the note, we examine how queer theory and its relationship with privacy can inform further discourse on Section 377.

One of the primary claims of queer theorists and their critique of legal frames in India is that heterosexuality is normalised by judgements – both progressive and regressive. Even the *Naz Foundation* judgement of the Delhi High Court, which decriminalized homosexuality, has been critiqued and examined on these lines. The pervasive idea in the judicial interpretation has always been to endorse binaries between natural and unnatural, normal and abnormal. In this aspect hence, it becomes important that *Puttuswamy* held that sexual autonomy is inherent to the right to privacy under the Constitution- a fundamental right that is based arguably, in natural law. In its essence, a right to privacy entails the primordial liberal clam to non-interference of legal subjects – the right to be let alone.[18] The privacy right arises from the liberal tradition of political theory where Enlightenment era philosophy constructs citizens as autonomous, detached and separate, inherently, in their beings.[19] On the basis of this, weaving in sexual autonomy into privacy entails to components – *first*, the protection of private choice and *second*, the protection of spatial spheres like a bedroom or a home.[20] Interestingly, these are also similar to the components discussed above in the question of martial rape with respect to the private choice of the woman on one hand and the protection of the household spatially as the other. Unlike the debate on marital rape, however, both a choice-based and a spatial-construction help the cause of sexual minorities in their efforts to decriminalize Section 377 and be granted the right to unencumbered sexual autonomy. Hence, the *Puttaswamy* judgement, clearly, protects both the privacy of choice and the privacy of a bedroom- thereby, respecting "sexual privacy" as a whole.

However, at this stage, it is crucial to take a step forward. Interestingly, even in the United States and other jurisdictions, the privacy right has been invoked as a tool towards the emancipation of queer community. In fact, the right to be let alone and the right of "letting be"- was integral to public discourse that decriminalized homosexuality. Interestingly though, the same privacy right has been a set-back at later stages. For example, in the Supreme Court judgement that permitted gay-marriages, the dissenting opinions cited the privacy right as a reason for not allowing gay marriage.[21] In fact, Chief Justice Roberts clearly says that the sexual right is only a private right and does not involve the right to form relationships and receive social sanction for them.[22] This rhetoric against gay marriage is prevalent across the world- where sexual expression is seen as a private right of a detached individual, rather than the freedom, also, to develop meaningful social relationships.

In light of this, in the Indian context, it is important to be mindful of these histories and trajectories. In articulation, sexual freedom must be emphasised as both a private right as well as the right to receive social sanction for bonds of love. Viewing one without the other is incomplete. Therefore, in further discourse it is important to analyse the importance of

[17] Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1.
[18] J. Braxton Craven, *Personhood: The Right to Be Let Alone*, DUKE LAW JOURNAL 1976.4 (1976): 699-720.
[19] *Id.*
[20] *Id.*
[21] *See* Obergefell v. Hodges, 576 U.S. ___ (2015).
[22] *Id.*, Dissenting Opinion, J. Roberts.

values of connectedness and relationships to the queer movement, and not merely, the right to sexual privacy.

III. THE PUTTASWAMY VERDICT: THE WAY FORWARD?

One of the earliest judicial articulations of bodily integrity as an inalienable dimension of privacy was propounded in *State of Maharashtra* v. *Madhukar Narayan Mardikar,*[23] where the SC found that the wanton sexual proclivities attributed to the victim had absolutely no bearing on her privacy, and offered no justification for the sexual violence inflicted on her person. In fact, the Court affirmed that such privacy would endow her with the right to defend herself against any such intrusions into her privacy. These observations were reaffirmed in *Suchita Srivastava* v. *Chandigarh Administration,*[24] where the Court indubitably asserted a woman's "right to refuse participation in sexual activity" as a core constituent of such privacy and bodily integrity. In *State of Karnataka* v. *Krishnappa*,[25] sexual violence was explicitly recognized as impinging upon privacy and dignity. These findings were noted favourably in *Independent Thought* v. *Union of India,*[26] the recent Supreme Court verdict which declared that sexual intercourse with a girl who is under the age of 18 years is rape, irrespective of her marital status. It observed that the discourse surrounding the contours of bodily integrity, space for exercising reproductive choice, and protection of dignity of the girl child only serves to reinforce that her human rights continue to exist and endure irrespective of her marital status, and therefore must be accorded due consideration and respect.[27] In spite of this discussion, however, the Court deliberately eschewed any direct discussion on privacy in light of the findings in the *Puttaswamy* decision, reasoning that such analysis would inevitably impact later cases on marital rape for adult women as well.[28]

Justice Nariman's exposition of the right to privacy in the *Puttaswamy* verdict is the ideal starting point for an analysis of the ways in which this verdict has fundamentally transmuted the Indian constitutional landscape, particularly with respect to individual autonomy. He found privacy to consist of three core facets: physical privacy of the body, informational privacy and the privacy imbricate in the autonomy of choice.[29] It is the last aspect that underscores the expansive reading of sexual privacy in the *Puttaswamy* judgement. Justice Nariman observed that it would be entirely inaccurate to argue that fundamental rights are a product of the State's benevolence; rather, they embody the entitlements inherent in every individual.[30] These entitlements are certainly guaranteed by the Constitution, but they inhere as foundational values *a priori* the Constitution. When ensconced as fundamental rights, they evidently retreat to the extent reasonable restraints are placed on them by the Constitution itself.[31] But this does not detract from their essential nature as core natural and human rights, which by definition also includes restricting the State's powers and actions that intrude into the scope of their operation.[32]

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[23] (1991) 1 SCC 57
[24] (2009) 9 SCC 1
[25] (2000) 4 SCC 75
[26] *Independent Thought* v. *Union of India,* 2017 SCC OnLine SC 122.
[27] *Id.,* ¶67.
[28] *Id.,* ¶204-209.
[29] Justice KS Puttaswamy v. Union of India, 2017 SCC OnLine SC 996, ¶669.
[30] *Id.*
[31] *Id.*
[32] *Id.*

Although the challenge to the constitutionality of Section 377 is currently pending before a larger bench of the Supreme Court, and the *Puttaswamy* verdict therefore abstained from pronouncing a verdict on this issue,[33] the Court noted that a discussion on the fundamental right to privacy would be incomplete without an elucidation of one of its core attributes, i.e. sexual orientation.[34] Thus, Justice Chandrachud declared in no uncertain terms that the SC's decision in *Suresh Kumar Koushal* v. *Naz Foundation* ('Naz')[35] had inaccurately repudiated the sexual privacy contentions rooted in the constitutionally guaranteed right to life and liberty.[36] Despite Justice Singhvi's explicit recognition of the intrinsic centrality of privacy to the Indian constitutional scheme in the *Naz* decision, the Court had reasoned there that such privacy of a minority of the polity – i.e. the LGBT community – alone did not constitute an adequate justification for declaring Section 377 to be unconstitutional.[37]

In the *Puttaswamy* verdict, Justice Chandrachud accurately highlighted the dissonance between these two stances in the *Naz* decision. He affirmed that the very meaning and ambit of fundamental rights, under which the right to privacy was recognized to lie, envisage their protection from overreaches and intrusions by majoritarian intrusions.[38] The presence or lack of acceptance of a fundamental right guaranteed by the Indian constitution, by the will of the Indian polity, could not extend or trammel its scope. Rather, as Justice Chandrachud lucidly posited, constitutional rights are guaranteed to all, including minorities, in a modern democracy.[39] Whilst expressly identifying sexual orientation as a core facet of privacy and individual identity, he also read in sexual privacy into the trinity of Articles 14, 15 and 21 of the Indian Constitution, thus deepening the roots of free exercise and expression of sexual choice and orientation in Indian constitutional jurisprudence.[40] He reasoned that equality in such exercise and expression is granted to all under the Indian constitutional order, and any denial of such equality would not only constitute discrimination – thus contradicting the ethos of the constitutional equality code – but also lead to unconstitutional violations of the fundamental rights of dignity and privacy of each individual.[41]

He dispelled the idea that a minimum threshold of prosecutions under Section 377 could be established in a constitutionally cogent manner, so as to justify denial of privacy on the pretext that very few prosecutions have occurred under this Section in the past.[42] Likening the impact of Section 377 to the inhibition on free expression engendered by prior censorship, Justice Chandrachud asserted that such discouragement of the free expression of sexual privacy and choice grossly violates the aforementioned constitutional tenets.[43]

Notably, this line of reasoning also helped him to repudiate the interpretation adopted by Chief Justice Roberts in *Obergefell* v. *Hodges*[44] that viewed sexual choice and freedom solely as a private right, and denied its concomitant facet of forming sexual

[33] *Id.*, ¶128.
[34] *Id.*
[35] Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1.
[36] Justice KS Puttaswamy v. Union of India, 2017 SCC OnLine SC 996, ¶126.
[37] Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1, ¶66.
[38] Justice KS Puttaswamy v. Union of India, 2017 SCC OnLine SC 996, ¶126.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*, ¶128.
[43] *Id.*
[44] Obergefell v. Hodges, 576 U.S. ___ (2015), Dissenting Opinion, J. Roberts.

relationships and receiving social sanction for them. Justice Chandrachud approved of the reasoning posited by the Constitutional Court of South Africa in *National Coalition for Gay and Lesbian Equality* v. *Minister of Justice*[45] that privacy contemplates within its scope the right to form and foster sexual and social relationships, free from intrusions of the society and the State.[46] The very concept of privacy would be rendered illusory if it did not include the right to express one's sexuality.[47] An intercession of such expression, whether in forming relationships or otherwise manifesting one's sexual orientation,[48] would constitute a gross violation of privacy.

The Court had similarly proffered in this decision that the right to privacy would be left entirely hollow if it were not read with the right to equality. [49] It unequivocally stated that anti-sodomy legislations repudiate the bedrock of the right to equality – "equal respect for difference" – and form ostensibly legitimate justifications for breach of the right to privacy.[50] Therefore, the State's repudiation of these variegated embodiments of sexual privacy also simultaneously violates the essence of the right to equality.[51]

Justice Chandrachud laid particular emphasis on the exposition of the meaning of privacy by the Constitutional Court in this case. Privacy and autonomy were held to encompass dimensions far beyond an incorporeal self's mere inhabitation of a space, separate and disconnected from the larger community, culture, society and the State.[52] The fulcrum of privacy was argued to rest not on the location of the activity (i.e. the traditional public-private distinction), but its nature (expression of sexual orientation in all spheres).[53] Thus, privacy also implies recognition of the social self that dwells in a living and corporeal body, and interacts and lives in a particular location, time, community and society.[54] Naturally, therefore, it is the core of such autonomy to form social and sexual relationships of one's own choosing, devoid of State intervention.[55] It was further observed that the common link interconnecting the symbiotic relationship between equality and privacy, and the larger constitutional scheme, was the fundamental right of dignity inherent in every individual.[56]

Justice Sanjay Kishan Kaul expressed his wholehearted agreement with Justice Chandrachud's views, further propounding that in the development of Indian constitutional jurisprudence, the notion of majoritarion will abrogating constitutionally entrenched fundamental rights has been held wholly inapplicable, and that the Court, as an interpreter and guardian of the Constitution, is entrusted with the solemn duty of even adopting a minority view, when so required and envisaged by the checks imbricate in the constitutional epistemology itself.[57] He thus reaffirmed sexual orientation as an indisputable facet of privacy.[58]

Thus, a reading of the *Puttaswamy* judgment offers a well-articulated and cogent rebuttal of strands of interpretation that have traditionally sought to unduly restrict the ambit of

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[45] National Coalition for Gay and Lesbian Equality v. Minister of Justice, 1999 (1) SA 6 (CC).
[46] Justice KS Puttaswamy v. Union of India, 2017 SCC OnLine SC 996, ¶295-299.
[47] *Id.*
[48] *Id.* (Evidently, conditional on such expression being consensual).
[49] National Coalition for Gay and Lesbian Equality v. Minister of Justice, 1999 (1) SA 6 (CC), ¶112.
[50] *Id.*
[51] *Id.*
[52] *Id.*, ¶117.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] Justice KS Puttaswamy v. Union of India, 2017 SCC OnLine SC 996, ¶811.
[58] *Id.*

the right to privacy, and in particular, sexual freedom. Drawing from the tradition of holistic reading of fundamental rights from the *Maneka Gandhi* case, it was held that privacy finds meaningful expression when read along with interconnected fundamental rights such as equality and dignity. This organic exegesis of autonomy thus enables the expression of privacy in all spheres. While the discussion on privacy in the context of Section 377 was relatively more, and there was no direct discussion regarding the consequence of the verdict on marital rape, the judgment nevertheless holds significant potential for striking down the Exception 2 to Section 375 of the IPC in its entirety. Its pioneering formulation of individual autonomy, recognized to encompass the dual facets of existence and expression of privacy as fundamental rights, equally incorporates the notion of the inviolate self. The conflation heralded by the traditional public-private distinction, which has been historically wielded simultaneously to ward off State interference directed towards criminalization of marital rape as well as to rebut State sanction of same-sex relationships, has thus been dismantled by this verdict. A close reading of the judgment clearly evinces that both the positive and negative dimensions of the right to privacy, i.e. the right to express one's sexual orientation as well as to protect oneself from sexual violence in all spheres – involved in the Section 377 and marital rape exception debates respectively – have been indubitably recognized in Indian constitutional jurisprudence.

IV. CONCLUSION

Cumulatively, hence, the verdict serves an interesting entry point for further questions on sexual autonomy with respect to Section 377 as well as with the issue of marital rape. Depending on the interpretations of privacy that the Court espouses, the outcomes in these cases could be radically affected. Hence, an analysis of the right to privacy holistically with respect to these questions is the need of the hour in the complex socio-political terrain of India.