

SILENT CRIES REMAIN UNHEARD: MARITAL RAPE & THE INDIAN LEGAL SCENARIO

- Mayuri Gupta*

Abstract

कुछ तो दे ऐ फलक-ए-नाइंसाफ़, आहो फ़रियाद की रुखसत ही सही..!

(Give me something, unjust one; At least present me the right to plea..!)

- *Mirza Ghalib*

Rape is an offence per se. Rape involves not only violation of women's body; it is an offence against her individuality and humanity. There is nothing more domestic and more violent than marital rape. Rape is rape regardless of the relationship between the rapist and the victim. Women who are raped by their husbands are likely to be raped many times. When we talk about *Rape*, we usually think of a malicious stranger and not in the context of marriage. We question: how a man who is availing his conjugal right can be accused of rape? Although marital rape is one of the most common masochism in Indian society, it is well veiled behind the knot of marriage. Despite several attempts to revise rape laws, most recently the Verma Committee Report, Marital Rape is still out of the purview of Indian Penal Law. The spousal exemption to rape statutes is a grave injustice and adds to the trauma of marital rape. There is an immediate need for a distinct law on marital/spousal rape in India, which should be at par with the accepted international norms on this issue. This paper will try to examine some crucial problems in prosecuting spousal rape, the need to remove the exemption, the comparative study of foreign penal laws with the Indian approach through the historical background and statistics and analyse the emerging themes in this context.

* Student- B.A.LL.B. (H) at Amity Law School, Amity University U.P., MOC (Near Malhaur Railway Station), Gomti Nagar Extension, Lucknow-226028 (U.P.) Email: mayurigupta55@gmail.com

INTRODUCTION

“Violence against women continues to persist as one of the most heinous, systematic and prevalent human rights abuses in the world. It is a threat to all women, and an obstacle to all our efforts for development, peace, and gender equality in all societies. Violence against women is always a violation of human rights; it is always a crime; and it is always unacceptable. Let us take this issue with the deadly seriousness that it deserves.”

- Ban Ki moon, United Nations Secretary General

The word ‘rape’ has been derived from the term ‘*rapio*’, which means ‘to seize’. Rape is therefore, forcible seizure, or the ravishment of a woman without her consent, by force, fear or fraud. It involves coercive, non-consensual sexual intercourse with a woman. Rape is an offence in itself, against the dignity of women violating her self-respect and when it occurs within the four-walls of a matrimonial residence, it reduces the woman to the status of an article used merely for sexual gratification. The term ‘marital rape’ or ‘spousal rape’ refers to unwanted intercourse by a man on his wife obtained by force, threat of force or physical violence or when she is unable to give consent. The words ‘unwanted intercourse’ refers to all sorts of penetration (whether anal, vaginal or oral) perpetrated against her will or without her consent.¹ While rape by a stranger is highly traumatic, it is typically a one-time event and is clearly understood as rape. Undoubtedly rape itself is an incomparable torment, but having a relation with the rapist increase the agony, in some cases reduce the ability to react and thus more destructive. Research shows that rape by a spouse or marital rape can be more emotionally and physically damaging than rape by a stranger.² Trauma from the rape adds to the effect of other offensive acts or abusive and demeaning talk. Besides, marital rape is rarely a one-time event, but a repeated if not frequent occurrence.³

HISTORICAL BACKGROUND

¹ Dipa Dube, *License To Rape: The Indian Viewpoint*, SOCIAL SCIENCE RESEARCH NETWORK, (Mar. 21, 2006), <http://ssrn.com/abstract=888964>.

² *Marital Rape*, RAINN, <http://www.rainn.org/public-policy/sexual-assault-issues/marital-rape> (Accessed on: 03/07/2013)

³ *Marital Rape*, HIDDEN HURT, <http://www.hiddenhurt.co.uk/marital Rape.html> (Accessed on: 03/07/2013)

All through the history the concept of marital rape remained unaccepted. Most societies, considered it acceptable for men to force their wives to sex. Traditionally rape has been defined as ‘sexual intercourse with a female not his wife without her consent’ which provided the husband with- “a license to rape”. Women were considered a property belonging first to their fathers, and then to their husbands. History reveals that there were direct ties between law, property and rape.⁴ Even the concept of ‘rape’ as an assault of the physical and emotional integrity of woman was non prevalent but was the theft of a woman against the consent of her guardian and the harm was treated as a wrong against her father or spouse. Consequently, no legal basis existed to prosecute husbands for raping their own wives, since the husband infringed no man's property rights. According to Blackstone's common law "unities" doctrine, husband and wife merged into a single legal entity upon marriage, with the husband assuming complete control of their joint existence.⁵ Susan Brownmiller states⁶, “*The ancient patriarchs who came together to write their early covenants had used the rape of woman to forge their male power- how then could they see rape as a crime of man against woman? Women were wholly owned subsidiaries and not independent beings. Rape could not be envisioned as a matter of female consent or refusal; nor could a definition acceptable to males be based on a male female understanding of a female’s right to her bodily integrity.*” In other words, rape laws originated to safeguard the ‘masculine pride in the exclusive possession of a sexual object.’⁷

The other traditional justification for the marital exemption was based on the notion of ‘irrevocable implied consent’ i.e., once a woman is married to a man, there is believed to be understood consent to sexual intercourse, which is irreversible in nature. Its origin can be traced back to statement made by Sir Matthew Hale, Chief Justice in 17th Century England. Lord Hale wrote that: *‘the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual consent and contract, the wife hath given up herself this kind*

⁴ JULIA R. AND HERMAN SCHEWENDINGER, RAPE AND INEQUALITY, 95 (Sage Publications, California, 1993)

⁵ R. Eskow , Review The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution Lisa, Stanford Law Review, Vol. 48, No. 3 (Feb., 1996), pp. 677-709, Published by: Stanford Law Review, URL: <http://www.jstor.org/stable/1229280> (Accessed: 18/11/2014, 02:09)

⁶ SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE, 18 (Penguin, 1975).

⁷ Charlotte L.Mitra, *For she has no right to give consent*, Crim. L.J., 558 (1979).

unto her husband which she cannot retract'.⁸ This established that once married, a woman does not have the right to decline sex with her spouse and there is always a presumption of her consent. "A female slave has an admitted right, and is considered under a moral obligation, to refuse her master the last familiarity. Not so the wife. However brutal a tyrant she may unfortunately be chained to... he can claim from her and enforce the lowest degradation of human being, that of being made the instrument of an animal function contrary to her inclinations".⁹ J.S. Mill observed that marital rape is never welcome to women for it represents a surrender of dignity so absolute in nature, that it lowers the stature of the wife beneath that of a slave.

REVIEWING THE MENACE

The International Criminal Court identifies Rape as the invasion committed by force, or by the threat of force or coercion, fear of violence, duress, detention, psychological oppression, or abuse of power, against such person or another person, or by taking advantage of a coercive environment or the invasion committed against a person incapable of giving genuine consent. In December 1993, the United Nations High Commissioner for Human Rights published the *Declaration on the Elimination of Violence Against Women* and established marital rape as a human rights violation. Marital rape is a widespread problem for a woman that has existed for centuries throughout the world. Millions of women worldwide have to suffer and face such abuse on a day-to-day basis. Despite the prevalence of marital rape, this problem has received somewhat little attention from social scientists, practitioners, the criminal justice system, and larger society as a whole. It is difficult to obtain accurate data on rape and violence against women within the family, because women are reluctant to report incidents, as women raped by their husbands may hesitate to report because of family loyalty, fear of their abuser's retribution, inability to leave the relationship, safeguarding the future of their children, or the fact that there are no stringent laws in force protecting the victims of

⁸ MATTHEW HALE, 1 HISTORY OF THE PLEAS OF THE CROWN, 629 (1736, London Professional Books, 1972)

⁹ R. Eskow, Review The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution Lisa, Stanford Law Review, Vol. 48, No. 3 (Feb., 1996), pp. 677-709, Published by: Stanford Law Review, citing, John Stuart Mill, The Subjection of Women, in JOHN STUART MILL & HARRIET TAYLOR MILL, ESSAYS ON SEX EQUALITY 123, 160 (Alice S. Rossi ed., 1970),), URL: <http://www.jstor.org/stable/1229280> (Accessed on: 18/11/2014)

marital rape. As in the case of **R v. Ahluwalia**,¹⁰ many battered women go back to their families because they realize that the dignity of family is at stake, failing to understand that these men who inflict the pain are closest to them. Many times it is the woman who has more to lose.¹¹

Despite underreporting, marital rape unquestionably has an enormous impact on the lives of women who experience it.¹² Statistics on marital rape in the United States suggest that one out of every seven or eight married women has been subjected to rape or attempted rape by her husband.¹³ Estimation illustrates that approximately 10% to 14% of the married women experience rape within marriage.¹⁴ In India, estimates for the number of married women between 15 and 49 years of age that have experienced rape are over two thirds. Despite the high number of marital rape cases in India, study says that 70% of women say that they would not report their husband for forcing them to have sex.¹⁵

Marital rape is often accompanied by physical, psychological, and sexual violence. Physical violence manifests in verbal or physical threats, use of weapons, and injury. Sexual violence includes physically forcing the victim to have sex, or committing sexual acts with someone who is disabled, under the influence of alcohol, drugs, or psychological pressure and thus unable or unwilling to consent to the sexual act. Perpetrators of marital rape also use psychological violence by isolating or humiliating the victim, and economic violence by

¹⁰ 1992 CrLCR 63, where a landmark was reached when a woman who killed her husband after years of mental and physical abuse was excused for justified homicide on grounds of her suffering

¹¹ Aditya Shroff & Nicole Menezes, Marital Rape as a Socio-Economic Offence: A Concept or a Misnomer!, Student Advocate, Manupatra (Vol. 6).

¹² Dr. Bhavish Gupta & Dr. Meenu Gupta, Marital Rape: - Current Legal Framework in India and the Need for Change, Galgotias Journal of Legal Studies, (2013) GJLS Vol. 1, No. 1, ISSN. 2321-1997.

¹³ Box, S., Power, Crime and Mystification, (London Tavistock Publications, 1983), p.122.

¹⁴ Diana. E. H. Russell, Rape in Marriage, Indiana University Press, Bloomington, 1990.

¹⁵ Background Guide, United Nations Entity for Gender Equality and the Empowerment of Women, The Johns Hopkins Model United Nations Conference 2013, citing, Biswas, Lesley D, "Marital Rape: Still an Underreported Crime in India," The WIP, http://www.thewip.net/contributors/2009/10/marital_rape_still_an_underrep.html (Accessed on: 10/11/2012)

denying the victim fundamental resources. These are just a few of the many ways victims of marital rape are coerced into sexual acts.¹⁶

PHYSICAL & PSYCHOLOGICAL EFFECT

Most experts agree that marital rape survivors suffer longer term psychological consequences as a result of the rape as a stranger rape victims do. (The more severe reactions may be a result of prolonged physical and emotional abuse, lack of recognition and ability to share the pain, and the profound sense of a betrayal of trust rather than the rape itself, but the research is not clear.) Despite the historical myth that rape by one's partner is a relatively insignificant event causing little trauma, research indicates that marital rape often has severe and long-lasting consequences for women. The physical effects of marital rape may include injuries to private organs, lacerations, soreness, bruising, torn muscles, fatigue and vomiting. Women who have been battered and raped by their husbands may suffer other physical consequences including broken bones, black eyes, bloody noses, and knife wounds that occur during the sexual violence. Specific gynecological consequences of marital rape include miscarriages, stillbirths, bladder infections, infertility and the potential contraction of sexually transmitted diseases including HIV. Women who are raped by their partners are likely to suffer severe psychological consequences as well. Some of the short-term effects of marital rape include anxiety, shock, intense fear, depression, suicidal ideation, and post-traumatic stress. Long-term effects often include disordered eating, sleep problems, depression, problems in establishing trusting relationships, and increased negative feelings about themselves. Psychological effects are likely to be long-lasting. Some marital rape survivors report flashbacks, sexual dysfunction, and emotional pain for years after the violence. Aside from the above effects, the victim also has a feeling of helplessness as she may find it difficult, for cultural reasons, to define the other spouse's conduct as rape or identify someone she married and loves as a *rapist*. Moreover there is a higher likelihood of the repeated assaults as the married perpetrator is more likely to humiliate, punish and take 'full' ownership of their partners. Nonetheless the victims who are dependent on their spouses have no way to leave

¹⁶ Background Guide, United Nations Entity for Gender Equality and the Empowerment of Women, The Johns Hopkins Model United Nations Conference 2013, citing, UN Women, "Violence against Women - Gender Issues," UNIFEM, http://www.unifem.org/gender_issues/violence_against_women/ (Accessed on: 10/11/2012)

the situation as they lack outside employment and may face additional pressure from family members or friends to remain with the perpetrator.¹⁷

UNCERTAINTIES IN CRIMINALIZING

The basis for the marital rape immunity has traditionally been Matthew Hale's proposition that through the marriage contract a woman was deemed to consent to sexual intercourse with her husband and was subsequently unable to retract that consent. This proposition had been undermined by various statutory and case law developments, as well as by changes in societal attitudes. As a result of these developments 'new practical rationales'¹⁸ were developed as a means of defending the existence of the husband's immunity. These 'new practical rationales' suggest, for example, that marital rape is less serious than other types of rape, that extending the law of rape to married couples would undermine the institution of marriage, that it would encroach upon marital privacy and hinder reconciliation, that it would allow vindictive wives the opportunity to make false allegations of rape, and that rape within marriage would be very difficult to prove.¹⁹ If reported there will be technical hitches in prosecuting spousal rape. Further, the attitude of the police, women's access to justice and the attitude of judiciary are important issues to be considered.

It is also important that the legal prohibition on marital rape is accompanied by changes in the attitudes of prosecutors, police officers and those in society more generally. For example, in South Africa, despite these legal developments, rates of marital rape remain shockingly high. A 2010 study suggests that 18.8% of women are raped by their partners on one or more occasion.²⁰ Rates of reporting and conviction also remain low, aggravated by the prevalent

¹⁷ Anjali Srivastava, Devanshu Jain & Ayan Hazra, Marital Rape: A Legalised Sin, *Indian Journal of Applied Research*, Volume: 3, Issue: 12, Dec 2013, ISSN - 2249-555X.

¹⁸ A.L. Buckborough, 'Family Law: Recent Developments in the Law of Marital Rape', *Annual Survey of American Law* 343 at 347 (1989)

¹⁹ Philip N. S. Rumney, When Rape Isn't Rape: Court of Appeal Sentencing Practice in Cases of Marital and Relationship Rape, *Oxford Journal of Legal Studies*, Vol. 19, No. 2 (Summer, 1999), pp. 243-269 Published by: Oxford University Press, URL: <http://www.jstor.org/stable/20468269> (Accessed on: 18/11/2014)

²⁰ Gender Links and the South African Medical Research Council, 'The War at Home' (2010) <http://www.mrc.ac.za/gender/gbvthewar.pdf> (Accessed on: 12/01/2013)

beliefs that marital rape is acceptable or is less serious than other types of rape.²¹ Changes in the law therefore need to be accompanied by widespread measures raising awareness of women's rights to autonomy and physical integrity, regardless of marriage or other intimate relationship. This was underlined in **Vertido v The Philippines**, a recent Communication under the Optional Protocol of the Convention on the Elimination of Discrimination Against Women (CEDAW), where the CEDAW Committee emphasized the importance of appropriate training for judges, lawyers, law enforcement officers and medical personnel in understanding crimes of rape and other sexual offences in a gender-sensitive manner.²²

A detailed study was conducted by the United Nations called the *"In- depth Study on all forms of Violence against Women"*²³. This study clearly finds that non-implementation or ineffective implementation of existing domestic laws in most countries was the single most important reason for continued immunity to perpetrators of violence against women particularly in intimate relationships.

SITUATION ROUND THE GLOBE

'The law must be stable but it must not stand still'

- Roscoe Pound

The call for criminalizing marital rape gained momentum in the 19th century, when for the first time the advocates of the feminist movement refused to draw any distinction between rape outside of, and within marriage.²⁴ Thereafter in 1993, the United Nation's Declaration on the Elimination of Violence against Women, recognized marital rape as a violation of

²¹ See further Gemma Hancox, 'Marital Rape in South Africa: Enough is Enough' (2012) BUWA Journal on African Women's Experiences 70 <http://www.osisa.org/buwa/south-africa/marital-rape-southafrica> (Accessed on: 12/01/2013)

²² Vertido V The Philippines Communication No. 18/2008, Committee on the Elimination of Discrimination against Women July 2010

²³ 43In-depth study on all forms of violence against women –Report of the Secretary General, July 2006, UN General Assembly Document A/61/122/Add.1 www.un.org/womenwatch/daw/vaw/SGstudyvaw.htm (Accessed on: 08/11/2014)

²⁴ C.H. Palczewski, Voltairine De Cleyre: Sexual Slavery and Sexual Pleasure in the Nineteenth Century, 7 NWSA J. 54 (1995)

human rights.²⁵ In 1995, at the *United Nations Women's Conference* in Beijing, China delegates unanimously passed a resolution stating that a wife has a right to refuse sexual demands by her husband. The *United Nations Convention on the Elimination of All Forms of Discrimination against Women*, has viewed that this sort of discrimination against women violates the principles of equality of rights and respect for human dignity. Further, the *Commission on Human Rights*, at its fifty-first session, in its Resolution entitled '*The elimination of violence against women*' recommended that marital rape should be criminalized.²⁶ The European Court of Human Rights, endorsed the conclusion that a rapist remains a rapist regardless of his relationship with the victim. It acknowledged that this change in the common law was in accordance with the fundamental objectives of the Convention on Human Rights, the very essence of which is respect for human rights, dignity and freedom.²⁷ This was given statutory recognition in the Criminal Justice and Public Order Act 1994.²⁸ By 2006, the UN Secretary General found that marital rape had been criminalized in nearly 104 States. Of these, 32 had created a specific criminal offence of marital rape, while the remaining 74 did not exempt it from general rape provisions.²⁹

Although the Lord Hale Doctrine determined the legal treatment of marital rape cases supported by the *properties, unities* and the *separate spheres*³⁰ theories for many years. The immunity has now been withdrawn in most countries. In England and Wales, the House of Lords held in 1991 that the status of married women had changed out of all recognition. The Court, declared, 'marriage is in modern times regarded as a partnership of equals and no

²⁵ See United Nation's Declaration on the Elimination of Violence against Women, G.A. Res. 48/104, U.N. Doc. A/RES/48/104, at Art.2, (Dec 20, 1993), (In June, 1993, India had accepted and ratified the United Nation's Declaration on the Elimination of Violence against Women, 1993)

²⁶ Anjali Srivastava, Devanshu Jain & Ayan Hazra, Marital Rape: A Legalised Sin, Indian Journal of Applied Research, Volume: 3, Issue: 12, Dec 2013, ISSN - 2249-555X.

²⁷ **C.R. v UK Publ.** ECHR, Ser.A, No. 335-C; see Palmer Feminist Legal Studies Vol.V no.1 [1997] pp. 1-7

²⁸ S. 142 abolished the marital rape exception by excluding the word 'unlawful' preceding 'sexual intercourse' in s. 1 of the Sexual Offences Act 1956

²⁹ See United Nations Secretary General, Report of the Secretary-General, In-Depth Study on all forms of Violence against Women, U.N. Doc. A/61/122/Add. (Jul 6, 2006)

³⁰ It replaced the unities theory. Under this theory men and women were no longer one, but men inhabited the public sphere and women the private spheres. The private sphere included all matters of home, which the courts were not allowed to interfere, thereby giving the husbands freedom to continue domestic abuse without state intervention

longer one in which the wife must be the subservient chattel of the husband.’³¹ USA recognized marital rape as a crime in 1993. In Canada, the provisions in the *Criminal Code* which denied criminal liability for marital rape were repealed in 1983. South Africa criminalized marital rape in 1993, reversing the common law principle that a husband could not be found guilty of raping his wife. The South African Criminal Law (Sentencing) Act of 2007 now provides that the relationship between the victim and the accused may not be regarded as a ‘substantial and compelling circumstance’ justifying a deviation from legislatively required minimum sentences for rape.³² In Australia, the common law ‘marital rape immunity’ was legislatively abolished in all jurisdictions from 1976. In 1991, the Australian High Court had no doubt that: ‘if it was ever the common law that by marriage a wife gave irrevocable consent to sexual intercourse by her husband, it is no longer the common law.’³³ According to Justice Brennan, ‘The common law fiction has always been offensive to human dignity and incompatible with the legal status of a spouse.’³⁴

Though we have advanced in every possible field, one of the most humiliating and debilitating acts, marital rape, is not an offence in India. *‘It is revolting ... if the grounds upon which [a rule of law] was laid down have vanished ... and the rule simply persists from the blind imitation of the past’.*³⁵

Regardless of the international commitments, constitutional obligations, number of amendments, law commission reports and new legislations, a general outlook at the protective options a married woman has in India, discloses that the legislations have been either non-existent or obscure and everything has just depended on the interpretation by Courts. The CEDAW Committee has recommended that India being a member should “widen the definition of rape in its Penal Code to reflect the realities of sexual abuse

³¹ *R. v R* [1991] 4 All ER 481 at p.484

³² The Reform of India’s Sexual Violence Laws, *Submissions prepared by Professor Sandra Fredman FBA QC (hon), with the assistance of members of Oxford Pro Bono Publico, on the invitation of the Justice Verma Committee investigating the reform of India’s sexual violence laws*, January 2013, Oxford Pro Bono Publico , University of Oxford <http://www.law.ox.ac.uk/opbp>

³³ *R v L* [1991] HCA 48; (1991) 174 CLR 379 at p. 390 per Mason CJ, Deane and Toohey JJ

³⁴ *Ibid* at p. 402

³⁵ W Holmes, ‘The Path of the Law’, 10 Harv L Rev 457 at 469 (1897)

experienced by women and to remove the exception of marital rape from the definition of rape... ”

The 42nd Report of Law Commission of India (1972) proposed the necessity of excluding marital rape from the ambit of Sec. 375 and criminalizing it. The 84th Report of Law Commission (1980) however was not in favour of the criminalization. Even the latest report of the Law Commission³⁶ (2000) has preferred to adhere to its earlier opinion of non-recognition of “rape within the bond of marriage” as such a provision “may amount to excessive interference with the marital relationship.” The only suggestion made is (again) with regard to age that may be enhanced from 15 to 16 years.³⁷

Section 375 of the Indian Penal Code, 1860, (post 2013-Criminal Law Amendment), deals with sexual assault, in a very narrow purview. It states that, an offence of rape within conjugal bonds is said to be committed only if the wife is less than 12 years of age, but if she is between 12 to 16 years, an offence is committed, which is less serious, attracting milder punishment. Once, the age crosses 16, there is no legal protection accorded to the wife, the rape legislation affords absolute immunity to the husband to impose himself on his wife and exercise complete sexual control over her body, in direct contravention to Human Rights regulations.

To remove the statutory lacunae and to extend the legal cover, as an aftermath of the Delhi gang rape case of 2012, Justice Verma Committee was constituted to recommend amendments to the Criminal Law so as to provide for quicker trial and enhanced punishment for criminals accused of committing sexual assault against women. The Committee submitted its report on January 23, 2013 and gave the following views regarding marital rape: *The IPC differentiates between rape within marriage and outside marriage. Under the IPC sexual intercourse without consent is prohibited. However, an exception to the offence of rape exists in relation to un-consented sexual intercourse by a husband upon a wife. The Committee recommended that the exception to marital rape should be removed. Marriage should not be considered as an irrevocable consent to sexual acts. Therefore, with regard to an inquiry about whether the complainant consented to the sexual activity, the relationship*

³⁶ Law Commission of India, One hundred and Seventy Second Report on Review of Rape Laws, March 2000.

³⁷ DipaDube, ‘Licenceto Rape: The Indian Viewpoint 1 (2003) National Law University, Jodhpur.

*between the victim and the accused should not be relevant.*³⁸ The Committee recommended that:

- i. The exception for marital rape be removed.
- ii. The law ought to specify that:
 - a. A marital or other relationship between the perpetrator or victim is not a valid defense against the crimes of rape or sexual violation;
 - b. The relationship between the accused and the complainant is not relevant to the inquiry into whether the complainant consented to the sexual activity;
 - c. The fact that the accused and victim are married or in another intimate relationship may not be regarded as a mitigating factor justifying lower sentences for rape.³⁹

Unfortunately, the recommendation of Justice Verma Committee regarding removal of the marital rape has not been included in Criminal Law Amendment Bill, 2013 passed by the Parliament. Rashida Manjoo, the UN Special Rapporteur on violence against women said that Justice Verma committee's recommendation and subsequent legislation was a "golden moment for India" but recommendations on marital rape, age of consent for sex, etc. were not adopted in the legislation. The government is hesitant to criminalize marital rape because it would require them to change laws based on religious practices, including the Hindu Marriage Act 1955, which says a wife is duty-bound to have sex with her husband. The parliamentary panel examining the Criminal Law (Amendment) Bill, 2012, said that "In India, for ages, the family system has evolved ... Family is able to resolve the (marital) problems and there is also a provision under the law for cruelty against women, It was, therefore, felt that if marital rape is brought under the law, the entire family system will be under great stress and the committee may perhaps be doing more injustice".⁴⁰ *It is hard to imagine how charging a husband with the violent crime of rape can be more disruptive of a marriage than the violent act itself. Moreover, if the marriage has already deteriorated to the*

³⁸ Anjali Srivastava, Devanshu Jain & Ayan Hazra, Marital Rape: A Legalised Sin, Indian Journal of Applied Research, Volume:3, Issue: 12, Dec 2013, ISSN: 2249-555X, Also Available at: <http://www.prsindia.org/parliamenttrack/report-summaries/justice-verma-committee-report-summary-2628/> (Accessed on: 29/7/2013)

³⁹ Report of the Justice Verma Committee on Amendments to Criminal Law, January 23, 2013.

⁴⁰ Dr. Mukesh Garg & Dr. Nareshlata Singla, MARITAL RAPE UNDER INDIAN LAW: A STUDY, International Journal in Management and Social Science Vol.01 Issue-02, (June, 2013) ISSN: 2321-1784, Also Available at: <http://www.ijmr.net>

*point where intercourse must be commanded at the price of violence we doubt that there is anything left to reconcile.*⁴¹

CONSTITUTIONALITY OF THE MARITAL RAPE EXCEPTION

The Constitution of a country is the text that reflects the soul of the nation. The Indian Constitution organizes and controls power, ensures human rights, balances the competing claims of social and individual interests, mirrors the cultures and experiences of the country and operates as a vehicle for national progress and unity.⁴²

The exception of section 375 of the Indian Penal Code 1860 permits a man to have sexual intercourse with his wife even without her consent, contravenes the Constitutional commitments under Article 14 and Article 21 of the Constitutional of India. Consequently, it establishes that, a women raped by her husband is to be treated differently from another women raped by a man who is not her spouse, such differentiation does not have a rational basis and violates Article 14 of the Constitution, which guarantees equal protection of the laws to both the sexes. Article 14 protects a person from state discrimination. Therefore such a classification between a rape by a stranger and a rape by her own husband is deemed to be unreasonable. It takes away a woman's right of choice and indeed effectively deprives her of bodily autonomy and her personhood. Thus the classification is unnecessary, unintelligible and violates the mandate of Article 14. Withdrawing the protection of Section 375 of the IPC from the victims of the crime of rape solely on the basis of their marital status is irrelevant for the purposes of legislation and thus violates the test of classification under Article 14.⁴³

Article 21 of the Indian Constitution confers on all persons the fundamental right of life and personal liberty. Post **Maneka Gandhi v. Union of India**⁴⁴ it has become the foundation of all forms of right aimed at protection of human life and liberty. The meaning of the term 'life', has thus expanded in the celebrated judgment of **Munn v. Illinois**⁴⁵ where Field J. held

⁴¹ As stated by the Supreme Court of Virginia in *Weishaupt v. Commonwealth* 315 S.E.2d 847, 855 (Va. 1984).

⁴² Roy, Sudhanshu & Jain, Iti, "Criminalizing Marital Rape in India: A Constitutional Perspective", *Criminal Law Journal*, Apr 2008, p. 81-92

⁴³ Dr. Bhavish Gupta & Dr. Meenu Gupta, *Marital Rape: - Current Legal Framework in India and the Need for Change*, 2013 GJLS Vol. 1, No.1 ISSN: 2321-1997

⁴⁴ AIR 1978 SC 597

⁴⁵ 94 US 113 (1877)

that life means ‘*something more than mere animal existence*’, which was further affirmed by the Supreme Court of India in the case of **Bandhua Mukti Morcha v. Union of India**⁴⁶ Article 21 provides the fundamental right to life and to live with human dignity. The current law only provides a small relief to wives not cohabiting with their husbands but what it fails to look at is that consent of a woman is the elementary condition for a sexual act and taking away the element of consent from a married woman when cohabiting is not only immoral but also unconstitutional. With the occurrence of an act like marital rape the right to live with dignity of a woman as interpreted under Article 21 of the Indian Constitution is directly violated and if we carefully look it can be clearly seen that a Marital Rape fulfils the first two essentials of Rape as defined in IPC i.e. firstly against her will and secondly without her consent but still due to the exception provided it does not fall under Section 375 (Rape) nor is punished under Section 376 (Punishment for Rape).⁴⁷ The Constitution of India also in its Article 51A (e) states that it is the fundamental duty of every citizen of India to renounce practices derogatory to the dignity of women.

As for the current scenario marital rape can be only seen as the legally permitted rape which takes away the element of consent from a married woman. The legislative framework of India has no provision to aid the plight of a married woman who constantly faces the evil because of the detrimental notion of the Indian society considering sex as an obligation. It is as if after marriage a woman ceases to be under the jurisdiction of the Indian law and enter the jurisdiction of a single man who would govern her life from then.⁴⁸

CONCLUSION

There is nothing more domestic and nothing more violent than marital rape.⁴⁹ The marital rape exemption does not exist in a legal vacuum; it reflects, and aggravates, the daily abuse

⁴⁶ AIR 1984 SC 802 at 811

⁴⁷ Anjali Srivastava, Devanshu Jain & Ayan Hazra, Marital Rape: A Legalised Sin, Indian Journal of Applied Research, Volume: 3, Issue: 12, Dec 2013 | ISSN: 2249-555X.

⁴⁸ *Ibid*

⁴⁹ MICHAEL D.A. FREEMAN, “But If You Can’t Rape Your Wife, Who[m] Can You Rape?”: The Marital Rape Exemption Re-examined, Family Law Quarterly, Vol. 15, No. 1 (Spring 1981), pp. 1-29 Published by: American Bar Association, URL: <http://www.jstor.org/stable/25739275> (Accessed: 18/11/2014, 02:10), citing,

Quote of Laura X, in Mildred D. Pagelow, Does the Law Help Battered Women?, Paper at Law and Society Association Meeting p. 4 (research notes) (Madison 1980)

experienced by married women whose husbands claim an absolute right of access to their bodies. The exemption also reinforces many wives' belief that duty compels compliance with their husbands' every sexual desire.⁵⁰ Many men, view sex as a tool women use to manipulate and undermine their husbands, far too many women experience sex in marriage as a weapon with which husbands dominate and batter their wives. According to Sally Mariko Lorang, a criminal appeals attorney, domestic violence volunteer, and member of the California State Bar Committee on Women in the Law: *The assumption that a man has a proprietary right to his wife's sexuality and reproductive capacity is so well entrenched in common law that it has only recently been challenged by such rulings as Roe v. Wade ... It has always been presumed that men should have unlimited sexual access to their wives.*⁵¹ As Susan Brownmiller maintains: *[I]f women are to be what we believe we are-equal partners-then intercourse must be construed as an act of mutual desire and not as wifely 'duty' enforced by the permissible threat of bodily harm or of economic sanctions.*⁵²

In India, 2/3rd of all married women claim to have been victims of marital rape (UNFPA, 2000), while one in every five men admitted to raping their wives (ICRW, 2011)! Most important, of course, is adjustment to the conjugal relationship. Marital rape, which is not accepted as a crime under Indian law, is however widespread. It is somewhat likely that many victims of marital rape are often unsuspecting children. With the development of feminist jurisprudence, the justifications to the marital rape exception on the basis that a wife's complaint cannot often be believed, and consequently, a women raped by her husband is to be treated differently from another women raped by a man who is not her spouse appear unreasonable. Such differentiation does not have a rational basis and violates Article 14 of the Constitution, which guarantees equal protection of the laws to both the sexes. Further, if fabrication is actually a major concern, then safeguards should be provided against it rather than not criminalizing marital rape. The phobia of frivolous litigation should not be an

⁵⁰ Russell's study of marital rape revealed that many wives who did not view themselves as having been raped perceived a "duty" to submit to their husband's desires, rendering them "unrapeable". DIANA E.H. RUSSELL, RAPE IN MARRIAGE X(rev. ed. Ind. Univ. Press 1990) (1982) at 58.

⁵¹R. Eskow , Review The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution Lisa, Stanford Law Review, Vol. 48, No. 3 (Feb., 1996), pp. 677-709, Published by: Stanford Law Review, citing, Sally Mariko Lorang, Femicide: The Politics of Woman Killing, 2 SAN DIEGO JUST. J. 565, 566 (1994) (book review) (discussing Jill Radford, Where Do We Go From Here?, in FEMICIDE: THE POLITICS OF WOMAN K ILLING 35 1 (Jill Radford& Diana E.H. Russell eds., 1992), URL: <http://www.jstor.org/stable/1229280> (Accessed on: 18/11/2014)

⁵² SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE 381 (1975).

obstacle in protecting to those trapped in abusive marital bonds, where the victims are degraded to the position of chattel. There is always apprehension that a law could be misused, but then, these laws still exist because the positives outweigh the threat of possible misuse. Marriage presupposes consent; but the said consent must enclose an individual's right over his/her body, irrespective of the gender. If non-consensual sex is considered a crime out of marriage, the same recognition must be given to non-consensual sex within a marriage. Ultimately, it is all about a person's basic human right, regardless of marital status. There is an urgent need to recognize the menace and to amend the existing provisions of the penal law to ensure the recognition of rape within marriages as sexual assault. The Indian society cannot continue to walk over the rights of the women in the guise of promoting social solidity and defending the sanctity of marriage.