

MARITAL RAPE: STRIPPING THE SANCTITY OF MARITAL RELATION AN INTERNATIONAL ANALYSIS

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ABSTRACT: Marital Rape is an important socio-legal concept which has been attracting the attention of the international community since eternity. The political debates and social discourses surrounding it have fuelled various discussions on feminism and the rights of women in a marriage. Such discussions are even extended to the sexual rights of a married woman and the denial of the same that has been happening due to the patriarchal mindset of the society. The concept of considering a woman as a property has been hailed and criticized time and again by jurists and courts.

Various municipal legislations are dedicated towards this crime and some international instruments also mention about it. However, the level of expected change in the society throughout the world, especially in countries where marital exception still exists, hasn't been seen. Thus, there is a demand for an international convention for the same. The same is analysed in this article.

Keywords: Marital Rape, Women Rights, Sexual Rights, Marriage, Marital Rights, women in marriage, United Nations, domestic violence, battered women

HYPOTHESIS

The hypothesis assumed by the authors is that the world needs an international convention and commensurate municipal legislations to penalize the offence of marital rape.

RESEARCH PROBLEM

Does the international community need to formulate a draft law for criminalizing marital rape in domestic jurisdictions without hurting the sanctity of marriage?

Introduction

Marriage is a sacred relationship signifying the togetherness of two people for the rest of their lives. Across cultures and religions, the relationship born out of sacramental marital vows is considered to be pious and pure. In some religions like Hinduism, the relationship is considered to be one which lasts beyond one lifetime. The verses of religious texts talk about marriage as a rite of utmost importance in human life.

Marriage is always about two persons and their lives. The families and off-springs are secondary parties. The primary and most important parties are the spouses who are expected to provide companionship to one another and support each other. While earlier, in patriarchal societies, the status of woman in a marital relationship was considered to be lower than that of the man, this isn't the scenario now. In the egalitarian civilizations, the work of a woman was restricted to being a homemaker and feeding the family while the man was expected to be the bread earner. However, these are the talks of a primitive societies when intellect and sense of rights wasn't developed.

Even in ancient times, various religious texts, including religious texts in Hinduism, give immense importance to women and consider them an important and integral part of the family and society. With changing times, modern ideas replaced archaic beliefs. The earlier deplorable condition of women in the society was replaced by the rights and opportunities which were conferred on women so that they could find an equal pedestal as men in society.

Over the years, the inalienable human and fundamental rights were extended to women. Rather, going a step ahead, various countries made provisions¹ for positive discrimination in favour of women for neutralizing culminative socio-economic, educational and political hardships that were faced by women in society.

Apart from these, various conventions² and laws have also been brought in force to protect women in households. After various cases of physical and psychological assault against women in marriages came to light, countries made efforts to protect such existing and prospective victims

¹ INDIA CONST. art 15, § cl. 3.

² United Nations General Assembly, Convention on Elimination of All Forms of Discrimination Against Women (CEDAW), United Nations (1979).

from abusive relationships. These laws included laws against dowry³, property rights of married women⁴, right to maintenance⁵, protection from domestic violence⁶ amongst others. However, these legislations, which were curated with utmost intelligence, leave out an important aspect of marital relationship.

Sexual intercourse is an integral part of marriage and has been considered by the society for thousands of years. Sexual intercourse between a married spouse is one of the pillars on which a marital relationship stands. Consummation is fundamental to a marriage⁷. While sexual relationship remains an innate pillar to marital bond, we need to consider its downside as well.

Rape is a heinous offence against men and women alike. However, the offence is widely committed against women in various countries. One of the reasons for this is comparatively less physical power with woman than man. It is an offence graver than murder as the woman who suffers dies a thousand hands while recollecting the incidence. Apart from tearing out the victim physically, the unfortunate and abominable act also leaves the soul and the conscience of the victim in shreds. Imprints are left on the mental health of the woman as she is stripped off her dignity in the worst possible manner.

While considering the marital relationship and the resultant sexual relation which gets a sanction from the society, we need to keep in mind the concept of rape or forced sexual relation between the spouses.

Before discussing marital rape, let us have a look at the definition of marriage given in sociology, theology and law.

³ Dowry Prohibition (1961) (India); Dowry Prohibition Act (1980) (Bangladesh); Social Practices (Reform) Act, (2033/1976) (Nepal).

⁴ Married Women's Property Act (1848) (United States of America); The Married Women's Property Act (1882) (United Kingdom); Married Women's Property Act (1874) (Pakistan); Married Women's Property Act (1874) (India).

⁵ Code of Hamurabi (1754 BC); Code of Justinian.

⁶ Protection of Women from Domestic Violence Act (2005) (India); Violence Against Women Act (1994) (United States of America); Domestic Violence, Crimes and Victims Act (2004) (United Kingdom); Family Law Act (1975) (Australia).

⁷ Hindu Marriage Act § 11 (1955) (India); Matrimonial Clauses Act § 12 (1973) (England and Wales); A v. J (Nullity) 1 FLR 110 (1989) (UK).

Marriage- meaning

The concept of marriage is described from different points of view since ages. These views include analytical and scientific views which are derived after the study of society. Others include religious definitions which are traced back to the religious texts and scriptures. Another branch of meanings is the legal definitions which derive recognition from Constitutions, parliaments and judiciary in some countries and are backed by the sanction of the monarch in others.

1.1. Sociology

Sociology is the study of the society and its elements. There have been various renowned sociologists like Emile Durkheim, Roscoe Pound and others whose detailed analysis and theories on society, law and justice have attracted attentions of jurists and social stakeholders.

Marriage is an indispensable part of the society. Aristotle had rightly said that man is a social animal. An individual who is unsocial naturally and not accidentally is either beneath our notice or more than human. Humans seek companionship in fellow humans and marriage ensures such companionship. Also, no society can exist without individuals. Thus, in order to ensure that humankind continues, procreation is important. Marriage is a socially sanctioned way to procreate.

Marriage can be conceptualized in three ways: as an institution, as a rite/ritual and as a process. As an institution, marriage consists of a set of patterned behaviours, expectations and relationships that are organized and endured over time. As a rite/ritual, it includes the ceremonies through which marital status is achieved and as a process, it is a phenomenon which is marked by gradual changes that lead to ultimate dissolution through separation, divorce or death⁸.

Marriage defines womanhood, manhood and adult status. It governs living arrangement and is also central in determining the division of labour and authority within the family. Historically, the status of wife and husband is one of the most important transitions in people's

⁸ Thakur, A.P. & Banerjee, A. , Encyclopaedia of Theoretical Sociology, 494 (Global Vision Publishing House, 2004).

lives. Marriage is the central element in defining economic well-being, physical health and mental health.⁹

In the above given definitions, the meaning of marriage revolves around man and women however, post the legalization of same-sex marriage and its recognition in various societies, these definitions are required to be viewed from a gender-neutral angle.

1.2.Theology

Theology refers to the study of religious faith and experiences. It can also be defined as the study of God and his relation with the world. The study of religion can be traced to the Greek and Roman civilizations in the western world. However, in the eastern parts of the globe, the study of religion wasn't restricted to Christianity. It spanned over Hinduism, Islam, Buddhism, Zoroastrianism and Judaism amongst other religious beliefs.

In Hinduism, the belief is that the primitive humankind were wanderers who wandered around in search of food, which they procured by hunting. They had no permanent residences and used to live under trees. It is also claimed that even those primitive humans indulged in sexual desires with any or every member of the opposite sex in their social group or other social group¹⁰. However, with the development of the society, restrictions were imposed on sexual relationships by social and spiritual leaders for the genesis of a disciplined society. The concept of marriage or vivah was brought into picture and the main aim behind it was to procure children¹¹. In order to canalize and give social recognition to the sexual-urge of humans, the concept of marital bond was developed¹². In Hinduism, marriage is one of the most important Samskaras or sacramental religious rites. Those who want to adopt a life of a Brahmachari or Sanyasi (saint) are not bound by these rites¹³.

According to Manu, every Hindu is enjoined to marry in order to enter the grihastha-ashram or the family life. He also mentions in his book, Manusmriti, that the religious and pious

⁹ Thorton, A., Marriage and Cohabitation, 4 (University of Chicago Press, London, 2007).

¹⁰ Nori Srinadha Venkata Somayajulu, Mana Vivaha Vyavastha, 3 (Kranthi Press, Madras, 1990).

¹¹ Nori Srinadha Venkata Somayajulu, Mana Vivaha Vyavastha, 5 (Kranthi Press, Madras, 1990).

¹² Id.

¹³ 14, John D.Mayne, Hindu Law & Usage, 125 (Bharat Law House, New Delhi, 1998).

acts done by a man won't be complete until and unless he is accompanied by his wife¹⁴. Vedas mention marriage as a union of "bones with bones, flesh with flesh and skin with skin, the husband and wife become as if they are one person."¹⁵

In Islam, marriage is regarded as a sacramental contract. An Arabic term "Nikah" is used to define marriage in Islam which literally means "contract". Quran specifically mentions marriage as a strong agreement. One of the other reasons because of which it is considered as a contract is that it fulfils all the essentials of a civil contract. The elements of competency, offer and acceptance, consideration and provision in case of breach of contract make it stand at par with a contract¹⁶.

Justice Mahmood has also stated that Muslim marriage is purely a civil contract and though it is solemnized with the recitation of certain verses of Quran, no such peculiar service has been prescribed under the Muhammadan law for the occasion, which steals its possibly sacramental nature¹⁷. However, it is not merely a contract. It is a sacred covenant as well. It has been equated with the act of Ibadat or worship since it keeps the mankind free from filth and contamination¹⁸. According to Dr. Jang, "marriage though essentially a contract, is also a devotional act; its objects are rights of enjoyment and procreation of children and regulation of social life in the interest of society¹⁹".

Nikah has been defined as the most pious acts in Muslim faith. Radd-ul-Mukhtar states that no act of devotion has remained prescribed on believers of Islam since the time of Adam except Nikah (marriage) and Imaan (faith)²⁰.

Marriage in Islamic texts is the union of sexes with the aim of conferring status of man and wife to the spouses and legitimacy to children born out of such a wedlock²¹. According to Tyabji, "marriage brings about a relation based on and arising from a permanent contract for

¹⁴ 2, Dr. Paras Diwan, Hindu Law, 532 (Orient Publishing Company, Allahabad, 2005).

¹⁵ Id.

¹⁶ Dr R.K. Sinha, Muslim Law, 41 (5th ed., 2003).

¹⁷ Abdul Qadir v. Salima, 8 All 149 (1886).

¹⁸ Dr R.K. Sinha, Muslim Law, 108 (5th ed. 2003).

¹⁹ Aquil Ahmad, Mohammedan Law, 108 (21st ed. 2004).

²⁰ Dr Mohammad Nazmi, Mohammadan Law, 32 (2nd ed. 2008).

²¹ Dr. Nishi Purohit, The Principles of Mohammedan Law, 105 (2nd ed. 1998).

intercourse and procreation of children between a man and a woman, who are referred to as parties to one marriage and who after being married, become husband and wife”.

In Christianity, marriage is solemnized on the basis of rules mentioned in the Bible. In the pre-Christian Roman law, marriage and divorce were private acts. No formalities pertaining to marriage or frustration of marriage were necessary. However, post the advent of Christianity, a new perspective was given to marital bond.

Canon law says that marriage makes man and wife as one flesh by the act of God. According to Saint Paul, marriage is a holy tie which is sacramental and indissoluble union²². In Christianity, marriage is a lifelong faith for which a man leaves his father and mother and joins his wife, who are then united into one²³. Love and relationships are a central theme of Bible. St. Augustine says that “our hearts are restless until we find our rest in Thee”. According to the Episcopal Book of Common Prayer (1979), “Christian marriage is a solemn and public covenant between the man and woman in the presence of God²⁴”.

God has sketched his basic idea of marriage in the Genesis 2:24 whereby he states that Adam was made out of ashes and Eve was made out of Adam’s flesh and blood. Thus, Adam and Eve, who signify man and wife, are made of the same flesh. In Malachi 2:14, marriage has been defined as a holy covenant before God. However, the idea doesn’t limit here.

In Christianity, the idea of marriage runs along the lines of union and divine relationship between Christ and his bride, Church²⁵. The bible also mentions the purpose of marriage as procreation²⁶. It is mentioned that “Husbands, in the same way be considerate as you live with your wives, and treat them with respect as the weaker partner and as heirs with you of the gracious gift of life, so that nothing will hinder your prayers²⁷.”

²² Kande Prasada Rao, The Law Relating To Marriages Of Christians In India (Asia Law House, Hyderabad, 1991).

²³ Genesis 2:24, ESV.

²⁴ The Episcopal Church, The Book of Common Prayer, 422 (Episcopal Church, 2007).

²⁵ Genesis 1:26-27.

²⁶ Genesis 1:28.

²⁷ 1 Peter 3:7.

In Mathew 19:9, it is mentioned that marriage once completed is indissoluble, except on high grounds of sexual immorality. If done so, it would be considered as adultery in the eyes of the lord and the society.

Apart from these three, there are various other religions and cultures who give high social and sacramental importance to marital relationships. While some religions and cultures are of the view that marriage can be frustrated in some instances, others are adamant on the view of indissolubility.

However, two things are common in most beliefs. First is the motive with which marriage is made. All cultures and religions are of the view that marriage provides legitimacy to sexual relations between man and wife and to the off-springs born thereof.

The second similarity is pertaining to the status of the women. Being the equal participant in marriage, the religions are of the view that women should be protected by men and should be given high regard and respect as spouse. Unfortunately, this doesn't seem to be the case when women are required to jeopardise their dignity and consent for participation in sexual relationship, post marriage.

1.3. Legal

In the words of Austin O'Malley, the three most important events of life are equally devoid of reason: life, marriage and death.

Marriage isn't merely a legal or a social concept. It has also derived legislative sanction through various laws that are prevalent in the various parts of the world. In one of the cases, the Supreme Court of United States had observed that marriage is one of the basic civil rights of man, fundamental to our existence and survival²⁸. In another case, the court had noted that the right to marry is part of the fundamental right of privacy implicit in the fourteenth amendment's due process clause²⁹.

The US Supreme Court has defined marriage as "an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society,

²⁸ Loving v. Virginia, 388 U.S. 1, 12 (1967).

²⁹ Zablocki v. Redhail, 434 U.S. 374, 384 (1978).

without which there would be neither civilization nor progress.³⁰” In *Baker v. State*³¹, the court had said that the marriage laws transform a private agreement into a source of significant public benefits and protection.

The Defence of Marriage Act 1996’s Section 3 defined marriage as a legal union between one man and one woman only. Due to the lack of recognition to same-sex marriages, the US Supreme Court declared the definition unconstitutional³².

In the common law, the earliest and classical legal definition of marriage can be found in the case of *Hyde v. Hyde and Woodmansee*³³. In this case, Sir James Wilde (Lord Penzance) said that, “I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.”³⁴

Apart from these, there are various other definitions of marriage that have been provided in various jurisdictions. The definitions vary from one another on the basis of cultural differences and religious requirements. However, in most legislations, consent of the spouses has been given great importance. Despite the disparities in age of consent, child marriages and unconsented marriages are avoided and provisions to annul them have also been provided.

2. Marital rape- definition and types

Since we have taken a look at the various definitions, let us divert our attention towards the elephant in the room. The topic of discussion of the paper is marital rape. To understand what it exactly refers to, we need to consider the definitions given of the same in various legislations and judgements.

Marital rape is an offence which shatters the foundation of a marital relationship. It extinguishes any trust and mutual respect that should and may have existed between spouses. Marital rape is also referred as spousal rape in certain jurisdictions.

³⁰ *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

³¹ *Baker v. State*, 744 A.2d 864, 883 (1999).

³² *United States v. Windsor*, 570 US 744 (2013).

³³ *Hyde v. Hyde and Woodmansee*, L.R. 1 P. & D. 130 (1886).

³⁴ *Id.*

2.2. Definitions

In the historical judgement, the view had been that woman, while consenting to marriage, consents to the desire of sexual intercourse of a man³⁵. She is expected to succumb to it as when he desires. It was also mentioned by Lord Hale, in his contractual theory. However, the archaic ideas have been washed over the years by modern theories.

Californian Penal Code defines 'spousal rape' as "Rape of a person who is the spouse of the perpetrator...an act of sexual intercourse accomplished under any of the following circumstances:

(1) Where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.

(2) Where a person is prevented from resisting by any intoxicating or anaesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known, by the accused.

(3) Where a person is at the time unconscious of the nature of the act, and this is known to the accused. As used in this paragraph, "unconscious of the nature of the act" means incapable of resisting because the victim meets one of the following conditions:

(A) Was unconscious or asleep.

(B) Was not aware, knowing, perceiving, or cognizant that the act occurred.

(C) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact.

(4) Where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat. As used in this paragraph, "threatening to retaliate" means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death.

(5) Where the act is accomplished against the victim's will by threatening to use the authority of a public official to incarcerate, arrest, or deport the victim or another, and the victim has a reasonable belief that the perpetrator is a public official. As used in this paragraph, "public official" means a person employed by a governmental agency who has the authority, as part of

³⁵ R. v. Clarke, 2 All E.R. 448, 448 (1949).

that position, to incarcerate, arrest, or deport another. The perpetrator does not actually have to be a public official.”

The European Council defines marital rape as, “non-consensual vaginal, anal or oral penetration of the body of another person where the penetration is of a sexual nature, with any bodily part or with an object, as well as to any other non-consensual acts of a sexual nature, by a spouse or ex-spouse or by a former or current partner with whom a victim of rape is or has been living in a partnership recognised by the national law.”³⁶

In *Trammel v. United States*³⁷, the Court had decided that “[n]o where in the common-law world-[or] in any modern society-is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being.” This pronouncement reiterates the right of dignity and identity of a married woman, which includes right against sexual exploitation.

2.3. Types

The marital rape has been divided into various types. The basic kinds in which this heinous offence has been segregated into are: force-only rapes, battering rapes and obsessive rapes.

- i. **Force-Only Rapes:** In this type of rape, the husband coerces the wife using threats and some degree of physical strength and violence. In this, only necessary force is used by the husband to make his wife indulge in sexual activities unwillingly. The violence maybe limited to verbal clashes or may even involve physical force. It is done by the man to hold down the woman or make her submit to his demands. Bettering the wife isn’t the characteristic here.
- ii. **Battering Rapes:** Battering rapes refer to those whereby extreme physical force is used on the woman. The wife is beaten and raped by the husband. The woman is both, sexually and physically assaulted in this kind of rape. It may also include physiological,

³⁶ Council of Europe, *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence and its Explanatory Memorandum*, Council of Europe Treaty Series No 210, (2011).

³⁷ *Trammel v. United States*, 455 U.S. 40 (1980).

economic, verbal and emotional abuse. Most cases of marital rape fall under this category.

iii. Obsessive Rape: It is also referred as ‘sadistic rape’. In this kind of marital sexual abuse, the abuser gets aroused by violence. The husband is obsessed with sex and the sexual intercourse involves torture and/or perverse acts which may generally result in physical violence³⁸.

Finkelhor and Yllo in their book ‘Men Who Rape’ also discuss two other types of marital rapes:-

- i. Anger Rapes:** Such violent sexual abuses occur to express hostility against women, to retaliate against them or to harm them. The prime aim of such act is to degrade the woman and she may be forced to indulge in degrading sexual acts like sodomy or bestiality.
- ii. Power Rapes:** This form of rape is committed with the aim of asserting dominance and control over the woman. Though the consent of the woman is absent however, the purpose isn’t to harm the female. The goal is to mask the inadequacy of the male spouse and impose a sexual conquest over the wife which may not be necessary in a happy and normal marital relationship. With increased retaliation and arguments from women, these rapes increase.

3. Implied consent and contract theory

When discussing the gruesome offence of marital rape, consent in sexual relations between spouses is what we are dealing with. All sexual offences are constituted on the non-availability of consent or qualifying consent (in case of minors or persons of unsound mind). Consent is the constituting element of the offence; thus, we need to worry ourselves with the implied consent theory.

British jurist Lord Mathew Hale had propounded the theory of implied consent and marital contract. His famous quote said that the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given up

³⁸ Finkelhor & Yllo, Men Who Rape (1985).

herself in this kind unto her husband, which she cannot retract.³⁹ This theory was also seconded by John Federick in his book, whereby he said that no man can be claimed to be guilty of the rape of his wife⁴⁰.

Hale also advocated that a marriage is a contract between the man and the wife which comes into force from the day of the marriage⁴¹. According to him, the terms of the contract include establishment of sexual relations by the parties of the contract, i.e. the spouses. While entering into the contract, which is the incidence of the conclusion of marriage ceremony, the wife gives an implied and irrevocable consent to the husband for sexual relations⁴². Thus, rape can never occur in a marriage because the consent is always impliedly present in such a relation.

Unfortunately, this is the most widely given rationale for justifying marital rape exception. This theory was, thus, critically analysed in various case laws and juristic opinions thereafter⁴³. The theory proposed by Hale is a rigid compartmentalization of the consent of married woman as her nemesis and characterizes woman as a property.

Though it dilutes the sanctity of marriage to a mere contract, contrary to the Christian beliefs and the ideals of the British crown, the theory was supported because of its negative momentum towards the criminalization on marital rape.

However, it was successful in sparking debates on important matters which led to a change in the mindset of people, forwarding the early ideas of criminalization of marital rape. A series of British case laws critically condemned the theory proposed by Hale, calling it unrealistic and impractical in the present times. This paved the way for the criminalization of marital rape in United Kingdom.

However, Hale's theory was widely read and regarded and many jurisdictions based their ideas and legislations on either the basis of his theory or on the basis of the criticism of his theory.

³⁹ 1, M. Hale, *The History of the Pleas of Crown*, 629 (S. Emlyn ed., 1778).

⁴⁰ John Federick, *Pleading and Evidence in Criminal Cases* (1822).

⁴¹ Mitra, "... For She Has no Right of Power to Refuse Her Consent.", 1979 CRIM. L. REV. 561.

⁴² Backhouse & Schoenroth, *A Comparative Study of Canadian and American Rape Law*, 7 CANADA-U.S. L.J. 173, 174 (1984).

⁴³ Freeman, "But If You Can't Rape Your Wife Whom I Can You Rape?". *The Marital Rape Exemption Re-examined*, 15 FAM. L.Q. 1, 9 (1981).

4. Marital rape and domestic violence

Gender-based violence has been defined by Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) committee in its General Recommendation 19 on Violence Against Women (VAW) as “violence that is disproportionately directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.” CEDAW committee argues that state parties are responsible not only to pass and enforce legislations but also to change attitudes and social dynamics that lead to violence against women.

The Declaration on the Elimination of Violence Against Women (DEVAW) defines gender-based violence, as "any act...that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life". The Declaration identifies three areas in which violence commonly takes place: in the family; within the general community; and perpetrated or condoned by the State. It is the duty of the state to prohibit violence against women whether committed by public or private actors in different contexts - within the family, at the community and at the State level.

The United Nations also provides a definition for violence against women which says that "any act of gender-based violence that results in, or is likely to result in, physical, sexual, or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life⁴⁴." This definition explicitly includes the angle of sexual suffering which we are discussing in this article.

International organizations and domestic laws have been making efforts to curb domestic violence. About 144 countries have legislations for domestic violence but they are not always

⁴⁴ United National General Assembly, United Nations. Declaration on the Elimination of Violence Against Women, United Nations (1993).

compliant to international standards, neither the recommendations are always implemented⁴⁵. Thus, despite laws, the statistics narrate a horrifying story.

It is estimated that about 35 percent women face physical and/or sexual harassment on the hands an intimate partner or non-partner. This doesn't include cases of sexual harassment. However, some domestic statistics claim that up to 70 percent women have experienced sexual and/or physical violence from intimate partner. Such women are reportedly at a higher risk of depression, abortion, HIV compared to other women who haven't had such experiences⁴⁶.

In majority of the countries, adolescent women are at an exposed risk of forced sex from current or former partners, husbands or boyfriends. Based on the data of 30 countries, unfortunately, only one percent such women sought professional help⁴⁷.

According to a data by the National Coalition Against Domestic Violence (NCADV), between 10 to 14 percent of married women experience marital rape in United States. 1 in 4 women in United States experience severe physical violence by their partners, sexual violence by partners, and/or stalking by intimate partners with long-lasting impacts such as injury, fearfulness, post-traumatic stress disorder, use of victim services, contraction of sexually transmitted diseases, etc⁴⁸

Considering that marital rape originates due to the marital and domestic relationship, it contributes heavily to the cases of domestic violence. However, treating it under the guise of domestic violence while ruling out the possibility of separate legislations and international standard won't be justified. The offence of marital rape strips the dignity and right to life of a woman. Just like charges of hurt or grievous hurt cannot be equated to that of rape or sexual violence, in the same manner, the offence of domestic violence cannot be kept at par with marital rape.

⁴⁵ World Bank Group, Women, Business and the Law 2018, World Bank Group (2018). .

⁴⁶ South African Medical Research Council, Department of Reproductive Health and Research, London School of Hygiene and Tropical Medicine, World Health Organization (2013).

⁴⁷ United Nations Children's Fund, A Familiar Face: Violence In The Lives Of Children And Adolescents, UNICEF, 73-82 (2017).

⁴⁸ Jennifer L. Truman & Rachel E. Morgan, Special Report- Nonfatal Domestic Violence 2003-2012, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics (2014).

Sexual violence, even in the marital relationship, leaves physical and psychological scars on the conscience of the victim which hinders her to lead her life in a normal manner, like any other human being. Physical violence may cause grievous and long-lasting effects, but snatching away the right to consent is wrong on another level of moral compass which shreds the dignity of the woman and batters her to the extent of trauma and psychological disorders.

5. International legal status

Marital rape is a greater evil than rape. This is because rape or other forms of sexual abuse are generally inflicted by stranger however, the offence of marital rape emerges from the most pious relationship in human life which is founded on immense trust and belief. This belief is shattered forever in case of intimate sexual abuse and the resultant fear cannot be overcome for an eternity. A set of researchers believe that “knowing that the perpetrator and the victim are spouses was shown to alter beliefs about both parties involved in conflictual interactions.”⁴⁹

The United Nations Task Force on Violence Against Women and United Nations Secretary-General released a report in 2006 which suggests that most common form of violence faced by the women around the world is caused by their intimate partners⁵⁰. Another research states that over 40 percent of women who face assaults were forced into sex by their male partners at one time or another⁵¹.

However, this isn't the worst part. Various men do not refrain from admitting their crime. Rather, they take pride in claiming that they have raped their wives, ex-wives or girlfriends. This was found in a study which was conducted in South Africa whereby 14.3 percent (241 out of 1681) men admitted without any shame that they raped their spouses and partners⁵². Another research which took place in Bangladesh revealed that 10 percent urban men and 15 percent rural

⁴⁹ Jennifer Langhinrichsen-Rohling et al., Attributions About Perpetrators and Victims of Interpersonal Abuse Results from an Analogue Study, 19 J. Interpersonal Violence, 484, 493 (2004).

⁵⁰ U.N. Secretary-General, Ending Violence Against Women: From Words to Action, United Nations, 43 (2006).

⁵¹ Jacquelyn C. Campbell & Peggy Alford, The Dark Consequences of Marital Rape, 89 AM. J. NURSING, 946, 946 (1989).

⁵² Rachel Jewkes et al., Gender Inequitable Masculinity and Sexual Entitlement in Rape Perpetration South Africa: Findings of a Cross-Sectional Study, PLOS ONE, 5 (2011).

men admitted of initiating forced sex with their spouses⁵³. Similar story has also been revealed about India where sexual violence exists in most marriages⁵⁴.

The statistics show that there is an important need of laws on marital rape. Let us take a look at the conditions prevailing in various countries.

5.2. Countries Having Laws on Marital Rape

Marital Rape has been recognized as an offence and criminalized in about 150 countries. These countries include USA, UK, Israel, Poland, Italy, Albania etc.

5.2.1. United States of America

Marital rape has been criminalized in 50 states of United States of America however, this may not be enough. Considerable number of states continue to retain marital immunity in one manner or another. The presumption of wife as husband's chattel still continues and it is testified by the spousal exemption given under the rape laws. While marital rape is illegal in several states, it remains semi-legal in some. Even the Model Penal Code provides a restricted approach towards marital rape in United States which states that a man who has sexual intercourse with a female who is not his wife can be prosecuted for rape⁵⁵.

The reform in the area of marital rape commenced in the United States as early as in 1970s when the marital rape charges were brought into picture only when spouses lived separately. The case of *Oregon v. Rideout*⁵⁶ is a legal milestone whereby charges of marital rape were imposed on a man for the first time, who lived with his wife. This is when the public, judicial and legislative discussion pertaining to marital rape accelerated. In the 1984 case of *People v. Liberta*⁵⁷, the court had observed that a marriage license doesn't empower the husband to forcibly rape his wife with impunity. By 1993, marital rape exemptions were either withdrawn or judicially declared unconstitutional in all states of United States. Marital rape and non-marital rape were equated

⁵³ Ruchira Tabassum Naved et al., *Men's Attitudes and Practices Regarding Gender and Violence Against Women in Bangladesh*, Partners4Prevention (2011).

⁵⁴ Rachel Jewkes, *Sexual Violence Research Initiative, Rape Perpetration: A Review*, Sexual Violence Research Initiative, 6 (2012).

⁵⁵ Model Penal Code § 213.6 (Proposed Official Draft 1962).

⁵⁶ *Oregon v. Rideout*, 5 FAM. L. REP. (BNA) 2164 (1978).

⁵⁷ *People v. Liberta*, 90 A.D.2d 681 (N.Y. App. Div.: 1982).

only in 17 states. Certain level of exemptions, based on cohabitation and degree of violence, continued in various states which made it difficult to implement the consequences of marital rape effectively.

The debate on repealing marital exemptions still continues and this, though, maybe a good sign but considering that the evil still exists in USA in one manner or another, the married women are still at a threat within the four walls of their homes.

5.2.2. United Kingdom

United Kingdom follows the rules of common law in civil and criminal matters. Constitution of UK is not codified which gives it immense flexibility to change laws and introduce reforms.

In 1736, Sir Mathew Hale declared in the History of Pleas of the Crown⁵⁸ that no man can be accused of the rape of his wife as his wife has married him and has consented to sexual relations. This fact was reiterated in the book, Pleading and Evidence in Criminal Cases⁵⁹ by barrister John Frederick in 1822.

Hale's theory was scrutinized in R. v. Clarence⁶⁰ whereby the court deduced that rape can happen in a marriage when wife refuses to sexual intercourse and husband uses force or violence against her.

R. v. Clarke⁶¹ was the first case which dealt with the offence of marital rape directly. The court, in this case, allowed charging the husband with the sections of raping his wife who lived separately from him. Then, in the 1992 case of Regina v. R.⁶², the House of Lords ruled that a woman cannot be expected to submit to her husband's sexual demands irrevocably, in all circumstances. The illegality of marital rape was explicitly laid out in the form of a legislation in the Sexual Offences Act, 2003. Eventually, the idea of a woman as a man's property was chattered.

⁵⁸ M. Hale, *The History of the Pleas of Crown*, 629 (1 ed. 1778).

⁵⁹ John Frederick, *Pleading and Evidence in Criminal Cases* (1822).

⁶⁰ R. v. Clarence, 22 Q.B.D. 57 (1889).

⁶¹ R. v. Clarke, 2 All E.R. 448 (1949).

⁶² Regina v. R., 1 AC 599 (1992).

However, it still remains an ideal on paper. The illegalization of marital rape doesn't seem to have made a long-lasting impact on the mentality of men who still consider women as their property. According to a recent and alarming study by YouGov⁶³, various men still do not consider forced sex in marriage as rape. These men include third of over 65s and 16 percent men aged between 16 to 24. Consolidating the data, it can be said that one out of four British men believe that marital forced sex doesn't constitute rape.

5.2.3. Israel

Israel is a country which has ratified three out of four international conventions concerning women⁶⁴. While Israel is also devoid of a written constitution, basic written statutes guide the legal framework. This leaves ample scope for amendments and reforms which can be speedily applied.

It is pertinent to mention here that marital rape is forbidden in Jewish law⁶⁵ and about 74 percent people in Israel follow Judaism. In the case of Cohen v. The State of Israel⁶⁶ as well, the fact that marital rape is incoherent to the religion of Jews was clarified by the court. It is a landmark case in Israel. In the case, it was also mentioned that 'unlawful sexual intercourse' includes marital rape⁶⁷. It did away with the common law marital exemption and gave birth to litigation on the subject of marital rape in Israel.

In 1991, Israel came up with the Law for Protection of Family Violence. One of the many aims of the legislation was to protect married women from physical or sexual abuse by the spouse or any member of the family. This law has been a strong backbone in preventing marital sexual abuse in Israeli households.

⁶³ End Violence Against Women, Major New YouGov Survey for EVAW: Many People Still Unclear What Rape Is, End Violence Against Women (26 July, 2020, 15:03 PM), <https://www.endviolenceagainstwomen.org.uk/major-new-survey-many-still-unclear-what-rape-is/>.

⁶⁴ Canada: Immigration and Refugee Board of Canada, Human Rights Brief: Violence Against Women in Israel, RefWorld (26 July, 2020, 16:38 PM), <https://www.refworld.org/docid/3ae6a81218.html>.

⁶⁵ Yehudis Fletcher, Marital Rape Is Expressly Forbidden In Jewish Law. However..., Jewish News (27 July 2020, 12:59 PM), <https://blogs.timesofisrael.com/shameful-denial-and-defence-of-marital-rape-must-end/>.

⁶⁶ Criminal Appeal 91/80, 35 (3) PD (1980) 281.

⁶⁷ Vasanthi Venkatesh, 'Pluralistic Legal Systems and Marital Rape: Cross-National Considerations', 89-136, (2017) .

5.2.4. Poland

The 1932 Criminal Code of Poland had made it amply clear that a husband cannot be prosecuted for the rape of his wife. At the time, it was the traditional notion in most of the European countries. After the second world war, the possibility of illegalization of marital rape was seen by many feminists⁶⁸.

A welcoming change was witnessed in the 1969 Criminal Code whereby the offence of rape was characterized as an offence against freedom of an individual, following the footsteps of the socialist Soviet Union. This step altered the interpretation of rape and suggested that a woman can be raped by her husband. It also maintained that married women have equal right to retain their sexual freedom as that of an unmarried woman⁶⁹. The same idea was also transported to the Criminal Code of 1997 which is now the binding law.

Though the approach of the Polish law-makers in treating marital rape as same as any other rape is appreciable, it hasn't attracted much interest from legal scholars. This is because consummation of marriage by husband and wife still remains an important part of Polish marriage and has received the validation of law as well.

The fact here remains that mere verbal reluctance without committing any act to prevent sleeping with husband and no use of physical force or illegal threats on part of the husband doesn't constitute rape⁷⁰. A woman can seek justice against marital rape only if the husband has raped her with utmost cruelty or she was made to sleep with someone else by her husband, without her consent.

Also, due to lack of special legislation for the criminalization of marital rape, the spousal relationship may affect the court's judgement. Same is the case in France and Italy. Despite existence of law, women refrain from initiating criminal proceedings in matters of marital rape which still remains a drawback⁷¹.

⁶⁸ H. Rajzman, *Nierząd Między Małżonkami, Państwo I Prawo*, 94–95 (1st ed. 1948).

⁶⁹ Polish Criminal Code § 197 (1997).

⁷⁰ *Id.*

⁷¹ A. Michalska-Warias, *Zgwałcenie W Małżeństwie. Studium Prawnokarne I Kryminologiczne* (2016).

5.3. Countries Refusing to Treat Marital Rape as a Crime

In the words of John Stuart Mill, marital rape represents surrender of dignity by woman, which thereby lowers her standard below a slave⁷². In the landmark case of *The Forum for Women, Law, and Development v. His Majesty's Government, Ministry of Law, Justice and Parliamentary Affairs*⁷³, the Supreme Court of Nepal has said that a married woman is not a slave and she also has human rights. The UDHR⁷⁴, in its Article 16, explicitly states that a man and a woman in marriage are equal. Even International Convention on Civil and Political Rights in Article 23(4) reaffirms the principle of equal participation in marriage. It is not the case in reality.

Around the globe, there are only a few countries who have not expressly or impliedly criminalized marital rape. These countries include India, Egypt, Sri Lanka and Nigeria. While the criminalization hasn't happened yet, the debate for bringing this offence under the purview of law has continued for a substantial time.

5.3.1. India

Rape is derived from the Latin term 'rapio' meaning 'to seize'. While India has criminalized rape under Section 375, the judicial definition of 'rape' has been given in the case of *Bhupinder Sharma v. State of Himachal Pradesh*. In this case, the court had observed that rape refers to ravishment of woman against her will or without consent or with her consent, where such consent is obtained by force, fear or fraud⁷⁵. Considering the heinous nature of the crime and the grave consequences that follow, the court has characterized it as 'a deathless shame and the gravest crime against human dignity'⁷⁶.

In the chairmanship of Justice J.S. Verma, a committee had recommended various changes to the rape law in India. Some of them were included through the Criminal Amendment Act of 2013. However, despite the recent advancement, marital exception still remains.

⁷² Mill, J.S., *The Subjection of Women*. 33 (1988).

⁷³ , Writ No. 55 of the year 2058 BS (2001-2002), The Supreme Court, Special Bench, Nepal.

⁷⁴ United Nations General Assembly, *The Universal Declaration of Human Rights – UDHR*, United Nations (1948).

⁷⁵ *Bhupinder Sharma v. State of Himachal Pradesh* AIR 2003 SC 4684, (2003) 8 SCC 551.

⁷⁶ *Bodhisattwa Gautam v. Subhra Chakraborty* AIR 1996 SC 922.

According to a data, approximately 10 percent to 14 percent married women are subjected to sexual abuse within marriage⁷⁷.

Marital rape is punishable in India only if the wife is below 15 years of age or when the spouses are judicially separated. The limit of 15 years was reconsidered and raised to 18 years by the judiciary⁷⁸.

The first case whereby the marital exception was scrutinized was in *Queen Empress v. Haree Mythee*⁷⁹ whereby the exception was upheld. In the case of *Sree Kumar v Pearly Karun*, the exception was upheld even when the parties were undergoing a dispute on divorce.⁸⁰ The 172nd Law Commission Report suggested the Government of India to repeal the marital exemption provided under Section 375(2) of Indian Penal Code. There are several judicial pronouncements whereby the sexual privacy of a woman was recognized and granted immense importance⁸¹. However, the pronouncements were not pertaining to married women.

A ray of hope was seen when the Gujarat High Court said that the concept of implied concept should be dropped in marriage⁸². Thereafter, Member of Parliament, Shashi Tharoor presented 'The Women's Sexual, Reproductive and Menstrual Rights Bill, 2018'. However, in *Anuja Kapur v. Union of India Through Secretary*⁸³, the court had claimed that they were more concerned with interpretation of laws than drafting of legislations.

Certain litigations are still pending before the court on this matter. However, judicial delay and medico-evidentiary loopholes are the reasons because of which the criminalization of marital rape is still at a halt. Also, battered woman syndrome is not recognized in India⁸⁴. Considering the large number of arranged marriages which are concluded in India, criminalization of marital rape is necessary in India.

⁷⁷ Diana. E. H. Russell, *Rape in Marriage*, (1990).

⁷⁸ **Independent Thought v. Union of India and Another** (2017) 10 SCC 800.

⁷⁹ *Queen Empress v. Haree Mythee*, (1891) ILR 18 Cal. 49.

⁸⁰ *Sree Kumar v. Pearly Karun*, 1999 (2) ALT Cri 77.

⁸¹ *State of Maharashtra v. Madhkar Narayan*, AIR 1991 SC 207.

⁸² *Nimeshbhai Bharat Bhai Desai v. State of Gujarat*, [2018 SCC OnLine Guj 732](#).

⁸³ *Anuja Kapur v. Union of India Through Secretary*, MANU/SCOR/19643/2019.

⁸⁴ *Manju Lakra v. State of Assam*, 2013 SCC OnLine Gau 207; (2013) 4 GLT 333.

5.3.2. Sri Lanka

Sri Lankan law provides for marital immunity in cases whereby the husband and the wife co-habit. According to Section 363(a) of the Penal Code of Sri Lanka, a man is said to have raped a woman when he establishes sexual relations with her without her consent. When such a woman is his wife and the spouses are judicially separated, even then the offence of rape is constituted. Thus, only de jure separation is given any value under the code.

In the 2014 Report of the Leader of Opposition's Commission on the Prevention of Violence Against Women and Girl Child, it was revealed that the amendment made to the Penal Code of Sri Lanka in 1995 had proposed to remove marital immunity however, after strong opposition from the Parliamentarians, the idea was sacked⁸⁵.

Though Sri Lanka is a signatory to CEDAW, which emphasises on making laws on domestic and sexual abuse, Sri Lanka has taken the advantage of the marital exception provided in Indian Penal Code to justify the exception mentioned in their code.

Though there have been uproars for criminalizing marital rape, the low number of reporting is another aspect which need to be kept in mind. The legislative and judicial reluctance is causing women to believe that marital rape is not rape, rather a marital duty, thus, reducing reporting and washing away any attempts made by the civil societies to criminalize the offence.

5.3.3. Botswana

Domestic Violence in Botswana is extremely widespread and is mostly resulted by increased female autonomy and changing socio-economic dynamics in gender roles⁸⁶. The Botswana Penal Code neither defines nor penalizes the act of domestic violence however, the Domestic Act provides for the same. However, the same is overshadowed by the customary and rural practices which prescribe women to be chastised by the husbands. Thus, marital rape is not criminalized.

⁸⁵ GBV Forum, Report of the Leader of Opposition's Commission on the Prevention of Violence against Women and the Girl Child (2014), Sri Lanka, GBV Forum (27th July, 2020, 10:46 AM) <http://gbvforum.lk/r-library/document/Report%20of%20the%20Leader.pdf>.

⁸⁶ 18, Mookodi, G., The Dynamics of Domestic Violence Against Women in Botswana. Pula: Botswana Journal of African Studies, 1-64 (2004).

Though provisions have been made to remove the victim woman from the house, no rehabilitation efforts or shelter has been provided for. The Domestic Violence Law does not characterize the offence of marital rape and refuses to criminalize it. Thus, the law is ineffective to combat violence against married women and fails to protect the rights of women⁸⁷. The judiciary has also showed little to no inclination towards taking steps on protecting women in marriage against sexual abuse.

The lack of protective provisions snatches away any right to consent that naturally and fundamentally exists in a woman, irrespective of her marital status.

6. Law on marital rape and sanctity of marriage

Marital Rape is an offence which is of the utmost gravity. The offence doesn't affect a single life. It affects the dynamics of families and the harmful consequences of the same may be reflected in the upbringing of the children born out of such socially-sanctioned non-consensual relationships.

The 167th Parliamentary Standing Committee Report on Home Affairs on Criminal Law (Amendment) Bill of 2012 of India warns against the criminalization of marital rape. The committee anarchically observes that the family system would be put under stress, invoking greater injustice which is the reason why a marital exception shouldn't be touched.

It is the belief of the majority of the Trinidadian parliament as well that judicial or legislative intervention in the matters pertaining to marital rape will adversely affect marital privacy and the so-called notion of the sanctity of marriage⁸⁸.

However, amidst the debate of preserving a social fiction which has already been destroyed beyond repair, we forget to have a fruitful discussion over the rights of an individual.

⁸⁷ United Nations Human Rights Commission, The UN Refugee Agency, Botswana- Domestic Violence Including, Legislation, State Protection, Recourse and Services, RefWorld, (27th July 2020, 12:15 PM) www.refworld.org/docid/4dbe8bc52.html.

⁸⁸ Tina Johnson, The Impact of Women's Consciousness on the History of the Present, 17 SOC. JUST. 131 (Summer 1990).

Man and woman, both are at the equal pedestal in a marital setup⁸⁹ however, physical power along with legal preservation gives the man a higher edge.

Family values are of great importance in every society and culture. Because of the same, various religions used to look down on the concepts of divorce and separation. However, over the years, these ideas were replaced by modern and progressive theories which talked about equal rights of exit from marriage to men and women. Women and men, both got rights to have a say in the dissolution of marriage and various grounds were provided for the same.

Also, when we discuss the sanctity of marriage, it is important to address that trust and mutual dependence is an important pillar of the institution of marriage. While considering the sacrosanct character of marriage, we cannot rule out the damage that has already been caused by decades of patriarchal regressions and anarchic thoughts.

The advent and propagation of feminism were based on the years of torture that women had to endure at the hands of the patriarchal ideologies. The idea behind it was to bring about a significant and positive change in society which can create the right place for women in society. It was to put women in the place which they deserved but were kept away from for years. This further brought the attention of eminent jurists, the international community, municipal legislators and judiciary towards the crumbling state of women in the then society.

However, despite conventions and laws, much change hasn't been witnessed in marital setup. The institution of marriage was left out of the realm of rape in various countries in the name of the sanctity of marriage. However, it is important to contemplate here that the sanctity of marriage was run down the day when marriage became a tool to control and chastise women and not for the companionship of two individuals.

Corporal punishments⁹⁰ and physical abuse isn't a new element to abusive marital relations. And it is pertinent to note here that corporal punishments imposed by husbands over wives were legal under the common law. Such notions are upheld by some Commonwealth countries, one of which is the Caribbean government.

⁸⁹ Joseph Shine v. Union of India, 2018 SCC OnLine SC 1676.

⁹⁰ Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1389 (2000).

Such immunities, including the marital immunity provided under various laws against marital rape, only shred the importance and the sanctitude of the marital bond. Rape is an offence which not only steals a woman's right to consent but also leaves her wounded and grieving. She loses the ability to instil trust in any man, let alone the person who has committed the crime. The physical marks may get healed with time but the scar which is left on the psychology of the victim can stay forever with her. It affects her life to the level that she may find it difficult to lead the life in a normal manner.

Marriage is one institution which holds equal importance in the life of an individual than religion and blood-relatives. If a woman has to undergo abuse, which extends to sexual nature, the sanctity of marriage gets ruined at the very instance of the act. Finding no way to justice furthers this cruelty and aggravates the offence. Such marriages are not holy. They become prejudicial, venomous and distasteful where there is no love or mutual respect left. The bond dilutes to a chore which has to be fulfilled by the victim and this, according to many learned men, may not affect the sanctity of marriage but it most definitely affects the life and upbringing of the kids, scarring their psychology and giving birth to mental health issues.

7. Marital rape and fundamental rights of women

In the words of famous psychologist Morton Hunt, a man who rapes his wife isn't able to shrug the anarchic notion whereby women are considered as subjects of their husbands, whom these husbands can rule upon. These patriarchal and toxic ideas spread in various aspects of marriage, include sexual matters whereby the man looks at sexual gratification as his right which he can acquire even with the help of force, against the will and consent of the wife. This power exchange helps him reinforce himself as the ruler and the wife as the slave or subject.

In international law, the norm of jus cogens prohibits torture. The Article 1 of the Universal Declaration on Human Rights declares all men and women to have been born with equal dignity and rights. The preamble of the same declaration recognizes inherent dignity and inalienable rights of all members of mankind or more appropriately put, human race. Article 3 of the same further emphasises on the human right to life, liberty and security of every individual. It is important to note here that various eminent international law scholars have characterised this

declaration as a part of customary international law, keeping in mind its significance and widespread acceptability.

Despite explicit recognition by the international law, marital rape continues to be prevalent in various jurisdictions. The act of rape in a marriage violates the right of women. They are made devoid of their sexual liberty and security which has been identified as an inalienable right. Their dignity, with grave cruelty, is stomped down and their reputation is ruined in one of the most trusted and sacred institutions of the society.

The United Nations has repeatedly considered and declared all kinds of violence against women as against their human rights and in contrary to the exercise of the freedom and liberties inherited by them naturally. These thoughts and theories have been extended to public violence as well as abuse in private life. The instruments for the protection of rights of women include the ICCPR, CEDAW, the Convention Against Torture, also known as the Torture Convention and ICESCR.

The right to be free of torture and cruel, inhuman and derogatory treatment includes such rights to be enforced in case of domestic violence⁹¹. The components of torture provided under Article 1 of the Convention Against Torture include infliction of severe pain and suffering, for a prohibited purpose that includes coercion, intimidation, or discrimination, which is acquiesced to or condoned by a state actor⁹². Though rape has been recognized as an act of torture, marital rape still remains out of its realms.

Numerous human right treaties and conventions have obligated signatory states to enforce systems for protection of the rights of women, they have mostly conveniently ruled out the topic of spousal rape. It is also worthy to note that the Constitutions of various countries are enshrined with some fundamental rights which guarantee right to life and dignity to all citizens. However, with existence of marital exception in various countries, the fundamental rights seem to be ineffective.

⁹¹ Barbara C. Alexander, Convention Against Torture: A Viable Alternative Legal Remedy for Domestic Violence Victims, 15 AM. U. INT'L L. REV. 895 (1999).

⁹² United Nations Human Rights Commission, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations (1984).

8. Need for international convention

Time and again, international community and international organizations have put their foot forward to ensure that the injustice prevailing in societies throughout the world could be eliminated and eradicated. Special emphasis has been laid on matters where women and other weaker and vulnerable sections of the society are involved. CEDAW and ICCPR are examples of the steps taken by the international community to safeguard the interests and rights of various classes and sections of society.

In light of a survey which stated that only 4 out of 10 countries criminalized marital rape the United Nations had released a statement saying , home is the most dangerous place for a woman⁹³. The UN's flagship annual report, Progress of the World's Women, revealed that there are about a dozen countries who allow rapists to evade charges by marrying their victims⁹⁴. No wonders, marital rape would be rampant in such an unjust marriage. Also, non-consensual sexual marital relationships continue to be legal in various countries⁹⁵.

Though, the increasing pressure from women and women welfare groups has caused various countries like Tunisia and Lebanon to scarp the marital exception and criminalize or illegalize marital rape. However, this doesn't seem to be enough for two major reasons. The primary reason is the premature laws which have little to no impact on the situation, while the other and equally important concerns is the lack of a worldwide model law to ensure uniformity in law on marital rape throughout jurisdictions.

When discussing the legal responsibility of international organizations and community in framing or hosting a convention on the issue of marital rape, we need to look at the previous efforts undertaken by such intentional organizations and community. In 1993, the United Nations Declaration on the Elimination of Violence Against Women (DEVAW) clearly highlighted the violence happening against women, including marital rape⁹⁶. Furthermore, the 1995 Beijing

⁹³ Ellen Wulforst, UN Urges Countries to End Marital Rape And Close Legal Loopholes, Global Citizen (04th August 2020, 13:39 PM) <https://www.globalcitizen.org/en/content/un-women-marital-rape-laws/>.

⁹⁴ Id.

⁹⁵ World Bank, Protecting Women From Violence, World Bank (2015).

⁹⁶ United Nations General Assembly, The UN Declaration on the Elimination of Violence Against Women, United Nations (1993).

Declaration and Platform for Action also made mentions of marital rape, stating that marital rape “is a manifestation of the historically unequal power relations between men and women” and demanded its criminalization by 189 signatory states, to ensure proper access to justice by women⁹⁷. Human right conventions, treaties and committees⁹⁸ have also considered marital rape as a violation of the right to life⁹⁹, liberty and freedom of a woman on basis of her gender.

However, here the question arises that whether the existing conventions are enough or we need a dedicated international instrument on marital rape to tackle the rising demon?

Though the UN Security General had said that most women face violence at home, characterizing violence to include sexual violence, the mere realization doesn't seem to be enough to bring a change¹⁰⁰. In various countries, the marital exception still continues, either completely or partially, keeping marital rape out of the purview of criminal adjudication. The world isn't new to the fact that about 40 percent all the assaulted women face sexual assault at the hands of their male partners at least once in their lifetime¹⁰¹.

While discussing marital rape, we shouldn't treat it just as an evil against marriage, society or the psychology and mental health of woman. It can have grave and long-term physical results on the victim's health as well, including HIV¹⁰².

The heinous act of marital rape not only infringes a pyramid of rights associated naturally to a human being, it also unveils and reinforces the archaic and patriarchal mindset of the society.

The international community has a responsibility, both legal and moral, to ensure that no woman is subjected to marital rape or similar grievous offences. And if unfortunately, she is exposed to such a crime, the gates of the judicial system should be open to provide her with justice, while upholding her dignity.

⁹⁷ World Conference on Women, Report of the Fourth World Conference on Women, 118 (1996).

⁹⁸ UN Human Rights Commission, General Comment 28, Equality of Rights Between Men and Women (Article 3), United Nations (2000).

⁹⁹ *Opuz v. Turkey*, App. No. 33401/02, 2009 Eur. Ct. H.R. 870; *Maria Da Penha v. Brazil*, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01, OEA/Ser.L/V/II.111, doc. 20 rev. 704 (2001); *Lenahan v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, OEA/Ser.L/V/II.142, paras. 170, 177, 199 (2011).

¹⁰⁰ Secretary General, In-Depth Study on All Forms of Violence Against Women, 112-113 (2006).

¹⁰¹ Judith M. McFarlane & Ann Malecha, Sexual Assault Among Intimates: Frequency, Consequences & Treatments, 3 (2005).

¹⁰² World Health Organization, Understanding and Addressing Violence Against Women: Sexual Violence, 6 (2012).

Since it is evident that the present international conventions haven't been able to put a full-stop to the crime, neither have they been able to compel all the signatory nations to make municipal laws on the matter, an exclusive convention or instrument on this issue is needed. The international community requires to undertake a dedicated instrument, which deals with the topic of marital rape in detail and ensures that the signatory states convert it into municipal laws to safeguard the rights and dignity of women throughout the world.

This would not only bring hope for thousands of battered women but will also give rise to uniform municipal legislations throughout jurisdictions. This would make sure that no woman of one nationality and living in another is subjected to unnecessary harassment on jurisdictional basis.

Conclusion

Patriarchy has been able to subdue women since eternity and even after three strong waves of feminist movement, the effect of the patriarchal mentality still remains in the minds of many men and even women throughout the world. Women are still treated as a commodity in various cultures and countries and are subjected to inhumane treatment and innumerable tortures.

It is understandable that marital offences can be against women and men both. Post the recognition of the LGBTQI by various countries, the marital offences are needed to be viewed from a novel angle which is able to accommodate the newly recognized community. However, as mentioned at the start of this paper, we worried ourselves merely with the offence of marital rape against a woman due to her possible vulnerability and physical weakness, as against her male counterpart. Generally, women can be subdued with power and force in an easier manner than men.

Also, it is told to women that her duty is to please her spouse and surrender herself to him in all circumstances. This even extends to sexual relations, even when the wife doesn't wish to indulge in it. Various women consider marital rape to be normal wear and tear of married life and though, the violation deeply scars their conscience, they blame themselves for it.

International community and organizations have been receptive of the needs and agitations of the feminist community which brought issues of marital relations in public light. However, the

municipal laws and judicial systems haven't been accommodative to such demands and have often taken the refuge of implied consent theory and sanctity of marriage. This, somewhere or the other, is harbouring the patriarchal mindset and undermining gender equality.

Statistics show that the issue of marital rape isn't meagre and should be dealt with more seriousness. If not, it won't be late when marriages will shatter at a greater rate and children born out of such unions will face graver mental health issues. Injustice against women will continue and will be passed on to generations in the form of physical abuse or mental trauma.

1. It is the need of the hour to ensure that both the pillars of humanity, man and woman, are treated equally and are given equal, respectable status in the marriage. Rape or forced sexual relations malign the marital vows and equating it with domestic abuse would be a greater injustice. Legal provisions for illegalization or better, criminalization, of marital rape need to be put in place urgently to stop the downfall the society and that of marital sanctity. gen.