

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 decades. 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 society. 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 it. However, the level of expected change in 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 on the subject, which is analyzed in this article. The research questions are the following : is the present legal framework surrounding marital rape sufficient and effective? Does the international community need to formulate a draft law for criminalizing marital rape in domestic jurisdictions without hurting the sanctity of marriage? The hypothesis assumed by the authors is that the world needs an international convention and commensurate regional and national legislations to penalize the offence of marital rape. The hypothesis also assumes that the existing legal framework surrounding spousal rape is ineffective and insufficient.

Résumé

Le viol marital (viol conjugal commis dans le cadre d'une relation maritale) est un concept socio-juridique qui a attiré l'attention de la communauté internationale depuis plusieurs décennies. Les débats politiques et sociaux ayant porté sur ce sujet ont alimenté diverses discussions sur le féminisme et les droits des femmes dans le mariage. De telles discussions se sont étendues à la question des droits sexuels des femmes mariées, le déni de ceux-ci ayant pu avoir lieu en raison de la mentalité patriarcale qui prévaut dans la société. Le fait, pour un homme, de considérer une femme comme sa propriété a été tant encensé que critiqué par les juristes et par les tribunaux. Diverses lois nationales portent précisément sur le crime du viol marital et quelques instruments internationaux le mentionnent également. Toutefois, le niveau de changement attendu dans la société, à travers le monde et particulièrement dans les pays où « l'exception maritale » existe toujours, n'a pas encore été observé. Il y a un besoin d'élaboration d'une nouvelle convention internationale à ce sujet, qui

sera analysé dans cet article. Ses questions de recherche sont les suivantes : le cadre juridique actuel concernant le viol marital est-il suffisant et effectif ? Est-ce que la communauté internationale doit établir un projet de convention en vue de criminaliser le viol marital devant les juridictions nationales, sans porter atteinte au caractère sacré du mariage ? L'hypothèse des auteurs de cet article est qu'il y a un besoin de convention internationale et de législations nationales et régionales correspondantes pour pénaliser le viol marital. Il est également supposé que le cadre juridique actuel sur le viol marital est inefficace et insuffisant.

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 lifetime¹. 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 the 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 primitive societies in which intellect and sense of rights weren'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 society². With changing times, modern ideas replaced archaic beliefs. The earlier deplorable condition of women in society was replaced by the rights and opportunities which were conferred on them 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 provisions³ for positive discrimination in favour of women for neutralizing cumulative socio-economic, educational and political hardships that were faced by women in society.

Apart from these, various conventions⁴ 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

¹ Punamchand, *Hindu Marriage, a tie for 7 lives*. Available online : <http://www.punamchand.com/2016/07/hindu-marriage-tie-for-7-lives.html> [retrieved on August 3rd, 2020].

² S. Zaidi et al, "Sexual Rights and Gender Roles in Religious Context", *International Journal of Gynecology and Obstetrics*, 2009, vol. 106, issue 2, p. 151.

³ Indian Constitution, art. 15, § cl. 3.

⁴ Convention on Elimination of All Forms of Discrimination Against Women (CEDAW), 1979.

prospective victims from abusive relationships. These laws included laws against dowry⁵, property rights of married women⁶, right to maintenance⁷, protection from domestic violence⁸ 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 marriage⁹ and has been considered by society for thousands of years. Sexual intercourse between spouses is one of the pillars on which a marital relationship stands¹⁰. Consummation is fundamental to a marriage¹¹. 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 countries¹². One of the reasons for this is the comparatively lesser physical power of the woman when compared to the man. It is an offence graver than murder¹³ as the woman who suffers dies a thousand times 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 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.

⁵ Dowry Prohibition (1961) (India); Dowry Prohibition Act (1980) (Bangladesh); Social Practices (Reform) Act, (2033/1976) (Nepal).

⁶ 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).

⁷ Code of Hamurabi (1754 BC); Code of Justinian.

⁸ 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).

⁹ *Cox v. Cox*, 493 S.W.2d 371, 373 (Mo. Ct. App. 1973).

¹⁰ *Hangar v. Hangar*, Civ. No. D138274 (D.C. Super Ct. 1974).

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

¹² M.c. Black et al, *The National Intimate Partner and Sexual Violence Survey: 2010 summary report*, Centers for Disease Control and Prevention, National Center for Injury Prevention and Control. Available online : http://www.cdc.gov/ViolencePrevention/pdf/NISVS_Report2010-a.pdf [retrieved on August 3rd 2020].

¹³ *State of Maharashtra v. Chandrabhan Sudam Sanap*, 2018 SCC OnLine Bom 6576.

1. MARRIAGE : MEANING

The concept of marriage has been described from different points of view for ages. These views include analytical and scientific perspectives 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 made of the legal definitions which derive recognition from Constitutions, parliament acts and the 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 Émile Durkheim, Roscoe Pound and others whose detailed analysis and theories on society, law and justice have attracted the attention of jurists and social stakeholders.

Marriage is an indispensable part of the society. Aristotle had rightly said that man is a social animal¹⁴. An individual who is unsocial naturally and not accidentally is either beneath our notice or more than human. St. Thomas Aquinas was also of similar opinion¹⁵.

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 important¹⁶. Marriage is a socially sanctioned way to procreate¹⁷.

Marriage can be conceptualized in three ways: as an institution, as a rite/ritual and as a process¹⁸. As an institution, marriage consists of a set of patterned behaviours, expectations and relationships that are organized and endured over time¹⁹. As a rite/ritual, it includes the ceremonies through which marital status is achieved and as a process, it is a phenomenon which

¹⁴ Aristotle, *Politics*, Chapter 2(9), University of Chicago Press, pp. 12-13.

¹⁵ St. Thomas Aquinas, *Summa Theologiae*, 1485, I-II.

¹⁶ N. Bostrom, "The Future of Humanity", *Geopolitics, History, and International Relations*, 2009, vol. 1, issue 2, pp. 41-78.

¹⁷ P.B. Horton, C.L. Hunt, *Sociology*, McGraw Hill Book Company, 1964, p. 206.

¹⁸ A.P. Thakur, A. Banerjee, *Encyclopaedia of Theoretical Sociology*, Global Vision Publishing House, 2004, p. 494.

¹⁹ *Ibid.*

is marked by gradual changes that lead to ultimate dissolution through separation, divorce or death²⁰.

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 family²¹. Historically, the status of wife and husband is one of the most important transitions in people's lives. Marriage is the central element in defining economic well-being, physical health and mental health.²²

In the above given definitions, the meaning of marriage revolves around men 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 world²³. The study of religion can be traced to the Greek and Roman civilizations²⁴ in the western world. However, in the eastern parts of the globe, the study of religion wasn't restricted to Christianity²⁵. It spanned over Hinduism, Islam, Buddhism, Zoroastrianism and Judaism amongst other religious beliefs²⁶.

In Hinduism, the belief is that the primitive humankind were wanderers who roamed around in search of food, which they procured by hunting. They had no permanent residences and used to live under trees²⁷. 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 groups²⁸. However, with the development of society, restrictions were imposed on sexual

²⁰ A.P. Thakur, A. Banerjee, *Encyclopaedia of Theoretical Sociology*, Global Vision Publishing House, 2004, p. 494.

²¹ A. Thorton, *Marriage and Cohabitation*, University of Chicago Press, 2007, p. 4.

²² *Ibid.*

²³ Merriam-Webster Online Dictionary, *Theology*. Available online : <https://www.merriam-webster.com/dictionary/theology> [retrieved on September 6th 2020].

²⁴ C. A. Contreras, "Christian Views of Paganism", *Aufstieg und Niedergang der römischen Welt*, II, 23.1, 1980 pp. 871-1022.

²⁵ Britannica, *History of the Study of Religion*. Available online : <https://www.britannica.com/topic/study-of-religion/History-of-the-study-of-religion> [retrieved on September 6th 2020].

²⁶ *Ibid.*

²⁷ N. S. V. Somayajulu, *Mana Vivaha Vyavastha*, Kranthi Press, 1990, p. 3.

²⁸ *Ibid.*

relationships by social and spiritual leaders for the genesis of a disciplined society²⁹. The concept of marriage or vivah was brought into picture and the main aim behind it was to procure children³⁰. In order to canalize and give social recognition to the sexual-urge of humans, the concept of marital bond was developed³¹. 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 rites³².

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 acts done by a man won't be complete until and unless he is accompanied by his wife³³. 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."³⁴

In Islam, marriage is regarded as a sacramental contract. An Arabic term "Nikah" is used to define marriage in Islam which literally means "sexual intercourse" but is referred generally to mean "a contract"³⁵. Quran specifically mentions marriage as a strong agreement³⁶. 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 contract³⁷.

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 the Quran, no such peculiar service has been prescribed under the Muhammadan law for the occasion, which steals its possibly sacramental nature³⁸. 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

²⁹ W. Little, R. McGivern, "Chapter 15" in W. Little, R. McGivern, *Introduction to Sociology - 1st Canadian Edition*, BCcampus, 2012. Available online : <https://opentextbc.ca/introductiontosociology/> [retrieved on June 17th 2021].

³⁰ N. S. V. Somayajulu, *Mana Vivaha Vyavastha*, Kranthi Press, 1990, p. 5.

³¹ *Ibid.*

³² J. D. Mayne, *Hindu Law & Usage*, Bharat Law House, 1998, p. 125.

³³ P. Diwan, *Hindu Law*, Orient Publishing Company, 2005, p. 532.

³⁴ *Ibid.*

³⁵ V. J. Cornell, *Voices of Life: Family, Home and Society*, Greenwood Publishing Group, 2007, pp. 59-60.

³⁶ I. Syed, *Same Sex Marriage and Marriage in Islam*, 2019, p. 2. Available online : https://www.researchgate.net/publication/337307555_SAME_SEX_MARRIAGE_and_MARRIAGE_IN_ISLAM [retrieved on June 19th 2021].

³⁷ R.K. Sinha, *Muslim Law*, Central Law Agency, 5th ed., 2003, p. 41.

³⁸ *Abdul Qadir v. Salima*, 8 All 149 (1886).

filth and contamination³⁹. 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 society*”⁴⁰.

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)⁴¹.

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 wedlock⁴². According to Tyabji, “*marriage brings about a relation based on and arising from a permanent contract for 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*”⁴³.

In Christianity, marriage is solemnized on the basis of rules mentioned in the Bible⁴⁴. In the pre-Christian Roman law, marriage and divorce were private acts. No formalities pertaining to marriage or frustration of marriage were necessary⁴⁵. 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 God⁴⁶. According to Saint Paul, marriage is a holy tie which is sacramental and indissoluble union⁴⁷. 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 one⁴⁸. Love and relationships are a central theme of Bible. St. Augustine says that “*our hearts are restless until we find our rest in Thee*”⁴⁹.

³⁹ R.K. Sinha, *op. cit.*, p. 108.

⁴⁰ A. Ahmad, *Mohammedan Law*, Central Law Agency, 21st ed., 2004, p. 108.

⁴¹ M. Nazmi, *Mohammadan Law*, Central Law Publications, 2nd ed., 2008, p. 32.

⁴² N. Purohit, *The Principles of Mohammedan Law*, C.T.J. Publications, 2nd ed., 1998, p. 105.

⁴³ *Amina v. Hassan Koye*, 1985 CriLJ 1996.

⁴⁴ “A Christian View of Civil Marriage”, *Focus on the Family*. Available online : <https://www.focusonthefamily.com/family-qa/a-christian-view-of-civil-marriage/> [retrieved on September 6th 2020].

⁴⁵ R. Beryl, *Marriage, Divorce and Children in Ancient Rome*, Oxford University Press, 1991, pp. 37-38.

⁴⁶ K. Prasada Rao, *The Law Relating To Marriages Of Christians In India*, Asia Law House, 1991.

⁴⁷ *Ibid.*

⁴⁸ Genesis 2:24, ESV.

⁴⁹ J. Braswell, *The Love of God*. Available online: <https://medium.com/@reachboto/thou-hast-made-us-for-thyself-and-our-hearts-are-restless-until-we-find-our-rest-in-thee-st-383c84f522ab> [retrieved on September 6th 2020].

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 God*⁵⁰”.

God has sketched his basic idea of marriage in Genesis 2:24 whereby he states that Adam was made out of ashes and Eve was made out of Adam’s flesh and blood⁵¹. 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 here⁵².

In Christianity, the idea of marriage runs along the lines of union and divine relationship between Christ and his bride, Church⁵³. The Bible also mentions the purpose of marriage as procreation⁵⁴. 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 prayers⁵⁵.”

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 society⁵⁶.

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 for marriage. 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 thereof⁵⁷.

⁵⁰ The Episcopal Church, *The Book of Common Prayer*, p. 422. Available online : <https://www.episcopalchurch.org/wp-content/uploads/sites/2/2021/02/book-of-common-prayer-2006.pdf> [retrieved on June 19th 2021].

⁵¹ W. Luck, *Cohesiveness in the Marriage Union- (Genesis 2:24)*. Available online : <https://bible.org/seriespage/1-cohesiveness-marriage-union-genesis-224> [retrieved on September 6th 2020].

⁵² M. Fairchild, “What Is The Definition of Marriage in Bible”, *Learn Religions*. Available online : <https://www.learnreligions.com/biblical-definition-of-marriage-701970> [retrieved on September 6th 2020].

⁵³ Genesis 1:26-27.

⁵⁴ Genesis 1:28.

⁵⁵ 1 Peter 3:7.

⁵⁶ S. Vachon, *Divorce and Celibacy in the Gospel of Matthew*, Master thesis, Acadia University, 2000, pp. 114-116. Available online : <https://scholar.acadiau.ca/islandora/object/theses%3A2659> [retrieved on June 19th 2021].

⁵⁷ D. Bell, *Defining Marriage and Legitimacy*, The University of Chicago Press, 1997, pp. 237-253.

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 a spouse⁵⁸. 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 death⁵⁹.

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 survival⁶⁰. 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 clause⁶¹.

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, without which there would be neither civilization nor progress.*”⁶² In *Baker v. State*⁶³, 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 unconstitutional⁶⁴.

In the common law, the earliest and classical legal definition of marriage can be found in the case of *Hyde v. Hyde and Woodmansee*⁶⁵. In this case, Sir James Wilde (Lord Penzance)

⁵⁸ J. MacArthur, “God's High Call for Women”, *Grace to You*. Available online : <https://www.gty.org/library/articles/A168/gods-high-call-for-women> [retrieved on September 6th 2020]

⁵⁹ A. Sheikh, “Right to Marry Under Right to Life: Panoramic View”, *Legal India*, 2012. Available online : <https://www.legalindia.com/right-to-marry-under-right-to-life-panoramic-view/> [retrieved on June 19th 2021].

⁶⁰ *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

⁶¹ *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

⁶² *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

⁶³ *Baker v. State*, 744 A.2d 864, 883 (1999).

⁶⁴ *United States v. Windsor*, 570 US 744 (2013).

⁶⁵ *Hyde v. Hyde and Woodmansee*, L.R. 1 P. & D. 130 (1886).

said : “*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.*”⁶⁶

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 importance⁶⁷. 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 can shatter the foundation of a marriage. It is capable of extinguishing any trust and mutual respect that exists between spouses⁶⁸. Marital rape is also referred as spousal rape in certain jurisdictions.

2.1. Definitions

In the historical judgement, the view had been that woman, while consenting to marriage, consents to the desire of sexual intercourse of a man⁶⁹. She is expected to succumb to it as and when he desires. It was also mentioned by Lord Hale, in his contractual theory⁷⁰. 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:

⁶⁶ *Hyde v. Hyde and Woodmansee*, L.R. 1 P. & D. 130 (1886).

⁶⁷ T. Braun, *The Role of Law in Eliminating Child Marriage in the Commonwealth- Why More Action Is Needed*, Commonwealth Lawyers Association, 2018.

⁶⁸ S. Nigam, *The Social and Legal Paradox Relating to Marital Rape in India: Addressing Structural Inequalities*, SSRN, 2015. Available online : <https://ssrn.com/abstract=2613447> [retrieved on June 19th 2021].

⁶⁹ *R. v. Clarke*, 2 All E.R. 448, 448 (1949).

⁷⁰ M. Hale, *The History of the Pleas of Crown*, S. Emlyn ed., 1778, p. 629.

(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 anesthetic 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 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."⁷¹

In *Trammel v. United States*⁷², 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

⁷¹ 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.

⁷² *Trammel v. United States*, 455 U.S. 40 (1980).

being.” This pronouncement reiterates the right of dignity and identity of a married woman, which includes right against sexual exploitation⁷³.

2.2. Types

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.

- 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 may be 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. Battering the wife isn't the characteristic here⁷⁴.

- 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, economic, verbal and emotional abuse. Most cases of marital rape fall under this category⁷⁵.

- 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 violence⁷⁶.

Nicholas Groth, in his book, *Men Who Rape*⁷⁷, also discusses two other types of marital rapes :

- 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 bestiality⁷⁸.

⁷³ Aarvi, "Right to Privacy Within Marriage in India", *RGNLU Student Research Review*, 2018. Available online : <http://rsrr.in/2018/10/27/right-to-privacy-within-marriage-in-india/> [retrieved on September 7th 2020].

⁷⁴ K. Yllo, "Marital Rape", *The Battered Women's Justice Project*, 1996, p.8.

⁷⁵ D. Finkelhor, K. Yllo, *License to Rape: Sexual Abuse of Wives*, The Free Press, 1985.

⁷⁶ *Ibid.*

⁷⁷ A. N. Groth, H. J. Birnbaum, *Men Who Rape : The Psychology of the Offender*, Plenum Press, 1979, p. 227.

⁷⁸ *Ibid.*

- 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 increase⁷⁹.

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)⁸⁰. Consent is the constituting element in the offence⁸¹; 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 has given up herself in this kind unto her husband, which she cannot retract⁸². This theory was also seconded by John Frederick Archbold in his book, whereby he said that no man can be claimed to be guilty of the rape of his wife⁸³.

Hale also advocated that a marriage is a contract between the man and the wife which comes into force from the day of the marriage⁸⁴. 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 solemnization of the marriage ceremony, the wife gives an implied and irrevocable consent to the husband for sexual relations⁸⁵. Thus, rape can never occur in a marriage because the consent is always impliedly present in such a relation.

⁷⁹ A. N. Groth, H. J. Birnbaum, *Men Who Rape : The Psychology of the Offender*, Plenum Press, 1979, p. 227.

⁸⁰ Law Commission (UK), *Consent in the Criminal Law*, Consultation Paper No. 139, 1995, p. 7.

⁸¹ T. O'Malley, E. Hoven, *Consent in Law Relating to Sexual Offences*, Cambridge University Press, 2020, pp. 135-171.

⁸² M. Hale, *The History of the Pleas of Crown*, S. Emlyn ed., 1778, p. 629.

⁸³ J. F. Archbold, *A Summary of the Law Relating to Pleading and Evidence in Criminal Cases*, Sweet and Maxwell, 1822.

⁸⁴ C. L. Mitra, "For She Has no Right of Power to Refuse Her Consent", *Criminal Law Review*, 1979, vol 9, p. 561.

⁸⁵ C. Backhouse, L. Schoenroth, "A Comparative Study of Canadian and American Rape Law", *Canada-United States Law Journal*, 1984, vol. 7, pp. 173-174.

Unfortunately, this is the most widely given rationale for justifying the marital rape exception. This theory was, thus, critically analysed in various case laws and juristic opinions thereafter⁸⁶. The theory proposed by Hale is a rigid compartmentalization of the consent of married woman as her nemesis and characterizes women as property⁸⁷.

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 people's mindset, 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 the 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.

4. MARITAL RAPE AND DOMESTIC VIOLENCE

Gender-based violence has been defined by the 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.*" The 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*

⁸⁶ M. D. A. Freeman, "'But If You Can't Rape Your Wife Who[m] I Can You Rape?' The Marital Rape Exemption Re-examined", *Family Law Quarterly*, 1981, vol. 15, issue 1, p. 9.

⁸⁷ R. M. Ryan, *The Sex Right: Legal History of the Marital Rape Exception*, Cambridge University Press, 1995, pp. 941-1001.

*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*⁸⁸. 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, the general community or at the State level.

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 compliant to international standards, nor are the recommendations always implemented⁸⁹. 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 of an intimate partner or non-partner⁹⁰. 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, and HIV compared to other women who haven't had such experiences⁹¹.

In the 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 of such women seek professional help⁹².

According to data collected 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

⁸⁸ United Nations, General Assembly, resolution 48/104, *Declaration on the Elimination of Violence Against Women*, A/RES/48/104 (20 December 1993).

⁸⁹ World Bank Group, *Women, Business and the Law 2018*.

⁹⁰ World Health Organization, *Fact sheet : Violence Against Women*.

Available online : <https://www.who.int/news-room/fact-sheets/detail/violence-against-women#:~:text=Global%20estimates%20published%20by%20WHO,sexual%20violence%20in%20their%20life time> [retrieved on June 19th 2021].

⁹¹ *Global and regional estimates of violence against women: Prevalence and health effects of intimate partner violence and non-partner sexual violence*, Report released by the South African Medical Research Council, London School of Hygiene and Tropical Medicine and the World Health Organization, 2013.

⁹² UNICEF, *A Familiar Face: Violence In The Lives Of Children And Adolescents*, 2017, pp. 73-82.

as injury, fearfulness, post-traumatic stress disorder, use of victim services, contraction of sexually transmitted diseases, etc⁹³.

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 on par with marital rape.

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. LEGAL STATUS THROUGHOUT THE WORLD

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 might never be overcome. 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.”*⁹⁴

The United Nations Task Force on Violence Against Women and the United Nations Secretary-General released a report in 2006 which suggests that the most common form of violence faced by women around the world is caused by their intimate partners⁹⁵. Another

⁹³J. L. Truman, R. E. Morgan, *Special Report : Nonfatal Domestic Violence 2003-2012*, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, 2014.

⁹⁴J. Langhinrichsen-Rohling et al., “Attributions About Perpetrators and Victims of Interpersonal Abuse Results from an Analogue Study”, *Journal of Interpersonal Violence*, 2004, vol. 19, issue 4, pp. 484-493

⁹⁵ UN Women, *Ending violence against women. From words to action. Study of the Secretary-General*, United Nations Publication, 2006, p. 43.

research states that over 40 percent of women who face assaults were forced into sex by their male partners at one time or another⁹⁶.

However, this isn't the worst part. Various men do not even 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 that they raped their spouses and partners⁹⁷. Another research which took place in Bangladesh revealed that 10 percent of urban men and 15 percent of rural men admitted on initiating forced sex with their spouses⁹⁸. Similar stories have also been revealed in India where sexual violence exists in most marriages⁹⁹.

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.

5.1. 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 as well as Albania. For the sake of the study in this research paper, 4 of these countries have been chosen for research.

The United States of America has been selected for the study because it is a developed, first world country where the first wave of feminism was propagated and widespread¹⁰⁰. The efforts towards the criminalization of marital rape have been extensive in this country, however researchers are of the opinion that such efforts were insufficient and incomplete in nature¹⁰¹. Including USA in our research would help us determine how an economically sound and socially modern country is dealing with this evil called marital rape.

The United Kingdom is a country which has had immense influence on the laws of various countries through colonialization and the common law system¹⁰². The consent theory

⁹⁶ J. C. Campbell, P. Alford, "The Dark Consequences of Marital Rape", *The American Journal of Nursing*, 1989, vol. 89, issue 7, p. 946.

⁹⁷ R. Jewkes et al., "Gender Inequitable Masculinity and Sexual Entitlement in Rape Perpetration South Africa: Findings of a Cross-Sectional Study", *PLoS One*, 2011, vol. 6, issue 12, p. 5.

⁹⁸ R. T. Naved et al., *Men's Attitudes and Practices Regarding Gender and Violence Against Women in Bangladesh*, icddr, Special Publication No. 135, 2011.

⁹⁹ R. Jewkes, *Rape Perpetration: A Review*, Sexual Violence Research Initiative, 2012, p. 6.

¹⁰⁰ R. Walker, "Becoming the Third Wave", *Ms Magazine*, 1992, pp. 39-41.

¹⁰¹ A. A. Tierney, "Spousal Sexual Assault- Pennsylvania's Place on the Sliding Scale of Protection", *Dickinson Law Review*, 1986, vol. 90, issue 4, pp. 777-801.

¹⁰² R. J. Daniels et al, *The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies*, Oxford University Press, 2011, pp. 111-117.

has also originated from this country¹⁰³. However, it has come a significant way in criminalizing spousal rape. This is the reason behind its selection.

Israel is one of the countries which does not have a written Constitution and its laws have been cultivated over time with the influence of the judiciary and of religion. It has been included in this study because it hosts the largest population of Jews in the world¹⁰⁴. Despite the male pre-dominance imposed on women in the form of Halakah¹⁰⁵, the country has come a significant way to deal with spousal rape.

Poland is the final country which the authors have taken into note. This is because Polish laws, pertaining to marital rape, are similar to that of various other countries in the European Union¹⁰⁶. Poland was one of the first countries in the present European Union to take a step towards the criminalization of marital rape and gave direction to its counterparts to move ahead with the criminalization.

5.1.1. United States of America

Marital rape has been criminalized in all 50 states of the United States of America however, this may not be enough. A considerable number of states continue to retain marital immunity in one manner or another. The presumption of wife as the 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 the United States which expresses that a man who has sexual intercourse with a female who is not his wife can be prosecuted for rape¹⁰⁷.

The reform in the area of marital rape commenced in the United States as early as the 1970s when marital rape charges were brought into the picture only when spouses lived

¹⁰³ H. J. Berman, "The Origins of Historical Jurisprudence: Coke, Selden, Hale", *The Yale Law Journal*, 1994, vol. 103, issue 7, p. 1165.

¹⁰⁴ JTA, "Israel's Population Hits 914 Million", *The Canadian Jewish News*, <https://www.cjnews.com/news/israel/israels-population-on-the-eve-of-the-new-year-hits-9-14-million> [retrieved on September 7th 2020].

¹⁰⁵ F. Raday, *Equality, Religion and Gender in Israel*, Jewish Women's Archive. Available online : <https://jwa.org/encyclopedia/article/equality-religion-and-gender-in-israel> [retrieved on September 7th 2020].

¹⁰⁶ A. Michalska-Warias, "Marital Rape in Poland from the Legal and Criminological Perspectives", *PRAWO W DZIAŁANIU SPRAWY KARNE*, 2016, vol. 26, pp. 50–84, 99–119. Available online : <https://iws.gov.pl/wp-content/uploads/2018/09/Aneta-Michalska-Warias-Marital-Rape-in-Poland-from-the-Legal-and-Criminological-Perspectives-62.pdf> [retrieved on June 17th 2021].

¹⁰⁷ Model Penal Code, § 213.6 (Proposed Official Draft 1962).

separately. The case of *Oregon v. Rideout*¹⁰⁸ is a legal milestone whereby charges of marital rape were imposed on a man who lived with his wife for the first time. This is when the public, judicial and legislative discussion pertaining to marital rape accelerated. In the 1984 case of *People v. Liberta*¹⁰⁹, 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 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, may be a good sign, but considering that this evil still exists in USA in one manner or another, the married women are still at risk within the four walls of their homes.

5.1.2. United Kingdom

The United Kingdom follows the rules of the common law in civil and criminal matters. The Constitution in this country 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 Crown*¹¹⁰ 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 Cases*¹¹¹ by barrister John Frederick Archbold in 1822.

Hale's theory was scrutinized in *R. v. Clarence*¹¹² whereby the court deduced that rape can happen in a marriage when the wife refuses sexual intercourse and the husband uses force or violence against her.

*R. v. Clarke*¹¹³ 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.*¹¹⁴, the House of Lords ruled

¹⁰⁸ *Oregon v. Rideout*, 5 FAM. L. REP. (BNA) 2164 (1978).

¹⁰⁹ *People v. Liberta*, 90 A.D.2d 681 (N.Y. App. Div.: 1982).

¹¹⁰ M. Hale, *The History of the Pleas of the Crown*, S. Emlyn ed., 1st ed., 1778, p. 629.

¹¹¹ J. F. Archbold, *A Summary of the Law Relating to Pleading and Evidence in Criminal Cases*, Sweet and Maxwell, 1822.

¹¹² *R. v. Clarence*, 22 Q.B.D. 57 (1889).

¹¹³ *R. v. Clarke*, 2 All E.R. 448 (1949).

¹¹⁴ *Regina v. R.*, 1 AC 599 (1992).

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 of 2003¹¹⁵. Eventually, the idea of a woman as a man's property was shattered.

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 YouGov¹¹⁶, various men still do not consider forced sex in marriage as rape. These men include a third of over 65 and 16 percent of 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 rape¹¹⁷.

5.1.3. Israel

Israel is a country which has ratified three out of four international conventions concerning women¹¹⁸. While Israel is also devoid of a written constitution, basic written statutes guide the legal framework¹¹⁹. 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 law¹²⁰ and about 74 percent of people in Israel follow Judaism¹²¹. In the case of *Cohen v. The State of Israel*¹²² as well, the fact that marital rape is incoherent with Judaism was clarified by the court. It is a landmark case in Israel, in which it was also mentioned that 'unlawful sexual intercourse'

¹¹⁵ J.R. Spencer, "The Sexual Offences Act 2003: (2) Child and Family Offences", *Criminal Law Review*, 2004, pp. 347-360.

¹¹⁶ "Major New YouGov Survey for EVAW: Many People Still Unclear What Rape Is", *End Violence Against Women*, December 6th 2018. Available online : <https://www.endviolenceagainstwomen.org.uk/major-new-survey-many-still-unclear-what-rape-is/> [retrieved on July 26th 2020].

¹¹⁷ "When Did Marital Rape Become A Crime ?", *The Week*, December 6th 2018. Available online : <https://www.theweek.co.uk/98330/when-did-marital-rape-become-a-crime> [retrieved on September 7th 2020].

¹¹⁸ Immigration and Refugee Board of Canada (Research Directorate), *Human Rights Brief: Violence Against Women in Israel*, 1995. Available online : <https://www.refworld.org/docid/3ae6a81218.html> [retrieved on July 26th 2020].

¹¹⁹ B. E. Genut, "Competing Visions of the Jewish State; Promoting and Protecting Freedom of Religion in Israel", *Fordham International Law Journal*, vol 19, issue 5, 1995, pp. 2120-2143.

¹²⁰ Y. Fletcher, "Marital Rape Is Expressly Forbidden In Jewish Law. However...", *Jewish News*, July 13th 2020. Available online : <https://blogs.timesofisrael.com/shameful-denial-and-defence-of-marital-rape-must-end/> [retrieved on 27 July 2020].

¹²¹ Stephen Sharot, *Israel: Sociological Analyses of Religion in the Jewish State*, Oxford University Press, 1990, sections 63-76.

¹²² Criminal Appeal 91/80, 35 (3) PD (1980) 281.

includes marital rape¹²³. 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 family¹²⁴. This law has been a strong backbone in preventing marital sexual abuse in Israeli households.

5.1.4. Poland

The 1932 Polish Criminal Code had made it amply clear that a husband could not be prosecuted for the rape of his wife¹²⁵. 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 feminists¹²⁶.

A welcoming change was witnessed in the 1969 Criminal Code whereby the offence of rape was characterized as an offence against freedom of an individual¹²⁷, following the footsteps of the socialist Soviet Union¹²⁸. 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 rights to retain their sexual freedom as that of an unmarried woman¹²⁹. The same idea was also transported to the Criminal Code of 1997 which is now the binding law¹³⁰.

¹²³ V. Venkatesh, “Pluralistic Legal Systems and Marital Rape: Cross-National Considerations” in M. Randall, J. Koshan, P. Nyaundi (eds.), *The Right to Say No: Marital Rape and Law Reform in Canada, Ghana, Kenya and Malawi*, Hart Publishing, 2017, pp. 89-135.

¹²⁴ Immigration and Refugee Board of Canada (Research Directorate), *Israel: Violence Against Women, Including Statistics, Legal Recourse, Services Available and Response by Government Authorities (2005-2006)*, 2007. Available online : <https://www.refworld.org/docid/469cd69ec.html> [retrieved on September 7th 2020].

¹²⁵ A. Michalska-Warias, “Marital Rape in Poland from the Legal and Criminological Perspectives”, *PRAWO W DZIAŁANIU SPRAWY KARNE*, 2016, vol. 26, p. 63. Available online : <https://iws.gov.pl/wp-content/uploads/2018/09/Aneta-Michalska-Warias-Marital-Rape-in-Poland-from-the-Legal-and-Criminological-Perspectives-62.pdf> [retrieved on June 17th 2021].

¹²⁶ H. Rajzman, “Nierząd Między Małżonkami”, *Państwo i Prawo*, 1948, vol. 1, pp. 94-95.

¹²⁷ A. Michalska-Warias, “Marital Rape in Poland from the Legal and Criminological Perspectives”, *PRAWO W DZIAŁANIU SPRAWY KARNE*, 2016, vol. 26, p. 63. Available online : <https://iws.gov.pl/wp-content/uploads/2018/09/Aneta-Michalska-Warias-Marital-Rape-in-Poland-from-the-Legal-and-Criminological-Perspectives-62.pdf> [retrieved on June 17th 2021].

¹²⁸ H. M. Malik, *Criminal Policy in Poland in the light of recent political changes*, 2019. Available online : https://www.nsfk.org/wp-content/uploads/sites/10/2019/03/Hanna-Malik_Criminal-Policy-in-Poland.pdf [retrieved on September 7th 2020].

¹²⁹ Polish Criminal Code, § 197 (1997).

¹³⁰ A. Michalska-Warias, “Marital Rape in Poland from the Legal and Criminological Perspectives”, *PRAWO W DZIAŁANIU SPRAWY KARNE*, 2016, vol. 26, p. 63. Available online : <https://iws.gov.pl/wp-content/uploads/2018/09/Aneta-Michalska-Warias-Marital-Rape-in-Poland-from-the-Legal-and-Criminological-Perspectives-62.pdf> [retrieved on June 17th 2021].

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 the law as well¹³¹.

The fact here remains that a mere verbal reluctance without committing any act to prevent sleeping with the husband and no use of physical force or illegal threats on part of the husband doesn't constitute rape¹³². 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 consent¹³³.

Also, due to a 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 in Italy¹³⁴. Despite the existence of law, women refrain from initiating criminal proceedings in matters of marital rape which still remains a drawback¹³⁵.

5.2. Countries Refusing to Treat Marital Rape as a Crime

In the words of John Stuart Mill, marital rape represents the surrender of dignity by woman, which thereby lowers her standard below that of a slave¹³⁶. In the landmark case of *The Forum for Women, Law, and Development v. His Majesty's Government, Ministry of Law, Justice and Parliamentary Affairs*¹³⁷, the Supreme Court of Nepal has said that a married woman is not a slave and she also has human rights. The Universal Declaration on Human Rights (UDHR)¹³⁸, in its article 16, explicitly states that a man and a woman in marriage are equal. Even the 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.

¹³¹ G. Bzdyrak, "Annulment of Marriage in Polish Law and Declaration of Nullity of Marriage in Canon Law – A Comparative Study", *Review of Comparative Law*, 2016, vol. 26, issue 3, pp. 65-87.

¹³² Polish Criminal Code § 197 (1997).

¹³³ A. Michalska-Warias, "Marital Rape in Poland from the Legal and Criminological Perspectives", *PRAWO W DZIAŁANIU SPRAWY KARNE*, 2016, vol. 26, p. 63. Available online : <https://iws.gov.pl/wp-content/uploads/2018/09/Aneta-Michalska-Warias-Marital-Rape-in-Poland-from-the-Legal-and-Criminological-Perspectives-62.pdf> [retrieved on June 17th 2021].

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ J. S. Mill, *The Subjection of Women*.

¹³⁷ Writ No. 55 of the year 2058 BS (2001-2002), The Supreme Court, Special Bench, Nepal.

¹³⁸ United Nations, General Assembly, resolution 217 (III), *Universal Declaration of Human Rights*, 10 December 1948.

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. For the sake of study, three countries have been included.

India is a country which is actively growing in terms of social and economic standards. The Indian population have proactively accepted modern ideas in their laws and society. However, the same ideals don't stand true in the case of marital rape. Various pro-women organizations in India are working towards the criminalization of marital rape. The movements lead by these organizations are raising issues of women's rights, including the removal of the marital rape exception¹³⁹.

Another country included in the research is Sri Lanka. The choice is dependent on the fact that Sri Lanka is signatory to various women rights' conventions and though, efforts were made to criminalize marital rape by the legislature itself, they became unsuccessful owing to the religious notions prevalent in the country¹⁴⁰.

Finally, Botswana has been included in the list of study. It is one of those countries where the customary law of non-requirement of consent during sex in marriage still prevails¹⁴¹. Botswana has a grave issue of domestic violence; however, the legislators have ignored marital rape for long and haven't made any efforts to criminalize it¹⁴². Not much social movement has also been witnessed in this regard in Botswana.

5.2.1. India

Rape is derived from the Latin term 'rapio' meaning 'to seize'¹⁴³. While India has criminalized rape under Section 375, the judicial definition of 'rape' was given in the case of

¹³⁹ R. Rao Kallakuru, P. Soni, "Criminalisation of Marital Rape in India: Understanding Its Constitutional, Cultural and Legal Impact", *NUJS Law Review*, 2018, vol. 11, issue 1, p. 4.

¹⁴⁰ *Report of the Leader of Opposition's Commission on the Prevention of Violence against Women and the Girl Child*, Forum Against Gender Based Violence Sri Lanka, 2014. Available online : <http://gbvforum.lk/r-library/document/Report%20of%20the%20Leader.pdf> [retrieved on July 27th 2020].

¹⁴¹ US Department of State (Bureau of Democracy, Human Rights And Labor), *2017 Country Reports on Human Rights Practices*, 2017.

¹⁴² G. Mookodi, "The Dynamics of Domestic Violence Against Women in Botswana", *Botswana Journal of African Studies*, vol. 18, issue 1, 2004, pp. 1-64.

Available online : https://ubrisa.ub.bw/bitstream/handle/10311/904/Mookodi2_PBJAS_2004.pdf?sequence=1&isAllowed=y [retrieved on June 17th 2021].

¹⁴³ H. S. Gour, *Penal Law of India*, Law Publishers India Pvt Ltd, 7th ed., 2018, p. 1843.

Bhupinder Sharma v. State of Himachal Pradesh. In this case, the court had observed that rape refers to the ravishment of a woman against her will or without consent or with her consent, where such consent is obtained by force, fear or fraud¹⁴⁴. 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*”¹⁴⁵.

In the chairmanship of Justice J.S. Verma, a committee had recommended various changes to the rape law in India¹⁴⁶. Some of them were included through the Criminal Amendment Act of 2013¹⁴⁷. However, despite the recent advancement, the marital exception still remains.

According to data, approximately 10 to 14 percent of married women are subjected to sexual abuse within marriage¹⁴⁸. 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 judiciary¹⁴⁹.

The first case through which the marital exception was scrutinized was in *Queen Empress v. Haree Mythee*¹⁵⁰ 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 divorce¹⁵¹. The 172nd Law Commission Report suggested the Government of India to repeal the marital exemption provided under Section 375(2) of the Indian Penal Code¹⁵². There are several judicial pronouncements whereby the sexual privacy of a woman was recognized and granted immense importance¹⁵³. 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 marriage¹⁵⁴. Thereafter, a Member of Parliament, Shashi Tharoor

¹⁴⁴ *Bhupinder Sharma v. State of Himachal Pradesh* AIR 2003 SC 4684, (2003) 8 SCC 551.

¹⁴⁵ *Bodhisattwa Gautam v. Subhra Chakraborty* AIR 1996 SC 922.

¹⁴⁶ Justice J.S. Verma et al, *Report of Committee on Amendments to Criminal Law*, 2013. Available online : <https://www.prsindia.org/uploads/media/Justice%20verma%20committee/js%20verma%20committee%20report.pdf> [retrieved on September 8th 2020].

¹⁴⁷ Criminal Law (Amendment) Act, Act No. 13 (2013).

¹⁴⁸ D. E. H. Russell, *Rape in Marriage*, Indiana University Press, 2nd ed., 1990.

¹⁴⁹ ***Independent Thought v. Union of India and Another* (2017) 10 SCC 800.**

¹⁵⁰ *Queen Empress v. Haree Mythee*, (1891) ILR 18 Cal. 49.

¹⁵¹ *Sree Kumar v. Pearly Karun*, 1999 (2) ALT Cri 77.

¹⁵² S. Mandal, “The Impossibility of Marital Rape - Contestations Around Marriage, Sex, Violence and the Law in Contemporary India”, *Australian Feminist Studies*, 2014, vol. 29, issue 81, pp. 255-256.

¹⁵³ *State of Maharashtra v. Madhkar Narayan*, AIR 1991 SC 207.

¹⁵⁴ *Nimeshbhai Bharat Bhai Desai v. State of Gujarat*, 2018 SCC OnLine Guj 732.

presented “The Women’s Sexual, Reproductive and Menstrual Rights Bill, 2018”¹⁵⁵. However, in *Anuja Kapur v. Union of India Through Secretary*¹⁵⁶, the court had claimed that they were more concerned with the interpretation of laws than the 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 India¹⁵⁷. Considering the large number of arranged marriages which are concluded in India, criminalization of marital rape is necessary there¹⁵⁸.

5.2.2. Sri Lanka

Sri Lankan law provides for marital immunity in cases whereby the husband and the wife co-habit¹⁵⁹. 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 consent¹⁶⁰. When such a woman is his wife and the spouses are judicially separated, even then the offence of rape is constituted. Thus, only the *de jure* separation is given any value under the code¹⁶¹.

In the 2014 *Report of the Leader of the 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 the marital immunity however, after strong opposition from the Parliamentarians, the idea was sacked¹⁶².

Though Sri Lanka is a signatory to CEDAW, which emphasises on making laws on domestic and sexual abuse, it has taken the advantage of the marital exception provided in Indian Penal Code to justify the exception mentioned in their code¹⁶³.

¹⁵⁵ S. Joy, “Make Marital Rape A Crime: Tharoor’s Bill in Parliament”, *Deccan Herald*, January 1st 2019. Available online : <https://www.deccanherald.com/national/make-marital-rape-a-crime-tharoor-bill-in-parliament-710844.html> [retrieved on September 8th 2020].

¹⁵⁶ *Anuja Kapur v. Union of India Through Secretary*, MANU/SCOR/19643/2019.

¹⁵⁷ *Manju Lakra v. State of Assam*, 2013 SCC OnLine Gau 207: (2013) 4 GLT 333.

¹⁵⁸ N. Bhandare, “Behind Closed Doors: Marital Rape in India”, *LiveMint*, May 25th 2015. Available online : <https://www.livemint.com/Politics/b6HcnmMqYadNzWAP05FbEO/Behind-closed-doors-Marital-rape-in-India.html> [retrieved on September 8th 2020].

¹⁵⁹ S.M. E. Goonetilleke, “Domestic Violence: Is the Sri Lankan Woman Still Trapped in the Private Sphere?” *OUSL Journal*, 2015, vol. 8, pp. 101-123.

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *Report of the Leader of Opposition's Commission on the Prevention of Violence against Women and the Girl Child*, Forum Against Gender Based Violence Sri Lanka, 2014. Available online : <http://gbvforum.lk/r-library/document/Report%20of%20the%20Leader.pdf> [retrieved on July 27th 2020].

¹⁶³ The Women and Media Collective Colombo, *Sri Lanka Shadow Report to the Committee on the Elimination of All Forms of Discrimination Against Women*, 2010. Available online :

Though there have been uproars for criminalizing marital rape, the low number of reporting is another aspect which needs 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 offence¹⁶⁴.

5.2.3. Botswana

Domestic violence in Botswana is extremely widespread and is mostly resulted by increased female autonomy and changing socio-economic dynamics in gender roles¹⁶⁵. The Botswanan Penal Code neither defines nor penalizes the act of domestic violence however, the Domestic Act provides for the same¹⁶⁶. Nonetheless, the same is overshadowed by the customary and rural practices which prescribe women to be chastised by the husbands. Thus, marital rape is not criminalized¹⁶⁷.

Though provisions have been made to remove the victim woman from the house, no rehabilitation efforts or shelter have been provided for. The Domestic Violence Law does not characterize the offence of marital rape and refuses to criminalize it. Hence, the law is ineffective to combat violence against married women and fails to protect their rights¹⁶⁸. The judiciary has also showed little to no inclination towards taking steps on protecting women in marriage against sexual abuse.

https://www2.ohchr.org/english/bodies/cedaw/docs/ngo/WMD_SriLanka48.pdf [retrieved on September 8th 2020].

¹⁶⁴ S. Nigam, "The Social and Legal Paradox Relating to Marital Rape in India: Addressing Structural Inequalities", *SSRN*, 2015. Available online : <https://ssrn.com/abstract=2613447> [retrieved on June 19th 2021].

¹⁶⁵ G. Mookodi, "The Dynamics of Domestic Violence Against Women in Botswana", *Botswana Journal of African Studies*, vol. 18, issue 1, 2004, pp. 1-64. Available online : https://ubrisa.ub.bw/bitstream/handle/10311/904/Mookodi2_PBJAS_2004.pdf?sequence=1&isAllowed=y [retrieved on June 17th 2021].

¹⁶⁶ E. Barad et al, *Gender-Based Violence Laws in Sub-Saharan Africa*, Center for Reproductive Rights, 2007. Available online :

http://reproductiverights.org/sites/default/files/documents/GBV_Laws_in_Sub_Saharan_Africa.pdf [retrieved on September 8th, 2020].

¹⁶⁷ G. Mookodi, "The Dynamics of Domestic Violence Against Women in Botswana", *Botswana Journal of African Studies*, vol. 18, issue 1, 2004, pp. 1-64. Available online : https://ubrisa.ub.bw/bitstream/handle/10311/904/Mookodi2_PBJAS_2004.pdf?sequence=1&isAllowed=y [retrieved on June 17th 2021].

¹⁶⁸ Immigration and Refugee Board of Canada, *Botswana : Domestic Violence Including, Legislation, State Protection, Recourse and Services Available to Victims (2007 – February 2011)*, 2011. Available online : www.refworld.org/docid/4dbe8bc52.html [retrieved on July 27th 2020].

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 THE SANCTITY OF MARRIAGE

Marital Rape is an offence 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 relationships¹⁶⁹.

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 observed that the family system would be put under stress, invoking greater injustice which is the reason why the marital exception shouldn't be touched¹⁷⁰. 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 marriage¹⁷¹.

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. Man and woman, both are at the equal pedestal in a marital setup¹⁷² however, physical power along with legal preservation gives the man a higher edge.

Family values are of great importance in every society and culture. For this reason, 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 same¹⁷³.

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

¹⁶⁹ D. E. H. Russell, *Rape in Marriage*, Indiana University Press, 2nd ed., 1990.

¹⁷⁰ PTI, "Criminalizing Marital Rape Will Hurt Family, Says Parliamentary Panel", *Times of India*, March 15th 2016. Available online: <https://timesofindia.indiatimes.com/india/Criminalizing-marital-rape-will-hurt-family-says-parliamentary-panel/articleshow/51408978.cms> [retrieved on September 8th 2020].

¹⁷¹ T. Johnson, "The Impact of Women's Consciousness on the History of the Present", *Social Justice*, 1990, vol. 17, issue 2, p. 131.

¹⁷² *Joseph Shine v. Union of India*, 2018 SCC OnLine SC 1676.

¹⁷³ N. Gerstel, "Divorce, Gender and Social Integration", *Gender and Society*, 1988, vol. 2, issue 3, pp. 343-367.

sacrosanct character of marriage, we cannot rule out the damage that has already been caused by decades of patriarchal regressions and anarchic thoughts¹⁷⁴.

The advent and propagation of feminism were based on the years of torture that women had to endure at the hands of the patriarchal ideologies¹⁷⁵. The idea behind it was to bring about a significant and positive change in society which can create in itself the right place for women. 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 the judiciary towards the crumbling state of women in the then society¹⁷⁶.

However, despite conventions and laws, not much change has been witnessed in the marital setup. The institution of marriage was left out of the realm of rape in various countries in the name of the sanctity of marriage¹⁷⁷. However, it is important to contemplate here that said sanctity was run down the day marriage became a tool to control and chastise women and not for the companionship of two individuals¹⁷⁸.

Corporal punishments¹⁷⁹ and physical abuse aren't new elements to abusive marital relations. And it is pertinent to note here that corporal punishments imposed by husbands over wives were legal under the common law¹⁸⁰. Such notions are upheld by some Commonwealth countries, one of which is the Caribbean government.

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 heal with time but the scar which is left on the psychology

¹⁷⁴ N. Burton, "A Feminist Critique of Marriage", *Psychology Today*, (September 8th 2020, 18:17 PM), <https://www.psychologytoday.com/us/blog/hidden-and-see/201708/feminist-critique-marriage>.

¹⁷⁵ L. Baldez, "Women's Movements and Democratic Transition in Chile, Brazil, East Germany and Poland", *Comparative Politics*, 2003, vol. 35, issue 3, pp. 253-272.

¹⁷⁶ *Ibid.*

¹⁷⁷ S. Basu, "Sexual Property: Staging Rape and Marriage in Indian Law and Feminist Theory", *Feminist Studies*, 2011, vol. 37, issue 1, pp. 185-211.

¹⁷⁸ A. Dubler, "Governing Through Contract: Common Law Marriage in the Nineteenth Century", *The Yale Law Journal*, 1998, vol. 107, issue 6, pp. 1885-1920.

¹⁷⁹ J. E. Hasday, "Contest and Consent: A Legal History of Marital Rape", *California Law Review*, 2000, vol. 88, p. 1389.

¹⁸⁰ R. B. Seigel, "The Rule of Love: Wife Beating as Prerogative and Privacy", *The Yale Law Journal*, 1996, vol. 105, issue 8, pp. 2117-2207.

of the victim can stay forever with her. It affects her life to the level that she may find it difficult to lead it in a normal manner.

Marriage is one institution which holds equal importance in the life of an individual to 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 offence¹⁸¹. Such marriages become prejudicial and distasteful. The bond dilutes to a chore and affects the sanctity of marriage and the life and upbringing of the kids, scarring their psychology and giving birth to mental health issues¹⁸².

7. MARITAL RAPE AND THE 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 upon¹⁸³. These patriarchal ideas spread in various aspects of marriage, including sexual matters, making the man look at sexual gratification as his right which he can acquire even with the help of force, against the will and consent of the wife.

International law also talks about the right against torture and right to dignity. Article 1 of the Universal Declaration on Human Rights (UDHR) declares all men and women to have been born with equal dignity and rights¹⁸⁴. The preamble of the same declaration recognizes inherent dignity and inalienable rights of all members of mankind or more appropriately put, human race¹⁸⁵. Article 3 of the same further emphasises on the human right to life, liberty and security of every individual¹⁸⁶. It is important to note here that though the UDHR isn't a legally binding instrument¹⁸⁷, various eminent international law scholars have characterised this declaration as a part of customary international law, keeping in mind its significance and

¹⁸¹ L. Baldez, "Women's Movements and Democratic Transition in Chile, Brazil, East Germany and Poland", *Comparative Politics*, 2003, vol. 35, issue 3, pp. 253-272.

¹⁸² D. E. H. Russell, *Rape in Marriage*, Indiana University Press, 2nd ed., 1990.

¹⁸³ M. Hunt, "Legal Rape", *Family Circle*, January 9th, 1979, p. 38.

¹⁸⁴ United Nations, General Assembly, resolution 217 (III), *Universal Declaration of Human Rights*, 10 December 1948.

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ M. A. Glendon, "The Rule of Law in the Universal Declaration of Human Rights", *Northwestern Journal of International Human Rights*, 2004, vol. 2, issue 1, p. 4.

widespread acceptability¹⁸⁸. The rights and freedoms set out in the UDHR have been widely incorporated in national laws and Constitutions, thus increasing its validity¹⁸⁹.

Despite explicit recognition by 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 International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention Against Torture, also known as the Torture Convention, and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The right to be free of torture and cruel, inhuman and derogatory treatment includes such rights to be enforced in case of domestic violence¹⁹⁰. 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 actor¹⁹¹. 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, but 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

¹⁸⁸ L. Henkin, *The Age of Rights*, Columbia University Press, 1990, p. 19.

¹⁸⁹ J. Goldsmith, "International Human Rights Law and the United States Double Standard", *Green Bag*, 1998, vol. 1, pp. 365, 366, 371.

¹⁹⁰ B. C. Alexander, "Convention Against Torture: A Viable Alternative Legal Remedy for Domestic Violence Victims", *American University International Law Review*, 1999, vol. 15, issue 4.

¹⁹¹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

citizens. However, with the existence of the marital exception in various countries, the fundamental rights seem to be ineffective.

8. EFFECTIVENESS OF PRESENT LAWS ON MARITAL RAPE

One of the major and significant barriers which arises while discussing criminalization of marital rape is its inclusion within the ambit of domestic violence. It isn't once that spousal rape has been included in the realms of domestic violence¹⁹². This reasoning rules out the need for separate laws as most countries have laws against domestic violence¹⁹³.

In some other countries, marital rape is subsumed within the legislations created for criminalization of sexual offences against women. While it is a praiseworthy primitive step, the offence of marital rape has unique features which cannot be compared to either domestic violence or rape¹⁹⁴.

The laws pertaining to domestic violence have developed on the lines of domestic feuds, family tensions, privacy of households and protection by the State against all kinds of violence. On the other hand, the legislations pertaining to rape run along the lines of consent and are often found caught in a tension between sexual consent and evidentiary proof. Marital rape had differential features which warrants unique solutions and attention¹⁹⁵.

It is often quoted that “*The nature of violence in an intimate relationship creates some distinct social and psychological problems that affect the victim's position in the legal system The criminal justice system treats rape that involves strangers as more serious than rape involving an intimate.*”¹⁹⁶ It is widely noted in the offence of marital rape that the economic and emotional hurdles created by a marital relationship between the wife and the husband, who is also the batterer, are difficult to overcome¹⁹⁷. The woman, who is violated by her own husband,

¹⁹² M. L. Woolley, “Marital Rape: A Unique Blend of Domestic Violence and Non-Marital Rape Issues”, *Hastings Women's Law Journal*, 2007, vol. 18, issue 2, pp. 269-293.

¹⁹³ UN News, “More Countries Have Laws Banning Domestic Violence, Says UN Women's Right Official”, November 22nd 2006. Available online : <https://news.un.org/en/story/2006/11/200542-more-countries-have-laws-banning-domestic-violence-says-un-womens-rights> [retrieved on September 10th 2020].

¹⁹⁴ M. L. Woolley, “Marital Rape: A Unique Blend of Domestic Violence and Non-Marital Rape Issues”, *Hastings Women's Law Journal*, 2007, vol. 18, issue 2, pp. 269-293.

¹⁹⁵ S. Harless, “From the Bedroom to the Courtroom: The Impact of Domestic Violence Law on Marital Rape Victims”, *Rutgers Law Journal*, 2003, vol. 35, pp. 305, 308.

¹⁹⁶ *Ibid.*

¹⁹⁷ M. Lucas, “An Invitation to Liability ? : Attempts at Holding Victims of Domestic Violence Liable as Accomplices When They Invite Violations of Their Own Protective Orders”, *Georgetown Journal of Gender and the Law*, 2004, vol. 5, pp. 786-787.

may find it difficult to leave her spouse and children while she is financially dependent¹⁹⁸ and emotionally connected to them. Considering this in mind, both internationally and domestically, there is a need to understand the special needs attached to this offence. The jurors and legislators, governments and law enforcers should put light on this need for special treatment of such victim, rehabilitation facilities for her and the differential prosecution of the perpetrator of marital rape¹⁹⁹.

The 1978 case of *Oregon v. Rideout*²⁰⁰ was a wake-up call for the entire world on the topic of marital rape and also brought out the issues pertaining to its criminalization. While the proceedings were on-going, the media trial left no stone unturned to question the moral and sexual character of the victim in the case²⁰¹. Even the District Attorney Gary Gortmaker didn't shy away from publicly demonstration his lack of sympathy with victims of spousal rape, stating that “*if it had happened in the bedroom and he didn't beat her up, I'd agree with the other side.*”²⁰²

Decades have passed since the Oregon case ; however, the social stance of marital rape continues to remain the same²⁰³. The fact is that a mere passing of law won't serve the purpose since the mindset remains the same. The legislation isn't capable of changing public opinion, as it hasn't been since so long²⁰⁴. The statistical analysis in countries where marital rape is criminalized haven't shown much hope²⁰⁵. The status-quo on social acceptance of marital rape as an offence remains somewhat similar as it was a few decades back²⁰⁶.

¹⁹⁸ UN Statistics Division, “The World's Women ; Chapter 8: Poverty”. Available online : <https://unstats.un.org/unsd/gender/chapter8/chapter8.html> [retrieved on September 10th 2020].

¹⁹⁹ M. L. Woolley, “Marital Rape: A Unique Blend of Domestic Violence and Non-Marital Rape Issues”, *Hastings Women's Law Journal*, 2007, vol. 18, issue 2, pp. 269-293.

²⁰⁰ *Oregon v. Rideout*, 5 FAM. L. REP. (BNA) 2164 (1978).

²⁰¹ M. A. Bazhaw, *For Better or for Worse? Media Coverage of Marital Rape in the 1978 Rideout Trial*, Master's thesis, Georgia State University, 2008, pp. 2-3.

²⁰² S. Barry, “Spousal Rape: The Uncommon Law”, *American Bar Association Journal*, 1980, vol 66, issue 9, p. 1091.

²⁰³ L. R. Eskow, “The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution”, *Stanford Law Review*, 1996, vol. 48, issue 3, pp. 677-709.

²⁰⁴ J. M. Ross, *Making Marital Rape Visible: A History of American Legal and Social Movements Criminalizing Rape in Marriage*, PhD thesis, University of Nebraska-Lincoln, 2015, p. 85.

²⁰⁵ I. Kolade-Fayesi, “Spousal Rape in a Globalized World”, *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, 2018, vol. 9, issue 1, pp. 107-115.

²⁰⁶ M. J. Anderson, “Lawful Wife, Unlawful Sex- Examining the Effect of the Criminalization of Marital Rape in England and the Republic of Ireland”, *Georgia Journal of International and Comparative Law*, 1998, vol. 27, issue 1, pp. 139-140.

Women need to be educated that, as against the notion, marriage isn't a licence to rape to eradicate the fear and reluctance related to reporting of matters related to marital rape²⁰⁷. This reluctance is manifested by the headline of Chinese daily, *South China Morning Post*, which stated that “*Marital Rape Victims Ignorant of Law Change; Not One Case Has Been Prosecuted Since Amendment Took Effect in 2002*”²⁰⁸. There is a gulf between the words written in black and white and the practical application of law.

Basing on the above discussion, the criminalization of marital rape doesn't limit to mere legislative reform. The simple declaration of elimination of marital exception has failed to bear any fruitful results in practicality²⁰⁹. The adequate dealing of this offence encompasses social awareness in favour of the victim and a supportive nexus of government agencies and non-governmental organizations. This would assist the sensitive treatment of the victim. Additionally, the judicial system shall together make efforts to portray that marital rape is intolerable²¹⁰.

Finally, the global enforcement of marital rape prosecutions lacks in the fact that most countries rely on respective governmental directives for making laws on marital rape. It is important to note that there is no international declaration or convention on the matter which is legally binding on the countries to criminalize marital rape.

*“While declarations and international conferences are pertinent for pointing out such issues of wide concern and for suggesting solutions, they do not create binding obligations that require states to enforce these solutions ... [they] carry political weight, but they are not, on their own, legally binding instruments unless they are seen as embodying notions of customary human rights law, which has a legally binding effect upon states.”*²¹¹

²⁰⁷ S. Harless, “From the Bedroom to the Courtroom: The Impact of Domestic Violence Law on Marital Rape Victims”, *Rutgers Law Journal*, 2003, vol. 35, pp. 305, 308.

²⁰⁸ N. Connolly, “Marital Rape Victims Ignorant of Law Change; Not One Case Has Been Prosecuted Since Amendment Took Effect in 2002”, *South China Morning Post*, October 17th 2005. Available online : <https://www.scmp.com/article/520844/marital-rape-victims-ignorant-law-change> [retrieved on September 10th 2020].

²⁰⁹ M. Anderson, “Marital Immunity, Intimate Relationships, and Improper References: A New Law on Sexual Offenses by Intimates”, *Hastings Law Journal*, 2003, vol. 54, pp. 1465-1554.

²¹⁰ K. Juthani, “Police Treatment of Domestic Violence and Sexual Abuse: Affirmative Duty to Protect vs. Fourth Amendment Privacy”, *NYU Annual Survey of American Law*, 2003, vol. 59, pp. 51-56.

²¹¹ S. Harless, “From the Bedroom to the Courtroom: The Impact of Domestic Violence Law on Marital Rape Victims”, *Rutgers Law Journal*, 2003, vol. 35, p. 318, *quoted in* : M. L. Woolley, “Marital Rape: A Unique Blend of Domestic Violence and Non-Marital Rape Issues”, *Hastings Women's Law Journal*, 2007, vol. 18, issue 2, p. 292.