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GENDER RIGHTS AND THE LAW RELATING TO RAPE: DOMESTIC AND COMPARATIVE PERSPECTIVES

LAW & SOCIETY TRUST

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Law & Society Trust
3 Kynsey Terrace, Colombo 8, Sri Lanka
(+94)11-2691228, 2684845 | fax: 2686843
lst@eureka.lk
www.lawandsocietytrust.org

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Editor's Note ... ...

This Issue of the *Review* contains three papers from contributors on the law relating to rape in Sri Lanka, India as well as an overview of the law on marital rape in South Asia.

The first paper by a senior retired civil servant and attorney at law, ***Somapala Gunadheera*** revisits the decision of the Court of Appeal in the *Kamal Addaraarachchi* case, probably one of the most contentious cases on the subject in Sri Lanka. Taken broadly, the Court's reversing of a lower court conviction in this case was based on several factors. Primarily, it was the Appeal Court's reasoning that the alleged rape victim's version of being an unwilling party to sexual intercourse was highly improbable, having regard to the normal conduct and behaviour patterns of Sri Lankan society. This conclusion was premised on the fact that the alleged rape victim had gone into the room of an unknown house with the alleged rapist in the dead of the night, without making any fuss. In so reasoning, the Court applied the yardstick of 'accepted and expected behaviour' of women in the country.

This judicial reasoning was directly at variance with the High Court's position that gender stereotyping as to what women should and should not do and when and where, detracts from the basic equality of men and women. The mere fact that a woman is willing to enter a room with a man should not mean that she was consenting to an act of intercourse. This may be an item of evidence but ultimately the question is whether she gave her consent. The absence of consent could be apparent by both verbal and non verbal behaviour and the accused could be found guilty if it is proved beyond all reasonable doubt that he was aware of or recklessly or wilfully blind to the fact that consent was not communicated.

Applying this principle to the facts, the High Court had opined that an ordinary and more experienced person might have made a different choice. However, the alleged victim was barely seventeen years at that time and was in a desperate situation. The mere fact that she acted as she did was held not to detract from the probability of her version of events.

In contrast, the Court of Appeal accepted the notion of implied consent by the women where rape is alleged. The fact that the rape victim exhibited no physical injuries, thus providing no corroborative evidence of her assertion that she resisted rape, was central to this judicial thinking. In this context, it is relevant that the 1995 amendments to the Penal Code specifically deleted the earlier legal condition that actual physical injury should be shown as

indicative of resistance in allegations of rape. Though the *Addaraarachchi* incident itself took place prior to the date of the enactment of these amendments to the penal laws, it would have been acceptable and indeed expected that courts deciding cases after the amended legislation would take into account the changed intentions of the legislators. In the instant case however, the Court of Appeal was clearly influenced by what they saw as the alleged rape victim's blatantly untrustworthy evidence, leading the Court to call for corroborative evidence in strong terms. Her delay in making a prompt complaint about what she went through is seen in a similar light. This essential lack of credibility, as the judges saw it, was what led to the Supreme Court's refusal to special leave to appeal against the Appeal Court decision.

Then again, the Court of Appeal went on to make harsh strictures on certain procedural steps taken by the High Court, including holding the trial in camera, which, in the opinion of the Court of Appeal, amounted to mollycoddling the alleged rape victim. The specific reason why the Court of Appeal opined that this should not have been done is because the alleged rape victim had earlier given the same evidence in a crowded court before the Magistrate and that she had been twenty years of age at that time.

Many aspects of this judicial reasoning have attracted stringent critique by rights activists as evidencing the precise reason as to why women victimised in whatever circumstances prefer to travel to holy shrines and pray to the gods to alleviate their woes instead of facing a public and hostile criminal trial.

In a refreshing and dispassionate examination of these aspects of the case, Gunadheera engages in a comprehensive scrutiny of comparative precedents in respect of core elements of the appeal court judgment, including the issue of credibility, the issue of consent, the issue of corroboration and evidence of resistance, questions of probability and stereotype, the objective or subjective test, admission of unproved learned treatises and procedural concessions made to the victim during the trial. The analysis takes into account developing standards of international and comparative law in a useful contribution to the existing critiques of the *Addaraarachchi* case.

In particular, the author makes a persuasive case as to why concessions during trial for rape victims are matters that ought to be looked at afresh. His observation is pertinent in this respect:

> *There is the risk that concessions given to a pretending complainant may result in unfair disadvantage to the accused. But just as much as an accused is entitled to the benefit of the doubt until he is proved guilty, a rape victim ought to be given the benefit of the doubt as to her*

truthfulness until the contrary is established. Denial of concessions to a genuine victim is bound to cause an irreparable failure of justice.

In conclusion, he relevantly calls for reforms in regard to the attitudes, values and strategies traditionally applied by the legal system for generations as well as the creation of a new legal ethos of women's rights.

Complementing this paper, the *Review* publishes two reflections on the law relating to rape in India as well as on marital rape in South Asia, written on invitation to the *Review*.

The first contribution by legal researcher ***Ashwita Ambast*** again demonstrates the extent of judicial conservatism commonly evidenced in rape cases, including the privileging of women who are traditional and value their chastity. In legal fora, such women are ordinarily accorded more credibility than women who exhibit more liberality in their social interactions. This writer briefly deals with the contested question of marital rape, observing that even law reform bodies have not been able to deal with this problem in a manner that befits modern day thinking.

This question is taken further in the concluding contribution to this Issue by ***Priya Thangarajah*** and ***Ponni Arasu***, which looks at developments relating to the legal recognition of marital rape in countries in South Asia. Common patterns of refusal of the law to acknowledge the implications and consequences of marital rape within not only deeply conservative societies but also in the context of the personal laws applicable to South Asian societies, are discussed.

Against this background, recent jurisprudence in Nepal comes as a welcome contrast where the Supreme Court has declared that marital sex without a spouse's consent amounts to rape. However, this is an exception to the rule. Generally legal reforms, as is the case in Sri Lanka, have only made a token concession to this concept by recognising its applicability in situations of judicial separation or divorce.

The writers argue for a wider understanding of the basic fact that rape, whether within the family or outside, is a most heinous act of violence against women. Attitudinal reform within the law, the legal system as well as by judges, lawyers and the public is crucial to bringing about this understanding.

Kishali Pinto-Jayawardena

ADDARAARACHCHI REVISITED: *GENDER RIGHTS* v. *THE LAW ON RAPE*

Somapala Gunadheera[*]

1. Introduction

I had taken my car to a garage and was biding my time until the ramp was ready. The persons, who had come in the vehicle on the ramp, were engaged in an animated conversation about the steep rise of corruption in society. They even challenged judicial decisions attributing unwholesome motives to them and cited the Judgment in the *Addaraarachchi* Appeal[1] as an example.

At that stage I decided to intervene. After identifying myself as a lawyer, I asked them what was wrong with the Judgment. Questioned further, the 'critics' admitted that they had not read the Judgment or bothered to ascertain the reasons for the conclusions. Challenged on an assurance of confidentiality, to identify the persons responsible for the 'corruption' in the case, they were tongue-tied. These responses were a good reflection of popular prejudice against cases which are heavily politicized due to the clash of cultural values.

Addaraarachchi has been a subject of adverse comment elsewhere. In a paper on "The Law on Rape – A Giant Step Back", Dr. Mario Gomez submits that the Court of Appeal Judgment in *Addaraarachchi* (The Judgment), *"is deeply flawed and reinforces notions of male supremacy in our society"*.[2] Referring to the said Judgment, Prof. Savitri Goonesekere has observed, *"The judges made several remarks which reflect their lack of sympathy for the prosecutrix in a rape case"*.[3]

This article is an attempt to revisit *Addaraarachchi* bearing in mind the diverse responses it has received from various stakeholders. More particularly, it seeks to examine the legal basis of the decision and to approach the Law on Rape from the perspective of women's rights.

2. The Background

The Accused-Appellant (AA) in *Addaraarachchi* was indicted in the High Court of Colombo under two counts. The first count pertained to the abduction of a girl in order that she may be forced or seduced to illicit intercourse, an offence punishable under Section 357 of the Penal Code. In the second count AA was indicted with having committed rape (Section 363), an offence punishable under Section 364 of the Code.

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[*] C.C.S., Attorney at Law, LL.M.

[1] *Kamal Addaraarachchi* v. *State* [2000] 3 SLR 393.

[2] "The Law on Rape: A Giant Step Back", Mario Gomez, in *LST Review* 11:159 (January 2001), pp.1-10.

[3] *Violence, Law and Women's Rights in South Asia*, Sage Publications India Private Ltd., 2004, p.70.

The learned High Court Judge, sitting without a jury, convicted AA on both counts, and sentenced him to a term of two years rigorous imprisonment on the 1st count and to a term of 10 years rigorous imprisonment on the 2nd count, in addition to a fine of rupees one million.

Facts of *Addaraarachchi* according to the version of the Prosecutrix (P) are as follows:

At the time of the incident, P who was 16 years and attending school, decided to run away from her aunt's to go to her grandmother's. She carried with her a travelling bag containing some clothes and an exercise book which included the name and address of AA. When P reached her grandmother's, she found her grandmother's house demolished and the place deserted.

Someone passing by had given P an address where she could find a job. Searching for the said address, P was redirected from place to place and finally arrived at AA's house. A lady in that house told her that there were no jobs available but P did not go away. AA had come home around 9PM and had spoken to P. The discussion lasted about two hours. AA had discouraged P from seeking employment, advised her to continue with her studies, promising to help her, and given her Rs.1,000/-.

The lady in the house (AA's) had agreed to keep P for the night. Later when AA was to drop P at her house, she had refused to go to her aunt's place and requested AA to drop her at her friend's house. Before leaving, AA had asked P to get into the front seat of his car.

On their way P had observed the car going in a wrong direction and warned AA accordingly. At that stage AA had told her that he would take her to her friend's place on the following day as it was too late then, and indicated that he would take her immediately to the house of one of his friends.

Having entered a room in the house that P was taken to, the two of them talked about teledramas in which AA had acted. Thereafter AA had requested P to change. When she refused, AA grabbed her and removed her under-skirt using his toes.

As they struggled on the bed, P's brassiere came out. AA removed P's other undergarments also by using his toes. Thereafter AA pulled P on to the bed and after some struggle, he had sexual intercourse with her against her will. P's claim is that since AA had said there was nobody there, she did not raise cries. P was dropped off by AA at a junction in the following morning.

P went to her friend's but did not disclose the alleged act of rape. Apparently on a complaint made by her friend's father, P had been taken to a Police Station later in the evening. That night a Police Officer recorded a statement from P but she mentioned the act of rape only in her second statement recorded after she had spoken to the Police Matron on her second night at the police station.

Box 1 - PENAL CODE, Section No.363

Rape

363. A man is said to commit "rape" who has sexual intercourse with, a woman under circumstances falling under any of the following descriptions:

(a) without her consent even where such woman is his wife and she is judicially separated from the man;

(b) with her consent when her consent has been obtained, by use of force or threats or intimidation or by putting her to fear of death or hurt, or while she was in unlawful detention;

(c) with her consent when her consent has been obtained at a time when she was of unsound mind or was in a state of intoxication induced by alcohol or drugs, administered to her by the man or by some other person;

(d) with her consent when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is, or believed herself to be, lawfully married;

(e) with or without her consent when she is under sixteen years of age, unless the woman is his wife who is over twelve years of age and is not judicially separated from the man.

Explanation-

(i) Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape;

(ii) Evidence of resistance such as physical injuries to the body is not essential to prove that sexual intercourse took place without consent.

AA's version of the incident was that P had come to his house in search of a job. He had advised her to continue her studies and given her Rs.1,000/-. When he wanted to drop her at her aunt's house, she had refused and wanted her to be dropped at her friend's place.

When AA had taken P close to her friend's house, she had refused to get down, giving him the impression that she wanted to stay with him for the night. Hence he took her to a room in a guest house and spent the night there with her. On that night both of them had sexual intercourse willingly.[4] He had sexual intercourse with her twice.

3. Credibility

The Judgment questions the credibility of P's evidence on several points. P's statement that she had set out from her aunt's in search of her grandmother was disbelieved for the following reasons:

1. P thought it fit to carry the book which contained the name and address of AA but not her school books.

2. According to P herself, the woman described by her as grandmother was a distant relative. Therefore there was the possibility that P was really unaware whether such a grandmother was among the living.

[4] See dictum at fn.7.

3. P's grandmother was living in a shanty and the question would arise as to whether P could have lived there and whether the grandmother could have afforded to support her.

4. Two defence witnesses stated that P came to their houses looking for AA. One of them said P asked for AA's address. The evidence of these two witnesses ruled out the prosecution story that the meeting of P with AA was by chance and supported the defence suggestion that it was a thought out act.

5. P who wanted to attend school from her grandmother's place, suddenly changed her plans and wanted to find a job.

6. At the discussion with AA, P did not say anything about her leaving the aunt's house in search of her grandmother.

Substantial as the reasons given are, one cannot be certain that they can be the only explanations to P's behaviour in this case. It is not impossible that at the spur of the moment of going in search of her grandmother to find alternative accommodation, P did not think of carrying her bag and baggage. It is also not clear as to how knowledge of the existence of the 'grandmother' can be conclusively related to the degree of relationship between the two. Considerations like comfort and feasibility may not occur to an immature girl running away in a huff.

A change of mind to find a job is not an unnatural result of the discovery that the grandmother was not available to provide shelter. In that context, a doubt arises whether P was looking for AA as fan and admirer or as possible employer. Mention of the search for the grandmother at the meeting with AA hours later, though relevant, may not have been an inevitable detail to the discussion.

The CA Judgment does not indicate that AA's was the only address recorded in the notebook of P. It may well have been one among many included in the address-book of a teenager fan of popular TV personalities. If so, the entry on AA may not warrant a definite conclusion on P's search.

Even if it is granted for the sake of argument, that P deliberately went in search of AA as assumed in the Judgment, such conduct on the part of P does not by itself, absolve AA from the charge of rape. It is preposterous to assume that every woman who seeks out a man, grants him a license for sexual intercourse with her.

4. Incidental Issues of Credibility

Among the reasons given for allowing the Appeal are issues of credibility that are not directly connected to the act of rape. They are:

1. When P was asked in the HC whether any contraceptives were used by AA, her reply was that she could not remember although she admitted the fact at the non-summary inquiry.

2. Having told the Magistrate about the second act of sexual intercourse, only one act of rape was claimed by P at the trial before the High Court.

3. P's delay in making a prompt complaint about the incident of rape.

It would be idealistic to expect one hundred percent credibility from every human being. Witnesses often deviate from the truth where it is advantageous for them to do so. If the evidence of a witness is completely rejected on the discovery of a falsehood, however trivial it may be, Courts would have hardly anything to go by. The challenge is to sift the truth from the evidence, discern appreciable reasons that may have dented the truth and more particularly, identify areas that are inseparably connected with the decision to be made.

In the instant case, P may not have been truthful in what she said about the use of contraceptives and the repetition of intercourse. It is possible that she deviated from the truth to bolster her case just as much as the *"accused-appellant's evidence was that he advisedly did not admit"* earlier. The core issue is whether P's claim that she was raped is true and if that fact is established on evidence that go directly to the crime, other ancillary embellishments and 'on course' adjustments have to be understood in their context.

P's delay in complaining compares with the post-trauma behaviour of the victims of *Olugboja* and *Ewanchuk* discussed below. It would appear that P held back her experience even from her friend with whom she went to stay after the incident.

There is no evidence that P sought out AA to continue a relationship or to obtain redress or as ransom for her silence. What could be the strategic motive, if any, that kept her tongue-tied? Certainly not disappointment at the failure of consideration as in *Linekar*.[5]

The common law prejudice against delay of complaint is facing dilution in sensitive jurisdictions. For instance, in Tasmania, absence of complaint or delay in complaining does not necessarily indicate that the allegation that the crime was committed is false and the jury has to be informed that there may be good reasons why a person may hesitate in making, or may refrain from making, a complaint.[6]

By and large, the credibility of P, as analyzed by the CA, appears to be the main reason for the SC not to grant to her special leave to appeal.[7]

5. Consent

The ingredient that converts sexual intercourse with a woman to the offence of rape is the absence of consent on the part of that woman. The Judgment gives several reasons for

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[5] *R.* v. *Garbet Linekar* [1995] 3 AllER 70.
[6] Criminal Code (Tas) (1987) S.371A.
[7] S.C. LA No.30/2001 decided on 30.05.2002 (Unreported).

assuming that there was consent to sex in *Addaraarachchi.* Out of them, the following are the most proximate to the incident:

1. P went into the room of an unknown house with AA in the dead of night, without making any fuss.

2. P's statement that she did not raise cries because AA had told her earlier that there was no one around is not trustworthy.

3. Any woman after the first act of rape would not think of sleeping with the rapist again unless at gun point, as P had done in this case.

4. P did not mention one word about rape being committed on her by the Accused-Appellant, to her friend at their subsequent meeting.

Yet, on P's version of the facts, it was not as if P had knowingly and willingly marched into an unknown location with AA. That the house was unknown to her was a point in her favour. P's evidence is that she was not aware where she was being taken to until she arrived at the room. She was taken out on the pretext of being taken to her friend's place. If so, she would have believed that she was being taken to the promised destination.

Hence her query when she discovered that the car was moving in a wrong direction. It was only then that AA told her that it was too late in the night to go to her friend's place and that she would be found accommodation for the night in the house of a friend of his. Suddenly placed in such a situation, what else could a young girl of 16 years have done at dead of night other than submitting herself to the unfolding sequence of events?

The meaning of 'consent' as applicable to the crime of rape has been meticulously defined internationally in several cases in similar jurisdictions. The following observations by the Court of Appeal in UK in *Rejina* v. *Olugboja*[8] are pertinent:

> It is now clear that lack of consent is the crux of the matter and this may exist though no force is used. The test is not "was the act against her will?" but "was it without her consent?"
>
> Although 'consent' is an equally common word, it covers a wide range of states of mind in the context of intercourse between a man and a woman, ranging from actual desire on the one hand to reluctant acquiescence on the other.
>
> The dividing line in such circumstances between real consent on the one hand and mere submission on the other may not be easy to draw.

These observations raise several issues regarding *Addaraarachchi.* Even if the act may not have been against P's will, was it done with her consent? Did she actually desire the act or

[8] *Rejina* v. *Olugboja* Court of Appeal (Criminal Division) [1982] QB 320, [1981] 3 AllER 443, [1981] 3 WLR 585 17.06.1981.

was it done with her 'reluctant acquiescence'? Did she really consent to the act or was it 'mere submission' on her part?

The Accused's culpability depends on a clear delineation of these issues. The Court of Appeal questioned the trial Judge's observation that there was no question of tacit consent in rape and the above formulation by that Court that there was consent is based on a tacit assumption on the part of AA. The Court observed:

> Besides the learned trial Judge has misdirected herself on the law relating to consent in rape cases by holding that "the law has no place for tacit consent" It is a serious misdirection in law.

The Canadian case of *R.* v. *Ewanchuk*[9] contains the following dictum based on the 1992 amendment to the Canadian Criminal Code:

> The doctrine of implied consent has been recognized in our common law jurisprudence in a variety of contexts but sexual assault is not one of them. There is no defence of implied consent to sexual assault in Canadian law.

In the words of *Fish J.A.*[10]:

> '[C]onsent' is... stripped of its defining characteristics when it is applied to the submission, non-resistance, non-objection, or even the apparent agreement, of a deceived, unconscious or compelled will.

It may be useful to compare the conduct of the complainants in *Olugboja* and *Ewanchuk* in which rape/sexual assault was established, with what is stated above as the conduct of P. In *Olugboja* the complainant was asked to take her trousers off and she did because she said she was frightened. To begin with, she made no complaint against the defendant; indeed she said he had not touched her. She said later she did not know why she did not complain to her mother about the defendant.

In *Ewanchuk* the accused asked the complainant to turn and face him. She did so, and he began massaging her feet. His touching progressed from her feet up to her inner thigh and pelvic area. The complainant did not want the accused to touch her in this way, but said nothing as she said she was afraid that any resistance would prompt the accused to become violent.

Although the victims in *Olugboja* and *Ewanchuk* gave fear as the reason for their reluctant submission it is not necessary in law to establish the frame of mind of the complainant.

> It is not necessary for the prosecution to prove that what might otherwise appear to have been consent was in reality merely submission induced by

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[9] [1999] 1 SCR 330.
[10] *Saint-Laurent* v. *Hétu*, [1994] RJQ 69 (CA), at p.82, cited in *R.* v. *Ewanchuk*, [1999] 1 SCR 330.

> force, fear or fraud, although one or more of these factors will no doubt be present in the majority of cases of rape[11] [emphasis added].

Such is the position even in International Law. The Appeals Chamber of the Yugoslav War Crimes Tribunal emphasized two points:

> the requirement of 'resistance' has no basis in customary international law...; coercive circumstances without relying on physical force may be deemed sufficient to determine the absence of consent [emphasis added].

Applying these principles to the facts of the case analysed in this paper, P was undoubtedly placed in a 'coercive circumstance' under the control of AA in a strange bedroom at the dead of the night. Sec.363(b) of the Penal Code discounts *"consent"* which *"has been obtained, by use of force or threats or intimidation or by putting her to fear of death or hurt"*. The essential ingredient of the crime of rape is the absence of consent on the part of the victim. 'Threats', 'intimidations' and 'fear' are factors that invalidate an apparent consent. Where consent is absent intrinsically, those factors do not come into the picture and form no part of the burden of proof.

Understandably, rape is an extremely shocking experience for the victim and in the intricately complex psychology of the situation, it may not be fair to expect her to conform to a uniform pattern of behaviour. Comparison is normally odious but it sometimes helps to gain a flash of insight into an abstruse experience.

Imagine a naughty lad swimming in the sea. In daredevil nonchalance born of inexperience, he ventures out deeper and deeper into the waves until he is caught up in a current and carried away in desperation. At that moment he realizes his folly but then he can do nothing but submit himself to the indomitable force of the current.

If the lad is carried to his death, would it be correct to conclude that he committed suicide? Suppose he is rescued by some chance and he remains tongue-tied for some time under the immensity of the shock he has just suffered, is it plausible to say that he is silent because he relished the horror of drowning? A recklessly forward lass who gets caught in the snare of a rapist due to her thoughtlessness would face a similar situation but would it be fair to say that she consented to her fate?

6. Mistaken Belief

AA's claim to have had the 'impression' that P wanted to stay with him has to be weighed against P's assertion that AA had sexual intercourse with her without her consent. If P did not really consent, AA's impression has to be a mistake.

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[11] *Supra*, fn.7.

Mistaken belief in rape has been a subject of judicial review over the years. In any case there ought to be an 'air of reality' behind such a belief as discussed in the Canadian cases, *Park,*[12] *Pappajohn*[13] and *Oslin*[14]. The mental element of rape was considered by the House of Lords in *Morgan*[15]. It was there held that an Accused's belief in consent need not be based on reasonable grounds but that his belief, reasonable or unreasonable, must be honestly held.

Did AA honestly believe in P's consent? This question involves an analysis of the versions of both protagonists. It is on record that the woman in AA's home had agreed to put her up for the night. If P's motive was to have sex with AA, that motive could have been easily achieved by spending the night under AA's own roof.

Even AA agrees that when P left his house with him, her declared intention was to go to her friend's place. That declaration could not have been a 'make-believe' as AA admits that they went close to the friend's house. Why did P change her mind at the last moment?

AA is obliged to adduce some reason as to why P changed her mind suddenly and what made him believe that P wanted to spend the night with him. A belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law, and provides no defence.[16]

Compared to this, is not P's claim that she raised a query when she was being taken in a direction away from their planned destination, more plausible? Does not her detailed description of how her clothes were forcibly removed, exhibit verisimilitude?

A similar situation has arisen in the Irish case, *DPP* v. *Creighton*[17] where the accused said much more than AA. He said the victim 'plainly and expressly' consented to intercourse. The victim by contrast gave evidence that not only did she decline consent, but she made her lack of consent very clear by what she said and did at the time. According to the report on Irish Law to the ECHR[18] by Ivana Bacik[19] the defence of genuine belief did not arise in the circumstances.

Was AA reckless as to P's consent? In *Pigg*[20] Lord Lane asserted:

> ...so far as rape is concerned, a man is reckless if either he was indifferent and gave no thought to the possibility that the woman might not be consenting in circumstances where if any thought had been given to the matter it would have been obvious that there was risk that she was not, or,

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12 *R.* v. *Park* [1995] 2 SCR 836.
13 *Pappajohn* v. *The Queen* [1980] 2 SCR 120.
14 *R.* v. *Osolin* [1993] 4 SCR 595.
15 *DPP* v. *Morgan* [1975] 2 AllER 347.
16 *R.* v. *M.* (M.L.) [1994] 2 SCR 3.
17 *DPP* v. *Creighton* [1994] 1 ILRM 551.
18 *M.C.* v. *Bulgaria*, ECHR (Case No.39272/1998).
19 Reid Professor of Criminal Law, Criminology and Penology, Law School, Trinity College Dublin.
20 *R.* v. *Pigg* (1982) 74 Cr App R 352.

> that he was aware of the possibility that she might not be consenting but nevertheless persisted regardless of whether she consented or not.

As AA does not claim that he was possessed of an expressed consent on the part of P, it would be reckless on his part to have proceeded to have sex with her without overtly ascertaining her wish. In Canada, the legislature has restricted the defence of mistaken belief in consent to cases where the accused had taken reasonable steps to ascertain whether the complainant was consenting[21]. Similar provision has been made in UK:

> ...the complainant is to be taken not to have consented to the relevant act unless sufficient evidence is adduced to raise an issue as to whether he consented, and the defendant is to be taken not to have reasonably believed that the complainant consented unless sufficient evidence is adduced to raise an issue as to whether he reasonably believed it.[22]

In Victoria, Australia the judge must direct the jury by mandatory directions[23] that the fact that a person did not say or do anything to indicate free agreement to a sexual act is normally enough to show that the act took place without that person's free agreement.

> A belief by the accused that the complainant, in her own mind wanted him to touch her but did not express that desire, is not a defence. The Accused's speculation as to what was going on in the complainant's mind provides no defence.[24]

7. Marks of Violence and Corroboration

Another reason why the CA disbelieved P is that she had no injuries on her despite her claim that there was a struggle before AA managed to enter her and she had fallen off the bed in the struggle. The Judgment reads, *"Absence of tell-tale marks is a circumstance that was supportive of the sexual act having taken place with consent."*

In the first place it would be dogmatic to insist that every struggle must inevitably end in injury. In the second, the Penal Code itself declares that, *"Evidence of resistance such as physical injuries to the body is not essential to prove that sexual intercourse took place without consent".*[25]

The Judgment does not specifically complain about absence of corroboration but it comments adversely on the use of the victim's statement in the MC as corroboration of her evidence in the HC, thus implying the relevance of corroboration to the issue.

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21 Canadian Criminal Code, Section 273.2(b).
22 UK Sexual Offences Act 2003, chapter 42, S.75.
23 Section 37 of the Crimes Act 1957 (Vic).
24 *Supra*, fn.8.
25 Penal Code Section 363, Explanation II.

Neither the Criminal Procedure Code nor the Evidence Ordinance calls for corroboration of evidence but the requirement has developed as a *cursus curiae*. So much so that conviction without corroboration has become the exception. Particularly in rape cases it has been considered unsafe to convict purely on the evidence of the Prosecutrix.[26] Nevertheless there have been exceptions such as *Dharmasena*[27] and *Piyasena.*[28]

The rationale behind this practice is that it is "very easy to fabricate, but extremely difficult to refute"[29] an act of rape. Logically the dictum should apply with equal force to a defence of mistaken belief in consent. The need for corroboration is condemned as a bias against women as it is insisted upon particularly in cases involving women such as breach of promise of marriage etc.

8. Probability and Stereotype

The Judgment observes, *"It is very unfortunate that the Court has misapplied the test of probability and improbability"*. The difficulty is that probability in not a constant. In the kaleidoscope of human psychology, the myriad of permutations and combinations are possible. It may be that one probability appeals to someone as it conforms to his values and beliefs and some probabilities may be more universally acceptable than others. But is it just and fair to dogmatically insist that, that probability is the only tenable inference under all circumstances?

The Judgment quotes the following submission by defence counsel in the HC:

> The defence suggested that her (Victim's) version of the incident was improbable, when considered in the light of the probability improbability test, as it went against the behaviour of any reasonable person. He clearly based this on the stereotype accepted and expected behaviour of women in society.

The Judgment itself leans heavily *"on the stereotype accepted and expected behaviour of women in society"*, when it states:

> The fact that the prosecutrix went into the room of this unknown house with the accused-appellant in the dead of the night, without making any fuss, makes her version that she was an unwilling party to sexual intercourse highly improbable, having regard to the normal conduct and behaviour patterns of women and girls in Sri Lankan society. It is common sense that both of them went into this room for sensual enjoyment. Therefore when the prosecutrix says that accused-appellant had sexual intercourse with her against her will or without her consent, her story becomes unacceptable.

Rights activists protest against deductions about women based on stereotype:

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[26] *James* v. *R.* [1971] 55 Cr. App. R 299.
[27] *R.* v. *Dharmasena* 58 NLR 15.
[28] *Piyasena* v. *AG* [1986] 2 SLR 388.
[29] Henry and Manning (1968) 53 Cr. App. R 150 at 153.

> Questions are seldom asked about the judicial use of socially-induced assumptions and beliefs, or about the use of stereotypes which judge individuals on their group membership rather than on their individual characteristics, abilities and needs.[30]

David Archard[31] adds:

> A crime is no less unwelcome or serious in its effects, or need it be any the less deliberate or malicious in its commission, for occurring in circumstances which the victim helped to realise. Yet judges who spoke of women 'inviting' or 'provoking' a rape would go on to cite such contributory behaviour as a reason for regarding the rape as less grave or the rapist as less culpable. It adds judicial insult to criminal injury to be told that one is the part author of a crime one did not seek and which in consequence is supposed to be a lesser one.

Practically, stereotypes cannot be excluded altogether from legal reasoning for they are also part of the social milieu which forms the background to a judicial decision. The fault however is to put blinkers on stereotypes and to arrive at rigid conclusions based on straight-jacket role models.[32]

In the instant case, P has clearly deviated from the classic stereotype but that deviation is no conclusive proof of her desire to have sex with the accused. It is equally possible that her non-conformist behaviour unexpectedly cast her into the trap of a rapist like the naughty swimmer referred to above. Her deviations from the norm may deserve censure but not punishment by rape.

Cultural stereotype, if applicable, should apply to both complainant and accused equally. As much as it is a part of indigenous culture for a woman to be wary about her dealings with a stranger, it is culturally incumbent on a man not to take mean advantage of an immature girl who accidentally falls into his hands.

9. Test – Objective or Subjective?

Another issue focussed on in the Judgment is the orientation of the test to be applied to consent. It reads:

> Counsel submitted that in applying the test of probability and improbability the test to be applied is an objective test and not a subjective test which has been erroneously applied by the learned trial Judge.

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[30] *Gender Equality and the Judiciary, Caribbean Regional Colloquium*, ed. K. Adams and Andrew Byrnes.

[31] Archard, David. *Sexual Consent*. Boulder, Colo.: Westview Press, 1998 at p.131; cited in Ewanchuk.

[32] *Maria da Penha Maia Fernandes* v. *Brazil*, Inter-American Commission on Human Rights, Case 12.051, 16.04.2002.

The orientation of the test to be applied to rape has been long debated. *Pigg* did not settle whether the question was subjective or objective. *Morgan* had made it clear that the test was subjective.

The Court of Appeal (UK) has had to reverse a string of convictions on the question of the orientation of the test to be applied. In *Bashir*[33] , the court took the view that the test to apply in rape was whether the defendant acted recklessly and not whether a reasonable man acted recklessly. The Australian case, *Banditt*[34] refers to the possibility of 'reckless' being both objective and subjective depending on the context. *Satnam S. and Kewal S.*[35] focuses on the target of recklessness rather than on its source:

> The word "reckless" in relation to rape involves a different concept to its use in relation to malicious damage or, indeed, in relation to offences against the person. In the latter cases the foreseeability, or possible foreseeability, is as to the consequences of the criminal act. In the case of rape the foresecability is as to the state of mind of the victim.[36]

10. Unproved Learned Treatises

It is significant that P opened up only on her second day at the police station. Reportedly, between her two statements she had a personal chat with the police matron, in which she is likely to have confided her experience to another woman who may presumably have been sympathetic.

Did the self-confidence gained by that chat relax her psyche from the stupefaction caused by her traumatic experience? That is a question for an expert psychologist. Apparently, that was what the State Counsel tried to answer by *"reference to several well known concepts relating to the offence of rape which describe how rape victims go into denial or seek escape or oblivion in order to deliberately erase the event from their mind"*.

But the Court objects to the move, quoting the authority of *Regina* v. *Pinhamy*: *"Counsel is not entitled to read to the jury extracts from any scientific treaties unless such extract had been introduced by way of evidence in the course of a trial"*.[37]

The objection in *Pinhamy* was in respect of reading to the jury. Here the State Counsel was not quoting authority to a jury but to the trial Judge who is authorized by the *Evidence Ordinance*[38] to take judicial notice of "*appropriate books or documents of reference*". In fact the CA Judgment itself refers at least to one learned treatise that had not been proved in the course of (the) trial.

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[33] *R.* v. *Bashir* [1983] 77 Cr App R 59.
[34] *Banditt* v. *The Queen* [2005] HCA 80.
[35] *R.* v. *Satnam S. and Kewal S.* [1984] 78 Cr App R 149.
[36] *Ibid.*
[37] 57 NLR 169, at 176.
[38] Section 57.

11. Concessions to Complainant

The Judgment also critiques the concessions granted to P at the trial namely, holding of the trial in camera, adjournment given in spite of the objections raised by the defence when P remained tongue-tied, change of prosecuting Counsel (presumably to balance the efficiency of counsel on both sides), facilitating P to adduce evidence without going into the witness box, informing P that she could even have her mother or a close relation accommodated in the Court, giving the prosecutrix an assurance that she had the protection of Court and inquiring from the prosecutrix when she became tongue-tied, whether the accused had threatened her.

The Judgment holds that the trial in camera was *"unnecessary for the reason that the prosecutrix had earlier given the same evidence in a crowded Court house before the Magistrate"*. Yet it was bad enough that P was exposed to embarrassment in the crowded Magistrate's Court but that is no reason for her to be embarrassed over again in the High Court. In any case, what P faced in the MC was only an Inquiry but the trial in the HC was decisive in her search for justice.

The concessions granted by the trial Court appears to have been calculated to put the complainant at ease. The evolving trend is for rape trials to provide privacy, sensitivity and transparency. The Criminal Law (Rape (Amendment)) Act, (Ireland) 1990 stipulates that: *"the judge... shall exclude... all persons except officers of the court, persons directly concerned in the proceedings, bona fide representatives of the Press and any such persons (if any) as the judge... may in his... discretion permit to remain"*.[39]

Box 2 - General Recommendation No.19

Gender-based violence against women is "violence that is directed against a woman because she is a woman, or violence 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".

"Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the convention".

Committee on the Elimination of Discrimination against Women
general recommendation No.19, para.7.

Declaration on the Elimination of Violence against Women, article 1

Violence against women "means any act of gender-based violence 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".

General Assembly resolution 48/104.

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[39] *Privacy's New Paradigm: The Rise and Reform of the In-Camera Rule*, Kieran Walsh, BCL III, University College Cork Irish Journal of Family Law [2005] 1 I.J.F.L. 12.

The Beijing Platform for Action

The Beijing Platform for Action's critical area of concern on violence against women established three strategic objectives:

- taking integrated measures to prevent and eliminate violence against women;
- studying the causes and consequences of violence against women and the effectiveness of preventive measures;
- eliminating trafficking in women and assisting victims of violence due to prostitution and trafficking.

Within these objectives, the Platform for Action sets out a series of concrete actions to be taken by Governments, including implementation of international human rights instruments; adoption and periodic review of legislation on violence against women, access to justice and effective remedies; policies and programmes to protect and support women victims of violence; and awareness-raising and education.

The Youth Justice and Criminal Evidence Act 1999, (UK), makes similar provision[40]. This concession is available even under Sri Lanka's Constitution[41] and statutory law[42]. A witness in criminal proceedings (other than the accused) is eligible for assistance in the UK if the court is satisfied that the quality of evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings[43]. In the UK as well as in several other jurisdictions, a litigant is allowed the assistance of an unobtrusive lay person who is called a *McKenzie Friend.*[44]

In a rape trial in Central Australia, the victim indicated to the prosecutor an unwillingness to give evidence. A woman lawyer was requested by the prosecutor to speak to the woman with a view to ascertaining the reasons for her decision. It emerged that she simply wanted her sister to sit with her in court while she was giving evidence. The sister was located and allowed to be with the victim in court while her evidence was given.[45]

The following observation would appear to highlight the need for concessions referred to above:

> The more general indictment of the current criminal justice process is that the law and legal doctrines concerning sexual assault have acted as the principal [sic] systemic mechanisms for invalidating the experiences of women and children. Given this state of affairs the traditional view of the legal system as neutral, objective and gender-blind is not defensible. Since the system is ineffective in protecting the rights of women and children, it is necessary to

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[40] Youth Justice and Criminal Evidence Act 1999, sec.25(1).
[41] Constitution of Sri Lanka, Art.6.2.
[42] Children and Young Persons Act, S.19.
[43] Youth Justice and Criminal Evidence Act 1999, S.17(1).
[44] *McKenzie* v. *McKenzie* [1970] 3 W.L.R. 472.
[45] *Crossing the Last Frontier: Problems Facing Aboriginal Women Victims of Rape in Central Australia*, Jane Lloyd, Pitjantjatjara Council, Alice Springs, Nanette Rogers, Central Australian Aboriginal Legal Aid Service Northern Territory www.aic.gov.au/publications/proceedings/20/lloyd.pdf.

> re-examine the existing doctrines which reflect the cultural and social limitations that have preserved dominant male interests at the expense of women and children.[46]

It is to be noted that the above concessions permitted in similar jurisdictions, are the outcome of the on-going battle for women's rights. There is the risk that concessions given to a pretending complainant may result in unfair disadvantage to the accused. But just as much as an accused is entitled to the benefit of the doubt until he is proved guilty, a rape victim ought to be given the benefit of the doubt as to her truthfulness until the contrary is established. Denial of concessions to a genuine victim is bound to cause an irreparable failure of justice.

Reforms to the laws applicable to rape referred to herein are not confined to advanced countries of the West. There have been similar responses to the demand for women's rights in the Pacific, Latin America and the Caribbean. If such proactive legislation was adopted in Sri Lanka as well, *Addaraarachchi* would certainly have taken a different turn.

In any case, even under the existing law, the reasonability and honesty of the Accused's plea of consent are questions that have to be answered by the jury which would have to come to a conclusion after balancing the credibility of both parties under the relevant circumstances and avoiding stereotype and gender bias. In a trial without the jury, the jury's place is taken by the judge. In the instant case the judge has answered them in favour of P. To reverse that decision in appeal, the mistake of fact has to be shown to amount to a question of law.

12. Ameliorating Women's Rights

The Judgment observes that *"the learned trial Judge has been misled and dazzled by some wrong notion of gender inequality"*. This contrasts with the comments of Madame Justice L'Heureux-Dube in *Ewanchuk, "Violence against women is as much a matter of equality as it is an offence against human dignity and a violation of human rights"*.[47]

What needs to be realized is that internationally, the legal standard in respect of the universal prohibition of violence against women is fast undergoing a revolution.[48] The U.N. General Assembly has declared that, *"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment"*.[49] This declaration led to the creation of the ICESCR[50] and the ICCPR[51] both of which ascribe human rights equally to men and women.[52]

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[46] "The Standard of Social Justice as a Research Process" (1997), 38 *Can. Psychology* 91, K.E. Renner, C. Alksnis and L. Park.

[47] *Supra*, fn.8.

[48] Domestic Violence and Human Rights: Local Challenges to a Universal Framework. By: Morgaine, Karen. Journal of Sociology & Social Welfare, Mar2007, Vol. 34 Issue 1, p109-129.

[49] The Universal Declaration of Human Rights (1948) Article 3.

[50] The International Covenant on Economic, Social and Cultural Rights.

[51] The International Covenant on Civil and Political Rights.

[52] In-depth study on all forms of violence against women: Report of the Secretary-General, A/61/122/Add.1, 6 July 2006.

The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)[53] holds ratifying countries accountable for insuring that women's rights are protected. Article 5(a) of the Convention calls upon States to *"[a]dopt all appropriate measures, ...to eliminate prejudices, customary practices and all other practices based on the idea of the inferiority or superiority of either of the sexes and on stereotyped roles of men and women"*.

Doubtlessly, the emerging provisions for women's rights appear 'molly-coddling' to a culture immersed in conservative tradition. The writer deliberately referred to *Addaraarachchi* in a group of mature people to test their reaction. The group consisted of 16 members, 13 of whom were elderly females, most of them being graduates. The very mention of the name led to howls of protests, not against the accused but against the complainant!

A Babel of voices shouted in anger, *"Why did she go to an unknown man? What did she have to do with him at dead of night? Why did she enter the room alone with him? She deserves what she got. In fact not enough. Shame! Is this how a respectable Sinhalese girl should behave?"* The comments of the Court of Appeal on the conduct of P appeared very pale in this exasperated outburst. Throughout this barrage of censure by the 'women's caucus', not a man in the company opened his mouth. It looked as if 'Women's Lib' had to be protected more from women themselves than from 'male chauvinist pigs'!

Be that as it may, as a member State of the UN and a subscriber to the CEDAW, Sri Lanka is obliged by international law to ensure its recommendations that her "laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity" and that "Gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention".[54]

Neighbouring India as well as South Africa have answered the call with responses like *Vishaka*[55] and *Carmichele*[56]. The demand for reform entails rethinking on the attitudes, values and strategies traditionally applied by the legal system for generations and the creation of a new legal ethos of women's rights. One dilemma of the Judiciary in the new regime of liberation would be to protect the innocent from scheming pretenders of rape.

> The law must afford women and men alike the peace of mind of knowing that their bodily integrity and autonomy in deciding when and whether to participate in sexual activity will be respected. At the same time, it must protect those who have not been proven guilty from the social stigma attached to sexual offenders.[57]

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[53] Convention on the Elimination of All Forms of Discrimination against Women was adopted by the General Assembly in 1979 by resolution 34/180.

[54] General Recommendation No.19 (11th session, 1992), para.24(b).

[55] *Vishaka* v. *State of Rajasthan*, AIR 1997 SC 3011.

[56] *Carmichele* v. *Minister of Safety and Security* 2001 (10) BCLR 995 (CC).

[57] The judgment of Lamer C.J. and Cory, Iacobucci, Major, Bastarache and Binnie JJ. at para 66 in *R.* v. *Ewanchuk*, [1999] 1 SCR 330.

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CONSTRUCTIONS OF RAPE IN INDIA

Ashwita Ambast *

"Rape can be the most terrifying experience of a woman's life".[1]

The legislative provision dealing with rape in India can be found in Section 375 and 376 of the Indian Penal Code enacted in 1860.[2] Hence, proving the offence as per authoritative texts on criminal law requires the alleged victim of rape to prove two important facts:

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* Legal researcher, National Law School of India University, Bangalore, India.

1 D.D. Schram, "Rape" Victimization of Women (ed. J.R. Chapman and M. Gates, California: Sage Publications, 1985) at 53.

2 Section 375 and 376, Indian Penal Code, 1860: 375. Rape.-- A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:- First.- Against her will. Secondly.- Without her consent. Thirdly.- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt. Fourthly.- With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. Fifthly.- With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent. Sixthly.- With or without her consent, when she is under sixteen years of age. Explanation.- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Exception.- Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape. 376. Punishment for rape.--

(1) Whoever, except in the cases provided for by sub-Section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever,-

(a) being a police officer commits rape-

(i) within the limits of the police station to which he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) on a woman in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) commits rape on a woman knowing her to be pregnant; or

(f) commits rape on a woman when she is under twelve years of age; or

(g) commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years. Explanation 1.- Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each

(a) Sexual intercourse between the man and the woman; and

(b) That the sexual intercourse must have taken place under any of the six circumstances falling under the given section.[3]

However, through this paper, an attempt will be made to show that being convicted for rape in India cannot be reduced to merely proving these two ingredients in the courts of law. Courts and the legislature have historically been guided by patriarchy and defined norms of morality, which have often worked to the disadvantage of the victim approaching the court. This paper, utilizing the pertinent legislations and relevant decisions by courts in India, explores how such biases have been introduced into judicial decision making when looking at the background of the alleged act of rape, while analyzing the events during the alleged rape and finally, while looking at the behaviour of the victim subsequent to the rape. This issue is pertinent to any discourse on rape in India as these attitudes have an important bearing on the outcome of the case and importantly on the guarantees of the right to equality and the right to privacy that all victims of rape have been guaranteed by virtue of being citizens of India.[4]

1. Background of The Victim

(A) "Indian Women" > "Western Women"

S. Edwards opines that decision making in rape cases relies unduly on the extent to which the behaviour of the victim deviates from what is expected from them in their *"appropriate gender role"*. He further states that the appropriate role of a woman has been domestic and traditional.[5] The Indian Judiciary exemplifies this in *Bharwada Bhoginbai Hirjibhai* v. *State of Gujarat*,[6] where the Apex Court in India ruled that:

> It is conceivable in the Western Society that a female may level false accusation as regards sexual molestation against a male for several reasons such as:
>
> (1) The female may be a "gold digger" and may well have an economic motive to extract money by holding out the gun of prosecution or public exposure.

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of the persons shall be deemed to have committed gang rape within the meaning of this sub- section. Explanation 2.-" women's or children's institution" means an institution, whether called and orphanage or a home for neglected women or children or a widows' home or by any other name, which is established and maintained for the reception and care of women or children. Explanation 3.- " hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation.

[3] R. Ranchhodas and D.K. Thakore, *Indian Penal Code* (30th edn., Nagpur: Wadhwa and Company, 2004) at 681.

[4] Article 14 and Article 21, The Constitution of India, 1950.

[5] S.E. Edwards, "Gender Justice? Defending Victims and Mitigating Sentence" *Gender, Sex and the Law* (ed. S.E. Edwards, London: Croom Helm, 1985) at 50.

[6] *Bharwada Bhoginbai Hirjibhai* v. *State of Gujarat* AIR 1983 SC 753 (Supreme Court of India) at 9,10.

(2) She may be suffering from psychological neurosis and may seek an escape from the neurotic prison by fantasizing or imagining a situation where she is desired, wanted, and chased by males.

(3) She may want to wreak vengeance on the male for real or imaginary wrongs. She may have a grudge against a particular male, or males in general, and may have the design to square the account.

(4) She may have been induced to do so in consideration of economic rewards, by a person interested in placing the accused in a compromising or embarrassing position, on account of personal or political vendetta.

(5) She may do so to gain notoriety or publicity or to appease her own ego or to satisfy her feeling of self-importance in the context of her inferiority complex.

(6) She may do so on account of jealousy.

(7) She may do so to win sympathy of others.

(8) She may do so upon being repulsed.

By and large these factors are not relevant to India, and the Indian conditions.

This assertion was reasoned by the courts as being a consequence of the non-permissiveness of Indian society and the impact that being a rape victim would have on the honour of the woman and the her family, given her loss of chastity.[7] It is important to note that a similar viewpoint has been espoused by various courts at different points of time. For example, in State of *Orissa* v. *Damburu* [8] the court saw no reason to disbelieve a simple village girl. Similarly, in State of *Rajasthan* v. *Shri Narain* [9] the Supreme Court accepted the argument of the learned Counsel for the state who submitted that *"the prosecutrix is a young woman belonging to the rural folk who had no reason whatsoever to falsely involve the accused in such a serious crime"*.[10]

The court in this case was making an attempt to create a case for the strength of the testimony of a victim of rape.[11] However, while the reasoning may be partly sound, it is problematic for two important reasons.

First, while the decision provides sociological justification to the credibility attaching to one category of victims of rape, the case works to the prejudice of other groups of victims as the court subsequently says that, *"Only very rarely can one conceivably come across an exception or two"* (to the general rule of credibility) and that too possibly from amongst the urban elites".[12] The current milieu is one of *"cultural lag and conflict of ideals"* where *"the*

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7 *Bharwada Bhoginbai Hirjibhai* v. *State of Gujarat* AIR 1983 SC 753 (Supreme Court of India) at 10.
8 *State of Orissa* v. *Damburu* (1992) 2 SCC 522 (Supreme Court of India).
9 *State of Rajasthan* v. *Shri Narain* AIR 1992 SC 2004 (Supreme Court of India).
10 *State of Rajasthan* v. *Shri Narain* AIR 1992 SC 2004 (Supreme Court of India) at 4.
11 *"In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury"*, AIR 1983 SC 753 (Supreme Court of India) at 9.
12 *Bharwada Bhoginbai Hirjibhai* v. *State of Gujarat* AIR 1983 SC 753 (Supreme Court of India) at 10.

woman is in a dilemma, whether to adhere to adhere to her traditional sex roles or to the emergent norms of occupational roles".[13] Society could hence expect women to become increasingly more "western" and more "urban". There will hence be more women *"suffering from psychological neurosis"* who seek to *"escape from the neurotic prison"*, all of whose credibility will be silently questioned in Courts of Law.

Secondly, many feminist scholars argue that the Indian law of rape is based on the enforcement of Victorian morality, chastity and good moral conduct on all women in society.[14] It is clear that by privileging the word of women who are traditional and value their chastity, the court in this case is exemplifying this critique.

(B) "Women make demands, but only ladies get protection"[15]

Common cultural myths and stereotypes indicate that a woman who gets raped "deserves it" or that only "bad women" get raped.[16] In India, for many years, these myths found place in legal direction.

As per Section 155(4) of the Indian Evidence Act, the court may impeach the credit of a witness if, *"when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character".*[17]

Thus we find that in a number of cases women were deemed to be liars and their case was dismissed on account of their being of loose moral conduct. A seminal example of this is in the famous Mathura case where a young girl was raped in the premises of a police station. Mathura's case was dismissed by the Sessions Court on account of Mathura being *"habituated to sexual intercourse"* and of *"loose morals"*[18]. Yet another important example is seen in the Suman Rani case,[19] where it was argued in the High Court that *"the victim Suman Rani was a woman of questionable character and easy virtue with lewd and lascivious behaviour and as such her version is not worthy of acceptance".*[20] The High Court concluded that the mandatory sentence provided under the penal provision is not called for, a decision which was greatly criticized. Finally, in a review, the Supreme Court clarified that the court had not passed judgment on the character of Suman Rani, yet the intentions of the High Court remain ambiguous.

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13 L. Devi, *Crime Atrocities and Violence Against Women and Related Laws and Justice* (New Delhi: Anmol Publications Ltd., 1998) at 50.

14 *Engendering Law Essays in Honour of Lotika Sarkar* (eds. A. Dhanda and A. Parashar, Lucknow: Eastern Book Company, 1999) at 143.

15 http://infochangeindia.org/index2.php?option=com_content&do_pdf=1&id=5621.

16 J. Bridgeman and S. Mills, *Feminist Perspectives on Law's Engagement with the Female Body* (London: Sweet and Maxwell, 1998) at 392.

17 Section 155(4), Indian Evidence Act, 1872.

18 *TukaRam* v. *State of Maharashtra* AIR 1979 SC 185 (Supreme Court of India).

19 *State of Haryana* v. *Premchand* AIR 1990 SC 538 (Supreme Court of India).

20 *State of Haryana* v. *Premchand* AIR 1990 SC 538 (Supreme Court of India) at page 499.

As a consequence of the sexual history of victims being freely discussed in courts of law, which in addition to being a violation of the privacy of citizens, was also extremely humiliating for the victim women, feminists began to call for a repeal of Section 155(4).[21] It was only in 2002, with the enactment of the Indian Evidence (Amendment) Act that this section was repealed.[22]

However, despite this, the decision making of courts has not evolved, for two crucial reasons. For one, the courts, despite the repeal of this section continue to account for the moral fibre of the victim while passing their judgments; *"the character of women is seen as important in rape cases despite amendment"*.[23] Further, on a more subversive level, even courts which are staunchly against incorporating the character of the victim into their decision, on occasion still exercise their power as adjudicators in labelling women as "loose" or "immoral". For example, the Supreme Court has in the case of State of *Maharashtra* v. *Madhukar N. Mardikar*, held that:

> *"...the unchastity of a woman does not make her open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate her person against her wish. She is equally entitled to the protection of law.* ***Therefore merely because she is of easy virtue, her evidence cannot be thrown overboard"*** [24] [emphasis added].

Hence, the judges have been provided a window to label the victim as being of "easy virtue" although it may not apparently affect their decision in the case.

(C) Marriage as sanction for rape

An important and much criticized aspect of rape laws in India is the exemption that is given to marital rape, which is a manifestation of the presumption that a married woman must always be willing to have sex with her spouse. The license for marital rape is often derived from the oft-quoted statement of Lord Matthew Hale who declared:

> *"but 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 her self in this kind unto her husband, which she cannot retract"*.[25]
>
> Therefore, *"the undeniable conclusion is that the wife has given irrevocable consent to the sexual relation with her husband even though there is no presumption of consent for the purposes of anything else, including the marriage itself"*.[26]

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[21] See generally, F. Agnes, "Law, Ideology and female Sexuality: Gender Neutrality in Rape Law" 37(9) *Economic and Political Weekly* 844 (2002).

[22] Section 3, The Indian Evidence (Amendment) Act, 2002.

[23] C. Chorine, *et. al.*, *Women and the Law II* (Bombay: Socio-Legal Information Centre, 1999) at 490.

[24] *State of Maharashtra* v. *Madhukar N. Mardikar* (1991) 1 SCC 57 (Supreme Court of India).

[25] S.F. Waterman, "For Better or for Worse: Marital Rape" 15 *North Kentucky Law Review* 611 (1988) at 612.

[26] *Supra* note 14, at 143; *Supra* note 3, at 528.

Efforts have been made in the past to protect women who are vulnerable to marital rape. The most notable move for greater protection of women took place after the *Phulmonee* case,[27] in which an 11 year old girl succumbed to haemorrhage subsequent to being forcefully subjected to sexual intercourse by her 35 year old husband. Given that the law at the time prescribed the offence of rape only if the victim was below 10 years of age, the accused could not be charged for rape.[28] However, Lord Wilson commented that under no system of law is the husband given the absolute right to enjoy his wife without regard to her safety.[29] This thought spurred the movement to raise the age of consent in India[30] and has also found mention in some recent cases on the point,[31] yet lawmakers remain reluctant to do away with this provision of law altogether.

To illustrate, although the 42nd Report of the Law Commission of India put forward the need for reconstructing marital rape as a separate offence[32] it was rejected. Subsequently, the 84th Report of the Law Commission merely suggested that the age for making marital rape criminal be raised to 18 to reflect the legal age of marriage.[33] Importantly, the 177th Report of the Law Commission rejected the removal of the exception on the ground that it *"may amount to excessive interference with the marital relationship"*.[34] Today, marital rape can be booked under the Protection of Women against Domestic Violence Act, 2005. However this law only imposes criminal sanction when protection orders are not conformed to and therefore is not equivalent to an independent criminal provision. Thus, it remains true today in India, that for the purposes of criminal law, women who are married are presumed by the law to consent to rape and no liability will be imposed on husbands.

2. The Act of Rape

(A) Consent

The primary question which arises in cases of rape is whether the victim had consented to the sexual intercourse or not. According to the current position of law, consent as a defence to an allegation of rape requires voluntary participation, after exercising intelligence and after freely exercising the choice between assent and resistance.[35] Women in India face a number of problems in establishing that they had not assented to the sexual intercourse.

In India, courts have been reluctant to convict a man of rape when the victim had assented to live with the accused previously, as it is assumed that the victim's consent can be inferred. For instance in the case of State of *Himachal Pradesh* v. *Dharam Dass*[36] the prosecutrix had

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27 *Queen Empress* v. *Huree Mohan Mythee* XVIII ILR (CAL) 49 (1891).
28 *Queen Empress* v. *Huree Mohan Mythee* XVIII ILR (CAL) 49 (1891).
29 A.N. Saha, *Marriage and Divorce* (New Delhi: Eastern Law House, 1996) at 553.
30 J. Sagade, *Child Marriage in India Socio-Legal and Human Rights Dimensions* (New Delhi: Oxford University Publications, 2005) at 41.
31 *Shugri* v. *State of Haryana* 1971 Punj LR 504.
32 42nd Report of the Law Commission of India, 1971.
33 84th Report of the Law Commission of India, 1980.
34 172nd Report of the Law Commission of India, 2000.
35 *Supra* note 3, at 681-2.
36 *State of Himachal Pradesh* v. *Dharam Dass* 1922 CrLJ 1758 (Himachal Pradesh High Court).

accompanied the accused to the house of someone and stayed there for a week. The Court held that the accused was entitled to acquittal. In the 2001 Rajasthan High Court decision of *State of Rajasthan* v. *Munsi*,[37] the prosecutrix testified to being in the company of the accused for 3 days in which they had engaged in sexual intercourse. The Court held that she was a consenting party *"from the very beginning"* and that rape was not constituted.[38] Further, in *State of Karnataka* v. *Sureshbabu Puk Raj Purral* [39]the prosecutrix stated that she had lived with the accused in various lodges in several places and that he had done something to her which should not have been done. In this case, it was held that the prosecutrix was habituated to sexual intercourse and hence the offence of rape cannot be proved.

The basic consequence of such decisions is to imply that women who live with men necessarily consent to sexual intercourse. Further, the implication is that if the woman consents once, she is consenting to intercourse at any point subsequent to that incident. These inferences can have devastating implications for women in live-in relationships, a trend which is rising in India.

Yet another aspect of the rape which has important implications for consent is the question of whether the prosecutrix had adequately resisted the advances of the accused, which is understood by courts by the degree of physical injury present on the body of the prosecutrix. In some cases, the courts have emphasised that the testimony of the victim is of utmost importance and has been regarded as *"inherently believable"*.[40] However, the level of resistance remains crucial in determining the consent of the prosecutrix.[41]

Therefore, in *Mahendra Kumar Muduli* v. *State of Orissa* [42]when the prosecutrix claimed that she was subjected to forcible sexual intercourse which was extremely painful, the court rejected this statement as there were no marks of violence on the prosecutrix and her hymen was intact. Similarly the *State of Rajasthan* v. *Munsi*, the Rajasthan High court has held that:

> The absence of injuries on the person of the prosecutrix generally gives rise to an inference that she was a consenting party to the coitus. The court is also aware that it is not necessary that in every case of rape injuries should have been caused, but this factor should remain in the mind of the Judge while deciding the case.[43]

It further stated that absence of injuries on the person of the prosecutrix negatives the allegation of rape and shows tacit consent.[44]

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[37] *State of Rajasthan* v. *Munsi* 2001 CrLJ 2756 (Rajasthan High Court).
[38] *State of Rajasthan* v. *Munsi* 2001 CrLJ 2756 (Rajasthan High Court) at 12.
[39] *State of Karnataka* v. *Sureshbabu Puk Raj Purral* 1993 (3) Crimes 600.
[40] V.K. Dewan, *Law Relating to Offences against Women* (2nd edn., New Delhi: Orient Law House, 200) at 204.
[41] *Supra* note 23, at 491.
[42] *Mahendra Kumar Muduli* v. *State of Orissa* 1989 (3) Crimes 56 (Orissa High Court).
[43] *State of Rajasthan* v. *Munsi* 2001 CrLJ 2756 at p.9 (Rajasthan High Court).
[44] *State of Rajasthan* v. *Munsi* 2001 CrLJ 2756 at p.12 (Rajasthan High Court). This is supported by *Nathu Singh* v. *State of Rajasthan* 2001 CrLJ 2171 where it was held that, *"she did not receive any*

An important problem with the need for there to be violence in order to prove the rape is a patent lack of sensitivity to differing reactions that individuals may have to traumatic incidents. To illustrate, in their treatise, Chapman and Gates talk of the various reactions that victims have had to rape. As per their study, the initial resistance could be verbal, such as screaming, attempting to draw attention to the place of crime. Only one-third of the victims attempted physical retaliation.[45] Further, according to, it is more likely that a woman will not offer physical resistance of any kind, given that women are generally socialized in their lifetime to be "nice" and because men's greater size and sense is threatening to women who are victims of rape.[46] The courts of India hence only cater to one third of the women who get raped in India, a severe lacunae in the understanding of the courts.

Importantly, the problem of needing marks of violence to display lack of consent is exacerbated by the idea that a fully grown woman cannot be raped by a single man without facing the stiffest possible resistance. This is a position that has been supported by cases such as *Pratap Mishra* v. *State of Orissa*.[47]

(B) Rape as a MALE act

An important yet subtle problem which many feminists and critics of the law of rape in India have with the manner in which rape is viewed is that it is seen as a male act and not as violence that has been perpetrated on the woman.[48]

This is understanding can be illustrated on two levels. First, rape is only constituted when there is penetration by the penis and not by any other object.[49] In fact, it has been the constant demand of feminist groups that penetration by any object causes as much indignity and pain to the victim and hence these offences should also be considered rape.[50] However, this understanding has not been accepted over many years, only proving that there is reluctance to purge the existing law of its phallocentrism, preventing the law becoming centred on the violence to the victim.

Second, the courts of law have often excused the acts of young men on the ground of their being uncontrollable sexual urges.

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injury and this fact itself goes to show that no forcible intercourse was done with her by accused appellant".

45 *Supra* note 1, at 66-67.

46 L.H. Schafran, "Barriers to credibility: Understanding and Countering Rape Myths" available at http://www.ng.mil/jointstaff/j1/sapr/files/Barriers_to_Credibility.pdf at page 3.

47 *Pratap Mishra* v. *State of Orissa* AIR 1977 SC 1307 at p.8: "*The opinions of medical experts show that it is very difficult for any person to rape single-handed a grown up and an experienced woman without meeting stiffest possible resistance from her*".

48 *Supra* note 14, at 144.

49 Section 375, Indian Penal Code, 1860.

50 *See Generally, Supra* note 21; *Sakshi* v. *Union of India* AIR 2004 SC 3566 (Supreme Court of India).

For instance, in the case of *Raju* v. *State of Karnataka*[51] it was held that:

> Considering the very young age of the accused persons and considering the circumstances under which there was very likelihood that they could not overcome the fit of passion and lost all sense of decency and morality and ultimately committed the offence of rape.[52]

This condonation blatantly ignores the trauma faced by the woman who, regardless of the urges of the men or otherwise has still been the victim of a heinous act. The law only accounts for the actions and urges of men.

3. Subsequent Acts

Not surprisingly, the law in India also takes into account, certain actions by the victim subsequent to the alleged act of rape which could determine the outcome of the case. The expectations are largely behavioural or related to the speed with which the victim reports the offence.

First, courts in India seek specific reactions from the victims to the rape. To illustrate, in the case of *State of Maharashtra* v. *Subhash Sitaram Sangare*[53] the court said that: *"it is very difficult to digest that a young virgin girl did not choose to confide in her own mother, when such a shockingly traumatic incident took place in her life"*. It further stated that in the instant case, *"she was not crying when she went home, after the so called forcible intercourse. All these are indications of only one circumstance that she was a consenting party"*. Using the support of these facts, the Supreme Court proceeded to acquit the accused.

A study conducted about prevalent myths about rape victims says that an important myth is that victims of rape report the crime immediately to the police. The reasons for their reluctance to report the rape include: fear of retaliation, fear of being disbelieved and blamed, fear of loss of privacy, denial and suppression, fear of the criminal justice system and finally, psychogenic amnesia or the tendency of victims to block out memories of traumatic experiences.[54] However, the Indian Judiciary has been largely insensitive to this and in the past suspicion has been cast on those cases when the First Information Report (FIR) was not lodged promptly with the police. For example, in *Moolia* v. *State of Rajasthan*,[55] the father of the victim lodged an FIR 22 hours after the incident took place. The court held that since the victim had told her father of the incident of the incident promptly, there was no excuse for the delay in filing the FIR. In *Ishwar Singh* v. *State of Uttar Pradesh*[56] the Supreme Court stated that:

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51 *Raju* v. *State of Karnataka* AIR 1994 SC 22 (Supreme Court of India).
52 *Raju* v. *State of Karnataka* AIR 1994 SC 22 (Supreme Court of India) at 7.
53 *State of Maharashtra* v. *Subhash Sitaram Sangare* 2001 CrLJ 4468.
54 *Supra* note 47, at 11.
55 *Moolia* v. *State of Rajasthan* 1979 Raj Cri C 85 (Rajasthan High Court).
56 *Ishwar Singh* v. *State of Uttar Pradesh* AIR 1976 SC 2423 (Supreme Court of India).

> This is a circumstance which provides a legitimate basis for suspecting, ...that the first information report was recorded much later than the stated date and hour affording sufficient time to the prosecution to introduce improvements and embellishments and set up a distorted version of the occurrence.

Similarly, in *Shiv Kumar and Others* v. *State of Rajasthan*,[57] the Rajasthan High Court held that, *"In this view of the matter, I find that there is an unexplained, inordinate delay for which there is no explanation whatsoever and such delay, according to the preposition of law, must be held to be fatal to the case of the prosecution"*.

However, the Courts in India in certain cases have been more sensitive to delays in reporting rape such as in *Harpal Singh* v. *State of Himachal Pradesh* where the court held that a delay of 10 days was acceptable as a question of the honour of the family was involved and the family was reluctant to take the matter to the court.[58] However, even in such cases, the courts often do not recognize the specific discomforts of the victim or their social reservations which lead to delays in reporting the rape and have in the past merely sought to condone the delay rather than encourage timely reporting of the crime by recognizing the aforementioned problems faced by victims.

4. When Rape Is Rape and When Rape Is Not

Assume that a young girl 'A' from a rural background moves with her parents to a large metropolis. She is a virgin, conscious and careful of her chastity and is unaccustomed to the company of men. One day, on her way back home, a strange man tries to make conversation with her. She ignores him and keeps walking however, the man angered by her lack of interest, pounces on her and drags her to a nearby bush where he has forcible sexual intercourse with her. She resists violently and screams out for help. Finally, she manages to run away and breaking into tears narrates this incident to her parents, who promptly file an FIR with the Police. Medical tests are conducted which confirm the existence of severe wounds across the girl's body and further talk of severe bleeding from her private parts.

Assume another young girl, 'B', brought up in Mumbai, goes to a bar, where she encounters a young man. The girl has habituated to the company of young men as she has had sexual relations with numerous men in the past. The two strike a conversation and spend many hours together. Late at night, the man invites the girl to his house for a drink. She assents and joins him at his resistance. While in the apartment, the couple sit closely, but when the young man asks the girl if she would spend the night with him, she firmly denies and offended, gets up to go. The man subsequently violently drags her to the bedroom and has forcible sexual intercourse with her numerous times. The girl, frightened and ashamed is unable to retaliate. Finally, when the man falls asleep, she creeps out of the house, yet is unable to tell her parents as she fears their censure. Finally, the girl tells her friends many

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[57] *Shiv Kumar and Others* v. *State of Rajasthan* 1993 CrLJ 3596.
[58] *Harpal Singh* v. *State of Himachal Pradesh* AIR 1981 SC 361 (Supreme Court of India).

days later who convince her to inform her parents and the police. An FIR is lodged and medical reports speak of no injuries to her body or her private parts.

Assume that yet another woman, 'C', who is married and is residing in a town. The couple have two young children and have had amiable marital relations for 8 years. However, of late the husband has been returning home drunk fairly frequently and the wife is concerned. One night, the husband returns home and demands to have intercourse with his wife, who angered by his condition firmly refuses. The husband, ignoring her protests, drags her into the room and forcibly has intercourse until she repeatedly screams in pain. The next day, the husband is apologetic, but the woman, humiliated approaches the police in order to file an FIR for rape.

Through these three distinct incidents, we can see very clear similarities. For one, all women were subjected to sexual intercourse without their consent, which under the Indian Penal Code constitutes rape.[59] Further, it can be seen that in all three circumstances, the women have experienced violence at the physical and emotional level. Moreover, and importantly, all women have felt humiliated and are seeking remedy for that humiliation from the law.

In the case of A, the accused will probably be convicted as A is of good moral character. She was outraged by the act as evidenced in her subsequent actions and lodged a complaint immediately.

However, the law of rape in India, as has been elucidated in detail through this paper, will treat all three women very differently. Therefore, C will have no case against her husband in the eyes of law as she falls directly within the exception made for marital rape.[60] C will have no remedy in Indian Law. Similarly, although B lodged the FIR, she will find it difficult to establish her case as not only has she been habituated to sexual intercourse but she has also entered the house of the accused, giving the impression that "she asked for it". Further, her testimony will fall into suspicion as there are very few signs of violence on her body and as she took fairly long to file the FIR.

Given the diverse reactions the judiciary is likely to have to these situations, there are interesting constitutional questions which arise. Article 14 of the Constitution of India guarantees the Right to Equality to all citizens.[61] Treating some women who have undergone a traumatic experience differently from other women who have undergone the same experience can have grave repercussions on this constitutional guarantee. Further, Article 21 of the Constitution of India provides a guarantee to the right to life of citizens.[62] Over years,

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[59] Section 375, Indian Penal Code, 1860.

[60] Exception, Section 375, Indian Penal Code, 1860: "*Sexual intercourse by a man with his wife, the wife not being under fifteen years of age, is not rape*".

[61] Article 14, The Constitution of India, 1950: "*The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth*".

[62] Article 21, The Constitution of India, 1950, "*No person shall be deprived of his life or personal liberty except according to procedure established by law*".

the right to privacy has been read into this right.[63] According to Anita Allen, the liberal conception of individual privacy is first, the idea that the government must respect:

> ...interests in physical, informational, and propriety privacy" and second, the idea of private choice under which the government must allow "individuals, families, and other nongovernmental entities to make many, though not all, of the most important decisions concerning friendship, sex, marriage, reproduction, religion, and political association.[64]

Hence, by the enforcement of stereotypes in the courts of law, the right of privacy of women to make their lifestyle choices is being affected. Hence, the current law can be questioned on yet another constitutional front.

5. Conclusion

The attempt made in this paper is to broadly analyse the law on rape in India in order to show that its construction is based on patriarchal notions and on gender stereotypes. The effort has further been to look at the manner in which this has affected the victims of rape and how this judicial and legislative attitude is in contravention of some of the pivotal civil and political guarantees provided to the citizens of India by the Constitution.

While the prejudices perpetuated by the legal system in India are heinous, they remain a symptom of the larger sociological problem of gender discrimination in India which has no easy remedy. Hence, reforms although slow, must necessarily account for the discontents of the victims and the direction of reform as suggested by groups working with this area of law or with victims of such violence.

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MARITAL RAPE AND LAW IN SOUTH ASIA

Priya Thangarajah[*] *and Ponni Arasu*[#]

1. Introduction

Marital rape in general is a complex issue that requires rigorous study and creative means of thinking and writing about law from a feminist perspective. This is further nuanced by the specific legal and social context of South Asia. This paper will outline a basic background to the issue in question and attempt to layout a framework from which to approach the issue, as it still remains at its nascent stages of analysis and any claim to the contrary is hard to corroborate.

The paper will attempt to define marital rape, which is often taken for granted, but which we believe to be at the crux of much of the difficulties of articulating the same first as a phenomenon and further as a legal concept. Then, we will attempt a brief non-South Asian history of the legal concept or the lack thereof and how it has evolved over time within the law. We will then proceed to examine any preliminary insights we might have about the phenomenon in the South Asian region. Furthermore, the paper will identify the different areas of law that need to be addressed if one is to analyze marital rape. The paper will end with a set of research and strategy related questions to address the phenomenon and take forward the discussion and advocacy around the same in the region.

At the very outset, it is important to lay out a few basic issues while addressing marital rape. First, the understanding of sex and marriage together contribute to a perverse nexus which often prevents women from even realizing or acknowledging an act as rape when meted out to them by their legally wedded husband. The context is such that the understanding of sex, sexuality, body and pleasure are abysmally low. There is no sufficient understanding of the fact that sex need not be painful or rushed but is one that is to be based on deriving pleasure from one another. In many cases, women who may be raped, by the legal definition of the term, assume their own consent in the act as they are made to believe that this is the inherent nature of sex itself. Second, even if there is a situation where a woman knows that this is not the essential nature of sex, that does not translate into recognition of 'marital rape' as rape. There is a very strong understanding of sex being a 'duty' within marriage. This may sound as if it were a mutual responsibility, but more often than not, it translates into it being a 'duty' that the wife is to perform at the discretion of her husband. Then, in cases where non-consensual sex is had, women do not have a context within which to acknowledge the same as 'rape' when the perpetrator is their husband. Any defiance to his desire is seen as being dangerous to and in defiance of the duties of marriage itself. Third, and not the least, given the above circumstances, there is enormous social taboo about describing any violation of rights within marriage. This is no different and is further heightened in the case of marital

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[*] Researcher on gender, sexuality and conflict in South Asia and law student, National Law School of India University, Bangalore

[#] Independent researcher and activist working on a range of issues related to gender, sexuality, conflict, displacement and labour in South Asia.

rape. Thus, if a woman is subject to and acknowledged marital rape, the social taboo is a factor to contend with. This would often make a public articulation of her experience almost an impossibility. Fourth, if a woman is to fight all of these above factors, the law provides no way to address the crime. At best, she can file a complaint under all the laws that address a range of sexual assault within marriage. This however, will not amount to rape. It is well known that there exists a gradation of sexual assault and rape is often seen as an extreme form. Complaints of this extreme form are not an option given to wives to file against their husbands.

It is in this context that we need to understand and analyze marital rape in the South Asian context.

2. Defining marital rape

A simple definition of marital rape would be that of rape within marriage where the perpetrator is the husband and the victim/survivor is the wife of such person. It is not simply rape within the institution of marriage, as that would need to necessarily include a range of different kinds of rape that could happen to a woman within her marital home. The concept as we use it here refers only to situations where the perpetrator is the husband and not other family members in the marital home. The reason is not a simplistic exclusion but based on the history of marital rape itself within the law. Any form of violence meted out to a woman in her marital home can be addressed by a range of legal provisions including, but not restricted to, domestic violence related laws, sexual assault laws in more general terms, and dowry related laws in some countries in South Asia.

Rape committed by a husband on his wife however is hard to be addressed within the law. Other forms of violence are now framed within the law in some parts, or beginning to be framed in some other parts. To a large extent, separate legislation on domestic violence address the same. Laws and practice related to divorce and maintenance also bring in the question of a husband's violent behaviour towards his wife. The meaning of this violent behaviour is broad in some cases and not so in others.

Under The Protection of Women from Domestic Violence Act of India, domestic violence has been defined in very broad terms to include: (a) an act that harms, injures or endangers the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse; or (b) an act that harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security; or (c) an act that has the effect of threatening the aggrieved person or any person related to her by any conduct mentioned in clause (a) or (b) above; or (d) an act that otherwise injures or causes harm, whether physical or mental, to the aggrieved person.[1] The Indian law then defines these various forms of abuse

[1] Section 3, The Protection of Women from Domestic Violence Act, 2005.

such as physical, mental, sexual and economical abuse in the widest terms possible and has been heralded as progressive law.[2]

The Prevention of Domestic Violence Act of Sri Lanka meanwhile defines domestic violence as (a) an act which constitutes an offence specified in Schedule I; (b) any emotional abuse[3], committed or caused by a relevant person within the environment of the home or outside and arising out of the personal relationship between the aggrieved person and the relevant person.

Schedule I of the Act includes all offences contained in Chapter XVI of the Penal Code of Sri Lanka, Extortion under Section 372 of the Penal Code, Criminal Intimidation under Section 483 of the Penal Code as well as attempt to commit any of the above offences.[4]

While in Sri Lanka and India there is an acknowledgment of violence within the family albeit ignoring marital rape, in Bangladesh the Prevention of Oppression against Women and Children Act, 2000 does not deal with spousal violence. However the Bangladeshi Law Commission has come up with a report on Domestic Violence, which is yet to be made law.[5] The Law Commission report's definition of domestic violence is much broader than its neighbour's enacted laws.[6] However, even the draft by the Bangladeshi Law Commission does not include marital rape.

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[2] Section 3 (i) "physical abuse" means any act or conduct which is of such a nature as to cause bodily pain, harm, or danger to life, limb, or health or impair the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force; (ii) "sexual abuse" includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of woman; (iii) "verbal and emotional abuse" includes: (a) insults, ridicule, humiliation, name-calling and insults or ridicule specially with regard to not having a child or a male child; and (b) repeated threats to cause physical pain to any person in whom the aggrieved person is interested; (iv) "economic abuse" includes: (a) deprivation of all or any economic or financial resources to which the aggrieved person is entitled under any law or custom whether payable under an order of a court or otherwise or which the aggrieved person requires out of necessity including, but not limited to, household necessities for the aggrieved person and her children, if any, *stridhan*, property, jointly or separately owned by the aggrieved person, payment of rental related to the shared household and maintenance; (b) disposal of household effects, any alienation of assets whether movable or immovable, valuables, shares, securities, bonds and the like or other property in which the aggrieved person has an interest or is entitled to use by virtue of the domestic relationship or which may be reasonably required by the aggrieved person or her children or her *stridhan* or any other property jointly or separately held by the aggrieved person; and (c) prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household.

[3] Emotional abuse means a pattern of cruel, inhuman, degrading or humiliating conduct of a serious nature directed towards an aggrieved person.

[4] Schedule I, Prevention of Domestic Violence Act, No.34 of 2005.

[5] http://www.apwld.org/pdf/lawcommission_finalreport.pdf.

[6] Section 3, Draft Domestic Violence Act- (a) Physical abuse- (i) assaulting including beating any member of the family for any reason whatsoever, whether the assault leads to any injury or not; (ii) damaging the physical beauty of a spouse by torture; (iii) indecently abusing, beating and maltreating the wife by the husband on being drunk; (iv) torturing the wife by the husband being influenced by others; (v) maltreatment, misbehavior, torture or assault upon a domestic servant by any member of the family. (b) Sexual abuse- (i) compelling the wife to cohabit with any body other than the husband; (ii) forcibly marrying a religiously prohibited woman or establishing illicit sexual connection with such woman voluntarily or otherwise; (iii) any kind of sexual abuse including sexual harassment of a member of the family. (c) Psychological abuse- (i) intimidation, harassment, denial

The Prevention of Domestic Violence Bill, 2005 of Pakistan has also defined violence in broad terms including physical, sexual and economical acts and includes various provisions of the Pakistan Penal Code.[7]

The Domestic Violence (Offence and Punishment) Act, 2066 (2009) of Nepal defines any form of physical, mental, sexual and economic harm perpetrated by a person to another person with whom he/she has a family relationship, and this word also includes any acts of reprimand or emotional harm.[8] The interesting point to note here is that the Nepali law is gender neutral in terms of understanding as to who the victim is.

Given the South Asian context and for the purposes of this paper, it is important that we use a strict definition of marital rape and try to explore that within this limited paradigm. So in effect, this brings us back to the simple definition of the 'rape of a wife by her husband'.

This also brings us to the question of what 'rape' means. In legal terms in most parts of South Asia, rape is understood as non-consensual intercourse of the penis inserted into the vagina causing hurt and/or grievous hurt and is a serious criminal offence.

Section 363 of the Sri Lankan Penal Code defines rape as:

> ...sexual intercourse with a woman without her consent; or where her consent has been obtained by use of force, threats or intimidation; where she is judicially separated from the man; with her consent when her consent was obtained when she was of unsound mind, in state of intoxication induced by drugs or alcohol; with her consent when the man knows he is not her husband and she is under the belief that she is married to him; with or without her consent when she is under 16 years except when she is his wife who is over 12 years and not judicially separated from him.[9]

Section 375 of the Indian Penal Code states that it is rape when a man has sexual intercourse with a woman where it is against her will; without her consent; with her consent, when her

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of food or drink for adequate sustenance, denial of salary or expenses, threat of physical or psychological abuse by any member of the family to the other or others; (ii) inducing or compelling a spouse to commit attempted suicide through continued oppression by any member of the family; (iii) blaming a spouse of immorality without any rational basis; (iv) threatening to divorce a wife on demand of dowry by the husband; (v) baselessly blaming or imputing insanity, or citing barrenness of a spouse with the intention to marry again or to get a male member of the family married again; (vi) bringing false allegation upon the character of a female member by any member of the family; (vii) keeping a female member of the family disconnected with her father, mother, child, sibling and other relatives; (viii) threatening to get a male member of the family remarried by the other member or members of the family on the ground of the female spouse giving repeated birth to female children; (ix) disallowing the children to see their father or mother during their separate living, being divorced or otherwise; (x) torturing the parents or any other member of the family by the husband being instigated by the wife; (xi) confining or detaining the victim against the will of the victim; (xii) causing mischief or destruction or removal of the victim's property or personal belongings or documents and papers relating thereto.

[7] Section 2(g), The Prevention of Domestic Violence Bill 2005: http://www.apwld.org/pdf/Domestic ViolenceBill2005.pdf.

[8] Section 2, Domestic Violence (Offence and Punishment) Act, 2066 (2009).

[9] Section 363, Sri Lanka Penal Code.

consent has been obtained by pulling her or any person in whom she is interested in with fear of death or of hurt; with her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married; with her consent, when at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent; or with or without her consent, when she is under sixteen years of age.[10] The exception to this provision clearly states that ***sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.***

Section 375 of the Bangladesh Penal Code has identical provisions like India in defining rape.[11]

In Pakistan, the Hudood Ordinance regulates punishment against rape. This law has been criticized by the women's movement and human rights activists in Pakistan as it makes it virtually impossible for women to allege rape as it requires four men to be witness to the same.[12]

A person is said to commit *zina-bil-jabr* if he or she has sexual intercourse with a woman or man, as the case may be, to whom he or she is not validly married, in any of the following circumstances, namely: (a) against the will of the victim; (b) without the consent of the victim; (c) with the consent of the victim, when the consent has been obtained by putting the victim in fear of death or of hurt; or (d) with the consent of the victim , when the offender knows that the offender is not validly married to the victim and that the consent is given because the victim believes that the offender is another person to who the victim is or believes herself or himself to be validly married to.[13]

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[10] Section 375, Indian Penal Code.

[11] Section 375 Penal Code 1860; (Act No. XLV of 1860); a man is said to commit "rape" who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions: Firstly. Against her will. Secondly, without her consent. Thirdly-With her consent, when her consent has been obtained by putting her in fear of death, or of hurt. Fourthly. With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. Fifthly. With or without her consent, when she is under fourteen years of age. Explanation. Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Exception. ***Sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape.***

[12] Section 8 of The Offence of Zina (Enforcement of Hudood) Ordinance, 1979. Ordinance No.VII of 1979- The Offence of Zina (Enforcement of Hudood) Ordinance, 1979. Ordinance No.VII of 1979 -Proof of zina liable to hadd shall be in one of the following forms, namely:- (a) the accused makes before a Court of competent jurisdiction a confession of the commission of the offence; or (b) at least four Muslim adult male witnesses, about whom the Court is satisfied, having regard to the requirements of tazkiyah al-shuhood, that they are truthful persons and abstain from major sins (kabair), give evidence as eye-witnesses of the act of penetration necessary to the offence.

[13] Section 13, The Offence of Zina (Enforcement Of Hudood) Ordinance, 1979.

However in 2006 Pakistan's national assembly voted to amend the country's strict Sharia laws on rape and adultery and allowed for civil courts to try rape cases. Yet, marital rape is not within the purview of these laws.

The chapter on indecent assault in the Country Code of 1963, Nepal incorporates certain aspects of physical and sexual abuse against women within and outside the domestic sphere. It prohibits touching any organ from head to foot of a woman above the age of 11 years except one's own wife with the intention to have sexual intercourse and prescribes a punishment with a fine up to five hundred rupees or imprisonment of up to one year.[14]

It is important here to note that the definition of rape is being challenged in some parts of South Asia. In the 2004 Sakshi judgment[15] the petitioners had pleaded for widening the understanding of rape to include all forms of penetration which is non consensual. However the Supreme Court of India held that only sexual intercourse, namely heterosexual intercourse, involving penetration of the vagina by the penis coupled with the explanation that penetration is to constitute the sexual intercourse necessary for the offence of rape under Section 375. The Court held that the wide definition that the petitioner wants to be given to 'rape' would create "chaos and confusion".[16] India is currently in the process of drafting and passing a sexual assault bill that broadens the definition of rape beyond penile-vaginal penetration. While the framework is still that of penetration, the logic to that is that if there is a hierarchy of offences then there needs to be corresponding punishment. In this context, rape is at the top of the pyramid. There is much to be said about this limitation to penetration and the corresponding hierarchical scheme of sexual crimes.

For the purposes of this paper however, we will use a more conservative definition of rape, one that revolves around intercourse of different kinds. The rationale for this remains that marital rape is excluded from rape laws in a way that other kinds of sexual assault by the husband on the wife, as stated earlier, are at least mildly addressed, even if formalistically, in laws around the region. But at the same time, the definition of penetration that is merely penile-vaginal will not be used in this paper. This is merely because further restricting the meaning of penetration is not useful in understanding the reality of sexual assault of women in the region.

In addition to this, the person who is legally wedded to the survivor/victim is the only one who is covered by the legal concept of marital rape. This aspect could be broadened beyond formalistic establishment of a marital situation to other situations resembling that of the husband-wife context. Having said that, cases in which the perpetrator is not the husband, technically he is not a part of the exceptions to some rape laws as 'marital rape' situations are. In that sense, it is important to restrict the concept to those that involve an official marriage between perpetrator and victim.

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[14] No.1, Chapter on Intention to Sexual Intercourse of Country Code, 1963.
[15] *Sakshi* v. *Union of India (UOI) and Ors.*, AIR 2004 SC 3566.
[16] *Ibid.*

In essence then, the definition of marital rape stands literally at the intersection of rape and marriage using varied versions of both these words as legal concepts. Such a usage is identified merely based on the need for openness and discussion legally and a category that will facilitate the same.

3. History of marital rape in law

Over time, the concept of marital rape, one can safely say, has had a vexed history within the law. From the very beginning of the framing of law around sexual violence against women, the possibility of husbands as perpetrators was established as an impossibility. There were specific exceptions always that made this possible. The understanding has always been that the concept of rape was established within law to not include situations where the perpetrator of the crime is the husband of the victim. This has been done over time in myriad forms, with an explicit exclusion of such a situation within rape law. Any form of violence meted out by a husband on the wife has been dealt with outside the scope of rape law.

The basic premise for this exclusion is the understanding that the husband owns the body of the wife and thus there is no need for him to claim it forcefully as his right on the same is absolute. If at all this right is to be challenged from the perspective of the rights of the wife in question, it still cannot be done within the framework of a serious criminal offence such as rape but needs to be relegated to another form of violence, such as, domestic violence. Rape is in direct reference to the danger that women are in where the perpetrators could be any man in the world (except her husband) who forcefully assaults her amounting to rape in any place and at any time.

There is no denying that the rape of a woman by any man and rape by her husband are two separate instances where the axis of power varies according to the position of the man in question in her life and society at large. They then need to be looked at differently. On the other hand, this difference cannot be used to exclude husbands from being possible perpetrators. Empirical data establishes beyond any doubt that marital rape is a stark reality. Theoretically the privileging of the institution of marriage over and above that of the rights of women is epitomized by the exclusion of marital rape from rape law.

This history is no different in the South Asian region. While in many parts of the world marital rape has subsequently come to be acknowledged and addressed, South Asia remains in the situation of the explicit exclusion within the law. Gender based legal analysis in the region in more recent times has begun to include marital rape as a category, while addressing violence against women in the family, such as domestic violence, etc. But we are yet to have a rigorous interrogation of how this can be firmly established as a legal concept. The challenges of including marital rape as a concept in law in the South Asian region is further complicated, not only by the realities of culture, tradition and religion, which further strengthen the absolute nature of a husband's power over his wife, but also by other aspects within law relating to marriage, such as child marriage, restitution of conjugal rights, etc. The present situation then has to be seen as a combination of the exclusion of marital rape within

rape law, combined with the various formulations within marriage related law that further strengthens this exclusion, directly or indirectly.

In essence, it is of no doubt that one has to address the conscious silencing within centuries of law making, if one is to begin to address marital rape. This is the basic reason also for the concept itself, as one could argue that rape remains rape and there should not be a need to specify the 'marital' nature of it even if the case may be so. But the reason needing to specify marital rape is a combination of the difference in the axis of power in cases of marital rape, which needs to be reflected in law, as well as its exclusion from general rape law—an exclusion that has made rape law by default, one that does not include rape by husbands.

4. Areas of law relevant to marital rape

There are a few areas within the laws in South Asia which could but does not include marital rape and sometimes goes a step further to explicitly exclude it.

First among them is the law relating to rape. As discussed above, definitions of rape in South Asian laws specifically exclude marital rape. This is the primary area where the inclusion of marital rape needs to be worked upon. Whether this should be done by an inclusion of a separate category or by the mere removal of the exception provided to marital rape, will be addressed in the next section.

While in the Nepal Criminal Statutes there is no acknowledgment of marital rape, a recent Supreme Court decision in Nepal has declared that husbands who force their wives to have sex can now be charged with rape.[17] The landmark ruling issued in May 2002 was a result of a July 2001 petition filed by the Forum for Women, Law and Development (FWLD), a women's rights organization in Nepal. The court decision declared that marital sex without a wife's consent constitutes rape. It also said that religious texts do not condone men who rape their wives.[18]

In Sri Lanka, the Penal Code was amended in 1995 to accommodate marital rape, albeit only in the instance of a judicial separation or divorce.[19] In other words, if a woman is married to a man and the marriage is still legal, then rape within that relationship is still not acknowledged as a crime in Sri Lanka.

The other major area within law, which must find space for marital rape, is the civil and criminal remedies relating to domestic violence. In some South Asian contexts, this also includes dowry related violence. This area within the law has been the subject of sustained campaigns in many parts of South Asia and is an area of law which is rather highly developed, in relative terms, in the South Asian context. One such example is the Prevention

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[17] FWLD vs. HMG/Nepal; Supreme Court Bulletin, 2059 B.S. Vol.19, p.1.

[18] http://www.panos.org.uk/?lid=19678.

[19] Section 363, Sri Lanka Penal Code-"sexual intercourse with a woman without her consent... where she is judicially separated from the man".

of Oppression against Women and Children Act, 2000 of Bangladesh,[20] which speaks of various crimes committed against women and children including dowry related violence. However it does not speak of marital rape. It is the same situation with Pakistan's Protection of Women Bill of 2006, which made various amendments to the Penal provisions, addressing violence against women. Interestingly most of these civil remedies do not use the language of rape within them. A range of different kinds of assault is mentioned, but there is no direct addressing of the rape of a wife by her husband. This is definitely a limitation as this would be the ideal area within law to include marital rape in no uncertain terms. The exact manner in which this needs to be done will be discussed below.

Other areas of marriage related law such as that of divorce, custody, restitution of conjugal rights, etc., also need to be adapted to include marital rape. More importantly, the sections of these laws that perpetuate the larger framework of the concept of the wife's body as belonging to the husband and the 'duty' of sex within marriage, needs to be addressed. For example, the restitution of conjugal rights statute establishes that it remains the primary duty within marriage to have sex with one another. Section 9 of the Hindu Marriage Act of India states: "When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights...".[21] This section is identical to Section 22 of the Special Marriage Act, 1954 of India. The same provision is in slightly different wordings in the Parsi Marriage and Divorce Act, 1936, but it has been interpreted in such a manner that it has been given the same meaning as under the Hindu Marriage Act, 1955. These formulations are much more deterrent to the cause of including marital rape within the law, as withdrawal from society is often interpreted as including refusal to have sex. Within rape law, the presence of an exclusion at least provides the space to argue that the phenomenon exists though it is excluded from rape law. From the other legislation however, it can be easily concluded that a woman's husband can never rape her as her body belongs to him anyway and the question of consent is irrelevant. It is then important that any reference within the law that makes 'having sex' part of the duty within marriage needs to be rigorously addressed and repealed.

Given the specific nature of rape and sexual violence in general, marital rape could well be a factor in legislation around divorce, maintenance and custody. If marital rape were established as a crime, then that logic could be extended to the civil law by virtue of claiming aggravated hurt in the civil context and thereby the victim could be entitled to corresponding remedies. The acknowledgement of a husband as a rapist needs to have an effect on any wife who is seeking a divorce or fighting for the rights of her child who she may believe is not safe with the husband for many reasons including the fact that he is a rapist.

In the South Asian context, the specific difficulty is also that, much of law relating to marriage is also the personal law of different social groups. Within these personal laws, it is even harder to bring in the notions of marital rape. While such an attempt has to be made at least at a minimal level, the establishment of the concept of 'sex as duty' within these laws needs to be addressed. Thus, the phenomenon needs to be addressed both within criminal and

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[20] http://www.apwld.org/pdf/prevention_act%2020.pdf.

[21] Section 9, Hindu Marriage Act, 1955.

civil law to have a cumulative effect in the long run. The approaches within different branches of law vis-à-vis marital rape may be different. They will be influenced by the nature of that particular branch of law itself.

5. Issues, questions and strategies

Having outlined a brief context for marital rape, we need to also think about how this can be addressed within the law.

In terms of research, there is a need for a conscious effort to bring in the instances of marital rape within the broader framework of rape related research. Quantitative and qualitative research of all kinds that address rape needs to clearly include—or at least not explicitly exclude—marital rape. It is not sufficient for us to have separate studies about marital rape alone. While that is very important, we also need to integrate this framework with research on rape and law. Without such inclusion there remains no major difference between our own approach and that of the existing law.

In order to make a case for marital rape to be criminalized and to make the concept of marital rape part of common parlance, much more focused quantitative and qualitative research is needed among women from various walks of life in different parts of the South Asian region. A specific effort needs to be made not only because of the emphasis on excluding rape of wives by husbands but to question the very framework of rape itself as a tool for oppressing women. Rape is often studied in the context of conflict or other such situations where the power of the rapist is derived from the act of rape as the woman is often seen as a symbol of the society that the rapist hopes to oppress. Thus, it is always seen as being in the realm of the outside and as a crime that is perpetrated by 'others'.

The flip side of this formulation is the establishment of the home as being a safe haven for women. As much as incestual child sexual abuse needs to be addressed more seriously, it is important to study marital rape to counter the baseless presumption of the safety of women within their homes. This safety needs to be questioned as this assumption has left many forms of oppressions within the home, outside the clear purview of the law. The law as we know has the responsibility to assure the safety, respect and dignity of persons at all times and this ethic cannot be compromised on the basis of irrational assumptions regarding the safety of one place (based on the normative notion of family and society) over another, especially for marginalized sections of society which in this case is women.

In terms of legal strategy and advocacy, there are a few possible matters to reflect upon. India is currently in the midst of rethinking its sexual assault laws, but there has not been a concerted effort to criminalize marital rape. Protection to wives is provided when they are separated from their husbands by virtue of a legal decree. This is interesting as the most radical form of acknowledging violence within marriage amounting to rape is addressed only at the time of separation. This amounts to implying by default that such a crime was not a crime at all if they are married and cohabiting. This then is strengthened beyond any further doubt through the exception to the rape laws.

In terms of legal advocacy, there is no need for a uniform approach to all kinds of law. In terms of the rape law, it might be worth our while to put our strengths behind removing the exception rather than including 'marital rape' as a category. There is not even a need for the use of the term in rape law. This might be not only an easier struggle, but it also hits at the very basic issue vis-à-vis marital rape and marriage in general. We need to imagine a world where a husband is no different from any other man on the road and they are both equally culpable to committing an offence of rape. Having said that, the gravity of the rape needs to be on a sliding scale as rape by a husband, more often than not, is more difficult to declare in public or get redress from in courts. The hegemony of marriage and family taken together with eons of societal belief in marital rape being an impossibility, will necessitate this scale. This however need not be addressed within rape law. Many parts of South Asia are now engaged in processes at various levels where changes in legislation around sexual assault are being considered carefully. This then is a good time to raise the question of marital rape.

Various civil and criminal provisions relating to marriage need to be read carefully to make sure at the base minimum that they can be used in the context of marital rape and that there is no such exclusion. These changes read along with the removal of the exception of marital rape in the rape law will provide the gradation in the offences which are being argued for, based on the different axes of power in cases of rape.

6. Conclusion

It is clear from the above account that reforming laws and changing attitudes relating to marital rape in the South Asian context involves a taxing and sustained struggle. This struggle need not merely concern itself about a simplistic inclusion but should also question the very basis of the default nature of marriage and the family in the lives of people. This will bring in other pertinent questions such as the way in which sex is understood in our societies.

For any real and lasting way to address marital rape, it is clear beyond any further doubt that specific legal arguments have to be coupled with a broader approach which addresses the limitations of the understanding of sex, body, sexuality and in that context marriage. We need to work towards an outcome where women are aware that sex, at all times, needs to be indulged in with their consent and of their free will and should be one that is pleasurable. Further, we need to communicate that 'providing sex' to the husband is not a default aspect of duties within marriage. The decision to engage in sex should be mutual and one spouse should not have more power than the other in this process.

It is only from this basis that we can imagine a situation where women are aware when their husbands rape them. This is the first step that could be, but not always, followed by wives who first acknowledge to themselves the violence they have experienced. Thereafter comes the decision of acknowledging such violence in public by using the law for instance. If any woman is at a stage where she is ready to acknowledge her experience in public, it is the responsibility of the law to provide the space for redress. This remains a non-negotiable. But on the other hand, without the recognition of this violence within the law, women will not have the context in which to even begin to understand these instances in their own lives. It is

important then to remember that naming of such violence within the law will assist women in naming the same first to themselves and then in public.

Having said that it is important to not settle for naming of marital rape as an offence alone but rather, advocates should adopt a holistic approach within the law to address the problem from all angles and use different strategies to achieve success.

In short, the instances of marital rape like all other kinds of rape and sexual violence is a grave violation of the rights of women. This particular kind of violence holds the added burden of going against the basic premise of marriage. The challenge ahead is formidable but must be taken up as ensuring the well being of women in all spaces including their homes. The sanctity of marriage and family needs to be replaced with the vibrant sanctity of the right to live a life with freedom, dignity and respect within the home and outside.

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