

## CONTESTING THE CONSENT: AN ANALYSIS OF THE LAW RELATING TO MARITAL RAPE EXCEPTION IN SRI LANKA

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### ABSTRACT

*In modern times, even though 'marriage' is regarded as a partnership of equals, the truth is the rights of married women are often restricted by social-cultural obstacles in the societies, where they live. Having emphasized the State Obligation under international treaty law, Article 16 (1) of the UDHR, Article 23 (4) of the ICCPR and Article 16 (1) (C) of the CEDAW declare that 'men and women are entitled to equal rights as to marriage and during the marriage.' However, criminalizing marital rape, in all circumstances remains controversial in many countries, despite their international obligations towards eliminating all forms of discrimination against women. In Sri Lanka, marital rape is not a criminal offence, unless the husband and wife are judicially separated. Therefore, this research argues that outlawing marital rape is a breach of international treaty obligations, as well as a violation of the Constitutional guarantee of equality before the law. On the other hand, the targets of the Goal 05 of the SDGs are to achieve gender equality and empower all women and girls. Hence, legislative and social reluctance in abolishing 'marital rape exception' is a major obstruction to achieving the women's empowerment and the practical realization of their fundamental rights. The main objective of this research is to make effective recommendations to protect women's human rights during the marriage, by providing a strong safeguard against the marital rape. This is a qualitative research; mainly, carried out by reference of secondary data.*

**Keywords:** Marital Rape, Marital Rape Exception, Gender Equality, State Obligation

### 01. INTRODUCTION

Marriage is in modern times, regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband.<sup>2</sup> Kanodia and Ray (2016) reaffirm the concept of 'equal partnership in marriage' and further describe that having married each other, both man and woman also gain some rights and duties towards each other and each one of them is to respect one another and recognise them as 'equals' in the relationship.<sup>3</sup> However, the truth is the rights of married women are often restricted by the social-cultural obstacles in the societies, where they live.

The concept of 'equality of men and women in marriage' has been enshrined in international treaty law. In particular, Article 16 (1) of the UDHR<sup>4</sup> declares that "men and women are entitled to equal rights as to marriage and during the marriage." This recognition has been reaffirmed by Article 23 (4) of the ICCPR.<sup>5</sup> Moreover, Article 16 (1) (C) of the CEDAW<sup>6</sup> declares that "States parties shall take appropriate steps to ensure equality of rights and responsibilities of spouses during the marriage." Therefore, it provides a solid understanding that both spouses should have equal rights to make decisions about their sexual and reproductive lives without violating human rights and sexual autonomy of each other.<sup>7</sup> In the landmark judicial decision in Nepal, *The Forum for Women, Law, and Development v. His Majesty's Government, Ministry of Law, Justice and Parliamentary*

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<sup>2</sup> *R. v R* [1991] House of Lords, 4 All ER 481 at 484

<sup>3</sup> Kanodia S., & Ray, R., (2016), Why Penalize Marital Rape, *IOSR Journal of Humanities and Social Science*, 21 (9), 49-55, at 49

<sup>4</sup> The Universal Declaration of Human Rights – UDHR was adopted by the United Nations General Assembly in Paris on 10<sup>th</sup> of December 1948 ([General Assembly resolution 217 A](#)).

<sup>5</sup> *International Covenant on Civil and Political Rights (ICCPR) (1966); Section 23 (4)* – "States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution."

<sup>6</sup> The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) is an international treaty adopted in 1979 by the United Nations General Assembly.

<sup>7</sup> Shalev has defined that; 'Autonomy' means the right of a woman to make decisions concerning her fertility and sexuality free of coercion and violence. Shalev, C., (1998), *Rights to Sexual and Reproductive Health* - the ICPD and The Convention on the Elimination of All Forms of Discrimination Against Women, The paper was presented at the International Conference on Reproductive Health, jointly organised by the Indian Society for the Study of Reproduction and Fertility and the UNDP/UNFPA/WHO/World Bank Special Programme of Research, Development and Research Training in Human Reproduction, 15-19 March 1998, Mumbai, India. Available at; <<http://www.un.org/womenwatch/daw/csw/shalev.htm>> (Accessed on 17/07/2017)

*Affairs*, the Supreme Court has emphasized that ‘a marriage does not mean women to turn into slaves and thus, women do not lose human rights because of marriage.’<sup>8</sup>

In literature, Shalev (1998) reveals one of the bitter social beliefs about the sex crimes against women as; “women’s sexuality is frequently subordinated to the satisfaction of male needs, exposing them to risks of sexual abuse and violence.”<sup>9</sup> Likewise, Pracher (1981)<sup>10</sup> has argued that “a woman may consent to sexual intercourse with her husband when it is a mutually desired act, but rape is the violent desecration of the victim's person.” In the decision of *R v. R* Lord Lane CJ confirmed this liberal approach to criminalize the sex crimes within the marriage as; “the time has now arrived when the law should declare that a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim.”<sup>11</sup>

Despite the aforementioned revolutionary viewpoints expressed by the scholars and judges, criminalizing marital rape in all circumstances remains as a controversial issue in many countries, including Sri Lanka, despite the treaty obligations and Constitutional guarantees towards protecting and promoting the equality before the law. The World Bank statistics on the gender equality shows that 112 countries in the world have not criminalized marital rape yet.<sup>12</sup>

Hasday (2000) has used very sensitive words to express his opinion against the marital rape exemption as; “the marital rape exemption was not just a theoretical question, and it affected how women lived their married lives.”<sup>13</sup> In literature, the term; ‘marital rape’ has been defined by Flowers (2006) as “any unwanted intercourse or penetration (vaginal, anal, or oral) obtained by force, threat of force, or when the wife is unable to consent.”<sup>14</sup> Marital rape also referred as ‘spousal rape’ or ‘wife rape.’ However, the position of this research paper is even a husband can be a victim of the forced sex within the marriage and therefore, the term; ‘wife rape’ is not accurate to use in the similar meaning for the term; marital rape.

First, this paper discusses the background of the study, research problem, research objective, research limitations and research methodology. Then, the paper focuses on to analyse the research findings. At the conclusion, recommendations will be provided to fill the gaps and shortcomings in the existing legal framework of Sri Lanka, particularly, in the lights of the recommendations made by the international bodies, committees, and scholars.

## 02. THE SCOPE OF THE STUDY

### 2.1 RESEARCH OBJECTIVE

The objective of this research is to make effective recommendations to protect the rights of married women against marital rape in Sri Lanka through effective legal and procedural reforms.

### 2.2 RESEARCH PROBLEM

The research problem of this study is does the existing legal framework of Sri Lanka provide an adequate protection against marital rape in all circumstances, to ensure the full enjoyment of human rights and fundamental freedoms by married women?

### 2.3 LIMITATIONS OF THE RESEARCH

This research focuses on heterosexuality and thus, has been limited to examining the identified legal issues relating to marital rape within the context of ‘opposite-sex marriage.’ Also, this study does not deny the fact that husbands can be subjected to marital rape. However, the research has been limited only to the situation, where the wife as the victim of marital rape. In the comparative analysis of other jurisdictions, this paper is limited into examining the Indian law.

### 2.4 RESEARCH MATERIALS AND METHODS

The qualitative research approach has been adopted in this study, which mainly carried out by reference of secondary data, such as; domestic laws, judicial decisions, international treaties, country reports, commentaries and concluding observations published by international organizations and committees, academic writings, and electronic databases. In this research, India has been selected for the comparative analysis by paying attention to the similarities prevails in social, cultural and legal backgrounds of

<sup>8</sup> The Supreme Court, Special Bench, Nepal, Writ No. 55 of the year 2058 BS (2001-2002)

<sup>9</sup> Shalev, *supra* note 7

<sup>10</sup> Pracher, M., (1981), *The Marital Rape Exemption: A Violation of a Woman's Right of Privacy*, *Golden Gate University Law Review*, 11 (3), 717-757, at 730

Available at: <<http://digitalcommons.law.ggu.edu/ggulrev/vol11/iss3/1>> (Accessed on 17/07/2017)

<sup>11</sup> *R v. R*, *supra* note 2

<sup>12</sup> The World Bank Data on the theme of Gender Equality – Goal 05 of the UN Sustainable Development Goals, Available at:

<<http://datatopics.worldbank.org/sdgtlas/SDG-05-gender-equality.html>> (Accessed on 17/07/2017)

<sup>13</sup> Hasday, J.E., (2000), *Contest and Consent: A Legal History of Marital Rape*, *California Law Review*, 1373-1505, at 1412, <[chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=11686&context=](http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=11686&context=)>

(Accessed on 6/7/2017)

<sup>14</sup> Flowers, R.B., (2006) *Sex Crimes: Perpetrators, Predators, Prostitutes, and Victims*, Charles C Thomas publisher, at 38

both countries. Sri Lanka and India, both countries are situated in the South Asian region, where women are more vulnerable to being physically and mentally governed by patriarchal social norms and practices. As a result of that, the legislative reluctance in abolishing the marital rape exception can be witnessed in examining the research findings in both jurisdictions. On the other hand, India and Sri Lanka have ratified the CEDAW Convention, and many other human rights treaties. Another justification to select Indian jurisdiction is the criminal law of Sri Lanka is highly influenced by the Indian law.

## 2.5 RESEARCH GAP IN THE EXISTING LITERATURE

This research is intended to fill the gap in the existing legal literature in Sri Lanka concerning the issue of marital rape exception. In 2004, Prof. Goonesekere<sup>15</sup> has provided a comprehensive comparative analysis of the law relating to marital rape in Sri Lanka, India and Pakistan by analysing the negative influences of the patriarchal attitudes on the enjoyment of women's rights in the South Asian region. In 2015, there was a study conducted to understand the issue of intimate partner violence in Sri Lanka in the medico-legal perspective.<sup>16</sup> As found in this research, there is no specific study conducted on this issue recently by exploring the Sri Lankan legal context. On the other hand, the lack of statistics and standard methodology for data collection hide the gravity and the effects of this issue from the eyes of the public and the lawmakers. Hence, this paper will contribute to fill that loophole in the literature on this issue, and it will further encourage the future studies on this subject matter.

## 03. RESEARCH FINDINGS / DISCUSSION

### 3.1 EFFECTS AND CONSEQUENCES OF MARITAL RAPE

Marasinghe (2012) states that "sexual crimes are the most horrendous of all crimes committed against women."<sup>17</sup> In *Manohari Pelaketiya v. Ministry of Education*; it was held that "continuous threats and abuses could also make a person unwell both physically and mentally."<sup>18</sup> As reported by the WHO (2002), "abused women reporting experiences of forced sex are at significantly greater risk of depression and post-traumatic stress disorder than non-abused women."<sup>19</sup> Even though, it is well-accepted that, the practical realization of women's human rights is crucial, that goal cannot be achieved without criminalizing all forms of sexual violence against women, irrespective of her marital status and the relationship with the culprit.

In human rights law, the UDHR proclaims that "all human beings are born free and equal in dignity and rights."<sup>20</sup> Moreover, Article 12 of the UDHR affirms that "no one shall be subjected to arbitrary interference with his privacy, nor to attacks upon his honour and reputation." Article 16 (1) (e) of the CEDAW recognises that "men and women should have the same rights to decide freely and responsibly on the number and spacing of their children." In that sense, marital rape is a grave violation of all human rights and fundamental freedoms of the victim. If the law does not provide an adequate legal protection against sex crimes within the marriage, married women are at high risk of re-victimization behind the closed doors of their matrimonial houses.

In general, rape victims are subjected to numerous physical, psychological and reproductive health effects, and it violates victims' fundamental right to health. The right to health is recognized as a basic human right by Article 25 of the UDHR as; "everyone has the right to a standard of living adequate for the health and well-being of himself." Significantly, some research revealed that sexual violence in marriage has a serious impact on pregnancy outcomes, as it has been linked to increasing the risks of miscarriage and abortions.<sup>21</sup> Not only that, if the husband is infected by Sexually Transmitted Diseases (STDs), there is a high risk of contracting these life-threatening infections to the wife through forcing her to have unprotected sex.

### 3.2 IS MARRIAGE A DEFENCE FOR RAPE?

<sup>15</sup> Goonesekere, S., (Eds.), (2004), *Violence, Law and Women's Rights in South Asia*, SAGE Publications, New Delhi, India, 60-64

<sup>16</sup> Guruge, S., Jayasuriya-Illesinghe, V., Gunawardena N., & Perera, J., (2015), Intimate partner violence in Sri Lanka: A scoping review, *Ceylon Medical Journal* 2015; 60: 133-138, Sri Lanka.

<sup>17</sup> Marasinghe, C. (2012), *Sri Lanka Law Directory on Protection of Women and Girl Children*, The Ministry of Child Development and Women's Affairs, Sri Lanka, at 67

<sup>18</sup> *Manohari Pelaketiya v. Secretary, Ministry of Education and Others*, The Supreme Court of Sri Lanka, SC/FR/No.76/2012, Decided on 28/09/2016

<sup>19</sup> Krug, E.G., Dahlberg, L.L., Mercy, J.A., Zwi A.B., and Lozano R. (Eds.), (2002), *The World Report on Violence and Health*, The World Health Organization, Geneva, at 163,

Available at; <[www.who.int/violence\\_injury\\_prevention/violence/world\\_report/en/full\\_en.pdf](http://www.who.int/violence_injury_prevention/violence/world_report/en/full_en.pdf)>

(Accessed on 12/06/2017)

<sup>20</sup> Article 01 of the UDHR, (1948), Available at;

<<http://www.un.org/en/universal-declaration-human-rights/>> (Accessed on 10/05/2017)

<sup>21</sup> Aina, O.I., Aransiola, J.A., & Osezua, C., (2006), Sexual Health and Sexual Rights within Marriage, *Understanding Human Sexuality Seminar Series*, Africa Regional Sexuality Resource Centre, Nigeria at 11, Available at; <[www.arsrc.org/downloads/uhsss/aina.pdf](http://www.arsrc.org/downloads/uhsss/aina.pdf)> (Accessed on 10/08/2017)

In a historical vestige of the legal doctrine of Coverture, sexual coercion among spouses was regarded not as a form of challengeable victimization.<sup>22</sup> For instance, in “*History of the Pleas of the Crown*” (1736), Sir Matthew Hale has written that “the husband cannot be guilty of rape, committed by himself upon his lawful wife for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband, which she cannot retract.”<sup>23</sup> It seems that the propensity towards introducing marital rape exception into the legal systems has been supported by the Principle of Coverture.<sup>24</sup>

Later, this legal immunity provided for marital rape was further strengthened by the patriarchal attitudes rooted in the South Asian societies such as, a woman gives her irrevocable consent to sexual intercourse by giving her consent to marriage, the State has no right to interfere in the personal relationships of the citizens, and criminalization of marital rape may contribute to breakdown the union of marriage. Another obstruction in criminalizing marital rape, in many of the South Asian countries is the reluctance of the lawmakers to interfere in the personal lives of the citizens. It shows that the marital rape exception is reinforced by the negative social perceptions on the role of a married woman and thus, public legal education must be a compulsory component in the legal recommendations in this regard.

This ideological reluctance prevails in the patriarchal societies in criminalizing marital rape has been criticised by the Justice Verma Committee Report in India (2013) as; “the exemption for marital rape stems from a long out-dated notion of marriage, which regarded wives as no more than the property of their husbands”.<sup>25</sup> It seems that, in South Asian societies, the degree of sexual autonomy and rights exercised by a married woman in relating to her reproductive rights, and sexual autonomy is highly influenced by the negative social perceptions.

By observing the existence of these extra-legal obstructions, this research strongly argues that the law should not recognise marriage as a defence for the offence of rape and marital rape exception must be abolished from the legal systems. On the other hand, married women, who are in ‘*de facto* separation’ with their husbands, are also vulnerable, since they have not been protected by the criminal laws in some jurisdictions including Sri Lanka. In this context, even though many scholars have proclaimed that marital rape exception is an outdated notion in the writings, the truth is, this social evil is still alive, as far as the legislative reluctance prevails.

### 3.3 THE LEGISLATIVE RELUCTANCE IN CRIMINALIZING MARITAL RAPE: A COMPARATIVE STUDY

#### 3.3.1. SRI LANKA

According to the contemporary criminal law of the country, marital rape is criminalized only in the event of judicial separation. As found in the Section 363 (a) of the Penal Code of Sri Lanka, (as amended by the Act, No. 22 of 1995) “a man is said to commit “rape” that he has sexual intercourse with a woman without her consent, even where such woman is his wife, and she is judicially separated from the man.” It shows the legislative reluctance of the lawmakers in criminalizing marital rape as a criminal offence in all circumstances.

This truth has been revealed by the Report of the Leader of the Opposition’s Commission on the Prevention of Violence against Women and the Girl Child in 2014 <sup>26</sup> as; “in Sri Lanka, at the time the 1995 amendment was tabled in Parliament, marital rape was included without the caveat of judicial separation, but strong opposition from some Parliamentarians resulted in the dilution of this provision.”

By recognising the impact of negative social perceptions in achieving the gender equality, CEDAW General Recommendation - 33 (2015) has emphasized that “attention should be paid to address the challenging cultural stereotypes concerning gender-based discrimination and violence, including domestic violence, rape and other forms of sexual violence, to ensure the women’s access

<sup>22</sup> Stringer, R., (2014), *Knowing Victims: Feminism, Agency and Victim Politics in Neoliberal Times*, Routledge, at 69

<sup>23</sup> Hale, M., (1736), *History of the Pleas of the Crown, 1st Ed.*, Vol: 1, Ch. 58, at 629

<sup>24</sup> William Blackstone has defined Principle of Coverture in “*Commentaries on the Laws of England*”, Vol. I, (1765), 442-445, as; “By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything; and is therefore called in our law-French a feme-covert, foemina viro co-operta; is said to be covert-baron, or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture.” Also see; In *Regina v. Mawgridge*, (84 E.R. 1107) at p. 1115, Lord Chief Justice John Holt stated that a man having sexual relations with another man's wife was “the highest invasion of property.” [Emphasis added]

<sup>25</sup> It must be noted that, in India, even though the Justice Verma Committee Report has recommended to remove the exception for marital rape from the Penal Code of India, *The Criminal Law (Amendment) Act, 2013* has reconstituted the same exception in the section 375 under ‘Rape’ as; “sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.” [Emphasis added]

<sup>26</sup> Report of the Leader of Opposition's Commission on the Prevention of Violence against Women and the Girl Child, Sri Lanka, (2014), Available at; <[www.childwomenmin.gov.lk/resources/30/REPORT.pdf](http://www.childwomenmin.gov.lk/resources/30/REPORT.pdf)> (Accessed on 10/06/2017)

to justice.”<sup>27</sup> Hence, the State parties to CEDAW have obligations to reform discriminatory laws, practices, mechanisms, as well as social perceptions, which enriched the application of the marital rape-exemption. A prominent scholar; Goonesekere (2004) explains that, the original reform in Sri Lanka covered marital rape in the situation of de facto separation,<sup>28</sup> however, the early Indian legal provision,<sup>29</sup> which recognised “marital rape was a criminal offence during a judicial separation authorised by court order” was used to justify the introduction of a similar restrictive reform into the Sri Lankan Penal Code Amendment of 1995. This restrictive legislative approach is also influenced in the Prevention of Domestic Violence Act of Sri Lanka, No. 34 of 2005, which defines ‘Domestic Violence’ as, all offences contained in the Chapter XVI of the Penal Code, where marital rape, in all circumstances, has not been recognized as crime.<sup>30</sup>

### 3.3.2 INDIA

In the comparative analysis, this research found that marital rape is not a criminal offence in India. It is surprised to observe that even though the Justice Verma Committee Report (2013)<sup>31</sup> had strongly recommended abolishing the marital rape exception from the Indian Penal Code, the Criminal Law Amendment Act (2013) has ignored the committee’s recommendation in this regard. Therefore, according to the contemporary law, the second exception to the section 375 of the Penal Code of India recognises that, “sexual intercourse or sexual act, by a man with his own wife, the wife not being under fifteen years of age, is not rape.”

By criticising this gender-insensitive approach, Kanodia and Ray (2016) raise a question that “why is it that the lawmakers close their eyes and ears and refuse to acknowledge such a heinous crime committed on a woman when it is within the four walls of her bedroom?”<sup>32</sup> Also, Rashida Manjoo; the UN Special Rapporteur on Violence against Women (2014) has also recommended defining marital rape as a criminal offence.<sup>33</sup> The CEDAW Committee (2014) has also urged to amend the existing criminal law in India to incorporate ‘marital rape’ as a criminal offence.<sup>34</sup> Therefore, the influence of negative socio-cultural factors in reinforcing the existence of marital rape exception can be witnessed in both India and Sri Lanka.

### 3.4 MYTHS AND FACTS; WHY IT IS NEEDED TO CRIMINALIZE MARITAL RAPE?

<sup>27</sup> CEDAW General Recommendation - 33 on Women’s Access to Justice, (2015)  
Available at: <[http://internet.ohchr.org/Treaties/CEDAW/.../1\\_Global/CEDAW\\_C\\_GC\\_33\\_7767\\_E.pdf](http://internet.ohchr.org/Treaties/CEDAW/.../1_Global/CEDAW_C_GC_33_7767_E.pdf)>  
(Accessed on 16/07/2017)

<sup>28</sup> Goonesekere, S., (Eds.), (2004), *Violence, Law and Women's Rights in South Asia*, SAGE Publications, New Delhi, India, at 60

<sup>29</sup> Once, the Indian Penal Code (1860) was amended to incorporate “the marital rape during the judicial separation” as crime. This section has been substituted by the Indian Penal Code (Amendment) Act, 1983 with effect from 25 December, 1983, by substituting Section 376 (A) as; “Whoever has sexual intercourse with his own wife, who is living separately from him under a decree of separation or under any custom or usage without her consent shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.” Prof. Goonesekere has suggested that, 1995 Penal Code Amendment Act of Sri Lanka was influenced by this Indian legal provision to recognize, marital rape in judicial separation, as crime in Sri Lanka. But, thereafter, India has again amended the Penal Code in 2013, by the Criminal Law Amendment Act of 2013 and amended the law relating to the rape. According to the section 375 of the Penal code of India (contemporary criminal law in India), marital rape is not a criminal offence, if the wife not being under fifteen years of age. Therefore, in a comparison, it seems that current Sri Lankan law is better than the contemporary Indian law. [Emphasis added]

<sup>30</sup> Section 23 of the Prevention of Domestic Violence Act (PDVA) of Sri Lanka states that, “Domestic Violence” means —(a) an act which constitutes an offence specified in Schedule I of the Act.

In Schedule-I, it states that, all offences contained in Chapter XVI of the Penal Code come under this.

But, marital rape is not a criminal offence incorporated in the Penal Code. Therefore, this research strongly suggests that, marital rape must be directly identified and incorporated in legislation, without underestimating the gravity of the crime. Therefore, PDVA is lack of recognizing marital rape as a separate offence in direct way. (‘Emphasis added’]

<sup>31</sup> The Justice JS Verma Committee, set up by the Government of India after the horrific gang-rape in Delhi on December 16, 2012, submitted a 630 page report on 23 January 2012, setting out its recommendations for the reform of India’s sexual violence laws. [Source: Oxford Human Rights Hub] See:<<http://ohrh.law.ox.ac.uk/the-justice-js-verma-committee-report-on-amendments-to-criminal-law-relating-to-sexual-violence-in-india-preliminary-observations/>> (Accessed on 10/08/2017)

The Justice Verma Committee Report available at:  
<[apneap.org/wp-content/uploads/2012/10/Justice-Verma-Committee-Report.pdf](http://apneap.org/wp-content/uploads/2012/10/Justice-Verma-Committee-Report.pdf)>

<sup>32</sup> Kanodia & Ray, *op. cit.*, note 3 at 50

<sup>33</sup> Report of the UN Special Rapporteur on Violence against Women, its Causes and Consequences, Rashida Manjoo, Mission to India (A/HRC/26/38/Add.1), April 2014, Para. 78(c)

<sup>34</sup> CEDAW Concluding Observations on the Combined 4<sup>th</sup> & 5<sup>th</sup> periodic reports of India (CEDAW/C/IND/4-5), 2014

'Whether marital rape must be criminalized or not' is a controversial topic in many countries in the South Asian region, because there are numerous social-cultural factors are interrelated with this issue. One of the main arguments against criminalizing marital rape is, wives may misuse such a law to revenge or cheat their husbands. On the other hand, some scholars argue that the imposition of criminal sanctions on husbands may cause for the breakdown of the marriages, and it further makes negative influences on the well-being of the children of such families.<sup>35</sup> When valuing the objectives of the criminal justice system, these scholarly arguments cannot be completely denied and therefore, balancing the interests of all the parties of the litigation process must be one of the ultimate objects of the law reforms.

The law, according to Roscoe Pound,<sup>36</sup> is social engineering, which means a balance between the competing interests in the society. Therefore, false rape accusations against husbands must be prevented and in that case, forensic and medical evidence, digital evidence, violent history of the husband and previous attempts can be used as corroborative evidence to prove the allegation of marital rape. On the other hand, the presumption of innocence must be valued, legal assistance must be provided and anonymity in legal proceedings must be maintained. The gravity of this issue can be clearly understood, when think about the situations such as; the victims of forced marriages and child marriages, when the husband suffering from STDs, in the situations where the wife is pregnant or is seriously sick, when the husband is under the influence of drugs or alcohol, and if the wife is forced to have unnatural sex. Hence, it is important to note that sex offences must be defined from the victim's viewpoint, if it is needed to fulfil the justice.

In *Motsamai v Everite Building Products (Pty) Ltd*, it was held that "sexual harassment goes to the root of one's being and must therefore, be viewed from the point of view of a victim, how does he/she perceives it, and whether or not, the perception is reasonable."<sup>37</sup> In light of the above findings, this research observed that public unawareness, ignorance of the authorities, patriarchal perceptions, lack of strategies in maintaining and analysing the statistics, the lack of gender-sensitive training and women's reluctance to make complaints are the main obstacles to combat against this social evil.

### 3.5 JURISPRUDENTIAL VIEWPOINT

Roscoe Pound (1927) believed that "the law is a specialized part of the whole regime of social control."<sup>38</sup> By admitting this point, this research argues that marital rape cannot be viewed as an isolated issue from the stereotype morality and conceptions of gender roles. From the feminist perspective, 'rape' is not an isolated act that can be rooted out from patriarchy without ending patriarchy itself.<sup>39</sup>

'Radical Feminists' believe that violence against women is a reflection of the unequal power relationship between men and women. For example, the Preamble to the DEWV recognizes that "violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men."<sup>40</sup> Eve Enslar (1996) has also found that unequal power relations between men and women expose women for the magnitude of violence, such as rape, sexual abuse, and genital mutilation.<sup>41</sup>

## 04. THE STATE OBLIGATION OF SRI LANKA

### 4.1 THE OBLIGATIONS UNDER THE SUPREME LAW OF THE COUNTRY

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<sup>35</sup> Nasir, M.A., (2017), *Legal Concept of Marital Rape: The Perspectives within African Customary Laws*, Presented at the 14<sup>th</sup> Kuala Lumpur International Business, Economics and Law Conference (KLiBEL14), held in Hotel Bangi-Putrajaya, Selangor, Malaysia from December 16 – 17, 2017.

<sup>36</sup> McManaman, L. J., (2013), Social Engineering: The Legal Philosophy of Roscoe Pound, *St. John's Law Review*: Vol. 33: Iss. 01, Art. 01, at 17;

Available at: <<http://scholarship.law.stjohns.edu/lawreview/vol33/iss1/1>> (Accessed on 12/07/2017)

<sup>37</sup> *Motsamai v Everite Building Products (Pty) Ltd* [2010] ZALAC 23; (4 June 2010) at para. 20

<sup>38</sup> Pound, R., (1927), Law and Social Change, *Indiana Law Journal*, 3 (3), 183-195, at 183, Available at: <<http://www.repository.law.indiana.edu/ilj/vol3/iss3/1>> (Accessed on 24/09/2017)

<sup>39</sup> Griffin S., (Sep. 1971) Rape: The All-American Crime, The Politics of Rape: An Inquiry, *Ramparts Magazine*, 26-35, at 35

<sup>40</sup> The Preamble to the UN Declaration on the Elimination of Violence against Women (DEVAW-1993), Also see; Beijing Declaration and Platform for Action, (1995), page 49, para 118, Also see; Policy Framework and National Plan of Action to address Sexual and Gender-based Violence (SGBV) in Sri Lanka 2016-2020; Also see; ASEAN Regional Plan of Action of Elimination on Violence against Women, Available at; <<https://acwc.asean.org/wp-content/uploads/2016/10/Final-ASEAN-RPA-on-EVAW-IJP-11.02.2016-as-input-ASEC.pdf>> (Accessed on 24/09/2017)

<sup>41</sup> Enslar E., (1996) *The Vagina Monologues*, (First play) at HERE Arts Center; Quoted by Zhongli Yu, (2015) *Translating Feminism in China: Gender, Sexuality and Censorship*, Routledge, at 68 (Zhongli has commented on the message of Vagina Monologue play is the unequal power relation of men and women contributed for the sexual violence against women. [Emphasis added])

If a woman is deprived of the protection of rape law, because of the marital status, it is a form of direct discrimination. Articles 12 (1) and 12 (2) of the Constitution of Sri Lanka (1978) guarantee that, "All are equal before the law and are entitled to the equal protection of the law" and "No citizen shall be discriminated against on the ground of sex."<sup>42</sup> Furthermore, Article 11 of the Constitution provides a guarantee that "No person shall be subjected to harassment or inhuman and cruel treatment."

At the same time, Sri Lanka has pledged to achieve the full realization of fundamental rights through Article 27 (2) (a) of the Directive Principle of State Policy. Moreover, Article 27 (2) (g) declares that the State is pledged to raise the moral and cultural standards of the people and ensuring the full development of human personality. It can be argued that Sri Lanka has an obligation to respect, protect and fulfill the Constitutional undertakings, which are enshrined in the supreme law of the country.

#### 4.2 DOMESTIC POLICY FRAMEWORK

The Women's Charter of Sri Lanka (1993)<sup>43</sup> is the basic policy document on women's rights. Section 16 of the Charter proclaims that, "the State shall take all measures to prevent the phenomenon of violence against women in the family, in particular, such manifestation of it as rape, sexual harassment and physical and mental abuse, torture and cruel, inhuman or degrading treatment."

Moreover, section 05 of the Charter states that "the State shall take all necessary measures to realize the constitutionally guaranteed fundamental rights of women, including the right to liberty and security of the person and to equal protection of the law."

#### 4.3 STATE OBLIGATION OF SRI LANKA, IN ADHERING TO THE INTERNATIONAL STANDARDS

Whatever the relationship between the perpetrator and the victim, there is no doubt that 'rape' is a brutal offence, which violates a number of human rights of the victim. The Vienna Declaration and Programme of Action (1993)<sup>44</sup> recognised that, "the human rights of women are an inalienable, integral and indivisible part of universal human rights." Article 113 (a) of the Beijing Declaration and Platform for Action (1995)<sup>45</sup> and Article 02 (a) of the Declaration on the Elimination of Violence against Women (1993)<sup>46</sup> have recognized that 'marital rape as a form of violence against women.'

As a State party to CEDAW, Sri Lanka has reflected its voluntary intention to abide by the Convention and, thus, ratification<sup>47</sup> can be interpreted as a pledge for fulfilling the State's commitments to take appropriate measures compatible with the treaty obligations.<sup>48</sup> In particular, CEDAW General Recommendation No: 19 (1992) has commented that, "family violence is one of the most insidious forms of violence against women and within family relationships, women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes."<sup>49</sup>

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<sup>42</sup> It can be argued that, Marital Status is incorporated in Article 12(2) of the Constitution of Sri Lanka (1978) under the phrase 'any one of such ground.'

<sup>43</sup> The Women's Charter of Sri Lanka was adopted on the 3rd of March 1993, Available at: <[http://eugc.ac.lk/ge\\_eq/wp-content/uploads/2016/04/Womens\\_Charter-1.pdf](http://eugc.ac.lk/ge_eq/wp-content/uploads/2016/04/Womens_Charter-1.pdf)> (Accessed on 12/07/2017)

<sup>44</sup> The Vienna Declaration and Programme of Action is Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, Para. 18

<sup>45</sup> Article 113 (a) of the Beijing Declaration and Platform for Action (1995) states that, "violence against women encompasses but is not limited to the following: Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation.

<sup>46</sup> Article 2 (a) of the DEVAW (1993): "Violence against women shall be understood to encompass, but not be limited to, the following: (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation; The UN General Assembly, 1993 [A/RES/48/104]

<sup>47</sup> Sri Lanka ratified CEDAW on 5<sup>th</sup> Oct. 1981 and the **Optional Protocol to CEDAW on 15<sup>th</sup> Oct. 2002**

<sup>48</sup> As an example, in Sri Lanka, Article 27 (15) of the Constitution of 1978 declares that, "The State shall promote international peace, security and co-operation and the establishment of a just and equitable international economic and social order and shall endeavour to foster respect for international law and treaty obligations in dealings among nations. Also see; *Weerawansa v. AG*, (2000) 1 Sri.L.R 387 Mark Fernando J. has interpreted the state obligation of ratifying a treaty under the article 27 (15) as; "that [Article 27 (15)] implies that the state must likewise respect international law and treaty obligations in its dealings with its own citizens." The State must afford to them the benefit of the safeguards which international law recognises." (Emphasis added]

<sup>49</sup> Section 23 of the CEDAW General Recommendation 19 – Violence against Women (1992) Available at; <<http://www.refworld.org/docid/52d920c54.html>> (Accessed on 10/05/2017)

Importantly, Article 16 of the CEDAW emphasizes that “States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular, shall ensure, on a basis of equality of men and women.” Article 02 of CEDAW refers to the ‘State obligation’ in taking appropriate means to ensure compliance with the requirements set out in the Convention.”<sup>50</sup> The obligations enshrined in Article 02 are inextricably linked with all other substantive provisions of the convention, as States parties have the obligations to ensure that all the rights enshrined in the convention are fully respected at the national level.<sup>51</sup> Not only that, the CEDAW Committee has also recognised the inadequate protection provided by the Sri Lankan law against marital rape. The CEDAW Concluding Observation on the combined fifth to seventh periodic reports of Sri Lanka (2011)<sup>52</sup> has recommended extending criminalization of marital rape, regardless of judicial acknowledgement of separation. Repeatedly, CEDAW has recommended in the concluding observations of 2017 to “criminalize marital rape in all circumstances, where the consent of a spouse is absent.”<sup>53</sup>

On the other hand, Article 27 (15) of the Constitution of Sri Lanka declares that “the State shall endeavour to foster respect for international law and treaty obligations in the dealings among nations.” Therefore, it is obvious that as a State party to the CEDAW, Sri Lanka should respect, protect and fulfil the State obligation to ensure the equality as to marriage and during the marriage.

## 05. CONCLUSION

### 5.1 RECOMMENDATIONS

At the conclusion, it is important to be tested the research problem of this study, and the findings of this research prove that the existing legal framework of Sri Lanka does not provide an adequate protection against marital rape in all circumstances, to ensure the full enjoyment of human rights and fundamental freedoms of married women.

The position of this paper is certain about the recommendation that marital rape must be criminalized in all circumstances by expanding its scope beyond the judicial separation and therefore, the section 363 (a) of the Penal Code of Sri Lanka and the Prevention of Domestic Violence Act must be amended accordingly. In addition, supplementary measures must be accompanied by this substantive legal reform to balance the interest of both parties, such as; the presumption of innocence must be valued, anonymity in legal proceedings must be maintained and prosecuting cases of rape and other forms of sexual offences can be heard in a special court.<sup>54</sup>

In addition to that, General Recommendation No. 25 of the CEDAW<sup>55</sup> advocates of temporary special measures, where women will be given an equal start and that they are empowered by an enabling environment to achieve equality in results. Hence, the proposed legal reform must be accompanied by other supportive and temporary special measures such as; public awareness programmes for eliminating marital rape myths in the society, providing gender-sensitive training for judges, lawmakers and law enforcement officers, empowering victims by providing legal aids, medical treatments, counselling services, accommodation facilities, and providing legal protection against re-victimization.

A successful step towards criminalizing marital rape has to be strengthened by providing solutions for the procedural matters, such as; protecting the anonymity of the victims in the litigation process and case reporting. Adopting ethical guidelines for cross-examination and the medical examination of the rape victims is also important. On the other hand, systematic data collection, handling by the authorized body on the incidents, investigation, prosecution, and sentencing of the cases is essential, and the data must be carefully analysed through standard methodologies.

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<sup>50</sup>Article 2(f) of the CEDAW, “States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”

<sup>51</sup>CEDAW General Recommendation: 28 on the Core Obligations of States Parties under Article 2 of the CEDAW (2010) at section 06

<sup>52</sup> The CEDAW Concluding Observation on the combined fifth to seventh periodic reports of Sri Lanka (2011), Forty-eighth session, CEDAW/C/LKA/CO/7, (2011).

<sup>53</sup> Concluding observations of the CEDAW, CEDAW/C/LKA/CO/8, 2017, Available at; <[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/LKA/CO/8%20&Lang=En](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/LKA/CO/8%20&Lang=En)> (Accessed on 19/07/2017)

<sup>54</sup> The Sunday Leader Newspaper Interview with the Minister of Women’s Affairs, Chandrani Bandara, *Special Courts to handle Rape Cases*, on 31<sup>st</sup> of December 2017. Available at; <<http://www.thesundayleader.lk/2015/05/31/special-courts-to-handle-rape-cases-chandrani-bandara/>> (Accessed on 31/12/2017)

<sup>55</sup> Section 08 of the General Recommendation No. 25 on article 4, paragraph 1, of the CEDAW on temporary special measures Available at; <[www.un.org/.../daw/cedaw/.../General%20recommendation%2025%20\(English\).pdf](http://www.un.org/.../daw/cedaw/.../General%20recommendation%2025%20(English).pdf)> (Accessed on 12/06/2017)



## 5.2 CONCLUDING REMARKS

In *People v. Liberta*, the Court<sup>56</sup> held that “rape is not merely a sexual offence against the unconsented, but rather a violent and degrading act, which violates the bodily integrity of the victim”. It was further held that “a married woman has the same right to have control over her body as does an unmarried woman” to do otherwise would be “irrational and absurd”.<sup>57</sup>

Therefore, the right to access to justice must be guaranteed for all rape victims, irrespective of their marital status or their relationship with the perpetrators. As recommended by the Verma Committee Report (2013), “a marital or other relationship between the perpetrator and victim is not a valid defence against the crimes of rape or sexual violation.” Hence, the marriage license should not be viewed as a license for a husband to forcibly rape his wife with impunity.<sup>58</sup>

Therefore, one of the most obvious facts that emerged from this study is, Sri Lanka, as a member of the international community, and as a signatory party to many of the international human rights instruments has an inviolable obligation to respect, protect and fulfil the commitments embodied in the international treaties. It must be also noted that the targets of the Goal 05 of the SDGs, is to achieve gender equality and empower all women and girls.<sup>59</sup> Therefore, providing an effective legal protection against all forms of sexual offences against women, irrespective of marital status is crucial to secure the full enjoyment of all other human rights and freedoms of women.

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<sup>56</sup> *People v. Liberta*, 64 N.Y.2d 152, The Court of Appeals of New York

<sup>57</sup> *Ibid.*

<sup>58</sup> Mosher, P.W., & Berman, J. (2015) *Confidentiality and its Discontents: Dilemmas of Privacy in Psychotherapy*, Fordham University Press, 2015 at 265

<sup>59</sup> In 2015, countries adopted a set of goals to end poverty, protect the planet, and ensure prosperity for all as part of a new sustainable development agenda. Each goal has specific targets to be achieved over the next 15 years.

<[www.un.org/sustainabledevelopment/sustainable-development-goals/](http://www.un.org/sustainabledevelopment/sustainable-development-goals/)>

(Accessed on 10/05/2017)

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