SEXUAL AUTONOMY OF A WIFE: THE INDIAN PERSPECTIVE

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I. INTRODUCTION

Marriage constitutes the foundation-stone of social organization in India. According to the 71st Report of The Law Commission of India,[1] the essence of marriage is the sharing of common life, a sharing of all the happiness that life has to offer and all the misery that has to be faced in life.

While Hindu, Christian and Parsee laws regard marriage as a sacrament, indissoluble and eternal, Muslim law and the Special Marriage Act regard marriage as a civil contract. It is however undisputed that in India marriage is the golden fabric that holds society together.

Irrespective of what view each religion takes of marriage, it confers a status of legitimacy on the parties and gives rise to certain spousal rights and obligations. The question of whether sexual intercourse between a married couple is regarded as one such spousal obligation is a contentious issue when the sexual privacy of a person is at stake.

The rape laws and provisions for restitution of conjugal rights have been studied to establish the rationale behind their existence and such laws have a tendency to unfairly place the wife on a weaker footing. The authors shall strive to showcase whether India recognizes a married woman's right to her own sexual inviolability.

The Constitutional mandate of our country guarantees certain

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[1]71st Law Commission Report, (Mar 8, 2010) (India), lawcommissionofindia.nic.in/51-100/Report98.pdf.

Fundamental Rights to all. Robbing a wife of her sexual autonomy is a sad testimony to the institution of marriage, since it amounts to a violation of this Constitutional mandate. This paper attempts to ascertain whether the laws of the land recognize this right of a wife to decide when and where her body is to be made a vehicle for sexual intercourse with her husband.

II. MARITAL RAPE: BREAKING THE SILENCE

Marital Rape means a wife being raped by her husband. Common law had exempted marital rape till the 19th century and the justification for the same was 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 up herself in this kind unto her husband, which she cannot retract*" stated by Justice Hales.[2]
In India it is still exempted by virtue of the Exception of Marital Rape from the offence of Rape as defined in S.375 of The Indian Penal Code, 1860. The rationale given for taking such a view may be that "*It is for the wife to love, honor, and obey; it is for the husband to love, cherish, and protect*."[3] Thus a husband cannot become guilty of rape by forcing his wife to his own embraces. Considering the fact that rape is considered as a taboo subject in India and victims of rape are stigmatized in Indian society, it is not surprising that there has never been any case dealing with marital rape in Indian jurisprudence. Hence the authors will be relying on the historical perspective and development of marriage and marital intercourse to ascertain the reasons for exempting marital rape and whether such reasons are justified in the present day scenario.

[2]State Of Rajasthan v. Narayan Kohli, A.I.R. 1992 SC 2003(India).
[3]Jill Elaine Hasday, *Contest And Consent: A Legal History Of Marital Rape,* 88 CAL. L. REV. 1373 (2000).

A. Historical treatment

a) Permanent consent rationale and marital unity

Various justifications state that the marriage contract implies permanent consent to sex, have been advanced in support of a spousal exemption in the law of rape. The rationale utilized is that when a woman marries, she gives up her rights to her body because she has formed a contract with her husband which cannot be retracted. [4] This doctrine made the rape of a woman by her husband a legal impossibility since a man could not rape his wife who had given permanently up the right to her body to her husband.[5]

Also, common law rationale for the marital rape exemption was that, upon marriage, the wife's identity merged into the existence of her husband. In 1765, Blackstone stated "*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*...."[6]

B. Modern justifications

a) Invasion into the sanctity of marriage

Defenders of the marital exemption who believe that it protects the sanctity of marriage argue that the criminalization of marital rape will destroy any chance of reconciliation and will violate marital privacy.[7] It is indeed likely that a rape prosecution by a wife against her husband would destroy the possibility of reconciliation. The debate over whether marital privacy overrides the individual privacy is to be considered. It has been held by the Delhi High Court that, "*inclusion*

[4]State v. Smith, 85 N.J. 193, 200, 426 A.2d 38, 41 (1981).
[5]Rene Augustine, *Marriage: The Safe Haven For Rapists,* 29 J. FAM. L. 559 (1991).
[6]Weishaupt v. Commonwealth, 315 S.E.2d 847, 850 (Va.1984).
[7]State v. Smith, 401 So.2d 1126, 1129 (Fla.Dist.Ct.App. 1981).

of Constitution in marital matters will not be desirable as it will be a ruthless destroyer of the marital institution and application of constitution will only weaken the bonds in a marriage."[8]

b) Spousal rape is not as serious as non-spousal rape

It has been contested quantitatively as well as qualitatively that marital rape does not happen as often as other forms of rape for the criminal and judicial system to be concerned.[9] It is considered that marital rape is less traumatic as compared to rape by a stranger and a bedroom squabble cannot be equated with a heinous crime like rape.[10] This conclusion was derived from the case of *R* v. *Hind* where the wife even after being raped by her husband used to go to meet him in the jail.[11]

c) Problem with evidence and proof

The argument offered in support of keeping the marital rape exemption is that it would be impossible to prove a marital rape case when the couple has had consensual sex, perhaps hundreds of times before.[12] Also, justification for spousal immunity is that the criminalization of marital rape will lead to women filing false rape charges in order to gain leverage in divorce and custody proceedings.[13]

[8]Harwinder Kaur v. Harmanadar Singh Choudhary, A.I.R 1984 Del 66(India).
[9]Schwartz, *The Spousal Exemption For Criminal Rape Prosecution,* 7 VT. L. REV. 33, 51 (1982).
[10]*Id.*
[11]R v. Hind, As Cited In Shroff, A. And Menezes, N., *Marital Rape As A Socio-Economic Offence: A Concept Or A Misnomer!.*
[12]Abigail Andrews Tierney*, Spousal Sexual Assault, Pennsylvania's Place On The Sliding Scale Of Protection From Marital Rape,* 90 DICK.L.REV. 777, 781 (1986).
[13]Anne L. Buckborough, *Family Law: Recent Developments In The Law Of Marital Rape,* ANN.SURV.AM.L. 343, 345 (1989). S F Waterman, *For Better Or Worse: Marital Rape,* 15 N.KY.L.REV. 611, 613-14 (1988).

d) Other remedies available

Last of all it has been argued that the wife has various other alternatives. She can carry out legal remedies under Section 351 of Indian Penal Code, 1908 or battery and most importantly under Domestic Violence Act, 2005. She can also file for divorce under her personal law. It has been claimed that since marital rape is not considered as grave as rape by a stranger, these remedies are sufficient.[14]

C. Critiquing the exemption

a) Permanent consent is no longer valid

The doctrine of permanent consent recently has been characterized as legal fiction, since it appears unrealistic to assume that modern women give unqualified consent to sexual relations with their husbands during marriage.[15] No one consents to violence when they marry. Though they may consent to sex in the marital relationship, women do not voluntarily consent to being raped by their husbands simply because they have entered into a contract for marriage. Also, earlier it could have been considered that marriage leads to unity but in today's date a woman has a different identity. For example, it is not just the house of the husband which is considered to be a marital home but her house can also be the marital house.[16] The personal laws also provide for separate living which proves that law considers wife to be a separate entity.

b) Qualitative and quantitative perspective

It is submitted that the argument of marital rape being lesser both quantitatively as well as quantitatively than other rape crimes reflects

[14]DAVID FINKELHOR & KERSTI YLLO, LICENSE TO RAPE SEXUAL ABUSE OF WIVES 1 (Henry Holt & Co 1st ed. 1985).
[15]M R Klatt, *Rape In Marriage: The Law In Texas And The Need For Reform,* 32 BAYLOR L. REV. 109, 114 (1980).
[16]Swaraj Garg V. K.M. Garg, A.I.R. 1978 Del 296(India).

on apathy towards the distress of a married woman. Dealing with the quantitative argument first, it is unreasonable to believe that rape does not occur in marriage. Existing data suggests that 14% of married women have been raped by their husbands at least once.[17] Any lack of quantitative information may be due to the fact that marital rape in most states is not a crime for the fear that reporting the crime will be useless, and that the investigative process and accompanying backlash from the guilty spouse may be worse than the crime itself and it may lead to the destruction of the marriage and family. This is the case especially in countries like India where marital rape is not exempted. Also, the quantitative figure does not determine the criminality of an act. A wife who is raped by her husband will be more traumatised because of a sense of betrayal, disillusionment, the upset of the whole marriage, and the fact that rape may be repeated for several years.[18] She will also have to face her rapist every day and be reminded of the violation by her husband.

c) <u>Heinousness of rape in any form</u>

"*The fact that rape statutes exist ... is a recognition that the harm caused by a forcible rape is different, and more severe, than the harm caused by an ordinary assault*." It affects the sexual integrity of a woman and cannot be equated with assault and battery. Also, an important argument is that marital rape may not lead to assault or battery and even in a situation where the husband has assaulted his wife he may go the extent of raping his wife in order to come under the protection. Even the punishment under the Domestic Violence Act, 2005 does not inflict a punishment as much as provided under

[17]Pamela L. Wood, *The Victim,* 11 AM.CRIM.L.REV. 335, 347-48 (1973).
[18]Diana E.H. Russell, *Rape In Marriage* 375-82 (1990) Of The Women Raped By Their Husband, 52% Reported That The Long Term Effects Were Severe, As Opposed To 39% Of Women Who Were Raped By Strangers.

Indian Penal Code, 1860 and hence may not deter the men adequately.[19]

d) Burden of proof

It is stated that it will be very difficult to prove marital rape. But this is no argument as, "*The difficulty of proof has never been a proper criterion for deciding what behaviour should be officially censured by society*."[20] If this is so then cases of battery or incest should also not be a crime. Stating that it will lead to false evidence would be predicated on the assumption that women are vindictive liars, is unconvincing for several reasons. Indeed, "*our jurisprudence is designed to test the very truth or falsity of accusations in all criminal proceedings*."[21]

e) Privacy of a wife

There is an increasing recognition of a wife's own volition and right to her own privacy and space even within the boundaries of marriage. That being the case, she has a right over her own body and a right to decide when and where her body is to be used for sexual gratification. Countering the argument of how criminalizing marital rape would disrupt the reconciliation process, it is hard to imagine how charging a husband with the violent crime of rape can be more disruptive of a marriage than the violent act itself. Moreover, if the marriage has already deteriorated to the point where intercourse must be commanded at the price of violence we doubt that there is anything left to reconcile.[22] Our society should not attempt to protect a

[19]Section 375 Of Indian Penal Code, 1860 provides For At Least 7 Years of Rigorous Imprisonment.
[20]Maria Pracher, *The Marital Rape Exemption: A Violation Of A Woman's Right Of Privacy,* 11 Golden Gate U.L.REV. 717, 730 (1981).
[21]*Supra* note 4.
[22]Weishaupt v. Commonwealth, 315 S.E.2d 847 (1984).

decaying and violent marriage by suggesting reconciliation at the expense of a woman's continuing abuse.[23]

Supporters of this modern justification also suggest that the marital exemption avoids interference with marital privacy. Although our legal system prefers to avoid interfering with problems between spouses, the state has a valid interest in preventing violent sexual assaults. The highest court in the State of New York held that "*just as a husband cannot invoke a right of marital privacy to escape liability for beating his wife, he cannot justifiably rape his wife under the guise of a right to privacy*."[24] Because the state intervenes in other areas of domestic violence, such as wife beating, there is no valid reason to exclude marital rape as an area unworthy of state protection. Also, it is preposterous to argue that the Constitution cannot interfere. An act within the personal law cannot be allowed to infringe the Constitution itself and sexual expression is so integral to one's personality that it is impossible to conceive of sexuality other that consensual intercourse. It offends human dignity. Any form of sexual intercourse with a girl below 16 is considered to be rape but marital rape of a 15-year-old girl by her husband is not considered to be rape!

In spite of marital rape being recognized as a crime in various countries[25] Indian legislature still advocates the historical view of marital unity and marriage being a permanent consent. While Section 376(A) of The Indian Penal Code views sexual intercourse with a wife without her consent by a judicially separated husband as an offence of rape, the offence still does not include similar sexual intercourse when it occurs within the precincts of marriage.

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[23]Geannie A. Morris, Note, *The Marital Rape Exemption,* 27 LOY.L.REV. 597, 598 (1981).

[24]People v. Liberta, 64 N.Y.2d 152. 474 N.E.2d 567, 574 (N.Y.1984) (Holding That the Supreme Court Of New York Recognized That The Court In Griswold v. Connecticut, 381 U.S. 469 (1965), Only Extended The Right Of Marital Privacy To Include Consensual Acts).

[25]Dhruv Desai, *Sexual Harrassment and Rape Laws in India*, (Mar. 6, 2010) http://www.legalserviceindia.com/articles/rape_laws.htm.

III. AN ANALOGOUS STUDY: RESTITUTION

The conspicuous absence of any case laws regarding marital rape in India may lead to an inference that forceful sexual intercourse in a marriage has not been addressed by the Indian judiciary as such. However, this issue of personal autonomy and sexual independence within a marital relationship has tangentially arisen in a few judgments pertaining to restitution of conjugal rights.

A decree of restitution effectively results in an unwilling party, who has left the company of the other spouse or withdrawn from his or her society, being forced to cohabit with such spouse for a period of one year. Hence an analysis of the provisions of restitution and the jurisprudence surrounding it will assist in understanding how the legal position regarding the sexual integrity of a married woman has been shaped in our country.

A. The concept of restitution

Of the various remedies available in marital discord, one is that of 'Restitution of Conjugal Rights'.[26] The remedy of restitution of conjugal rights is a positive remedy that requires both parties to the marriage to live together and cohabit.

Restitution of Conjugal Rights is a relatively new notion in Indian matrimonial jurisprudence that finds its origin in the Jewish laws. The remedy was unknown to Hindu law till the British introduced it in the name of social reforms. In fact it is the only matrimonial remedy

[26]S.9, Hindu Marriage Act, 1955; S.22, Special Marriage Act, 1954. The provision is different worded 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 and the Special Marriage Act, 1954. However, the provision is different under the S.32, Indian Divorce Act, 1869 but efforts are being made to give it such an interpretation so as to bring it in consonance with the other laws. The provision under Muslim law is almost the same as under the modern Hindu law, though under Muslim law and under the Parsi Marriage and Divorce Act, 1936 a suit in a civil court has to be filed and not a petition as under other laws.

which was made available under the British rule to all communities in India under the general law.[27]

The remedy dates back to feudal England, where marriage was considered a property deal, and wife was part of man's possession. India, being a British Colony, inherited this law along with the several other laws as well.[28]

There is a very popular proverb that one can take the horse to a pond, but cannot force him to drink water. The provision of Restitution of Conjugal Rights is along similar lines. After the solemnisation of marriage, if either the husband or the wife, without reasonable cause or excuse, withdraws from the society of the other, the aggrieved party may approach the Court for restitution of conjugal rights to ensure cohabitation and resumption of marital 'consortium.'[29]

B. Consortium

Where either the husband or the wife has withdrawn from the society of the other party without just cause, the court orders the withdrawing party to return to the conjugal fold, so that the consortium is not broken.[30] Consortium in the context of marriage has been defined as "*companionship, love, affection, comfort, mutual services, sexual intercourse*."[31]

The cohabitation of two people as husband and wife means that they must live together not merely as two people living in one house, but as husband and wife.[32] This implies that cohabitation as a result of restitution has to involve all aspects of marital consortium, which *inter alia* include sexual intercourse.

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[27]Paras Diwan, *Law of Marriage And Divorce* (4th ed., Universal Law Publishing House).

[28]Hazel D. Lord, *Husband and Wife: English Marriage Law From 1750,* S. CAL. REV. L. & WOMEN'S STUD. (2001).

[29]Harwinder Kaur v. Harmanadar Singh Choudhary, A.I.R. 1984 Del 66(India).

[30]*Id.*

[31]Crabtree v. Crabtree, (No. 2) (1964) Australian Law Reports 820 (10), Per Selby, J., At 821.

[32]Wheatley v. Wheatley, (1950) I K.B. 39 (9) Per Lord Goddar CJ. At 43.

C. Sexual Intercourse in Restitution

The Delhi High Court has held that the remedy of restitution aims at cohabitation and consortium, not merely at sexual intercourse.[33] This line of argument that sexual relation constitutes an important part of marriage but is not the *summum bunum* of a matrimonial consortium has been reaffirmed by the Supreme Court as well.[34]

In this regard it is pertinent to note that in 1983 the Andhra Pradesh High Court had held S.9 of The Hindu Marriage Act, 1955 (restitution of conjugal rights) to be unconstitutional in *T. Sareetha* v. *T. Venkata Subbaiah.*[35] Choudhary, J., had argued in this case that a decree for restitution against a wife who had left her husband may be misused by a husband for enforcing coerced sexual intercourse upon her. While stating that the right to privacy and sexual autonomy was retained by a wife even after marital association, it was held by the Court that the provisions for restitution were violative of Art.19 and Art.21 of the Constitution. The Court further went on to declare that since a decree for restitution and subsequent cohabitation (and *inter alia*, sexual intercourse) would irretrievably alter the life-pattern of a wife if she conceived from her husband during the restitution period, it would cripple her future plans in life if she were to seek for divorce later. In this manner the Court established that the remedy of restitution would in reality become one-sided and available only to the husband, thus violating the pledge of equal protection of laws as envisioned in Art.14.

However this decision in *T. Sareetha* was rejected by the Delhi High Court in 1984 in *Harwinder Kaur* v. *Harmanadar Singh Choudhary*[36] where it was held that the objective behind restitution was not to enforce sexual intercourse but rather to act as a cooling-off period for reconciliation between a couple so as to avoid a sudden breakdown of

[33] *Supra* note 29.
[34] Saroj Rani v. Sudarshan Kumar Chadha, A.I.R. 1984 SC 1562(India).
[35] A.I.R. 1983 AP 356(India).
[36] A.I.R. 1984 Del 66(India).

marriage. T.Sareetha was scathingly criticised by Rohatgi, J., who opined that Justice Choudhary's observations in that judgment were the result of a misconceived view of marriage being nothing more than a legalised means of sexual self-satisfaction. The Supreme Court over-ruled *T. Sareetha* in *Saroj Rani v. Sudarshan Kumar Chadha*[37] by declaring that the institution of marriage stood for much more than mere sexual congress and holding that S.9 of The Hindu Marriage Act, 1955 was not unconstitutional when viewed from the proper perspective of ensuring matrimonial reconciliation.

IV. THE INTERFACE OF MARITAL RAPE WITH RESTITUTION: PLAYING THE DEVIL'S ADVOCATE

It is humbly submitted that the above discourse on restitution reveals that while sexual intercourse is recognised as one of the elements of marital consortium, it is not the *summum bunum* in a decree for restitution. It has further been established that the Court's rationale behind a decree for restitution is not to enforce sexual intercourse but to provide the married couple with an opportunity to reconciliate and sort out their differences.

However, it is contended that while there may be an ennobling objective behind restitution, it does not negate the fact that there is scope for abuse of such a provision as was envisioned in *T. Sareetha*.

Marital rape has been carved out as an Exception to S.375 of The Indian Penal Code. As has been discussed above, the traditional view of a wife's identity merging into the existence of her husband is still prevalent in India with regard to the offence of rape. It is submitted that in such a scenario, when the Supreme Court itself has recognised sexual intercourse as one of the elements of matrimonial cohabitation, it is reasonable to assume that a situation may arise where during a period of restitution a husband chooses to have forced sexual

[37]A.I.R. 1984 SC 1562(India).

intercourse with such wife who was unwilling to live with him in the first place.

While it can be argued that forced sexual intercourse with a wife may be considered as "*reasonable cause*" for such wife leaving her husband in the first place and a Court would not be expected to grant a decree for restitution in favour of the husband in such circumstances, it still leaves the wife without a criminal recourse when such intercourse is forced upon her subsequent to the decree for restitution.

The authors contend that marital rape is not recognised as an offence in India in the first place, and a decree of restitution in favour of a husband acts as a tacit, albeit minute, recognition of marital rape as a conjugal right. The authors submit to the Supreme Court's observation in *Saroj Rani* that sexual intercourse cannot be enforced through a decree for restitution. However, the authors further extend this argument to propound that while a decree for restitution does not enforce sexual intercourse *per se*, such a decree amounts to a facilitation of such an act.

T. Sareetha had been criticised and over-ruled by the apex court on the ground that it had oversimplified the concept of restitution to imply only sexual intercourse. The erstwhile Attorney General of India had dismissed the observations in *T. Sareetha* by stating "*that a few freak instances of hardship may arise on either side cannot be a ground to invalidate a piece of legislation*."[38] The authors contend that the arguments put forth by Choudhary, J., in T. Sareetha for invalidating S.9 of The Hindu Marriage Act, 1955 are based on recognised principles of Indian constitutional jurisprudence, and the situations and circumstances referred to in the case are practical examples which can plausibly exist anywhere in the country.

The authors contend that the Delhi High Court and the Supreme Court mainly took objection to the fact that Choudhary, J., had equated restitution solely with sexual intercourse. It is further submitted that

[38] *Supra* note 26.

the rationale behind the judgment in *T. Sareetha* was the upholding of the Fundamental Rights of a married woman.

It is submitted that these same arguments of *T. Sareetha* would pose a serious threat to the Constitutional validity of the Exception to Rape if such a case were to be brought before the judiciary.

V. CONSTITUTION VIS-A-VIS PERSONAL LAWS

The judiciary has for some reason been reluctant in applying the constitutional mandate to personal laws. Rohatgi, J., had opined in *Harvinder Kaur*, that 'Introduction of constitutional law in the home is most inappropriate. It is like introducing a bull in a china shop.'

In this regard it would be useful to understand the concept of the Constitution, and the rationale (if any) behind excluding the constitutional mandate when dealing with personal laws.

A. Constitution suprema lex

Supremacy of the Constitution is a concept well established as a vital part of the basic structure of the Constitution.[39] It may be compared to Kelsan's Concept of Grundnorm[40] or basic law that remains constant and same.

'Supremacy of the Constitution' which has been accepted by the Apex Courts in numerous cases, originated from H.L.A. Hart's Ultimate Rule of Recognition. As per H.L.A. Hart, legal system is a combination of Primary and Secondary rules. Primary rules are rules of obligation while secondary rules are parasitic upon primary rules and are rules about primary rules. While primary rules impose duties, secondary rules confer power, public or private.[41]

Besides these two types of rules, Hart identifies an 'ultimate rule of recognition'. If a primary or secondary rule satisfies the criteria which

[39]Keshavananda Bharti v. State of Kerala, A.I.R. 1973 SC 1463(India).
[40]Sheela Rai, *Hart's Concept of Law and The Indian Constitution*, (2002) 2 S.C.C. 1(India).
[41]H.L.A. HART, THE CONCEPT OF LAW 94 (2d ed. Clarendon Press, Oxford.)

are provided by the ultimate rule of recognition, then that rule is legally valid.[42] The Constitution of India is the ultimate rule of recognition[43] and all laws derive their validity from this ultimate rule of recognition, i.e. the Constitution.

It essentially propounds that the Constitution is the Supreme Law of the Land and all other laws are to be read and enforced in light and within the limitations of the constitution including all personal laws.

B. Constitutional mandate in personal laws

It is submitted that one of the reasons for negating the supremacy of the Constitution when personal laws are in question may be that if the constitutional mandate was applied to personal laws, quite a few of the personal laws would become void. However, the authors contend that it is not up to the discretion of judges as to whether to apply the constitutional mandate to a particular set of laws or not. Principles of our Constitution must govern all laws that are in force in the country.

Every law, being enforced within the territory of India, must under all circumstances be recognized by the *ultimate rule of recognition* or the Constitution It is not the discretion of judges to selectively apply the constitutional mandate. This point of view has been affirmed by the Bombay High Court in *In Re Amina.*[44] Dhanuka, J., while delivering the judgment, took a bold step and for the first time declared that all personal laws are subject to the constitution. Even customs and usages having the force of law are void if found inconsistent with any of the fundamental rights guaranteed by the Constitution. He held that, "*It could not be the intention of the founding fathers of our Constitution to create any immunity in favour of personal laws."*[45]

Such an interpretation has been resorted to by the Supreme Court itself in a number of cases. The apex court has on certain occasions tested personal laws on the touchstone of fundamental rights and read

[42] *Id.* at 110.
[43] *Id.*
[44] A.I.R. 1992 Bom 214(India).
[45] *Id.*

down these laws or interpreted them so as to make them consistent with fundamental rights.

In *Githa Hariharan* v. *Reserve Bank of India*[46] a three judge Bench of the Supreme Court was considering the Constitutional validity of S.6 of the Hindu Minority and Guardianship Act. The challenge was on the basis that the section discriminates against women, as the father is the natural guardian of a minor and not the mother. The Court did not reject the Petition on the ground that it could not go into Constitutional validity of personal law. Instead it read down S.6 so as to bring it in consonance with Articles 14 and 15.

In *John Vallamattom* v. *Union of India*[47] a three Judge Bench of the Supreme Court had considering the Constitutional validity of S. 118 of the Indian Succession Act, 1925, a pre-Constitutional personal law applicable essentially to Christians and Parsis and struck it down as being violative of Article 14 of the Constitution.

Commenting on this aspect of whether personal laws are subject to the provisions of Part III of the Constitution and hence governed by the principles of Art.13, eminent Constitutional expert H.M. Seervai has opined, "*We have seen that there is no difference between the expression 'existing law' and 'law in force' and consequently. Personal law would be 'existing law' and 'law in force'. This conclusion is strengthened by the consideration that custom, usage and statutory law are so inextricably mixed up in personal law that it would be difficult to ascertain the residue of personal law outside them."*[48]

The authors contend that the above position of including personal laws within the ambit of 'laws in force' as stated in Art. 13 of the Constitution of India and therefore making them subject to all constitutional tests is the correct position of law. All laws in the

[46](1999) 2 S.C.C. 228(India).
[47](2003) 6 S.C.C 611(India).
[48]H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 491 (Universal Book Traders 2002).

country must be recognized by this *ultimate rule of recognition,* failing which, they must be declared void. A law which is violative and contrary to the provisions and norms of the Constitution or *the ultimate rule of recognition* has to be struck down as unconstitutional. When viewed in this light, a fresh look has to be taken of *T. Sareetha* on merits and all conventional Constitutional tests have to be made applicable to Marital Rape and the Restitution of conjugal rights to ascertain whether they amount to an obliteration of the right to sexual autonomy of a wife in India.

VI. CONCLUSION: ROADMAP FOR THE FUTURE

The authors contend that if the constitutional mandate were to be made applicable to the institution of marriage the exclusion of marital rape from the definition S.375 of The Indian Penal Code would in all probability be held as unconstitutional.

The authors have tried to establish how in the absence of marital rape being viewed as an offence a decree of restitution would facilitate such forceful sexual intercourse with an unwilling wife. Although the objective behind restitution is not to give an unbridled license to the husband to commit rape, the practical outcome of such a decree results in a tacit recognition of coerced sexual intercourse as a part of restitution. While it is conceded that a sexually harassed wife has recourse to various remedies, she will still not be able to claim that she has been raped. Hence the introduction of Constitutional tests in personal law is imperative to give utmost importance to the sexual inviolability of a wife.

The most serious problem in recognizing sexual abuse within the institution of marriage is that it presupposes that the family structure is disturbed. Even though marital rape has become a crime in majority of countries it has to be dealt with differently in our country. Keeping in mind the actual motive behind a relief for restitution, which is to give a married couple time to reconciliate and sort out their

differences, the authors propose the following suggestions to be kept in mind if and when the Legislature decides to address this issue:

1. India is said to have a social order characterized by a strong family ties and a low divorce rate. Hence, a blanket criminalization of family problems would only result in the complete breakdown of a home.
2. Indian culture is vastly different from western society where marriage is a contractual and temporary phenomenon. Considering the sensitivity of this problem it is best advised that such matters should be dealt with by the family court only and not a criminal court.
3. While conceding that marital rape is difficult to prove especially when both partners are known to have voluntarily engaged in sexual activity in the past and the issue of consent arises at a later point when there is non-consensual sex, it is equally true that no such heinous act should go unpunished.
4. Marital rape should not be denigrated as a lesser offense merely because it occurs within the precincts of a marital relationship.
5. The present need is for the legislature and the judiciary to actively intervene in this area, by following the recommendations of the National Commission for the Women, India[49] and the draft bill suggested by them, which should be implemented along the lines of the Canadian Model that combine marital rape with the offense of assault.
6. Such steps will fill in the lacunae present in the existing legislations, which discourage women from reporting crimes of sexual assault against their husbands, and otherwise curtail any effective exercise of right to judicial redress.

[49](Mar 11, 2010), ncw.nic.in/.../Recommendations_on_amendments_to_the_laws_relating_to_rape_and_related_ %20provsions.pdf.

7. Hence the urgent need to amend the existing provisions of the law with regard to procedure evidence, punishment and conviction in order to ensure that sexual assault is perceived and treated as a social evil, without tampering with the laws of restitution and matrimonial reconciliation.

In conclusion marital rape should be included within the definition of sexual assault, in order to ensure that Indian society does not continue to tread on rights of women in the guise of promoting social cohesion and protecting the sanctity of marriage. The makers of the Constitution always fostered relations out of the free volition of the parties and that is how it should be.