Behind Closed Doors: Is the 'Personal' Political?

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Abstract

From time immemorial, Indian society is patriarchal. Women have found it impossible to go beyond the field of patriarchal power. But, since Indian independence, efforts were made to make our society more egalitarian vis-a-vis women. In this paper, we identify two areas where the Indian State has dismally failed to protect women - female foeticide and marital rape. They constitute two of the most intimate concerns of a married woman's life, through which a husband assumes power over the most private part of her life – her body and it becomes a site of violence. This paper concludes by arguing that laws in themselves are not enough. It is time that we women fought our battles ourselves.

Key Words: Patriarchy, Domestic Violence, Female Foeticide, Marital Rape

1. Introduction

From time immemorial, Indian society is patriarchal. All societal norms and laws are dictated by what males in the community hold to be just and right. Women have found it impossible to go beyond the clutch of patriarchal power, so ensnared they have been in its folds. This patriarchal power has in its turn, 'sought the consent of women, beguiled them with its social and cultural myths and rituals and implicated them in its workings' (Geetha, Theorizing Feminism - Patriarchy, 2007).[1]

In the post-independence period, efforts were made by the Constitution makers to make our society more egalitarian vis-a-vis women. The Indian State was viewed as a guarantor of the constitutional rights of women, including the right to equality and justice. The State was regarded as the only agent with its power and legitimacy to bring about egalitarian social transformation and empower women.

Under pressure from women's movements, the state formulated laws and policies specific to women and brought about changes in existing laws. In disregard to the constitutional provision for equality and equal treatment for all, the Indian state also positively discriminated by reserving 33% quotas for women in panchayats (local elected village councils). In spite of its attempts to ameliorate the conditions of women, reports of the Committee on the Status of Women in India (CSWI) showed that the Indian State had a dismal record when it came to improving women's status. The declining sex ratios, the low literacy rates, high levels of maternal mortality and infant mortality, widespread violence against women, discriminatory employment and wage rules indicated that the

status of women in India had systematically worsened over the years since independence.

In this paper, we identify two areas where the Indian State has dismally failed to protect women. These areas constitute most intimate concerns of a married woman's life, and readily becomes a site of violence. Through the acts of female foeticide and marital rape, the physical and mental wellbeing of a wife, her notions of selfhood, sovereignty and bodily integrity are destroyed without repair.

In India both, in cases of both abortion of female foetuses and sexual violence at home it is found that the law has a limited capacity to pursue justice.

This paper has three sections. In Section I, we look at the dichotomy between the public and private spheres and question the 'right to privacy' as guaranteed by courts of law. In this context, we also throw some light on the problems associated with implementing laws by focusing on the legal system in general and the judiciary of our country in particular. Against this backdrop, in Sections II and III, we examine the two cases of female feticide and marital rape to show the failure of the Indian state reflected through the incapacity of its laws to protect women.

2. The Right to Privacy

"The right to privacy is a right of men 'to be let alone' to oppress women one at a time...It keeps some men out of the bedrooms of other men" (Mackinnon, 1987).*Catharine MacKinnon in Feminism Unmodified.*

Laws emerged as a tool of the bourgeois democratic revolutions in Europe. Law was the tool which fought the unequal treatment of individuals, henceforth assumed to be equal. The history of political thought in Europe since the 17th century shows that laws have centred on *the distinction between the private and the public* that relegated women in particular to an inferior position in society and hence, out of their purview.

In ancient Greece, there was a sharp distinction between the domestic household and the public realm which condemned women to public invisibility (Elshtain, 1981).[2] Rome was the first western society to develop the concept of the private realm and insist on its relative inviolability in relation to the public realm.

In classical liberalism also, justice referred to the 'public' realm, where adult men dealt with each other according to mutually agreed upon conventions. On the other hand, family relationships were 'private', governed by natural instinct or sympathy. Liberals regarded the family as the centre of the private sphere

'encompassing and protecting the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing' (Jaggar, 1983).[3] The adult male head of the household had the right to be free from interference by the State or Church and complete rights over people under his control in the private realm, mainly his women, servants and children. Men, as a result, started having unequal power in most marriages, power which was exercised in decisions concerning work, leisure, sex, consumption etc and which was also exercised in marriage, in acts or threats of domestic violence.

Differences between the 'public' or non-domestic and the 'private' or domestic spheres excluded the family from the values of 'justice' and 'equality'. The family came to be at the centre of the cultural devaluation and economic dependence attached to women's traditional roles. While the public arena was generally understood to be open to regulation by the government, the private realm was supposed to be protected from such regulation. The family and sexuality were considered private matters. Issues like protection of women from forms of domestic violence or reproductive rights, being private matters, remained excluded from the purview of the state. The 'private' sphere thus became the arena of oppression.

There were in fact two different conceptions of the public-private distinction in liberalism.

a) The first distinction originated in John Locke. It spoke about the distinction between the political and the social, between the state and civil society which excluded the family from either of the two. Liberals who were concerned with protecting men's ability to participate freely in social life were not concerned with ensuring that domestic life was organized along principles of equality and consent (Kymlicka, 2002).[4] The 'state-society' distinction was a distinction 'within the world of men', with women assumed to be at home in the domestic sphere, where they 'naturally' belonged.
b) The second distinction originating with Romantically-inspired liberals separated the personal or the intimate from the public, where the 'public' included both state and civil society. For the Romantics, private meant 'detachment from mundane existence, and was associated with self-development, self-expression and artistic creation' (Kymlicka, 2002).[5] The Romantics included social life in the public realm because they felt that the bonds of civil society subjected individuals to the judgement and possible censure of others. A realm would have to be created where individuals could have privacy. Women and the family were located in this private realm. Intervening in a man's private or family affairs would be an invasion of his personal private sphere. The idea of this right to privacy meant that any outside interference in the family was a violation of privacy.

The basic structure of the traditional family thus remained immune to judicial reform because it was seen as a bastion of civilization, and a precondition for social stability (Kymlicka, 2002).[6] It immunized the family from reforms designed to protect the interests of women - for example, state intervention which would protect women against domestic violence and marital rape, or empower women to sue their husbands. This right to privacy, as Mackinnon says, "reinforced the division between public and private that...kept the private beyond public redress and depoliticized women's subjection within it (Mackinnon, 1987)."[7]

The legal notion of privacy also actually exacerbated sexual oppression because it protected domestic and marital relations from scrutiny and from intervention by government and social agencies. When it came to dealing with abuse in the 'private' sphere, the state refused to intervene. Protecting the private sphere or the family from state intervention did not guarantee women a sphere for personal retreat from the presence of others, or from the pressure to conform to the expectations of others. For many women, the family itself seemed an institution from which they desired privacy, and state action was urgently needed by them to protect their privacy within the domestic sphere and prevent abuse.

If we look at the USA, we find that the U.S Supreme Court also interpreted the right to privacy on similar terms. It withdrew from interfering in the familial life of people on the grounds of the right to privacy. It justified its emphasis on marital privacy by stressing the ancient and sacred character of marriage as the basis of its decisions (Kymlicka, 2002).[8] It upheld that if two people entered a marriage, the right to privacy guaranteed that the state would not interfere with the domestic decisions of the couple. This family-based conception of privacy failed to protect women's desire for privacy when they were threatened by abusive husbands or fathers. Landmark judgements in the USA on abortion also upheld the individual's right to privacy (For example – Roe vs Wade 1972). However, by sanctioning abortion as a right of privacy, the state also ensured that the control women won out of this law went to men. When women in the USA got abortion as a 'private privilege', not a 'public right', in effect it was men – their husbands or fathers – who ended up controlling their decisions to abort. Moreover, when abortion was framed as a right of privacy, the state did not have the need to provide public funding for it (Mackinnon, 1987).[9]

For feminism, the family became an important locus of the struggle for sexual equality. As Anita Allen referred to it, "women's privacy problem is both the 'problem of getting rid of unwanted forms of privacy and acquiring the privacy they do not have' (Allen, 1988).[10] Feminists argued that the fight for sexual equality must go right up to the devaluation of women in the private sphere. Catharine Mackinnon wrote, "...the very things feminism regards as central to

the subjection of women – the very place, the body; the very relations, heterosexual; the very activities, intercourse and reproduction; and the very feelings, intimate – form the core of what is covered by privacy doctrine. From this perspective, the legal concept of privacy can and has shielded the place of battery, marital rape, and women's exploited labour; has preserved the central institutions whereby women are deprived of identity, autonomy, control and self-definition..." (Mackinnon, 1987).[11] Carole Pateman sums up the issue "the dichotomy between the public and the private...is, ultimately, what feminism was all about" (Pateman, 1987).[12]

In India too, the Supreme Court did uphold the judgement of the Delhi High Court that the introduction of constitutional law into the ordinary domestic relationship of husband and wife would strike at the root of the relationship, and that in the privacy of the home and married life, neither Article 21 (Right to Life) nor Article 14 (Right to Equality) had any place. As documentation of domestic violence reveals, the arms of the state like the police also dismissed the abuse of women by husbands and other family members as the private concern of families (Krishnaraj M. , 2009).[13]

However, Indian feminists across the political spectrum were unanimous in their realisation that the distinction between the 'public' and the 'private' spheres and the withdrawal of courts from the private lives of individuals were reinforcing and protecting the existing structures of male domination and power in the family. They insisted that 'gendering of citizenship lay in the creation of public-private divide, wherein male domination and female subordination were being structured by the strict separation of hierarchical spheres with male belonging to the public and female to the private' (Chari, 2009).[14] As 'private' and 'public' were governed by patriarchal principles, demystifying and challenging the distinction between the two was necessary for the liberation of women. They used slogans like 'the personal is political' to bring issues like reproductive rights, domestic violence against women, marital rape etc into the public arena. The belief was rampant that the law should intervene in the recesses of the 'private' to ensure gender justice. If laws were framed from the point of view of women, they could be of use to women. Even if law was as enmeshed in the power structures of society as 'the community' is, it could be forced into the service of progress and change by the pressure of democratic movements. As Nivedita Menon argued, "Law is seen as the primary legitimating discourse and it is believed that legal criminalisation would socially delegitimize a practice" (Menon, 2004).[15] Feminist politics attempted to use the law to liberate 'women's bodies' from the oppression of patriarchal structures.

The late 1960's and early 1970's witnessed attempts by women to articulate gender concerns and raise issues like violence against women, sexual division of

labour etc. Women pressed for control to define the issues concerning their personal lives. In Maharashtra, for example, the women activists of the organisation 'Shramik Sanghatana' started discussing issues relating to domestic violence. They protested against issues like alcoholism and wife-beating, thus questioning violence in the 'private sphere' (Chari, 2009).[16] In the course of struggles like these, new demands were put forth for the prevention of sexual exploitation. The 1970's also witnessed the formation of the trade union SEWA (Self Employed Women's Association) in Gujarat. In the late 1970's and 1980's, the women's movement picked up the theme of violence against women, focusing on issues like wife battering, marital rape and reproductive health issues like sex-selective foeticide, invasive technologies, harmful contraceptives etc. Through campaigning on these issues, the women's movement exposed patriarchal values that legitimised chastity and sexual 'purity', which related women's honour and body to social identity and 'stigma' of being dishonoured as a woman (Chari, 2009).[17] The household was opened up to show it as a unit of exploitation and control of women's freedom and choice. These movements attempted to challenge and break the binaries of public-private.

Under pressure from feminists, the state started intervening in the 'private' realm. Over the decades, the state has brought about changes in existing laws protecting women against violence of all sorts and implemented new ones. But, things did not become smooth for women. Rather, it was the beginning of a long, tenuous and thorny path to justice. This is because laws created more problems rather than solving existing ones. First, laws have had to operate within prevailing social structures and ideologies. Therefore, discrimination against women is present in our legal system. Secondly, Judges and legal agents have also interpreted laws in patriarchal ways. Decisions have been taken by individual judges on the basis of their own interpretations. These interpretations have reflected social and individual male biases and practices. Thirdly, in India, men and women are located in society which is unequal and gender blind. Therefore, even when law treats men and women equally, it is basically discriminatory to women. Fourthly, even when women know their rights are being violated, family honour prevents them from taking recourse to court of law. Fifthly, women who question injustice within the family and in the court of law find themselves isolated and all alone, fighting lonely battles. Finally, as objectivity is regarded as the norm, the law and the state render helplessness towards invisible women's subjective experience of oppression (Menon, 2004).[18] Although laws were regarded as the sources of equal rights, the agents with the power and legitimacy to bring about women's emancipation, especially since the late 1970's, feminists have started raising questions about the capacity of law to act as a transformative instrument. Although the women's movement had reacted to almost every case of violence against women since the 1990's by demanding legal action, lately, it has argued that functioning in a manner compatible with

legal discourse can radically refract the ethical and emancipatory impulse of feminism. Creation of new laws has also meant an increase in the control of the state. Proper implementation of laws has remained unsatisfactory and convictions have been few and far between. Laws have also failed to offer any challenge to the social base responsible for the oppression of women. Therefore, laws have been utterly ineffective in bringing to women what they need.

3. Female Foeticide

Prabhuji main tori binti karoon
Paiya paroon baar baar
Agley janam mohey bitiya na dije
Narak dije chahe dwar
-old folk song from Uttar Pradesh

Through a discussion of the issue of female foeticide, we will try to examine the loopholes in existing laws and the utter failure of the Indian State to protect and empower women.

In the West, due to intervention of feminists, the right to abortion came to be regarded as a fundamental and non-negotiable right, a right to self-determination to which all women are entitled. The feminist movement generally focused on legal barriers to the realisation of individual liberty and denied the validity of any social regulation of reproduction. Feminists primarily tried to conceptualise abortion in moral terms, which would be compatible with both generally held notions of the value of life as well as with feminist visions of sexual and reproductive autonomy.

In India, on the other hand, abortion was seen as a measure to control population growth. It was felt that if unbridled population growth is not restrained, economic development of the country will suffer and the result will be increasing poverty. Government sponsored programmes and private institutions like Marie Stopes advocated abortion mainly to control population growth. Given the rising number of illegal and unsafe abortions in the country, in the year 1966, a Government Committee (the Shantilal Shah Committee) recommended legalising abortion.

In the year 1971, the Medical Termination of Pregnancy Act was implemented in India which legalised abortion. Under this Act, abortion was to be allowed under three circumstances – a) if the woman concerned was a victim of forcible sexual acts b) if the woman concerned became pregnant because of failure of contraception c) for eugenic reasons – if the woman concerned was at risk of giving birth to crippled children.

In the year 1975, the All India Institute of Medical Sciences, New Delhi began to use amniocentesis for detecting foetal abnormalities. Within a few years, amniocentesis started being used for sex-selective foeticide. The government issued circulars to central and state departments to make the use of pre-natal sex determination a penal offence. This ban led to the privatisation and commercialisation of female foeticide and private clinics grew up everywhere. Since the 1980's, the process of amniocentesis was increasingly being used illegally to determine the sex of foetuses in order to abort female foetuses specifically. This led to the formation of the FASDSP (Forum Against Sex Determination and Sex Preselection). However, there are problematic areas in the FASDSP. Although the FASDSP holds that it seeks only to restrict Sex Determination Tests, not the access to abortion itself, it has remained unable to separate the two issues. The issue is a bit complicated generally because in many ways, arguments against selective abortion of female foetuses occupy the same terrain as those against abortion.

The government of Maharashtra also achieved a breakthrough in 1988 with the implementation of the Maharashtra Regulation of the Use of Prenatal Diagnostic Techniques Act.

In 1994 also, the Pre-Natal Diagnostic Techniques (PNDT) Act was passed. However, its main concern was with medical procedures to detect the sex of the foetus. The Act specified that pre-natal diagnostic tests can be conducted for the detection of five types of abnormalities – chromosomal, genetic metabolic, haemoglobinopathies, sex linked genetic diseases and congenital. However, the female foeticide racket thrived illegally. The problem assumed such alarming proportions that in 1996, the World Health Organisation endorsed the fact that female foeticide was an extreme manifestation of violence against women (Sarna, 2003).[19]

If we look at the decline in the sex ratio in India over the decades, we will find that female foeticide has been on the rise. The figure below shows the decline in sex ratio in India from the year 1901 to 1991 with a slightly higher rise since then.

The records above show that the sex ratio or the number of females for each thousand males has gone down consistently over the past decades till the 1990's. The sex ratio in India has sharply declined from 972 females per 1000 males at the turn of the last century to 927 females per 1000 males in 1991. Although it has marginally increased since then (to 933 females in 2001 and 940 females in 2011), the fact remains that Acts like the Pre-Natal Diagnostic Techniques Act have not been able to have much impact on the problem of female foeticide.

The sex-ratio map of India for the year 2001 also shows that the Acts to stop female foeticide have not had much effect in our country.

From the map above, we can see that in large parts of our country (denoted by the states marked in blue and green) the sex ratio is dismally low. In Jammu and Kashmir, Punjab, Haryana, Delhi, Uttar Pradesh, Sikkim, the sex ratio is only between 801-900 females per 1000 males. In the states of Rajasthan, Madhya Pradesh, Gujarat, Maharashtra, Bihar, Jharkhand, West Bengal and in most of the north-eastern states, the sex ratio is between 901-950 females per 1000 males.

There are many factors responsible for this menace of sex-selective foeticide. Some of these are –

a) Social security – Families in most parts of our country prefer sons to daughters as boys are seen to provide security to aged parents while daughters, once wedded, leave their parental homes forever.

b) Dowry – While giving birth to a girl child involves the burden of accumulation of sufficient resources to provide for her dowry at her marriage, a boy child means quite the opposite. Boys become bread earners for the family as well as bring in huge amounts of dowry. Thus, girls become 'unwanted liabilities' while boys become 'useful assets'.
c) Cultural reasons – The concept of 'vanshodharak' or the carrier of the family name makes people crave for boys. Also, as it is a male child who performs the last rites of Hindus, the desire for boy children is very strong.

3.1 Failure of the State

After the 2001 census showed a significant drop in female-to-male sex ratios, the Indian State increased its efforts to publicise the illegality of selective abortion of female foetuses. However, there are many areas where the state has failed miserably in its efforts. There are many reasons for this failure. The first and foremost reason is the lack of will to implement the Acts. Interestingly, among a large section of our country, the view also prevails that the selective abortion of female foetuses is justified as a form of population control. It is argued that permitting the abortion of female foetuses would stop couples from continuing to have children until the desired son was produced. It is also argued that because the social pressure to bear male children falls entirely on the woman, she should have the right to abort a female foetus.

Despite the MTP Act, the number of unsafe abortions in our country continues to be very high. An article in Manushi mentioned that only about 10% of total induced abortions were performed through licensed safe medical services (Bang Rani and Bang Abhay, 1992).[20] Records from the Marie Stopes Clinics show that about 6.6 lakh women in India die every year due to abortions performed by unqualified personnel. An important problem is that since the women concerned and their families, as well as the doctors and clinics / hospitals do not report the offence themselves, reporting of the crime is practically non-existent.

Even though the Indian State does not openly advocate sex determination tests, it's Sixth and Seventh Five Year Plans are somewhat problematic. As Nandita Menon mentions in her book, "these plans set a target of a Net Reproduction Rate (NNR) of one (that is, one woman should replace her mother) and it is expected that this goal, together with the objective of limiting births to two to three per woman, will be achieved by 2006-2011. One implication of these policies seems that 'excess' girls will have to be killed at the foetal stage to maintain the NRR of one" (Menon, 2004).[21]

Not only the Five Year Plans, the provisions of the MTP Act also legally permit the selective abortion of female foetuses. Under this Act, an abortion is legal up to twelve weeks without restriction, up to twenty weeks if the physical or mental

health of the woman or child is at risk and after twenty weeks only if it is certified as immediately necessary to save the life of the pregnant woman. Thus, the regulatory regime would be breached only if a) termination after twenty weeks of pregnancy cannot be supported by evidence of a sufficiently grave threat to the life of the pregnant woman and b) in terminations between twelve and twenty weeks, sufficient evidence cannot be shown that the pregnancy threatened the physical or mental health of the mother or child. Neither in the MTP Act nor in the relevant penal codes, the words 'abortion', miscarriage' and 'termination of pregnancy' have been defined properly. This leaves individual medical opinion on these matters sacrosanct.

The legislation in Maharashtra which attempts to curtail pre-natal sex determination is also full of loopholes. Firstly, it does not ban private genetic laboratories and clinics which carry out sex determination tests but only provides for their registration. Secondly, it enables the state government to overrule the decisions of the highest monitoring body set up by the Act regarding cancellation or suspension of the licence of a clinic or laboratory. Thirdly, it can exempt any public lab or clinic from the provisions of the Act. Fourthly, common citizens cannot directly move the courts but must approach the monitoring bodies if they come across cases of sex-selective abortion. Finally, the monitoring bodies can refuse to make records or information available to the complainant 'in the public interest'.

The narrow focus of the Pre-Natal Diagnostic Techniques (PNDT) Act has also left the law incapable of tackling effectively the problems of even Sex Determination tests. For example, private clinics can continue to determine the sex of foetuses by misusing tests meant for the purposes permitted by the Act. This Act also says that no person conducting pre-natal diagnostic procedures shall communicate to the woman or her relatives the sex of the foetus. However, there is nothing in this Bill that prohibits the communication of such information to non-relatives. A question was also raised in the course of the passing of this Act as to whether the woman whose female foetus is being aborted should also be punished. One thing that people need to think about is that sometimes, when a woman acts without apparently being 'forced', she may still be acting against her best interests. Therefore, there is very little point in punishing a woman for a decision that is probably never her own.

In spite of the state implementing laws to control female foeticide, the fact remains that in rural India, there is a serious lack of facilities and trained personnel. Mere implementation of laws rarely suffices if they are not supplemented by sufficient infrastructure. The state has also turned a blind eye to the fact that there are many districts in our country which lack clean drinking

water and electricity but do not lack pre-natal sex determination clinics (Menon, 2004).[22]

The fact that the laws and acts are having very little effect is also evident from the cases that keep coming up in newspapers. For example, in June 2007, a doctor was confronted with the charges of illegally aborting 260 female foetuses at his maternity clinic in the outskirts of New Delhi. Again, in July 2007, the Orissa Police recovered as many as thirty polythene bags stuffed with female foetuses from a dry well near a private clinic in Nayagarh, close to Bhubaneshwar. Overall, as many as ten million girls in India have been killed by their parents either before or immediately after birth over the past twenty years.
Even if we go on having more and more laws, increasingly simpler techniques of sex determination are being developed and the abortion of female foetuses is being rendered unnecessary by sex pre-selection techniques. In this context, active and honest state intervention is the need of the hour to control this menace. This has to be done through sustained campaigns and active monitoring of the Acts preventing sex-selective foeticide. State governments have to realize the importance and priority of the law and not merely treat it with their usual non complacency. Structures for implementing the PNDT Act of 1994 will have to be created at the district levels. Volunteers will also have to be mobilized actively to monitor registration and functioning of sex determination clinics all over the country. Cases have to be filed against violators and convictions brought about quickly. Finally, social consciousness has to be raised against the crime.

The major problem is that the progressive attitude of the Indian state towards abortion is dictated by compulsions other than commitment to women. In Nivedita Menon's words, "what animates the legal discourse on abortion is not concern for women's health or their autonomy, but a punitive spirit which treats abortion as a crime..." (Menon, 2004).[23] For this reason, big talk about women's empowerment will achieve nothing unless and until honest attempts are made that give priority to women. As the Roundtable on Women's Perspectives on Family Planning, Reproductive Rights and Reproductive Health in Ottawa in 1993 stated, "the key to women's empowerment lies in women acting individually and collectively to exercise their rights, in particular, their reproductive rights" (Menon, 2004).[24]

4. Marital Rape

Susan Brownmiller wrote way back in 1976, "The human anatomy is such that men can rape women while women cannot rape men...rape is not an act of sex at all but one of power and domination" (Brownmiller, 1976).[25] Masculine power and feminine powerlessness neither simply precede nor cause rape; rather, rape is one of culture's many modes of feminizing women (Marcus, Fighting Bodies,

Fighting Words: A Theory and Politics of Rape Prevention, 1992).[26] Rape can at best be defined as a sexualized and gendered attack which imposes sexual difference along the lines of violence.

Rape and domestic violence are not fictions or figurations 'that admit of the free play of signification' (Marcus, Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention, 1992).[27] Rape particularly, is a very personal and intimate traumatic experience. It is real; to be real means to be fixed, determinate, and transparent to understanding. It is not just a criminal offence, but an offence that reflects power relations within society. Masculinist culture designates rape as a fate worse than, or tantamount to, death; 'the apocalyptic tone which it adopts and the metaphysical status which it assigns to rape implies that rape can only be feared or legally repaired, not fought (Marcus, Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention, 1992).[28]

In India, the issue of rape appeared on the public agenda in the late 1970's, against the background of a Supreme Court judgement that acquitted the police rapists of a young tribal girl, Mathura. This case showed that it is extremely difficult for a woman to prove that she did not consent 'beyond all reasonable doubt', as was required under criminal law. In the decades after Mathura, feminists raised questions relating to custodial rape, the notion of consent, the use of past sexual experience as testimony and lengthy court trials. The Criminal Law Amendment Act was passed in 1983 which accepted that in custodial rape cases, the burden of proof lies with the man accused. It also stipulated that the penalty for custodial rape should not be less than seven years' imprisonment and provided for in camera proceedings.

Sharon Marcus writes, "Marital rape distorts the contract of male protection of women and shatters the community of care established between lovers; it produces an uncanny, dreadful estrangement from familiar expectations (Marcus, Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention, 1992).[29] Marital rape is the term used to describe non-consensual sexual acts between a woman/man and her husband/wife, ex-husband/wife, or intimate long-term partner. These sexual acts can include: intercourse, anal or oral sex, forced sexual behaviour with other individuals, and other unwanted, painful, and humiliating sexual activities. It is rape if one partner uses force, threats, or intimidation to get the other to submit to sexual acts. There are three types of marital rape:

a) Battering Rape - This involves forced sex combined with battering, motivated primarily by anger toward the victim. The sexual abuse is either part of the entire physical abuse incident or is a result of the husband later asking his wife to prove she forgives him for the beating by having sex with him.

b) Force-Only Rape - The husband uses only as much force as necessary to coerce his wife into sexual activity. This type of sexual assault is primarily motivated by the need for power over the victim. In his mind, he is merely asserting his right to have sex with "his" wife on demand. This is the most common type of marital rape.
c) Obsessive Rape - The husband's sexual interests run toward the strange and perverse, and he is willing (or even has a preference) to use force to carry these activities out. This is the least common, yet arguably the most physically damaging, type of marital rape. Although battered women are more at risk for marital rape than their non-battered counterparts, some men will rape their wives and never beat them; others will beat them, but not rape them. These issues may be inter-linked or seemingly unrelated.

According to the United Nations Population Fund, more than two-thirds of married women in India between the ages of 15 and 49 have been beaten, raped or forced to provide sex (Huggler, 2006).[30]

Marital rape is destructive for women as it betrays the fundamental basis of the marital relationship; it questions every understanding one has of one's partner and the marriage and of oneself. Women suffering the trauma of marital rape end up feeling betrayed, humiliated and confused. It is difficult to even define marital rape. The traditional idea that it is impossible for a man to rape his wife and that somehow, in taking our marriage vows, we have abdicated any say over our own body and sexuality and denied ourselves the right to say 'no', is still prevalent amongst Indian wives and husbands.

Sexual assault generally is a most feared, terrifying and humiliating form of attack. It radically alters the quality of the victim's terror and pain. The harm caused by marital rape especially, does not lie only in the causing of physical damage only, but in the violation of the bodily integrity of the wife. A sexual act in which a 'wife' is involved against her desire is traumatic in a way other acts or encounters are not. If 'rape' can occur inside the home, then 'inside' no longer remains what it is meant to be – sheltering, separate and distinct from an unsafe, external realm. The relative powerlessness and lack of autonomy that characterises the relations of husband and wife, particularly in India, also adds to the woes of victims of marital rape. It is absolutely necessary to question this experience in the realm of legal discourse.

Generally speaking, sexual acts sanctioned by the social order are regarded as perfectly legitimate. Consent of both parties is assumed in such cases. It is precisely because of this reason that Section 375 of the Indian Penal Code stated that 'Sexual intercourse by a man with his wife, the wife not being under fifteen years of age, is not rape.' Sex within marriage is not considered abnormal. For

these very reasons, the term ‘marital rape’ till some time back, existed only in feminist lexicon.

The 1993 Draft formulated by the National Commission for Women suggesting amendments to the rape law in India was one of the first to introduce the possibility of recognising rape within marriage. It explicitly stated the need to cover the continuous rape of adult females within marriage or by other adult members of the family under rape laws.

The Law Commission of India released its 172nd report on the Review of Rape Laws in 2000. It recommended the deletion of Section 155(4) of the Indian Evidence Act, which would prevent a victim of rape from being cross-examined about her ‘general immoral character’ and sexual history. (This section was later deleted in the winter session of Parliament in 2002) In the same year, the Draft Sexual Assault Law Reforms (India) was passed. However, it was gender-neutral in the sense that it referred to ‘persons’ as victims of sexual assault rather than women specifically. It was felt that this law would do more harm than help women as sexual assault would no more be treated as a gendered crime.

The Protection of Women from Domestic Violence Act was passed in the year 2005. Section five of the Act defined domestic violence as including physical abuse, sexual abuse, verbal or emotional abuse, and economic abuse as crimes.

a) Physical abuse means any act or conducts which can cause bodily pain, harm, or danger to life, limb, or health, or impairs the health or development of the aggrieved person and includes assault, criminal intimidation and criminal force.
b) Sexual abuse means any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of women
c) Verbal and emotional abuse includes insults, ridicule, humiliation, name calling, insults as well as repeated threats to cause physical pain
d) Economic abuse includes deprivation of all or any economic or financial resources, disposal of household effects and prohibition or restriction to continued access to resources or facilities.

This is the first time the Indian law recognised marital rape (sexual abuse) of a woman by her husband as a crime. Punishment can include a jail sentence of up to one year and a fine of up to Rupees twenty thousand.

However, the mere existence of a law is not really enough, especially in a country like ours. As the following pages indicate, there are innumerable hurdles when it comes to handling rape within marriage.

4.1 Problem Areas in Case of Marital Rape

Nivedita Menon says, "three things have to be kept in mind regarding rape in general and marital rape in particular –
rape is violence, not sex
rape is violence, but a unique form of violence because of its sexual character
rape is violence and violence precisely *is* sex" (Menon, 2004).

The first problem arises because of the fact that most women cannot believe that a husband *can* rape his wife. A man forcing his wife for sex is only availing of his conjugal rights. Thus, in the tradition bound, patriarchal society of India, a wife would not only be unaware, but also reluctant and hesitant even to admit to herself that any such incident as rape has occurred to her, inflicted by her husband. She will prefer to 'continue to be abused and raped by the one person she trusted enough to want to spend the next seven lifetimes with' (Rodrigues, 2009).[31]

Secondly, even if a woman is aware of the fact that she is being raped by her husband, she {the ideal Indian (Hindu) woman} *cannot talk* about rape by her husband. As our culture has, since antiquity, discouraged women from talking about sexual matters with outsiders, women remain silent about sexual abuse at home. Married women are given to understand that their desires and dreams must be subject to those of their husbands. Since sexual relations are a part of the marriage setup, they cannot refuse to have sex with their husbands. Therefore, they accept the physical violence that takes place under the guise of conjugal relations in marriage.

Thirdly, marriage in India is the only route to social acceptance of adult womanhood. There are strong social incentives on women to enter into marriage. The very same reasons also act as negative motivators. Accusations of marital rape may bring isolation and punishment by other family members. Thus, social disapproval and retaliation by other family members also force women to accept their abusive marriages as destiny. Moreover, women can hardly count on the legal system coming to their aid.

Fourthly, there is a widespread belief in India that the concept of rape by a husband should not be entertained at all. A husband cannot be prosecuted for raping his wife because consent to matrimony presupposes consent to sexual intercourse. For this reason, judges and lawyers have, time and again ignored and dismissed cases of rape by husbands. Nivedita Menon refers to a case where the belief was upheld in a Supreme Court judgement that rape and sexual violence are *impossible* within marriage. The Supreme Court stated in this case that "it is not possible to believe that when a married woman has sex with her husband in the privacy of their bedroom, she would suffer abrasions..." (Menon,

2004)[32]. This judgement reinforces traditional assumptions about the sexuality of women and the nature of violence in their lives

Fifthly, an important problem that arises in case of marital rape specifically is the fact that the victims concerned are used to sexual intercourse. It may be difficult at times to find incriminating evidence against the husband which would otherwise be more conveniently available in case of rape by outsiders or rape of a virgin girl. Married women thus face the 'heavier burden' of proving rape by the husband in a court of law. What are required in cases like these are judgements of the kind given in the case of 'Harpal Singh and another v. State of Himachal Pradesh', where the court opined that, 'the fact that... the girl is used to sexual intercourse is immaterial in a rape trial' (Agnes F. , 1992).[33]

Sixthly, in cases of marital rape, it is very difficult to establish the innocence of the wife. She may find it impossible to prove that she did not consent 'beyond all reasonable doubt', as is required under criminal law. This kind of rape greatly differs from the kind of 'act' recognised as 'real' rape and portrayed in Hindi movies which involves strangers, the use of weapons, a public scene, torn clothes, bruises and cuts on the body and private parts of the victim etc.

Another area of concern is that in the period after the amendment of rape laws, provision for more stringent punishment has resulted in fewer convictions. Therefore, it seems that the new law has served no purpose at all, and even if it has, it has reduced the prospect of securing convictions. This raises the ominous feeling in our minds whether sexual violence within the four walls of the home is at all capable of being comprehended by law.

The problem surrounding the issue of marital rape is fairly reflected in these words of Flavia Agnes, "...In fact, the same old notions of chastity, virginity, premium on marriage and fear of female sexuality are reflected in the judgements of the post-amendment period...we have not gone beyond this definition" (Agnes F. , 1992). In fact, Nandita Gandhi and Nandita Shah opine that women find it easier to fight against the state or social customs through the state, than to fight for their rights within the family or on 'personal' issues which bring them closer to the starkness of the inegalitarian and oppressive relationship between men and women (Nandita Gandhi and Nandita Shah, 1992).[34]

5. What Needs to be Done?

Even though the law exists to protect women at home (Protection of Women from Domestic Violence Act 2005), the issue of marital rape reveals the limitations of the law and its inability to encompass the lived experiences of women. Marital rape laws have to be enforced strictly and attempts have to be made to hasten convictions.

Another area of concern in marital rape is that it is put into effect by men (insensitive judges and lawyers) who do not at all understand what a sexual assault by a husband means to a woman. The judiciary and the police have to be sensitised to deal with rape cases. Judges and lawyers also have to realise that marital rape is a heinous crime and deserves as much punishment as ordinary rape.

The definition of marital rape has to be expanded to include a wide range of violations in addition to actual sexual penetration. This should include penetration into any orifice by any object, for a sexual purpose. Even forcing a woman to do things she would not like to do for the sexual satisfaction of her husband or other males in the family or even touching, gesturing etc against the will or without the consent of the wife should amount to rape. The law should criminalise a whole range of behaviour which married women may accept as 'normal' but by which they feel humiliated, oppressed, violated or even uncomfortable. It may even be necessary to change the definition of marital rape or create a new one with totally different criteria and a totally different concept of justice that will enable women to take the help of the state in their fight for justice.

Women also have to be made aware so that they realise that they have a right to feel violated even if they experience violation at the hands of their husbands. The dissemination of information among women will help to create an environment where victims can come forward without fear.

Legislation basically is embedded in the dominant values of the system and often distorts the purpose intended. The law simply echoes what social mores often take for granted, that women have no rights over their own bodies and their wills are subject to those of their husbands. It is no doubt true that the law has a limited ability to provide a complete remedy to the problem of rape. But, the law still remains a crucial weapon to fight sexual violence against women. As Catharine Mackinnon says, "recourse to the law is seen as necessary and inevitable because it is believed that designing a law around an experience proves 'it matters'; law is the concrete delivery of rights through the legal system" (Mackinnon, 1987).[35]

Finally, in case of rape in general, there is a lot of ambiguity. This is because the claim of the law is based on a binary logic of truth/untruth, guilt/innocence, consent/non-consent etc at once. Carol Smart argues that this binary logic is not appropriate to the 'ambiguity' of rape. In criminal law, the object is to establish guilt or innocence, and in rape cases, the establishing of either, turns on another pair of opposites: that of consent/non-consent (Smart, 1989).[36] Once consent is established somehow, the act is considered legitimate. We find this ambiguity

present in the case of the Mumbai film actor Shiney Ahuja who was recently released on bail in the rape case involving his domestic help. In this case, the lawyers of the defence pleaded guilty of consensual sex. Moreover, the dilution of the maid's statement after months of trial has also cast a grey shadow over the case. No one knows whether a conviction will occur and even if it does when? There is a lot of ambiguity in women's experience of sex, to which the law cannot always respond appropriately. Even in cases where convictions are secured, the process of 'trials and judgements powerfully reinstate patriarchal norms of female sexuality and legitimate codes of female behaviour' (Menon, 2004).[37] Thus, the 'crime' of rape itself becomes very ambiguous and needs probably a quicker and a more woman-friendly method of trial in courts. Feminist politics also needs to understand marital rape as a real, clear fact of a woman's life.

6. Conclusion

In India, political citizenship is mainly understood as having a right to vote. But that does not make a woman a citizen. Her formal right to vote does not give her substantive rights as a citizen. We need a proactive state that sincerely ensures the enforcement of constitutionally guaranteed rights of citizenship, and the absence of those social conditions that would deter women from enjoying their right effectively. However discriminatory the state and flawed its laws maybe, unless the state stands by women, their demands for autonomy over their soul and body will remain an illusion. Maithreyi Krishnaraj opines, "Women, in particular, face a dilemma: neither community support nor liberal individualism offers them a true political identity. We need *a definition of empowerment* that can travel into the worlds of community as well as that of individuals" (Krishnaraj, Women's Citizenship and the Public-Private Dichotomy, 2009).[38]

Women need to be aware of the rights they have over their bodies. While spreading awareness, we should also focus on the sense of self of a woman, denied to her by the men violating her body and soul as well as by the state and its enforcement agencies. Gender education and awareness also have an important role to play to reinstate victims of sexual violence within the community. Women also need to get rid of notions of shame and stigma associated with the female body.

Feminists also have a significant role to play in this context. In order to articulate gendered citizenship, they have to negotiate, struggle and confront with the state. As Anurekha Chari says, "feminist analysis necessitates a shift from the construction of the state as an inherently oppressive capitalist patriarchal monolith" (Chari, 2009).[39] Feminists have to engage with this capitalist patriarchal state to extend and defend the citizenship rights of women. In cases of sex-selective foticide and marital rape, feminists have to drive home the fact

that the state is accountable for the violence perpetuated on women and the delays in bringing justice to women.

The law also needs to be more sensitive to the particular needs of women. This is because the quantity and quality of pain suffered by women are, much more than men. There is a pressing need to redress the discriminatory nature of particular laws, create new ones (especially in the private realm of the family), and try to keep vigil on the patriarchal bias in the interpretation and implementation of existing laws. The understanding of the political and social basis of gender injustice has to be incorporated into legal practice.

However, laws are really not enough. As Flavia Agnes says, "if oppression could be tackled by passing laws, then the decade of the 1980's would be adjudged a golden period for Indian women, when protective laws were offered on a platter... the crime statistics reveal(ed) a different story… (Agnes F. , 1997).[40] Laws can only be a part of a wider struggle. There is the need to look into other strategies and methods to tackle these issues apart from reforms of law. The problem regarding the ineffectiveness of laws is neatly summed up in Nivedita Menon's words, "...in the four hundred years since the law emerged as an emancipatory tool, the political landscape has been irretrievably transformed...while the law may not have failed us, we may have outgrown the law..." (Menon, 2004).[41] So, rather than looking towards the state institutions and agencies to emancipate women, it is time that women should fight their battles themselves.

Notes:

1 Geetha, V (2007): Theorizing Feminism - Patriarchy, pp - 2

2 Elshtain, Jean Bethke (1981): Public Man, Private Woman: Women in Social and Political Thought, pp - 22

3 Jaggar, Alison (1983):Feminist Politics and Human Nature, pp - 199

4 Kymlicka, Will (2002): Contemporary Political Philosophy, pp - 396

5 Ibid, pp - 396

6 Kymlicka, Will (2002): Contemporary Political Philosophy, pp 396-397

7 MacKinnon, Catharine (1987): Feminism Unmodified, pp - 102

8 Kymlicka, Will (2002): Contemporary Political Philosophy, pp - 397

9 MacKinnon, Catharine (1987): Feminism Unmodified, pp 93-102.

[10] Allen, Anita (1988): Uneasy Access: Privacy for Women in a Free Society, pp 180 - 181

[11] MacKinnon, Catharine (1987): Feminism Unmodified, pp 101 - 102

[12] Pateman, Carol (1987): Feminist critiques of the public/private dichotomy, pp - 103.

[13] Krishnaraj Maithreyi (2009): 'Women's Citizenship and the Private-Public Dichotomy', Economic and Political Weekly, No.17, Vol XLIV, 1992, pp - 44

[14] Chari, Anurekha (2009) 'Gendered Citizenship and Women's Movement', Economic and Political Weekly, No.17, Vol XLIV, 1992, pp 46 - 47

[15] Menon, Nivedita (2004): Recovering Subversion – Feminist Politics beyond the law, pp - 117.

[16] Chari, Anurekha (2009) 'Gendered Citizenship and Women's Movement', Economic and Political Weekly, No.17, Vol XLIV, 1992, pp - 52

[17] Ibid, pp - 54

[18] Menon, Nivedita (2004): Recovering Subversion – Feminist Politics beyond the law, pp 3-4.

[19] Sarna, Kamla (2003): 'Female foeticide on the rise in India' in Nursing Journal of India, February 2003

[20] Bang Rani and Bang Abhay (1992): 'Contraceptive Technologies, Experience of rural Indian women', Manushi, No.70, 1992, pp 29

[21] Menon, Nivedita (2004): Recovering Subversion – Feminist Politics beyond the law, pp - 76.

[22] Menon, Nivedita (2004): Recovering Subversion – Feminist Politics beyond the law, pp - 75.

[23] Ibid, pp - 89

[24] Menon, Nivedita (2004): Recovering Subversion – Feminist Politics beyond the law, pp - 92.

[25] Brownmiller, Susan (1976): Against our will: Men, Women and Rape.

[26] Sharon Marcus, 'Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention' in Butler, Judith and Scott, Joan W. (1992): Feminists theorize the political. pp - 391

[27] Sharon Marcus, 'Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention' in Butler, Judith and Scott, Joan W. (1992): Feminists theorize the political. pp - 387

[28] Sharon Marcus, 'Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention' in Butler, Judith and Scott, Joan W. (1992): Feminists theorize the political. pp 385

[29] Sharon Marcus, 'Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention' in Butler, Judith and Scott, Joan W. (1992): Feminists theorize the political. pp 394

[30] Huggler, Justin (2006): 'Law to protect Indian women from marital rape and abuse'.

[31] Rodrigues, Cynthia (2009): 'Trauma of Marital rape'

[32] Menon, Nivedita (2004): Recovering Subversion – Feminist Politics beyond the law, pp 132.

[33] Agnes, Flavia (1992): Protecting Women against Violence? Review of a Decade of Legislation 1980-89, Economic and Political Weekly, 25 April 1992.

[34] Gandhi, Nandita and Shah, Nandita (1992): The Issues at Stake, pp 271.

[35] MacKinnon, Catharine (1987): Feminism Unmodified, pp 103.

[36] Smart, Carol (1989): Feminism and the Power of Law, pp 33

[37] Menon, Nivedita (2004): Recovering Subversion – Feminist Politics beyond the law, pp 129.

[38] Krishnaraj Maithreyi (2009): 'Women's Citizenship and the Private-Public Dichotomy', Economic and Political Weekly, No.17, Vol XLIV, 1992, pp 44

[39] Chari, Anurekha (2009): 'Gendered Citizenship and Women's Movement', Economic and Political Weekly, No.17, Vol XLIV, 1992, pp 55

[40] Agnes Flavia (1997): 'The Hidden Agenda Beneath the Rhetoric of Women's Rights' in Partha Chatterjee (ed.), State and Politics in India, pp 521

[41] Menon, Nivedita (2004): Recovering Subversion – Feminist Politics beyond the law, pp 232.

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