

# EVALUATING ISSUES REGARDING POST PENETRATIVE RAPE FROM A WOMEN'S PERSPECTIVE

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## ABSTRACT

*Post penetration rape deals with the issue of withdrawal of consent after sexual intercourse has commenced. This involves an ethical contestation of sexual rights and universally accepted norms of social behaviour. The understanding that humans will comply with their promises maintains harmony in society and forms the building blocks of law of contract. Social transactions presuppose equality in bargaining power unless shown otherwise. This paper will be an attempt to understand whether this holds true in sexual relations restricted to men and women. It will attempt to understand how women's sexuality has developed and what factors have contributed towards building socially accepted norms of women's behaviour and psychology. Furthermore, I will discuss the landmark judgements that have changed the definition of rape, examine theories of consent and evaluate whether rape laws in general function more as a protective shield for men and put victims in a vulnerable position. In order to do this, the paper will briefly give an introduction to the concept and then attempt to understand and analyse the relationship between 'rape' and 'victim-hood' and will subsequently scrutinise judgements and their facts wherein the concept has been accepted or rejected by courts. Further, the elements of*

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*proof associated with the concept shall be evaluated vis-à-vis their reliability and finality. Finally, the paper will discuss the potential effects of recognising the concept with regards to women's rights and its contribution in exploding rape myths which greatly stereotype, marginalise and hamper sexual rights of women.*

## I. INTRODUCTION

Control over women's sexuality has been a concern and subject for almost all societies<sup>1</sup>; even talking about sexual rights of women evokes moral panic from some sections. Female sexuality comes under scrutiny when men derive their prestige, honour and dependency to perpetuate their lineage from the reproductive power of women to protect *inter alia* caste, class and racial purity within strict and controlled structures of reproduction. Therefore, monitoring this power of the female sex and repressing and shielding it from women themselves by creating a carefully articulated system of right, wrong, immoral, moral, good, bad becomes necessary to enforce "discipline", "purity" and rigidity of a social order.

Sexual violence is one such form of female subjugation which deprives women of their right to choose their sexual partner. Gender based violence removed from the act of sex for pleasure can also be motivated by power, control and domination; an act which reinforces the superior position of men

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<sup>1</sup> GEORGE BUHLER, LAWS OF MANU, AT 206 (2009). Manu clarifies the essential and innate nature of women as "*Knowing their disposition, which the Lord of creatures laid in them at the creation, to be such, (every) man should most strenuously exert himself to guard them.*"

in the power relations between men and women. For example, a recent United Nations Report<sup>2</sup> has revealed that the South Sudanese government has conducted a “scorched earth policy” against civilians caught up in the country’s civil war, allowing its soldiers and allied militias to rape women in lieu of wages, torture and murder suspected opponents and deliberately displace as many people as possible<sup>3</sup>.

The Convention on the Elimination of all Forms of Discrimination against Women (“CEDAW”) defines rape as “*violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty*”.<sup>4</sup> Apart from causing immense immediate physical and mental harm, it may damage the psyche of the victim irreversibly in some cases and may severely jeopardize their reproductive success.<sup>5</sup> Sexual domination and subordination is a way of sexualizing gender inequality.

The threat of sexual violence manifests itself in all spheres of a woman’s life, at the workplace, in public places and even at home. A large percent of violent attacks on women are committed by persons known to

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<sup>2</sup> Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, Assessment mission by the Office of the United Nations High Commissioner for Human Rights to improve human rights, accountability, reconciliation and capacity in South Sudan: Detailed findings at 49, U.N. Doc. A/HRC/31/CRP.6 (March 10, 2016).

<sup>3</sup> Sam Jones, *UN report: South Sudan allowed soldiers to rape civilians in civil war*, The Guardian, (March 11, 2016 15:01 GMT), <https://www.theguardian.com/global-development/2016/mar/11/south-sudans-soldiers-allowed-to-rape-civilians-civil-war-says-un-government-torture>

<sup>4</sup> General Recommendation No. 19 (11<sup>th</sup> session of CEDAW, (1992).

<sup>5</sup> DONALD SYMONS, THE EVOLUTION OF HUMAN SEXUALITY, AT 35 (1979).

them. According to a UN report, 78 percent of all rape victims knew their attacker<sup>6</sup>. Like all forms of violence in society, addressing sexual violence comes within the domain of politics but in a patriarchal society addressing it effectively becomes tricky as sexual oppression and violence is both a symptom and means of oppressing women.

Moreover, while trying to penalize rape, the law and lawmakers deal with sex itself, which brings them in confrontation with sex roles, differentiated perceptions and ideas of masculinity, femininity and of sexuality; all of which may present themselves differently to men and women. Further, there may be variations in their outlook shaped by their lived realities. The dominant view of the people in power and their socialization then defines rape for all; only to be adhered to.

Human Rights also comprise of sexual rights and it should be the duty of every just society to ensure that women are able to freely exercise their right to make choices with respect to their sexuality, reproductive and sexual health unencumbered by any external control, discrimination or coercion<sup>7</sup>. The crime of rape has evolved through the ages yet, both historically and currently, rape law has been chiefly reflective of male standards and perspectives, and has thus

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<sup>6</sup> UN Commission on Human Rights, *Integration of the Human Rights of Women and the Gender Perspective-Violence Against Women* at 31(2003).

<sup>7</sup> “[i]t is the primary and inescapable responsibility of the State to protect the right to life, liberty, equality and dignity of all of those who constitute it. It is also the responsibility of the State to ensure that such rights are not violated either through overt acts, or through abetment or negligence. It is a clear and emerging principle of human rights jurisprudence that the State is responsible not only for the acts of its own agents, but also for the acts of non-State players acting within its jurisdiction. The State is, in addition, responsible for any inaction that may cause or facilitate the violation of human rights.” NHRC Order dated April 1, 2002 in Case No. 1150/6/2001-2002.

entrenched sexism in the way society perceives women. Sexism is inherent in rape law and has proved to be a roadblock for women to obtain justice when someone violates their bodily integrity. In English Common law, rape was initially seen as a property crime where a father or husband's property was devalued through a possible dilution of family lineage that was the basis of establishing and determining patriarchal inheritance rights<sup>8</sup>. Gradually with the codification of rape law, twin concepts of *force* and *consent* emerged which further compromised and attenuated the stance of women<sup>9</sup>.

Even though both are interrelated, courts demanded separate proof for each thereby putting women in a vulnerable position. If they did not resist and arrived in court with minor or no injuries there were chances of them being disbelieved and if they chose to put up a fight with the accused they made themselves vulnerable to physical harm or death. Such outlooks and standards for judging and legislating on rape also got reinforced by men in positions of political, medical and legal power. For example, Justice Matthew Hale stated that "*rape is an accusation easily to be made and hard to be proved and harder to defended by the party accused, though never so innocent*"<sup>10</sup> An understanding needs to emerge that demanding greater sexual freedom over our bodies is not "uncooperative behaviour" but a statement of political resistance.

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<sup>8</sup> Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, at 1465, 1478 (2003).

<sup>9</sup> In *Tuka Ram And Anr v. State Of Maharashtra*, 1979 AIR 185 the Supreme Court of India held that the offence was not rape as "*no marks of injury were found on the person of the girl after the incident and their absence goes a long way to indicate that the alleged intercourse was a peaceful affair.*"

<sup>10</sup> SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN , WOMEN AND RAPE*, AT 369 (1975).

The law does not always segregate or recognize the categories of acquaintance and stranger rape and the elements of both continue to remain the same. It thus becomes extremely difficult for the victim to provide evidence for proving ‘non-consent’ and ‘force’ as the usual stereotypical signs associated with stranger rape like bruises, injuries and aggravated mental distress might not be present in situations of acquaintance rape. In situations where the woman consented to some degree of sexual activity, proving rape involves going into the questions of integrity and credibility of the parties involved, specifically for women<sup>11</sup>.

Full development of sexuality is essential for individual, interpersonal, and societal wellbeing<sup>12</sup>. Rape hinges on attacking and attenuating a person’s sexual worth and sexual esteem. The right to sexual freedom, sexual integrity, autonomy and safety, emotional and sexual equity are of utmost importance. With the advent of women’s liberation and advancement in the socio-economic sphere, these rights and their contours have evolved with the changing times. Newer dimensions have been added to rape laws. The crime of rape has many dimensions to it; that of racism, sexism, class, culture, socio-economic factors etc. but this paper would try to understand it from the vantage point of *consent*.

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<sup>11</sup> The now repealed Section 155(4) of the Indian Evidence Act, 1872(which deals with impeaching the credit of the witness) was often used by the defense which allows them to cross-examine the rape victim in order to prove that when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally “immoral character.”

<sup>12</sup> World Health Organization, Department of Reproductive Health and Research, *Developing sexual health programs: A framework for action* at 1(2010),WHO/RHR/HRP/10.22.

Post penetration rape deals with the issue of withdrawal of consent after sexual intercourse has commenced. It is a new and emerging understanding of actions that is now being perceived as forceful sexual activity which needs to be penalized. A valid defense to many criminal acts is consent but the laws governing rape does not see non-consent on the part of the woman as an intellectual act, but demands proof of the non- consent in the form of physical resistance.<sup>13</sup> Post penetration rape tries to wrest the power of self-determination from the male perspective and places it with the “victim” by challenging this idea of non-consent and questioning the ‘power’ that suppresses all sex beyond the heterosexual marital bed.

For many, it is hard to imagine rape once consent is initially given owing to a universal acceptance of sexual male aggression and feminine female impassiveness, therefore, this paper will also attempt to clarify for readers the process involved by analyzing the facts of a central case (in *re John Z*) in detail and a few other cases wherein courts have conceded to the factum of the existence and reality of this new understanding of rape. The law that we make for ourselves makes a difference in our lives and this paper is conceived as an intellectual exercise towards discussing and thinking about our sexuality and sexual rights and the extent to which we will allow our rights over our bodies to be violated or protected by law.

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<sup>13</sup> Explanation 2 to Section 375 of the Indian Penal Code, 1860 vide the Criminal Law(Amendment) Act, 2013 has enlarged and defined the meaning of ‘consent’ in the following words- “*Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act.*”

## **II. RAPE AND VICTIMHOOD**

Post penetration rape can only happen with persons a woman knows to varying degrees. Therefore, it is under the category of acquaintance rape which is mostly presumed to be consensual and even if it isn't, the system attaches less significance to this type of rape because there is a belief that the trauma associated with it is lesser. Rape as perceived by laws is very technical, mechanical and rigid. The law perceives the psychic structure of consent as binary viz. "yes" and "no" and the crime of post-penetration rape exposes the insufficiencies and limitedness of these binaries and forces us to explore other mixed forms of consent. The ability to give a valid consent is legally thought to be a measure of intellectual sophistication. The law doesn't recognize it as also being a very emotional and experiential transition of the mind and not solely cognitive.

In this domesticated and structuralized system of perceived outrage, stranger rape becomes the politically central axis of "victimhood" and the sufferers of post- penetration rape get pushed to the margins. This breeds a "one size fits all" understanding of the "authenticated" rape victim where women fight for their rights and "ladies" get protection. This politics of sexuality creates an environment where rights might be subverted with an obsession with the law which requires specificity, certainty, taxonomy and precision. The voice of a particular type of a rape victim, as created by the state, society, intellectuals and funders of the civil society then becomes the sole representative of a gamut of lived experiences and realities. Victimhood

thus is created strategically which is then imposed by society and the law even on those persons who might not want the tag.

The image of a “good victim” of rape is manufactured and then becomes the sole criteria of marginalization. The *Nirbhaya* case is a good example of labelling the woman as a “good victim”. For example, an article written on her mentions that all the trips she took with her then male partner were to holy places like Vaishno Devi, Haridwar etc. and even when they stayed together, all they did was hold hands.<sup>14</sup> Therefore, in order to get legitimacy from the state, women have to portray themselves as perfect/good victims. Still, the crime of rape is surrounded by a silence which is equally deafening for both; women who were “really” raped and also for those who got raped because they were “asking for it”.

Power structures between men and women force us and the systems that we make to take sides. In a patriarchal society, men always wield greater power in terms of their privileged positions. Moreover, patriarchy enforces the “boys will be boys” mentality and makes us believe that the privileged persons can and will never change. This results in concretizing the understanding of a “good victim” and when we try to challenge it, we end up challenging all institutions of a patriarchal society viz. the family, economy, education, health etc.

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<sup>14</sup> Krishna Pokharel, *India Rape Victim's Friend Describes Their Love Story*, The Wall Street Journal, (Jan. 30, 2013, 4:46 a.m. ET), <http://www.wsj.com/articles/SB10001424127887323829504578271810720960682>.

There is also a flip side to this in which the “good” victimhood becomes a source of power and the right to choose a particular type of victimhood is taken away from women and the nuances of their experiences are lost in the narrative. Also, while imposing victimhood, one superior identity of the “victim” comes to the fore and engulfs and underplays other contours of selfhood. So, when a Dalit woman is raped, her identity as a Dalit becomes supreme and all her limitations as a woman get side-lined and her experience of outrage is fused with the atrocities on Dalits.

Coming back, not every forceful and non-consensual sexual act may be termed as rape and laying down an objective standard for judging whether the bodily integrity of a woman has been violated or not may not always result in just decisions. Women should have the right to decide which sexual acts and from which point onwards constitute rape and the law must lay down only a standard and not a norm for judging this. By having rigid norms and standards and black and white segregation of the elements of rape the law ends up protecting men from criminal punishment for rape rather than protecting women.

Further, demonizing flirtatious behaviour on the part of men can also be viewed as aggression and oppression as it forces women to take all the risks associated with relationships. The dichotomy between the binaries of pleasure (sexual) and danger (e.g. pregnancy) is falsely created when in reality they are part of the same conversation. Patriarchy gives a solution to this in the form of the institution of marriage which is a cure to the fears of dangers associated with pleasure.

The legal and social understanding of acquaintance rape is seen to be heavily sexist in nature, a manifestation of male perceptions, standards and perspectives. The law seeks corroboration of a victim's testimony, ponders upon the amount and method of resistance offered, linking it to a woman's race, ethnicity, class, caste<sup>15</sup> and convolutes the meaning of "consent" and "force," with a male centred understanding. The medico-legal understanding of rape through interpretations of medical jurisprudence textbooks<sup>16</sup> in India also further reinforces gender stereotypes and sexism in legal trials. An example is the "scientific" two finger test which is a medical examination to test the elasticity of a woman's vagina and thereby deduce her "habituation" to sexual intercourse. The test entrenches a skewed understanding about women that they are innately deceitful and works against justice dispensation.<sup>17</sup>

The two finger test in rape trials has proved to be imperative in deducing whether a woman was "habituated" to sexual intercourse; such test based on the medical jurisprudence in India brings in past sexual history of

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<sup>15</sup> In JAISING P. MODI, *A TEXTBOOK OF MEDICAL JURISPRUDENCE AND TOXICOLOGY* AT 938 (2008) it says "[I]t is necessary to take into consideration the relative strength of the parties and the community to which the victim belongs. It is obvious that a woman belonging to a laboring class who is accustomed to hard and rough work will be able to offer a good deal of resistance and to deal blows on her assailant and will thus succeed in frustrating his attempts at violation. On the contrary, a woman belonging to middle class or rich family might not be able to resist for long, and might soon faint or be rendered powerless from fright or exhaustion."

<sup>16</sup> The history of evolution of medical jurisprudence textbooks in India can be traced to "*A Manual of Medical Jurisprudence for Bengal and the Northwest Provinces*" written by Norman Chevers in 1856. Lyon published another book called the *Medical Jurisprudence for India: With Illustrative Cases textbook* which heavily influenced Dr. Jaising Modi in writing his seminal book in 1920 called *A Textbook of Medical Jurisprudence and Toxicology* which has proved to be a primary scientific source in legal adjudication of rape.

<sup>17</sup> Durba Mitra, Mrinal Satish, *Testing Chastity, Evidencing Rape Impact of Medical Jurisprudence on Rape Adjudication in India*, XLIX no 41, Economic and Political Weekly, 52-55 (2013).

victims which influence favourable decisions against the victims<sup>18</sup>. The Supreme Court of India in the recent case of *Lillu v. State of Haryana*<sup>19</sup> held the test and its implications to be violative of the dignity and integrity of the victim. It said that even if the test was “positive” it bears no inference on consent. But the court did not rule the test illegal and merely gave an instruction to not consider the test while formulating judicial opinions in rape cases.

Again, the *utmost resistance requirement* came into the legal system because according to men, chastity of women should be paramount and must be protected even at the cost of her life. The centre of attention in such a scenario is the victim, not the accused. The judiciary puts the onus on women to show “*appropriate*” or “*reasonable*” resistance as proof of non-consent and refrains from finding out whether the accused committed the crime with ill intentions<sup>20</sup>.

Although it is no longer the law but authoritative books on medical jurisprudence in India necessitate proof of physical resistance in order to corroborate accusation of rape. For example, one textbook lays down that “[i]t is necessary to prove that the resistance offered by the woman was up to her utmost capability

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<sup>18</sup> The test is also conducted on small female children (*Syed Pasha v. State of Karnataka* 2004 Cri L J 4123 (Kar)) and married women (*The Public Prosecutor, High Court of Andhra Pradesh v. Badana Ramayya* 2004 Cri L J 3510 (AP)).

<sup>19</sup> AIR 2013 SC 1784.

<sup>20</sup> In *Brown* 106 N.W. 536, 536 (Wis.1906), the accused raped a 16 year old girl after attacking her in a field and pushing her down on the ground. The victim screamed and shouted and struggled as hard as she could. Despite this the court acquitted the accused as it came to the conclusion that the prosecution failed to establish non-consent. It stated “[n]ot only must there be entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person.”

*and that every means, such as shouting, crying, biting, or beating had been tried to prevent the successful commission of the act.*<sup>21</sup> Therefore, the perspective through which a woman's actions are scrutinized and judged are male-centric. The requisite *mens rea* on the part of the defendant is not corroborated by his actions, but is deduced by judging the reactions of the victim.

By completely focusing on the victim; factors like her each move, her sexual past, her clothes, her gestures, her body<sup>22</sup>, the aptness of her behaviour etc. become the fulcrum of judicial adjudication about whether she was raped or not thereby putting the victim on trial instead of the accused. Physical reactions to rape have a rigid standard digressing from which may prove fatal to a rape accusation. The individuality of a woman is taken away and her unique way of reacting is dismissed as irrelevant. Therefore, even though the victims of rape are often women but men get to decide the meaning of that term.

### **III. POST-PENETRATION RAPE**

The term post- penetration rape was coined by Amy McClellan, a student at Santa Clara Law School in 1991.<sup>23</sup> It pertains to the *timing of withdrawal of consent*. A woman will be deemed to be a victim of post-

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<sup>21</sup> JAISING P. MODI, A TEXTBOOK OF MEDICAL JURISPRUDENCE AND TOXICOLOGY AT 898 (2008).

<sup>22</sup> The importance and features of breasts like roundness, plumpness and elasticity have been adduced as evidence in rape cases to prove virginity (e.g. *Nanda vs State of Madhya Pradesh*, MANU/MP/0543/2009). IN JAISING P. MODI, A TEXTBOOK OF MEDICAL JURISPRUDENCE AND TOXICOLOGY AT 277 (1945) photos of breasts belonging to virgins as compared to women who have not indulged in sexual intercourse are presented.

<sup>23</sup> Amy McClellan, *Post-Penetration Rape-Increasing the Penalty*<sub>31</sub>, Santa Clara Law Review at 780 (1991).

penetration rape if she initially consented to sex but during the act withdraws it but is made to continue using force despite her non- consent. However, because it involves initial consent it carries with it the tendency to be prone to sexist stereotypes and sexualisation of gender roles.

In 2003, Illinois became the first state to statutorily recognize post penetration rape under the category of acquaintance rape<sup>24</sup>. It enjoins upon the man a duty to cease sexual intercourse once consent is withdrawn or be liable to be charged for rape. Apart from this statute, analysing a few leading cases on post penetration rape to understand the way courts perceive rape, rape myths and decide on questions of sexual freedom and autonomy for women becomes imperative.

### ***A. Decisions curtailing Woman's Sexual Rights***

In *State v. Way*<sup>25</sup>, the court held that once consent is given for sexual intercourse, it cannot be unilaterally withdrawn. It enunciated that if initial penetration happened with the free consent of a woman and later was withdrawn, accused cannot be held guilty of rape, but he may be charged with other offences. The victim and accused were on their first date, after which they went to his house where he threatened her with death if she did not participate in sexual acts with him. The defendant only ceased the intercourse

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<sup>24</sup> 720 ILL. COMP. STAT. 5/12-17 (2002), amended by Act of July 25, 2003, P.A.93-389, § 5. "A person who initially consents to sexual penetration or sexual conduct is not deemed to have consented to any sexual penetration or sexual conduct that occurs after he or she withdraws consent during the course of that sexual penetration or sexual conduct."

<sup>25</sup> 254 S.E.2d 760, 762 (N.C. 1979).

after the victim started experiencing extreme stomach pain. However, the North Carolina Supreme Court held that consent can only be withdrawn for subsequent sexual acts and not for the one which has already begun.

Similarly in *Battle v. State*<sup>26</sup>, the Court of Appeals held that consent once given cannot be revoked and becomes unqualified. The court reasoned that rape occurs when penetration happens without initial consent and even if later the woman concedes, it would still fall under the definition of rape, ergo, if a woman consents before sex, and even if she withdraws it in the middle, it does not amount to rape.

Both the court decisions concluded that there is no such thing as post penetration rape. Even though the reasons for arriving at their decisions were different, the conclusion was similar that once a woman submits herself to a man sexually, then he acquires the rights over her body to sexually satisfy himself.

### ***B. Decisions Recognizing Women's Right to Say No***

In *State v. Robinson*<sup>27</sup> the Supreme Court of Maine took a critical view of the reasoning adopted by the court in *State v. Way*. The court brought in the critical element of compulsion which the victim undergoes to continue sexual intercourse which gives it the character of rape and withdrawal of consent is not the only decisive factor. The court held-"[i]t becomes rape if and when the

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<sup>26</sup> 414 A.2d 1266 (Md. 1980).

<sup>27</sup> 496 A.2d 1067 (Me. 1985).

*prosecutrix thereafter submitted to defendant's sexual assault due to threat of physical force or another form of compulsion*<sup>28</sup>.

In 2003, the Supreme Court of California in *In re John Z*<sup>29</sup> upheld the validity of post-penetration rape and overruled *People v. Vela*<sup>30</sup> a case decided by California Court of Appeals, and held that withdrawal of consent following initial penetration, must be heeded to by the other party to take it outside the purview of rape.

In *Vela*<sup>31</sup>, the court was faced with the question of post penetration for the first time. The case involved the issue of rape by a 19 year old of a 14 year old girl. The defendant stated to the police that the victim initially consented to having sexual intercourse with him but in the midst of the act withdrew her consent and communicated it to the defendant. He continued the act of penetration without terminating the sexual act against the will of the victim.

The court relied on cases from Maryland<sup>32</sup> and North Carolina<sup>33</sup>, and came to the conclusion that it was not rape. The court rested its reasoning on the subjectively determined *outrage* experienced by a rape victim and held that it would be less for a victim who had initially consented to sex. It stated-

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<sup>28</sup> *Robinson*, 496 A.2d at 1070.

<sup>29</sup> 60 P.3d 183 (Cal. 2003).

<sup>30</sup> Cal. Ct. App. (1985).

<sup>31</sup> 218 Cal. Rptr. 161 (Cal. Ct. App. 1985).

<sup>32</sup> *Battle v. State*, 414 A.2d 1266 (Md. 1980).

<sup>33</sup> *State v. Way*, 254 S.E.2d 760 (N.C. 1979).

*“the essence of the crime of rape is the outrage to the person and feelings of the female resulting from the non-consensual violation of her womanhood. When a female willingly consents to an act of sexual intercourse, the penetration by the male cannot constitute a violation of her womanhood nor cause outrage to her person and feelings. If she withdraws consent during the act of sexual intercourse and the male forcibly continues the act without interruption, the female may certainly feel outrage because of the force applied or because the male ignores her wishes, but the sense of outrage to her person and feelings could hardly be of the same magnitude as that resulting from an initial non-consensual violation of her womanhood.”*

In 2000, the First District Court of Appeal in California in *People v. Roundtree*<sup>34</sup> was again faced with a situation of post penetration rape. It rejected the reasoning of *Vela* and upheld the feasibility of post-penetration rape. It followed the reasoning adopted by the court in *State v. Robinson*<sup>35</sup> and several other cases<sup>36</sup> which held that that-

*“[t]he dramatic change from the role of a voluntary participant to that of a victim compelled involuntarily to submit to the sexual intercourse is a distinct one. When a victim is forced to submit to continued intercourse for a period after she has revoked her original consent, the crime of rape is committed”.*

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<sup>34</sup> 91 Cal. Rptr. 2d 921 (Cal. Ct. App. 2000).

<sup>35</sup> 496 A.2d 1071.

<sup>36</sup> *McGill v. State*, 18 P.3d 77, 84 (Alaska Ct. App. 2001); *State v. Siering*, 644 A.2d 958, 963 (Conn. 1994); *Robinson*, 496 A.2d at 1071; *State v. Crims*, 540 N.W.2d 860, 865 (Minn. Ct. App. 1995); *State v. Jones*, 521 N.W.2d 662, 672 (S.D. 1994).

*In re John Z.*, the Supreme Court of California again faced the issue of post penetration rape. The court rejected the reasoning of *Vela* and said that outrage experienced by a victim is only a reason for punishing rape and is not a decisive factor in concluding the occurrence of the crime. It further held that the outrage felt by a victim of post penetration rape must be substantial. It stated that, "*we have no way of accurately measuring the level of outrage the victim suffers from being subjected to continued forcible intercourse following withdrawal of her consent. We must assume the sense of outrage is substantial.*"<sup>37</sup>

It articulated two principles which would convert initial consent to non-consent and make the forced sexual act rape. *First*, the victim must clearly communicate her withdrawal of consent to the opposite party after sexual intercourse has begun with consent. After this the defendant must ignore her wishes and to judge this, the subjective standard of a 'reasonable person' would be used to assess whether he acted prudently for a man in his position in ascertaining whether she withdrew her consent. *Second*, the defendant continues to have intercourse with substantially greater force than is necessary to commit the rape itself.

The court applied these principles to the case at hand. It said that the first was satisfied as Laura (victim) told John to stop continuously and communicated her desire to go home. The court held that no reasonable person could have mistaken this for continuing consent. For the second element to be satisfied the court relied on the testimony of the victim when

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<sup>37</sup> People v. John Z 29 Cal. 4th 756.

she said that "*John stayed inside of me and kept basically forcing it on me.*" This according to the court met the force requirement of the second principle.

The court also rejected the "*primal urge*" or the "*unstoppable male*" theory which was raised by the defence contending that John should have been given a *reasonable amount of time to withdraw* and stop the sexual intercourse because all males have this basic primal instinct which makes it hard to control their sexual urges if told to stop immediately. The court held that "*[w]hen consent is withdrawn; continuing sexual intercourse for 4 to 5 minutes is not reasonable and constitutes rape.*" The court therefore acknowledged the invasive, disturbing and horrific effect of rape which exists even if consent was given prior to the act of sexual intercourse.

#### **IV. ELEMENTS OF PROOF**

Although post penetration rape is a noble way of advancing women's sexual right it would still function under a patriarchal socio-legal system which will look for some corroborative evidence of non-consent apart from verbal withdrawal of consent. Even though, the law has practically given up on the "utmost resistance" criteria, yet, courts while interpreting and balancing the legal and practical requirements of *consent* and *force* in rape law would ask for proof of *reasonable resistance* on the part of the victim.

As sexual activity in post penetration rape is initially consensual there will be lesser signs of physical distress or trauma. There may be no or little injuries on the bodies of the parties such as those associated with initial non-

consensual rape such as genital wounds and bruises. Therefore, there is a need to look at evidence of mental trauma or emotional distress to ascertain occurrence of rape. To do this, *Rape Trauma Syndrome* (“RTS”) becomes paramount and can be cited as evidence to prove rape besides the testimony of the victim. This was a result of feminist- oriented research towards understanding what women go through after rape<sup>38</sup>. Judith Herman, a psychiatrist from Harvard has been credited with forming a connecting theory between trauma and feminism.

RTS falls within the category of Post-Traumatic Stress Disorder (“PTSD”), a medical diagnosis of psychic harm which the physiologists associated with veterans of war and those who had experienced some traumatic event. PTSD was included in the 1980 edition of the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders*, known as DSM-III<sup>39</sup>. According to Judith Herman, it was “clear that the psychological symptoms seen in survivors of rape, domestic battery, and incest was essentially the same as the syndrome seen in survivors of war.”<sup>40</sup> During the process of revising the DSM in the 1980s, women’s groups successfully urged incorporation of abused women’s experience into the text.<sup>41</sup>

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<sup>38</sup> Ann Wolbert Burgess & Lynda Lytle Holmstrom, *Rape Trauma Syndrome*, 131 Am. J. Psychiatry 981 (1974).

<sup>39</sup> John P. Wilson, *The Historical Evolution of PTSD Diagnostic Criteria: From Freud to DSM IV*, 7 J. Traumatic stress. 681 (1994).

<sup>40</sup> JUDITH HERMAN, TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE – FROM DOMESTIC ABUSE TO POLITICAL TERROR AT 32 (1992).

<sup>41</sup> LISA APPIGNANESI, MAD, BAD, AND SAD: WOMEN AND THE MIND DOCTORS AT 425-26 (2007).

Victims of sexual assault experience symptoms which include depression, insomnia, nightmares, anxiety, nausea, numbness, anger, crying, sobbing, and even smiling<sup>42</sup>. Some victims may even respond in a different or unexpected way by being in complete control of their reactions and being calm, subdued and silent by hiding their feelings.<sup>43</sup> Some may experience situations where they feel like they are reliving the rape<sup>44</sup> or may react by developing phobias or by developing a general sense of nervousness called the “startle response”.<sup>45</sup>

Therefore, presenting evidence of RTS would greatly help in arriving at the right decisions and deciphering false cases from genuine ones. Moreover, the entire burden of proving that consent was withdrawn and was properly communicated despite of which the defendant did not stop sexual intercourse will be on the prosecution. This will help in weeding out false cases.

Another means by which false accusation may be prevented is by way of providing for criminal prosecution of anyone who is found to have made a false charge. Furthermore, the element of *force* may be examined. Usually, force is seen to be physical to which resistance is given which signifies non-consent. Moreover, the force so applied is seen in respect of the sexual act and not in a holistic manner. For example, a woman may submit to sex in a situation and later withdraw consent but it may not be physical force which subjugates her

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<sup>42</sup> Arthur H. Garrison, *Rape Trauma Syndrome: A Review of Behavioural Science Theory and its Admissibility in Criminal Trials*, 23 AM. J. Trial Advoc.591, 596 (2000).

<sup>43</sup> *Id.*

<sup>44</sup> *Id* 637.

<sup>45</sup> *Id* 598.

to continuance. It might not even be related to anything said or done on that day but may relate to past experiences with the man. In such situations, exploring the accused's past behaviour with the victim, removed in connection with the victim must be scrutinized.

In cases where the power relations between the accused and the victim are skewed heavily in favor of the accused and there might not be any evidence of force used.<sup>46</sup> In India, Dalit women repeatedly get raped by men even though they submit to the sex. No physical force in its traditional sense is used and consequently, some may even be disbelieved owing to the fact that they are untouchables.<sup>47</sup>

In all situations, where a woman is beaten, or subjugated in any manner, with whom lies no power to assert herself; *force* must be assumed and must not become a road block to justice. The distinction between power and force must be understood in the realm of real human relationships where the oppressor might not need to resort to *force as understood by law* to sexually make

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<sup>46</sup> A point of departure is the case of State of North Carolina v. Matthew Douglas Lester 321 S.E.2d 166 (Ct. App.1984). The defendant in this case was a violent man who beat his wife and daughters and indulged in sexual activities with all of them. On one occasion, he took his daughter to his trailer and asked his daughter "once or twice" if she wanted "to do it," and she answered that she did not. He then told her to take off her pants and panties, and the victim refused. When she perceived that her father was angry, however, the victim "finally gave in," undressed, and lay down in the seat of the car in compliance with her father's directions. The court in this case held "*there is no evidence, however, that defendant used either actual or constructive force to accomplish the acts with which he is charged. The victim's fear of defendant, however justified by his previous conduct, is insufficient to show that defendant forcibly raped his daughter on 25 November and 18 December.*"

<sup>47</sup> Maham Javaid, 'How India's "Untouchable" Women Are Fighting Back Against Sexual Violence', Refinery29, (October 15, 2015, 6:00 p.m), <http://www.refinery29.com/2015/10/95759/dalit-untouchable-women-india-sexual-violence>.

a woman submit to his authority. The lawmakers and interpreters of it should understand that in many situations, *force* and *non-consent* is not something that is patent but many women agree to sex because they feel that they do not have the power to say “no”. Similarly, post penetration rape victims do not lose their right to say “no” if they said “yes” initially. It is critical to appreciate that not recognizing this structure of consent and deeming it an aberration from the usual construct of consent translates into suppressing the individual sexuality of women.

## **V. EFFECTS OF RECOGNIZING POST-PENETRATION RAPE**

Rape victims are usually the target of societal sympathy or apathy which forces them to keep reliving their traumatic experiences and makes it difficult for them to feel normal. To give women more power over their sexuality, the man who ignores the woman’s decisive “no”, ignores the tears falling down her face, ignores her requests to stop, howsoever meek, must be punished, provided that the law lays down in clear terms the consequences.

Moreover, many much needed reforms in society must not be based on statistical evidence of effect of change in criminal law over society or *vice versa* by analyzing reporting of cases of convictions. By trying to find out some numerical data on how much “effect” bringing in a law has on society, we end up diminishing the experiences of many women and men. Recognizing a sub category of rape and adding it to law books, or changing the focus on rape from the victim to the accused might not change the data associated with rape but it will affect the lived realities of many women.

Legally recognizing post penetration rape will help in changing societal attitudes towards women, sex, gender roles, and sexuality and go a long way in debunking rape myths (discussed later). We can take a cue from the campaign for removing Section 377 of the Indian Penal Code. The total number of cases registered under Section 377 in 2014 was a mere 778<sup>48</sup> all over India while that of rape was a whopping 36,735.<sup>49</sup> The numbers are extremely low but that is not a criterion for not supporting its abolition as it deals with securing the dignity of people in society.

A law dealing with post penetration rape will cast a legal duty on every man to act with caution when it comes to sex, to respect women and their desires, to believe that women have complete agency over their decision. However, it has its own limitations and is not a panacea for bringing about complete change in law and society. Even if we think of its impact as subtle and largely symbolic, it will have a positive effect on women's right to sexual autonomy and the way we perceive women in sexual power relations.

When consent/non-consent are understood in a holistic women centric manner, focus on the victim's past sexual relationships, resistance, corroboration etc. would lose importance and victims will feel unburdened with the past. The idea is to broaden the understanding of rape, to desecrate the image of the "good victim" and to place some power in the hands of

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<sup>48</sup> Lok Sabha Unstarred Question No. 4883, <http://mha1.nic.in/par2013/par2014-pdfs/ls-231214/4883.pdf>.

<sup>49</sup> Crime In India – 2014, *Chapter 5- Incidence and Rate of Violent Crimes During 2014*, National Crimes Record Bureau, Ministry of Home Affairs, <http://ncrb.gov.in/StatPublications/CII/CII2014/Table%203.1.pdf>.

women when it comes to their bodies. The notion that some rapes matter more than others, is a fundamental flaw in the system which needs to be corrected.

Adopting an alternate perspective, the state and society can be compelled to take note of gender violence is to look at the costs associated with the current approach. When we place the power to regulate their own safety in their hands, the state can also draw back from incurring the *inter alia* continuous cost of surveillance. The need is to devise a strategy in which women can be on an equal footing in terms of discussions and contributions as far as it relates to their own safety. One of the problems many victims of sexual assault face is that even though they suffer physical or mental consequences, they are not able to judge for themselves if they have been victims of a crime. Due to social conditioning and trivializing of the notion of sexual freedom for women, many women do not report incidents of a sex crime. There is a general acceptance in society of sexually aggressive and assertive men. Men are believed to be not able to control their sexual desires and women are expected to understand this by not taking their sexual misbehaviour seriously.

Similar problems arise in cases of acquaintance rape where the victim is often unable to categorize her experience of sexual violation into any definition under law and therefore refrains from reporting. This is due to the stereotype associated with “real rape” or stranger or traditional rape where the woman is violently raped by a stranger and in order to defend her sustains injuries and wounds. Post penetration rape deals with all these issues of victims who consented initially to sexual intercourse but were made to forcefully have

sex after they withdrew consent. They may even feel that they have no right to withdraw consent because they initially consented. Therefore, by legally recognizing post penetration rape, women will be enabled to come out and report cases.

Rape myths further constrict the sexual rights of women and aggravate and encourage the tendency in society for putting the blame on the victim of sexual assaults. For example, one rape myth is that "[o]nce women entice men; the men are absolved, of their moral responsibility to control their sexual appetites."<sup>50</sup> This suggests that because a woman did not behave 'appropriately' she invited sexual wrath and hence should be solely responsible for it and face consequences. It also implies that a man's sexuality is dormant and he only becomes aroused or his sexuality is awakened when a woman entices him and therefore the blame falls on the women.<sup>51</sup> Recognizing post penetration rape will rightly hold a man responsible for his sexually aggressive actions and for controlling his sexual desires no matter how aroused he is.

Another problem associated with acquaintance rape is that society is more sympathetic towards victims of stranger rape and view acquaintance rape victims with doubt and distrust.<sup>52</sup> Such myths deny women freedom of sexual choice and portray women as confused about their sexual desires or hiding them which a man must find out by employing even physically aggressive

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<sup>50</sup> Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663,683 (1999).

<sup>51</sup> MARTHA R. BURT, RAPE MYTHS AND ACQUAINTANCE RAPE, 32 HIDDEN CRIME(1991).

<sup>52</sup> David P. Bryden & Sonja Lengnick, *Criminal Law: Rape in the Criminal Justice System*, 87 J. Crim. L. & Criminology, 1204 (1997).

means. Recognizing post penetration rape may help in slowly eradicating such preconceived notions about women. Since post penetration rape happens once consent initially given is withdrawn, therefore the stereotypical signs or signals that men think women give out to communicate their consent non-verbally become redundant in judging whether a woman was in fact consenting or not.

## **VI. CONCLUSION**

Sexual violence needs to be construed as a political problem and not one resulting of the morality of women and society. We also need to prioritize the agency of women in the face of violence and give them the freedom to react in whichever way they deem fit instead of bracketing their responses in the moral and legal sufficiency norms. The civil society and the larger framework of the women's movement needs to embrace the marginalized lived realities of the victims of post penetration rape and legitimize the violation of their sexual rights and the rights over their bodies.

The prosecution in post penetration rape cases will have to give victim friendly interpretation of critical elements of rape i.e. to the meaning of *consent* and *force* which have historically been constructed in favour of accused. Changing societal and legal attitude towards women is a gradual process and although recognizing post penetration rape legally will help in dissipating sexist perception of women and gender stereotypes, it has its own limits of functioning.

It provides legal sanction to the fact that sexual rights of women are to be respected and upheld and that forced sex with a woman is not a right if she granted consent initially but a privilege. In other words initial consent to sex is not a license to rape a woman. This understanding of rights of women is also a process of introspection which individuals need to observe when delineating the limits of their own behaviour.

Deconstructing and demolishing rape myths will prove to be highly effective because they give legitimacy to certain types of behaviour detrimental to both men and women. Therefore, stranger rape becomes the norm and anything short of fulfilling its conditions becomes unrecognizable as rape. Recognizing post penetration rape poses a serious challenge to a very central rape myth that “*rape is perpetrated by unknown persons*”.