

MARITAL RAPE : CHALLENGES AND CONCERNS

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ABSTRACT

Violence against women and girls is a major health and human rights issue. After marriage, the greatest risk of violence for women continues to be in their own homes where husbands and, at times, in-laws, may assault, rape or kill them. The abuse of women is effectively condoned in almost every society of the world. Violence therefore operates as a means to maintain and reinforce women's subordination. Feminists claim that a woman's lack of control over her person as the key foundation of her subordination.¹ Rape as an offence has been abhorred by the society and the law makers alike as is evident in the Criminal Law Amendment Act, 2013 wherein the definition of rape was enlarged to include non-vaginal rape. However when the issue of marital rape is raised, the 'silence' is disturbing. Marital rape violates the right of dignity of a married woman. It breaches the trust of wife. The reluctance to criminalize and prosecute marital rape has been attributed to traditional views of marriage, to interpretations of religious doctrines, and to cultural expectations of subordination of a wife to her husband. The question is, whether on being someone's wife does a woman forfeits her right to her body? Is marriage a license to rape one's wife? What are the justifications for marital rape exemptions? No doubt the purpose of the marriage is to provide right to have sex with wife but such right cannot be seen as an absolute right without having regard to the willingness of the wife. In this paper attempt shall be made to understand the complexities surrounding 'marital rape' followed by suggestions to address the issue. Doctrinal method of research has been applied in this paper.

Key Words : Marital Rape, Patriarchy, Human Rights Violation, Gender Equality

Introduction

Someone you know well and love-your mate-can rape you.

-a marital rape survivor²

We were married. He wanted sex. I didn't and was forced.

-a marital rape survivor³

No matter who the people are and what their relationship is- the fault always lies with the person who commits the acts. Rape is power, aggression, domination and always humiliation. It has to do with

all things being unequal. It is a reminder to that. Letting one know for certain, you have no choice in what's happening. It makes you feel less than human. Just like the family dog.

-a marital rape survivor⁴

Global estimates of intimate partner violence perpetrated by men against women indicate that 30% of ever partnered women (about one in three) worldwide have experienced physical and / or sexual violence by an intimate partner at some point in their lives.⁵

Nearly one out of four men in a United Nations study of 10,000 men in Asia admitted to having committed

a rape. Marital rape was by far the most common type of rape, followed by the rape of an intimate partner.⁶

According to a study by the International Centre for Women (ICRW) and United Nations Population Fund's (UNPFA), one-third of men out of a sample size of 9,205 admitted to have forced a sexual act on their wife or girlfriend. The study was conducted in eight states in India including Punjab, Haryana, Uttar Pradesh, Rajasthan, Gujarat, Maharashtra, Madhya Pradesh and Odisha.⁷ **The report also said that 75% of married women were subjected to marital rape.**⁸

Most cases of sexual assault in India are perpetrated by people the women know. In fact, the number of women sexually assaulted by their husbands is 40 times the number of women who suffer such violence from others. The study, by Aashish Gupta of the US-headquartered RICE Institute, cites statistics published by UN Women in 2011, which say that one in every 10 Indian women has suffered sexual assault by their husband and one in three has faced physical violence from the husband or intimate partner.⁹

A 2011 study by the International Centre for Research on Women (ICRW) stated that one in every five Indian men surveyed admitted to forcing their wives into sex.¹⁰

20% of Indian men admit to forcing their wives or partners to have sex.¹¹

According to National Family Health Survey, husbands commit the majority of the acts of sexual violence in India. Out of the total number of rapes reported to NFHS, 97.7% were committed by spouses of the victim.¹²

Contrary to popular notion, the impact of a rape from a perpetrator known and trusted by the victim may even be greater than sexual assault from a total stranger. Nevertheless, marital rape is perceived as the least serious or injurious because the perpetrator and the victim knew each other or were married to each other.¹³

Marital rape occurs mostly in societies which believe in the unjustified conventional assumption that once married, the husband essentially owns the wife. Sex within marriage is an essential component of a

happy married life, but this doesn't give the husband any authority to dominate the bedroom and force his wife to make love when she simply doesn't want to. It is at this juncture that the drawn lines are crossed and the sanctity of the institution of marriage is challenged.

Marital rape- the current position in India

In our society where cohabitation between a man and a woman, hitherto considered immoral and forbidden, has been judicially accepted in India. In a judgment in 2013, Additional Sessions Judge, Virendra Bhatt presiding a fast track court established to expedite cases of sexual offences against women held that rape charges cannot be slapped against a man because a relationship involving consensual physical intimacy with a woman did not culminate in marriage.¹⁴ This judgment gave recognition to free choice among consenting adults doing away with the requirement of 'marriage'. The judgment moved us towards a more modern meaning of rape focusing on individual rights: that which violates a woman's consent and choice giving the go-by to conservative social norms. However, within marriage, the same 'consent' is not considered necessary for our law makers including our Apex Court. To them, marital rape is a matter concerning 'personal issue' and does not qualify for a 'public cause'.¹⁵

In February, 2015, the Supreme Court bench headed by Justice A.R. Dave refused to entertain a woman's petition for declaring marital rape a criminal offence despite her plea that her husband, with whom she had a love marriage, repeatedly used force to violate her and said that the petition had been filed by an individual, so no general law could be laid down.¹⁶

The commonly accepted legal definition of rape is to have sexual intercourse by a man with a woman, not his wife, without her consent. In India 'marital rape', where a husband uses violence to force his wife to have sex with him, is not treated as an offence. The exception 2 to Section 375 I.P.C. (penalizing rape)

says "sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age is not rape".

A married woman being subjected to non consensual sexual intercourse, the perpetrator being spouse/husband, is worse off than a woman being subjected to rape, perpetrator being anyone other than spouse, merely because she is the 'wife' of the perpetrator, provided she is above 15 years of age. Also, as a general law, a man having sexual intercourse with a woman shall be guilty of rape, whether consensual or non-consensual, provided she is under 18 years of age.¹⁷ In the former case the perpetrator enjoys legal immunity from penal consequences while in the latter case, the perpetrator will be charged with the offence of rape. This amounts to discrimination solely on the grounds of marital status and is thus violative of Article 14 and 15 of the constitution which prohibits such discrimination.

As a result of this exception, force and violence by the husband against his wife culminating in forcible and violent sexual intercourse overriding the protests of his wife, is considered legal. On 29 April 2015, The minister of state for home Haribhai Parthibhai Chaudhary answering a query in Rajya Sabha that whether government will amend the Indian Penal Code to include forced sexual intercourse within marriage or 'marital rape' as an offence within the definition of rape commented that since marriage is perceived as a sacred union, marital rape cannot be brought within the purview of rape law.¹⁸ The Minister replied, "It is considered that the concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context due to various factors, including level of education, illiteracy, poverty, myriad social customs and values, religious beliefs, mindset of the society to treat marriage as a sacrament." The views reiterate notions of patriarchal norms. They seem to convey that men in India have a license to rape their wives with impunity. The acceptance of marital rape is detrimental to India's sociological health. The act of rape itself destroys the institution of marriage, not the ability, or inability to legally prosecute such

an offence. It is an insult to society at large for marital rape to not be criminalized," stated the petition challenging the exception clause to section 375 I.P.C.¹⁹

Earlier the 172nd Law Commission Report declined to recommend the deletion of the exception 2 to Section 375 I.P.C. on the ground that it may amount to excessive interference with the marital relationship.²⁰

Also, the Parliamentary Standing Committee On Home Affairs in The One Hundred And Sixty Seventh Report On The Criminal Law (Amendment) Bill, 2012 observed that if the marital rape is brought under the law, the entire family system will be under great stress and the Committee may perhaps be doing more injustice.²¹

Backing the long-standing demand of the women's activists that marital rape be considered as an offence, Justice J.S. Verma committee, the three-member panel, which was constituted to recommend amendments to criminal laws in the wake of the national outrage over the December 16 gang rape in Delhi, had sought "an inclusion for the definition of marital rape in the existing laws." The committee said, "The law ought to specify that marital or other relationship between the perpetrator or victim is not a valid defence against the crimes of rape or sexual violation." Also, the committee opined that the "relationship between the accused and the complainant is not relevant to the enquiry into whether the complainant consented to the sexual activity and the fact that the accused and the victim are married or in another intimate relationship may not be regarded as a mitigating factor justifying lower sentences for rape."²²

However these recommendations were not adhered to by the law makers.

Legal justifications for marital rape exemption

Under Common Law, the very concept of marital rape was treated as an impossibility. Husbands were exempt from prosecution for raping their wives. The

contemporary debate over the exemption operates on the assumption that the law's treatment of marital rape first became controversial in the late twentieth century. The opponents and defenders of the marital rape exemption generally content themselves with a brief citation to Sir Matthew Hale, who wrote the most influential treatise defending the marital rape exemption at common law.²³ The traditional explanation for legal incapacity to rape one's wife is that the marriage constitutes a blanket consent to sexual intimacy between the spouses. Marital rape exemptions are strikingly easy to trace to misogynist roots, from Hale's infamous argument that a married woman is presumed to consent to all marital sex and therefore cannot be raped, to the common law's assumption that marriage results in the unification of husband and wife.

Sir Mathew Hale, a former Chief Justice of the Court of King's Bench in England, in his 'History of the pleas of the Crown' wrote: "But the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract his wife hath given herself up in his kind unto her husband which she cannot retract." This principle established by Chief Justice Hale in 1736 was not challenged until *R vs. Clarke* [1949] 2 ALL E.R. 448, in this case the wife obtained a separation order containing a non-cohabitation order from the Magistrate's court.

Finally, in *R vs. R.*, it was held that there was no longer a rule of law that a wife was deemed to have consented irrevocably to sexual intercourse with her husband and therefore a husband could be convicted of the rape or attempted rape of his wife where she had withdrawn her consent to sexual intercourse. [*R. vs. R*(1992) 1 A.C. 599, House of Lords.²⁴

Bertrand Russell in his book 'Marriage and Morals' wrote "Marriage for a woman is the commonest mode of livelihood, and the total amount of undesired sex endured by women is probably greater than in prostitution." According to John Stuart Mill, in Victorian culture and society, "Culture insists that a woman's primary duty is to please and serve others and to put her own desires on hold. Moreover woman had to rely on their husbands for

everything. This reliance of a wife on a husband created a type of slavery. Just as a slave is fearful of displeasing his master because the master is the only way the slave gets fed and clothed, a wife is also fearful of displeasing her husband because her husband is her only means of food, shelter and social status."²⁵

Early nineteenth century women's movement challenged the presumed right of men to engage in forced or coerced sex with their wives. Historically rape and sexual assault were not criminalized when committed within the context of an intimate relationship. As an episode of law reform, the course of the nineteenth-century feminist campaign against marital rape illuminates a deep cultural resistance to altering this aspect of law, at a time when other aspects of a married woman's legal status were beginning to evolve. States willing to augment the property rights of married women in the middle of nineteenth century, or to ratify woman suffrage in the early twentieth century, were emphatically unwilling to subject husbands to prosecution for marital rape. Especially in case where sexual and reproductive rights were so directly implicated, the law makers categorically opposed the notion of incorporating into the law a vision of marriage as a potentially unhealthy, abusive, discordant, even dangerous site of human interaction, in which wives might need and deserve legal rights against their husbands.

One of the most striking aspects of the modern defense of the marital rape exemption is that it assumes the aligned interests of husband and wife. The defenders argue that the rule's continued existence protects marital privacy and promotes marital harmony and reconciliation. The assumption of aligned interests between husband and wife is so strong that proponents do not acknowledge that a marital rape exemption might cause wives harm. Despite the feminist efforts to analyze the exemption as an instrument of women's legal subordination, the notion of aligned interest between husband and wife assumes that a wife's interests, like her husband's are fully and consistently served in a marital relationship shielded from the possibility of criminal prosecution for

rape.²⁶The exemption's survival into the modern era is evidence to the fact that despite decades of feminist objection, the defenders of the exemption were far more powerful than its critics.

In the nineteenth century, the common law principles of coverture, further subordinated wives to their husbands. William Blackstone, explains "By marriage", the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband : under whose wing, protection, and cover, she performs everythingUpon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage.

Coverture united husband and wife by subsuming a married woman's civil identity and according husbands wide ranging control over their wives. According to James Schouler, 'the laws of nature and divine revelation jointly designated the husband as "the head of the family". It was for the wife to love, honour, and obey; it was for the husband to love, cherish, and protect.' The marital rape exemption is primarily understood, explained and defended on the marital status rule that conclusively inferred consent from a person's initial agreement to marry and coverture principles that organized marital status so that husbands exercised control over their wives.²⁷

The Common law recognized that a man can be prosecuted for raping a prostitute. In 1631, the King's Bench noted in Lord Audley's Case that a rape conviction could stand, notwithstanding proof that the party ravished was of evil fame, and of an unchaste life.²⁸The legal basis of such prosecution was based on the notion that the concern of rape laws centered, not on the status of the victim, but on the fact that the act in question was 'against the will of the female on whom it is committed'. Although, a man accused of raping a prostitute or concubine could offer evidence of 'bad character' against his alleged victim which may create a likelihood that the woman had in fact consented. Legal writers have maintained that the want of chastity of the female is no defense, for the crime of rape may be committed

upon a prostitute or upon the mistress of the assailant. However, the same reasoning for criminally holding husbands liable for raping their wives has been categorically denied.

While the concept of rape within intimate relationship remains highly problematic in many countries, an increasing number of countries are removing exemptions for rape/ sexual assault within an intimate relationship from their penal codes and / or enacting specific provisions to criminalize it.

Psychological and social justifications for marital rape exemption

Sexual entitlement — the "belief that men were entitled to sex regardless of consent" — was the top reason men gave for committing a rape, and half of the men who admitted to rape said they had committed their first rape as teenagers.²⁹

On March 1, 2015, *The Guardian* carried a story on the documentary *India's Daughter* by British filmmaker Leslee Udwin, highlighting an interview with Mukesh Singh, one of the four accused in the December 16, 2012 Delhi gang rape case. Mukesh's statement- "when being raped, she (a woman) shouldn't fight back. She should be silent and allow the rape"- which were seen as a generalization of the Indian male attitude.³⁰Mukesh's statement 'a decent girl won't roam around at 9:00 p.m.'³¹implying that being out at odd hours makes her automatically more 'desirable' for being raped without impunity, shows the preying nature of men in general and a woman as an object of desire, where there is no scope for 'consent'. Therefore, given this backdrop, sex within marriage where the question of 'consent' is inconsequential though legally allowed appears nothing more than sexual slavery. Within the context of marriage, Russell argues that men who rape their wives are patriarchal and feel a sense of ownership of them. Bergen's research indicates that entitlement to sex and the attempt to control wives through sexual violence

were commonly reported by women as the motivating factors of their husbands who raped them.³²

Also, men's attitudes and behaviour are strongly influenced by societal expectations about what it means to be a 'real man'. Emotion may be a sign of weakness. A 'real man' therefore admits little concern for his partner's wishes, pleasure or well-being.³³ Also, men become sexually entitled to their wives bodies because of the payment of bride price, a practice common in many African cultures, which renders the woman a property of the husband. Finkelhor and Yllo also found that American husbands they interviewed perceived sex in marriage as an entitlement and felt a sense of power in their ability to control their wives by raping them.³⁴

Harmful norms, such as those encouraging violence, can also be transmitted across generations. A meta-analytic review of 39 published research studies on the intergenerational transmission of partner violence demonstrated that children who witness intra-parental violence are themselves more likely to be involved in violent relationships in adulthood. These studies all point to the importance of childhood experience on later attitudes towards gender equality and perpetration of violence.³⁵

Psychological and social reasons for under-reporting of marital rape

Rapes committed by non stranger were less likely to be reported to the police as compared to stranger rapes.³⁶ Husbands commit a majority of acts of sexual violence in India, and just one percent of marital rapes and six percent of rapes by men other than husbands are reported to the police as per social scientist, Aashish Gupta.³⁷ Similarly, only about 1% of the incidents of physical violence by other men, and 2% of the incidents of physical violence by husbands were reported.³⁸ Usually, marital rape remains hidden and the available information underestimate the extent of abuse. There are many reasons why all forms of violence against women including marital rape go under-reported. Firstly,

because of socially constructed gender roles and sexual scripts for a 'good woman'. There are research which indicates that wives are emotionally coerced to have sex with their partner through a sense of marital obligation and wifely duty. Secondly, the fear of bringing shame and loss of honour to their families. The fear that nobody would respect them if they complained of being raped by their own husbands, because no self respecting woman refuses her husband sex.³⁹ Also there is the need to protect the family privacy and dignity. Because people generally believe that incidents of non consensual sexual intercourse within intimate relationships undermine a family's image of public respectability. Thirdly, it is the fear of subsequent family aggression (including divorce and custody battles) in case the incident of marital rape is reported. Fourthly, economic dependence forces most women to remain silent about their abuse for fear of losing the economic support they receive from their husbands. Also, despite having economic independence women usually do not have decision making power in sexual relationship and are forced to comply because men still have more social power due to patriarchy.⁴⁰ Fifthly, researches have found that even though women see forced sexual intercourse as rape, they often doubt whether this can be considered a crime within marital relationships.⁴¹ Sixthly, most of the victims believe that the rape was a personal or private matter. Other reasons cited were the fear of reprisal and the victim's belief that the police would be inefficient, ineffective or insensitive.⁴²

International safeguards against marital rape

Violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanism by which women are forced into a subordinate position compared with men.

Gender Violence throughout a Woman's Life

<u>Phase</u>	<u>Type of Violence</u>
Prenatal	Sex-selective abortions, battering during pregnancy, coerced pregnancy (rape during war)
Infancy	Female infanticide, emotional and physical abuse, differential access to food and medical care
Childhood	Genital mutilation, incest and sexual abuse, differential access to food, medical care and education, child prostitution
Adolescence	Dating and courtship violence, economically coerced sex, sexual abuse in the workplace, rape, sexual harassment, forced prostitution
Reproductive	Abuse of women by intimate partners, marital rape , dowry abuse and murders, partner homicide, psychological abuse, sexual abuse in the workplace, sexual harassment, rape, abuse of women with disabilities.
Old Age	Abuse of widows, elder abuse (which affects mostly women) ⁴³

United Nations Resolution 61/143 of 19 December 2006, on the intensification of efforts to eliminate all forms of violence against women stresses the need to criminalize all forms of violence against women and urges States to revise or abolish all laws and regulations that discriminate against women or have a discriminatory impact on women. Resolution 63/155 of 18 December 2008 urges states to use best practices to end impunity and a culture of tolerance towards violence against women.

The United Nations Declaration on the Elimination of Violence against women, under Article 1, the term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life. Further under Article 2 'violence against women' includes, inter alia, physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-

spousal violence and violence related to exploitation.

National safeguards against marital rape

Under the present legal system, the remedies available to a woman is provided for in The Hindu Marriage Act, 1956, Indian Penal Code, 1860 and the Protection of Women from Domestic Violence Act, 2005.

Under the Hindu Marriage Act, under Section 13, an aggrieved woman can seek divorce on the ground of cruelty.

Under Section 376B IPC a man can be imprisoned for a term not less than two years but which may extend to seven years and shall also be liable to fine, if he has sexual intercourse with his wife during separation, without her consent, whether judicial or otherwise.

Section 498A IPC makes it a criminal offence if a husband or his family treats his wife cruelly. Though

'cruelty' has not been defined in the Indian Penal Code, the explanation to Section 498A IPC includes physical and mental harassment and can be extended to include incessant demands for sex. The penal offence is punishable with imprisonment for a term which may extend to three years and shall also be liable to fine.

The Protection of Women from Domestic Violence Act, 2005, which defines 'sexual abuse' to include any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of a woman; provides for the civil remedies like protection orders, residence orders, the right to reside in a shared household, counseling etc. depending upon the particular case at hand.

It is argued that women are trapped in sexually abusive marriages only because of the clause which exempts husbands from the purview of section 376 of the Indian Penal Code. If this offensive clause is deleted, women will be able to walk out at the very first instance of sexual abuse and press criminal charges against their husbands.⁴⁴

Women do not walk out of their abusive marriages because of the very nature of dependency. So even if the offending clause is deleted, it will not change the lives of women unless they have a strong support base and society stops viewing marriage as the be all and end all of a woman's life. Lacking state support and economic means, marriage is the only option for most women to ward off destitution and secure a roof over their head. Rape every night and domestic violence becomes a small price to pay, when basic survival is at stake. Moreover, despite the clinching evidence of wide prevalence of domestic violence, our only answer to the problem has been to provide "counseling", where the woman is advised to adjust, reconcile and 'save the marriage' even at the cost of danger to her life, because nothing else exists for her outside.⁴⁵

Conclusion

The rampant increase in the incidences of marital rape along with the striking under-reporting of cases of marital rape which is clearly elicited by statistics

calls for its immediate criminalization as a separate offence. It is the duty of the State to ensure protection for its citizen, particularly women facing sexual assault within marriage instead of taking the responsibility of protecting the institution of marriage. It has been seen that nation states have been uncomfortable in addressing marital rape as a human rights violation of women. Governments have been reluctant in taking note of such brutal acts especially in patriarchal societies. Furthermore, in countries where customary laws prevail alongside codified law, governments have been concerned about the use of discriminatory customary law and practice, despite laws enacted to protect women from violence.

With the criminalization of marital rape, women will move forward towards attaining legal equality under the law and in their marriages, women will be recognized as autonomous persons, not mere property. The criminalization of marital rape helps to establish a culture of accountability for women's human rights, and to improve the physical safety and security of women. It contributes to the creation of societies that respect women's rights, and helps to reduce the vulnerability of women to other forms of violence. It protects women from a form of violence that has serious health consequences, including the spread of HIV/AIDS. Marriage should not be seen as an institution marred of unequal power relations between men and women. Sex within marriage should be an expression of love not violence. Ending marital rape immunity means that in taking marriage vows, women are not required by law to cede control over their own bodies. In short, married women will have the right to say NO to sex at any time, for any reason.

Suggestions

1. There is a need to address social norms that make violence against women acceptable, including men's belief that they have the right to sex within marriage. Governments must undertake initiatives to address gender socialization and unequal power relations between men and women.
2. Marital rape must be made a penal offence in India. Although, the Criminal Law Amendment Act 2013 widened the scope of the offence of rape, however, marital rape remains to be acknowledged as a penal offence.
3. Research into male perpetration of Intimate partner violence has been quite scarce. It must be prioritized by all the stake holders.
4. Attempt should be made to link provisions of the civil law of Domestic Violence Act to the criminal provision, if the need arises, so that the woman is simultaneously awarded protection, maintenance, shelter and support.
5. There is a need to integrate violence prevention into social and educational policies and thereby promote gender and social equality.
6. Denying a woman right to her person after marriage is a serious human rights violation. Emphasis should be made to promote and monitor adherence to international treaties, covenants to protect human right violation in the name of 'men sexual entitlement'. According to a study, 73.3% of respondents accepted 'sexual entitlement' as the reason to have committed rape.⁴⁶
7. Enhance capacity at local as well as national level for collecting data on marital rape.

8. Define priorities for and support research on the causes, consequences and prevention of instances of marital rape.
9. Governments and law enforcing agencies must be held accountable for ensuring proper implementation of laws, particularly enforcing women's rights.

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