

Marital Rape: The Victim behind Closed Doors

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ABSTRACT

Marital rape is a serious yet unheard offence. The walls of the house, the doors of that room are the evidence of how deep, brutal and inhumane crime is being committed and the victim has to remain silent only because of the social stigma and her husband uses his superior position to breach her trust and individual integrity. Marital rape is a serious and often insidious form of violence against women with potentially devastating long term physical and emotional effects.

In India, marriage is considered a sacred union hence the term attached 'rape' with marital is dissolving its sacred sense. Marital rape is just as heinous as a rape, being married to a husband who rapes you every night is a daily terror, a ritual that had to be done every night without her approval. There is a immediate reason to change the prevailing laws in India which can give the victim the answer that married woman have the right to approach the legal system. With new generation coming, the archaic law should be changed and by criminalizing spousal rape one does more than punish rapists, it protects women in abusive relationship as well.

Keywords: Marital, Criminalizing, spousal, India, Integrity.

INTRODUCTION

The word 'rape' has been derived from the term 'rapio', which means 'to seize'. Rape is therefore, forcible seizure, or the ravishment of a woman without her consent, by force, fear or fraud. It involves coercive, non consensual sexual intercourse with a woman. Rape can be viewed as an act of violence of the private person of a woman, an outrage by all means. It is the ultimate violation of the self esteem of a woman. The Supreme Court of India has aptly described it as 'deathless shame and the gravest crime against human dignity'¹. Rape is not merely a physical assault, but is destructive of the whole persona of the victim. The law did not conceptualize it as an offence against the person of the woman, one that destroys her freedom; rather, it conceived rape as an instrument for protecting a man's property from the sexual aggressions of other men. Therefore the act of rape within marriage was not recognized as an offence as woman was considered the property of the husband, and a man could not be perceived to violate his own property. Marital rape is particularly complicated because the complex, personal nature of marital relationships makes it hard for the victim to even see herself as a victim, which is why Marital Rape is one of the highly under-reported violent crimes. Even

¹ Bodhisattwa Gautam v. Subhra Chakraborty AIR 1996 SC 922

the women who do consider themselves victims are disinclined to approach the authorities because they are financially dependent upon their husbands, and reporting the matter could very well result in withdrawal of financial support leaving them and their children without food and shelter.

Robin Morgan defines rape as “rape exists any time sexual intercourse occurs when it has not been initiated by the woman, out of her own genuine affection and desire.” Rape is not the worst thing that can happen to a woman, as rape was in the past seen as such a terrible crime because it was about tainted male honor. A raped woman would be defiled, a source of shame to fathers, husbands and brothers; the deed was done and could not be undone.

Now rape is again seen as a matter of permanent defilement. Women never get over rape; we are told that they are scarred for life. Rape cases are a law unto themselves - the woman’s name is kept secret, she is allowed to testify via a video link - set apart from other crimes. Everything reinforces the notion that this is a uniquely devastating and shameful crime. This forces the victim not to carry on the life as one wanted, the society and our law never lets the victim forget the terrible incident.

Today there are various countries that have criminalized spousal rape or have laws that do not distinguish between marital rape and ordinary rape. These countries include: Albania, Algeria, Australia, Belgium, Canada, China, Denmark, France, Germany, Hong Kong, Ireland, Italy, Japan,

Mauritania, New Zealand, Norway, the Philippines, Scotland, South Africa, Sweden, Taiwan, Tunisia, the United Kingdom, the United States, and recently, Indonesia.

In Colombia, marital rape was criminalized in 1996,² in Chile in 1999.³

Thailand outlawed marital rape in 2007⁴.

LAW AGAINST RAPE IN INDIA

“Rape of women by men has occurred throughout recorded history and across cultures and religions. It is a crime against basic human right and a most common crime against women in India.”⁵

The history of Rape laws in India begins with the enactment of the Indian Penal Code (IPC) in 1860 (45 of 1860) covered under Section 375 and 376. According to the original provision as in Section 375, a man is said to have committed rape who, except in the case hereinafter accepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:

- (1) Against her will,
- (2) Without her consent,
- (3) With her consent, when her consent has been
Obtained by putting her in fear of death or of hurt,
- (4) With her consent when the man knows that he is not her husband, and her consent is given because she believes that he is another

² ["Violence against Women in Colombia" \(PDF\)](#). Omct.org

³ ["Concluding comments of^s "Violence against Women in Colombia" \(PDF\)](#)

⁴ ["Thailand outlaws marital rape"](#). The China Post

⁵ Jiloha R.C "Rape: Legal issues in mental health perspective"

man to whom she is or believes herself to be lawfully married, and

(5) With or without her consent when she is under 16 years of age.

This definition explains that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. It gives an exception that sexual intercourse

By a man with his wife, the wife not being under 15 years of age will not constitute rape.

Section 376 provides punishment for rape. According to this Section, whoever commits rape shall be punished with imprisonment for life, or with imprisonment of

either description for a term, which may extend to 10 years, and shall also be liable to fine, unless the woman raped is his own wife and is not under 12 years of age, in which case he shall be punished with imprisonment of either description for a term, which may extend to 2 years or with fine or with both.

AMENDMENTS

The rape law under IPC had gone through a lot of amendments⁶. In 1983, amendment was made and Section 376 (2), that is, Custodial Rape, Section 376 (A), that is, Marital Rape, and Section 376 (B to D), that is, Sexual Intercourse not amounting to rape were added. As per the Criminal Law Amendment Act (1983), revealing the identity of a rape victim is an offence. Though this Act maintains more or less the same definition of rape, it introduces many new categories of offence of sexual intercourse by persons in custodial situation such as superintendents of hospitals, remand homes, prisons, and police officials with women in their custody. In cases of

⁶ Gaur KD. Text Book on Indian Penal Code, Delhi: Universal Publishing; 2003,

custodial rape, burden of proof lies with men and if a woman victim makes a statement that she did not consent, the court would believe that she did not consent. Sexual intercourse by a man with his wife, who is living separately from him under a decree of separation or under any custom or usage without her consent, is punishable with imprisonment, which may extend to 2 years. This offence is cognizable and bailable⁷. The Supreme Court verdict of 2012⁸ says that the rape trials must end within 2 months as stipulated under law. The Supreme Court also directed trial courts to "strictly adhere" to existing norms while asking them to rule out the possibility of "maneuvering" through undue long adjournments. Section 309 of the Criminal

Procedure Code (CrPC) provides that in every inquiry or trial the proceedings should be held as expeditiously as possible and once the examination of witnesses begins the same shall be continued on a day today basis till all the witnesses are examined. In cases that come under Section 376 (rape) and related offences under Sections 376 A to D of the IPC, the CrPC stipulates that "the inquiry or trial shall, as far as possible, be completed within a period of 2 months from the date of commencement of the examination of witnesses." The victim of rape suffers mental and psychological trauma, which must be addressed to provide a helping hand to

Enable her to cope with the trauma suffered and to tide over her immediate and long term needs so that she is able to lead a dignified and meaningful life. The provision of rape laws in the IPC (Section 375 and

⁷ Jiloha R.C "Rape: Legal issues in mental health perspective"

⁸ Supreme court norms on rape trial not being followed strictly: Experts. The Economic Times. PTI Dec 30; 2012

376, IPC), echoes very archaic sentiments, when it mentions as its exception clause "*Sexual intercourse by man with his own wife, the wife not being under 15 years of age, is not rape.*" Law bestows an absolute immunity on the husband in respect of his wife, solely on the basis of the marital relation. It is a nonconsensual act of violent perversion by a husband against the wife where she is physically and sexually abused. Marital rape is far too common in Indian society. The UN Population Fund⁹ states that more than two third of married women in India, aged 15-49 have been beaten, raped, or forced to provide sex.

LAW COMMISSION REPORT

There are four major law commission reports¹⁰ that address the law on rape while two reports recommend on the IPC in general within which the provision of rape is discussed, the other two reports exclusively deal with reforms related to rape. These are as follows:

1. 42nd Law Commission Report
2. 84th Law Commission Report
3. 156th Law Commission Report
4. 172nd Law Commission Report.

Each successive Report is an improvement over the prior one addressing the issue; however, many useful recommendations have not found their way into the Bills presented to Parliament. The 172nd Law Commission Report had made the following recommendations for substantial change in the law with regard to rape.

1. Rape should be replaced by the term 'sexual assault'.

2. Sexual intercourse as contained in Section 375 of IPC should include all forms of penetration such as penile/vaginal, penile/oral, finger/vaginal, finger/anal, and object/vaginal.

3. In the light of *Sakshi v. Union of India and Others* [2004 (5) SCC 518], 'sexual assault on any part of the body should be construed as rape'.

4. Rape laws should be made gender neutral as custodial rape of young boys has been neglected by law.

5. A new offence, namely section 376E with the title 'unlawful sexual conduct' should be created.

Section 509 of the IPC was also sought to be amended, providing higher punishment where the offence set out in the said section is committed with sexual intent.

Marital rape: Explanation (2) of section 375 of IPC should be deleted. Forced sexual intercourse by a husband with his wife should be treated equally as an offence just as any physical violence by a husband against the wife is treated as an offence. On the same reasoning, Section 376 A was to be deleted. Under the Indian Evidence Act (IEA), when alleged that a victim consented to the sexual act and it is denied, the court shall presume it to be so. The Domestic Violence Act, 2005 (DVA)¹¹ provides civil remedies to what the Section 498A of IPC provision of cruelty already gave criminal remedies, while keeping the status of the matter of marital rape in continuing disregard. Though Section 498A deals with cruelty, to protect women against perverse sexual conduct by the husband, there is no standard of measure or interpretation for the

⁹ The United Nations Population Fund: Assault on the World's People, http://www.unfpa.org/docLib/20080624_U_NPF.pdf [2008 Jun 24].

¹⁰ Sen R. Law commission reports on rape. *Eco Political Weekly* 2010;XLV: 445

¹¹ The Protection of Women from Domestic Violence Act 2005 (43 of 2005)
<http://indiacode.nic.in/fullact1.asp?tfnm=200543>

courts, of 'perversion' or 'unnatural,' the definitions within intimate spousal relations.

Is excessive demand for sex perverse? Isn't consent a *sine qua non*? Is marriage a license to rape? These are some of the questions need to be answered. [33] Section 3 of the DVA, among other things in the definition of domestic violence, has included any act causing harm, injury, anything endangering health, life, etc., mental, physical, or sexual.

It condones sexual abuse in a domestic relationship of marriage or a live-in, only if it is life threatening or grievously hurtful. It is not about the freedom of decision of a woman's wants. It is about the fundamental design of the marital institution that despite being married, she retains an individual status, where she does not need to concede to every physical overture even though it is only her husband.

IDEA OF MARITAL RAPE

Roots of 'marital rape' can be traced in the statement of Sir Mathew Hale, England's chief justice during the 1600s, "*The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given herself in kind unto the husband, whom she cannot retract.*"

The revolution against marital rape began with women activists in America raising their voices in the 1970s for elimination of marital rape exemption clause and extension of guarantee of equal protection to women. The importance of consent for every individual decision cannot be overemphasized. A woman can protect her right to life and liberty, as well as her body even within the wedlock. As a result most of the Western countries have declared marital rape unlawful.

The Section 376 in dealing with sexual assault, in a very narrow purview lays down that, an offence of rape within marital bonds stands only if the wife be less than 12 years of age, if she be between 12 and 15 years, an offence is committed, however, less serious, attracting milder punishment. Once, the age crosses the permissible limit there is no legal protection accorded to the wife, in direct contravention of human rights regulations.

The definition of rape (Section 375 IPC) has been criticized for other reasons as well by the Indian and international women's and children organizations, who insist that including oral sex, sodomy, and penetration by foreign objects within the meaning of rape would not have been inconsistent with nay constitutional provisions, natural justice, or equity. Even international law now says that rape may be accepted as the "*sexual penetration, not just penile penetration, but also threatening, forceful, coercive use of force against the victim, or the penetration by any object, however slight.*"

In 1869, John Stuart Mile observed that marital rape is never welcome to women for it represents a surrender of dignity so absolute in nature, that it lowers the stature of the wife beneath that of a slave. The basic premise fir this assumption lies in the fiction that the wife is considered to have given her irrevocable consent to sexual intercourse at the time. Article 2 of the declaration of the elimination of Violence against women includes marital rape explicitly in the definition violence against the victim and not the criminal the benefit of doubt.

Statistics of Marital Rape

In 2010, figures released by the Medical Research Council showed that 18.8 % of South African women admitted to being subjected to marital/partner rape. Similarly,

18.2 % of men who were studies admitted to forcing their current or ex partners/wives to have sex when they refused. A similar study by the Council showed sexual violence by an intimate partner was only reported by 2.1 % of women experiencing this form of violence. South Africa only criminalized marital rape in 1993. But even in countries where it has been made illegal, laws are not always reinforced by communities, for example: Nepal passed a law in 2006, making marital rape a criminal offense. Yet, the World Health Organization found in 2007, that in practice, this law is not enforced strictly, owing to a lack of support for it by law enforcement agencies, as well as the prevalence of victim-blaming.¹²

In 2013, a United Nations survey found that nearly a quarter of 10,000 men questioned in six Asia-Pacific countries including India, admitting to having rape a female partner. The belief that they are entitled to have sex even without their partner's consent is a common motivation, the study found. Majority of these men experienced no legal consequences. *"This study reaffirms that violence against women is preventable, not inevitable"* says James Lang, Programme Coordinator, Partners for Prevention. *"Prevention is crucial because of the high prevalence of men's use of violence found across the study sites and it is achievable because the majority of the factors associated with men's use of violence can be changed."*

¹² Infographic: marital rape is still legal in these 38 countries, <http://www.w24.com/infographic>.

Regarding rape, the study found that in the sites where the survey was conducted:

- Of those men who had admitted to rape, the vast majority (72-97 percent in most sites) did not experience any legal consequences, confirming that impunity remains a serious issue in the region.
- Across all sites, the most common motivation that men cited for rape was related to sexual entitlement - a belief that men have a right to sex with women regardless of consent. Over 80 percent of men who admitted to rape in sites in rural Bangladesh and China gave this response.

The study's findings reaffirm that violence against women is an expression of women's subordination and inequality in the private and public spheres. The findings show how men's use of violence against women is associated with men's personal histories and practices, within a broader context of structural inequalities.¹³

For the average Indian man, masculinity is about *"Acting tough, freely exercising his privilege to lay down the rules in personal relationship and above all controlling women."*¹⁴ the study found that 60% of men admit their wives to have sex by using violence.

¹³ United Nations survey of 10,000 men in Aisa and the pacific, "why some men use violence against women and girls", (Sep 10,2013), <http://www.unpd.org>

¹⁴ United Nations Population Fund, research study, 2014

Efforts towards bringing Change

Various incidents happen to women that they cannot share with anyone and remain silent, there are certain cases that are so heinous that women have to be admitted in hospitals. Doctors know that this is the case of marital rape yet no FIR is lodged against the husband because no such parameters are given in our law.

In 2013, an article was published¹⁵ in a newspaper which had an interview with a lawyer named Manisha Tulpule. She said, "There is a pattern to the silence: women stay quiet about the assault when young, but are willing to report it at a later stage. Recalling a particularly gruesome case where a man administered electric shocks to his wife's vagina, lawyer Manisha Tulpule, who handles cases of domestic violence and family matters, said the woman complained after enduring 25 years of this: "The woman was over 50 when she complained." Ms. Tulpule said that in many cases, women are in their forties when they speak out.

In 2013, a panel of lawmakers told parliament that the move "has the potential of destroying the institution of marriage." Home Affairs Minister Haribhai Chaudhary said¹⁶ in April that "the concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context due to various factors, including illiteracy, poverty, social custom, religion and the

widespread perception that "marriages are sacrosanct the Indian government, would not be considering any amendment to its laws regarding marital rape despite a United Nations recommendation to do."

It does not take literacy or wealth to recognize that rape is wrong¹⁷ nor is this problem restricted to poor communities. In fact, no social custom or religious belief permits rape. "For a large part of society, marriage is not a romantic, egalitarian partnership entered into by choice, but an understanding between two families promising economic and social security to a woman in exchange for sexual availability and fidelity, housekeeping and child birth and care," Supreme Court advocate Sood said. "The issue of non consensual sex is often not even seen as a valid issue then, as marriage is viewed as irrevocable consent for life." This view that wives are duty-bound to have sex with their husbands is, in fact, codified in law.

In 2012, a high court in the southwest Indian state of Karnataka ruled that a woman denying sex to her husband without a specific reason is a form of "cruelty." The Supreme Court made a similar ruling last year.

In other words, while "a woman can't accuse her husband of rape," the husband "can legally take her to court for saying no to sex," said the Nalsar University of Law's Mustafa. "Marital rape is legal, [but] a woman saying no too often is not."

¹⁵ Srivastava Roli, The Hindu, September 16, 2016, Mumbai.

¹⁶ Dominique Mosbergen, Huffintonpost, November 24, 2015.

¹⁷ Minakshi Ganguly interview with huffintonpost.

A 27-year-old woman last week, who, after being abused, beaten, and raped by her husband in their first year of marriage, petitioned the courts to change the archaic law. *“Every night was a nightmare. I used to get jitters before going into my room at night. I would dread the thought of what was awaiting me. What happened in our bedroom every night was not what normally happens between a husband and wife. I felt like he had bought me. I was treated like a sex slave, like a sex toy. He would insert things inside me, slap me, and bite me”*.she told the Hindu.

“It was the 14th of February 2014, and it was his birthday. I had baked a cake. What he did to me that night is a disgrace to the institution of marriage. He hit me 17 to 18 times with a box and with a [flashlight], after which he inserted [the flashlight] into my vagina. I started bleeding but instead of taking me to the hospital he took me to my in-laws’ house and locked me up until late evening. When the bleeding didn’t stop, my in-laws took me to the hospital. I was in a semi-conscious state and had to be taken in an ambulance. My legs and my entire body had swollen up. I was bleeding profusely. I bled for 60 long days. After almost a year of trying to get justice in lower courts, the woman—who is not being identified because

Indian law forbids revealing the identity of sexual assault victims—with the help of lawyers from the New Delhi-based Human Rights Law Network (HRLN), a collective of lawyers and human rights activists, approached the Supreme Court of India in February, petitioning to declare marital rape a criminal offense.

“I’m not angry, but I’m sad. I’m sad at the condition of the women in my country who face this, day after day, night after night. If, as an educated and independent woman, I’m struggling for justice, think about the many women who endure the pain and torture in silence every day. Will there never be a law that upholds their rights?” “I don’t understand the law. I’m a layman. All I want to know is: Don’t married women have any right to approach the legal system? Are they only meant to suffer, commit suicide or die?”

This is something serious and demands an urgent need to change, this law can let women go before the court after marriage and not feel powerless. If our law cannot provide them the help they need it is worthless to their existence. Woman has and still continues to be victimized by man and society. There is a need to acknowledge her as a human being, to give her respect and the dignity she deserves.