

BEHIND THE CLOSED DOORS: IS MARITAL RAPE NO RAPE?

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A rape is essentially an offense against a woman, disrespecting her dignity and sense of pride and when it happens inside of the four walls of her own bedroom, it reduces the status of a lady to a mere article utilized just for sexual pleasure. There is an urgent requirement for an explicit law on marital rape in India, which ought to be at par with the global standards on this dreadful issue. The fear of facing it and further having to noiselessly endure it is an agonizing felt that influences the mind of the women. The absence of laws and copious social marks of disgrace against the demonstration of marital rape is one of the essential reasons that the malevolence of marital rape is still holed up behind the holy of marriage. The woman has been bestowed with the right to fight for assurance and justice when her perpetrators are strangers, however when the culprit of her real honesty is her own spouse, who she wedded with all the pompous and show, such assurance is abandoned by the law. In light of this, the thought that a woman (wife) needs to engage in sexual relations with her spouse irrespective of her will and well being, is completely unfair and unacceptable to a well educated society. Most certainly, simple criminalization of marital rape in India wouldn't end this issue, yet it beyond any doubt is an imperative step towards changing the women's experience of sexual brutality in a marriage. The stage has come, that the notion, "a rape is a rape, inconsiderate of the relationship between the victim and the culprit" is put entirely in black and white in the statutes.

"I say nothing, not one word, from beginning to end, and neither does he. If it were lawful for a woman to hate her husband, I would hate him as a rapist."

— Philippa Gregory, *The Red Queen*

Marital rape is both an outcome and a causal factor to women's inequality in the Indian society. The sad fact that it has not been criminalized in India shows a deep lacunae in the laws of India, and highlights the apparent failure of the legal system of India. Marriage is essentially a social and sacrosanct institution in India. And this "*sacrosanctity*" has been used as a veil to cover the acts of the husband by stating that marital rape cannot be criminalized in India because it

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is a sacrosanct institution.¹⁰⁸ The "*sacrosanct*" institution of marriage has now come down to nothing but, being a mere myth and is evidently defiant of a woman's perception of the ground realities of the marriage. Marriage isn't just a devout union of two people, like everything else, it has its own set of problems. One of which is now the talk of the town, the problem of '*Marital Rape*', which is a sad and bleak truth of our Indian society.

The word 'rape' has been derived from the term 'rapio', meaning, 'to seize'. Rape therefore is the forcible seizure, or the ravishment of a woman without her consent, by force, fear or fraud¹⁰⁹. While, rape has been defined under law as, "the unlawful carnal knowledge of a woman by a man forcibly and against her will".¹¹⁰ "Marital rape therefore, implies unwanted intercourse by a man with his wife by force, by threat of force, by physical violence, or when she is unable to give consent¹¹¹. The role of wives has been generalized as one which is delicate, accommodating and of a homemaker. Sexual intercourse has been dealt with as a necessary requirement in a marriage. Even talking openly of it is a taboo in India, therefore, the ignorance. Financial independence, still a dream for many Indian women is an obviously essential condition for being heard and regarded with respect. With these women being augmented the bitter medication of becoming the "ideal wives", by discreetly and selflessly serving their husbands, guiding and counselling these women seems like a far reach.

The immunity from marital rape finds its origin in the long out-dated concept of marriage that regarded wives nothing more than the property of the husbands. According to this concept, a wife was presumed to have given consent to have intercourse with her husband at his convenience and will, the moment she married him. To make it worse, this presupposed consent was incapable of being revoked by the wife. Tracing the roots back to 1736, Sir Matthew Hale declared: "The husband cannot be guilty of rape committed by himself upon his

¹⁰⁸Haribhai Parthibhai Chaudhary, *Minister of State for Home Affairs*. Article available at <http://ibnlive.in.com/news/centre-says-marital-rape-not-a-crime-as-marriage-is-sacrosanct-in-india-activists-cry-foul/542926-3.html>

¹⁰⁹ Dr. Bhavish Gupta & Dr. Meenu Gupta; *Marital rape : Current Legal Framework in India & the need for change*

¹¹⁰ Black's Law Dictionary, 2nd edition

¹¹¹Priyanka Rath ; *Marital Rape and the Indian Legal Scenario*. Available at http://www.indialawjournal.com/volume2/issue_2/article_by_priyanka.html

lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract"¹¹².

It is very surprising and disappointing at the same time to note that Lord Hale did not offer any genuine argument, case law or legal basis to back his assertion. He asserted that, on agreeing to the marriage, the wife unconsciously hands over her legal person to the husband and consents to all sexual acts inter alia other things, which cannot be withdrawn at any later date for any reason. He implanted within the concept of marriage, a notion of 'implied consent' that started at the time of the marriage and continued for the entire course of the marriage, and such consent was deemed to be irrevocable by Lord Hale.

As early as 1869, John Stuart Mill stated 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." There is an alarming upsurge in the demand for criminalizing marital rape. It is very crucial that the differentiation between rape outside marriage and inside marriage be removed. A rape is a rape whether it be by a stranger or by the husband. In fact, married women are at a greater risk of multiple and repeated rapes when under the same roof as the rapist (husband) as compared to a complete stranger. Marriage in no possible way should be used as a defence and as a license to rape. The disheartening fact that, Marital Rape is not rape in India, is the poignant reality of our country and depicts the submissive position of the Indian wives in a marriage. Even if by gathering courage, in case a woman facing such sexual abuse wants to challenge it, her will to initiate legal proceedings is curtailed by law. There is no State protection for women facing rape inside marriage, because it has been explicitly mentioned as an exception to the definition of Rape¹¹³ under the Indian Penal Code.

There have been judicial pronouncements in this regard, where the Judiciary has tried to address this issue. In *Bodhisattwa Gautam v. Subhra Chakraborty*¹¹⁴ The Supreme Court of India, said that "*rape is a crime against basic human rights and a violation of the victim's most cherished of fundamental rights, namely, the right to life enshrined in Article 21 of the Constitution. Yet it negates this very pronouncement by not recognizing marital rape*"

¹¹²Hale ; *History of the Pleas of the Crown* 629 (1778).

¹¹³ Indian Penal Code(45 of 1860) Section 375

¹¹⁴ AIR 1996 SC 922 : (1996) 1 SCC 490 : (1996) 1 SCJ 338

REPERCUSSIONS THAT FOLLOW

In 2000, 2/3rds of married Indian women claimed to have been forced into sex by their husbands when surveyed by the United Nations Population Fund¹¹⁵.

A rape has far reaching effects on a woman, whether physically, psychologically or emotionally. The physical effects include, torn muscles, bruises, irregular menstrual cycles, vaginal tearing, injuries to private body parts of the woman etc. Additionally, women raped by their husbands repeatedly may face certain gynaecological issues and problems such as miscarriage, still births, infertility and potential transfer of STDs.¹¹⁶ This is the result of the recurring nature of such rapes and multiple assaults that result in long-term physical, emotional and mental ramifications.

A study¹¹⁷ was conducted where 68 women, who were brutally raped during the war times, by the Medical Centre for Human Rights (Zagreb), Croatia during 1992-1995 were the respondents. The study deduced that the most common after effects faced by victims of rape included psychological disorders such as depression, suicide attempts, substance and alcohol abuse and dissociative disorders.

The psychological ordeal also runs through the family when the children of the family become witnesses to the sexual abuse of the father on the mother. Even if the woman recognizes the husband as abusive, there are barriers to her escape. Various social and religious hurdles include shaming of the woman and her family and these represent hindrances to separation or divorce.

Financial and monetary dependency on the husband and in some cases photographs and videos shot of the sexual abuse are used as tools to blackmail the woman, also limiting her options to reach out for help and stand against the injustice done to her.

VIOLATION OF RIGHTS OF WOMEN

At the very first instance, it is evident that the Exception to Section 375 of the Indian Penal Code, which states that “sexual intercourse by a man with his own wife, the wife not being

¹¹⁵<http://www.icrw.org/media/press-releases/unfpa-press-release-unfpa-icrw-study-deconstructs-mind-%E2%80%98masculine%E2%80%99-indian-male>

¹¹⁶ Saurabh Mishra & Sarvesh Singh, *Marital Rape - Myth, Reality and Need for Criminalization* Available at http://www.supremecourtcases.com/index2.php?option=com_content&itemid=1&do_pdf=1&id=586

¹¹⁷ <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2080379/>

under fifteen years of age, is not rape”, goes beyond the scope of at least two constitutional provisions.

1. Article 14

Article 14, guarantees the equal protection of laws to all persons and requires that all persons are equal in the eyes of law. The marital rape exception under section 375 of IPC, however, categorically denies to "married" women the protection of laws against rape, a protection that is extended to the unmarried women under the same statute. Putting it simply, this means that the law unequally distinguishes a class of women solely based on their marital status. The law under Article 14 provides that a reasonable classification is allowed if there exists a nexus between the classification and the objective to be achieved. Here, the classification of married woman and unmarried woman is unreasonable and also does not have any nexus with the objective to be achieved by the rape law. The rape law aims at reducing the number of rapes and gradually extinguishing the crime of rape from the Indian society. Therefore, this exception to section 375 is clearly violative of Article 14 of the married women in India. It puts them in a position of loss only because they are married. The mere fact that a woman is married does not make the crime of rape a lesser crime.

2. Article 21

Secondly, by depriving the married women of an effective and strict penal remedy against forced sexual intercourse by their husbands, their right to privacy and bodily integrity are violated. These two are very well the aspects of the right to life and personal liberty guaranteed under Article 21. The women are deprived of protecting their body and their integrity because of absence of a concrete law for marital rape.

The traditional link of the right to privacy and the physical spaces of the bedroom has for long been criticised. Keeping the State, law and judiciary out of the bedroom ensures the perpetuation of inequalities between men and women that exist within the domestic and private sphere, and deepens the existing structures of power and domination by the Indian men. Critics argue that marital privacy, which by the way justifies explicitly laws such as the marital rape exception, is a fundamental denial and a question mark of the society's commitment, the constitutionally guaranteed rights of treating all persons with equal respect and concern.

THE STATUS QUO

As per the Indian Penal Code, the instances wherein the husband can be criminally prosecuted for an offence of marital rape are as under:

1. When the wife is between 12 – 15 years of age¹¹⁸;
2. When the wife is below 12 years of age.¹¹⁹
3. Rape of a judicially separated wife¹²⁰;
4. Rape of wife of above 15 years in age is not punishable¹²¹

Marital Rape has been explicitly included in the definition of violence against women in Article 2 of the Declaration of the Elimination of Violence against Women¹²². Emphasis on these provisions is not laid to torture, but to give the victim and not the criminal, the benefit of doubt.

The Supreme Court has held in a number of cases that the "offence of rape violates the right to life and the right to live with human dignity of the victim of the crime of rape".¹²³ The Supreme Court in the case of *State of Maharashtra v. Madhkar Narayan* has held that every woman was entitled to sexual privacy and it was not open to for any and every person to violate her privacy as an when he wished or pleased.¹²⁴

172nd LAW COMMISSION REPORT

The 172nd Law Commission report¹²⁵, passed in March 2000, recommended *inter alia* that the exception of marital rape mentioned under section 375 of IPC should be deleted. Any kind of forced sexual intercourse by a husband with his wife should be treated as criminal an offence just as any physical violence by a husband against the wife is treated as an offence. On the same grounds of reasoning, section 376A was recommended to be repealed.

THE STAND SO FAR

¹¹⁸ Indian Penal Code (45 of 1860), Section 376(1).

¹¹⁹ *ibid*

¹²⁰ Indian Penal Code (45 of 1860), Section 376A.

¹²¹ Indian Penal Code (45 of 1860), Section 376A.

¹²² <http://www.un.org/documents/ga/res/48/a48r104.htm> visited on 30/6/2015

¹²³ *The Chairman, Railway Board v. Chandrima Das*, AIR 2000 SC 988

¹²⁴ AIR 1991 SC 207.

¹²⁵ 172nd report of Law Commission of India on Review of Rape Laws, March 2000, para 3.1.2.1

In *Emperor vs. Shahu Mehrab*¹²⁶, a man was convicted under section 304A¹²⁷ Indian Penal Code for causing death of his child-bride by the act of rash and negligent sexual intercourse with her.

In *Saretha vs. T. Venkata Subbaih*¹²⁸, the Andhra Pradesh High Court held: The "rights and duties of parties in a marriage, like its creation and dissolution are not the terms of a private contract between two individuals. The right to privacy is not lost by marital association".

The Kerala High Court, in *Sree Kumar vs. Pearly Karun*¹²⁹, held that because the wife was not living separately from her husband under a decree of separation or under any of the customs, even if she is subject to any kind of sexual intercourse by her husband against her will and without her consent, any offence under Section 376A, IPC cannot and will not be attracted.

In October 2014, when a man in Delhi showed adult videos to his wife and forced her to perform unnatural sex, was accused of raping her, the Additional Sessions Judge, Kamini Lau was seen saying, : "*Non recognition of marital rape in India, a nation set upon the bedrock of equality, is gross double standard and hypocrisy in law which is central to the subordination and subjugation of women.*"¹³⁰

With the above-mentioned judicial pronouncements, it is evident that even though the State and Judiciary are willing to help the victims of the heinous crime of rape, they actively differentiate between women who have been raped under various different circumstances only on the ground that the circumstances were different. What needs to be understood is that with change in circumstances the offence does not! The Judicial Stand has been so varied that it is difficult to comment on the status of rape laws in India. One couldn't with surety tell, whether a certain case of forced sexual intercourse would fall under the definition of rape or not in India.

JS VERMA COMMITTEE REPORT

As a consequence of the gang rape in Delhi on 16 December 2012, where a medical student aged, 23 was brutally gang raped by six men, leading to her death, a number of protests,

¹²⁶ AIR 1917 Sind 42

¹²⁷ Causing death by negligence.—Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both

¹²⁸ AIR 1983 AP 356

¹²⁹ 1999 (2) ALT Cri 77

¹³⁰ <http://www.vakilno1.com/legal-news/court-emphasizes-need-make-marital-rape-serious-offense.html>

marches and uproar were seen across the country. A three member commission was appointed to reform and invigorate the anti-rape law of India. Justice Verma was appointed as the Chairperson for the committee. The committee members included Ex-Solicitor General Gopal Subramanian and Justice (Retd.) Leila Seth. The committee took consideration of the recommendations made by the UN Committee on the Elimination of Discrimination against Women (UNCEDW committee) in respect of India. The CEDAW Committee has recommended that India "should widen their definition of rape under the Penal Code to reflect the realities of sexual abuse experienced by women and to remove the exception of marital rape from the definition of rape"¹³¹

Inter Alia, the committee recommended rape law amendments for marital rape . The judgment of the European Commission of Human Rights in the case of *C.R. v UK*¹³², was quoted in the report of the committee, which clearly mentioned the conclusion that a rapist remains a rapist irrespective of what relationship he has with the victim.

In the light of the same, the committee recommended that,

" i. The exception of marital rape should be removed.

ii. The law ought to explicitly state that:

a. A marital or any other relationship between the accused and the victim is not a valid defence against the crimes of rape or sexual violation;

b. The relation between the accused and the complainant is not important for the inquiry into whether the complainant consented to the sexual activity;

c. If the accused and victim are married or in another intimate relationship, it may not be regarded as a mitigating factor for pronouncing lower sentences for rape"

In a report submitted to the Parliament in March, a group of lawmakers said that the proposed marital rape law "*has the potential of destroying the institution of marriage,*" adding that "*if marital rape is brought under the law, the entire family system will be under great stress.*"

¹³¹ <http://nlrd.org/wp-content/uploads/2013/01/121798698-Justice-Verma-Committee-report.pdf>

¹³² (1995) 21 EHRR 363

The recommendation of the JS Verma committee on criminalizing marital rape was not accepted by the Government and the Criminal Law Amendment Bill 2013 that was passed subsequent to the JS Verma Committee report did not mention marital rape as an offence under the Indian Penal Code. The government is hesitant to criminalize marital rape because it would mean amending laws based on personal religious practices like the Hindu Marriage Act 1955.¹³³

CONCLUSION

Today there are numerous nations that have either enacted marital rape laws, repealed their exception or do not look at an ordinary rape and marital rape differently. These nations include: Australia, China, Belgium, Canada, France, Denmark, Ireland, Norway, Hong Kong, Japan, Italy, Germany, New Zealand, South Africa, Scotland, the Philippines, Taiwan, Sweden, UK, US, and the latest, Indonesia. Turkey criminalized marital rape in 2005 whereas, Mauritius and Thailand did the same in 2007. The criminalization of marital rape in all these nations, both in and around our continent Asia is a corroboration to the fact that the act of marital rape is currently perceived as an infringement of human rights. In 2006, it was assessed that marital rape is an offense rebuffed under the criminal law in at least 100 nations and disappointingly, India is not one of them. Despite the fact that marital rape is predominant in India, it has taken cover behind the holy and sacrosanct veils of marriage.

Despite the fact that a husband's rough and non-consensual demonstration of intercourse may qualify a wife for bringing a suit for criminal assault, or divorce, what is required as the need of the hour is the incorporation of and recognition of a strict punishment for marital rape in our penal laws. Not just child - brides, but all wives need legitimate security from assault inside of the marriage. It is high time that the poise and opportunity of a woman over her body and individual must be perceived. Could the State truly enter the four walls of the bedroom? The response to this is a "yes". It as of now already does, in the instances of cruelty, same-sex relations, separation and settlement requests, then why leave the most abominable and egregious wrongdoing outside the ambit of the State and laws. Why should the zone of marital rape remain past its pale? The State which does not include itself at the marriage yet goes about as a referee amid separation must secure a woman's entitlement to her body. The woman has and still keeps on being deceived by man and society. There is a need to recognize her as an individual, far from the antiquated thought of her being a unimportant asset, and give her regard

¹³³ Preetika Rana ; Why India Still Allows Marital Rape

and the pride she merits. The patriarchal force structures have considered marriage to be a permit to legitimate unwilling sex. There is an aggregate refutation of the self-esteem of a woman.

At long last, to the individuals who contend that criminalizing marital rape will bring about a large number of "false" and sham cases, as do haters of Section 498A : for a casualty of rape, the difficulty does not end when she documents an objection against her abuser; her own particular sentiments of disgrace, blame and absence of self-esteem, and the anguish of being physically and candidly abused are not all she must battle with. From the minute she stands up, she is subjected to uncertainty, trashing and even shunning; at each stage, her thought processes, beliefs and ethical quality are addressed, and she is regularly compelled to experience a level of investigation that even her abuser does not confront. For a woman who is assaulted by her own spouse, the disgrace is just intensified; the investigation just expanded. She must face allegations of conveying disrespect to her family, stayed with marks that will tail her for the duration of her life .This atmosphere of threatening vibe towards real casualties is most sufficiently likely to deter most women from wrongfully charging their mates.

All said and done, there would only be advantages in criminalizing the crime of marital rape, more so, in identifying marital rape as a crime. The women empowerment that India talks about and desires to achieve can only be possible when crime against women are taken at hand. Criminalizing marital rape would be a strong step towards the same. Are wives not women?