

MARITAL RAPE IN INDIA: WHEN SAYING NO IS NOT AN OPTION

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BACKGROUND

Rape is an act said to be committed when a man had a sexual intercourse with a women against her will or without her consent¹. From a woman's perspective, if she chooses not to have intercourse with a specific man and the man chooses to proceed against her will, he has perpetrated a criminal act of rape.² Marital rape being a type of rape is committed by the husband on her wife by having a sexual intercourse against her will or without her consent. Amongst all types of rape, marital rape is the most invidious type of rape yet largely unnoticed form of sexual violence.³

In India women are considered as a private property of a husband to whom he is entitled to use in whichever way he wants to. Although society recognizes that family violence is a serious and pervasive problem, often requiring intervention by the criminal justice system, marital rape has not raised the public eyebrow, despite its alarming frequency.⁴ Statistics indicate that one out of every seven women "who has ever been married, has been raped by a husband at least once, and sometimes many times over many years."⁵

According to Susan Brownmiller, "Rape became not only a male prerogative but man's basic weapon of force against woman, the principal agent of his will and her fear. His forcible entry into her body, despite her physical protestations, became the vehicle of the victorious conquest of her being, the ultimate test of his superior strength, the triumph of his manhood..."⁶

¹ Section 375 of Indian Penal Code, 1860.

² S. Brownmiller, *Against Our Will* 18 (1975).

³ S. Devika and T. Mohan "Marital Rape and Criminal Law: Patriarchal Phantoms and "Neutral" Facades".

⁴ Note, *Marital Rape*, 9 NOVA L.J. 351 (1985); see also Griffin, *In 44 States, It's Legal to Rape Your Wife*, 9 STUDENT LAW. 57 (1980).

⁵ D. RUSSELL, *RAPE IN MARRIAGE* 2 (1982). The conclusion is based upon a random sampling of 930 women which Russell generalized to the population at large.

⁶ Susan Brownmiller "Against our will-Men, Women and Rape" (New York, Bantam), 1975

This paper deals with the concept of marital rape in India and its effect on the society. Marital rape is the type of rape which is not criminalized in India as it is constituted within a marriage and in India marriage is considered as a sacrament in which a husband holds a license to treat his wife in whatever way he wants. According to them marriage is a license to sex and if a woman refuses to her husband for not having sex then they are justified in using force on her or even raping her.

Marital rape just not breaches the trust of women but violates their right to live a life with dignity and respect. Even then by not criminalizing it as an offense, Indian Parliament raises a serious question that is a married woman being considered as an object or the property of the husband in the Indian society?⁷ Clearly by not making any law for marital rape and still recognizing it as legal the Indian Parliament seems to support this contention. It also raises the question, as to does a married woman holds any right to save her body from the lust of her husband.⁸ India is a land where girls are treated as a goddess in that land there is no laws to protect women in her own house by her husband. On one hand we Indian celebrate *Navratri* for 9 days preaching the various faces of '*Maa Durga*' and on the other hand our men treat their wives as their slave to whom they are entitled to do anything, whose will and consent is immaterial to them. No doubt the purpose of the marriage is to provide *Right To Have Sex* with wife but whether this right can be coupled with force or right to have sex even against the will or consent of the wife.

India has been a male dominated society and it is also a fact that Indian culture gives special status to the women. Today, we talk about women empowerment and many rights have been provided to the women for their empowerment and development but in a male dominated society, would women be empowered in real sense without criminalizing marital rape. The main purpose of this article is to find out as to whether the sex without the consent of wife should be considered as rape.

INTRODUCTION: WHAT IS MARITAL RAPE?

'If Rape is the genus, then marital rape is one of its species. It can be defined as unwanted or forced

⁷"Behind closed doors Marital rape in India" available at <http://www.livemint.com/Politics/b6HcnmMqYadNzWAP05FbEO/Behind-closed-doors-Marital-rape-in-India.html> (last visited on 09.05.2015)

⁸ *Id.*

sexual intercourse by a man with his own wife without her express or implied consent by the use of threat or coercion of physical harm'.⁹

Husband is the one whom wives totally trust for their safety and protection but what remedy they have when they feel unsafe within their own house by their own husband? Though society nowadays considers rape as very heinous and serious crime and because of the same reason there are strict laws implemented for punishing the rapists and ensuring justice to the victim but rape laws do not pay any attention towards the protection of married women.

Married women who are subjected to this kind of sexual violence by their own husbands in their own house have no place left to go as according to societal views of India after marriage a women's life is in her husband's house only, he is her god and she should do everything to make her husband happy and satisfy so they cannot complain about their husband to their family due to societal pressure and as law does not recognized marital rape as a crime they can't even go to police. Thus, no options left they are condemned to this humiliation and torture daily.¹⁰

Marital rape does not only affect the women physically but psychologically also, it affects both the body and soul of a women. The act of using and abusing a women's body for sexual pleasure without her express or implied consent does not only affects her dignity but also creates a revolting thought that her presence is just required for providing sexual pleasure to someone.

REASONS FOR MARITAL RAPE

The reasons of marital rape can be many such as sexual perversion of husband, to prove his superiority over her, to dominate her, to release his anger and frustration on her, to torture her, on petty domestic issues, an attempt of her to demand right in marital relationship, etc. Thus, in short the main reason of this marital menace is wide spread gender inequality prevailing in our society which taught every boy since their childhood that they are superior to girls, girls are made for adjusting, for sacrificing and for dominating. There is nothing wrong if u mistreat her. It is another aspect of our patriarchal

⁹ "Marital Rape" available at <http://www.indiacelebrating.com/social-issues/marital-rape/> (last visited on 09.05.2015)

¹⁰ *Id.*

and male-dominated system of social norms where women and girls do not hold any right in front of male.¹¹

Another reason is the role assigned to married women in our society since ancient times. The role as defined by society to married women is of '*Pati-vrata Naari*' means pure, faithful and obliging women who follow her husband's directions fully and fulfill all his demands without any questioning.¹² Sexual relationship has been considered as an important part of married woman's duty towards her husband and she is not supposed to deny that to him in fact there is no requirement of obtaining any type of consent to her. Her role must be of submission and surrender.

One of the reasons that married women are unable to protect themselves from frequent practice of marital rape is the economic dependence that she has on her husband and in laws and are bound to bear the violence and torture because of it. The *absence* of any legal provisions recognizing marital rape as an offence is another reason which indirectly encourages the man to continue treating their wives badly and leaving their wife with no remedy.

MARITAL RAPE AND THE LAW OF THE LAND

The most shocking thing that one can feel in India is dealing with the problem of marital rape. This is a problem which society till today hesitates to accept and the law of the land refuses to criminalize but the fact clearly shows that how women is facing this problem in a large number. There is no special provision present in the **Indian Penal Code, 1860** for the marital rape; in fact *Section 375* of **IPC** states it as an *exception* to the definition of rape.

Even though marital rape satisfies all the conditions stated under *Section 375* but still marital rape is stated as an exception to this section. **Neither the Indian Penal Code, 1860 nor any other specialized legislation such as the Domestic Violence Act, 2005 specifically recognizes marital rape as a crime.**

¹¹ *Id.*

¹² *Id.*

Though marital rape is one of the most humiliating and degrading experience for a woman but our legislatures did not yet find it appropriate to amend existing laws or to enact a new specialized legislation to protect married women from this continuing violence. Even in the recent case of 'Rashmi', the apex court has refused to accept the plea for marital rape stating that it is not possible to amend the law for one person.¹³ The recent incident of gang rape and sexual harassment which took place on 16 December 2012 however had created a revolution in the Indian society when a young physiotherapy student died because of the various injuries she had suffered. People walked out of their houses and gathered in the streets forcing the then Government to amend the laws related to the rape. Then the Congress-led United Progressive Alliance government appointed a three-member commission headed by **Justice J.S. Verma** to suggest remedies for combating sexual violence and rape. One of its recommendations was to criminalize marital rape but the Government refused it stating that if made a crime, marital rape would be misused or be difficult to prove or would result in the unnecessary break-up of marriages as no one can pee in the bedroom of a couple to see that actually what happened between them.¹⁴ Rape laws developed to protect the interests of men, not the victimized women, whom men viewed as property. Men designed laws to prevent abduction of propertied virgins, a crime they viewed as akin to damaging another man's property.¹⁵ From this perspective, prosecuting a husband for raping his wife made no more sense than indicting him for stealing his own property.¹⁶ After being abducted and ravished, a propertied woman who was a virgin could save her rapist by marrying him.¹⁷

The primary issue was the consolidation of the property interests of the two, not vindication for the victim's injury.¹⁸ Among the various objections on criminalizing marital rape the most common question is how do you prove it? You can't refuse to enact a law just because of the reason that it will be difficult to prove the crime. One should go to the outpatient departments of any government

¹³ <http://www.bbc.com/news/world-asia-india-32810834> (last visited on 09.05.2015)

¹⁴ *Id.*

¹⁵ *Supra* Note 2, For a chronology of historical developments in rape, see S. BROWNMILLER, Pg. 11-22; B. TONER, THE FACTS OF RAPE 112-30 (1977).

¹⁶ Freeman, "But if you can't Rape Your Wife, Who[m] Can You Rape": The Marital Rape Exemption Re-examined, 15 FAM. L.Q. 1, 8 (1981).

¹⁷ *Supra* Note 2, "Subsequent Marriage Doctrine" See S. BROWNMILLER.

¹⁸ *Id.*

hospital to know the extent of married women coming in for treatment for grievous injuries caused by sexual assault done by their husband.¹⁹

It is difficult to prove the crime stated under section-377 i.e. unnatural offences still we have a law for it. It is difficult for proving rape charges also still we have laws for it similarly there is a need of strict laws for marital rape. Marital rape charges will be subjected to cross examination and forensic evidence like any other rape charge and can be proved by it.²⁰

The second objection for not criminalizing marital rape as an offence is by saying that sexual assault is already covered by the existing Domestic Violence Act but the reality is that the Domestic Violence Act deals with the problem of sexual assault only. It does not criminalized marital rape as an offence. It is a civil law that gives relief to abused wives by which she can seek protection or civil relief but not criminal prosecution. According to many men's rights group if we criminalize marital rape then the whole institute of marriage will fall apart and this will be widely misused as section 498A of the Indian Penal Code is misused which was made to seek to protect women.

CONTRADICTIONS:

Indian government played a very contradictory role after rising the age of consent by which a girl is deemed capable of consenting to sex from 16 to 18 years. In other words, any sex with a girl below the age of 18 is statutory rape, even if she is in a consensual relationship with their partner but what if that girl is his wife? Is this change the whole scenario? Here's where the contradictions begin. If a girl of 15 years old is married then it is legal for her husband to have sex with her with or without her consent. Then it won't amounts to rape.²¹ Just a stamp of marriage makes the act of rape legal then. India has the largest number of child brides in the world in spite of the fact that the legal age of marriage for girls is 18. There are a large number of such contradictions where law is something but the need of the time is something totally different. According to one of the report of 'The Hindu' last

¹⁹ *Supra Note 9.*

²⁰ *Id.*

²¹ "Behind closed doors- Marital rape in India" available at <http://www.livemint.com/Politics/b6HcnmMqYadNzWAP05FbEO/Behind-closed-doors-Marital-rape-in-India.html> (last visited on 09.05.2015)

year, out of 600 court judgments in Delhi, 40% of all rape cases dealt with consenting couples where the girl was a minor and her parents had accused her boyfriend of rape.²² This is the result of rising down the age bar for girls to give consent for a sex. Irritated Parents of the girl used this as a tool and weapon to teach them a lesson.

The conservatism in matter of sexual offence can easily be seen by the judiciary and the government by these types of action of the government and the judiciary. Recently in February 2015, the Delhi high court refused to entertain a public interest litigation challenging section 375 of IPC that does not consider “sexual intercourse by a man with his own wife, the wife not being under 15 years of age” to be rape.

There is a great discomfort about the sexual autonomy of women and courts rarely take a stand, falling back on stereotypes about how women use the law.²³

ESTABLISHMENTS:

Delhi gang rape case in India had witnessed a revolution and lot of changes in the mindset of the society. People got agitated and furious and were demanding strict laws for crime like sexual assault, rape, acid attacks etc. but still on the issue of marital rape they were silent. For rape there was zero tolerance among people but for criminalizing marital rape, very few voices. In India, the idea of sexual consent in marriage is still an anomaly for many. If women had given her consent to marriage, then she is consenting to a sexual relationship as according to many people the main purpose of marriage is satisfying the biological needs of the man so it doesn't matter if a woman is ill and does not want to have sex that day. If the husband wants to have sex then he has every right to do so as she is his wife who is his private property after marriage. The issue of marital rape is still waiting for an incident like Delhi rape case to wake the society from their traditional thinking.

FIGURES OF SHAME:

²² *Id.*

²³ “Behind closed doors- Marital rape in India” available at <http://www.livemint.com/Politics/b6HcnmMqYadNzWAP05FbEO/Behind-closed-doors-Marital-rape-in-India.html> (last visited on 09.05.2015)

- A survey of NCRB states that 98% of all rapes involve perpetrators familiar to survivors. These presumably include friends, acquaintances, colleagues and relatives.²⁴ But husbands? Obviously not! Maybe this is the reason for not criminalizing marital rape because husband can't rape!
- In 2013, a United Nations survey found that nearly a quarter of 10,000 men questioned in six Asia-Pacific countries, including India, admitted to having raped a female partner.²⁵ The majority of these men experienced no legal consequences as there are no such laws available for punishing them.
- "A study by the United Nations Population Fund and the International Center for Research on Women found that 60% of men admitted to using violence which includes kicking, beating, slapping, choking and even burning to establish dominance. For the average Indian man, masculinity is about "acting tough, freely exercising his privilege to lay down the rules in personal relationships, and, above all, controlling women", found by the research."²⁶
- In a government survey, 10% of the women interviewed said their husbands had forced them to have sex.²⁷

JUDICIAL PRONOUNCEMENTS:

As the law of the land does not recognize marital rape as an offence and hence till today does not criminalize it, there are no registered cases for marital rape. A woman can't file an FIR for marital rape as it is not an offence recognized by the IPC, 1860. So, they certainly can't go to the court for seeking justice. There are many marital rape victims in India but very few show the courage to come forward and demand justice to the society and judiciary. 'S' a secure government job holder walked out of her marriage within five months. For her these five months were her life's worst phase. Her looks, the dowry she had brought her family and even sex. Her husband had an issue with everything. Among these the worst was not the torture or taunting in public or slapping in private. The worst was the rape. He was her husband; he was the one who was supposed to protect her but instead of protecting her he used to do things or made her do such things about which she can't even tell her

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ <http://www.bbc.com/news/world-asia-india-32810834> (last visited on 09.05.2015)

mother.²⁸

The other incident is of *Rashmi* (not her real name), a 25-year-old victim of marital rape who is fighting a lonely battle for justice. According to her "I was only a toy for him which he thought he could use differently every night. Whenever we had a fight, he would take it out on me in bed. There were times I pleaded with him to stay away because I was unwell, but he would not take a no for an answer, not even during my periods. I still remember the night of 14 February 2014 which was also his birthday. We had a heated argument and then he forced himself on me. I resisted as hard as I could, but he didn't stop. And then he inserted a torch inside me. I had to be admitted to hospital and I bled for 60 days after that."²⁹

In February, India's Supreme Court rejected *Rashmi's* plea to declare marital rape a criminal offence stating that it's not possible to order a change in the law for one person.

There are many such young educated women in India like *Rashmi* who fell in love with an office colleague and married him. But their relationship has never been about "consent" and "equality".

The third story is about *Pooja*, mother of three daughters who suffered in silence for 14 years before she could muster the courage to come out and file a case of domestic violence against her husband. The prime reason for their separation, she says, is "forced and violent sex".

"I had no right to say no because I was his wife. I was managing the children and the house singlehandedly. But he never showed any consideration."

Pooja later got separated from her husband but doesn't divorce him because she thinks that divorce will give him a chance to remarry and she doesn't want to let him live happily after remarrying. This is her way of punishing him of whatever he had done to her. She cannot let him use her and move on to another woman and ruin her life.³⁰

In *R. v. R.* the House of Lords declared that a husband can be charged as an offender in the rape of

²⁸ *Supra* note 23

²⁹ <http://www.bbc.com/news/world-asia-india-32810834>

³⁰ *Id.*

his wife.³¹

CONCLUSION

Law presupposes that in a marriage, the wife has consented to have sexual intercourse with her husband anytime when he wants. He is in an obligation to fulfill his physical need whenever he wants, her consent her wish does not hold any relevance. This archaic rule is still subsisting and is the main hurdle in recognizing marital rape as an offense.

Without any law for marital rape in India it is almost impossible to stop this issue of marital rape. Victims of this moral crime have nowhere to go as family does not support them because of their old thinking. Perhaps the last resort is only the Judiciary. Judiciary of our country has certain discretions which it can use to recognize marital rape and a serious moral and ethical crime liable for strict punishment. And in some cases judiciary is doing the same through judicial creativity; for instance: Additional Sessions Judge Dr. Kamini Lau, in one of the recent cases, has observed: “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.” “We in India are yet to recognize the woman’s right to control marital intercourse as a core component of equality” and emphasized that the “woman has full autonomy over her body, recognition of marital rape and offensive sexual acts, and raising our voices against it is the first crucial step towards achieving substantial equality between man and woman.” “Marital rape is offensive to morality and liberty and any kind of sexual perversity is required to be exposed, addressed and condemned.”

But in absence of any specific provisions of law, judiciary is also bound and cannot of its own consider forceful sexual intercourse by a man upon his wife as marital rape.

Therefore it is necessary that the legislature of our country who holds the power to make laws in India and also the law commission to wake up to the new and changing reality of present times and provide much needed legal protection to helpless married women who suffer silently in their homes without any help in sight. Also, the society should also take some steps in general and every household in particular should also start to disown and condemn such behavior by a man against his own wife so

³¹ (1992) 1 AC 599; (1991) 3 WLR 767; (1991) 4 AII ER 481 (HL).

that the culprit husband does not get any kind of approval for his criminal act from the society. Such positive acts by the law as well as society would give married women a sense of security and safety and provide them a redressal mechanism to fight against marital rape.

The fundamental rights like right to equality and right to live with dignity, freedom and self-respect will remain as a dead letter if women of our country will not have any right over their own body and will not have any choice of their own as far as sexual relationship in marriage is concerned.³² India is among those 40 countries that did not recognize marital rape as an offence and hence legalized in their country like Bangladesh, Afghanistan, Egypt, Iran, Pakistan whereas there are 99 other countries in the world such as USA, Sweden, Denmark, Australia and U.K who have criminalized marital rape as an offence.³³ It's now a high time for us to learn something from these countries and take some strict action.

³² “ Marital rape” available at <http://www.indiacelebrating.com/social-issues/marital-rape/> (last visited on 09.05.2015)

³³ G.B. Reddy: Women & Law.