
MARITAL RAPE: THE SOCIALLY LEGAL GAME OF POWER SEX AND VIOLENCE

SHREYA SINHA

Abstract: Three forms of coercion are generally applied by husbands in the act of Marital Rape—*social coercion* which is the pressure women feel because of cultural expectations or social conventions, *interpersonal coercion* that occurs when a husband threatens the wife into having sexual intercourse but the threats are not violent in nature and *threatened or actual physical coercion* which is at the core of rape. More than 2/3rd of married women in India, aged 15 to 49 have been beaten, raped or forced to provide sex but still there isn't any case dealing directly with marital rape in India. In most of the cases women are not aware of their rights and even if they are then the future of children, the financial dependence and the future of children on husband, the '*Pativrata Dharma*' instilled in the Indian tradition and the *taboo* of discussion on marital sexual relations in the public sphere prevents them from speaking up. Our penal system is also flawed. Intercourse with woman under 16 is statutory rape but rape of a wife between 15 and 16 is not a crime. Legal age for marriage of a woman is 18 to protect the life and health of the woman but no protection accorded to the wife between 15 and 18 from rape. Marital rape reflects the perversity of not just the husband, but also of the legislature and the criminal justice system and the Indian society in general. There is a need for change in the social outlook on the issue of marital rape and also, the empowerment of women so that they can themselves fight for their personal rights. The authors would analyse the pros and cons of criminalising marital rape in India.

Keywords: *Actual physical coercion, Interpersonal coercion, Pativrata Dharma, Social coercion, Taboo.*

Introduction: *Marital Rape refers to unwanted intercourse or penetration mainly anal or vaginal by a man with his wife obtained by force, threat of force, or physical violence, or when she is unable to give consent. Marital rape could be by the use of force only, a battering rape or a sadistic/obsessive rape. It is a non-consensual act of violent perversion by a husband against the wife where she is physically and sexually abused.*

Marital rape, also known as spousal rape, is a non-consensual sex in which the perpetrator is the victim's spouse. As such, it is a form of partner rape, of domestic violence, and of sexual abuse. Once widely condoned or ignored by law, spousal rape is now repudiated by international conventions and increasingly criminalized. According to Finkelhor and Yllo there are three forms of coercion that are generally applied by husbands in the act of marital rape – social coercion which is the pressure women feel because of cultural expectations or

General Indicators of violence and abuse against women: When we study the statistics of violent crimes against women in the country, we see a staggering trend. According to the National Crime Records Bureau's report of 2011,

10.38% of the total crimes against women (which would include everything from cruelty, kidnapping, molestation, sexual harassment, immoral trafficking etc.) reported in the year 2010, were incidents of rape. The rape victims were mainly between the ages of 18 to 30 followed by the age group of 30 to 50, with 2.5% being under the age of 10. Around 43% of the victims were minors. In 7.5% of the cases, the offenders were related to the rape victims. Moving on from rape, 19.01% of the total numbers of reported crimes against women are incidents of molestation and 44.02% of the total crimes against women fall under the category of cruelty by husband and relatives, indicating a disturbing

social conventions, interpersonal coercion that occurs when a husband threatens the wife into having sexual intercourse but the threats are not violent in nature and threatened or actual physical coercion which is at the core of rape "They are married and when she says NO, and he forces, it is marital rape." The marital rape exemption can be traced to statements by Sir Mathew Hale, Chief Justice in England, during the 1600s. He wrote, "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."

Not surprisingly, thus, married women were never the subject of rape laws. Laws bestowed an absolute immunity on the husband in respect of his wife, solely on the basis of the so called marital relation.

amount of abuse of women in the private spheres of their homes. According to the Deccan Herald only one in 69 cases of rape gets reported in India. No statistics or data have been gathered specifically on the problem of marital rape in India, pointing at the lack of consciousness regarding this issue. The only relevant statistics on spousal rape has been provided by the research conducted by Finkelhor & Yllo in 1985¹⁰ and Russell in 1990¹¹ in the USA. 10% to 14% of ever-married women have experienced at least one forced sexual assault by a husband or ex-husband. Studies of battered women staying in shelters and women seeking relationship help show 1/3rd to 3/4th of those asked reported sexual assaults by their husbands or intimate partners. Most of the women reported being raped on more than one occasion, and 1/3rd of the women under study reported being rape more than 20 times over the course of their relationship.

In the present day, studies indicate that between 10 and 14% of married women are raped by their husbands: the incidents of marital rape soars to 1/3rd to 1/2 among clinical samples of battered women. Sexual assault by one's spouse accounts for approximately 25% of rapes committed. Women who became prime targets for marital rape are those who attempt to flee. Criminal charges of sexual assault may be triggered by other acts, which may include genital contact with the mouth or anus or the insertion of objects into the vagina or the anus, all without the consent of the victim. It is a conscious process of intimidation and assertion of the superiority of men over women.

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Reasons for no reported cases in India: In most of the cases in India, women are not aware of their rights and even in rare cases if they are then they are way too shy and timid to go against their husbands and in-laws. Sometimes the bleak future of the children without a father and his financial support becomes the nightmare for a wife thereby enhancing her incapability to stand against her husband. In India, especially in Hinduism the concept of '*Pativrata Dharma*' meaning husband is the god – has been so deeply instilled in the tradition that the wife fears to go against her god even if he turns into a devil. The wife's role has traditionally been understood as submissive, docile and that of a homemaker. Sex has been treated as obligatory in a marriage and also taboo. With the women being fed the bitter medicine of being "good wives", to quietly serve and not wash dirty linen in public, even counseling remains inaccessible.

Marriage is based on sex, it will not be wrong if we define it as a mere means to legitimize sex but its ironical that the discussion on marital sexual relations in the public sphere is a **taboo** ; which further prevents them from speaking up.

Various provisions for rape in our penal system: Marital rape is not very specifically defined as under the Indian penal code but it is involved in the provision of rape as it is one of the type of rape which are provided as under the section 375 of Indian Penal Code, 1860. Section 375, the provision of rape in the Indian Penal Code (IPC), has echoing very archaic sentiments, mentioned as its exception clause- "Sexual intercourse by man with his own wife, the wife not being under 15 years of age, is not rape." S. 375 Indian Penal Code talks about Rape and Spousal exemption. Sexual intercourse by a man with his wife, the wife not being under fifteen years of age, is not rape. Section 376 of IPC provides punishment for rape. According to the section, the rapist should be punished with imprisonment of either description for a term which shall not be less than 7 years but which may extend to life or for a term extending up 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 with fine or with both.

S. 376 IPC talks about Punishment of Rape which is an Imprisonment of minimum 7 years to maximum life. Rape with a wife between the ages of 12 and 15 brings an imprisonment up to 2 years and coercion for sex on a wife of 15 year and above bears no punishment. S.376A IPC talks about rape during judicial separation. It was effected to protect the sexual respect of only wives who are undergoing judicial separation and here the imprisonment may extend to 2 years. S. 498A IPC further encloses any act of cruelty by husband or relatives of the husband. Here cruelty means any conduct that is likely to drive the woman to commit suicide or to cause grave injury or danger to her life, limb or health. This section protects the wife from the insistence of the husband on perverse sexual conduct and excessive and unreasonable demands of sexual intercourse. Here the husband may be given a sentence of Imprisonment up till three years. Furthermore, marital rape is not a separate ground for **divorce**. Marital rape accompanied with physical abuse falls under the scope of cruelty, which is a ground for divorce. Therefore, marital rape comes under passive or threatened consent. Even under **Protection of Women from Domestic Violence Act, 2005**, a woman is provided with only civil remedies to the offence of cruelty. It covers marital rape only under the circumstances of life-threatening or grievously hurtful conduct.

Our penal system is flawed. Intercourse with woman under 16 is statutory rape but rape of a wife between 15 and 16 is not a crime. Legal age for marriage of a woman is 18 to protect the life and health of the woman but no protection accorded to the wife between 15 and 18 from rape.

Marital rape reflects the perversity of not just the husband, but also of the legislature and the criminal justice system and the Indian society in general. There is a need for change in the social outlook on the issue of marital rape and also, the empowerment of women so that they can themselves fight for their personal rights.

Criminal Law (Amendment) Bill, 2010: The bill failed to include criminalization of Marital rape within its purview which is being demanded from long time. In England this exception has already been removed after its pronouncement in *R v R*. A man and women are treated as equal partner in matrimonial relation now a day, so it will be improper to say that after marriage a woman has submitted herself for sexual intercourse in every condition. Rape is a traumatic for the victim whether it is rape done by husband of his wife or unknown persons. Not including marital rape for criminalization is violation of fundamental right of a person under Article. 21 of the constitution which guarantee every person to live its life with dignity and respect. The concept that women is mutually agree to

have sexual intercourse with her husband after marriage is outdated now and has been discarded from many legal systems all over the world. Marriage is not a license which a husband gets to rape his wife or have sexual intercourse with her without her permission. If husband and wife are judicially separated and husband forces to have sexual intercourse with his wife, he is punishable for 2 years but the bill has recommended to increase the penalty for a minimum of 3 years under S 376A of IPC.

Legislators use results of research studies as an excuse against making marital rape an offence, which indicates that many survivors of marital rape, report flash back, sexual dysfunction, emotional pain, even years out of the violence and worse, they sometimes continue living with the abuser. For these reasons, even the latest report of the Law Commission has preferred to adhere to its earlier opinion of non-recognition of "rape within the bonds of marriage" as such a provision may amount to excessive interference with the marital relationship.

A marriage is a bond of trust and that of affection. A husband exercising sexual superiority, by getting it on demand and through any means possible, is not part of the institution. Surprisingly, this is not, as yet, in any law book in India.

Status of marital rape in different countries

USA: Until the late 1970's, most states did not consider spousal rape a crime. Typically, spouses were exempted from the sexual assault laws. For example, until 1993 North Carolina law stated that "a person may not be prosecuted under this article if the victim is the person's legal spouse at the time of the commission of the alleged rape or sexual offense unless the parties are living separate and apart." These laws are traceable to a pronouncement by Michael Hale, who was Chief Justice in England in the 17th century, that a husband cannot be guilty of rape of his wife "for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto the husband which she cannot retract." In the late 1970's, feminists began efforts to change these laws. Currently, rape of a spouse is a crime in all 50 states and the District of Columbia.

The states used three different techniques for criminalizing spousal rape. The majority of states simply removed the marital rape exemption, without adding any other language. Other states replaced the exclusionary language with text specifying that marriage to the victim is not a defense. A few states created a separate offense of "spousal rape."

While spousal rape is now considered a crime, victims often have to overcome additional legal hurdles to prosecution not present for other victims of rape. These include time limits for reporting the offense, a requirement that force or threat of force be used by the offender, and the fact that some sexual assault offenses still preclude spousal victims.

Ghana: Forcing sexual intercourse on an unwilling marital partner, or marital rape, is not a crime in many societies around the world, because of a marital

exemption rule that prohibits the prosecution of husbands who rape their wives. Concurrently, marital rape is one of the least studied phenomena in sexual violence research. This is particularly true for societies in the non-Western world. The current study examined the general attitudes of a sample of university students in Ghana, a West African country, toward marital rape. Respondents were also asked whether an ongoing legislative effort to criminalize marital rape in the country was warranted. The results indicated strong opposition toward criminalization. The results also indicated no marked differences between male and female respondents in attitudes toward marital rape and the need for a legislative response to the phenomenon. Patriarchal ideologies such as wifely submission to the husband and an implicit duty to provide sex in marriage provided some of the justifications furnished for why marital rape should remain non-criminalized. Advocates of criminalization mentioned the social, physical, and psychological effects of rape and how the enactment of marital rape legislation and the imposition of severe criminal sanctions would help prevent the incidence of marital rape and other forms of violence against women in the society. Marital rape is illegal in 18 American States, 3 Australian States, New Zealand, Canada, Israel, France, Sweden, Denmark, Norway, Soviet Union, Poland and Czechoslovakia. Rape in any form is an act of utter humiliation, degradation and violation rather than an outdated concept of penile/vaginal penetration. Restricting an understanding of rape reaffirms the view that rapists treat rape as sex and not violence and hence, condone such behavior.

Arguments for criminalizing of Marital rape in

India: There are nine commonly argued points in favour of the criminalization of marital rape. The first is the physical effect of the act on abused wives. The physical effects of marital rape generally include injuries to the vaginal and anal areas, bruising, soreness, torn muscles, fatigue, lacerations and vomiting. Women who have been assaulted and raped by their husbands may suffer broken bones, black eyes, bloody noses, and knifewounds that occur during the sexual violence. Campbell and Alford in their paper report that one half of the marital rape survivors in their research sample were kicked, hit or burned during the sexual acts. Secondly, spousal rape causes great emotional distress to the victim which persists for a long period of time. Long-term effects often include disordered eating, sleep problems, depression, problems establishing trusting relationships, and increased negative feelings about themselves. Some marital rape victims undergo flashbacks, sexual dysfunction, and emotional pain for years after the incidents. Some of the short-term effects of marital rape include shock, depression, fear, suicidal tendencies, and post-traumatic stress disorder. Compared to women raped by strangers, wives who have been raped by their husbands report even higher rates of anger and depression. The third argument is that there are certain anomalies in the Indian Penal

Coderegarding the act of marital rape. Sexual intercourse with a woman under the age of sixteen is statutory rape according to the clause sixthly of section 375 of the IPC. And if the woman is above the age of fifteen and married, then sexual intercourse between her and her husband will not be rape, according to the exception provided in the same section. But, if the woman, who is between the ages of fifteen and sixteen is married to a man, and her husband has sexual intercourse with her, be it with or against her will and consent, it will not amount to rape under any circumstance. This is an anomaly and it goes against the statutory rape provision enacted to protect young girls, the only reasoning being that the girl is married to her rapist. There is another anomaly in this provision. The legal age for marriage for women has been provided as eighteen by the Child Marriage Restraint Act, 1929. This was enacted to protect the rights of young women under the age of eighteen. The Commentary to this legislation states that “the object is to eliminate the special evil which had the potentialities of dangers to the life and health of a female child, who could not withstand the stress and strains of married life and to avoid early deaths of such minor mothers.” But section 375 of the IPC protects the right to sexual privacy of wives only till the age of fifteen. Thus, there is a very large bracket from fifteen to eighteen whose basic rights to life and health and reproductive freedom are being violated by this provision. There is a third anomaly in the law on rape, provided in section 376 of the IPC, which provides for punishment for the offence of rape. Here, the punishment for the rape of the wife between the ages of twelve and fifteen is imprisonment for a maximum term of two years, or fine or both. Section 375 clearly excludes wives above the age of fifteen from the ambit of rape. But, when it comes to determining the punishment, the wives under the age of fifteen, but above twelve get lesser justice than rape victims outside the wedlock or raped wives below the age of twelve. Fourthly, section 376A of the IPC protects wives from marital rape only if they have been judicially separated, and not if they have been living separately upon their own volition, even if for a long period of time. Fifthly, section 122 of the Indian Evidence Act, 1872 prevents communication during marriage from being disclosed in Court unless one spouse is being prosecuted for a crime against the other. So this provision will provide for the disclosure of marital communications only in criminal cases, like cruelty and battery. The Domestic Violence Act provides for civil remedies for the sexual abuse of wives, and the communication, though relevant, would be inadmissible in a proceeding under this Act. Hence, it is impossible to combine the Domestic Violence Act and the aforementioned section, unless marital rape is criminalized. The sixth argument is on the basis of Article 21 of the Constitution of India, which provides for the fundamental right to life. The Supreme Court has in its judgements extended the scope of this right to life to the

right to live with dignity³⁴ and the right to health. Marital rape as discussed above violates these two fundamental rights of the wife.

Seventhly, Article 14 of the Constitution provides for equal protection of law to each and every citizen of the country. Again, the non-criminalization of marital rape goes against this fundamental right, by legally differentiating between women who have been raped on the basis of the marital relation between the victim and the abuser.

The eighth argument is that the international community has recognized the married woman's right to sexual privacy. The position of other countries on the issue of marital rape has already been discussed. The United Nations Declaration of Elimination of Violence against Women affirms that “violence against women constitutes a violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms, and concerned about the long-standing failure to protect and promote those rights and freedoms in the case of violence against women” and in Article 2 explicitly includes marital rape within the scope of physical, sexual and psychological violence occurring in the family, which the Article recognizes as violence against women. The Supreme Court has held that the International Covenants and Declarations as adopted by the United Nations have to be respected and regard must be had to them for construing domestic law. The meaning given to the words in the Declarations and Covenants has to be such as would help in effective implementation. And lastly, if a wife refuses to have sexual intercourse with her husband over a long period of time, causing mental and emotional distress, the husband can seek divorce on its basis³⁸, and there is no justification for the husband forcing his wife to resume sexual relations against her will.

Arguments against criminalization

There are some common arguments against the criminalization of marital rape in India that are generally put forth by family rights activists. The primary opposition is by the idea that spousal sexual relations fall under the private sphere and the revocation of the implied consent associated with the traditional concept of marriage by legislation or judicial activism would be an excessive interference with marital rights and hence, will corrode the fabric of marriage. This feminist demand of the woman's right to refuse sexual intercourse post marriage is often hailed as the violation of the procreation and conjugal rights of the husband. Another argument is that such a law will become an unfair weapon in the hands of the wife who can pin false charges of rape against the husband. Marital rape is said to be difficult to disprove on account of continued sexual relations and the often lack of bruises due to passive consent. The criminalizing law can then be misused by dissatisfied wives wanting to hurt the social standing and the general well-being of the husband. The third rationale provided is that

marriage stands for the coalition of the identities of the husband and wife. The wife belongs to the husband and the husband belongs to the wife, and hence the state cannot take any penal action against any sexual act of either spouse against the other.

Conclusion: Marital rape reflects the perversity of not just the husband, but also of the legislature and the criminal justice system and the Indian society in

general. It ravishes the dignity and sexual privacy of the victim. Wives in these abusive traps should be uplifted and given a position which is at par with men. The judiciary and the police must be sensitized towards this issue. There is a need for change in the social outlook on the issue of marital rape and also, the empowerment of women so that they can themselves fight for their personal rights.

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3RD year student of BA.LLB (hons),
Institute of Law, Nirma University, Ahmedabad,
Gujarat. 11bal106@nirmauni.ac.in