

MARITAL RAPE: AN ANALYSIS

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INTRODUCTION

Marital Rape refers to unwanted intercourse 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.

Approximations have quoted that every 6 hours; a young married woman is burnt or beaten to death, or driven to suicide from emotional abuse by her husband. The UN Population Fund states that more than 2/3rds of married women in India, aged of 15 to 49 have been beaten, raped or forced to provide sex. In 2005, 6787 cases were recorded of women murdered by their husbands or their husbands' families. 56% of Indian women believed occasional wife-beating to be justified.

HISTORY

Historically, '*Raptus*'¹, the generic term of rape was to imply violent theft, applied to both property and person. It was synonymous with abduction and a woman's abduction or sexual molestation, was merely the theft of a woman against the consent of her guardian or those with legal power over her. The harm, ironically, was treated as a wrong against her father or husband, women being wholly owned subsidiaries.

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 husband²." Not surprisingly, thus, married women were never the subject of rape laws. Laws bestowed an absolute immunity on the husband in

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¹ Oxford Law Dictionary

² Criminal Law by P. S. Pillai

respect of his wife, solely on the basis of the marital relation. The revolution started with women activists in America raising their voices in the 1970s for elimination of marital rape³ exemption clause and extension of guarantee of equal protection to women.

In the present day, studies indicate that between 10 and 14% of married women are raped by their husbands⁴: the incidents of marital rape soars to 1/3 to 1/2 among clinical samples of battered women. Sexual assault by one's spouse accounts for approximately 25% of rapes committed⁵. 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.

Advancing well into the timeline, marital rape is not an offence in India⁶. Despite amendments, law commissions and new legislations, one of the most humiliating and debilitating acts is not an offence in India. A look at the options a woman has to protect herself in a marriage, tells us that the legislations have been either non-existent or obscure and everything has just depended on the interpretation by Courts.

LEGAL PROVISIONS IN INDIA

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.*" 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.

³ History of Criminal Offence by O. P. Srivastava

⁴ Crime against women statistics by law Audit Report 2015

⁵ Crime against women statistic by U.N report 2015

⁶ Sudesh Jakhoo v K.C.J & Others, 1996 (3) AD Del 653

This section 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 to 16 years, an offence is committed, however, less serious, attracting milder punishment. Once, the age crosses 16, there is no legal protection accorded to the wife, in direct contravention of human rights regulations.

How can the same law provide for the legal age of consent for marriage to be 18 while protecting from sexual abuse, only those up to the age of 16? Beyond the age of 16, there is no remedy the woman has.

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 taboo⁷. At least the discussion openly of it, hence, the awareness remains dismal. Economic independence, a dream for many Indian women still is an undeniably important factor for being heard and respected. 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.

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.

The very definition of rape (section 375 of IPC) demands change. The narrow definition has been criticized by 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

⁷ Principle of Sociology by C. N. Shanker Rao

equity⁸. Even international law now says that rape may be accepted as the “sexual penetration, not just penal penetration, but also threatening, forceful, coercive use of force against the victim, or the penetration by any object, however slight.” Article 2 of the Declaration of the Elimination of Violence against Women includes marital rape explicitly in the definition of violence against women. Emphasis on these provisions is not meant to tantalize, but to give the victim and not the criminal, the benefit of doubt.

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.

The importance of consent for every individual decision cannot be over emphasized. A woman can protect her right to life and liberty, but not her body, within her marriage, which is just ironical⁹. Women so far have had recourse only to section 498-A of the IPC, dealing with cruelty, to protect themselves against “perverse sexual conduct by the husband”. But, where is the standard of measure or interpretation for the 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? There is no answer, because the judiciary and the legislature have been silent.

2013 VERMA COMMITTEE REPORT

The 172nd Law Commission report¹⁰ 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.

⁸ Women Protection From Violence Report 2012

⁹ Criminal Audit Report By Law Audit 2012

¹⁰ Criminal Law Amendment Act, 2103

3. In the light of *Sakshi v. Union of India and Others*¹¹, '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.
6. 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.
7. 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.
8. 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.

LEGAL PROVISION UNDER DOMESTIC VIOLENCE ACT, 2005

The much awaited Domestic Violence Act, 2005 (DVA) has also been a disappointment. It has provided civil remedies to what the provision of cruelty already gave criminal remedies, while keeping the status of the matter of marital rape in continuing disregard. Section 3 of the Domestic Violence Act, amongst 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 doesn't need to concede to every physical overture even though it is only by her husband. Honour and dignity remains with an individual, irrespective of marital status.

¹¹ 2004 (5) SCC 518

INDIAN EVIDENCE ACT, 1872

Section 122 of the Indian Evidence Act prevents communication during marriage from being disclosed in court except when one married partner is being persecuted for no offence against the other. Since, marital rape is not an offence¹², the evidence is inadmissible, although relevant, unless it is a prosecution for battery, or some related physical or mental abuse under the provision of cruelty. Setting out to prove the offence of marital rape in court, combining the provisions of the DVA and IPC will be a nearly impossible task.

The trouble is, it has been accepted that a marital relationship is practically sacrosanct. Rather than, making the wife worship the husband's every whim, especially sexual, it is supposed to thrive on mutual respect and trust. It is much more traumatic being a victim of rape by someone known, a family member, and worse to have to cohabit with him. How can the law ignore such a huge violation of a fundamental right of freedom of any married woman, the right to her body, to protect her from any abuse?

As a final piece of argument to show the pressing need for protection of woman, here are some effects a rape victim may have to live with¹³,-

- Physical injuries to vaginal and anal areas, lacerations, bruising.
- Anxiety, shock, depression and suicidal thoughts.
- Gynecological effects including miscarriage, stillbirths, bladder infections, STDs and infertility.
- Long drawn symptoms like insomnia, eating disorders, sexual dysfunction, and negative self-image.

CONCLUSION

Marriage does not thrive on sex and the fear of frivolous litigation should not stop protection from being offered to those caught in abusive traps, where they are denigrated to the status of chattel¹⁴. Apart from judicial awakening; we primarily require generation of awareness. Men are the perpetrators of this crime. 'Educating boys and men to view women as valuable

¹² Shruti Kumar v. Union Of India AIR 1967 SCC54

¹³ Criminal Law Audit Report Against Women 2014

¹⁴ Usha Badri v. K. K. Babu AIR 2002 SCC 45

partners in life, in the development of society and the attainment of peace are just as important as taking legal steps protect women's human rights', says the UN¹⁵. Men have the social, economic, moral, political, religious and social responsibility to combat all forms of gender discrimination.

In a country rife with misconceptions of rape, deeply ingrained cultural and religious stereotypes, and changing social values, globalization has to fast alter the letter of law.

¹⁵ Women Protection Report By U.N. Audit Report 2015