

Sexual Violence in Private Space: Marital Rape in India

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1. Understanding the Problem

India has advanced in almost every field, yet sexual violence which occurs within the four walls of a matrimonial home is considered to be a private, family matter and is excluded from scrutiny by public institutions like the courts. Marital rape is not an offence in India and the criminal justice system has failed to render justice to married women who are victims of sexual violence. Marital rape is a common but under-reported crime. The true prevalence of marital rape in India, as in most countries of the world, is unknown, but various research conducted in India indicate that it is common despite the unwillingness of many officials to acknowledge it.

In 2011, a survey in India revealed that one in five men have forced their wives to have sex.¹ More than two-thirds of Indian married women between 15 and 49 years old claimed to have been beaten or forced into sex by their husbands.² In another study,³ it was found that one out of seven married women in India has been raped by her husband at least once.⁴ Women cannot report these rapes because the law does not acknowledge this as a crime. The International Institute of Population Sciences claimed that 26 per cent of women in Pune, 23 per cent in Bhubaneswar, and 16 per cent in Jaipur often have sex with their husbands against their will. The study found a direct link between alcoholism and sexual abuse. One-fifth of the women surveyed said their husbands were often drunk while forcing sex.⁵ Marital rape

is a conscious process of intimidation and assertion of the superiority of men over women.⁶ Although a woman may only experience rape once to bear the full impact of it, these statistics indicate that some women are subjected to rape on a regular basis.

Arguably marital rape is no less an offence than murder, culpable homicide or rape *per se*. It degrades the dignity of a woman and reduces her to a chattel to be used for man's own pleasure and comfort. It reduces a human being to a corpse, living under the constant fear of hurt or injury. Medical evidence proves that marital rape has severe and long-lasting consequences for women. Criminal law cannot turn a deaf ear towards the injustice perpetrated in Indian society against women. It must interfere and impose the stamp of criminality on inhumane acts that occur, irrespective of the fact as to whether such recognition is desirable. Complaints against marital rape may be few, yet it is of utmost necessity that the law declares it to be a penal offence. The lawmakers should realize that if the sanctity of the Constitution is to be maintained, the dignity of married women must be protected.

2. The Indian Penal Code

Section 375 of the Indian Penal Code ('IPC')⁷ – the provision on rape in the IPC – reflects somewhat archaic sentiments, stating in its exception clause that “[s]exual intercourse or sexual acts by a man with his own wife, the wife not being under 15 years of age, is not rape”. Section 376 provides punishment for rape: the rapist shall be punished with imprisonment of either description, for a term which shall not be less than seven years, but may extend to imprisonment for life or for a term which shall not be less than 10 years, and shall also be liable to fine. The IPC was amended in 1983 to make way

¹ The International Men and Gender Equality Survey, 2011.

² The United Nations Population Fund Survey, 2000.

³ Conducted by the Joint Women's Programme, an NGO, New Delhi.

⁴ Subsequent research finds that more women are raped by their husbands each year than by strangers, acquaintances, or other persons. Over one third of the women in India's battered women's shelters report being sexually assaulted by their husbands.

⁵ Mihika Basu, “Marital rape is an ugly reality”, Mumbai, 30 April 2013 (<http://archive.indianexpress.com/news/marital-rape-is-an-ugly-reality/1109618/>).

⁶ Sana Shakil, “Treat marital sexual abuse as rape”, *Times of India*, 5 March 2014.

⁷ The Indian Penal Code (45 of 1860) (<http://www.legal-tools.org/doc/6a8f6b/>).

for the criminalization of spousal rape during the period of judicial separation.⁸ In the case of sexual intercourse by a husband upon his wife without her consent, when she lives separately under a decree of separation or otherwise, he shall be punished with imprisonment of either description for a term which shall not be less than two years, but which may extend to seven years with fine.

These provisions on sexual assault lay down that rape within marital bonds is only a crime in India if the wife is less than 15 years of age or, if she is above 15 years, only when committed during judicial separation and then attracting milder punishment. Once the age crosses 15, there is no criminal law protection given to the wife, in direct contravention of human rights law. How can the same law provide for the legal age of consent for marriage to be 18 while protecting from sexual violence only those up to the age of 15? Beyond the age of 15, there is no remedy a married woman in India has against sexual violence in the matrimonial home.

The IPC has dealt with marital rape in a piecemeal manner. Various provisions relating to sexuality reinforce not only older notions of morality, but also, in effect, the non-agency of women.⁹ Thus, it is visible that the law which is considered as the saviour of the victimized and the vulnerable is inadequate to protect married women who suffer the consequences of marital rape. The basic argument which is advanced in favour of these provisions is that consent to marry in itself encompasses a consent to engage in sexual activity. But, an implied consent to engage in sexual activity does not mean consent to being inflicted with sexual violence. Like sadomasochistic sexual acts, in marital rape women are presumed to have consented to the violence. However, rape and sex cannot be distinguished on the basis of violence alone. Violence creates a sense of fear and insecurity and this causes the women to submit to sex and this cannot be construed as consenting to sex. This fear may be compounded by her feeling of not having fulfilled her husband's desire. The distinction between consent and non-consent is fundamental to criminal law.¹⁰

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 the doubt. The importance of consent for every individual decision can-

not be over-emphasized. It is just ironical that a married woman in India can protect her right to life and liberty, but not her body within her marriage. Is consent not a condition *sine qua non*? Is marriage a license to rape? There is no answer, because the Indian judiciary and the legislature have been silent.

The 42nd Law Commission Report put forward the necessity of excluding marital rape from the ambit of Section 375 of the Indian Penal code and emphasised to not even call it as "rape" in the technical sense.¹¹ The 172nd Law Commission Report¹² released in March 2000 made recommendations with regard to marital rape saying that exception 2 of section 375 of IPC should be deleted. Forced sexual intercourse by a husband with his wife should be considered an offence, just as any physical violence by a husband against the wife.

3. Justice Verma Committee Report (2013)

In 2012, as an aftermath of the Delhi gang rape case, the Justice Verma Committee was constituted to recommend amendments to criminal law so as to provide for quicker trial and enhanced punishment for criminals accused of committing sexual assault against women. The Committee submitted its report on 23 January 2013, giving the following views regarding marital rape: "The IPC differentiates between rape within marriage and outside marriage. Under the IPC sexual intercourse without consent is prohibited. However, an exception to the offence of rape exists in relation to un-consented sexual intercourse by a husband upon a wife. The Committee recommended that the exception to marital rape should be removed. Marriage should not be considered as an irrevocable consent to sexual acts. Therefore, with regard to an inquiry about whether the complainant consented to the sexual activity, the relationship between the victim and the accused should not be relevant".¹³

The panel relied heavily on the judgments made by courts in various countries: "Our view is supported by the judgment of the European Commission of Human Rights in *C.R. v UK*¹⁴, which endorsed the conclusion that a rapist remains a rapist regardless of his relationship with the victim", the 630-page report said, slamming the prevailing notions on this subject.

4. Criminal Law (Amendment) Act (2013)

The 2013 Criminal Law (Amendment) Act¹⁵ refused to

⁸ Section 376B: Sexual intercourse by husband upon his wife during separation.

⁹ Ved Kumari, "Gender Analysis of Indian Penal Code", in Amita Dhanda and Archana Parashar (editors): *Engendering Law: Essays in the Honour of Lotika Sarkar*, Eastern Book Company, Lucknow, 1999, pp. 139-160.

¹⁰ Aditya Shroff and Nicole Menzes, "Marital Rape as a Socio-Economic Offence: A Concept or a Misnomer", *Student Advocate*, Vol. 6, 1994, pp. 67 and 68.

¹¹ Available at <http://www.legal-tools.org/doc/a34ab4/>.

¹² 172nd report of Law Commission of India on Review of Rape Laws, March 2000, para. 3.1.2.1. (<http://www.legal-tools.org/doc/1c639d/>).

¹³ The Justice Verma Committee Report, 2013 (<http://www.legal-tools.org/doc/8712ed/>).

¹⁴ (1992) 1A.C.599.

¹⁵ Criminal Amendment Act, 2013, Act No. 13 of 2013 (2 April 2013)

include marital rape in the IPC and it continues to give a lesser punishment for rape of a separated wife by a husband. The Act retains the exception for rape committed by a man on his wife when she is over 15 years of age. Only rape committed within a marriage when the spouses are living separately can be punished. According to the legislature, not every 'non-consensual' sexual act is rape. Even if the wife is separated from her husband, the law will be 'understanding' and 'lenient' towards him if he rapes her, since she was 'once his wife'. This means that the Act continues to see the wife as the husband's sexual property, rather than as a person with the same right to say 'yes' and 'no' to sex as any unmarried woman. This provision needs a serious reconsideration in order to protect women from sexual violence within the marriage. In this regard, the government should consult widely with women's groups in its process of reform of laws and procedures relating to rape and sexual abuse.¹⁶

5. The Protection of Women from Domestic Violence Act (2005)

The Indian Domestic Violence Act regards marital rape as a form of domestic violence and provides for a lesser jail term than non-marital rape.¹⁷ This is the only way of penalizing marital rape in India, and it is a civil remedy and not a criminal action. Under this Act, if a woman has suffered marital rape, she can go to the court and obtain judicial separation from her husband. Being subjected to sexual violence by her own husband envelops a wife in a sense of insecurity and fear. Her human rights are sacrificed on the altar of marriage. But, this is only piecemeal legislation, with many loopholes. However, the enactment of specific legislation against domestic violence has opened the door for legislation criminalizing marital rape because it signals a shift in the state's approach of non-intervention in family life.

6. The Challenges

The root cause of sexual violence against women in India is, in my opinion, gender discrimination. The marital rape exemption contained in IPC Section 375 is a legal mechanism through which the state has come to institutionalize gender inequality. The government is required to take all necessary steps to protect its female citizens, and to modify social and cultural patterns of conduct that promote stereotyped roles of men and women. Failure to do so reflects discrimination on the basis of gender.

(<http://www.legal-tools.org/doc/8f62ce/>).

¹⁶ Concluding comments of the Committee on the Elimination of Discrimination against Women: India, UN doc. CEDAW/C/IND/CO/3, 2 February 2007, paras. 22-23 (<http://www.legal-tools.org/doc/70a473/>).

¹⁷ The Protection of Women from Domestic Violence Act, 2005, Section 3 Explanation 1 (ii), passed in August 2005; entered into force in October 2006 (<http://www.legal-tools.org/doc/f2589f/>).

The Constitution of India prohibits discrimination on the grounds of gender¹⁸ and protects the dignity of women.¹⁹ The government must safeguard women against the violation of human rights caused by marital rape. Removal of marital rape exception to IPC Section 375 would express such commitment more specifically but perhaps not clearly enough given the gravity of the crime and the reluctance to acknowledge it.

Violence, sexual violence in particular, is pervasive, common, and a critical instrument in the subjugation of women and their confinement to private spaces. The persistence of this exception is an anomaly in the government's stated recognition of the violence women face in their marital homes.²⁰ This leads to the inference that, within the context of numerous other challenges, the laws currently in place which do not criminalize marital rape do not effectively tackle the issue of gender discrimination and are therefore inadequate to confront the problem of marital rape in India. The government recently rejected the idea of removing the exemption clause for husbands under IPC Section 375, stating that doing so would amount to excessive interference with the marital relationship.

7. Concluding Reflections

Sexual violence against women in the form of marital rape is merely a symptom of a wider social issue. To fragment the issue is to preserve and protect spaces of abuse and violation. The absence of criminal law protection against marital rape has reinforced a variety of social, economic and political myths regarding the role of women in Indian society. This lacuna has contributed to the process of normalizing this form of sexual violence by failing to hold perpetrators accountable, and in so doing has contributed to marital rape remaining invisible. This has led to a situation in which many women are unable to name forced sex within marriage as 'rape'. Thus, the importance of deconstructing the public and private spheres, and of naming and documenting violence against women as a social issue, cannot be overemphasized.

The inevitable resistance to legal reform regarding marital rape can be attributed to the fact that – as with revised intestate succession laws – they pose a significant threat to the status quo which sees men at dominating positions of power and control within the family and over communities. Despite this, legal reform can bring more

¹⁸ Article 15, Constitution of India, 1950 (<http://www.legal-tools.org/doc/7a26ed/>).

¹⁹ *Ibid*, Article 21.

²⁰ See the report "India: Second NGO Shadow Report on CEDAW", Coordinated by National Alliance of Women (NAWO), November 2006, 233 pp.; see also CEDAW General Recommendation 19 (<http://www.legal-tools.org/doc/f8d998/>).

gender-sensitive policies and programmes, and thus represents a necessary step towards the reduction of marital rape in India. Ultimately, by ending the “marriage between an intimate relationship and the improper inference of ongoing consent to sexual intercourse”,²¹ the law can take an important step towards fulfilling its role in confronting marital rape, as such separation is required by equality.

The continuing exemption of marital rape from the purview of Indian criminal law sustains the assumption of the wife as exclusive property of the husband. “Its immunity from the purview of the criminal law is explained on the grounds that the female victim is a wife. This justification can be understood in the context of the dominant familial ideology and female sexuality which treats a wife as property and as having no sexual agency or decision making in sexual activity within the marital contract.”²² It is clearly a serious form of violence against women and worthy of public and state attention. Women who are raped by their husbands are more likely to experience multiple assaults and often suffer long-term physical and emotional consequences. In this context, marital rape may be even more traumatic than rape by a stranger because a wife lives with her assailant and she may live in constant terror of another assault whether she is awake or asleep. India is moving in the direction of positive legal change for women in general, but further steps are required, culminating in criminalizing marital rape and changing the underlying cultural assumptions about women in marriage.

Not only child-brides, but all wives need legal protection against rape within the marriage. It is high time that the dignity and freedom of a woman over her body and person be recognized in India as well. Should the state really enter the realm of the matrimonial home? The answer is ‘yes’. It already does, in cases of cruelty, divorce and dowry demands. Why leave the most atrocious and heinous crime outside the ambit of the state and laws? Why must the area of marital rape remain beyond its reach? A state that does not involve itself at the time of the marriage but acts as an arbitrator during divorce must

protect a woman’s right to basic physical integrity. The patriarchal power structures have deemed marriage to be a license to forced sex. This negates the self-worth of women. Currently, ‘marital rape’ can only be seen as legally permitted rape, abolishing the element of consent from married women. The legislative framework of India has no provision to aid the plight of a married woman who faces this evil due to the detrimental notion in Indian society that considers sex as an obligation. It is as if after marriage a woman ceases to be under the jurisdiction of Indian law and enters the jurisdiction of a single man who governs her life from then on.

For a country that claims to be on the path of development, India is replete with paradoxes. Mainstream national movements have been organized around ‘non-violence’, but structural violence against women persists in the social, political and cultural life that binds our collective identity as a nation. The country has the latest defence technology at its disposal guaranteeing the state’s security, but its women live in fear for their life and dignity within the family on the state’s territory. Fault lines of gender discrimination run deep into our society. Unless the chain of complex and interlinked issues is closely examined and addressed, a reduction in sexual violence against women and the subsequent liberation of women from fear and subjugation will remain an unfulfilled dream.

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²¹ Michelle Anderson, “Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offences by Intimates”, in (2003) 54 *Hastings Law Journal* 40.

²² Kathrine O’Donovan, *Family Law Matters*, London: Pluto Press, 1993, p. 1.