



DUTY OR DURESS: MARITAL RAPE LAW

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“The husband should give to his wife her conjugal rights, and likewise the wife to her husband. For the wife does not have authority over her own body, but the husband does.”

- First Corinthians 7:1-5, Verses 3-5

The institution of marriage has always been taken as license to legal sex. There are certain circumstances in marriage, when the wife is subjected to sexual intercourse cloaked as being her duty. However, despite being socially approved, the question as to consent still remains shrouded in mystery, especially when the sexual intercourse is being performed under social obligations and not something that she consents to.

The husband generally sees sex as a solution to all matrimonial problems as well as the source of validation for masculine identity- this might also lead to problem of toxic masculinity in society. The individuality of women is lost in social pressure. Stereotypes mislead men into believing, that they should ignore a woman's cry for protest. These stereotypes also mislead women into believing that they are bad wives for not enjoying sexual encounters or that they are bad wives for not enjoying sex against their will.

This sexual act includes intercourse, anal or oral, forced sexual behavior with the other spouse, which is considered by the victim as

degrading, humiliating, painful and unwanted- this is known as spousal rape. It is a non-consensual act of violent perversion by a husband against the wife where she is physically and sexually abused. Percentage of women who have experienced intimate partner sexual violence at least once in their lifetime, stands at 60-67% in Asia alone. The situation in the developed countries relatively fair better with North America at 20-30% and Europe at 20-40%.¹

The marital rape exemption can be traced to statements by Sir Matthew Hale, Chief Justice in England, during 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 law. Laws bestowed an absolute immunity on the husband in respect of his wife solely on the basis of marital relation.² This 'Implied Consent Theory of Sir Hale' found its way into the legal system of all former British colonies that adopted the common law system.

Sexual violence in marriage has been a part of the institution of marriage since the conceptualization of the institution itself. Marital rape, like the other forms of sexual assault, has however been linked to the problems faced by the millennial generation.

The rape laws of the pre-modern times defined any type of sexual assaults as a

¹Unstats.un.org- unsd gender

² Indian law journal- article by Priyanka Rath- Marital Rape and the Indian Legal Scenario



property crime against the husband or father whose wife or daughter was “defiled”, thereby labelling all female relatives as the property of the male members of the family. Under this legal framework marital rape was considered to be an oxymoron, since a wife had been legally defined as a husband’s sexual property, in the pre-modern laws. When the rape laws were first defined in the 17th century– from British common law to the Qing dynasty in China (Ng, 1987) – sanctioned rape, it was considered to be a violation of a woman’s purity or chastity; again, not possible in the context of marriage, as women were considered to be the property of their husbands.

This ideology of permanent, irrevocable consent pervaded legal and cultural conceptualizations of marriage and forced sex within it. And this ideology has global resonance, not because people on many continents were influenced by Lord Hale, but because control of women’s bodies through marriage is foundational to patriarchy. Until 1993, rape laws across the US included a “spousal exemption” that specifically excluded husbands from rape prosecution.³

In the United States, marital rape has been outlawed in all 50 states, however, there have been times when these laws have failed the Americans. Many officials carry certain assumptions and biases that more often than not cloud their judgment. The major assumption being- if a person is married to another that they love, then the person is expected to give the other partner sex. How can one be raped when they're supposed to

have sex with them out of marital obligation and duty?

This assumption can be seen in a number of laws. For example, according to the Daily Beast, 8 states still have laws differentiating general rape and marital rape, some of which even carry exemptions under certain situations. A local newspaper from Ohio had even stated that a victim "isn't protected from attacks involving rape drugs and other types of impairment when the perpetrator is her spouse." In Oklahoma, marital rape has to be shown that the case can only be considered rape if the victim was violently coerced. If intercourse occurs while the victim is sleeping, it can also be considered rape, as long as the perpetrator isn't the victim's spouse.⁴

The Marion Superior Court Judge who originally presided over David Wise, a man who had drugged his wife for a period of 12 years then raped her, had let Wise go without so much as any prison time. The most astounding fact regarding the entire case was that, the Judge presiding over the case asked the wife of Wise to forgive him for his acts of the past 12 **years**. Fortunately, this sentenced was reversed when Wise violated the terms of his home detention, and as of now must spend five years in the Department of Correction. He will also have to register as a sex offender for 10 years.

The first country to begin the process criminalizing marital rape was Poland with its Criminal Code of 1932. A concrete change in the interpretation was brought with the amendment in 1969- that protected

³ Marital rape in a global context: from 17th century to today- Kersti Yllö

⁴ How the United States Treats Marital Rape- Robin Goodfellow



the sexual freedom of married women in the same way as the sexual freedom of anyone else. The words that are used to describe rape do not exclude anyone from the possible range of victims or offenders, hence, it can be inferred that spouses also can commit the offence or be its victims. Later, following the example of their European counterpart, the Scandinavian countries of Sweden, Norway, Denmark passed laws penalizing marital rape in the 1950s. Soon, they were followed by the Communist Bloc countries of former Soviet Union and Czechoslovakia.

Australia, under the impact of the second wave of feminism which focused on increasing equality for women by gaining more than enfranchisement became the first common law country to pass reforms in 1976 that made rape in marriage a criminal offence. Since the 1980s, many common law countries like South Africa, Ireland, Canada, the United States, New Zealand, Malaysia, Ghana, and Israel have legislatively abolished the marital rape immunity.

Following the European Parliament's Resolution on Violence against Women in 1986, many nations like France, Germany, the Netherlands, Belgium and Luxembourg called for criminalization of spousal rape. In 1991, the House of Lords in the UK struck down its common law principle that a marriage contract implied a woman's consent to all sexual activity. The possibility of condemning a husband for raping his wife was fully accepted in England, in 1992 after a House of Lords decision known as R. v. R.

The journey of women's rights from being considered as the property of her husband or other male relatives to having an individual identity of her own, has been riddled with innumerable hurdles. Despite the 'first-world countries' being developed in the economic and political spheres, it failed to establish a progressive and inclusive (of women) human society. What one can understand from the statistics available, even the most developed countries failed to recognize the rights of women 'behind closed doors.'

In India marital rape exists de facto but not de jure. Where, in other countries either marital rape has been criminalized or the judiciary has been playing an active role in recognizing it as an offence, in India however, the judiciary seems to be unsure how marital rape will be perceived, given the diversity of patriarchy in India.

The peculiarity of Indian law is in adoption of the principle of primacy and supremacy of husband's right over that of the wife, even when she is well below the legal age of marriage.⁵

Until 1890, thirty years' post-enactment of the Indian Penal Code (IPC), 1860, rape laws continued to be unchanged. It was only after the landmark case of **Queen Empress vs Haree Mythee**⁶ rape of child wife was severely criticized and the Court held that the husband did not have the right to enjoy the person of his wife without any regard to the safety and consent of his wife. It was only after this ruling, that the age of consent

⁵Marital Rape - Exemption under Indian Penal Code: Quest for Recognition and Liability-Dr. Vandana

⁶1891 ILR 18 Cal 49



was raised to 12 from 10. This was the very first time that the judiciary recognized marital rape as a crime in India.

Despite the recommendation of the Law Commission in its 42nd Report, to include sexual intercourse of a man with his minor wife as an offence, the Joint Committee dismissed the recommendation. The Committee had argued that a husband could not be found guilty of raping his wife whatever may be her age. When a man marries a woman, sex is a part of the package. Clearly, the government was not very keen on enacting a radical legislation which was the need of an evolving society. Even when the lawmakers of the nation shelved the concept of marital rape altogether, the Indian Judiciary recognized the concept of marital rape, irrespective of its diverging views.

In **Bodhisattwa Gautam vs. Subhra Chakraborty**,⁷ the Supreme Court held that, rape is a crime against basic human rights, namely, the right to life enshrined in Article 21 of the Indian Constitution. Yet, it negates the very guarantee by not recognizing marital rape. Despite the developments in women rights, it has mainly been confined to physical rather sexual abuse.

In **State of Maharashtra vs. Madhkar Narayan**⁸ the Supreme Court held that every woman is entitled to her sexual privacy and it is not open for any and every person to violate her privacy as and when he wished. In **Vishakha vs. State of Rajasthan**⁹ the Court extended the right of privacy in

working environments also. Further, along a similar line we can translate that, there exists a right of privacy to go into a sexual relationship even in a marriage. Subsequently, decriminalizing rape in a marriage, the marital exception teaching, damages this right of privacy of a wedded lady and is consequently illegal.¹⁰

In **Sree Kumar vs Pearly Karun**¹¹ the Kerala High Court observed that, the offence under section 376-A IPC won't be pulled in as the spouse is not living independently from her husband under a declaration of partition or any custom or use. Regardless of the possibility that she's liable to sex by her better-half without wanting to and without her consent. In this situation, the spouse was forced to copulate against her will by her husband when she cohabitated with him as a result of settlement of separation procedures sub judice. Subsequently, the spouse was not found to be guilty of raping his wife though he was de facto guilty of doing or committing the crime.

The Judiciary's stance on criminalizing spousal rape has only been minuscule so far because it can only interpret laws and not enact them. The lawmakers of the nation are duty bound to introduce laws in consonance with whatever ails the society. Marriage in India is a holy sacrament where the wife submits herself as a devotee to her husband. The social conditioning is such that the government has failed to enact a law protecting married women where the sexual predator is the husband himself. In India, only two groups of married women are

⁷1996 AIR 922, 1996 SCC (1) 490

⁸AIR 1997 SC 207

⁹AIR 1997 SC 3011

¹⁰ Marital Rape – Sangamithra Logonathan

¹¹1999 (2) ALT Cri 77, II (1999) DMC 174



protected under the rape laws, namely- those being under 15¹² years and those who are separated from their husbands.¹³

Not only does the Indian law therefore condone statutory rape, it also doesn't recognize the very possibility of rape in a marriage.

According to National Family Health Survey (2015-16), 31% of married women experienced sexual violence in India. Among ever-married women aged 15-49, who have ever experienced sexual violence, 83% reported their current husband and 9% reported their former husbands as perpetrators.¹⁴

During National Family Health Survey (NFHS) 4, Indian men were asked specific questions to assess their gender egalitarian attitudes. In particular, men were asked, if a woman refuses to have sex with her husband when he wants her to, does he have the right to display the following four different behaviors: use force and have sex with her even if she doesn't want to; get angry and reprimand her or refuse to give her money or other means of financial support.

According to the national average, 9% of the men agree to the fact that the husband has the right to use force and have sex with his wife even when she does not want to; 11% agree to the fact that the husband has the right to refuse financial support to his wife if she refuses to have sex with him; 18% men believe that they have the right to get angry and reprimand their wife if she refuses sexual intercourse; 9% of men agree to the

fact that a husband is justified in chastising his wife if she refuses sexual intercourse. These facts highlight the need of the hour which is to introduce legislation penalizing marital rape.

The introduction of the Domestic Violence Act was a breather for the oppressed Indian women. Although, it only penalized physical violence with regards to dowry, the women now had a tunnel of hope. Sexual abuse in marriages, especially in India, where it is regarded as the most pious institution prevailing in the society, is not only looked down upon albeit something which the society believes to be far from reality. The concept of mutual consent is assumed in the conduct of sexual relations between the spouses, whereas, it should be a precursor in any marriage.

The association of marriage and compulsory sexual intercourse should undergo a rational change because the social fabric allows submission of independent identity of women and does not recognize any sort of bodily autonomy yet. Through the statistics one can clearly comprehend what the average man in India believes- the right to have sex with his wife notwithstanding the fact that, whether she's willing or not. Exemption of women rights in their own households only under the pretext of safeguarding the institution of marriage in India will only perpetuate the presence of supremacy of men over women.

In the words of Maneka Gandhi, "It is considered that the concept of marital rape as understood internationally cannot be suitably applied in the Indian context, due to various factors like level of education,

¹² exception 2 to section 375, IPC

¹³ section 376-A, IPC

¹⁴ NFHS-4



illiteracy and poverty.” This view of the Cabinet Minister for Women and Child Development, clearly reflects the patriarchal and orthodox thought process of the Indian legislature at large. Being one of the lawmakers of the nation, it is expected of her to float changes for establishment of an egalitarian society. The stereotypes should not be perpetuated, but broken; these views places women as a second-class gender in India.

Justice Pardiwala of the Gujarat High Court opined- “A law that does not give married and unmarried women equal protection creates conditions that lead to the marital rape. It allows the men and women to believe that wife rape is acceptable. Making wife rape illegal or an offence will remove the destructive attitudes that promote the marital rape. Such an action raises a moral boundary that informs the society that a punishment results if the boundary is transgressed. The total statutory abolition of the marital rape exemption is the first necessary step in teaching societies that dehumanized treatment of women will not be tolerated and that the marital rape is not a husband’s privilege, but rather a violent act and an injustice that must be criminalized.”

Although a small voice, but the winds of change have definitely picked up in the Indian society. Mr. Shashi Tharoor, has championed the cause of marital rape in India by introducing ‘The Women’s Sexual, Reproductive and Menstrual Rights Bill’ in 2018. If the Bill sees the light of the day in both the Houses of Parliament, it will take away the exception given to men in section 375, IPC- which does not penalize the man, if the sexual intercourse is committed with

his own wife who is above 15 years of age. The Bill said- “The autonomy of the woman must be rightfully restored to her by granting her the agency over her sexual and reproductive rights. For this, marital rape should be criminalized to eliminate the loss of woman’s sexual independence, post marriage.”

The introduction of marital rape laws does not necessitate acceptance of the same in the society. It will take a lot for married women to report as the taboo attached with women being recusant in their marriage will not be easy to surmount. The right to live with human dignity as enshrined in Article 21 of the Indian Constitution, is averse to the very idea of spousal rape in a marriage. This not only dampens her self-worth, as the one person that she entrusts her life to becomes her worst nightmare but also degrades her to a second-class citizen.

The 21st century women should not lose the agency of sexual autonomy to a man upon marrying him.
