

# Marital Rape - Myth, Reality and Need for Criminalization

Marital Rape – Myth, Reality and Need for Criminalization

By Saurabh Mishra & Sarvesh Singh\*

Cite as : (2003) PL WebJour 12

## Introduction

The idea of the “sacrosanct” institution of marriage dished out by the mainstream Indian cinema is a myth and is contrary to women’s perceptions of reality. Though marital rape is the most common and repugnant form of masochism in Indian society, it is hidden behind the iron curtain of marriage. Social practices and legal codes in India mutually enforce the denial of women’s sexual agency and bodily integrity, which lie at the heart of women’s human rights. Rape is rape. Be it stranger rape, date rape or marital rape. The law does not treat marital rape as a crime. Even if it does, the issue of penalty remains lost in a cloud of legal uncertainty. The legal system must be forced to accept rape within marriage as a crime. Further, women themselves must break free of societal shackles and fight for justice. They must refuse to comply with the standards applied to them as the weaker sex. This paper is an attempt to expose the discrimination, shortcomings and fallacies of the criminal justice system in India as regards marital rape. It goes on to provide arguments and reasons necessitating criminalization of marital rape. Lastly, the paper suggests certain legal reforms essential to achieve the desired objectives.

## Physical and psychological effects of marital rape

Despite the historical myth that rape by one’s partner is a relatively insignificant event causing little trauma, research indicates that marital rape often has severe and long-lasting consequences for women. The physical effects of marital rape may include injuries to private organs, lacerations, soreness, bruising, torn muscles, fatigue and vomiting. Women who have been battered and raped by their husbands may suffer other physical consequences including broken bones, black eyes, bloody noses, and knife wounds that occur during the sexual violence. Specific gynaecological consequences of marital rape include miscarriages, stillbirths, bladder infections, infertility and the potential contraction of sexually transmitted diseases including HIV.<sup>1</sup>

Women who are raped by their partners are likely to suffer severe psychological consequences as well. Some of the short-term effects of marital rape include anxiety, shock, intense fear, depression, suicidal ideation, and post-traumatic stress. Long-term effects often include disordered eating, sleep problems, depression, problems in establishing trusting relationships, and increased negative feelings about themselves. Psychological effects are likely to be long-lasting. Some marital rape survivors report flashbacks, sexual dysfunction, and emotional pain for years after the violence.<sup>2</sup>

## Types of marital rape

The following three kinds of marital rape are identified by legal scholars as generally prevalent in the society:<sup>3</sup>

**Battering rape:** In “battering rapes”, women experience both physical and sexual violence in the relationship and they experience this violence in various ways. Some are battered during the sexual violence, or the rape may follow a physically violent episode where the husband wants to make up and coerces his wife to have sex against her will. The majority of marital rape victims fall under this category.

**Force-only rape:** In what is called “force-only” rape, husbands use only the amount of force necessary to coerce their wives; battering may not be characteristic of these relationships. The assaults are typically after the woman has refused sexual intercourse.

**Obsessive rape:** Other women experience what has been labelled “sadistic” or “obsessive” rape; these assaults involve torture and/or “perverse” sexual acts and are often physically violent.

## Legal position in other countries

In United States researchers estimate that 10% to 14% of married women experience rape in marriage. When researchers examined the prevalence of different types of rape, they found that marital rape accounts for approximately 25% of all rapes.<sup>4</sup> Despite the prevalence of marital rape, this problem has received relatively little attention from social scientists, practitioners, the criminal justice system, and larger society as a whole. In fact, it was not until the 1970s that the society began to acknowledge that rape in marriage could even occur.

Till recently, the general rule was that a husband could not be convicted of the offence of raping his wife as he is entitled to have sexual intercourse with his wife, which is implied under the contract of marriage.<sup>5</sup> In 1993, marital rape became a crime in all fifty States, under at least one section of the sexual offence codes.<sup>6</sup> However, it is remarkable that only a minority of the States have abolished the marital rape exemption in its entirety, and that it remains in some proportion or

other in all the rest. In most American States, resistance requirements still apply.<sup>7</sup> In seventeen States and the District of Columbia, there are no exemptions from rape prosecution granted to husbands. However, in thirty-three States, there are still some exemptions given to husbands from rape prosecution. When his wife is most vulnerable (e.g. she is mentally or physically impaired, unconscious, asleep etc.) and is legally unable to consent, a husband is exempt from prosecution in many of these thirty-three States. The existence of some spousal exemptions in the majority of States indicates that rape in marriage is still treated as a lesser crime than other forms of rape. Importantly, the existence of any spousal exemption indicates an acceptance of the archaic understanding that wives are the property of their husbands and the marriage contract is entitlement to sex.

In England, earlier as a general rule, a man could not have been held to be guilty as a principal of rape upon his wife, for the wife is in general unable to retract the consent to sexual intercourse, which is a part of the contract of marriage.<sup>8</sup> However, the marital rape exemption was abolished in its entirety in 1991. The House of Lords held in *R. v. R.*<sup>9</sup> that the rule that a husband could not be guilty of raping his wife if he forced her to have sexual intercourse against her will was an anachronistic and offensive common-law fiction, which no longer represented the position of a wife in present-day society, and that it should no longer be applied. Corresponding amendment to the statutory law was made through Section 147 of the Criminal Justice and Public Order Act, 1994. This judgment was also affirmed by the European Court of Human Rights in the decision of *SW v. UK*<sup>10</sup>.

In New Zealand, the marital rape exemption was abolished in 1985 when the present Section 128 to the Crimes Act, 1961 was enacted. Sub-section (4) now provides that a person can be convicted of sexual violence in respect of sexual connection with another person notwithstanding that they are married at the time the sexual connection occurred.<sup>11</sup> Further, the fact that the parties are married or have been in a continuing relationship will not warrant a reduction in sentence.<sup>12</sup> There is now, therefore, no distinction in principle to be drawn between sexual violation in marriage and outside of marriage.

In Mexico, the country's Congress ratified a bill that makes domestic violence punishable by law. If convicted, marital rapists could be imprisoned for 16 years. In Sri Lanka, recent amendments to the Penal Code recognize marital rape but only with regard to judicially separated partners, and there exists great reluctance to pass judgment on rape in the context of partners who are actually living together. However, some countries have begun to legislate against marital rape, refusing to accept the marital relationship as a cover for violence in the home. For example, the Government of Cyprus, in its contribution to the Special Rapporteur, reports that its Law on the Prevention of Violence in the Family and Protection of Victims, passed in June 1993, clarifies that "rape is rape irrespective of whether it is committed within or outside marriage".

#### Position in India

In India marital rape exists de facto but not de jure. While in other countries either the legislature has criminalized marital rape or the judiciary has played an active role in recognizing it as an offence, in India however, the judiciary seems to be operating at cross-purposes. In *Bodhisattwa Gautam v. Subhra Chakraborty*<sup>13</sup> the Supreme Court said that "rape is a crime against basic human rights and a violation of the victim's most cherished of fundamental rights, namely, the right to life enshrined in Article 21 of the Constitution. Yet it negates this very pronouncement by not recognizing marital rape.<sup>14</sup> Though there have been some advances in Indian legislation in relation to domestic violence, this has mainly been confined to physical rather than sexual abuse. Women who experience and wish to challenge sexual violence from their husbands are currently denied State protection as the Indian law in Section 375 of the Indian Penal Code, 1860 has a general marital rape exemption. The foundation of this exemption can be traced back to statements made by Sir Matthew Hale, C.J., in 17th century England. Hale 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, which she cannot retract."<sup>15</sup>

This established the notion that once married, a woman does not have the right to refuse sex with her husband. This allows husbands rights of sexual access over their wives in direct contravention of the principles of human rights and provides husbands with a licence to rape their wives.

Only two groups of married women are covered by the rape legislation "those being under 15 years of age<sup>16</sup> and those who are separated from their husbands.<sup>17</sup> While the rape of a girl below 12 years of age may be punished with rigorous imprisonment for a period of 10 years or more, the rape of a girl under 15 years of age carries a lesser sentence if the rapist is married to the victim. Some progress towards criminalizing domestic violence against the wife took place in 1983 when Section 376-A was added in the Indian Penal Code, 1860, which criminalized the rape of a judicially separated wife. It was an amendment based on the recommendations of the Joint Committee on the Indian Penal Code (Amendment) Bill, 1972 and the Law Commission of India.<sup>18</sup> The Committee rejected the contention that marriage is a licence to rape. Thus, a husband can now be indicted and imprisoned up to 2 years, if firstly, there is a sexual intercourse with his wife, secondly, without her consent and thirdly, she is living separately from him, whether under decree or custom or any usage. However, this is only a piecemeal legislation and much more needs to be done by Parliament as regards the issue of marital rape. When the Law Commission in its 42nd Report advocated the inclusion of sexual

intercourse by a man with his minor wife as an offence it was seen as a ray of hope.<sup>19</sup> The Joint Committee that reviewed the proposal dismissed the recommendation. The Committee argued that a husband could not be found guilty of raping his wife whatever be her age. When a man marries a woman, sex is also a part of the package.

Many women's organizations and the National Commission for Women have been demanding the deletion of the exception clause in Section 375 of the Indian Penal Code which states that "sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape". However, the Task Force on Women and Children set up by the Woman and Child Department of the Government of India took the view that there should be wider debate on this issue. The mandate of the Task Force was to review all existing legislation and schemes pertaining to women. Of the four recommendations made by the Task Force vis-à-vis rape under the Indian Penal Code, the most significant pertains to the definition of rape. It took the position that the definition of rape ought to be broadened to include all forms of sexual abuse. As per the recommendation, the Law Commission's proposed definition of "sexual assault" could be adopted in place of the existing definition of rape in Section 375 IPC as "it is wide, comprehensive and acceptable". However, like the Law Commission, the Task Force also stopped short of recommending the inclusion of marital rape in the new definition. As of now, the law in India is wholly inadequate in providing supporting mechanisms for women to exercise bodily integrity and sexual autonomy.

#### Rebuttal of arguments against criminalization of marital rape

The following are some of the common arguments given against the idea and proposal of criminalizing marital rape as an offence:

- "There is no need to give legislative attention to marital rape, as it is quite uncommon.
- "Due to the near impossibility of proving marital rape, its criminalization would only serve as an increased burden to the already overburdened legal system.
- "Dissatisfied, angry, vengeful wives might charge their innocent husbands with the offence of marital rape.
- "There is an implied consent to have sexual intercourse when a woman marries a man.
- "Marital rape laws would destroy many marriages by preventing any possible reconciliation. A perusal of these arguments would make it quite evident that these are mere fanciful, lame excuses of a male-dominated society that lack any sort of legal substance or moral force. A rebuttal of the abovementioned arguments is not very difficult.

Marital rape is a common but under-reported crime. A study conducted by the Joint Women Programme, an NGO, found that one out of seven married women had been raped by their husband at least once.<sup>20</sup> They frequently do not report these rapes because the law does not support them.

As to the second argument, that marital rapes are difficult to prove, it may be showed that criminalization of marital rape, serves to recognize rape in marriage as a criminal offence and would have a deterrent effect on prospective rapist husbands. The mere fact that marital rape would be very difficult to prove is no reason for not recognizing it as a crime.

As regards the third argument of women foisting malicious charges, it may be noted that if proving a claim of rape in marriage is hard, proving a fabricated claim will be even more difficult. Because of the associated stigma of rape trials, it is unlikely that women will elect to undergo such an experience out of sheer spite. Besides, the criminal justice system provides inherent safeguards such as the requirement of proof beyond any reasonable doubt. This is no justification to say that the victims should be denied protection simply because someone might be at risk of a fabricated case.

As far as the fourth argument is concerned, it is true that a wife impliedly consents to sexual intercourse with her husband after marriage, but the expression of love through sexual intimacy is not the same as forced sex. On the other hand, it strikes at the very foundation of matrimony irrespective of whether the marriage is a sacrament or a contract. By no stretch of imagination can it be said that a person consents to harm or violence by marriage, and neither does the law permit any person to give such consent.

Finally, a marriage in which a husband rapes his wife is already destroyed. Attempt to hold together marriages may be one of the objectives of matrimonial laws. But it cannot override the fundamental objective of law in general and that of criminal law in particular, which is to protect and preserve the bodily integrity of a human being. Thus, withholding justice and denying equal protection for preserving marriages, at best, can be an improper goal of law. The law should not encourage forced cohabitation and should not protect a raping husband.

#### Lacunae in Indian law

The whole legal system relating to rape is in a mess, replete with paradoxes. The major legal lacunae that come in the way of empowering women against marital rape are:

- "The judicial interpretation has expanded the scope of Article 21 of the Constitution of India by leaps and bounds and

“right to live with human dignity”<sup>21</sup> is within the ambit of this article. Marital rape clearly violates the right to live with dignity of a woman and to that effect, it is submitted, that the exception provided under Section 375 of the Indian Penal Code, 1860 is violative of Article 21 of the Constitution.

- “ Article 14 of the Constitution guarantees the fundamental right that “the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India”. Article 14 therefore protects a person from State discrimination. But the exception under Section 375 of the Indian Penal Code, 1860 discriminates with a wife when it comes to protection from rape. Thus, it is submitted, that to this effect, exception provided under Section 375 of the Indian Penal Code, 1860 is not a reasonable classification, and thus, violates the protection guaranteed under Article 14 of the Constitution.

- “ Though protection of the dignity of women is a fundamental duty under the Constitution,<sup>22</sup> casting a duty upon every citizen “to renounce practices derogatory to the dignity of a woman”; it seems that domestic violence and marital rape do not come under the definition of dignity.

- “ The “United Nations Convention on the Elimination of All Forms of Discrimination against Women” (CEDAW), of which India is a signatory, has viewed that this sort of discrimination against women violates the principles of equality of rights and respect for human dignity. Further, the Commission on Human Rights, at its fifty-first session, in its Resolution No. 1995/85 of 8-3-1995 entitled “The elimination of violence against women” recommended that marital rape should be criminalized.

- “ A husband cannot be prosecuted for raping his wife because consent to matrimony presupposes consent to sexual intercourse. This implies that having sex anytime, anywhere and of any sort is an implied term of the contract of marriage, and the wife could not breach that term of the contract.

- “ The law prevents a girl below 18 years from marrying, but on the other hand, it legalizes non-consensual sexual intercourse with a wife who is just 15 years of age.

- “ The Indian Penal Code, 1860 states that it is rape if the girl is not the wife of the man involved and is below 16, even if she consents.<sup>23</sup> But if she is a wife, not below 15 and does not consent, it is not rape.

- “ Another paradox is that according to the Indian Penal Code, 1860, it is rape if there is a non-consensual intercourse with a wife who is aged between 12 and 15 years. However, the punishment may either be a fine or an imprisonment for a maximum term of 2 years or both,<sup>24</sup> which is quite less in comparison to the punishment provided for rape outside the marriage.

- “ Though the advocates of women’s rights secured a clause in 1983 under which it is unlawful for a man to have sexual intercourse with his separated wife pending divorce, the courts are reluctant to sentence husbands in spite of the law. Suggestions for reform

In light of the above discussion following suggestions are made:

- “ Marital rape should be recognized by Parliament as an offence under the Indian Penal Code.

- “ The punishment for marital rape should be the same as the one prescribed for rape under Section 376 of the Indian Penal Code.

- “ The fact that the parties are married should not make the sentence lighter.

- “ It should not be a defence to the charge that the wife did not fight back and resisted forcefully or screamed and shouted.

- “ The wife should have an option of getting a decree of divorce if the charge of marital rape is proved against her husband. Though a case of marital rape may fall under “cruelty” or “rape” as a ground of divorce, it is advisable to have the legal position clarified.

- “ Demand for divorce may be an option for the wife, but if the wife does not want to resort to divorce and wants to continue with the marriage then the marriage should be allowed to continue.

- “ Corresponding changes in the matrimonial laws should be made. Conclusion

It is conceded that changing the law on sexual offences is a formidable and sensitive task, and more so, in a country like India, where there is a contemporaneous presence of a varied and differentiated system of personal and religious laws that might come into conflict with the new amendments in the statutory criminal law. Further, though, there is need for substantial changes in the law on sexual offences such as making them gender-neutral and eliminating the inequalities, a radical overhauling of the structure of sexual offences is not advisable.<sup>25</sup> The immediate need is criminalization of marital rape under the Indian Penal Code. But, mere declaration of a conduct as an offence is not enough. Something more is required to be done for sensitizing the judiciary and the police. There is also a need to educate the masses about this crime, as the real objective of criminalizing marital rape can only be achieved if the society acknowledges and challenges the prevailing myth that rape by one’s spouse is inconsequential.

\* Students, IVth Year, BA LLB (Hons.), National Law Institute University, Bhopal. Return to Text

1. Thornhill, R. & Palmer, C.T., A Natural History of Rape “ Biological Bases of Sexual Coercion (1st Edn., MIT Press Cambridge Mass., 2000). Return to Text

2. Thornhill, R. & Thornhill, N., The Evolution of Psychological Pain, in Sociology and Social Science, Edn., Bell, R. & Bell, N. (Texas Tech University Press, 1989). Return to Text

3. Gosselin, D.K., *Heavy Hands* " An Introduction to the Crimes of Domestic Violence (1st Edn., Prentice-Hall Inc., New Jersey, 2000). [Return to Text](#)
4. National Violence Against Women Survey, NCJ 172837, Washington, DC: US Department of Justice. [Return to Text](#)
5. 65 Am Jur 2d, Rape, Â§ 527. [Return to Text](#)
6. National Clearinghouse on Marital and Date Rape, 1996. [Return to Text](#)
7. Schulhofer, S.J., *Unwanted Sex : The Culture of Intimidation and the Failure of Law* (Harvard University Press, Cambridge, 1998), p. 30. [Return to Text](#)
8. Halsbury's Laws of England, 4th Edn., Vol. 11(1), para 495. [Return to Text](#)
9. (1992) 1 AC 599 : (1991) 4 All ER 481 (HL) [Return to Text](#)
10. (1996) 21 EHRR 363 [Return to Text](#)
11. Simester, A.P. & Brookbanks, J., *Principles of Criminal Law* (1st Edn., Brookers Ltd., Wellington, 1998), p. 552. [Return to Text](#)
12. R. v. D. (1987) 2 NZLR 272 (CA). [Return to Text](#)
13. (1996) 1 SCC 490 [Return to Text](#)
14. Tandon, N. & Oberoi, N., *Marital Rape " A Question of Redefinition*, Lawyer's Collective, March 2000, p. 24. [Return to Text](#)
15. 1 Hale, *History of the Pleas of the Crown* 629 (1778). [Return to Text](#)
16. Exception to Section 375 of the Indian Penal Code, 1860. [Return to Text](#)
17. Section 376-A of the Indian Penal Code, 1860. [Return to Text](#)
18. Law Commission of India, 42nd Report, 1977, Indian Penal Code, para 16.115, p. 277. [Return to Text](#)
19. *Ibid.* [Return to Text](#)
20. Subsequent research finds that more women are raped by their husbands each year than by strangers, acquaintances, or other persons. Over a third of the women in our country's battered women's shelters report being sexually assaulted by their husbands. [Return to Text](#)
21. *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, (1981) 1 SCC 608. [Return to Text](#)
22. Article 51-A(e) of the Constitution of India. [Return to Text](#)
23. Section 375(6) of the Indian Penal Code. [Return to Text](#)
24. Section 376 of the Indian Penal Code. [Return to Text](#)
25. Because radical restructuring in the United States, Canada and New South Wales has proved disappointing. See Nicolson, D. & Bibbings, L., *Feminist Perspectives on Criminal Law* (1st Edn., Cavendish Publishing Ltd. London, 2000), p. 185. [Return to Text](#)