

## **Marital Rape in Bangladesh: Law and Reality**

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From time immemorial, marriage is considered as the most important institution in our society. It is a union that has physical, emotional, social, legal and even spiritual consequences between two persons and to some extent even between their families. Due to the significance attached to it, a lot of effort is put to make marriages successful in sub-continent, and we indeed take pride in claiming that our marriages are more lasting than those of West<sup>1</sup>. But the sickening fact is that our marriages are exposing women to “Patriarchal Terrorism”<sup>2</sup>, by subjugating them to domestic violence and inequality. Marital rape is just one of the few ways through which such violence is implemented. It is a sexual violence that not only violates the right of dignity of a woman but also harms the relation between a husband and a wife. Society and our legal system have overlooked the injurious consequences of marital rape for a long time now. Keeping pace with the world, the lawmakers of our country should realize the grave reality of marital rape in order to save our marriages as well as the society.

### **Defining Marital Rape:**

The term ‘rape’ comes from the Latin word *rapere* which means “*to snatch, to grab, to carry off*”. The 1988 International Criminal Tribunal for Rwanda defined rape as a physical invasion of a sexual nature committed on a person under circumstances which are coercive<sup>3</sup>. In Bangladesh, rape is defined under Section-375 of Penal Code as sexual intercourse with a woman against her will or without her consent or by obtaining consent by putting her in a fear of death or hurt or by making her believe he is her lawful husband or if she is under 14 years of age. On the other hand, marital rape, also known as spousal rape, can be defined as engaging in sexual intercourse with one’s own spouse without consent or against the will of the other spouse<sup>4</sup>. The definition of rape under Penal Code<sup>5</sup> is also applicable for marital rape in our country only if the victim i.e. the married woman who has been raped by her husband is under the age of 13.

### **Legal Basis of Marital Rape Exemption:**

For centuries politicians and judges claimed that marital rape did not exist within law and as a matter of public policy could not occur. That is, it was impossible for a husband to rape his wife under the laws of God and man.<sup>6</sup>

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<sup>1</sup> General Divorce Rate in Bangladesh was 1.3% according to Report on Bangladesh Sample Vital Statistics 2015 compared to 53% in USA, 47% in UK, 43% in Australia (Divorce Fact Sheet 2016, Feldstein Family Law Group)

<sup>2</sup> Johnson, Michael P., “*Patriarchal terrorism and common couple violence: Two forms of violence against women,*” *Journal of Marriage and the Family*, Vol. 57, No. 2 (May, 1995), pp. 283–294

<sup>3</sup> Smith, ed. By Merrill D., *Encyclopedia of Rape*, (Westport, Connecticut, Greenwood Press, 2004), pp. 169-170

<sup>4</sup> Penal Code of Bhutan, 2004; Article-199

<sup>5</sup> Penal Code, 1860; Section-375

<sup>6</sup> Goodwin, Michele, *Marital Rape: The Long Arch Of Sexual Violence Against Women And Girls*, *American Society Of International Law*, Vol. 109, January 20, 2017

Husbands who raped their wives were not held guilty in common law due to an extrajudicial statement made by jurist Sir Matthew Hales that

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 up herself in this kind unto her husband, which she cannot retract.<sup>7</sup>

Though it wasn't any judicial authority, it became the doctrinal basis of spousal immunity from rape and courts began to accept this starting with *Commonwealth v. Fogerty*<sup>8</sup>. This contention of Sir Matthew Hale was backed by the legal doctrine of *Coverture*, under which a woman had no legal standing after her marriage and was considered as a property of her husband. Since wife was considered as the property of her husband, a husband could not be held liable for raping her wife than an owner could be for stealing his own property<sup>9</sup>. Laws regarding exemption of marital rape were in fact developed to protect the interests of men.<sup>10</sup> Bangladesh having inherited common law system from its rulers has ignored marital rape in its laws.

### **Criminalization of Marital Rape:**

The problem of the lack of legal means for protecting the rights and freedoms of a woman in the sphere of sexual life were noticed quite early by people fighting for women's rights in the 19th century.<sup>11</sup> The first doubt about the Hale's doctrine of marital rape exemption was raised in *R v Clarence*<sup>12</sup>, but it took a long time before marital rape was criminalized. Poland in 1932 became the first country to enact laws criminalizing marital rape.<sup>13</sup> Soviet Union and some other members of the Communist Bloc followed by Yugoslavia, Israel, Australia and several former British-ruled countries followed the trend. The European Parliament's Resolution on Violence against Women of 1986 called for the criminalization of marital rape<sup>14</sup>. In USA, first marital rape conviction occurred in 1979 and by 1993 marital rape was a crime in all 50 states. In England the exemption was finally abolished through the case of *R v R*<sup>15</sup>. Article-2 of Declaration on the Elimination of Violence against Women first established marital rape as a violence against women and thus a human rights violation. Up until 2006, at least 100 countries have laws providing punishment for marital rape<sup>16</sup>. Even Pakistan, who have inherited the

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<sup>7</sup> Sir Matthew Hale, *The History of Plea of Crown*, 1736, (The Lawbook Exchange Ltd. England, reprinted in 2004), P. 629

<sup>8</sup> 74 Mass. (8 Gray) 489 (1857)

<sup>9</sup> Charlotte L. Mitra, "...For She Has no Right or Power to Refuse Her Consent", 1979 CRIM. Law Review, pg 558, 560

<sup>10</sup> Ryder, S., & Kuzmenka, S., "Legal rape: the marital rape exemption", 24:393 (1991) *The John Marshall Law Review*, pp.393-421, at page 394

<sup>11</sup> J. E. Hasday, *Contest and Consent: A Legal History of Marital Rape*, California Law Review, Vol. 88, No. 5 (Oct., 2000), pp. 1373-1505

<sup>12</sup> (1888) 22 QBD 23

<sup>13</sup> Shalini Nair, Marital Rape a crime in many countries, an exception in many more, *The Indian Express*, available in <https://indianexpress.com/article/explained/marital-rape-a-crime-in-many-countries-an-exception-in-many-more-4821403> (Last Accessed on 3<sup>rd</sup> October, 2018)

<sup>14</sup> The Routledge Handbook of European Criminology, (Sophie Body-Gendrot, Mike Hough, Klara Kerezsi Edited, 2014, Abindom, Oxon)

<sup>15</sup> (1991) 155 JP 989

<sup>16</sup> Dr. Bhavish Gupta & Dr. Meenu Gupta, "Marital Rape: - Current Legal Framework in India and the Need for Change," *Galgotias Journal of Legal Studies*, 2013 Vol. 1 No. 1, pg 18

same colonial era Penal Code, 1860 as Bangladesh, have removed the exception clause of Section 375, which provided immunity to husbands who raped their wives.<sup>17</sup>

### **Current Legal Framework in Bangladesh:**

The provision of Penal Code, 1860<sup>18</sup> limits the application of law of rape in case of marriage to only those under the age of 13. And the punishment in this case is also reduced to imprisonment which may extend to two years, or fine, or both.<sup>19</sup> Though under section-2 of Domestic Violence (Prevention and Protection) Act, 2010; any conduct of sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of the victim is a domestic violence and marital rape can be brought under the scope of this section. Even the Kerala High Court of India has stated that forcible sex against the wishes of a woman is a cruelty and is a good ground for dissolution of marriage.<sup>20</sup> But in reality, the express provision of Penal Code will prevent the prosecution of marital rape in our country. Even Section 9 of NARI-SHISHU NIRJATON DAMAN AIN, 2000 contains an explanation clause that defines rape as sexual intercourse under certain circumstances, committed only by a man who doesn't have marital ties with the victim woman. So, the current laws regarding rape and violence against woman doesn't provide any sorts of recourse to the married women who have been raped by their husbands.

### **Marital Rape and the Constitution:**

Article 27 of the constitution of People's Republic of Bangladesh guarantees equal protection of law to everyone. Again, Article 28 of the constitution prohibits discrimination against citizens on the ground of sex and ensures equal rights to women in all spheres of life. Though, our constitution approves a form of inequality in the banner of 'Reasonable Classification',<sup>21</sup> classifying married women separate to that of unmarried ones, doesn't serve the purpose of reasonable classification. As stated in *Sheikh Abdus Sabur v. Returning Officer*,<sup>22</sup> reasonable classification is permissible only for the purpose of legislation and must be founded on an intelligible differentia that has a rational relation to the object sought to be achieved by the statute in question. While Penal Code, 1860 was enacted to define offences, prescribe separate punishment for them and state which matters can be shown as a defense to a charge of an offence,<sup>23</sup> NARI-SHISHU NIRJATON DAMAN AIN, 2000 was enacted to prevent the offences of oppression of woman and children strictly<sup>24</sup> and Domestic Violence (Prevention and Protection) Act, 2010 was enacted to establish equal rights to women and children guaranteed in the constitution, prevent and protect them from domestic violence and as a part of the signatory of Convention on the Elimination of All Forms of Discrimination against

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<sup>17</sup> Taqbir Huda, "Why is marital rape still legal in Bangladesh?", The Daily Star, (26<sup>th</sup> July, 2017) available at <https://www.thedailystar.net/opinion/society/why-marital-rape-still-legal-bangladesh-1438600> (Last Accessed on 3<sup>rd</sup> October, 2018)

<sup>18</sup> Supra note-6

<sup>19</sup> Section 376, Penal Code, 1860

<sup>20</sup> Bini T. John vs Saji Kuruvila AIR 1997 Ker 247

<sup>21</sup> M Jashim Ali Chowdhury, *An Introduction to The Constitutional Law of Bangladesh*, (2nd Edition, Sun Shine Books, January 2014), Page 179

<sup>22</sup> 41 DLR (AD) (1989) 30, para 69, See also Budhan v. State of Bihar AIR (1955) SC 191 (India) and State of West Bengal v. Anwar Ali Sarkar AIR (1952) SC 75 (India)

<sup>23</sup> Ratanlal & Dhirajlal's The Indian Penal Code, (33<sup>rd</sup> Edition V.R. Manohar Edited LexisNexis Butterworths Wadhwa Nagpur 2010), Page iv, v

<sup>24</sup> Preamble, Act No. VIII of 2000; Bangladesh Gazette; Dated-14 February 2000

Women, 1979.<sup>25</sup> There is no logical ground as to why to achieve the object of these legislations, which are prevention of oppression, domestic violation and protection and providing equal rights to women, might require classifying unmarried women into a different category. Rather the limitation of age in Penal Code, 1860 that prevents the courts from trying marital rape offenders and other legislations that explicitly decriminalizes marital rape clearly stands in violation of the Article 27 and 28 of our constitution as it denies protection to the married women similar to that of an unmarried woman and causes discrimination.

### **Consequences of Marital Rape:**

Similar to rape, marital rape is a violation of a women's dignity. In fact, marital rape does more harm to a woman than rape by stranger and is single handedly responsible for some concerning public health problems<sup>26</sup> such as

- Poor maternal & child health
- Repeated infections with Sexually-Transmitted Infections
- Long term exposure to the risk of HIV infection

Other gynecological consequences of marital rape may include miscarriages, stillbirths, bladder infections, infertility<sup>27</sup> along with vaginal bleeding or infection, genital irritation, pain during sex, chronic pelvic pain, and urinary tract infections<sup>28</sup> Again, marital rape is associated with mental health problems like trauma with high chance of depression and anxiety, higher self-blame, lower self-esteem<sup>29</sup> as well as loss of trust, shock and intense fear,<sup>30</sup> humiliation, anger and somatic complaints,<sup>31</sup> dislike of men in general, and problems with sexual functioning etc.<sup>32</sup>

Needless to say marital rape adversely affects the overall harmony of a family and thus children growing up in a family marred with occurrence of marital rape faces psychological and mental health problems due to witnessing the unhealthy relationship of parents. Most of the time marital rape is accompanied by repeated or frequent incidents of physical assaults, which is injurious to the health of the victim.

### **Social Reality of Marital Rape:**

Marital rape is a concept that is unrecognized in our society. Even the victims of this hateful act are not aware of their human rights violation. From the ancient times domestic violence

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<sup>25</sup> United Nations, Treaty Series, vol. 1249, p. 13

<sup>26</sup> "Marital Rape and its Impacts: A Policy Briefing for Kenyan Members of Parliament", Policy Brief No.13, 2010 ; African Population and Health Research Center

<sup>27</sup> Thornhill, R. & Palmer, C.T., A Natural History of Rape " Biological Bases of Sexual Coercion (1st Edn., MIT Press Cambridge Mass., 2000)

<sup>28</sup> William R. Miller, Ann Marie Williams & Mark H. Bernstein, The effects of rape on marital and sexual adjustment, The American Journal of Family Therapy, Volume 10, 1982, Issue 1, published online, Jun 13, 2007, P. 51-58

<sup>29</sup> Campbell, J. C., & Soeken, K. L. (1999) Forced sex and intimate partner violence: Effects on women's risk and women's health. *Violence Against Women*, 5, 1017–1035

<sup>30</sup> Can a husband rape his wife? Vanguard News available at <https://www.vanguardngr.com/2016/04/can-husband-rape-his-wife> (Last accessed on 31st May, 2019)

<sup>31</sup> Finkelhor, David; Yllo, Kersti ; License to rape, New York: Holt, Reinhart and Winston (1985) p. 138

<sup>32</sup> Ibid

towards woman, torture for dowry, inhuman treatment etc have been common practice in the sub-continent. Though with time almost all of these heinous acts have been criminalized and brought under the scope of law, marital rape is still largely ignored. The reason behind this can be explored in the prevalent attitude of the people in our society.

Firstly, it is widely accepted that one of the main aim of the institution of marriage is procreation and establishing sexual relation between two human beings that is legally, morally and socially accepted. Due to this orientation of marriage, society is unwilling to recognize the presence of rape in marriages.

Secondly, there is a common misconception that a woman is in danger of rape and violence usually from a stranger. But in fact a woman is more prone to violence from her family and relatives than strangers. In a nationwide survey titled “Violence Against Women Survey 2011”, conducted by the Bangladesh Bureau of Statistics in collaboration with the United Nations Population Fund, it was found that 87% of the married women in Bangladesh are abused by their husbands, with one-third of married women experiencing sexual violence perpetrated by current husbands in their lifetime.<sup>33</sup> The survey also found that the age group of 20-34 is more vulnerable to spousal sexual violence compared to other age groups,<sup>34</sup> which is well beyond the scope of Penal Code, 1860. In fact marital rapes are more emotionally and physically damaging than rape committed by a stranger because of the subsisting relation between victim and perpetrator. In this regard, the researchers Finkelhor and Yllo remarked:<sup>35</sup>

When a woman is raped by a stranger, she has to live with a frightening memory. When she is raped by her husband, she has to live with the rapist”.

Thirdly and probably the biggest hindrance in criminalization of marital rape in our country is the patriarchal nature of our society. A woman in our society faces outright discrimination in each and every sphere of her life. Customs, practices and even laws of our country are more suited for men than women. Even in marriage, the traditional view is that a husband will gain full control over his wife and anything that a husband forces on his wife, is not contradiction of any rights of the wife. A wife is considered as a property of the husband. Although laws regarding rape, domestic violence and safety of women have been enacted in our country, they have not proven to be effective due to the attitude of the society.

In the context of our society, the idea of laws regarding marital rape will not be welcomed since our customs and usages prefer solving marital matters inside the family rather than dragging them into the courts. Prosecution of marital rape may indeed lessen the chances of reconciliation, but if a marriage has already deteriorated to a point where intercourse is commanded at the expense of violence, it is safe to say that there is nothing left for reconciliation<sup>36</sup>.

### **The brutal truth of Child Marriage Restraint Act, 2017:**

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<sup>33</sup>Report on Violence Against Women (VAW) Survey 2011 <http://evaw-global-database-unwomen.org/-/media/-files/un%20women/vaw/-vaw%20survey/-bangladesh%20vaw%20survey.pdf?vs=5638> (Last Accessed on 3<sup>rd</sup> October, 2018)

<sup>34</sup> Ibid

<sup>35</sup> Finkelhor, David; Yllo, Kersti ; License to rape, New York: Holt, Reinhart and Winston (1985) p. 138

<sup>36</sup> Weishaupt v. Commonwealth 315 S.E.2d 847, 855 (Va. 1984)

Instead of protecting the rights of a married woman, our legal system took a step backwards by attaching special provision clause in Section-19 of recently enacted Child Marriage Restraint Act, 2017; which enables a victim of rape to be married with her rapist if the court permits. If it wasn't shameful enough that law was failing to provide justice for married women, on top of that law has been made to force women to be married with the vary man who violated her dignity and honor. Now the question remains how can one expect that a marriage, which originates from the shameful act of rape guarantee safety, protection and dignity to the women. It is highly likely that the woman who has been subjected to such marriage will be a victim of further abuse and repeated marital rape during the existence of such marriage.

### **Concluding remarks:**

It is very unfortunate that the worst kind of human rights violation is occurring in the midst of the oldest and the most important institution of our society. Marriage could never be an excuse to strip dignity and safety of a woman. Whether a woman is married or not and whether the rapist is her husband or a stranger, should not be a consideration while dispensing justice. Our constitution guarantees equal protection of law to everyone<sup>37</sup>. And thus the limitation of age in Penal Code that prevents from trying marital rape offenders is unconstitutional as it denies justice to married women. If it wasn't shameful enough that Bangladesh has failed to criminalize marital rape, section-19 of Child Marriage Restraint Act, 2017 has taken us back to the primitive days of injustice. It should be the aim of a society to give protection and safety to the women and ensure their dignity because disrespect of women is disrespect to the society itself. Marital rape not only endangers the women but tarnishes the sole reason behind the creation of marriage i.e. love and harmony between two human beings. Women in our society already face discrimination from all sectors and burdening them further with abuse and violence is the grossest of all human rights violation. Family is the fabric with which our society is woven. Family must be that one place where everyone feels safe. Marital rape is that pest that ruins family by violating a woman's dignity, destroying the relation of trust and respect between husband and wife and forcing the children to grow up watching the unhealthy marriage of their parents. In order to protect our family and our women, law needs to change. Amending Penal Code to accommodate the concept of marital rape has become a necessity indeed. Repealing section-19 of Child Marriage Restraint Act, 2017 and making express provision in Domestic Violence (Prevention and Protection) Act, 2010 regarding marital rape will also be needed. South Africa having criminalized marital rape in 1993 saw its first conviction in 2012<sup>38</sup>. If we delay in changing our laws and doing justice with the victims of marital rape, it will only deteriorate our families and our society.

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<sup>37</sup> Constitution of People's Republic of Bangladesh, Article-27

<sup>38</sup> Khethiwe Chelemu, "Wife's seven-year wait for justice", Times Live, (19<sup>th</sup> January, 2012), available at <https://www.timeslive.co.za/news/south-africa/2012-01-19-wifes-seven-year-wait-for-justice/> (Last Accessed on 3<sup>rd</sup> October, 2018)