

Stigma of Marital Rape: Quest for Specific Laws

Md. Akiful Islam

Student of LL.B.(Hons), 3rd Year, Department of Law, University of Chittagong

Introduction

Marital rape is one of the most disgusting and shameful forms of masochism in today's world. Yet it is hidden under the marriage vows. Many of the victims remain silent instead of raising their voice against the violence; even they don't tell it to their family and friends because of the fear of social stigma which makes marital rape one of the heinous atrocities against women in our society. Where people are raising their voice against vices such as domestic violence as a crime, it is needless to say, marital rape is neither being treated as a rape nor criminalized by the government of our country with the assumption that the husband cannot be guilty of rape committed by himself upon his lawful wife. Exemption of Marital rape clearly constitutes a denial of a married woman's constitutional right as it violates their right of physical and psychological integrity and equal protection of law enjoyed by the citizens of Bangladesh¹, solely on the basis of their marital status. Thus Women are lacking meaningful access to courts and therefore justice.²

Once, a skewed notion existed that man and woman become one under the marriage tie and women were being treated as not a human but as the personal property of the husband. Thus, it is impossible to rape wife even when sex is done with force and marital rape exemption was permitted. But with the onset of time, such a notion had started to change in the 20th century and a number of countries have started to criminalize marital rape as a crime. The marital rape exemption in our Penal Code had been inserted by the British colonial rulers, which opened the window of evil turpitude to treat the wife as personal property rather than a human being. However, the lawmakers have had chances again and again to amend or outlaw marital rape exemption and enact new provision of laws to prevent marital rape within its ambit according to the present social norms. Yet, surprisingly this social violence against women within marriage goes unnoticed and unacknowledged by our lawmakers, and even no mass awareness arises against such a relentless crime which is really inconceivable and extremely frustrating in this era.

What is marital rape?

Marital rape is defined as any unwanted sexual acts by a spouse or ex-spouse, committed without consent or against a person's will, obtained by force, or threat of force, intimidation, or when a person is unable to consent.³ It is also defined as spousal rape, happened between legally married couple using force and not taking consent of the intimate partner, where the married women are the victims of this crime. According to a number of reports, there are three kinds of marital rape: Battering rape, force only rape and obsessive rape. According to *Michele Goodwin*:

As Incest is an invisible crime So too was marital rape and sadly in many parts of the world, it is continuing to stigmatize and penalize women. For centuries politicians and judges claimed that

¹ Art. 27 of The Constitution of The People's Republic of Bangladesh

² See E.G., Catharine A. Mackinnon, *Toward a Feminist Theory of the State* (1989); Catharine A. Mackinnon, *Feminism Unmodified* (1987).

³ Sherri Stritof, *Understanding Marital rape*, APRIL 20, 2018

marital rape did not exist within the 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.⁴

But the cruel and shocking truth is that this social malice is being practiced against thousands of women by their husband around the globe but neatly hidden under the marriage shield. Survivors of wife rape describe a deep personal violation of trust as well as body:

When a stranger does it, he doesn't know me, I don't know him. He's not doing it to me as a person, personally. With your husband, it becomes personal. You say, this man knows me. He knows my feelings. He knows me intimately, and then to do this to me - it's such a personal abuse.⁵

Is it a crime?

The function of law is not to protect the matrimonial harmony but to protect the right of the citizens guaranteed in the constitution irrespective of their identity vis. Sex, race, caste and social status. But during 1600s Mathew Hale, Chief Justice in England, in his famous thesis entitled *Historia Placitorum Coronae*⁶ wrote:

The husband cannot be guilty of a rape committed by himself upon his lawful wife, by their mutual matrimonial consent and contract, the wife has given herself in kind upon the husband, whom she cannot retract.

This statement legalized the inhumane torture upon the wife and gave themandate to treat the wife as a chattel, not as a wife under the blanket of matrimony. Later on, in England, this implied consent theory was overruled by the historic judgment on *R v. R*⁷, stating that it cannot be maintained that by marriage a wife submits herself irrevocably to sexual intercourse in all circumstances."In England and the USA, the turning point of criminalizing marital rape was the New York case of *People vs. Liberta* where it was finally decided that there was no reason for differentiating between marital rape and non-marital rape noting that a marriage license should not be viewed as a license to forcibly rape [the defendant's] wife with impunity".⁸ Moreover, the denial of marital rape constitutes the denial of equal protection of laws as it violates women's bodily integrity and self-dignity.

Effects of marital rape

Every year a significant number of women are being exposed to marital rape or intimate partner violence. According to the report of WHO, throughout the world, 42% of women who have experienced physical or sexual violence at the hands of a partner have experienced injuries as a result.⁹ The victims of marital rape experienced physical health, mental or psychological problem and

⁴ Goodwin, Michele, Marital Rape: The Long Arch Of Sexual Violence Against Women And Girls, American Society Of International Law, Vol. 109, January 20, 2017

⁵ Finkelhor, David and Yllo, Kersti, License to Rape: Sexual Abuse of Wives, 1985
available at https://scholars.unh.edu/soc_facpub/337

⁶ Hale Matthew (1736) *The History of Plea of Crown*, reprinted in 2004 The Lawbook Exchange Ltd. England, P. 629

⁷ (1991) 3 WLR 767

⁸ Caroline Johnston Polisi, Spousal Rape Laws Continue to Evolve, WeNews commentator, July 1, 2009
available at <http://womensenews.org/story/rape/090701/spousal-rape-laws-continue-evolve>

⁹ World Health Organization, Department of Reproductive Health and Research, London School of Hygiene and Tropical Medicine, South African Medical Research Council, Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence, 2013, p. 2.

sociological problems in our society. The sexual assaults involved in marital rape also destroy their social confidence:

Physical health problem

The physical injuries of marital rape that are being suffered by women push the women into serious health risk, which are not less than the injury of stranger rape. The physical injury caused by husband in marital rape is being committed by throwing something that could hurt, Pushing, grabbing, shoving, Pulling hair, Slapping and hitting with an object, Choking, trying to drown and Beating up, threatening with gun and knife. These surmising result of such heinous activities leave injuries to the vaginal and anal area, Scrapes, cuts, Bruises and soreness, Torn muscles Fatigue Vomiting, Broken bones Injuries caused by weapons, miscarriages or still births, contraction of sexually-transmitted infections, including HIV. The victim faces a lot of gynecological and reproductive health problems the respondents attributed to sexual abuse included anal or vaginal stretching, bladder infections, vaginal bleeding, anal bleeding, leaking of urine, missed menstrual periods, miscarriages and stillbirths, unwanted pregnancies, infertility, and sexually transmitted diseases,¹⁰ vaginal bleeding or infection, genital irritation, pain during sex, chronic pelvic pain, and urinary tract infections¹¹. Besides, spouse rape can also inflict Noncommunicable Diseases such as cardiovascular disease and hypertension.¹² The most shocking report has been noted by WHO that, It's been found that half of the women had been forced to have sex when they were ill, and almost half were coerced immediately after discharge from the hospital, often after childbirth.¹³

Psychological problem

The most pervasive form of mental trauma is marital rape which has very severe and long-lasting effects on victim's existence. Even the negative effect on mental of such spouse rape is more intense than Stanger rape. The psychological problems that generate from marital rape includes Post-Traumatic Stress Disorder PTSD¹⁴, anxiety depression eating disorders, fundamental loss of trust suicidality. In recent years, it has become apparent that much of the battered woman's syndrome overlaps with Post-Traumatic Stress Disorder (PTSD) symptoms, including difficulties falling or staying asleep, nightmares, flashbacks, increased startle responses, and numbed affect. PTSD "stresses the abnormal nature of the stressor which causes the mental health symptoms, not individual pathology"¹⁵ Yet, in our society, the situation is such that we never know the nightmare of marital rape that is perpetrating around almost everyday against our woman. At the very least, it brings into question the victim's ability to trust her spouse, issues of power and dominance, and questions relating to the meaning of marital sex. Furthermore, the victim is likely to continue to face the perpetrator in daily interaction and to be subjected to recurrent, often brutal victimization.¹⁶

¹⁰Jacquelyn C. Campbell and Peggy Alford, *The Dark Consequences of Marital Rape*, *The American Journal of Nursing*, Vol. 89, No. 7, July 1989, Published by: Lippincott Williams & Wilkins, P. 4 available at <http://www.jstor.org/stable/3426372> (Last Accessed On 25-05-2018 15:21 UTC)

¹¹William R. Miller, Ann Marie Williams & Mark H. Bernstein, *The effects of rape on marital and sexual adjustment*, *The Volume 10*, 1982, Issue 1, published online, Jun 13, 2007, P. 51-58

¹² Supra note 6, P. 15

¹³ Supra note 8

¹⁴Elaine K.Martin^a Casey T.Taft Patricia A.Resick *Aggression and Violent Behavior*, A review of marital rape, Volume 12, Issue 3, May-June 2007, P. 329-347

¹⁵Bennice JA, Resick PA, Mechanic M, AstinM. *The Relative Effects of Intimate Partner Physical and Sexual Violence on Post-Traumatic Stress Disorder Symptomatology*, *Violence and victims*, 2003;18(1):87-94.

Available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2981038/>

¹⁶ Nancy M. Shields and Christine R. Hanneke, *Comparing the Psychological Impact of Battering, Marital Rape and Stranger Rape*, *Clinical Sociology Review*, Vol. 10, Issue 1, January 1, 1992, p. 2

Sociological problem

Marital rape is a part of a larger continuum of violence against women and it is the powerful tool used by men to humiliate them, which leaves a lot of sociological impacts on victims' life. Many victims of marital rape and battering spoke informally of feeling "controlled" by their partners and they never feel close to others.¹⁷ The report found that Women whose partners verbally abused them, were jealous or possessive, or denied them access to family, friends, and these findings suggest that many women in violent relationships are victims of systematic terrorism; that is, they experience multiple forms of abuse and control at the hands of their partners.¹⁸ They become stigmatized and trodden as they remain silent because of their children and lack of proper opportunity of employment. Thus, it lowers the self-esteem of the victims in a society. Most shockingly, the effects of marital rape have influences on the children and family too. The family environment in which wife rape occurs thus becomes increasingly one of inequality, fear, constant threat, and a sense of less loving relationships.¹⁹ Besides, divorce is on the rise as a woman has no option without it if she doesn't want to live together again with her rapist husband.

Present scenario of marital rape laws in Bangladesh

Marital rape is the most underreported crime in our country. The laws that were laid down by the British colonials are still subsisting in our country as these arbitrary laws are neither amended nor outlawed by the lawmakers. The provision for rape case are laid down in section no. 375 of the penal code, 1860, which describes five scenarios under which a person's actions will be deemed as rape. This section clearly states that "sexual intercourse by a man with his own wife, the wife not being under 13 years of age, is not rape". on the other hand Section 4 of the Child Marriage Restraint Act provides that:

Whoever, being a male above twenty-one years of age, or being a female above eighteen years of age, contracts a child marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand Taka, or with both.

Hence, such provision in 156-year-old penal code is really confusing and frustrating when the legal age of marriage for a girl is minimum 18 years. When marrying a girl under 18 years of age is illegal and is a criminal offense, it is beyond possibility to rape a wife under thirteen years age. Thus, the present situation provides a scenario where marital rape is not been recognized at all. However, The legal age of marriage for girls changes with the flow of time but the protection systems in the penal code that are badly needed to protect them remains archaic, static, arbitrary and brutal for years after years. Again, Regardless of age and marital relation, rape is rape, when it is forced and without consent. Yet, it is a matter of shame to say that the punishment is so minimum and low.

Section 376 of the penal code which describes punishment for rape also creates confusion as to the inconsistency relating to the age of wife. It provides that, "Whoever commits rape shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, unless the woman raped is his own wife and is not under twelve years of age, in which case he shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both." again there is inconsistency as to the precise age a wife must be for marital rape to be punishable since the exemption clause in section 375

¹⁷ Ibid, p. 18

¹⁸ Patricia Tjaden and Nancy Thoennes, *Extent, Nature, and Consequences of Intimate Partner Violence, Findings From the National Violence Against Women Survey*, U.S. Department of Justice, July 2000, P. 60

¹⁹ Supra note 5

sets it at under thirteen years but Section 376 states it to be under twelve years.²⁰ Apart from The Penal Code the most surprising fact is that both NariO ShishuNirjatanDomonAin, 2000 and even The Family Violence (Defense and Protection) Act,2010 are also silent about marital rape. Thus, our laws push the married women to live a hollow life like a walking dead in a “living hell” and shut the door to get access to court under the shield of wedlock. According to Robin West, The martial exemption, in brief, is simply the most brutal of all possible expression of the social inclination to trivialize women's interest in physical and sexual security.²¹

Problems and Lacking

The research found that during the year 2000-2013, 81.6% married²²women in Bangladesh have experienced psychological violence by their husband And Yet they can't express their forced sex experience for a number of reasons, which have universally remained the same. The first and foremost reason is that marital rape is yet to criminalize in our country and the existing laws to protect violence against women do not serve the purpose. Secondly, most of the women are uneducated and have lacked knowledge and awareness which is why they believe that sex is totally a taboo in our society and embarrassing to discuss with family and friends. Therefore, marital rape is a bedroom talk which is totally self-prohibited topic to discuss. As a result, they are bearing the undeserving cruelty against their mental and physical health. Thirdly, the economic condition of women in our society is very much lower than the male as they remain unemployed. Hence, they have lower self- esteem as they remain dependent upon their husband's earning. A report of HRW suggests that women endured sexual violence because they were unable to escape, felt acute financial pressure to remain in their homes, or were under threat of greater harm if they did report.²³Fourthly, in a male dominating society like ours, a lot of women still have a very ill believe that once they are married to their husband they have no right to refuse against their husband's will and start to believe that they have no right to exercise control over her body and they remain quiet about the abuse and assault involved in such crime.

Besides, there is no task force to prevent and to monitoring marital rape in our country. According to WHO, Addressing intimate partner violence requires a range of approaches, including awareness-raising, education, prevention activities, provision of necessary health, legal and social services, shelters and counseling and improved follow-up on reported cases so that women may free from physical injury and fear. However, there has been seriously lacking in those preventive and protective measures against intimate partner violence in our country to provide comprehensive care facilities to women experiencing abuse. In fact, Violence against women also incurs significant economic costs, both direct and indirect. Direct costs include those associated with the police, hospital and other health services, legal costs, and costs associated with the housing, social and support services.²⁴ Although as a developing nation, it will take time to create all the facilities to satisfy the urgent need. Most of all, there is a serious lack of social awareness about marital rape in our country which ultimately forced women to believe them that it is not a crime against them but a right of the husband which must be tolerated by not raising their voice against it. Consequently, most of the crimes have

²⁰Huda, Why is marital rape still legal in Bangladesh?, (The Daily Star), July 26, 2017

²¹West, Robin, "Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment" (1990), *Georgetown Law Faculty Publications and Other Works*. 648, Florida Law Review, Vol 42, 1990, P. 78 Available at-<https://scholarship.law.georgetown.edu/facpub/648&https://heinonline.org/HOL/LandingPage?handle=hein.journals/uflr42&div=12&id=&page=>

²²Violence against women, the world's women, 2015, P.151 <https://unstats.un.org/unsd/gender/chapter6/chapter6.html>

²³ Amnesty International, Unheard Voices, 2005 Available at <http://web.amnesty.org/library/index/engaf440042005>

²⁴ Supra note 21, P. 141

gone unreported. According to the report of Rupperecht, the main reasons are Shame and embarrassment, fear of being blamed, fear of not being believed, distrust of the police/courts/legal process, fear of family and friends knowing/public disclosure/stigma, fear of retaliation/further attacks, as well as uncertainty on whether a crime has been committed.²⁵

The criminalization and legislation against marital rape In Bangladesh and beyond

Now globally 52 countries²⁶ around the world have criminalized marital rape. Poland in 1932 was the first to have a law explicitly making it a criminal offense. And then Australia, under the impact of the second wave of feminism in the seventies, was the first common law country to pass reforms in 1976 that made rape in marriage a criminal offense. In the two decades before that, several Scandinavian countries and countries in the Communist bloc passed laws criminalizing spousal rape including Sweden, Norway, Denmark, and the former Soviet Union and Czechoslovakia.²⁷

The United Kingdom that inserted marital law exemption in the penal code of sub-continent brought the turning point for marital rape law in its common law system on 23rd October 1991 (which until then believed that wife rape was not an offense since there was an implied consent present). On this day in a unanimous judgment, five Law Lords declared that a husband's immunity from a charge of his wife's rape formed no part of English Law.²⁸

However, It is breathtaking to say that we still can't recognize marital rape as a crime while Nepal repealed marital rape exemption on the ground of right to life and equal protection of law in 2007 and Pakistan in 2006 by legislating Protection of Women Act 2006 respectively, though the case reported in these countries are not even the tip of iceberg because of fear of retribution and stigma associated in such criminal offense. At least, it is hopeful that they are trying to alleviate the violence day by day, which is not possible in our country when the law is not amended. The rape laws in India are more or less the same as ours Based on the irrational logic that criminalizing marital rape 'will destroy the institution of family, will attack its sanctity' and 'will be used as a weapon by women to torture the male members',²⁹ as section 375 of the Indian Penal Code clearly stipulates that "Sexual intercourse by man with his own wife, the wife not being under 15 years of age, is not rape." Although the Protection of Women from Domestic Violence Act, 2005 had listed sexual abuse as a form of domestic violence under which, women can get civil protection if they have been subjected to marital rape which is not enough as a punishment against marital rape occurred repeatedly over a prolonged period. In Europe, Marital rape was recognized in law in Austria in 1989; in Switzerland in 1991 (though not until 2003 did it become a state offence); in the Netherlands in 1992; Germany in 1997 and in France in 2006³⁰ just after passing the EU parliament's Resolution on the violence

²⁵Ms Marlene Rupperecht, Rape Of Women, Including Marital Rape, Report: Committee On Equal Opportunities For Women And Men, Doc. 12013, 14 September 2009, p. 6

²⁶ Supra note 21, P. 139

²⁷27 Shalini Nair, Marital rape a crime in many countries, an exception in many more, The Indian Express, August 31, 2017, available at

<http://indianexpress.com/article/explained/marital-rape-a-crime-in-many-countries-an-exception-in-many-more-4821403/>

²⁸ Kate Painter, Wife rape in UK, Institute Of Criminology, available at

http://www.crim.cam.ac.uk/people/academic_research/katePainter/wiferape.pdf (last seen on 30th August 2015)

²⁹ Shalu Nigam, The Social And Legal Paradox Relating To Marital Rape In India: Addressing Structural Inequalities, June 03, 2015 Available at <https://www.couriercurrents.org/nigam030615.htm>

³⁰ Prof. Dr. Carol Hagemann-White, Stocktaking study on the measures and actions taken in Council of Europe member States, The Council of Europe, 2006, pp. 19-20,

against women in 1986. Besides, Belgium and Luxembourg also enacted new laws to explicitly make marital rape a criminal offence. But it is beyond imagination in this 21st century that there is no effective legal remedy against the stigma that fueled marital rape to protect the rape survivors because there is any Law even to recognize this heinous act which makes it a crime with no risk and punishment or incentives for the perpetrators.

Until 1993, all the 50 states of the US have criminalized marital rape. The US medical community treats millions of intimate partner rapes and physical assaults annually and an estimated 4.8 million intimate partner rapes and physical assaults are perpetrated against women.³¹ They are monitoring and taking necessary actions against the perpetrators by the task force and providing both health services and legal remedies to the marital rape survivors. Since the 1980s, many common law countries have legislatively abolished the marital rape immunity. These include South Africa, Ireland, Canada, the United States, New Zealand, Ghana, and Israel³² and recently South Korea has also criminalized marital rape to address the violence.

Among the South East Asian nations, Malaysia is the one which legislatively abolished marital rape exemption to help all types of a rape victim in 2007. It has One Stop Crisis Centers (OSCC) providing comprehensive care to women and children experiencing abuse located in A&E departments of urban public hospitals.³³ Although in its neighboring country Singapore, there is a partial immunity for marital rape because it is not a criminal offense except when the wife is below 13 years of age or when any of the specific circumstances provided under section 375(4) of the Singapore Penal Code are satisfied. However, voice has been raised gradually after the case of *Public Prosecutor v N*.³⁴ As an archaic rule, it is suggested for the complete abolishment of section 375 altogether.³⁵

When most of the advanced countries around the world thrown the spouse rape away and criminalized it in the early 20th century, In Bangladesh, there is neither political debate to criminalize marital rape as a crime nor to amend the immunity section existing in our laws in this country that are actually existing to preserve the idea of ignorance of the right of the women and patriarchic cultures seeking to protect the husband rapists by making the married women as chattel perceiving not as human beings holding own desires and feelings.

Recommendation

To address the violence against women under the marriage covenant like marital rape, it needs multiplenumbers of factors that must be implemented. Thus the following recommendations are needed:

- Repealing the marital rape exemption altogether from section 375 of The penal code and amending section 376 of the penal code to severe the punishment and fine; recognizing marital rape as a crime.
- Enacting new law titled Marriage “Women’s privacy and Protection Act” which addresses the violence of marital rape in its full essence; criminalizing it and treating it as not less severe crime than stranger rape by all law enforcement personnel and courts, to illegalize

31 supra note 15, P. 5

32 Supra note 29

33 Colombini M, Ali SH, Watts C, Mayhew S. One stop crisis centres: A policy analysis of the Malaysian response to intimate partner violence. *Heal Res Policy Syst* 2011;

34 [1999] 3 SLR(R) 499.

35 Low Jun-Lim Steven, An Analysis of the Marital Rape Exemption in Singapore, Singapore law review, Faculty of Law, National University of Singapore, Vol.8, February 28, 2017

marital rape and deem it as a crime with severe punishment with fine and compensation for the victims to protect them from re-victimization.

- Establishing comprehensive health care centers especially for the marital rape victims equipped to provide a comprehensive response, addressing both physical and mental consequences.
- Providing compulsory training programs for police officers, judicial personnel, Health-care providers and gathering forensic evidence when needed to enable them to identify cases of rape in particular, of marital rape, and to enable them to advise and assist the victims more effectively and consistently.
- Taking comprehensive steps to prevent marital rape in the first place including, by empowering women through changing their position in the society, specially married women.
- Moreover, mass Social awareness must be spread throughout the society against marital rape because If awareness can continue to bring the issue of marital rape to the forefront of conversation that converses that marital rape is no longer a stigma but brutal crime against the privacy and self-dignity of the women, then Incan help to make changes in society in relation to the issue. Besides, it is necessary to bring changes in the attitude towards married women in our society.

Conclusion

Our women in society have been indoctrinated with the notion and belief that they should try to be inherently affirmative against the will of dominating male and remain silent against the physical and mental traumas gravely Caused by their husband. In fact, their silence is the delineation of their worst and vulnerable condition in the society.

To live a life all the people need freedom regardless of anything. Women need freedom so that they can stand up to raise their voice against the violence they are bearing for years after years, The lawmakers should take drastic action to repeal the marital exemption away from the penal code and penalize it as a severe crime not even less serious as of rape of strangers so that the victims can get the ground to raise their voice against forced marital rape and get access to the justice through a legal process. However, it is not possible to claim that repealing marital rape exemption from penal code and making legislation against it would totally remove marital rape from the society. But there are countless women who are vulnerable to violence of forced marital rape every day, and they can't express their victimization to anybody because of the deep stigma attached in it and eventually fails to get access to remedies which are still more frustratingly not available for them in our existing legislation.