

Criminalizing Rape Within Marriage: Recasting Indian Rape Law

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Abstract

The paper is an attempt to bring marital rape under the purview of legal discourse in India with substantive equality approach to problematize the existing defined structure of Indian Rape Law. This paper takes up the challenge to create a legal language on the issue of rape within marriage which is till now absent from the legal and social scenario. The equal treatment of women before and under the law within the context of marital rape is critical to ensuring the recognition of women as full citizens, and ensuring their freedom from violence. This paper examines the following questions: how marital rape contributes to and results from women's inequality; how the discriminatory roots of the historical-cultural rationales contributes to the exemption of marital rape from the Indian legal system; how the issue of marital rape has been debated in personal-political scenario from the feminist viewpoint; how equality jurisprudence can support the case for the legal treatment of marital rape claims. This paper questions the socio-legal passivity about the suppression of married women; cultivate the knowledge that helps women to generate their own thinking and to apply that in creating the new subjects, to make the women able to express their disagreements about the consent and to make them aware of their active sexuality to provide them bodily integrity. The paper is, thus, an attempt to emphasise the need to transform the prevailing masochistic heterosexual socio-legal matrix. The paper underlines the need to bring the issue of marital rape in the political sphere by bringing this to the purview of Indian law in both formal and substantive manner.

Keywords: marital rape, masochistic heterosexuality, personal-political dichotomy, socio-legal matrix, sexual passivity, substantive equality

Introduction

Gender inequalities are embedded within the state structures and practices and, through the same dynamic process, gender relations are also constituted through the state. The state is strategic in the sense it acts as the 'main organizer' of gendered power through its legislation and policies, and the ways in which it is implicated in the construction of the public/private distinction. This demarcation between public and private life within a society is an inherently political process, which reflects and reinforces power relations of gender and which legitimates direct and indirect violence against women.

This public / private distinction established by the state was first interrogated by radical feminists through the slogan 'personal is political' where women are brought from the confines of 'private' realm to the 'public' sphere. The gendering of sexuality within the private sphere drew attention to the way the state constructs 'women' in terms of their distinction from men by formulating law and policies which apply only to them, and also by differentiating among them. For instance women have been treated 'differently' in law and government policies categorized as 'good' and 'bad' (prostitutes and housewives), virgin and non-virgin, married and unmarried, normal and deviant (the deviant constituting the destitute and insane) and so on. The feminists argue that construction of "Women" in these ways — both as a unitary category and as a differentiated one — is primarily the work of the state. And that is why violence done to women in the private sphere cannot be left untouched by the state and in order to make women free from all kinds of subordinations state needed to come up with some affirmative laws. With such provisions state no longer remains passive in the private domain. So, to end the violence in private sphere, state took many progressive steps like laws against dowry, domestic violence act, criminalizing rape, and measures against girls and women trafficking and so on. At the same time, however, such interventions still take place in gendered ways.

The gendered practices of state and law have been particularly criticized by radical feminists in the domain of sexual violence. This is an area where the law and state still work on the public / private divide and by blindly adhering to the social norms, they tend to reinforce such cultural myths such as women's passive sexuality and men's active sexuality, coital imperative, cultural sadism and other phallogocentric norms and tend to view through the lenses of such norms. Geetanjali Gangoli argues that while purporting to provide justice to raped women, the legal system tends to reinforce patterns of heterosexual dominance in which women are seen as inferior, sexually passive and within marriage, the sexual property of their husbands. Feminists argue that the state constructs the meanings of sexual violence or even domestic violence done to women. Many women do not even think that they have been sexually abused, even though so much force may have been used because they were not raped in a way that can be legally proved. Though women's movements have forced the state to intervene in the domestic sphere in the hope that it could abolish all kinds of violence and oppression women face but in reality state has often used this power to manipulate, formulate and categorize women's identity, in different ways.

One such issue that has been manipulatively excluded by the state and law is the issue of marital rape in India which is not only the product of inequality but reinforces the grounds for inequality too. Marital Rape is not a crime in India. A woman has no legal recourse if she is raped by her husband. Though this issue remains a taboo among women, it does not mean that it doesn't exist or that it is right. On the contrary, marital rape is very common in India but remains hidden behind the iron curtains of the "sacrosanct" institution of marriage, which coupled with legal ignorance on this issue, reinforces the denial of women's sexual agency and bodily integrity. It amounts to women losing their self respect and identity after marriage as the law

provides no relief to women in case of marital rape.

Rape is usually defined in terms of what has done to the victim rather than establishing a legal relationship between the perpetrator and the victim. The legal definition of rape as per the Section 375 of the Indian Penal Code (IPC), states that a man commits rape when he engages in intercourse with a woman, 'not his wife', by force or threat of force, against her will or without her consent. Marital rape is not recognized under this definition. This implies that when a woman marries, as a wife she loses her right to consent to sexual relations and the husband on the other hand acquires an unconditional, unqualified right of sexual access to her. From the standpoint of basic human rights, the husband should not be entitled to have intercourse with his wife without her consent and irrespective of her state of health or her valid objections and a wife must have a right to retract her consent to cohabitation or intercourse. In other words, excluding marital rape from the purview of law amounts to an infringement of a woman's fundamental human rights, equality and justice.

The paper throws light on the dualistic nature of the state towards the issue of rape within marriage. For instance, if domestic violence can become a part of 'public' issue despite the fact that it is about 'private' domain, then why rape within marriage is still conceived as the part of the 'private' realm and is still excluded from the legal purview and even social debates. The paper underlines the need to bring this issue in the political sphere so that women can attain complete bodily integrity even in the private realm. This paper not only abides by the old feminists slogan of 'personal is political' but also points to other side of this picture that 'political is personal' because without criminalizing rape within marriage in 'political' domain, which includes the state, law and society, a radical change cannot be expected at home, that is the 'personal' sphere. In this sense both 'personal' and

'political' mutually complement each other and, that is why, the paper emphasizes the need to understand the issue of rape within marriage through the engagements between socio-political and legal understandings and emphasizes the need to criminalize rape within marriage to provide women substantive equality and justice.

Defining Marital Rape

There are very few historical accounts available on the issue of a wife's rape. Susan Brownmiller addressed it, probably for the first time, in her book, *Against Our Will*. According to Brownmiller, "The exemption from rape prosecutions granted to husbands who force their wife into acts of sexual union by physical means is as ancient as the original definition of criminal rape, which was synonymous with that quaint phrase of Biblical origin, 'unlawful carnal knowledge' outside the marriage contract, which meant that it was, by definition, 'lawful' so long as it was obtained within such a contract. Thus, as the law evolved, the idea that a husband could be prosecuted for raping his wife was unthinkable.¹ E.H. Russell argues that wife's rape should not be seen only as the extension of violence, but rape in marriage should rather be seen as being at one end of a marital sex continuum, with voluntary, mutually desired and satisfying sex. At the other end rape like behavior such as coercive sex (without physical force or threat of physical force), unwanted sex, sex in which the wife is totally passive servicing her husband.²

In some countries, marital rape is a cognizable offence. In the UN conference in Beijing in 1995, almost 150 countries including America, Canada, and Vietnam admitted marital rape as legal offence. In these countries either the legislature has criminalized marital rape or the judiciary has

¹ Susan, Brownmiller, *Against Our Will: Men, Women and Rape*, New York, Routledge, 1975, p. 380.

² D.E.H. Russell, *Rape in Marriage*, Indiana University Press, 1982, p. 377.

played an active role in recognizing it as an offence. In California, USA, for example husbands can only be charged with felony or misdemeanor crime of “spousal rape” if they use force of threat and if rape is reported within ninety days.³ In Nepal, the Supreme Court has declared that husbands who force their wives to have sex can now be charged with rape. The May 2002 landmark ruling was a result of a July 2001 petition filed by the Forum for Women, Law and Development (FWLD), a women's rights organization in Nepal. The court's judgment declared that marital sex without a wife's consent constitutes rape. Drawing upon the religious texts, which do not condone men who rape their wives, the court stated that Hinduism stresses conjugal harmony based on mutual understanding between husband and wife.

Types of Marital Rape

Three kinds of marital rape may be identified:

1. Battering Rape: Many marital rape victims are battered wives and violence and terror are an integral part of their lives. Women experience physical and sexual violence. Men hit their wives and after insulting and abusing them in a

humiliating and degrading manner they resort to sexual violence. While beating the wife a husband may strip his wife and force her to disrobe and then have intercourse. Sometime the hitting and the punching continue throughout the sex and that itself becomes a violent experience.

2. Force-Only Rape: In this, husband uses only as much force as necessary to coerce their wives into sex, though it is also humiliating and upsetting, they use less violence and more often, these involve a specifically sexual grievance.
3. Obsessive Rape: In this, husband's sexual interests are strange and they use torture and force to force his wife for participating in such activities.

To put it simply, marital rape refers to unwanted intercourse by a man with his wife obtained by force, threat of force, or physical violence, or when she is unable to give consent. It is a non-consensual act where wife's consent is ignored or ruptured by a husband and wife is physically and sexually abused.⁴ Thus, it becomes important to explore the dynamics of heterosexuality that reinforces masculinity and how it operates to legitimize women's sexual oppression within the institution of marriage.

³ They can be charged if they use violence without force or threat; or if the wife is incapable of giving consent because of a mental disorder or a developmental or physical disability about which they are cognizant, or if the wife is prevented from resisting due to intoxicating, anesthetic or controlled substances administered by them or with their knowledge; or if the wife is unconscious of the nature of the act at the time it occurred, and this is known to them; or if intercourse is forced on the wife by the threat of deporting or incarceration. Ibid., pp. 377-378.

⁴ Priyanka Rath, “Marital Rape and the Indian Legal Scenario”, in *Indian Law Journal*, vol. 2, issue 2, 2007. (<http://www.indianjournal.com/> on 12.08.2009).

Feminist Interrogation of Heterosexuality: Pivotal to Legitimizing Masculinity and Women's Sexual Oppression

Post modernist thinking has introduced the idea of viewing men and women and divisions between them as discursive constructs, which opened up heterosexuality and within this masculinity to interrogation. Though Mary Wollstonecraft from a liberal standpoint had first questioned the normative modes of male sexuality in the late eighteenth century, two centuries later, the development of sexology also witnessed a decline in feminist attention to sexual politics. In fact, sexology, with its scientific engagements legitimized the patriarchal model of sexuality which was found in the model of heterosexuality naturalizing the domination of men over women. Through sexology and its popularization with sex manuals and essentialisation of penis and phallus by Freud and Lacan respectively, the norms of sex were re-casted as immutable and determined by laws of nature. Such ideas not only accepted and legitimized male aggressive behavior as natural but also made women responsible for their rape within marriage.

With the emergence of 'women only' groups and practice of consciousness raising among them, feminists coined the slogan "the personal is political", that is because women discovered that many of their individual problems and anxieties were shared by others and concluded that these were not personal but derived from their social and political situation and within marriage it is more prominent because women do not have right to say 'NO' to their husbands for sexual intercourse. Feminists like Sheila Jaffrey, Mackinnon, Dworkin, Russell, Jackson, Kelly, Clark and Lewis, Burt, Berger and Searles, considered sexual violence simply as the endpoint on a continuum of heterosexual interactions where male aggression and female passivity are integral to the socially constructed roles

and forms of coercion are normative⁵ within marriage. So the feminist critiques of heterosexuality took the oppression of women as their point of departure. Sheila Jaffrey viewed heterosexuality as pivotal to women's oppression. Stevi Jackson discussed heterosexuality in terms of both heteronormativity and heteropatriarchy or hetero-oppression. In heteronormativity, heterosexuality is considered as a norm and any alternative is viewed as 'other' or 'marginal'.⁶ Alternatively, heterosexuality leads to the hetero-patriarchy as if that is the standard norm and women find it very difficult to get rid of this and ends up being captured in the male dominated system that is heterosexual in character.

Within this heterosexual structure pleasure for sex does not pertain to women's desire, but is used to discipline women according to men's wishes. Women discipline their own bodies and pleasure to suit men, and thus, concede sex as penetration alone as it is pleasurable for men and it is assumed that penetration is pleasurable for women as well. With this perspective sex within marriage is always

⁵ Lynne Segal is of the view that to generalize heterosexual relationship as the foundation of rape and sexual violence actually devalues the trauma of the rape victim. See, Lynne Segal, "Feminist Sexual Politics and the Heterosexual Predicament" in L. Segal (ed.), *New Sexual Agendas*, Basingstoke, Macmillan, 1997, pp. 36-37); and, Susan Estrich argued that radical feminists arguments are trying to prohibit all sex. See, Susan Estrich *Real Rape*, MA, Harvard University Press, 1987, p. 82.

⁶ Stevi Jackson, "Heterosexuality, Heteronormativity and Gender Hierarchy: Some Reflections on Recent Debates" in Jaffrey Weeks, Janet Holland and Matthew Waites (eds.), *Sexualities and Societies: A Reader*, Cambridge, Polity Press, 2003, pp. 71-73.

regarded pleasurable for women, which makes it unquestionable.

It is interesting to note that some feminists have also strongly defended heterosexual eroticism. Lynne Segal, for instance, is aware of inequalities in heterosexual relations but this, according to her, is 'incidental', and she argues that heterosexual relations (consensual sex) could generate equality at a broader level and even sexual passion is capable of transforming, even dissolving gender because all oppressive dichotomies slide away in a sexual act.⁷ On the other hand, for Wendy Hallway penetrative sex is not about oppression or subjugation but about feeling somebody's love inside the body.⁸ Such an understanding of heterosexuality accords higher priority to penetration and is not able to see politics of hegemonic masculinity behind sexual acts. In fact, heterosexuality is understood as penetration by man, while some scholars also view it in terms of invasion and colonization of women's bodies. An alternative reading of this phenomenon is offered by Carol Smart who suggests discouraging penetration from heterosexuality so that penetration's privilege place, resulting in masochistic sex, as an essential heterosexual act can be challenged and we can move towards post heterosexual desire.⁹

Radical feminists, on the other hand, understand heterosexuality in context of gender. Heterosexuality is not a monolithic but a complex of institution, identity,

experience and practice — all of which intersect with gender, which in turn, is sustained at a variety of levels. Heterosexuality in its gendered form creates a hierarchical platform that gives privilege to masculinity over femininity.¹⁰ Tamsin Wilson further argues that gender and heterosexuality are mutually constituted to the extent that heterosexuality institutionalizes subordination of women and puts forth the concept of heteropolarity — the socially constructed difference that positions men and women as complementary opposites — which is crucial for maintenance of heterosexuality¹¹ and masculinity resulted from this.

Women's identity is determined within heterosexual relations as a wife, girlfriend, daughter or mother. Association with these identities affects the ways in which, women experience the institution and practice of heterosexuality. In sexual terms too, her identity is shaped by heterosexual imperatives — the need to attract and please a man. This is heterosexuality that produces conventional feminine identities in which women's self worth is assumed in her desire to be sexually attractive that is closely bound up with the gendered disciplinary practices through which docile female bodies and masculine imperatives are produced.¹²

There are indeed a host of everyday practices through which the social technologies of gender produce men and women as gendered subjects. Drawing upon the Foucault and Althusser's notions of interpellation Butler deploys the concept of interpellation to explain how particular kinds of identities are produced. Such discursive power not only constructs our minds, but our

⁷ Lynne Segal, "Feminist Sexual Politics and the Heterosexual Predicament" in L. Segal (ed.), *New Sexual Agendas*, Basingstoke, Macmillan, 1997, p. 86.

⁸ Wendy Hallway, "Theorizing Heterosexuality: A Response", *Feminism and Psychology*, London, Sage, 1993, pp. 413-414.

⁹ Carol Smart, "Desperately Seeking Post Heterosexual Woman", in Janet Holland and Lisa Adkins (ed.), *Sex, Sensibility and the Gendered Body*, Basingstoke, Macmillan, 1996, p. 236.

¹⁰ Jackson, op. cit., 2003, p. 78.

¹¹ T. Wilson, "Which One's the Man? The Heterosexualisation of Lesbian Sex", in D. Richardson (ed.), *Theorizing Heterosexuality: Telling in Strength*, Buckingham, Open University Press, 1996, p. 126.

¹² S.L. Bartky, *Femininity and Domination*, New York, Routledge, 1990.

whole beings, including our bodies, because discourses, “actually live in bodies”.¹³ This notion of reiteration of interpellation can well be understood in the context of sexual practice within marriage that helps to understand how the physical bodies function according to the practices of normative heterosexuality. Such practices of heterosexuality determine our physical experiences of sex and their discourses implicitly constitute subjectivity and positions us in particular ways. Women are, for instance, trapped in the passive femininity within marriage which is accepted as a ‘natural’ phenomenon without realizing that she has been forced in this social and cultural web of subjugation. She cannot even recognize and resist male sexual drive discourse and the coital imperative¹⁴ which function together to ensure that penis vagina penetration becomes a necessary part of a “real” sex for heterosexuals that is precisely why rape within marriage is always considered as something which even does not exist.

The paper draws upon three dominant discourses of heterosexuality outlined by Wendy Hallway that provide a cultural foundation on which heterosexual relations are organized and by which masculinity is normalized within marriage. First, male sexuality is pervasively influenced by a “male sexual drive discourse” that produces masculinity. It holds that the drive or need to have sex is uncontrollable for men and this overwhelming drive is natural, and thus a man can go to great lengths to satisfy this need which is justifiable within

marriage because it is considered normal to play their sexual drive on their wives even in violent ways. Second, a “have / hold discourse” has played an important role in shaping women’s sexuality in relation to men within marriage. Women’s sexuality is considered asexual, and must be viewed within the parameters of a monogamous heterosexual relationship, for producing children. Some also consider a woman’s sexuality as dangerous and, always in need of control.¹⁵

In both these discourses, men are seen as the subject and women as objects of a sexual discourse. Husbands are considered as always ready for sex and it is assumed that it is one of the wife’s duty to arouse this interest. A heterosexual matrix makes it very difficult for women to step outside this discourse. When a woman is not considered sexual or attractive she is often labeled as “ball-breaking”, “a cock teaser”, “frigid”, “a cold bitch” or “uptight” and if woman doesn’t show her interest in sexual acts with her partner, she herself enters a discursive space riddled with pejorative and potentially punitive consequence.¹⁶ Third pertains to a “permissive discourse” in which women are portrayed as sexual as men. However, it does not have a liberatory context but deploys hidden components of double standard and gender inequality in sexuality. Characterizing it as “pseudo liberation”, Segal points to pornography reaching its higher peak, where women’s bodies were not only subjugated but this subjugation got a platform to be enjoyed.¹⁷ For many feminists, this new equalization of woman was a conduit of misogynist fantasy.

In fact, the phenomenon of heterosexuality cannot be seen as an

¹³ Judith Butler, *Bodies that Matter: On Discursive Limits of “Sex”*, London, Routledge, 1993, pp. 35-38.

¹⁴ Male sexual drive discourse holds that the desire or the need to have sex is a strong drive that exists in all healthy normal men. Coital imperative is used to advance the idea that heterosex is about penetrating vagina by penis. It is considered to be uncommon to exclude coitus from heterosex.

¹⁵ Wendy Hallway, *Subjectivity and Method in Psychology: Gender, Meaning and Science*, London, Sage, 1989.

¹⁶ Nicola Gavey, *Just Sex: The Cultural Scaffolding of Rape*, London, Routledge, 2005, p. 105.

¹⁷ Segal (1983), op.cit., p. 30.

individual preference, as something into which people either drift or are fixed as a result of psychological processes in childhood but rather as a socially constructed institution¹⁸ which hegemonise masculinity. Radical feminists emphasize that masculinity should not be taken for granted as a norm but its prevalence needs to be explained.

Masculinity, feminists argue, is the most important base of patriarchy. In a heterosexual relationship, women emotionally, materially and sexually service men and owing to their masculine upbringing, men are in a dominant position at home as well as in the public domain. Adrienne Rich further argues that women are bound to heterosexuality, which has been imposed on them as compulsory. That is perhaps why she has coined the term of “compulsory heterosexuality”.¹⁹ Drawing upon Rich’s work the paper articulates the term “compulsory masculinity” because this is masculinity which is imposed on women’s mind and body with in heterosexual relations which is the root of masculine imperative of marriage. Rich elaborates different spheres through which it works and male power is perpetuated. Women’s denial of their own sexuality by means of clitoridectomy and infibulation²⁰ chastity

belts, denial of lesbian existence and clitoris; imposition of male sexuality upon women by rape within marriage, wife beating, incest, the socialization of heterosexual romance in everyday life, psychoanalytic doctrines of frigidity and vaginal organism, pornographic depictions of women responding pleasurably to sexual violence and humiliation, are all different meanings which make up the ideology of sadistic masculinity being normal. Masculinity is, thus, forced on women and violative aspect of masculinity is considered normal by women themselves within marriage.²¹

Kathleen Barry also argues that this compulsory heterosexuality resulted into essentialist masculinity legitimizes all kinds of enforced conditions under which women live subject to men such as in prostitution, marital rape, father-daughter and brother-sister incest, pornography, bride price, the selling of the daughter, purdah and genital mutilation. Rape within marriage is a vicious circle that leads to the rationalization and acceptance of other forms of enslavement, where the woman is presumed to have chosen her fate to embrace it passively.²² Characterizing such conditions as that of women’s sexual slavery, she argues that it is present in all situations where women or girls cannot change their given conditions, or, are subject to sexual violence and exploitation and marriage is such an institution where she finds herself stuck in. In this heterosexual matrix, the conquering male sex drive is pervasive and the penis has a life of its own, which not only justifies

¹⁸ Even Freud considered that all people are originally bisexual, but become heterosexual during the normal path of development.

¹⁹ Adrienne Rich, “Compulsory Heterosexuality and Lesbian Existence” in Ken Plummer (ed.), *Sexualities: Critical Concepts in Sociology*, London, Routledge, 2002.

²⁰ Clitoridectomy refers the partial or complete removal of a woman’s clitoris. As a result, after undergoing a clitoridectomy, most women can no longer function sexually. However, due to cultural beliefs in certain parts of the world, the procedure is a common rite of passage that marks a girl’s transition into womanhood. It is believed that by removing the clitoris women are

prevented from engaging in premarital sex. This, procedure is often accompanied by infibulation, or the stitching together of the vulva. This is usually done following the removal of the clitoris, when the woman’s labia major is sewn together, leaving an opening small enough for only urine and menstrual blood to pass through.

²¹ Rich, op. cit., pp. 104-105.

²² Kathleen Barry, *Female Sexual Slavery*, New York, New York University Press, 1979, p. 33.

sexual slavery but has become the norm and rationale for adult male sexual behavior – a condition of arrested sexual development.²³ Women learn to accept the inevitability of this drive as natural. In heterosexuality, the problem does not lie in ‘hetero’ per se, but in the way, it is practiced, which is masculine in nature. Masculinity is the problem and a feminist understanding renders it as a socially constructed phenomenon.

Janet Holland, for instance, points out that heterosexuality is not about putting masculinity and femininity in opposition, but it is about masculinity primarily because femininity simply does not exist or, does not play an active role in heterosexuality. With her notion of the “The Male in the Head”, she emphasizes that it is a kind of surveillance power of a “Male dominated and institutionalized heterosexuality” which has in its base Foucauldian notion of panoptican model that produces surveillance power to regulate the acts of the people²⁴ In heterosexual matrix, there is no room for women’s pleasure and desire since women are a sexual object, they are considered as a natural sexual prey to men within marriage and it is assumed that women love it. Sexuality and violence are considered congruent, so that for women sex is essentially masochistic, humiliation pleasurable and physical abuse erotic. In other words, enforced submission and use of cruelty are taken as sexually “normal” within marriage. Mackinnon points out that in a heterosexual relationship where male is supreme, the notion of consent within marriage has no meaning because sex is always violent. In this sense in marriage men’s violent nature is taken as normal and women’s screaming is considered as a symbol of pleasure. For Mackinnon too, the institution of heterosexuality has admitted force on women by men in normal sexual encounters. This idea has made force or violence an integral part of sex within marriage. It is assumed if force has not been

used during sex then the wife would not understand him masculine enough.²⁵

A close association between male sexuality, power and violence is constructed as a biological necessity and therefore, inevitable and, at the same time, there is a connection between female sexual pleasure and pain. Ellis argues that women instinctly enjoy roughness, violence, pain and danger and in this way women enjoy their subjugation²⁶ within marriage. On the other hand, the masculine tendency is to enjoy giving this pain and violence, and thus, men enjoy dominating women. A. Marro corroborates this viewpoint and emphasizes the force as the foundation of male sexuality and it is also a quality in men wanted by women. That is how, the aggressiveness in masculinity and submissiveness in femininity stands naturalized.²⁷ MacKinnon further states that inequality is always covertly or overtly inclined into the social conceptions of male and female sexuality of masculinity and femininity and of sexiness and heterosexual attractiveness. In this way, sexual intercourse within marriage normally occurs between un-equals. The nature and pressure of heterosexual force actually amounts to eroticized women’s subordination.

John Archer defines masculinity in terms of power and argues that men who internalize masculine role attributes and values, perpetuates a proclivity towards sexual

²⁵ C.A. Mackinnon, *Feminism Unmodified: Discourses on Life and Law*, London, Harvard University Press, 1987, p. 92.

²⁶ H. Ellis, *Studies in the Psychology of Sex*, 3rd edition, London, William Heinemann, 1948, pp. 3, 32, 95.

²⁷ Ellis also argues that only to a certain limits a woman really enjoys the pain, discomfort or subjection to which she submits but she has not clarified who will decide the parameters of these aggression and pain. In this way she has not considered for the active ground for women in heterosexual sex.

²³ Ibid., p. 140.

²⁴ Gavey, op. cit., p. 112.

aggression. Coercive strategies are used by men to obtain sex which has its basis in adversarial attitude to women who are viewed largely in terms of sexual gratification.²⁸ Men's masculinity is assured through his categorization as Macho male whose sense of self worth is bolstered by the pursuit of dominance and exploitation of the opposite sex. This masochism is very much engrained in the state apparatuses and Indian legal system that it naturalizes rape within marriage and leaves wife's body unquestionable when it comes on terms with husband's context.

Legal and Statutory Discourse on Marital Rape

In India marital rape exists de facto but not de jure. According to legal definition of rape, as described in Section 375 of the Indian Penal Code, if a man has a sexual intercourse with his wife who is not below fifteen, it is not rape. So, a marital rape cannot occur by definition in the case of sexual intercourse between husband and wife, in which a possibility that a man can use force to have sexual intercourse with her is, thus, in the realm of juridical nullity. Section 375 and 376 of the IPC, therefore continues to remain a site of struggle which do not accept that all rape is rape even if it is not by a stranger. Law still follows the binary system of logic that is thinking in the oppositional terms of active/passive, truth/lie, rationality/emotionality, man/woman, in which the female is always subordinate to the male.

Our Constitution guarantees equality to both men and women. However non-criminalization of marital rape violates all fundamental rights guaranteed to its women citizens. Article 14 ensures equality before law and Article 19 guarantees the right to freedom to every citizen but the wife is excluded from their purview. Laws do not consider wife as a person or a citizen but merely as an object, a property of her

²⁸ John Archer, "Male Violence in Perspective" in John Archer (ed.), *Male Violence*, New York, Routledge, 1994, pp. 3, 8.

husband to use, abuse and violate as and when he desires. The exemption of marital rape from Section 375 and Section 376A of the IPC shows that the laws are not only blind, but it's also patriarchal in nature. According to the rape law, rape is a sexual intercourse with a female not his wife without her consent. This gave David Finkelhor and Kersti Yllo an understanding that "the marriage license can indeed be called a 'license to rape'."²⁹

In the dictionary of judicial grammar the law has defined two circumstances – the first in which rape cannot occur by definition and the second where no judicial verification is required for establishing consent. The first holds true in cases of sexual intercourse between a man and his wife, where latter's consent is taken for granted. The second is the case of a girl below the age of 15 in which case only the fact of intercourse is sufficient to establish the offence of rape.³⁰

The idea of marital rape is associated with two categories wherein law recognizes rape based on the age of consent decided by the state through its Age Of Consent Act. Age of consent is about the age at which a girl can give her consent to marriage. Second category is about the will of the married

²⁹ David Finkelhor and Kersfi Yllo, *License to Rape: Sexual Abuse of Wives*, New York, The Free Press, 1985, p. 2.

³⁰ An analysis of Section 375 and 376 proves that Indian law is bounded with patriarchal ideology, if we look into three positions regarding the wife. (a) below the age of 12 (b) between the age of 12 and 15 years (c) not below the age of 15. In the first and second circumstances severe punishment is prescribed. In contrast to it, in the third instance, by virtue of the exception clause to Section 375, forcible sexual intercourse with a wife above 15 years is not considered to be rape at all. See, Nidhi Tondan and Nisha Oberoi, "Marital Rape: A Question of Redefinition", in *Lanymers Collective*, March, 2000, p. 24.

women, where the law has not recognized rape within marriage. According to law, if a woman is legally married (in the context of age) then she does not have any right to say no to her husband for sexual intercourse. The following section discusses their implications in detail.

Age of Consent Controversy: Where is the Will of Women?

Age of consent controversy is directly linked to the issue of marital rape, because the whole discourse of Age of Consent Act (1860, 1891, and 1927) evolved as a result of occurrence of marital rape. The inclusion of marital rape was first recommended by J.C. Thomas, a member of the law commission of 1846, who argued that because of the prevalence of child marriage in India, it was necessary to include married and unmarried girls in the 'age of consent clause' of the Indian Penal Code. In view of the growing abuse of child wives, colonial government decided to include Thomas's suggestion in the 5th clause (in the exception) to Section 375 of the Indian Penal Code. Some Hindu reformers such as Brahma reformer A.K. Dutt, and Pandit Ishwarachandra Vidyasagar, also supported inclusion of married girls in the age of consent clause in 1860 Penal Code. The nine years age of consent as proposed by Thomas, was raised to ten for both married and unmarried girls. There was hardly any resistance against this change and it was prominently accepted in India.³¹ It became a controversial issue when the Native Marriage Act III of 1872 sought to introduce extremely radical provisions prohibiting polygamy, legalizing divorce and setting up a fairly high minimum age of marriage.

After this the 1891 Age of Consent Act, came into existence which was brought after two drastic incidents. Legally, the demand for consent legislation was reinforced by two

court cases that considered different aspects of the child marriage. The first was 'Rukhmabai case' and the second 'Phulmonee Dasi' case. Rukhmabai case offered a famous example of imposing the oppressive and aggressive nature of Hindu patriarchal traditions of Hinduism on women doing "her duty". This case was fought under restitution of conjugal rights and indirectly became the issue of the consent or the age of consent.³²

In 1884, Rukhmabai's husband Dadaji Bhikaji filed a suit for restitution of conjugal rights over Rukhmabai. She had refused to live with her husband on many grounds such as his poverty, uneducated status, consumptive nature and more importantly, her lack of consent to the marriage when she was only eleven years old and, was not eligible to give her consent for that marriage, and the fact that it had not been consummated. But all these claims were in vain because the court decided against Rukhmabai and ordered her to go back and live with her husband Dadaji, or if she didn't follow the law, she will face imprisonment. Rukhmabai was ready to undergo imprisonment rather than live with her husband. Ironically by enforcing restitution of conjugal rights Britishers actually perpetuated child marriages, as in this case Rukhmabai was forced to go back to her husband to consummate the marriage.³³ Hindus were satisfied because the

³¹ Mrinalini Sinha, *Colonial Masculinity: The Manly Englishman and the Effeminate Bengali*, Manchester, Manchester University Press, 1995, p. 162.

³² Certain provisions of Section 260, Code of Civil Procedure 1882, introduced by colonial law, related to the execution of decrees for the restitution of conjugal rights and suit for the recovery of a wife. By this law husbands could use threats of imprisonment to force their reluctant wives to live with them.

³³ Sudhir Chandra, "Whose Laws: Notes on 19th Century Hindu Case of Conjugal Rights", in Vasudha Dalmia and Hvon Stitencron (ed.), *Representing Hinduism: The Constitution of Religious Tradition and National Identity*, New Delhi, Sage, 1995, pp. 155, 167.

fear of imprisonment, it was argued, would make many young wives return to their husband's home and live a happy life.³⁴

It is significant to note that orthodox Hindus who had always opposed any interference by colonial rule in their personal laws favoured the colonial law in Rukhmabai's case because that law helped in strengthening patriarchy. In other words, they didn't shy away from supporting the colonial rule if it led to the curtailment of women's rights.³⁵ It was Malabari who refused to consider marriage between Dadaji and Rukhmabai as a valid marriage. Raising the issue of consent, he insisted that since in Rukhmabai's marriage her consent was absent, so marriage could not be considered as valid.³⁶

The case of Phulmonee was even more important because it not only divided the society into two ideologies—Revivalists and Reformists, but also shook the patriarchal foundations of the Indian society. In 1890, Phulmonee, a girl of about ten or eleven years of age was raped to death by her 35 years old husband Hari Maiti, but he was not charged with the rape as it was claimed that Phulmonee had been within the statutory age limit of ten. The judges were forbidden to go beyond the established law: "Neither judges nor juries have any right to do for themselves what the law has not done." The Phulmonee's mother, aunt and grandmother's arguments that the marriage had never been consummated earlier, and that Hari Maiti had forced himself on their daughter were ignored. The court believed that the couple had slept together earlier and for them the fact that Phulmonee gained the age of ten was sufficient to give benefit of doubt to Hari Maiti. Tanika Sarkar explains that then main concern was the exoneration of man, rather than the horrible death of

Phulmonee. The law preserved the custom, and protected male's right to enjoy an infantile female body.³⁷

These two cases highlighted the disastrous consequences of child marriage beginning from lack of choice and compatibility, leading to unhappiness in the bride's life and premature consummation resulting in tragic death of the bride. That is how a reformer started campaigning against child marriage or sexual abuse of a girl child within marriage. Efforts of Malabari and these cases reinforced Sir Andrew Scoble's resolve to amend Section 375 of the Indian Penal Code. Scoble drafted the Bill which was introduced by the Viceroy of India, Lord Landsdowne, into the Supreme Legislative Council on January 9, 1891. The age of consent was raised to twelve years in the case of both married and unmarried girls but in the case of married girls the offence by the husband was made non-cognizable and the law would apply all religious communities. After a well reasoned debates and wise speeches the Age of consent Act was passed on March 19, 1891.³⁸ This Age of Consent Act of 1891 created a hue throughout India, resulting in sharp divisions between Revivalists and Reformists opposing the bill and favouring it.³⁹

The whole debate centered around two contrasting notions of subjection: the

³⁴ Charu Gupta, *Sexuality, Obscenity, Community: Women, Muslims and the Hindu Public in Colonial India*, New Delhi, Permanent Black, 2001, pp. 129-130.

³⁵ Ibid., p. 130.

³⁶ Chandra, op. cit., p. 169.

³⁷ Tanika Sarkar, *Hindu Wife, Hindu Nation: Community, Religion, and Cultural Nationalism*, New Delhi, Permanent Black, 2001, p. 212.

³⁸ Meera Kosambi, "Girl Brides and Socio-Legal Change: Age of Consent Bill (1891) Controversy", in *Economic and Political Weekly*, vol. 26, no. 31-32, 3-10 Aug, 1991, p. 1859.

³⁹ Kosambi has a different opinion on this, she has searched for another strand between revivalists and reformists and that was reactionists. According to her the fight was not between Reformists and Revivalists, but between reactionists and reformists. She clubs together the revivalists with reactionists.

colonized Hindu male, denoting the forced surrender and real dispossession of the male, and the apparently subordinated Hindu wife at home. Such juxtaposition between the husband and wife and former's conjugal rights remained at the centre stage of debates on domination and subordination; and subjection and resistance.

Revivalists could not bear the interference of colonial rule in the private sphere — the only place where they could exercise their power and turned it into a test of their manhood by criticizing Bill on accounts of rituals, ethics and rites.⁴⁰ They argued, for instance, that this Bill would violate the *garbhadan* ritual because it had raised the minimum age for a girl's marriage to twelve and, if she menstruates before this age, as it happens with thousands of girls, these girls will have impure *garbhas* and their children would be impure as they won't be able to offer 'pindas'. Consequently, this would destroy the Hindu community and principle of Hindu domesticity.⁴¹

The nationalists also projected the entire issue especially as a test of the reformer's masculinity. Gangadhar Tilak claimed that reformers were not masculine because of their inability to control their own household or to protect their daughters or that they are asking the colonial government to have watch over their private family matters. The support for the Bill was interpreted as support for the government, which in turn, was linked to the effeminacy of reformists.⁴²

The British government which imposed the Bill also had their political motives behind these reforms. They allowed them to intervene into the daily social and cultural lives of Indians. Britishers wanted to create ideological hegemony to seek

legitimacy of their rule.⁴³ Their government made no changes in the existing patriarchal structure. The British secretary to the public health society wrote to the government of Bengal:

Council directs one to lay special stress upon the point... that they base no charge against the native community.... The council admits that our national fellow's subjects must be allowed the fullest possible freedom in deciding when their children should be ceremonially married. That, in the constitution of Hindu society, is a matter with which no government could meddle and no government ought to meddle.⁴⁴

So, the colonial rule had a dualistic nature, in that, they favoured social reforms but wanted to sustain the patriarchal approach.

Reformists were also not much different. They did not favour conviction of husband on the charge of marital rape, but argued that the crime of a sexual intercourse between a husband and wife should be recognized as 'criminal assault' and not rape.⁴⁵ Their concern was not to protect the child wives from harm but to save men from the punishment. Their rejection of child marriage was also born out of the need for maintaining good and healthy nationhood.⁴⁶ The word 'consent' itself was used in the reference of a girl's 'body' but not her 'will'. Medical and legal experts, reformists and nationalists all associated consent with a certain physical capacity when a girl could sustain intercourse without much damage. The girl could get the

⁴⁰ Sarkar, op. cit., pp. 197-198.

⁴¹ Ibid., p. 224; Sinha, op. cit., p. 148.

⁴² Sarkar, op. cit., p. 159.

⁴³ Himani Bannerji, *Inventing Subjects: Studies in Hegemony, Patriarchy and Colonialism*, India, Tulika, 2001, pp. 72-75.

⁴⁴ Sarkar, op. cit., p. 239.

⁴⁵ Sinha, op. cit., p. 162.

⁴⁶ Sarkar, op. cit., p. 238.

security by law only till the age of twelve. So it was her body not the will of the girl that signified consent.⁴⁷

Finally it may be concluded that reformists and revivalists both had a patriarchal approach. The concept of the self rule in the domestic sphere was bound with the sacrifice of the physical safety or the body of Hindu girl or her life, as might be necessary.⁴⁸ This sacrifice could bring autonomy for the Hindu male or Hindu community.⁴⁹ Both reformist and revivalists didn't break patriarchal matrix.⁵⁰

In 1927, Harbilas Sarada mooted the idea that the consent of the child wife was not enough, but it was necessary to fix a minimum age for marriage. The issue was hotly debated in the legislative assembly. And, an Age Of Consent Committee was set up that submitted its reports and evidence from various provinces. The report revealed that there were many cases of infringement of the law of consent but very few came before the courts.⁵¹ The Bill, which was named Sarada Act, was finally passed in 1929, fixed the minimum age of marriage at 14. Revivalists launched an agitation but this time, there was an organized response by women's organization, All India Women's Commission (AIWC) that took a lead in mobilizing support. However, in practice it proved to be a dead letter and was not able to stop child marriages throughout the province. Reports received from commissioners and district officers of Uttar Pradesh on the implementation of this act

revealed that most were not aware of it or thought it could be disregarded. Still, this Act was a victory for the women's movement⁵²

The whole debate on the age of consent controversy brought the women's body under the scrutiny of the debate between the reformists and the revivalists. Thus, women's body was at the centre stage and her will was ignored. The whole historical debate highlights the fact that it was the state that enforced marital rape. In the contemporary period too, the state and law have become instruments for enforcing marital rape. This aspect has been addressed in the following section.

Law and State: An Instrument Enforcing Marital Rape

The foundation of the legal justification for the marital rape exception was expounded in the famous declaration made by Sir Matthew Hale: C.J. in 17th Century England, Hale Wrote: - "The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial contract, the wife hath given up herself in this kind unto the husband, which she cannot retract".⁵³ Under Lord Macaulay, when the first Indian Law Commission, drafted the Indian Penal Code in 1837, it followed the same law by declaring that "sexual intercourse by a man with his own wife is in no case rape".⁵⁴ This established the notion that once a woman is married, she doesn't have the right to refuse sex with her husband. This allows husband's rights of sexual access over their wives in direct contravention of the principles of human rights and provides husbands with a "license to rape" their wives.⁵⁵

⁴⁷ Ibid., p. 243.

⁴⁸ Cultural nationalists made a comparison between Phulmonee's death and death of Indian culture. Their motive to keep the culture alive or superior made her death insignificant. They argued that the death of an ordinary girl Phulmonee Dasee can't be recognized at the cost of the death of the culture. See, Sarkar, op. cit., p. 236.

⁴⁹ Ibid., p. 18.

⁵⁰ Kosambi, op. cit., p. 1860.

⁵¹ Gupta, op. cit., p. 136-137.

⁵² Ibid., p. 138.

⁵³ Sinha, op. cit., p. 161.

⁵⁴ Ibid.

⁵⁵ Saurabh Mishra and Sarvesh Singh, "Marital Rape: Myth, Reality and Need for Criminalization", PL WebJour 12, 2003. (<http://www.ebc->

The tensions between judicial grammar and judicial verification may restrict a husband from inflicting grievous bodily harm to his wife during sexual intercourse but in the realm of judicial grammar, this cannot be classified as rape. On the other hand if a girl is below 15 years of age consents to sexual intercourse, then her consent somewhere reduces the period of imprisonment.⁵⁶ The fulfillment of male desire within the confines of matrimony is considered legitimate, irrespective of how it is done. The legal codes do not recognize marital rape and consequently at the level of judicial grammar, this category does not exist. In the process of judicial verification, the judges can find instances when grievous bodily harm has been done to the wife in exercising a man's conjugal rights but even then this whole act could not be classified as a sexual offence by the husband.⁵⁷ To quote Das, "in the case of conjugal couple, the surface of the female body has no information to convey for determining the 'nature' of the inside for she does not exist as a subject for purposes of rape law".⁵⁸ A woman doesn't have rights on her own body, as conjugal rights are only for men where his rights on her body are naturalized in the political and social definitions. She asserts that in the Indian judicial discourse the relationship between power and sexuality has played a dynamic active role in the production of bodies and speech—both male and female. Female body and male

desire are the sites of judicial discourse and silence is maintained on the contrasting attributes of female desire and male body. Male desire is considered 'normal' or 'natural' and female body as the natural site on which his desire is to be worked out. In this sense, women are not seen as desiring subjects in the rape laws as wives they do not have the right to withhold consent from their husbands.⁵⁹ Even where the state protects them from the desires of other men, their concern is not the protection of bodily integrity of women, but protection of the property of the legitimate property owner, that is the husband.

Hence marital rape is not recognized, but law has prescribed punishment for non-age marriage. Marriage is a contract and under Section 23, Indian Contract Act, 1872, if both parties are below the age of consent then it is an invalid contract and since their marriage is not valid, the question of marital rape does not arise.⁶⁰

Another area of concern is Section 9 of the Hindu Marriage Act, 1955 that gives both the husband and wife a right to apply to court for restitution of conjugal rights when either the husband or wife has withdrawn from the society of the other. Does the Hindu wife have the right to privacy, enabling her to have control over her body in the light of such a provision? Interestingly the *Manu Smriti* wrote against forced cohabitation. *Manu* said, "A man is advised to approach her wife only when she desired it or intercourse is not allowed if the wife or the husband is suffering from any disease".⁶¹ In the modern context as well,

india.com/lawyer/articles/645.htm on 12.07.2009).

⁵⁶ Though it is prescribed in law that even if a girl, who is below 15 years of age, gives her consent to sexual intercourse, the man who is engaged with her in the act of sexual intercourse would be criminalized for rape.

⁵⁷ The well known case of this kind was Phulmonee Dasee case as discussed in the text earlier.

⁵⁸ Veena Das, "Sexual Violence, Discursive Formations and the State", in *Economic Political Weekly*, vol. 31, no. 35/37, 1 September 1996, p. 2421.

⁵⁹ *Ibid.*

⁶⁰ Nidhi Tondan and Nisha Oberoi, "Marital Rape: A Question of Redefinition" in *Lawyers Collective*, March 2000, p. 24.

⁶¹ Ramnika Jalali, *Indian Women in the Smritis*, Jammu, Vinod Publisher, 1944, pp. 128-129.

sexual relations should not be restored when the marriage in essence has broken.⁶²

In one such important case in the Andhra Pradesh High Court filed in July, 1983, Venkata Subbiah sought restitution of conjugal rights against his wife, film actress Sareetha. In the judgment, Justice P.A. Chowdhry concluded that Section 9 constitutes the grossest form of violation of an individual's privacy and human dignity which are both included in the fundamental right to life and personal liberty guaranteed by Article 21 of the Constitution. That judgment declared that forced sex, like all forced things, is a denial of all joy... no positive act of sex can be forced upon an unwilling person, "because nothing can conceivably be more degrading to human dignity and monstrous to human spirit than to subject a person by the long arm of the law to a positive sex act."⁶³ It noted that restitution of conjugal rights is a 'barbarous' remedy, and is not good for society. It's unconstitutional to exercise sexual rights on wife in the grant of restitution of conjugal rights.

Though this judgment still falls short of recognizing marital rape, there is no doubt that it spreads a message that forcible sexual intercourse within marriage is also unconstitutional and deprives a woman of her rights to life and liberty (Article 21). In *Bodhisattawa Gautam v. Shubhra Chakraborty*, IR 1996 SC 922, the Supreme Court noted 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. But once again, it shied away from recognizing marital rape as a criminal and sexual offence.

⁶² Tondan and Oberoi, op. cit., p. 24.

⁶³ Vimal Balasubrahmanyam, "Conjugal Rights vs Personal Liberty: Andhra High Court Judgment", *Economic and Political Weekly*, vol. 18, no. 29, Jul. 16, 1983, p. 1264.

Giving an account of parliamentary debates, Pratiksha Baxi has demonstrated that during its discussions on marital rape, the use of force in sexual intercourse was considered normal. In the report of the joint parliamentary committee on the proposed amendments to the rape law, a separate category of illicit sexual intercourse not amounting to rape was introduced to cover cases in which a man who is separated from his wife has forcible sex with her. In favour of this amendment they stated that

The committee feels that in a case where the husband and wife are living separately under the decree of judicial separation, there is a possibility of reconciliation between them until a decree of divorce is granted. Hence the intercourse by the husband with his wife without her consent during such period should not be treated as, or equated with rape. The committee is of the opinion that intercourse by the husband with his wife under such circumstances should be treated in illicit sexual intercourse.⁶⁴

Baxi, on the other hand, argues that "the distinction between rape and sex from the women's point of view gets blurred for the state permits force in sexual intercourse, not only for describing it as normal but by normalizing it for the sake of 'reconciliation'. Here power is deployed to constitute married woman's sexuality as 'passive' for the capacity to say 'no' to sex within marriage is not recognized by the law as a legal right."⁶⁵ In the committee, however, several members of Parliament argued that marital rape should not be

⁶⁴ Pratiksha Baxi, "Rape, Retribution, State: On Whose Bodies?" *Economic and Political Weekly*, XXXV, 14, 2000, p. 1198.

⁶⁵ Ibid.

criminalized, irrespective of wife's age. Senior advocate, Ram Jetmalani rejected the idea of criminalizing marital rape because sexual intercourse between husband and wife is a right of husband. State should not have any right to interfere in their personal relationship. Moolchand Daga went much further to argue that if marital rape is criminalized then, "woman would not have been raped, but the poor man will certainly be raped in court."⁶⁶

The 42nd Law Commission Report had recommended that sexual intercourse between a man and his wife below fifteen years of age be removed from Section 375 and made a separate offence. Consequently, an amendment to the IPC was proposed by the way of the IPC (Amendment) Bill, 1972. The joint committee, however, took the view that intercourse by a man with his own wife, regardless of her age should not be regarded a rape. Consequently, it deleted the proposed new section in clause 157 of the Bill, which sought to introduce the offence of marital rape.⁶⁷ The law commission has rejected proposals to repeal the marital rape exception on the grounds that it would amount to "excessive interference with the marital relationship".⁶⁸

By not criminalizing marital rape, governments and their agencies participate in maintaining silence on sexual abuse, especially in case of marriages. Several studies, including the 2005-06 National Health Survey (NFHS-3) have revealed that despite the Child Marriage Restraint Act (CMRA), 1929, and the Prohibition of Child Marriage Act (PCMA), 2006, child marriages still take place. They have failed to prevent a child bride from living with her husband or, from being abused, sexually or

otherwise.⁶⁹ The Delhi Commission of Women and the National Commission for Women have also questioned CMRA and PCMA because their definition of 'child' has not been specified and suggested that all marriages below the age of 16 should be declared null and void and those between the ages of 16 and 18, be rendered void at the instance of either party.⁷⁰

Indian law only recognizes marital rape in case a girl is below the age of fifteen years (under Section 375, IPC 1860, Act No. 45 of 1860). However, this is mitigated by the religiously defined personal laws⁷¹, whereby even the rape of a young girl between the ages of twelve and fifteen years carries a lesser sentence if the rapist is married to the victim.⁷² This raises the question if both the state and women's local communities are simply unwilling to confront the rape of young girls in the name of marriage, which goes on every day.

There is another aspect of marital rape, whereby rape is accorded the status of marriage which became evident in Imrana case. Imrana was raped by her father-in-law and then following a fatwa issued by some local clerics she was forced to accept the miscreant as her husband. Even the Hindu women meet the same fate as in many cases the penalty of rapists is mitigated if they agree to marry the victim. Such judgments tend to legitimize the continuation of marital rape.⁷³

⁶⁶ Ibid., p. 1197.

⁶⁷ Ibid.

⁶⁸ *Review of Rape Laws, Law Commission of India, 172nd Report, 2000, Chapter 3, p. 14.*

⁶⁹ T.K. Rajlakshmi, "Child Redefined", *Frontline*, vol. 25, no. 7, March 29–April 11, 2008, pp. 91-93.

⁷⁰ Ibid.

⁷¹ See *Socio-Legal Aid Research and Training Centre (SLARTC), Rights of Women in India*, Calcutta, 1995, p. 6, 24, 40.

⁷² Lotika Sarkar, "Rape: A Human Rights versus a Patriarchal Interpretation", in *Indian Journal of Gender Studies*, vol. 1, no. 1, Jan-Jun, 1994, pp. 69-91.

⁷³ Saswati Chakrabarti, "The Commercial Heritage of Marital Rape in Relevance to Indian Women", in *Gender Inequality*, 3

Domestic Violence Act: An Illusion

It is argued that marital rape has been subsumed within the much awaited Domestic Violence Act 2005. But this is not correct. In fact, this Act has also been a real disappointment. It has provided civil remedies to the provisions that have already been noted or criminalized. On the issue of marital rape, however, silence persists. Though Section 3 of the Domestic Violence Act acknowledges sexual abuse “harms or injuries or dangers to the health, safety, life, limb or well-being, whether mental or physical, of the aggrieved person or tends to do so and includes causing physical abuse, sexual abuse, verbal and emotional abuse and economic abuse,” and its accompanying explanatory note on “sexual abuse” includes any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of a woman.⁷⁴

In this definition the word unwanted sexual intercourse or rape is not used. The inclusion of the term ‘sexual abuse’ alone would not allow women to charge their husbands for rapes because the law has different interpretations for rape and sexual assault/abuse. A male, for instance, cannot be raped but sexually assaulted. Moreover Section 375 of IPC still exempts the husband from marital rape which makes the inclusion of term ‘sexual abuse’ void. Another point of concern is that it restricts sexual abuse in a domestic relationship of marriage or live-in, only if it is threatening or grievously hurtful. It is not about the will or desire of women. It is decided by the state, when and in what condition she can rightly claim for protection.

April 2006.

(http://www.meghbarta.org/nws/nw_main_p022b.php?issueId=6/§ionId=29&articleId=127 on 12.07.2009).

⁷⁴ Rath, op. cit.

Marital rape, as it violates women’s bodily integrity and her self esteem, needs to be redefined. It is violent assertion of power and denies women the right to intimacy and pleasurable sexual activity within marriage and more than anything else becomes yet another instrument for further entrenching the patriarchal value system. This brings a need to discuss the social aspects of marital rape.

Marital Rape: A By-Product of the Society

The phenomenon of marital rape must be understood in the context of society’s patriarchal structures because ultimately this structure is responsible for rendering women powerless and allowing men in a dominant position. Patriarchal structure makes the division of labour unequal for men and women, which “perpetuates the husband’s power over the wife. This is the context within which wife rape and wife beating occur/s and often continues”.⁷⁵ This is mainly because men treat their wives as their private property, in fact, as the sexual property of their husbands. Their economic status in the society is determined by their sexual and reproductive capacities.⁷⁶ Wife rape is equally a manifestation of male sexuality which is oriented to conquest and domination, and to prove masculinity defined in terms of power, superiority, competitiveness, control and aggression, a “real man” is supposed to get what he wants, especially in their sexual relationships.⁷⁷ Groth notes: “wives are regarded as possession or even opponents to be used, controlled or dominated...sex is seen as the solution to all marital problems, as well as the source of validation for the masculine identities”.⁷⁸

⁷⁵ Russell, op. cit., p. 4.

⁷⁶ Lorraine Clark and Debra Lewis, *Rape: The Price of Coercive Sexuality*, Toronto, The Women's Press, 1977, pp. 111-114.

⁷⁷ Russell, op. cit., p. 357.

⁷⁸ Cf. Clark and Lewis, op. cit., p. 120.

With marriage all women learn that sexual intercourse is formative of their identities as married women.⁷⁹ The dominant cultural discourse prescribes that a woman without a husband has no life. If the woman doesn't obey her husband, including being sexually available to him, he would go to other woman. So, to have 'a life', status, esteem and honour as a married woman, she has to submit herself to the demands of her husband. They have been taught that by consenting to sexual experiences women gain legitimacy and symbolic value as good wives.⁸⁰ The normative social biography associates honour with a woman who follows all the norms and rituals of married life. Consequently, women often do not accept the reality of marital rape.

These are buttressed by societal beliefs that acknowledge male sexual supremacy as a source of pride and measure of self worth. When that supremacy is challenged, men need to reassert their dominant position in the gender hierarchy. Finkelhor and Yllo's study shows that one quarter of divorced or separated women reported a past incident of forced marital sex.⁸¹ In Indian society attainment of puberty gives a free license to a husband for sex. Equating girl's attainment of puberty with a husband's license to seek and force sex upon her denies each girl control over whether, when and with whom she has sexual relations.⁸² By appreciating the sexual activity, she understands that she has power

and she always remains in an illusionary satisfaction of body-for-self.⁸³

Many of them accept unwanted sex as something normal, and as part of their duty to please their husband. With marriage, a woman's body is no longer her own body, it has been taken over by the community of men to establish and legitimize their image in society. Through socialization, such discourses about marriage create a web of norms, within which a woman encapsulates herself as a whole. Foucault argues that discourse becomes normative and normalizing ideals, according to which the body is trained, shaped, cultivated and invested. The daily sexual disciplining of married women can be seen as the operation of *biopower* at the sight of individual women's bodies. "Biopower emphasized localized, routinized bodily practices in families and constructs the body as a corporeal entity that becomes the systematic target for disciplinary measures implemented by local experts like family members".⁸⁴

In this way women can be seen as victims of social practices and patriarchal system whose bodies become a vehicle for their husband's satisfaction. These discourses discipline women, not through the threat of violence or force, but by creating desires, embodying individuals with specific identities, and establishing norms against which they and their behaviours and bodies are judged and against which they police themselves. Women are forced to accept sexual exercise with their husbands as normal because that is how women's identities are validated in a particular social situation. When wives are battered and raped daily, they don't resist forced sex for they fear that resistance will provoke a more severe beating. Since women are associated with child rearing, keeping house clean or as a homemaker they are not economically independent. In Russell's study, ninety percent of wives stayed with their husbands following a rape because they didn't have

⁷⁹ Annie George, "Embodying Identity Through Heterosexual Sexuality: Newly Married Adolescent Women in India", in *Culture, Health and Sexuality, Sexual and Reproductive Health in South and Southeast Asia*, vol. 4, no. 2, April-June, 2002, p. 215.

⁸⁰ Ibid., p. 217.

⁸¹ Finkelhor and Yllo, op. cit., p. 8.

⁸² Mariam Quattrra, (et al.), "Forced Marriage, Forced Sex: The Perils of Childhood for Girls", in *Gender and Development [Violence Against Women]*, vol. 6, no. 3, Nov. 1998, 1998, p. 32.

⁸³ Ibid., p. 208.

⁸⁴ George, op. cit., p. 214.

their own economic sources and were dependent on their husbands for financial support. Their dependency becomes a source of economic vulnerability and many wives in this situation are coerced by their vulnerability into living with objectionable or abusive husbands.⁸⁵ On the other hand, those who were economically self sufficient walked out of their marriage.⁸⁶

Bourdieu's concept of *habitués* provides an alternate understanding of social fabrication of beings. He argues that our identities are never defined simply in terms of our individual characteristics but they place us in particular social spaces that we come to understand through embodiment, as our place in dialogical actions.⁸⁷ *Habitués*, or embodied understanding, gives meaning to practice when it encodes certain cultural beliefs and practices. Women discipline their bodies to encode cultural expectations of idealized femininity and accept unwanted or coercive sex as wanted as they want to become a good wife, which makes them habitual to their rapes by the husbands. They discipline their bodies into heterosexual necessities. In order to make their marriage work, they just surrender their bodies to their husbands and let them do whatever they want to do, whether in a coercive and violent way. George has named both of these positions as compliance and resistance. It is compliance because women participate in enacting female subservience in heterosexual sexuality. It is resistance because women are fully aware that they are using their bodies for taking social and economic benefits.

On the other hand Rajan argues that this cannot be seen as transformation, as transformations are always constrained by

the restricting nature of dominant constructions of femininity which has been accepted and internalized by women as being their defining characteristics.⁸⁸ The reality is that a woman cannot search for a space of emancipation in coercive sexual experiences. Sangari similarly argues that transformative agency must be understood in a framework of their dialectical relations with determining material, epistemic, institutional and ideological structures which they both reproduce and transform. So "the truth about agency is that the dividing line between compliance and subversion is thin and the women's body is often the conflicting site of both giving in to, as well as resisting, dominant constructions".⁸⁹ A woman may not always be aware of the conditions of their construction; hence agency has both endless possibilities and is limited.

Since a family is supposed to be full of harmony and peace, the society finds it difficult to accept the phenomenon of domestic violence. The family can, thus, become a subversive site where violence is institutionalized and abetted by the state and society, which also uses law to deny the existence of marital rape. The public / private dichotomy in a society, however, plays out in different ways. On the one hand, criminal laws construct the family as a public space which needs protection as in the cases of adultery, and on the other hand in the case of marital rape, the sphere of family becomes so private that it's beyond the reach of law. Yet, both the regulations of adultery and marital rape share an understanding of marital relationship which views it as an exclusive site of legitimate sexuality. Paradoxically, privacy continues to, and reinforces, the intimacy and sense of solidarity in family life, while it also nurtures

⁸⁵ Russell, op. cit., p. 4.

⁸⁶ Ibid., p. 220.

⁸⁷ P. Bourdieu, *The Logic of Practice*, trans. R. Nice, Stanford, Stanford University Press, 1990; P. Bourdieu, *Outline of a Theory of Practice*, trans. R. Nice, Cambridge, Cambridge University Press, 1997.

⁸⁸ R.S. Rajan, *Real and Imagined Women*, London, Routledge, 1993.

⁸⁹ K. Sangari and S. Vaid, *Recasting Women: Essays in Colonial History*, New Delhi, Kali for Women, 1989, p. 11.

and protects the very conditions in which conflict and violence develop.⁹⁰

Marital Rape: A Violent Experience

Feminists focus on the violent aspects of marital rape. Notwithstanding the legal and societal silences on this subject, marital rape is very much a reality. Several studies have shown that between ten to fourteen per cent of married women are raped by their husbands. In clinical samples of battered women, one third to half of the cases is that of marital rape. Sexual assault by one's spouse accounts for approximately twenty five per cent of rapes committed.⁹¹ K.G. Santhya's pioneering study examined the extent of unwanted sexual experiences among married young women in rural settings in India. It showed that sexual activity among adolescent girls and young women in India mostly takes place within marriage and almost twenty five per cent of adolescent girls aged between fifteen to nineteen years are married and presumably sexually active while fewer than ten per cent of unmarried young women are reported to be sexually experienced. Marriage does not inherently make sex safe, voluntary or pleasurable. Indeed the marriages of ten to fifteen per cent of adolescent brides are consummated by force.⁹² The results corroborate this assessment because twelve percent of married young women reported that they frequently experienced unwanted sex, while thirty two percent experienced it occasionally. Thus forty four percent had experienced frequent or occasional sex against her will.

This study also illustrated some examples of sexual coercion. A first time mother from West Bengal stated: "he forces me often for sex. We have sex three to four

days a week. In one month, he has coerced sex four to five days. I do not feel like having sex, it becomes painful, but he does not stop".⁹³ Another narrated a similar story: "sometimes my husband forces me to have sex, which I don't like. Once I was feeling sick; I had burning sensation while urinating and was feeling giddy. I told him that I didn't feel like having sex at that time, but he didn't listen to me and he forcefully did it. Sometimes he will not listen to any of my problems. If I try to resist him, he will ask me whom should he go to instead and he will get angry, then I just accept it".⁹⁴

This study showed women also suffered from physical abuse with unwanted sex. A woman during her first pregnancy stated: "if I say no at night, he will do it in the morning, I can't say no anytime. He will not say anything at night; he goes to sleep turning his back. But when he asks for something in the morning and I say no, he beats me".⁹⁵ Often women accept their husband's demands for sex because they want to prevent an argument or punishment. Coerced sexual experiences are more common in the earlier years of marriages and if the wife knows the husband at the time of marriage and he is supportive in nature then the risk of unwanted sex is low.⁹⁶

The physical effects of marital rape, it is important to note, may include injuries to private organs, lacerations, soreness, bruising, torn muscles, fatigue, vomiting, broken bones, black eyes, bloody noses, and sometimes even knife wounds. Specific genealogical consequences of marital rape include miscarriages, still births, bladder infections, infertility and the potential contraction of sexually transmitted disease including HIV.⁹⁷ Women also suffer psychological scars because of marital rape which includes anxiety, shock, intense fear,

⁹⁰ Tondan and Oberoi, op. cit., p. 23.

⁹¹ Rath, op. cit.

⁹² K.G. Santhya, (et al.), "Consent and Coercion: Examining Unwanted Sex Among Married Young Women in India", in *International Family Planning Perspectives*, vol. 33, no. 3, 2007, p. 125.

⁹³ Ibid., p. 128.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid., p. 130.

⁹⁷ Mishra and Singh, op. cit.

depression, suicidal ideas and post traumatic stress, problems in establishing trusting relationships, sexual dysfunction and emotional pain; they also create negative feelings about themselves.⁹⁸ In this way, the marital rape is as much traumatic as rape is. Women equally suffer in both the cases.

Purva Sen's research shows that women who complain about sexual abuse in marriage are aware that this may lead to separation, which may cause further problems ranging from social ostracism to violent attacks, including rape and economic destitution. That is why they hesitate in taking step against their husbands even if they rape or experience sexual abuse at their husband's hands.⁹⁹ Sen's study revealed that in almost half the cases of forced sex or marital rape, the girl wives had made their husbands aware of their unwillingness to have sex or of pain during sex, but in eighty percent of these cases the rape continued.¹⁰⁰

Feminist Voices: Encountering Legal Bases

Feminists have identified three common law fictions on which the exemption of marital rape has been made or accepted: the theory of "women as chattel", "unities" theory, and "implied consent" theory.¹⁰¹

The "Women as Chattel" theory establishes women as a property, in that a woman was first the property of her father and after marriage became the property of her husband. With this regard, if a woman was merely a property, she is not supposed to have individual human rights and the

husband who committed rape on his wife is actually using his own property according to his own wishes.¹⁰²

"Unities" theory sees husband and wife as one person. Sir William Blackstone articulated that: "by marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated [into her husband]". This theory encapsulated husband and wife as one but actually this constitutes the husband only.¹⁰³

Third "implied consent theory" led to the belief that because a woman gave her consent to sexual relations with her husband at the time of marriage, the consent will remain valid forever. This theory is actually grounded on the above two theories – the fake notions of woman as the chattel or property of her husband and the unity of the husband and wife on marriage

These theories in the contemporary context are legitimized through four 'modern' rationales that may be characterized as relatively more "benign": marital privacy; marital reconciliation; fear of false allegations and difficult evidentiary requirements; the argument that rape within marriage is less severe than outside marriage. The idea of marital privacy suggests that relationship between husband and wife is private and personal which should be kept outside legal interference. Marital relationship depends upon intimacy protected from outside scrutiny and legal interference would break the intimacy that is foundation of marriage.¹⁰⁴ Marital reconciliation may be seen as an extension of the first notion which stipulates that keeping the spouses "in" and the law "out" fosters greater mutual respect between the parties and would make their ultimate reconciliation easiest. Third problem pertains to the fears of false allegations, that

⁹⁸ Ibid.

⁹⁹ Quattra, op. cit., p. 31.

¹⁰⁰ The study revealed that girls were even consummated before their menstruation or the very beginning of menstruation. That makes it a severely painful and bloody affair for her.

¹⁰¹ Suman Saha, "Sleeping with the Enemy? - Recognizing Marital Rape", *Women's Link*, vol. 10, no.2, April-June 2004, p. 3.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid., p. 4.

is with the criminalization of marital rapes it is feared that women would file false charges against their husbands and use this right to threaten their husbands. There would also be the problem of lack of evidence because it is really difficult to find evidence in marital rapes. Finally, marital rape is considered to be less severe than that outside marriage, or 'real' rape is ostensibly considered to be rape by a stranger. It is assumed that with marriage a wife provides her individual rights to her husband and so she doesn't lose self-respect in same manner as in case of rape by a stranger. So, it should not be criminalized.¹⁰⁵

Feminists reveal the fallacy of all these arguments to make a case for criminalizing marital rape. First, it is argued that if one views Article 14 in our constitutional paradigm then marital privacy cannot be considered as an absolute right, in which case no crimes between husband and wife can be prosecutable. If domestic violence can be penalized under law, which means, that a husband is not justified in beating his wife, he cannot also justify raping his wife under the guise of a right to privacy.

Likewise on the issue of false allegations, it can be argued that such fears are present in other crimes also, then why should there be an exemption made only in the case of marital rape? The difficulty of collecting evidence also applies to other criminal acts; so, law cannot choose to ignore injurious acts such as marital rape merely because they are difficult to prove. In fact, this is true for most sexual offences, which take place in the private domain. The reconciliation theory is ridiculous as it denies the wife the protection of the criminal laws. After being raped by her husband, a wife is unlikely to consider the probability of marital reconciliation. Rape is a heinous crime irrespective of who perpetrates it. The notion that marriage is a perpetual license for assuming women's consent is wrong. On the contrary, rape by a stranger may be a devastating one-time

occurrence but marital rape involves a continuing nightmare for the women.

Women can charge her husband under Section 498-A of the IPC, dealing with cruelty, to protect themselves against "perverse sexual conduct by the husband". But no standard of this measure or interpretation of perversion or unnatural is available. Is excessive demand for sex perverse? Can a husband use force or violence to achieve sex? There is no answer because judiciary and the legislature are silent on these issues.¹⁰⁶

Some feminists have suggested certain steps to end these unwanted or coerced sexual experiences. These include increasing the years of schooling for girls. Education will help girls master better resources and enhance their ability to deal with the outside world, seek an equitable relationship with her husband. This would also help her become permanently independent because it's well proven that economic pressures are directly related to sexual coercion.¹⁰⁷

An excellent study conducted by Santhya also shows that government's sexual and reproductive health programmes seeking to protect women from HIV infection cannot succeed without mitigating or ending the risk of coercive or unwanted sex for a wife that is because sexual coercion within marriage has adverse effects on sexual and reproductive health.¹⁰⁸

Women themselves don't talk about their sexual experiences because they feel inhibited for discussing them owing to their socialization and cultural beliefs. Feminists underline the need for openly discussing the issue of marital rape. In fact they lack even the vocabulary for discussing sexual violence within marriage, which in turn, hinders their ability to distinguish husband from rapists. Many do not even acknowledge the

¹⁰⁵ Ibid.

¹⁰⁶ Rath, op. cit.

¹⁰⁷ Santhya, op. cit., p. 130.

¹⁰⁸ Ibid.

phenomenon of rape within marriage. This attitudinal invisibility reinforces the statistical invisibility of the most prevalent form of rape, that is, marital rape, which is why there is hardly any survey done on marital rape in India. In Russell's study, only seven percent of women responded affirmatively when asked directly if they had been raped. Another six percent acknowledged incidents of forced sex but changed their language and explained it in other ways by saying "it was almost like rape", or "he pinned me down like it was rape"; or it was just like a rape except I was on (my own) bed".¹⁰⁹

So women themselves don't realize that something wrong has happened to them and the reason being absence of language by which they can define their emotions in the law. Indian Judicial grammar does not possess women's voice, emotions and their living. The law takes steps for abolishing rape because it wants to save virginity of virgin girl for the sake of legitimate property owner that is husband but manipulatively sidelines those women who are not virgin — married women and prostitutes. The mere difference is that a married woman is there to be raped by one and only legitimate husband and a prostitute is categorized as a legitimate rape victim by different men. So women must have their own vocabulary, their own emotions to speak and write not in the context of men but in their own context or in the context of their own material and linguistic space of bodily matter as has been emphasized by Luce Irigaray so that women's body could be incorporated in the linguistic discourses¹¹⁰. In the same vein Helen Cixous asks women to write more and bring women to writings as well so that their bodies could write and speak their own anti – linear and cynical behavior which is not bounded or structured

as presupposed by patriarchal society¹¹¹. She comes up with a new writing practice (*l'écriture féminine*) to deconstruct fixed categories of sexual identities and in these terms deconstructs the masculine fixed sexual behavior which expects women to act in certain fixed ways. She wants women to write because when they write they actually speak about their bodies. Another Post-Structuralist, Julia Kristeva has adopted an emancipator path for women and drawing upon Derrida argues that due to endless differences of meaning, language is dynamic and if subject is the product of language, which is dynamic, then the subject is a dynamic process as well. She brings 'semiotic' and 'symbolic' as central to her idea of subjectivity and argues that though the 'semiotic' that is pre-linguistic stage where differences do not take place, remains not that much important as 'symbolic' captures but 'semiotic' is important in the sense that it does not incorporate the hierarchy which brings inequality¹¹². The paper drawing upon these understandings argues that women should write their own legal language on rape within marriage. They should speak, shout, debate and write about the rape within marriage which is not 'just sex' for them because when they speak they actually speak about their bodies, for their bodies. The need is to make their own new language and vocabularies not bidding by masculine social cultural and legal contexts but in the context of their own spaces. First a woman should herself have the courage to speak with new vocabulary that she has been raped by her husband and should create a judicial grammar to criminalize rape within marriage.

Conclusion

¹⁰⁹ Russell, op. cit., p. 53.

¹¹⁰ Luce Irigaray, *This Sex Which Is Not One*. Ithaca, NY: Cornell UP, 1985 and Luce Irigaray, *Speculum of the Other Woman*, Ithaca, NY: Cornell Univ., 1989.

¹¹¹ Cixous, H. "The Laugh of the Medusa", trans. K. and P. Cohen, in E. Marks and I. de Courtivron in *New French Feminisms* Brighton: Harvester, 1981(a), pp. 245-64.

¹¹² Kristeva, J. (1986) 'A Question of Subjectivity. Interview with S. Sellers', in *Women's Review*, Vol.12, pp. 19-22.

Rape is an offence against the woman, violating her dignity and self respect and even when it occurs within the four walls of the home, it reduces the wife to a sexual objectification for men's gratification. To make the woman realize her own being, the law should seek to protect the right of every woman to choose whether to have sexual intercourse or not with her husband and evolve a new, more suitable judicial grammar for this purpose. There is also a need to educate the masses about this crime, as the real objectives of criminalizing marital rape can only be achieved if the society acknowledges and challenges the prevailing myth that rape by one's spouse is unquestionable. However, it is important to realize that the first step would be effective only if the law takes some appropriate action about it otherwise women will always have to carry the label of "second sex". Therefore, there is a need to criminalize marital rape and moreover the law should have substantive equality approach towards criminalizing rape within marriage because this is the discrimination inherent in the failure to criminalize marital rape. This substantive approach would expose the root sources of discrimination and would facilitate reform efforts to address the cause of the problem rather than the symptoms of the problem so that the contexts — socio-cultural, political and legal — in which the roots of inequality generates and further reinforces the grounds for legitimizing rape of a wife by husband within marriage could be analysed and examined. The paper emphasises the need for the law to adopt substantive equality approach by problematizing reasons for rape within marriage in socio- cultural and political contexts with women's own vocabulary.