

2. Women, Family and the Law: Conception, Construction and Patriarchal Hegemony

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Abstract

Violence against women has been recognized as a grave public health concern with devastating consequences for the physical, emotional, mental and reproductive health of women. Marital rape represents a seemingly invisible aspect of domestic violence. The lack of legal recognition for this heinous crime is a shocking revelation of the prevalent attitude towards women, which sees them as property of men. If rape is understood as any act of sexual intimacy forced by one person on another, what possible logic can there be for excluding marital sexual assault from the ambit of being seen as rape. This paper will attempt to explore the societal and cultural perceptions of marriage, sexuality and gender roles that underlie the legal exemption of marital rape from the law protecting women against rape.

Keywords: Women, Indian Family, Marital Rape, Law

INTRODUCTION

Rape is linked with power, that is, the power that men enjoyed in society. . . . Rape brings out, and enlarges opposition between the sexes nakedly, unlike other forms of gender-based oppression, such as lower wages for women. Rape, and the fear of rape therefore is an instrument for terrorising and paralysing women, contributing to a low sense of self-worth.ⁱ

According to the 2021 National Family Health Survey report nearly one in three of married women aged 18–49 reported experiencing spousal violence, with a significant proportion involving sexual violence.ⁱⁱ Despite this, fewer than 10% of cases are reported due to societal stigma and lack of legal recourse. In fact the invisibility of spousal violence and marital rape has been made possible by the refusal of the Indian social and legal system to recognize marital rape as rape. Marriage is considered sacred and women are expected to serve their husbands,

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in traditional marriages. Marital discord and divorce are considered to be taboo and are mostly blamed on the woman's inability to adjust. The refusal to criminalize marital rape is based on an anxiety that doing this will upset the internal dynamics upon which families are established.

Section 203 of the Bharatiya Nyaya Sanhita defines rape and consent in graphic terms that seek to do away with any ambiguities. This statute replaced the earlier Section 375 of the Indian Penal Code. However, it fails to recognize marital rape as rape, declaring : "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape."ⁱⁱⁱ

Seen as regressive and a violation of the right to equality, there is a strong movement to repeal the marital rape exemption law. The Union Government has also opposed its striking down, arguing marital rape cannot be equated with rape in other contexts.

DENIAL OF BODILY INTEGRITY AND AUTONOMY

The assumption that a husband has unrestricted right to the body of his wife is based on the strongly patriarchal tenor of our law and our society. The notion of women as properties of men are highlighted and underscored by cultural practices such as *Kanyadaan*. The colonial legal framework recognized the marital immunity clause, which considered consent as implied and irrevocable within marriage. A woman's right to bodily autonomy and dignity are thus denied by this legal permission for marital rape. The damaging consequences of marital rape include depression, PTSD and suicidal ideation. Thus, a discussion and consideration of marital rape as a critical public health concern becomes imperative.

DEFINING MARITAL RAPE

What exactly is marital rape? Das (2010) defines marital rape as "unwanted intercourse by a man on his wife obtained by force, threat of force or physical violence or when she is unable to give consent. . . the words 'unwanted intercourse' refers to all sorts of penetration (anal, vaginal or oral) perpetrated against her will or without her consent."^{iv}

According to Das, marital rape can be categorized as rapes involving violence, those using coercion to control the victim, and sadistic rapes. The refusal to consider marital rape as a crime distinguishes between a married and an unmarried woman and therefore acts against the right to equality.



This simply legitimizes sexual violence against women as long as it occurs within the context of marriage. A discussion of some cases that are engendered by this strange logic will be discussed here.

In 2002 the judgement for Rafik Taksir's imprisonment for rape and kidnapping was set aside when he married the rape victim with the consent of her mother.^v While he had been sentenced to 7 years rigorous punishment, he was now set free after six and a half months. Marrying the victim was somehow supposed to have magically erased her trauma and humiliation. Similarly a Delhi Court acquitted Kanhu Panda of rape in 2005 when wedding pictures with the victim surfaced. In the same year Bhura, a ward boy at a hospital raped a nurse, gouged out her right eye and locked her up. In a post-conviction application he offered to marry the victim. The fact that Bhura was offering marriage as reward and as temptation is reprehensible. It conflates the issues of marriage as the prime destiny of women. So within the context of marriage, does rape miraculously lose its violent and sadistic intent?^{vi}

The logic for this is often argued to be the marriage contract specifically requires men and women to have sexual relations with their spouses. By virtue of agreeing to marry, it is assumed sexual intimacy is acceptable. The compulsory nature of sexual relations works in the interest of men. Legal prescriptions seem to assume women are the property of the men they marry. Violent and coercive sexual relations within marriage is an ugly, dark truth that we need to look at closely.

Radical feminists have long recognized rape as a fundamentally aggressive rather than a sexual act. It expresses hostility rather than a sexual or conjugal need. Susan Brownmiller contends rape is an exercise in power, it is a political rather than a personal act, and it is a way in which all men use sexual aggression to keep all women intimidated out of fear. It is another manifestation of male domination and female degradation. "Rape is a political act. It is not an act of passion or sex, but of power. The object is to intimidate, to dominate, to degrade, and to terrorize. Rape is an exercise in power and control over women."^{vii}

If rape is more of a power act than a sexual act, then a closer look at family power dynamics is well warranted. Marriage cannot possibly be the solution to rape. For an understanding of that, we will have to turn to the ways in which marriage and its associated regimes of sexual control have formed the pivot of patriarchal hegemony where marriage inscribes gender sexual subordination in the guise of protection.

WOMAN AND THE INDIAN FAMILY

Discussions of Indian families, kinship and marriage in sociology and anthropology centre around the role of women as agents of exchange. The Alliance theory of kinship, for example, evinces interest in the nature of exchange relationships articulated through positive marriage rules. The family is the site of production and reproduction as well as the primary socialization of children. The major influence in the study of family, kinship and marriage in India over the last few decades has undoubtedly been Claude Levi-Strauss. His work on the incest taboo and on the issues of exogamy and endogamy are based on his understanding of the “rule of reciprocity” which requires men to exchange in marriage that most precious category of goods – women. “By ensuring the circulation of women, the incest taboo constitutes a crucial mechanism of social integration.”^{viii}

The idea of reciprocity as the general principle underlying kinship organizations allowed Levi Strauss to examine elementary structures of marital exchange in terms of restricted exchange, generalized exchange etc.

In his critique of Levi-Strauss, Leach helpfully adds reciprocity can be achieved not only by the exchange of women for women but the exchange of women for labour, for consumer goods, for capital goods, for money, for ritual objects and for intangibles such as territorial or political rights or social status and prestige.^{ix}

Dumont’s study of Dravidian kinship systems drew on the alliance theory and where he posited alliance as the fundamental principle of South Indian kinship. Hierarchical relations of alliance divide kinship into a complex set of rules regarding “wife givers” and “wife takers”

The time is ripe for a gender sensitive rewriting of the discursive field of Indian family and kinship. One wonders why it is completely acceptable to talk about men exchanging women in marriage. Perhaps a beginning was made by Irawati Karve, a pioneer in an indigenous feminist perspective on the Indian family. “Her central contrast of north and south Indian kinship revolved around differences in marital arrangements as seen through the viewpoint of women: marriage with kin versus marriage with strangers; marriage close by versus marriage at a distance; a more or less marked distinction between “daughters” and “brides” and so on.”

Similarly, she evaluated modern changes in family life from the viewpoint of the possible effects on women’s lives.^x

THE INDIAN STATE AND THE QUESTION OF WOMEN

A seminal moment in the realm of legal interventions into the role and status of women was enacted by the passing of the Child Marriage Restraint Act in 1929. The political campaigns and international attention accrued by its introduction in legislature raised awareness about the problematic position of women under the Indian state. A series of laws have been passed subsequently in the interest of women. These include The Hindu Succession Act (1956), The Dowry Prohibition Act (1961), The Medical Termination of Pregnancy Act (1971) The Equal Remuneration Act (1976), The Protection of Women From Domestic Violence Act (2005) and The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

However, despite these laws, Indian women within the Indian state remain marginalised and vulnerable. To understand the reasons for this we must turn to an understanding of the Indian Family as itself constitutive of the oppression of women.

The Mitakshara joint family system is characterized by the following features:

1. **Coparcenary System:** The Mitakshara system is based on the concept of coparcenary, where male members of the family inherit property by birth. The coparcenary consists of four generations of male descendants, including the father, son, grandson, and great-grandson.
2. **Karta:** The eldest male member of the family, known as the *Karta*, acts as the head of the family. The Karta has significant control over family affairs, property management, and decision-making processes.
3. **Joint Property:** Property in a Mitakshara joint family is held jointly by all male members. Individual members do not have absolute ownership but have an undivided share in the property. The property can include ancestral property, jointly acquired property, and any property purchased with joint funds.
4. **Women's Rights:** Traditionally, women in a Mitakshara joint family did not have equal rights to property. Daughters were excluded from the coparcenary and could not claim a share in the ancestral property. However, legal reforms, such as the Hindu Succession (Amendment) Act, 2005, have granted daughters equal rights as coparceners.
5. **Partition:** Partition in a Mitakshara joint family can occur by mutual agreement among the coparceners or through legal proceedings. Upon partition, the joint family property is divided, and individual shares are distributed to the coparceners.

6. **Historical Significance:** The Mitakshara system has its origins in the commentary on the Yajnavalkya Smriti by the scholar Vijnaneshwara during the 11th century. It has played a crucial role in shaping Hindu family law and property rights.^{xi}

The joint family system consequently functioned on the basic assumption of male authority, as the Karta. It inhibited women's rights to property ownership. Male centric inheritance and the assumption of stereotypical gender roles, the curtailment of women's mobility, education and economic independence made this system un-conducive to the rights of women.

GOING TO THE ROOT OF THE PROBLEM

In our discussion of the connection between law, society, marriage and sexuality it is important to understand the way in which law relates to society. Marx regarded the law as superstructure, which would represent the interests of those that owned the economic infrastructure, or the means of production. Marxist tradition thus introduces the idea of law as being contingent upon the structures of power produced by economic inequality in society. Weber, on the other hand, envisioned the superstructure as having greater relative autonomy. In the Weberian conception, the superstructure and the infrastructure do not exist in a hierarchical relationship but mutually influence one another. Weber also broadened the idea of power to include status and party in addition to class as a basis for power. To us, the Weberian conception of power and its influence on law more closely relates to the study of law as it interacts with, and engages with gender. Gender emerges as a "status" which is ascribed, and independent of, though in some ways interacting with, dimensions of economic and political power. In that sense, gender produces hierarchy between men and women, which may be ameliorated, but (more likely) exacerbated by an individual's economic or political power.

We believe law and gender should be seen as existing in a dialectical relationship. The very formation of law is a social process that involves various bureaucrats in ministries, the parliament and, in some instances, expert consultation via committee reports. The absence of mandatory pre-legislative consultation can mean that not enough voices reach the lawmakers before the law is made. Fundamentally, since lawmaking is a social process, it replicates many hegemonic ideas about gender, including stereotypes typical to benevolent patriarchy. Hence, limitations on night-time work exist across labour laws in India, which seek to protect women from an unsafe working environment.

Crucially, in seeing women as victims rather than active agents, these laws locate the goal as “protection” as opposed to “safe workplace.” Hence, the response – a ban on night-time work and overtime, deprives women employees agency as opposed to legal stipulations providing for more safety in the workplace. The law also acts relatively autonomous of dominant patriarchal narratives in instances where it seeks to bring in reform. Partially owing to the extraordinary powers of the post-colonial state, which is situated at the crosscurrents of traditional and modernity, law has functioned as a tool of reform and gender justice. Thus, political citizenship in India was conceived in universal terms when all adults (initially, over the age of 21) were awarded the right to vote. The Nehruvian-Ambedkarite project of the Hindu Code Bill was a progressive project of social reform that sought to introduce the right to divorce for Hindu women. It was rooted in the multicultural understanding of diverse experiences of Hindu women, including the fact that women in the lower castes had experienced a version of the right to end a marriage. The Hindu Succession (Amendment) Act, 2005, in equalizing the inheritance rights of both sons and daughters, seeks to provide a measure economic justice to women, and acknowledges that the subjugation of women is multi-dimensional where restricted access to resources plays an immense role in limiting opportunities for women. Yet why has the progressive potential of legislation failed when it comes to the recognition of marital rape as rape. Karuna Nundy asks: “To me, it’s one of the problems in the law that goes to the heart of the worst patriarchy. If you’re legally not allowed to sexually assault, slap, molest, or kill your wife in the bedroom, why are you allowed to rape her?”^{xii}

WOMEN AS SEXUAL PROPERTY

If women are goods for exchange, or a property that belongs to the men who marry them, it is easy to see why marital rape can be treated as an exception to the laws regarding rape. While the constitution assumes equality vis a vis the fundamental rights, the personal law governing families retains blatant legal subordination. Marriage is the site of gendered political inequality.

The exception for marital rape in India’s law exists because of the Indian Penal Code, first enacted by British colonials in 1860. Matthew Hale, the chief justice of England from 1671 to 1676, originally argued that consent to marriage itself implied consent to sex, which, once given, could not be revoked. The U.K. and other British colonies have long since overruled this, but in India, the issue has been met with fierce debate. We are on the wrong side of history

on this issue. 77 out of 185 (42%) countries have already criminalised marital rape through legislation.

The United Nations has urged countries to end marital rape by closing legal loopholes, saying that “the home is one of the most dangerous places for women”^{xiii}

CONCLUSION

The government fears that criminalising marital rape will destabilize the family. Perhaps they are right. The traditional family structure is centred around patriarchal control of women’s bodies, sexuality and reproductive destinies. Marital rape is therefore embedded in the patriarchal structure of marriage where the bodily autonomy of the woman is denied. Laws, such as the marital rape exemption law, protect the sexual entitlement of men. The family and marriage laws function to silence women and to invisibilize the phenomenon of marital rape. Marriage as an institution allows the control of female bodies for male satisfaction. A feminist critique of the family, in the context of marital rape, reveals how patriarchy and traditional family structures contribute to the normalization and perpetuation of sexual violence within marriage. Feminists argue marital rape is a manifestation of broader societal power imbalances, which too often are ignored or justified by law and culture. Feminists call for legal recognition of marital rape, the dismantling of patriarchal norms, and the empowerment of women to have control over their own bodies, both within marriage and in society at large.

ENDNOTES AND REFERENCES

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