

# ‘MARITAL RAPE’ IN MARRIAGE: THE NEED FOR REFORM IN BANGLADESH

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## ABSTRACT

*The notion of marital rape is not new and came from Hale’s theory. Although it is an old concept, but still some of the state parties of the United Nations are using this option as immunity. However, there are quite a few modern justifications that can actually defeat the Hale’s theory. Hence, the notion of Hale’s theory is not valid anymore in the 21<sup>st</sup> century. Currently, more than 100 countries have incorporated ‘marital rape’ as a criminal offence and punishing the offenders. Unfortunately, marital rape is not an offence under the Penal Law of Bangladesh unless the wife is under 13 years old. This article analysed the current Bangladeshi laws regarding rape, which is substandard to protect the marital rape victims. In addition, it also argues how current law is violating several international laws and the rights guaranteed under the Constitution of Bangladesh. The existing laws of rape under the Penal Law of Bangladesh are outdated and therefore, reform is the demand of time.*

## I. INTRODUCTION

Rape is a sexual offence, an unwanted act that executes in an unlawful manner. It is recognised as the most severe form of sexual violence all over the world. In rape, the perpetrator can be anyone, a stranger or even a family member. However, it is a common tendency to think that an offender of rape is usually a stranger, a malicious person.<sup>1</sup> Nevertheless, people do not think of rape in case of marriage.<sup>2</sup> However, rape could actually take place in marriage, and this form of rape is called “marital rape”. It is a non-consensual sex where the perpetrator is the victim’s spouse. Marital rape is a sensitive issue and has serious implication on one’s private life and therefore, people do not normally discuss the matter in public. Consequently, when such incident happens, it does not come as an issue to be considered as a criminal offence. It is an unwanted and undesirable sexual act forcefully committed by a husband against the consent or will of the wife.<sup>3</sup> It is simply an outrageous expression to affirm manliness and

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<sup>1</sup> Gupta, B., & Gupta, Dr. M., “Marital rape: - current legal framework in India and the need for change”, 1 (1) (2013) *Galgotias Journal of Legal Studies*, pp.16-32, at p. 17.

<sup>2</sup> *ibid.*

<sup>3</sup> Ola, T., M. and Ajayi, J., O., “Values clarifications in marital rape: a Nigerian situation”, 1(35) (2013) *European Scientific Journal*, pp. 291-306, at p. 291.

retain a patriarchal social order.<sup>4</sup> The consequences of marital rape cause injuries to the vaginal and anal areas, lacerations, soreness, bruising, torn muscles, fatigue and vomiting. Generally, marital rape is not limited to sexual violence only, but also includes other physical violence. This physical violence may cause broken bones, black eyes, bloody nose, and knife wounds. Today more than 100 countries have enacted marital rape as a criminal offence.<sup>5</sup> However, it is sad to say that marital rape immunity still exists in Bangladesh. The Penal Code of Bangladesh has defined 'rape' as a criminal offence, but also made an exemption for marital rape. Section 375 of the Bangladesh Penal Code 1860 states that:

“If a man has sexual intercourse with a woman or a minor girl against her consent or with her consent obtained by threat of death, hurt or fraudulence, he is said to commit rape. Sexual intercourse falling under any of the five following descriptions would be treated as rape: (1) against the woman's will, (2) without her consent, (3) with her consent when her consent has been obtained by putting her in fear of death or of hurt, (4) with her consent when the man knows that he is not her husband and that her consent is given because she believes herself to be lawfully married, and (5) with or without her consent when she is under 14 years old. Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Sexual intercourse by a man with his own wife, the wife not being under 13 years of age is not rape.”

Therefore, it will not be rape if any wife is more than 13 years old. In addition, a 13 years old girl is not legally able to get married under the Child Marriage Restraint Act, 1929. Section 4 of the of the Child Marriage Restraint Act provides that:

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

The above section clearly shows that a girl is unable to marry until she is eighteen years old. It also shows that conducting a child marriage is a criminal offence in Bangladesh. Hence, the proposition of rape law under the Penal Code of Bangladesh is inconsistent with the Child Marriage Restraint Act. This exemption clause is against married women and in violation of other laws of the country as well as various international laws.

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<sup>4</sup> *ibid.*

<sup>5</sup> *supra* note 1 at p. 18.

## II. THE HISTORY OF LEGALIZATION OF MARITAL RAPE

History says that laws regarding exemption of marital rape have developed to protect the interests of men.<sup>6</sup> People had been assuming that women were men’s personal belongings. Based on the notion of ‘personal belonging’, a man charged for raping his wife is similar to a man charged for stealing his own property.<sup>7</sup> Marital rape is nothing but an offence and there cannot be any distinction with the rapes that is committed outside the marital relationship, and it cannot be treated as merely as a kind of domestic violence. Unfortunately, marital rape was not an offence in most of the countries even 50 years ago. In general, the presumption was that a woman was the property of her father and after marriage; the woman would be the property of her husband.<sup>8</sup> According to the common law marriage, women were the chattels of their husbands.<sup>9</sup> The understanding was that if women were the chattels of their husbands then husbands could not be guilty of raping their wives.<sup>10</sup> In addition, it seems that a woman in marriage leaves her identity to become a single person with her husband.<sup>11</sup> Thus, it curtails women’s legal identity and enlarges the power of domination of man over his wife.<sup>12</sup> The foundation of legal exemption can be traced back in the 17<sup>th</sup> century.<sup>13</sup> Sir Mathew Hale, Chief Justice of England said:<sup>14</sup>

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<sup>6</sup> Ryder, S., & Kuzmenka, S., “Legal rape: the marital rape exemption”, 24:393 (1991) *The John Marshall Law Review*, pp.393-421, at p. 394.

<sup>7</sup> *ibid.*

<sup>8</sup> *ibid* at p. 401.

<sup>9</sup> Pracher, M., “The marital rape exemption: a violation of a woman's right of privacy”, 11(3) (1981) *Golden Gate University Law Review*, pp.717-757, at p. 726.

<sup>10</sup> *ibid.*

<sup>11</sup> One commentator describes the woman's status under the unity of the parties doctrine by analogy, saying: “The next thing that I will show you is this particularities of law; in this consolidation which we call wedlock is a locking together; it is true that man and wife are one person, but understand in what manner. When a small brooke or little river incorporateth with Rhodanus, Humber, or the Thames, the poore rivulet loseth her name; it is carried and recarried with the new associate; it bareth no sway, it possesseth nothing during coverture. A woman as soon as she is married is called covert, in Latine nupta, that is veiled, as it were clouded and overshadowed she hath lost her streame. I may more truly far away say to a married woman, her new selfe is her superior, her companion, her master.”; see: Chapman, A Brief Summary in Plain Language, of the Most Important Laws Concerning Women; Together With A Few Observations Thereon, in *On The Property Of Married Women And The Law Of Divorce* 13 (M. Milnes ed. 1975).

<sup>12</sup> F. Pollack & F. Maitland, *The History of English Law*, 2d ed., reissued (1968), Cambridge, Cambridge University Press, at p. 403 – 404.

<sup>13</sup> *supra* note 1 at p. 19.

<sup>14</sup> *ibid.*