



MARITAL RAPE: RAPE THAT SHACKLED WOMEN DURING COVID-2019

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I. Introduction

If a woman is married by someone who is a stranger then it is called as 'rape' but if a woman is married and raped by her own husband then it is not called to be as 'rape'. There are several reasons which are provided by the Indian Judiciary as to why the judiciary is not classifying marital rape or spouse rape as 'rape'. The most common reason which is provided is, that marriage is an institution in which women have given their irrevocable consent to have sexual intercourse with her husband. The government is hesitant to declare marital rape as crime because then, they have to change the other laws which are based on the religious belief, for e.g. Hindu Marriage Act, 1955 which states that a wife is duty bound to have sexual intercourse with her own husband.¹ It is also accepted that the matters like 'sexual intimacy' are related to the matters which are private in nature and judiciary should not intervene as the families since long period of time are able to resolve their issues on their own. Marriage is a partnership between two equally important adults, marriage does not mean that one person (husband) is going to dominate another person (wife), husband has to respect his wife's personal choices, integrity and dignity, because marriage doesn't give any right to husband to violate his own wife's rights.²

II. Background of marital rape:—

The Indian Penal Code (1860) has considered 'rape' as a criminal offence in section 375 which is given below:

375. Rape.— A man is said to commit 'rape' if he—

- a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
 - b) inserts to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
 - c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
 - d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,
- under the circumstances falling under any of the following seven descriptions:—

First— Against her will

Secondly— Without her consent

Thirdly— With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly— With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married

Fifthly— With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or

¹ See Nimeshbhai Bharatbhai v. State of Gujarat, [2018] SCC OnLine Guj. 732

² See R v. L, (1991) HCA 48



through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of the that to which she gives consent.

Sixthly— With or without her consent, when she is under eighteen years of age.

Seventhly— When she is unable to communicate consent.

Explanation 1. — For the purpose of this section, “vagina” shall also include *labia major*.

Explanation 2. — Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates to participate in the specific sexual act:

Provided that a woman who does not physically resist to act of penetration shall not by the reason only of the fact, be regarded as consenting to the sexual activity.

Exception 1. — A medical procedure or intervention shall not constitute rape.

Exception 2. — Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

The exception 2 to section 375, provides the definition of ‘marital rape’. It states that if husband tries to have sexual intercourse or to have any sexual act with his wife, not being under fifteen years of age will not amount to rape. In this exception of section 375, it is clearly mentioned that the decision to have

sexual intercourse or to perform any sexual acts, solely depends on the desire of husband, where the ‘consent’ of his wife is not even taken into consideration. By giving exception 2 in section 375 of Indian Penal Code, the authorities are giving right to males to rape their own wives. This clearly means that women after marriage shall be considered to be as *chattel* of her husband. Further I shall discuss the reasons due to which the crime like marital rape is not penalized.

A. The reasons which exonerate the crime committed by men against their lawfully wedded wives are:—

Firstly, there is an age-old concept, which has been followed till date, that is, the concept of ‘implied consent’ given by women in marriage. Sir Mathew Hale back in 1736 stated that “The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract.”³ This statement by Sir Mathew Hale, clearly states that marriage is a lawful contract in which woman after getting married has given up her matrimonial consent to have sexual intercourse with her husband. From the statement it can be derived that, the sexual intercourse in a marriage can be done only at the desire of husband, as the husband has got ‘right’ to have sexual intercourse with his wife.⁴

Secondly, it is considered that a choice of having a sexual intercourse between two consenting adults is a private sphere in which

criminalized rape very early. This court stated that even though husband has got ‘right’ to rape his wife, but not to claim his right by violence.

³ See The History of Pleas of the Crown, 1 Hale PC (1739) 629

⁴ Brussel Court of Appeal in 1979. Even though Belgium was amongst the few countries which



state has no business to intervene in personal matters⁵. According to Indian Laws, ‘sexual intimacy’ in marriage brings the idea of wholeness and oneness due to which it excludes the concept of coercion and cruelty. Here, it clearly means that even if wives are forced or put under threat or forced to have a sexual intercourse with her own husband then also, wife has got no right to criminally punish her husband, due to the acceptance of the concept that sexual intimacy excludes the concept of coercion and cruelty. Thus, it is considered that the intimacy between the consenting adults is a matter of personal choice.

Thirdly, it is believed amongst the committee members in criminal amendment bill, 2012, that if ‘marital rape’ is declared as a criminal offence, then this might lead to disruption in the whole family structure. It is also stated in the bill⁶, that there are the other means provided in law through which women can approach courts, due to which several committee members ‘believed’ in the notion, that by declaring ‘marital rape’ as a criminal offence in Indian Penal Code (1860) can lead to injustice as it has the potential to destroy the ‘institution’ of marriage.

Fourthly, marital rape cannot become a tool by lawful wedded wife against her ‘innocent’ husband to harass him⁷. Here the question arise is, that if, by criminalizing marital rape will lead to harassment of ‘innocent husband’ than, by not criminalizing will lead to harassment of lawful wedded wives. These arguments amongst judges clearly states, that the law system in a country like India is gender-biased to such a degree that it can lead

to harassment of one person (wives) by defending the harassment of another (husband). In the next part, I shall discuss the current situations of women becoming victim in their own house.

B. Is the Indian Judiciary now going to declare ‘marital rape’ as ‘rape’?

Since the day, lockdown has been imposed in the entire country by the Indian government, in order to protect the nation from the widespread coronavirus, the lockdown started showing its negative impact not only on the ones who are getting affected by such novel virus but it has impacted the families and especially women residing in their homes to a large extent. Earlier to this coronavirus when the lockdown was not imposed before these conditions when women were raped, there used to be implied theories which were followed by the society like, lady must be wearing short dresses, lady must have gone alone without her husband/brother/father or she must be roaming on the roads late at night. Now, during coronavirus there are the restrictions which have been imposed by states on free movement, so, during these conditions we need to ask ourselves that, when women are living in their homes then also, what could be the reason for such rise in the number of women getting raped. The basic principle that has to be understood is that, “rapist remains a rapist regardless of his relation with the victim”.⁸ The effect of coronavirus is not only outside the homes but rather this virus has disturbed the women who have been shackled in their own houses. During coronavirus it has been observed by National Commission for Women, that there has been steep rise in the cases related to the

⁵ See Navtej Singh Johar v. Union of India, Writ Petition (Criminal) No. 76 of 2016

⁶ Criminal Amendment Bill, 2012, 167th report on Parliamentary Standing Committee

⁷ See Nimeshbhai Bharatbhai v. State of Gujrat, [2018] SCC OnLine 732 Guj.

⁸ See C.R. v. U.K. Publ. ECHR, Ser. A, No. 335-C



domestic violence from 123 cases (between February 27 to March 22) pre-lockdown to 239 cases and more (from 23 March to 22 April) post-lockdown. National Commission for Women's Chairperson earlier stated that "the outbreak can lead to increase in number of cases as the abuser and victim are together."⁹ Due to the lockdown, the restriction which has been imposed on the free movement, even if women go through rapes then also they cannot move outside their own homes for an alternative house where they can feel safe. The number of cases which are reported to National Commission for Women, may not be enough as the number of cases which remain unreported is 86%, and the most shocking is that there is 77% of cases which are not even mentioned by women to anyone.¹⁰ I believe that the women still not filing a case against her own husband because there must have been a huge amount of pressure being put on women either by her husband or by her own family members, that she cannot file a case against her own husband, then secondly this marital rape acts like a taboo in our society just like menstruation, either nobody is going to listen about it or even if a lady is sharing about issues being faced by her in her own house on daily basis, then also people are going to make fun about what she is talking about, and at last there is no availability of severe punishment which could be given to the

criminal of marital rape/ sexual violence as they just roam around or live in the same house with the victim can also lead to decrease in the number of cases filed against husband. Due to such reasons women don't even report such matters, because they believe, that there is no way to get out as they have considered this brutal rape as a part of their everyday lives, then even during coronavirus if wives files case against her husband then also the greatest backdrop during this this time is that neither any police officer can visit the victim nor the victim can go to police station. The only remedy which is available now with the NGO's or the state bodies is to provide the victims with the counselling,¹¹ but is this sufficient against the crime that is happening in present time? By not giving criminal liabilities to these criminals, state itself is providing a chance to these criminals to fulfill their own needs. Further, I shall discuss about the reforms which are need to be brought in legal provisions.

III. Reforms which are required to be brought in legal provisions:—

Firstly, It is rightly stated in State of Madhya Pradesh v. Bhopal Sugar Industries Ltd¹² that the customs and traditions which were followed since ages may not be valid when the time passes as the necessity and mindset of the people changes with the passage of

⁹ The Economic Times (2020) India witnesses a steep rise in crime against women in amid lockdown, 587 complaint received: NCW, April 17, 2020 <https://economictimes.indiatimes.com/news/politics-and-nation/india-witnesses-steep-rise-in-crime-against-women-amid-lockdown-587-complaints-received-ncw/articleshow/75201412>

¹⁰ Vignesh Radhakrishnan, Sumant Sen, Naresh Singaravlu (2020) Domestic violence complaints at a 10-year high during COVID-19 lockdown, The Hindu, June 20, 2020

<https://www.thehindu.com/data/data-domestic-violence-complaints-at-a-10-year-high-during-covid-19-lockdown/article31885001>

¹¹ Dhamini Rhatnam (2020) Domestic violence during COVID-2019 emerges as a serious concern, The Hindustan Times, April 26, 2020 <https://www.hindustantimes.com/india-news/domestic-violence-during-covid-19-lockdown-emerges-as-serious-concern/story-mMRq3NnnFvOehgLOOPpe8J>

¹² 1964 6 SCR 846



time, thus, there is a 'requirement' in bringing about changes in the legal provisions as the customs and traditions which were considered to be legally valid earlier may not be legally valid in the contemporary time. Instead of considering Marriage as an institution between a weak and strong person, it has to be considered as a partnership who are equally important and powerful.

Secondly, there has to be criminal penalties against the marital rape, since there is only domestic violence act, 2005 act which was enacted to provide only basic civil remedy¹³ such as, monetary relief, custody of her children or providing compensation for the injuries being caused to wife. The Indian law makers states that since there is presence of contrary laws like domestic violence act, 2005, which can provide relief to wife, then there is no requirement to declare marital rape as an offence. The relief which is provided in such laws are generally compensation against the damages caused by husband on his lawfully wedded wife. If sexual assault or injuries on wife vital parts are compensated with the money, then are the wives selling themselves to be raped or being subject to sexual assault? If this is the point then is there any difference in the status of wife and concubinage? If every criminal is allowed to substantiate his crime committed against the victim with the monetary relief than there should be no imprisonment or any other form of punishment.

Thirdly, there has to be a clear distinction ever exist between the mutual consent and the implied consent. In Indian legal system it is considered that the women has given her

implied consent from the day of marriage to have a sexual intercourse with her husband, whereas I believe that in the mutual consent both the person have conjointly agreed instead of one person impliedly accepting the notion that the other person must have agreed. Here, I am trying to point out that the marriage is a mutual agreement in which anyone of them has right to make a decision as to whether they shall have sexual intercourse in between them or not.¹⁴ Therefore, individual consent should not be intermixed with the implied consent.

Fourthly, state has to protect the dignity, interest and constitutional rights of each and every individual irrespective of favouring one gender. In case of *K.S. Puttaswamy v. Union of India*¹⁵, court clearly states that 'human dignity' is an integral part of Indian constitution and the notion of dignity is provided in Article 14 (Guarantee against arbitrariness), Article 19 (Right to freedom), Article 21(Right to life and personal liberty). After marriage also, women are the citizen first and above that they are human, and such rights are still provided by state to her, due to which if women has not given her 'consent' to have sexual intercourse with her husband should be treated as her "right to say no" because she has right to freedom and right to life and personal liberty, with which she is privileged by Indian Constitution. Thus, marital rape should be declared as 'unconstitutional', as this crime is against the women's privilege to live with dignity and freedom.

IV. Conclusion

At the end, I conclude that marriage is between equal partners and they have to treat

¹³ See *Indra Sharma v. V.K.V. Sarma*, (2013) 15 SCC 755

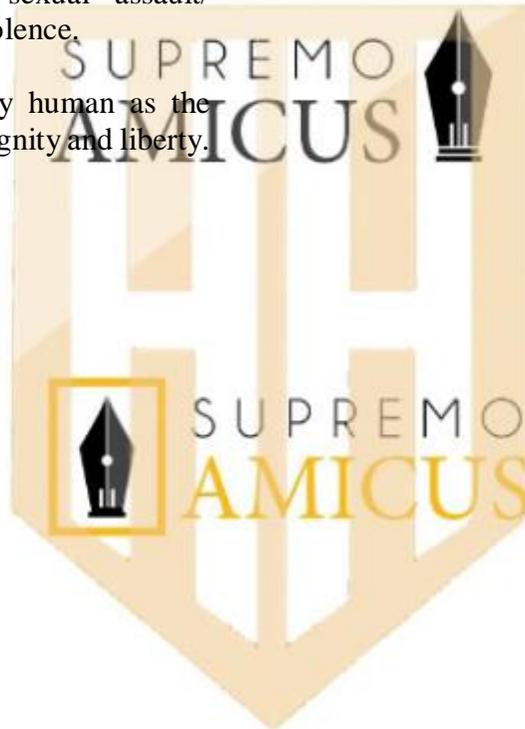
¹⁴ See *R v. L*, (1991) HCA 48

¹⁵ (2017) 10 SCC 1



both of themselves with equality, should respect their personal choices. Marital rape cannot be left from being criminalized just by stating the reasons like wrong matters will be reported against husband, sexual intimacy should not be intervened, or illiteracy/religious beliefs/ poverty/ social values/ custom values attached with the marriage.¹⁶ There is lack of awareness amongst women on their basic rights¹⁷ thus, there is need to organize campaign on spread of awareness amongst the women on their own rights and the remedy which they can prevail whenever women face issues like sexual assault/ physical abuse/ domestic violence.

Thus, I conclude that every human as the right to live with freedom, dignity and liberty.



¹⁶ India Today (2016) Marital rape cannot be criminalized in India, March 11, 2016
<https://www.indiatoday.in/india/story/maneka-gandhi-marital-rape-criminalisation-312848-2016-03-11>

In this article Maneka Gandhi, minister of women and child development back in 2016 stated that the marital

rape that is accepted/ understood as a concept internationally cannot be applied in India because of the reason stated above.

¹⁷ Report of committee on amendment to criminal law (2013), JS Verma Committee, January 23, 2013