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'NO' SHE SAID, 'YES' HE HEARD - MARITAL RAPE IN INDIA

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ABSTRACT

This article talks about the concept of marital rape also known as spousal rape and why should we criminalize marital rape because if non-consensual intercourse can be termed as rape then why is it not rape when married. We can see some cases wherein husbands are not accused of rape just because they are married and marriage is considered a tradition and a sacrament wherein rape is not a concept the main reason for Marital rape is having control, dominance or if the women are more successful than the man. A woman has autonomy over her own body irrespective of the fact that she is married or not and she should be protected from the sexual abuse and violence. We cannot ignore the very fact the most essential thing in marital rape is lack of consent so it is a non-consensual act and as mentioned in IPC non- a consensual act of sexual intercourse should be termed as rape whether it be with a stranger, between girlfriend and boyfriend or be it between a husband and wife. NO is always a NO.

Keywords- *Marital rape, Consent, spousal rape, sexual violence, Criminalize*

“Truth: Rape does indeed happen between girlfriend and boyfriend, husband and wife. Men who force their girlfriends or wives into having sex are committing rape, period. The laws are blurry, and in some countries marital rape is legal. But it still is rape.”

— *Patti Feuer Eisen*¹

INTRODUCTION:

Rape is a forcible and non- consensual act of sexual intercourse and is discussed under Section 375 of the Indian Penal Code (IPC). It is derived from the word ‘Rapio’ which means “to seize”. Although rape is an offence in India shockingly marital rape is outside the ambit of conviction. People have very less knowledge in regards to what is marital rape. ‘NO’ SHE SAID, ‘YES’ HE

¹<https://www.goodreads.com/quotes/tag/maritalrape#:~:text=%E2%80%9CTruth%3A%20Rape%20does%20indeed%20happen,countries%20marital%20rape%20is%20legal.>

HEARD, is not only a title for the article but is the reality and the mindset of the people in India that when married they both have consented to sexual intercourse and that fact cannot be changed. This article talks about the reasons to criminalise marital rape. Marital rape also known as spousal rape is the act of sexual intercourse with one's spouse without their assent or consent. In both cases rape and Marital rape, the essential element is "the lack of consent". Marital rape is of three types that are battering rape, force-only rape and Obsessive rape. All of these are bodily violent and lack the consent of the wife. The main reason for the marital rape by husbands is to emphasize dominance and control over women. There are many countries that have laws for marital rape except India that is the reason women are prone to sexual abuse at their home than on the streets.

Rape is defined under section 375 of IPC but because Marital rape is not considered as an offense in India the laws regarding Marital rape are non- existent. The only cases wherein Marital rape is considered an offense under IPC are:

1. When the wife is between 12 to 15 years of age,
2. When the spouse is under 12 years of age and
3. Rape of judicially secluded spouse.

INDIAN PENAL CODE AND MARITAL RAPE:

Section 375 (6) Exception 2 of Section 375 of IPC that is sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.² Although we have this exception these laws are very mild. We can understand that with the help of the infamous case of Phulmoni Dasi also known as Queen- Empress v Huree Mohan mythee³ which triggered the concept of "age of consent". Phulmoni Dasi was a ten-year-old girl that was raped by her 30-year-old husband. She died due to excessive bleeding when her husband tried to consummate their marriage but as we all know this is the case of rape but the husband was not charged for rape but was convicted under section 338 of IPC for causing grievous hurt. Later Independent thought, a Non- Governmental Organisation (NGO) filed a writ petition before the supreme court. The

²<http://legislative.gov.in/actsofparliamentfromtheyear/indian-penal-code>

³ Empress vs Hurree Mohun Mythee(1891) ILR 18 Cal 49

petition filed was saying that there should be no classification based on married and unmarried minor girls in regard to sexual offense and that it is also contrary to the obligation of the state to protect children under Article 21 of the constitution. On the date of 12th October 2017, the exception to section 375 was read down and the age of consent was raised to 18 years of age. A series of the petition pending that were filed by the RIT foundation in Delhi High Court⁴ and was heard before a bench that comprised of Justice Gita Mittal and Justice C Hari Shankar. It challenged the exception to section 375 of IPC and with that also challenges 376 (B) which says that whoever has sexual intercourse with his wife and without her consent must be punished. This differential punishment that is punishing a set of responses but not others was challenged to be unconstitutional.

In 2005, The Protection of women from Domestic violence Act⁵ was passed that mentions sexual assault but this act is not a criminal law, it is civil law. Although it protects women from domestic violence, it fails to understand that non- consensual sex perpetrated by a husband on wife is an offense. A woman is said to be free when she can live with dignity. Marital rape violates Article 21 of the Indian constitution⁶, it includes the rights to health, privacy, dignity, safe living conditions, and safe environment and continuous internet among others. We can get a clear understanding of a woman's dignity in this Supreme court judgment that gave an unambiguous verdict in the case of *J.K.S. Puttuswamy v Union of India*⁷ that “privacy of an individual is the essential element of dignity” and rape violates a woman's autonomy over her own body. One should have a basic right over his or her body. In the case of *Suchita Srivastava v Chandigarh Administration*⁸, the judgement talks about the woman's right to privacy, dignity and personal integrity. Marital rape in India is an epitome of what we call an “Implied consent”. It is believed that marriage between a man and a woman in India implies that both have consented to sexual intercourse and that it cannot be otherwise, no one understands that a ‘yes’ yesterday does not imply a ‘yes’ today. We can understand that in the case of *Nimesh Bhai Bharatbhai Desai v state*

⁴ RIT Foundation v Union of India Writ Petition No 284 of 2015

⁵ http://chdsla.gov.in/right_menu/act/pdf/domviolence.pdf

⁶ <https://indiankanoon.org/doc/1199182/>

⁷ Justice K S Puttuswamy v Union of India, 2012

⁸ Suchita Srivastava v Chandigarh Administration (2009) SCC

*of Gujarat*⁹ wherein the court observed that husbands need to be reminded that marriage does not provide a licence to forcibly rape their wives.

A quote that best suits the concept of Marital rape in India is: “The seven circumambulations (Saat phere) and a Sindoor gave him the right to do anything with her.

When we talk about strengthening the anti-rape laws or having laws for the protection of women from marital rape, the arguments against Marital rape according to people are:

1. According to them, Marital rape is said to threaten the social unit of the family: But is the social unit of our society based on the fact that women have no autonomy over their own bodies? No. women have rights over their own body whether she is married or not.
2. Criminalising Marital rape is an alien concept: Our constitution promises equal rights and protection of rights to every individual so how is equality and protection of rights and access to law by a married woman an Alien concept?

Minister for Women and Child Development Maneka Gandhi has said. "It is considered that the concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context due to various factors like level of education or illiteracy, poverty, myriad social customs and values, religious beliefs, the mindset of the society to treat the marriage as a sacrament, etc. " Maneka Gandhi said in a written reply in the Rajya Sabha in response to a question on whether the government plans to criminalise marital rape.¹⁰ I would like to comment on this statement as:

1. According to Maneka Gandhi, one of the factors is illiteracy, some women are illiterate but they cannot be denied their right over their bodies just because they are married.
2. She said that it is an alien concept but Marital rape cannot be a western concept because India is where marital rape is legal and that the patriarchal structure gives marriage a licence to legal unwilling sex which is rape but not when married. Why? Women asking for equal protection should not be termed as an alien concept.

⁹ Nimeshbhai Bharatbhai Desai v. State of Gujarat R/Criminal Misc. Application Nos. 26957, 24342 of 2017 and R/Special Criminal Application No. 7083 of 2017

¹⁰ <https://www.indiatoday.in/india/story/maneka-gandhi-marital-rape-criminalisation-312848-2016-03-11>

3. It destroys the social institution of marriage in our society: People believe that criminalising marital rape is going destroys marriage is correct but in reality, rape is what destroys a marriage.
4. People also argue that the state cannot interfere in matters inside a home, but the state already does involve matters like dowry, cruelty, Divorce, etc. then why is such a heinous crime considered to be petty and is excluded.

Some facts relating to marital rape are that

1. The number of Indian women sexually assaulted by their husbands is 40 times the number of women who suffers such violence from others.
2. Even the UN recommended criminalise Marital rape in India because According to the UN, more than two-thirds of married women in India between the age of 15 to 49 years have been beaten and forced to provide sex.
3. Marital rape is a huge problem in India. 1 in 3 men admit to raping their wives, and 1 Indian woman is raped by her husband every 3 seconds. It is a crying shame that even after so many years marital rape has not been criminalized in this country.¹¹

CONCLUSION:

In a nutshell, Marriage cannot be an excuse for any type of abuse and we should understand that there is an immediate need to criminalise marital rape in India. The main reason why a pet is clear according to the Indian Penal Code that any non-consensual sexual act is rape but then marital rape being a non-consensual act should also be recognised as rape and should be criminalised. **If in rape ‘no’ is ‘no’ then why is ‘no’ not a ‘no’ when married? Therefore, rape is rape, be it in the relation of boyfriend and girlfriend or be it between husband and a wife, every no means no. Marriage cannot be an excuse for any type of abuse.**

¹¹ https://www.equalitynow.org/marital_rape_is_not_a_crime_in_india_it_needs_to_be