

THE SUPREME COURT'S VERDICT ON MARITAL RAPE: CHALLENGES AHEAD

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INTRODUCTION

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 of violent perversion by a husband against the wife where she is abused physically and sexually.¹ The concept of marital rape originates in the common law principle of marriage as 'coverture ', the idea that the woman is always under the husband's protection and authority.² The grounds for "marital immunity" for rape prosecution were laid by Chief Justice Sir Matthew Hale in the History of the Pleas of the Crown, published in 1736, 60 years after his death. He wrote, "The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract." This "Implied Consent Theory of Sir Hale" found its way into the legal system of all former British Colonies that adopted the common law system.³ From the time of John Stuart Mill, Western democracies have grappled with the question of women's sexual autonomy, without which equality is an empty shell.⁴ In the Indian context, it would be worthwhile to peruse the written reply given by the Union Minister for Women and child Development, Maneka Gandhi in Parliament. She said," The concept of marital rape as understood internationally cannot be suitably applied in the Indian context due to various factors like level of education/ illiteracy, myriad social customs and values, religious beliefs [and the] mindset of the society to treat the marriage as a sacrament."⁵ The Justice J.S.

¹ Nimeshbhai Bharatbhai Desai Vs. State of Gujarat, Criminal Misc. Application (For Quashing & Set Aside FIR/ Order) No. 26957 of 2017, Gujarat High Court, Hon'ble Justice J.B. Pardiwala, oral order dt. 06.11.2017, available of www.Livelaw.in (7.11.2017).

² Editorial, The Hindu, dt. 15.3.2016.

³ Shalini Nair, Marital rape a Crime in many countries, an exception in many more, The Indian Express, dt. 31.8.2017.

⁴ Editorial, The Indian Express, Dt. 31.8.2017.

⁵ Editorial, The Hindu, dt. 15.3.2016.

Verma Committee, which recommended sweeping changes in the law relating to offences against women, called for marital rape to be made an offence. The committee's recommendation of a separate bill of rights for women guaranteeing "complete sexual autonomy" further heralded a new dawn in the realm of women's right to her own body and the women's sexual autonomy. Endorsing the view of the Government through her minister, the Lawmakers reacted by stating that "If marital rape is brought under the law, the entire family system will be under great stress."⁶ Adding insult to injury was the twitter statement of Swaraj Kaushal, Mizoram Governor that if marital rape were to be criminalised, "there will be more husbands in the jail, than in the house."⁷ Here, it is pertinent to note that just days after Minister of Women and Child Welfare Maneka Gandhi submitted in Parliament that the government wouldn't criminalise "marital rape", a top U.N. official, Helen Clark, the UNDP Chief said that the issue is one of consent, not culture, suggesting that India would be violating the Sustainable Development Goals it has adopted if it did not amend the law accordingly.⁸

Under the IPC sexual intercourse without consent is prohibited. However, an exception (Exception 2 to section 375) to the offence of rape exists in relation to unconsented sexual intercourse by a husband upon a wife. Justice J.S. Verma Committee recommended that the exception to marital rape should be removed. Marriage should not be considered as an irrevocable consent to sexual acts. Therefore, with regard to an inquiry about whether the complainant consented to the sexual activity, the relationship between the victim and the accused should not be relevant.⁹ Expressing the similar sentiments in an observation made by a Bench comprising Acting Chief Justice Gita Mittal and Justice C. Hari Shankar, on a Petition by the RIT Foundation, with the All India Democratic Women's Association (AIDWA) and a marital rape victim, the Court held that "Marriage does not mean that the woman is all time ready, willing and consenting (for establishing physical relations). The man will have to prove that she was a consenting party."¹⁰

⁶ Gulika Reddy, the legal message, *The Hindu*, dt. 14.10.2017.

⁷ Editorial, *Hindustan Times*, dt. 1.9.2017.

⁸ Suhasini Haider, *Criminalise marital rape: UNDP Chief*, *The Hindu*, dt. 14.3.2016.

⁹ Harsimran Kalra, *Report Summary, Report of the Committee on Amendments to Criminal Law, 2013*, PRS Legislative Research, 25.1.2013, available at www.prsindia.org, accessed on 1.9.2018.

¹⁰ Apoorva Mandhani, *Marital Rape Hearing Marriage does not mean that the wife should always be willing to engage in sexual relations: Delhi H.C.*, available at <https://www.livelaw.in/marital-rape-hearing-marriage-does-not-mean-that-wife-should-always-be-willing-to-engage-in-sexual-relation-delhi-hc/>, accessed on 2.9.2018.

A UN survey said in 2014 that one in every five Indian women has suffered rape in an intimate partnership.¹¹ The problem of marital rape is also connected with the unhealthy tradition of child marriages in India. As per the data collected in National Family Health Survey-III, 46% of women between 18-29 years in India were married before the age of 18. It is also estimated that there are 23 million child brides in the country.¹² The social cost of a child marriage (and therefore of sexual intercourse with a girl child) is quite enormous. Census data have demonstrated an upswing of female deaths in the age group of 15-19 years. Though the Prohibition of Child Marriage Act, 2006 prohibits the child marriages, yet such marriages are not ipso facto illegal. To date, only Karnataka has amended the Act and declared any marriage of a child, a female aged below 18 years and a male below 21 years, as void.¹³ This example needs to be followed by other states as well.

Privacy, also lies at the heart of marital rape issue. The Supreme Court in its judgment on the right to privacy¹⁴ held that privacy began with the human body, and that at the heart of the right to privacy was the idea of decisional autonomy - the right of an individual to decide how her body would be used. More crucially, however, the right to privacy judgment clarified that privacy was a right possessed by individuals.¹⁵

Thus, the issue of marital rape can be viewed from so many diverse angles, ranging from moral, social, economic, privacy rights and so on, but at the bottom lies women's right to sexual autonomy and to have a decisional right about her own body. This paper explores the issue of marital rape in the light of recent Supreme Court's judgment of criminalising marital rape and the further challenges to implement the decision in letter and spirit.

¹¹ Editorial, Hindustan Times, dt. 17.3.2016.

¹² Vijaita Singh, Centre Cited Tradition, wanted Section 375 to stay, The Hindu, dt. 12.10.2017.

¹³ Amit Anand Chaudhary, Make Child marriage void: Court, The Times of India, dt. 12.10.2017

¹⁴ K.S. Puttaswamy (Retd.) & Anr. Vs. Union of India and Ors. (2017) SCC Online SC 996, decided on 24.8.2017

¹⁵ Gautam Bhatia, Privacy is at the heart of the marital rape issue, Hindustan Times, dt. 2.4.2018.

KINDS OF MARITAL RAPE

Hon'ble Justice J.B. Pardiwala of Gujarat High Court in the case of Nimeshbhai Bharatbhai Desai Vs. State of Gujarat¹⁶ has mentioned three kinds of marital rape, generally prevalent in the society which are as under:

(a) *"Battering rape:* In this type of marital rape, women experience both physical and sexual violence in the relationship and in many ways. Some instances are those where the wife is battered during the sexual violence, or the rape may follow a physical violent episode where the husband wants to make up and coerces his wife to have sex against her will. In most cases, the victims fall under this stated category."

(b) *"Force only rape:* In this type of marital rape, husbands use only that amount of force, as it is necessary to coerce their wives. In such cases, battering may not be a characteristic and women who refuse sexual intercourse usually face such assaults."

(c) *"Obsessive rape:* In obsessive rape, assaults involve brutal torture and/or perverse sexual acts and are most commonly violent in form. This type has also been labeled as sadistic rape."

The Court further observed that "Marital rape is in existence in India, a disgraceful offence that has scarred the trust and confidence in the institution of marriage. A large population of women has faced the brunt of the non-criminalization of the practice."

MARITAL RAPE: GLOBAL SCENARIO

"The Implied Consent Theory" of Sir Matthew Hale was adopted into the legal systems of all former British colonies where the common law system was in vogue. However, Australia was the first common law country to pass reforms in 1976 by making rape in marriage a criminal offence. It was allegedly done in the wake of the second wave of feminism in the seventies.¹⁷ Several Scandinavian countries and countries in the communist bloc passed such laws

¹⁶ Criminal Misc. Application (For Quashing & Set Aside FIR/order) No. 26957 of 2017.

¹⁷ Shalini Nair, Marital rape a crime in many countries, and exception in many more, the Indian Express, dt. 31.8.2017.

criminalizing marital rape including Sweden, Norway, Denmark, and the former Soviet Union and Czechoslovakia in the two decades before the Australia did it. In 1932, Poland became the first country to explicitly making marital rape a criminal offence.¹⁸ Since 1980s many countries including South Africa, Ireland, Canada, the United States, New Zealand, Malaysia, Ghana, and Israel have legislatively abolished the marital rape immunity.¹⁹

The European Parliament passed a resolution in 1986 pertaining to violence against women which called for criminalisation of marital rape. Very soon, several countries including France, Germany, the Netherland, Belgium and Luxembourg followed suit. In 1991, the House of Lords in the UK struck down its common law principle that a marriage contract implied a woman's consent to all sexual activity.²⁰

In Nepal, its Supreme Court held that it went against the constitutional right of equal protection and the right to privacy. It said, "The classification of the law that an act committed against an unmarried girl to become an offence and the same act committed against a married woman not to become an offence is not a reasonable classification." Accordingly, the marital rape exception was done away with in Nepal in 2002.²¹

UN Women's 2011 Report states that out of 179 countries for which data was available, 52 had amended their legislation to explicitly make marital rape a criminal offence. The remaining countries include both types where marital rape is an exception under their laws and also where the spouse can be prosecuted under the general rape laws.²²

MARITAL RAPE AND THE SUPREME COURT

In its latest judgment, *Independent Thought Vs. Union of India and Anr.*²³, a Two-Judge Bench comprising Justice Madan B. Lokur & Justice Deepak Gupta held that sexual intercourse by a man with his wife, who is below 18 years of age, is rape. A girl child below the age of 18 cannot

¹⁸ Ibid

¹⁹ Ibid

²⁰ Ibid

²¹ Ibid

²² Ibid.

²³ W.P. (C) No. 382 of 2013, order dated 6.9.2018.

be treated as a commodity having no say over her body or someone who has no right to deny sexual intercourse to her husband, the Supreme Court held.²⁴

In regard to Exception 2 to Section 375 which is at the root of marital rape issue, Justice Deepak Gupta held that:

"88.....I am clearly of the opinion that Exception 2 to Section 375 IPC in so far as it relates to a girl child below 18 years is liable to be struck down on the following grounds:

- (i) It is arbitrary, capricious, whimsical and violative of the rights of the girl child and not fair, just and reasonable and, therefore, violative of Article 14, 15 and 21 of the Constitution of India;
- (ii) It is discriminatory and violative of Article 14 of the Constitution of India and;
- (iii) It is inconsistent with the provisions of POCSO, which must prevail."

Justice Madan B. Lokur also elaborated on the issue in the similar vein by stating that:

"1.The exception carved out in the IPC creates an unnecessary and artificial distraction between a married girl child and an unmarried girl child and has no rational nexus with any unclear objective sought to be achieved. The artificial distraction is arbitrary and discriminatory and is definitely not in the best interest of the girl child and has no rational nexus with any unclear objective sought to be achieved. The artificial distraction is arbitrary and discriminatory and is definitely not in the best interest of the girl child. The artificial distinction is contrary to the philosophy and ethos of Article 15 (3) of the Constitution as well as contrary to Article 21 of the Constitution and our commitments in international conventions. It is also contrary to the philosophy behind some statutes, the bodily integrity of the girl child and surely each one of us must discourage trafficking which is such a horrible social evil."

As regards woman's right to bodily integrity and the reproductive choice, the Court dwelt upon her earlier rulings in *State of Maharashtra Vs. Madhukar Narayan Mardikar*²⁵ and *Suchita*

²⁴ Krishnadas Rajagopal, Sexual intercourse with minor wife is rape, says SC, *The Hindu*, dt. 12.10.2017.

²⁵ (1991) 1 SCC 57.

Srivastava Vs. Chandigarh Administration.²⁶ In the former case, it was held by the Apex Court that "Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes. So also it is not open to any and every person to violate her person as and when he wishes. She is entitled to protect her person if there is an attempt to violate it against her wish."

In Suchita Srivastava's case, the Apex Court held that the right to make a reproductive choice was equated with personal liberty under Article 21 of the Constitution, privacy, dignity and bodily integrity. It includes the right to abstain from procreating. "It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods," the Court observed.

The Apex Court in this case (Independent Thought Vs. Union of India) observed thus:

"64. The discussion on the bodily integrity of a girl child and the reproductive choices available to her is important only to highlight that she cannot be treated as a commodity having no say over her body or someone who has no right to deny sexual intercourse to her husband. The human rights of a girl child are very much alive and kicking whether she is married or not and deserve recognition and acceptance."

Hailed by many as a progressive verdict, the Supreme Court has clearly ruled that sex between a man and his wife below 18 years of age will amount as rape and the husband can face upto 10 years imprisonment under the Indian Penal Code or even life term under the POCSO Act of 2012. Her willingness or consent is of no concern. However the Court has clarified that they have made no observation with regard to the marital rape of a woman who is 18 years of age or above since that issue was not before the Court. Now, for the first time since the IPC came into effect in 1860, there is now a uniform minimum age (18) for marriage, consent and marital sex.

²⁶ (2009) 9 SCC 1.

Post Supreme Court Verdict on Marital Rape: Challenges Ahead

(i) *Child Marriage:*

Complete abolition of child marriages look like a distant dream now in India. Though in the last four decades the incidence of child marriage has decreased from 41.2% to 32.7% globally. India too, has seen a decline in child marriage below 14 years. However, 17 million children between 10 to 19 years were married in 2011 alone (76% girls). This shows our commitment to fulfil Sustainable Development Goals target in coming years may prove to be a tough going indeed.²⁷ In Northern parts of the country, one in every 5 wedlocks is a child marriage, according to 2011 census data. Under Section 3 (1) of the Prohibition of Child marriage Act, 2006 (the PCMA), a child marriage is voidable at the option of any contracting party who was a child at the time of marriage. The marriage can be declared a nullity in terms of the proviso to Section 3 (1) of the PCMA through an appropriate petition filed by the child within two years of attaining majority and by approaching an appropriate court of law. Further, Section 13 (2) (iv) of the Hindu Marriage Act, 1955 stipulates that a child bride can petition for a divorce on the ground that her marriage (whether consummated or not) was solemnized before she attained the age of 15 years and she has repudiated the marriage after attaining that age but before attaining 18 years of age. In the recent Judgment,²⁸ Justice Madan B. Lokur, of the Supreme Court has observed thus in this regard:

“37. It is quite clear from the above that Parliament is not in favour of child marriages per se but is somewhat ambivalent about it. However, Parliament recognizes that although a child marriage is a criminal activity, the reality of life in India is that traditional child marriages do take place and as the studies (referred to above) reveal, it is a harmful practice. Strangely, while prohibiting a child marriage and criminalizing it, a child marriage has not been declared void and what is worse, sexual intercourse within a child marriage is not rape under the IPC even though it is a punishable offence under the Protection of Children from Sexual Offences Act, 2012.”

In this context it would be worthwhile to mention that State of Karnataka has inserted subsection (1A) in Section 3 of the PCMA (on obtaining the assent of the President on 20th April,

²⁷ Renu Singh, Forced to be adults before their time, Hindustan Times, dt. 31.5.2016.

²⁸ Independent Thought Vs. Union of India and Anr., W.P. (civil) No. 382 of 2013.

2017) declaring that henceforth every child marriage that is solemnized is void ab initio . The relevant extract of the Karnataka amendment reads as follows:

“ (1A) Notwithstanding anything contained in Sub-section (1) [of Section of the PCMA) every child marriage solemnized on or after the date of coming into force of the Prohibition of Child Marriage (Karnataka Amendment) Act, 2016 shall be void ab initio. “

The Apex Court further observed that “It would be wise for all the State Legislatures to adopt the route taken by Karnataka to void child marriages and thereby ensure that sexual intercourse between a girl child and her husband is a punishable offence under the POCSO Act and the IPC.”

Thus, one of the most potent, arguably the root cause, of the marital rape issue lies in the happening of child marriages in India. Our lawmakers have to traverse proverbial “miles to go” path to wean away people from this harmful tradition. The proper amendment in the PCMA by the Central Government is the first challenge. State Governments may also be encouraged to follow the Karnataka example as wished by the Hon’ble Supreme Court. The sooner this step of amendment in the PCMA is taken, the better will be the future of girl child who will not become girl brides. Moreover, they will not be a victim of marital rape anymore.

2. As far as the question of girl brides at present is concerned, it is indeed very difficult even to think that they will lodge a complaint against their husbands. And if they do so, how the evidence will be collected because the girl bride will always be surrounded by near and dear ones. This problem of evidence is felt in all child - centric Acts like POCSO & J.J. Act etc. This issue has to be taken up seriously by the lawmakers and the legal experts at the earliest. The procedural aspect has to be studied in detail comparing our system to other foreign legal systems like that of European Union, American, British and other European countries. This is a big challenge not only in context of marital rape but in regard to other heinous crimes against children.

(3) Illiteracy and lack of proper education among the girls is a cause of worry for all. This is more worrisome in distant rural and tribal areas where educational infrastructure is either missing or totally inadequate. In such areas, they only inherit age-old worn-out traditions and customs which have lost relevance in modern times. Child marriage is also an example of such types of traditions. Having imbibed a pious theme of Beti bachao, Beti padhao, it is still an

enormous challenge before the concerned governments to achieve total literacy and proper education for a girl child. It is expected from a properly educated girl that she can stand up on her own against so many social evils which are prevailing in the name of traditions.

(4) Spreading awareness among the masses about the good schemes for the betterment of girls and women in general, relevant laws passed by the Central and State governments in favour of womenfolk etc. is extremely beneficial for the whole society. It sets the momentum for social change. Though the Govt. owns broadcasting medium like Radio and Television, yet the results seem to be off target. In the present age of social media, much impetus can be given to awareness programmes. This is another challenge before the lawmakers. But this is the need of the hour.

(5) The whole attitudinal change is required in the mindset of the law and order machinery including the police and the Judiciary. For example, while dealing with a girl bride complaining of the marital rape, first the police authorities, and later on the judicial officers are required to have a sympathetic attitude towards the victim. The procedure before the court for such types of cases also needs fresh approach. The existing procedures only give a harrowing and gruelling time for such victims who are still in their teens. Our lawmakers have to think about making changes in the procedural laws so that the future of young girls could be secured to the maximum.

CONCLUSION

The issue of marital rape has now been settled by the Supreme Court in a recent judgement which clearly laid down that sexual intercourse with the wife below 18 years of age amounts to rape and is punishable under law. Early marriages and its consequences are manifold ranging from social, socio-economic, moral, health-wise and others aspects. Though so many voices have been raised against this ill-practice of marital rape from time to time, yet the travails of girl bride remained undiluted just because of absence of proper laws. Now, the lawmakers, civil society and the respective government must work in tandem to help implement the present ruling of the Apex Court in letter and spirit. There is also urgent need to accordingly make amendments in the criminal laws and the PCMA. The condition of the girl child in general, be it girl bride, has been largely pathetic in our societal structure. Time has now come to make

amends in this regard. Undoubtedly, this will not be an easy task for the government to tackle the ensuing challenges, yet a beginning has to be made in this regard urgently. The role of civil society is already cut-out. This is high time we get rid of such harmful practices like marital rape in the name of traditions and provide our girls a healthy and robust ecosystem to grow.

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