

MARITAL RAPE AND MARRIAGE INSTITUTION IN ISLAMIC LAW

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ABSTRACT

'My Body, My Choice' has been an eminent slogan since 1970, used by the feminists for their self-determination and sexual rights. Despite the increased recognition, that the topic of spousal rape has generated in the past two decades, criticism still exist. The purpose of this study is to analyze the legal status of Marital Rape and importance of Marriage Institution in Islam. To inspect the conjugal rights of both spouses. Elaborating the object and remedies of Islamic Law in the frequent circumstances of Marital Rape. And particularly investigation of the question that "Whether wife's consent for sexual relation is required? "

WESTERN VIEW OF MARITAL RAPE

For most of recorded history, marital rape has been studied rarely, yet surprisingly prevalent social phenomena. (Searles and Berger, 1987).

"Spousal rape is a situation where a man has sexual intercourse with his wife, to whom he is lawfully married, without her consent. That is, non-consensual sexual intercourse with a spouse" (Emwju, 2015)

In the 19th century, most rape laws did not specify if the husband could be prosecuted for marital rape and during 19th century, no husband was ever prosecuted for raping his wife. It was not until the late 20th century that the statutes allowed husband to be prosecuted for marital rape in America, yet the conviction rates are surprising. In 1985, the national clearinghouse on Marital and date rape reported that 49.5% of the total arrests for marital rape resulted in convictions. Out of the 49.5% in convictions rate, 50% were from spouses living together and in 49.4% were from spouses not living together (Whatiey, 1993).

FREQUENT CIRCUMSTANCES OF MARITAL RAPE

Women are at particularly high risk for being raped by their partners under the following circumstances:

- a) Women married to domineering men who view them as 'property'.
- b) Women who are in physically violent relationships.
- c) Women who are pregnant.
- d) Women who are ill or recovering from surgery.
- e) Women who are separated or divorced.i

MARITAL RAPE AND MARRIAGE INSTITUTION IN ISLAM

a) Family System in Islam

The family is core constituent of a Muslim Society that comes as a result of bond created between a man and woman through a religious and legal relationship. The family gets expanded through children who grow up and maintain their relationship.ⁱⁱ A traditional Muslim family is extended, often spanning three or more generations. An extended structure offers many advantages including stability, coherence, physical and psychological support, particularly in times of need. (Dhami & Sheikh, 2000)

b) Purpose of Marriage

In order to examine adequately the impacts of a new concept of Marital Rape on family system, we have to take a brief stance on purpose of marriage. In addition to objectives like protection, companionship, piety, safeguard against lewdness one of main purpose of Marital Institution is enjoyment from each other, as a means of procreation. The Prophet Muhammad (صلى الله عليه وسلم) said; "There are three persons, whom the Almighty Himself as undertaken to help—first, one of them is a person he who marries with a view to secure his chastity."ⁱⁱⁱ Also, Allah Almighty said in The Holy Quran;

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنْفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُمْ مَوَدَّةً وَرَحْمَةً^{iv} "

" And of His signs is that He created for you mates from among yourselves, so that you may find tranquility in them; and He planted love and compassion between you."

Also;

"هُنَّ لِبَاسٌ لَكُمْ وَأَنْتُمْ لِبَاسٌ لَهُنَّ"^v

"They (Women) are clothing for you and you (Men) are clothing for them."

c) Rights of Husband in Islam

It is abusive of women to withhold sex. If denied sex, a man has no alternative but to cheat. The proposed legislation of Marital Rape is as a threat to all men. In many of the articles, the assumption is made that any advances in rights for women are somehow a reduction in the rights of men, that "*gains for women must mean losses for men*" (Gavey & Gow, 2001). Gender equality is portrayed as a zero-sum game.

The rights of the husband over his wife are among the greatest rights; because Allah says (interpretation of the meaning): "And they (women) have rights (over their husbands as regards living expenses) similar (to those of their husbands) over them (as regards obedience and respect) to what is reasonable, but men have a degree (of responsibility) over them."vi The rights of husband in Islamic Law include:

1. Obey him long as there is no disobedience to Allah Almighty.
2. To safeguard his honor and wealth.
3. Not allow anyone to enter his home without his permission.
4. To make home a peaceful and pleasant place.
5. Making herself available to her husband.

Marriage and Rape in Islamic Law

a) Marriage: According to all Muslim Jurist from four different school of law as concluded as follow:

" عقد يتضمن إباحة الاستمتاع بالمرأة بالوطء والمباشرة والتقبيل والضم و غير ذلك اذا كانت المرأة غير محرم "
 "ينسب او رضاع او صهر"

"A contract that include the legalization of enjoyment with the women of intercourse, kissing, hug etc. if that woman is not forbidden due to; blood relations, breastfeeding, and marital relation."vii

b) Rape: According to the renowned scholar of Islamic Law Rape is defined as:

"ملك له فيه بلا شبهة تعمدًا لا و طء مكلف مسلم فرج آدمي"

"Penetration (consensual or non-consensual) by a sensible Muslim in the vagina or anus of a human that is not in his authority without doubt, intentionally."viii

QUESTION OF LAW

After looking at the definitions of marriage & rape, the Question of Law that arise; *Whether the consent with wife for sexual relation is for whole life?* We would have a bird eye view on

the sources of Islamic Law, to clarify this question. Following are some references from the sources of Islamic Law i.e. Quran, Hadith, Maqasid-e-Sharia and Islamic Jurisprudence.

a) **In Quran**

"يَسَاؤُكُمْ حَرْبٌ لَّكُمْ فَاتُّوا حَرْبَكُمْ أَيَّ شَيْءٍ"

"Your women are cultivation for you; so, approach your cultivation whenever you like." x

b) **In Hadith**

"إِذَا دَعَا الرَّجُلُ امْرَأَتَهُ إِلَى فِرَاشِهِ فَأَبَتْ أَنْ تَجِيءَ لَعَنَتْهَا الْمَلَائِكَةُ حَتَّى تُصْبِحَ"

"Narrated Abu Huraira (رضي الله عنه): The Prophet (صلى الله عليه وسلم) said; if a man Invites his wife to sleep with him and she refuses to come to him, then the angels send their curses on her till morning." xi

"وَالَّذِي نَفْسُ مُحَمَّدٍ بِيَدِهِ لَا تُؤَدِّي الْمَرْأَةُ حَقَّ رَبِّهَا حَتَّى تُؤَدِّيَ حَقَّ زَوْجِهَا وَلَوْ سَأَلَهَا نَفْسَهَا وَهِيَ عَلَى قَتَبٍ لَمْ تُمْنَعُهُ"

"By the One in Whose Hand is the soul of Muhammad! No woman can fulfil her duty towards Allah until she fulfils her duty towards her husband. If he asks her (for intimacy) even if she is on her camel saddle, she should not refuse." xii

c) **Maqasid Al-Shariah (Higher Objective of Islamic Law)**

Briefly, Maqasid Al-Sharia is defined as; **"the ultimate objectives of sharia or Islam which consisting of protection of religion, protection of life, protection of offspring, protection of intellect and protection of wealth or property."** Islam allows or forbids something for achieving those ultimate objectives of Islam as they are beneficial for individual and society. Thus, the issue of marital rape should also be looked from Maqasid-e-Sharia framework.

Firstly, Islam encourages his followers to get married to legalize sexual relations and to protect offspring. The objective of marriage in Islam is to restrain men and women committing adultery. Pertaining to the sexual intercourse in marriage institution, it cannot be denied that both parties are having mutual benefits and interest in having sex. In other words, husband and wife are having right in channelling their desire and lust toward goodness and not involved in adultery as it is prohibited in Islam. Thus, if a husband has desire to intercourse with his wife, it is the very obligation of wife to fulfil his sensual appetite. Because it results in protection of

husband from adultery which is considered as one of the ultimate objectives of Sharia (Maqasid-e-Sharia).

On the other hand, if both husband and wife claim that he or she has an interest (Maslaha), then degree of necessity would be considered. For example, wife is too tired, and husband wants her to fulfil his sexual urge, though he had intercourse three hours ago. Here wife's interest is prior, hence she could refuse. Regardless, it would be her virtue if she please him. As Ibn Hajar Al-Asqalani Says: "**A man is less patient as compare to women in staying away from intercourse**" (Nasri and Hamat, 2017,173).

d) **Islamic Criminal Jurisprudence**

An important essential of a crime is mens rea or evil intend. There can be no crime without an evil mind. Even in strict or absolute liability some mental element is required. That is why "actus non facit reum nisi mens sit rea"^{xiii} is considered a fundamental principle of penal liability.^{xiv} Similarly Islamic Jurisprudence provides us a legal maxim with relation to intention and motive; **أَنَّ مَا الْأَعْمَالُ بِالنِّيَّاتِ** which means "The reward of deeds depends upon the intentions."^{xv} And criminal motive in case of Marital Rape is nearly impossible to decide, even there are extreme rare chances of Mens Rea in spousal rape.

e) **Procedural Law**

Every offence is dealt with an established criminal procedure. And one of the most difficult elements to prove is the intention of the accused. In the case of Marital Rape, the Mens Rea of husband and question of fact that "whether the intercourse was consensual or non-consensual" is extremely difficult to decide. "If I, as an innocent man, have no way to prove innocence, then the law discriminates against me as a man" (as cited in Benjamin & LeGrand, 2012).

IMPACT OF NEW CONCEPT

The concept of Marital Rape has disastrous effects on the entire society & family system:

1. It Promotes domestic broils.
2. Weaken the feelings of mutual confidence.
3. Increase prostitution rate in the society.
4. Negative impacts on the grooming of children.

5. Increase the exploitation probability of Law.
6. Endanger the solace of married life.

RIGHT OF WIFE TO REFUSE

There are some situations in Islamic Jurisprudence when a wife has the right to refuse sexual intercourse. And in some cases, it is the very obligation of wife to refuse her husband. Some of these situations are as follow:

1. During menstruation periods.
2. During her parturition (nifas) periods.
3. During fasting.
4. While she is performing pilgrimage.
5. If she is in advance stage of pregnancy.
6. If she believes, her husband is suffering from sexually transmitted disease.
7. If she is divorced (Talaq-e-Ba'ain). xvi

However a wife cannot refuse her husband other than special situations as stated by Alan Wertheimer in his book "Sexual Consent To Relation"xvii;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 had given up herself in this kind unto her husband, which she cannot retract” (as cited by Resick, 2003).

REMEDIES FOR WIFE

Marital Rape is not a crime, instead it is regarded as a sin^{xviii} in Islam. Which results in penalty in hereafter and not worldly punishment. Also, if Marital Rape causes severe bodily harm, damage to organ or extensive bleeding then a wife can bring charges against the husband. And husband have to pay the compensation or could be punish as Tazir.^{xix} But the crime in this

case is due to deliberate bodily harm and not the non-consensual sexual intercourse. xx Imam Ibn Al-Qayyim reports in his famous book "Tibb Al-Nabawi" that the Prophet Muhammad (صلى الله عليه وسلم) forbade from engaging in sexual intercourse before foreplay (Kiss, Hug etc for the arousal of wife). xxi

CONCLUSION

The relationship of husband and wife is sacred. Both spouses have conjugal rights over each other and it is duty of both to fulfil each other's sensual appetite. Islamic law had already prohibited the frequent circumstances of spousal rape. A wife cannot refuse her husband without reasonable justifications. *As the consent of wife with her husband for sexual relation is for whole life.* And a husband having a non-consensual sexual relation, is not guilty of committing rape. On the other hand, Islamic Law provides remedies for the harm during the non-consensual sexual intercourse.

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ENDNOTES

i (Bergen R.K,2006)

ii Abdelghani Houba, (2017), The Family System in Islam, Page No. 1.

iii Issues in Women's Rights: A Practitioner's Resource Book, edited by K M Baharul Islam, Allied Publishers PVT. LTD, (2014), Page Number 263

iv Al-Quran, Surah Al-Room, Chapter 30, Verse 21.

v Al-Quran, Surah Al-Baqarah, Chapter 2, Verse 187.

vi Al-Quran, Surah Al-Baqarah, Chapter 2, Verse 228.

vii Wahbah Az-Zuhaily, Al-Fiqh Al-Islami wa Adillatuhu, Vol 9, Page: 6513.

الفقه الاسلامي وادلته لوهبة الزحيلي، جز ٩، صفحة ٦٥١٣

viii Dr Abdul Hakeem, Al-Hadood Fi Fiqh-ul-Islami, Vol 1, Page 56.

صفحة رقم ٥٦، الحدود في الفقه الاسلامي لدكتور عبد الحكيم، الطبعة الأولى

ix أي means when, how and where;

القاموس المحيط

x Al-Quran, Chapter No. 2, Verse 223.

xi Sahi Al-Bukhari, Hadith Number 5193 (International Numbering)

xii Sunan Ibn Majah, Vol. 3, Book 9, Hadith Number 1853 (International Numbering)

xiii The standard common law test of criminal liability is expressed in the Latin phrase *actus reus non facit reum nisi mens sit rea*, i.e. "the act is not culpable unless the mind is guilty".

xiv Kenny's Principle of Criminal Law by C.S Kenny, 2003, Mansoor Book House, Page No: 29.

xv Sahih Al-Bukhari, Hadith No. 1.

xvi (Nasri and Ham, 2017, 167-16).

xvii Consent to Sexual Relations by Alan Wertheimer,2003.

xviii Deeds that are against the sayings of Allah Almighty and Prophet Muhammad (صلى الله عليه وسلم), and which are punishable in the world hereafter. (الذنب اسبابه وعلاجه للشيخ حسن قراءتي)

xix In Islamic law, Tazir refers to punishment for offences at the discretion of judge or ruler of the state. (التشريع الجنائي الاسلامي لعبد القادر عودة)

xx (Ikra)

xxi Al-Tibb Al-Nabawi, i83, from Jabir Ibn Abdullah.

