

‘CRIMINALIZATION OF MARITAL RAPE: A BALANCED STRIKE AGAINST VIOLATION OF CONSTITUTIONAL MORALITY USING REFORMATIVE PUNISHMENTS’

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“If it cannot be kept under Category of Crime,

Give it a place under Fundamental Rights!”

ABSTRACT

‘Marital Rape’ is a most common Non-Declared crime prevailing in our society. It is so deseperating that such type of human rights violation is highly protected by our legal system by becoming silent viewer despite that it is as brutal as Polygamy, Halala and Triple Talaq.¹

But, recently Hon’ble Supreme Court indirectly held it as ‘Violation of Constitutional Morality’². It is a good but incomplete and much delayed beginning as it guarantees the ‘Constitutional Morality.

Also, A bench of acting Chief Justice Gita Mittal and C Hari Shankar in the Hon’ble Delhi High Court³ said that in a relationship like marriage, both man and woman have a right to say ‘no’ to physical relations. Marriage does not mean that the woman is all time ready and also held that physical force is not necessary for constituting the offence of rape.

But, Government is afraid of destabilization of institution of marriage and becoming it to be a harassment tool for husbands by making it a criminal offence.

A better way is to achieve such dream by criminalizing it with the soul concept of ‘Gender Justice by the use of reformative punishments’

¹ Business Standard Newspaper: October 29,2018 Edition

² Indian Express Newspaper: September 28, 2018 Edition

³ A news 18 Report on July 17 2018: www.news18.com

KEYWORDS:

- Marital Rape
- Violation of Constitutional Morality
- Non- Declared Crime
- Human Rights Violation
- Sexual Offences

1. INTRODUCTION:

Marital rape is any unwanted sexual acts by the spouse, committed without consent and/or against a person's will, obtained by force, or threat of force, intimidation, or when a person is unable to consent or deny. Within a marriage, if a marital partner gives consent to sexual intercourse because of threat of injury or depriving such marital partner of the right to stay in the house or receive maintenance, it is not valid consent. It is still rape.

The offence of marital rape has not been sufficiently accounted for in the law in India. There are provisions in law for rape of only unmarried women and the law does not punish rape within marriage if the woman is above fifteen years of age.

Before proceeding further, it is important to know the causes and impact of Marital Rape. The main reasons behind Marital Rape are given as under:-

- Psychological factors like depression, negative thoughts, anger, and behavioral pattern
- Any type of addiction like drugs, alcohol etc.
- Extremely high sexual desires
- Obscene and pornographical literature

It is also pertinent to discuss here the impact of such a barbarian act of Marital Rape which are as follows:-

The physical and psychological effects of marital rape may include injuries to private organs, torn muscles, broken bones, miscarriages, stillbirths, bladder infections, infertility and the potential contraction of sexually transmitted diseases including HIV, anxiety, shock, intense fear, depression, suicidal ideation, and post-traumatic stress. sleeping problems, flashbacks, sexual dysfunction, and problems in establishing trusting relationships.

2. STATEMENT OF PROBLEM:

The main Problems in criminalization of Marital Rape are as under:-

- Our society is Male-Dominating and the major convicts of such an evil are Males which do not want to make it criminalize.

- If there will be strict punishment for such an evil, Big portion of Husbands will be in jails which will ultimately demolish the faith from the sacrament of marriage.
- Such crime can be committed only in the privacy. It is also problematic that what to consider as consent for sexual relationship and what to not and how can it be proved by outside world?
- It is an unreported crime, with absolutely improper data about its existence, but spread everywhere in our society like Cancer and very difficult to remove.

3. **RESEARCH OBJECTIVE AND OTHER FACTS:**

The main objective is to legally declare ‘committing or imposing’ marital rape as a criminal offence on the foundations of strict gender equality and equal justice with the use of reformatory punishments and which may be analyzed by these steps as under:-

3.1. **FLAMING QUESTIONS REGARDING MARITAL RAPE:**

The prominent flaming questions regarding criminalization of Marital Rape are as follows:-

- Should an undeclared crime of ‘Marital Rape’ be declared as a criminal offence by inserting a separate definition for ‘Marital Rape’ other than ‘Rape’ under ‘IPC’ and other criminal laws?
- Why not exception 2 to section 375 of IPC should be deleted?
- Isn’t it a matter of clear and brutal Human Rights violation through the license of Marriage like in case of ‘Triple Talaq’, ‘Polygamy’ and ‘Halala’?
- Should a Marital Partner be permitted to dominantly and forcibly use another partner like a property or civil right?
- Isn’t it prevailed in our society everywhere ‘from Affluent’s Bed to Poor’s Bunk’ and become like ‘Cancer’- which is mandatory to remove?
- Should it be deemed as ‘Violation of Constitutional Morality’ or ‘Immortalization of Constitutional Morality’?
- What type of punishments should be there for the convicts of ‘Marital Rape’ whether Reformatory Punishment is appropriate for such purpose and up to level or degree?
- What appropriate steps should to taken to remove such an ‘Invisible and Unreported’ crime from our so called civilized society without any damages to the sacrament of marriage and our life-long relations?

3.2. **RESEACH HYPOTHESIS**

The Criminal and Marital Laws in India did not consider the existence of ‘Marital Rape’ and even provides unintentional protection to it by becoming either silent or vague upon its criminalization and punishment, due to Constitutional Vagueness and Parliamantary Ignorance, which should be criminalized mandatorily in an effective and balanced manner.

3.3. RESEARCH METHODOLOGY

Doctrinal Method has been adopted for the present research work. It involves scrutiny and analysis of prior enactments, case laws, articles, books, newspapers, journals and websites etc.

4. STATISTICS ABOUT MARITAL RAPE

According to National Health and Family Survey (NFHS-4) for 2015-16, 5.4% women have experienced Marital Rape. 4.4% of them say they have experienced it in just the last 12 months. The figure recorded by NFHS-3 for 2005-06 was 9.5%.

11.5% of such women considered his husband as perpetrator and not the husband.

These number are far from accurate and could be multiple times over.

It is even so ridiculous that Marital Rape exists in data, but not in law.

5. LEGAL INDIGENCE REGARDING MARITAL RAPE IN INDIA:-

The present legal and constitutional system in India is contributing as a safeguard mechanism for the convicts of the Marital Rape, having no proper and legally binding provisions, can be discussed further as follows:-

5.1. CONSTITUTIONAL VACUUM

Indian Constitution is unintentionally giving its implied consent and even protecting criminalization of Marital Rape.

Although, Article 14 states that “The State shall not deny to any person equality before the law or the equal protection of laws within the Territory of India” and Article 21 states that “no person shall be denied of his life and personal liberty except according to the procedure established by law.” Additionally, The Supreme Court include the rights to health, privacy, dignity, safe living conditions, and safe environment among others in it.

As mentioned above, it is well settled that the “right to life” envisaged in Article 21 is not merely a right to exist. For example, there can be no dispute that every citizen of India has the right to receive healthcare or that the state is required to provide for the health of its constituents. In this vein, the courts have repeatedly held that the “right to life” encompasses a right to live with human dignity.

Also, Article 15 provides fundamental right to prohibition of discrimination on the grounds of religion, race, caste, sex, place of birth which can be foundation stone to a balanced and gender equality based criminalization of Marital Rape in India.

But, Exception 2 of Section 375 of IPC is violating Article 14, Article 15 and Article 21 of the Indian Constitution which states that sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

Allowing spousal rape and not criminalizing it, effectively means that human dignity can be accorded lesser value in the case of a woman when she is married. Does not they have equal right to live with human dignity?

It is inherently wrong and problematic to assure dignity and sexual autonomy to any one marital partner of a specific gender.

Only when two marital partners are given equal rights over their bodies can the “sacred” institution of marriage thrive.

5.2. VAGUENESS OF CRIMINAL LAWS

The definition of rape was revised through the Criminal Law (Amendment) Act 2013⁴, after Nirbhaya’s gang rape, which also raised the legal age of minor to eighteen.

Section 376B of the new 2013 law made forced sexual intercourse by a man with his wife – if she is living separately – a crime, whether under a decree of separation or otherwise, punishable with at least a 2-year prison term.

Forced sex by a man on his wife may also be considered a prosecutable domestic violence under other sections of Indian Penal code, such as Section 498A as well as the Protection of Women from Domestic Violence Act 2005⁵. The crime of sexual assault on a child, that is anyone below the age of eighteen, is further outlined and mandatory punishments described in The Protection of Children from Sexual Offences Act 2012⁶.

Even, the Protection of Women from Domestic Violence Act, 2005⁷ although did not consider marital rape as a crime, did consider it as a form of domestic violence, but under this Act, if a woman has undergone marital rape, she can go to the court and obtain judicial separation from her husband.

However, Marital Rape between married couples, when the wife and husband live together, not to be a crime even after Criminal Law (Amendment) Act, 2013.

⁴ Act No. 13 Of 2013

⁵ Act No. 43 of 2005

⁶ Act No. 32 Of 2012

⁷ Act No. 43 Of 2005

Even, the narrow definition of Rape under section 375 of IPC has been criticized by Indian and international women's and children organizations and proper re-designing of criminal laws having provisions about marital rape is the need of the time.

5.3. EMPTINESS OF FAMILY LAWS

Marital Rape have even no place in Family laws in India as no community either Hindu, Muslim or any other accept it as a crime as their custom do not permit it but still consider it as a shameful and immoral act. We are the people of such country which supports and follow “Ahimsa Parma Dharma” but unknowingly supporting this form of pure non-violence with lack of Justified family laws about that matter.

Disappointingly, Marital Rape is even not a ground for divorce under the Hindu Marriage Act, 1955⁸, the Muslim Personal Law (Shariat) Application Act, 1937⁹, or the Special Marriage Act, 1954¹⁰.

So, there is a great need to reform our family and customary laws for incorporating provisions regarding Marital Rape based on social equality and gender justice.

5.4. IGNORANCE OF PALIAMENT AND STATE LEGISLATIVE ASSEMBLIES

Justice Verma Committee in 2013, gave its report on the issue of ‘Marital Rape’, favouring its criminalization but remain unsuccessful in declaring it as criminal offence due to parliamentary ignorance and government apprehensions.

Our law making bodies are also proving to be dormant and silent viewer as our parliament and state legislative assemblies have not made any law regarding such a barbarian social evil

during a long period of 72 years since independence, which clearly shows that those are ignorant and not serious about such a crucial and burning issue of the society which can demolish social structure and family values, if remains unattended.

⁸ Act No. 25 of 1955

⁹ Act No. 26 of 1937

¹⁰ Act No. 43 of 1954

5.5. LIBERAL BEHAVIOUR OF INDIAN JUDICIAL SYSTEM

Indian Judicial System is showing its liberal behavior specifically in the case of Marital Rape. Still, It have been continuously providing various landmark verdicts which can become a strong base of criminalization of Marital Rape in the near future. Some of them are as follows:-

In Francis Corallie Muin v. Union Territory of Delhi¹¹ case, Article 21 incorporates the right to live with human dignity and all that accompanies it.

Even, Right to privacy is not mentioned in the Indian Constitution. Nevertheless, in a series of cases like Kharak Singh v. State of U.P.¹²; Govind v. State of Madhya Pradesh¹³, ; Neera Mathur v. LIC etc¹⁴ and recently in Justice K.S. Puttaswamy (Retd.) and Anr, v. Union of India and ors.,¹⁵ The State of Karnataka v. Krishnappa¹⁶, Suchita Srivastava v. Chandigarh Administration¹⁷, State of Maharashtra v. Madhukar Narayan¹⁸, Hon'ble Supreme Court has perceived that a right to privacy is intrinsically ensured under extent of Article 21 and non-consensual sexual intercourse amounts to physical and sexual violence, explicitly recognized right to make choices regarding intimate relations and also held that "Forced sexual cohabitation is a violation of that fundamental right".

In the landmark case of Vishakha v. State of Rajasthan¹⁹, the Supreme Court extended this right of privacy in working environments also.

In an another landmark case of Shayra Bano v. Union of India and Ors.,²⁰ the Apex Court declared the practice of 'Triple Talaq' unconstitutional and violation of Article 14 (Right to Equality).

Likewise, other malafied practices such as Marital Rape should be abolished from the society due to intervention of Hon'ble Supreme Court.

Recently, in Joseph Shine vs. Union of India²¹, Supreme Court has struck down Section 497 of IPC, which criminalizes adultery earlier, held it as unconstitutional which is ultimately a victory for the rule of gender equality and opens the door for criminalization of Marital Rape having content of gender equality.

¹¹ 1981 SCR (2) 516

¹² 1963 AIR SC 1295

¹³ 1975 SCC (2) 148

¹⁴ 1992 AIR SC 392

¹⁵ WP (C) No. 494 of 2012

¹⁶ JT 2000 (3) SC 516

¹⁷ CA 5845 SC 2009

¹⁸ AIR 1991 SC 207

¹⁹ AIR 1997 SC 3011

²⁰ WP (C) No. 118 of 2016

²¹ WP (C) NO. 194 of 2017

Also, in Navtej Singh Johar v. Union of India²², Supreme Court held that Gender Identity and self-expression are basics to human dignity, held Section 377 of IPC unconstitutional which increased the hopes for criminalization of Marital Rape for implementing strict gender equality.

It is pertinent to mention here that The Delhi High Court recently turned down a plea seeking direction to the Centre to declare marital rape as a ground of divorce²³. A Division Bench of the High Court presided by Chief Justice DN Patel and C Harishankar said the court was not entitled to do so. The court observed that this was the mandate of the legislature and the judiciary was not entitled to pass an order on the same.

Earlier, A bench of acting Chief Justice Gita Mittal and C Hari Shankar in the Hon'ble Delhi High Court²⁴ said that in a relationship like marriage, both man and woman have a right to say 'no' to physical relations. Marriage does not mean that the woman is all time ready, and also held that physical force is not necessary for constituting the offence of rape.

Also, as discussed above, the bench of Justice D.Y. Chandrachud in the Hon'ble Supreme Court without directly delving²⁵ into that issue observed that, "Any legislation which results in the denial" of constitutional guarantees to women "cannot pass the test of constitutionality what the court has called Constitutional Morality".

It is a 'good but incomplete and much delayed beginning' to remove such a scary and invisible evil from our society as it talks about 'Guarantee of Constitutional Morality' under the holy sacrament of Marriage.

So, Direct intervention of judiciary is the need of the hour for quick criminalization of Marital Rape in the real and practical sense.

5.6. PERCEPTION OF GOVERNMENT AND OTHER DIGNATIRIES:-

The central government's reactionary stand that criminalizing marital rape would "destabilize the institution of marriage" and could become an easy tool to "harass husbands" in RIT Foundation vs Union of India²⁶, before the Delhi high court, is utterly disappointing. It is difficult to understand how Marital Rape is any less brutal than triple talaq or polygamy.

²² WP (CrL.) No. 76 of 2016

²³ India Today Newspaper, July 9, 2019 Edition

²⁴ A news 18 Report on July 17 2018: www.news18.com

²⁵ Indian Express Newspaper: September 28, 2018 Edition

²⁶ WP (C) No. 284 Of 2015: Delhi High Court

The Centre has also submitted before the Delhi high court that “what may appear as marital rape to an individual wife, it may not appear so to others”.

The big question is what evidences the courts will rely upon in such circumstances as there can be no lasting evidence in case of sexual acts between a man and his own wife,” the affidavit said.

Recently, former CJI Dipak Misra also says marital rape should not be a crime in India. The notion that Marital Rape is a crime is borrowed from other countries, he said²⁷

“I do not think that marital rape should be regarded as an offence in India, because it will create absolute anarchy in families and our country is sustaining itself because of the family platform which upholds family values.

6. LEGAL POSITION OF MARITAL RAPE IN OTHER COUNTRIES:-

In more than 50 countries²⁸, including neighbouring Nepal, the United States, Britain and South Africa, it is criminal for a husband to rape his wife. In United States researchers estimate that 10% to 14% of married women experience rape in marriage. Some countries have begun to legislate against marital rape, refusing to accept the marital relationship as a cover for violence in the home. Hence, If we examine the laws in different countries, we see that most countries punish rape within and outside marriage.

7. DIFFICULTIES IN PRACTICALLY IMPLIMENTATION:-

- . Offence difficult to prove as committed in the privacy.
- Fear of society is another lacuna as people do not raise voice against the accused and bear everything year to year. That’s why it is unreported and unattended till today.

8. CONCLUSION AND SUGRESSIONS:-

Criminal law at present defeating the constitutional provisions that grant gender equality and prohibit discrimination. “A Rapist remains a rapist regardless of his relationship with the victim and of course the gender”. Even it is much worse than rape as the rapist is someone who was supposed to take care of his/ her marital partner.

Even, when the Hon’ble Supreme Court can stuck down or held unconstitutional Section 497 and Section 377 of IPC, then exception 2 of Section 375 may also be removed by the Apex Court which is unintentionally protecting

²⁷ Firstpost Website, www.firstpost.com, July 16, 2019

²⁸ Melba Kuriakose, Attitudes towards Marital Rape: A cross- cultural study between young adults in the U.K. and India, The International Journal of Indian Psychology

the offence of 'Marital Rape' which is as brutal and inhuman as 'Triple Talaq', 'Polygamy' and 'Halala' and there should be 'Zero Tolerance Policy' in our country regarding that matter.

New Parliamentary Committees should be formed to criminalize Marital Rape with the core concern of gender equality.

Various social awareness campaigns should be initiated by the government upon Social Media, Newspapers and Television to remove Marital Rape from our civilized society.

In the light of all of above discussion, I strongly propose some points to criminalize the Marital Rape which are as follows:-

- Firstly, Marital Rape should be defined separately, other than definition of Rape, under 'Indian Penal Code' and other criminal laws by making balanced and effective amendments in those enactments and by clear and unconditional interpretation of Constitution and other existing statutes in this regard by the Indian Judicial System .
- Secondly, The exception clause to section 375 of Indian Penal Code should be deleted and the relationship of husband and wife between the convict and the victim should not be a point of defense, if such situation occurs.
- Thirdly, 'Appropriate degree of reformatory punishments' should be used for such cases to save the holy institution of marriage and as well as to remove criminal phenomena from the minds of such 'domestic culprits'.

However, firstly there only reformatory punishment must be applied up to a prescribed limit.

But, in case if such an offence committed frequently, other modes of punishment should be used.

- As an example of Reformatory Punishment, A 'Sin Sign- Board' system should be introduced as a reformatory punishment tool for convicts of 'Marital Rape'.

In this system, a 'Black colored sign board having Red colored splash' upon it (representing 'sins' committed by the person) should be affixed on the wall of bed room of the convict having all details about the offence committed by him to criticize such a shameful act and to make him realize and reform through only such innovative and effective reformatory punishments.

But, It is strongly advisable that Identity of either accused or convict should not be revealed in the public domain in any manner due to effect of society on their marital relations in future.

- Fourthly, it is also proposed to make certain amendments in the Evidence Act to take into account the complexities of prosecution in cases of marital rape.

New developments of technology in the field of medical and forensic sciences can be used to remove such apprehensions about proving of the offence committed.

- Sixthly, An idea to form 'Reformative Punishment Board (RPB)' is here under the chairmanship of 'Chief Justice of India' to suggest, control and regulate the reformative punishments under penal laws in India.

In such a board, Gender Equality must be maintained by inclusion of equal ratio of male and female members other than the chairman.

Also, Chairman of National Human Rights Commission (NHRC) and National Commission for Women (NCW), a renowned psychologist, a famous forensic and medical expert, a world class law scholar and other dignitaries must be its members.

Conclusively, Criminalization of 'Marital Rape' can only become reality by removing such legal and constitutional vacuum through incorporating balanced and effective provisions in law on the basis of gender equality and social justice with the inclusion of reformative punishments as discussed above for preventing destabilization of the holy sacrament of marriage from such a scary, invisible and unreported evil.

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