

“Marital Rape and Dearth of Laws”

Mudit Saxena
Galgotias University

Abstract

This paper aims to prove the existence of marital rape in India and towards the formation of gender neutral laws subjected to this matter. The method which I have used is both qualitative and quantitative which support the existence of marital rape in India. The paper also aims to bring out the global scenario with respect to this issue. As there is obfuscation of laws I have tried to answer the questions like- What is marital rape? Why laws against marital rape do not exist in the country? What is the need for gender neutral laws? This paper also includes ideologies and commentaries of various politicians, educationists etc. which aims to provide a societal review prevailing in the country. The paper will endeavor a critical analysis of rape laws in India and various petitions that were filed for the sake of attaining laws against marital rape. The paper will also put light towards the lack of support towards the Public Interest Litigation by the general public.

Keywords: Marital Rape, gender neutral, raptus, infringement, coverture, consent, de facto, pro forma, subjected

Introduction

The English word consent¹ derived from the two Latin words *consentire* meaning “feel together”. Thus consent can be defined as the permission for something to happen. In Indian law consent plays a vital role in the formation of an agreement and contract. Moreover the consent should always be a free consent².

The word ‘rape’ has been derived from the Latin term *raptus* which means the act of one person of damaging or destroying the property of another person whereby the property is referred to male/female.

The marital rape then can be defined as the unconsented sexual intercourse between husband and wife. It basically refers to the actual use of force by one partner to compel the other partner for sexual intercourse. Marital rape is one of the most sinful offences but has no law with regard to it. The women are the most vulnerable w.r.t. marital in the country. This vulnerability of women roots back to the history of mankind where women were considered as the property of the husband and had a legal principle of *coverture* which implied that the wife would be subjected as the property of her husband. The patriarchal domination of the society has granted to the partners (mostly husbands) exception in cases of marital rape.

¹ Defined under section 13 of The Indian Contract Act, 1872.

² Defined under section 14 of The Indian Contract Act, 1872.

In this modern world people are somewhat are considering this topic as one of the most herculean hurdle in the course of women empowerment. In contrast to this, there is an ideology that is raising among people i.e. the misuse of the marital rape laws if formed, which is true to some extent.

HISTORICAL BACKGROUND

The customs prevailing in the country as suggest that once a woman is married, it is the duty of the husband to maintain her dignity and respect her. On the contrary to these prevailing custom women however are not given the respect that they should be given and their dignity does not even exist. The marital rape might have evolved in the present days but there was dearth of laws in the past and in the present as well. The primitive mindset i.e. a woman is bound by the ties of the marriage and thus she has to render her husband with everything that he may ask for. The women are ringed in the ordeals of their husbands and are submissive to them. Over the years, the vision of women empowerment and the gender equality has improved the scenario and amendments have been made to criminalize such malpractices and offences against married women. Moreover, various developed nations and developing nations are making or amending their laws in order to protect women from marital rape.

In India, even at present no such law are made that mentions marital rape as an offence and inculcates punishment with respect to it. Although many efforts are made by social activists, law commission have brought up various reports and bills in the parliament but this horrendous act that impure the sanity of the marriage is still not declared as an offence in the nation.

Hence in contemporary India, the marital rape is an offence “*de facto*” but no “*pro forma*” has been done to criminalize the offence. In other countries like the US, Canada legislations have been lead down or the judiciary is working in order to bring reforms that mark marital rape as a punishable offence.

The honorable Supreme Court of India has stated rape as an act against the entire humanity but this stand has no mentioning of marital rape. The women who are victim of marital rape cannot claim for the remedy as the section 375 of the Indian Penal Code, 1860 under its exception clearly mentions that a husband cannot be held guilty for forcing his own wife for sexual intercourse.

This exception of IPC clearly infringes women’s fundamental right of equality, right to live with dignity but in the case of marital rape women cannot claim remedy for the infringement of their rights as the is no law prevailing which can aid them. Despite of this dearth of law, section 376-A protects women from forced sexual intercourse who live separately and the husband can be sentenced a punishment upto two years of imprisonment.

Present Scenario of Laws w.r.t Marital Rape

The Domestic Violence Act, 2005 somewhat indicates towards the marital rape. This act prohibits any sexual abuse during the course of marriage. The Indian Penal Code, 1860(section 375) excludes the sexual abuse in a marriage and does not mention it under the head of rape, thus no punishments can be imposed. This dearth results in the infringement of fundamental rights of the married women guaranteed under Article 14³, Article 15⁴ and Article 21⁵.

In order to shatter this legal deadlock, marital rape can be brought under the head of barbarism and can act as a source for divorce. Cruelty refers to an intentional infliction of distress, either mental or physical on a living being, especially a human. Also, the Indian Penal Code, 1860 explains barbarism as any action by the husband that drives woman to commit suicide or cause herself adverse and serious injury. The landmark case of Shobha Rani v. Madhukar Reddy observed that cruelty must be studied in light of the conduct of one spouse towards another in a marriage and in the respect of marital obligations.

All personal laws tag along with the fault theory of divorce. This theory is opted by a spouse who hankers to be exculpated by way of proving the fault of the other spouse. The Hindu Marriage Act, 1955 expresses cruelty as a fault for divorce. So as the personal laws provide cruelty as an important source for divorce that includes the Special Marriage Act, 1954, the Dissolution of Muslim Marriage Act, the Indian Divorce Act, 1869, the Parsi Marriage and the Divorce Act, 1936. Thus, in order to constitute marital rape as a source for divorce one has to resort to the ground of cruelty due to the absence of a separate ground of marital rape.

Proposition

In spite of the present situation where marital rape acquires a very small attention by the legal profession, it is a serious offence that harms the dignity of a woman. In accordance with the Indian law, a woman under sixteen years of age having consensual sex is subjected as the victim of rape. However, if a married woman is compelled for sexual intercourse via force is not at all acknowledged as rape. The thought of a woman who cannot seek legal protection or legal aid on being forced by her husband to have sexual intercourse is very disturbing.

The United Nations via its committee on Elimination of Discrimination against Women has brought recommendations that India should criminalize marital rape. The Justice Verma committee which was formed during the course of the lethal Nirbhaya gang rape case criminalized various sexual offences but marital rape should be criminalized was disregarded completely. This was solely based on the ideology of the parliamentarians that the criminalization of marital rape would bring the institution of marriage under stress and might go

³ Right to equality

⁴ Prohibition of discrimination

⁵ Right to life with dignity

against the principles of family harmony. Arguments were put forward that stated- if a law criminalizing marital rape is brought, it would be abused greatly.

Marital rape might lead to the breakdown of the marriage and would also destroy the sanctity of the marriage. Despite of this situation, it is expected that the wife that should remain silent and continue with the marriage. The worst disadvantage would be that the woman is compelled to live with the husband i.e. the rapist himself. Hence, there lies a dire need to bring about substantial and crucial changes with regard to the laws subjected to sexual offences. For instance, inequalities in any form should be eliminated and gender neutral laws should be framed that would ensure there is least misuse of the laws.

Women today who are the victims of such crimes should be made aware of their rights and the remedies available to them against such barbarian acts. Women should raise their voices against such maltreatment backed up by the support from the society. Indian culture always accentuate on equality, strength and not on any sort of abuse, control or power. Therefore it is convenient for justice for women that the Indian judicial system criminalizes marital rape and inculcates it as a fault ground for divorce.