

**INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES**
[ISSN 2581-5369]

Volume 3 | Issue 4

2020

© 2020 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com>)

This Article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in International Journal of Law Management & Humanities after due review.

In case of **any suggestion or complaint**, please contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication at **International Journal of Law Management & Humanities**, kindly email your Manuscript at editor.ijlmh@gmail.com.

Martial Rape in India: A curse in the Indian Society and in the Criminal Justice System

DEEPESH KATARIYA¹

ABSTRACT

Institution of marriage gives permission to a male and a female to live together. customary and statutory law. It is a special bond shared between two souls, who wedding knot after promising to be companions for a lifetime. It is the physical, mental spiritual unison of two souls. Marriage provides confidence in wife that husband will not safety and respect her dignity and when he commits unwanted/forcefully intercourse with wife, it breaks this confidence and breaches the trust of the wife. Marital rape refers unwanted intercourse by a man with his wife obtained by force, threat of force or physics violence, when she is unable to give consent. Marital rape could be by the use of force only, a battering rape or sadistic rape. It is a non-consensual act of violent perversion by a husband against the wife where she is physically and sexually abused According to Hindu law, certain religion rites have to be performed. Invoking the fire and performing saptapadi around the sacred fire have been considered to be two of the basic requirements for a traditional marriage. There can be a marriage acceptance in law according to customs which do not insist on performance of such rites, i.e. invoking the fire and performing saptapadi and marriages of this type give rise to legal relationship which the law accepts The Constitution of India has granted the right to equality, liberty and dignity to all of its citizens, however, when it comes to actual implementation of law, this paradigm is hardly revoked. The legal vocabulary is a full of archaic and draconian concepts like 'restitution of conjugal rights a concept that legally sanctions rape within marriage. The court, according to this concept is empowered to order a spouse to submit to the conjugal act. This provision is read as consent of the partners within marriage. Its language has been used to humiliate and torture women within the domestic arena. Further when it comes to implementation of this clause, the courts in India maintain a conflicting stance whenever the rights of wives are being invoked and often end up giving confusing decisions about rights of spouses within marriage. There are many cause of marital rape in India Amongst them the principal causes of marital rape like poverty, lack of women empowerment This paper talks about the challenges in the implication of women right and its implication the divorce and domestic violence clause.

¹ Author is a student at Amity Law, School, Amity University, Jaipur, Rajasthan, India.

I. INTRODUCTION

The evolution of the Indian criminal system is a process of 3000 years. A variety of socioeconomic and political condition has framed the current criminal system. Before the kings came to India Dharma as it was propounded in the Vedas was considered to be supreme. After the kings came into the power they start making laws and regulations keeping the view of the customs and the local needs and usages. . It was during the era of Muslim rulers that justice and the punishment were harsh and not up to the mark. It suffered from defects and non Muslims were subject to discrimination and harsh and brutal punishment. After the Ruler system ended in India, the British came and brought a drastic changes in the country legal system: the magistracy, judiciary and the jail system developed during the reign of the British. While so many changes were made by the British the very basic concept of equality was not fully put into force or in other words was not fully implemented. In the present era the criminal justice system can be understood as the agencies or the agents of the government which are entitled to enforcing law, adjudicating crime and then to correct criminal conduct. It is a tool which helps to administer justice. When the society feels endangered or threatens to some kind of act, it strictly tries to control it or outlaws it outright. The society as such already known to such type of person who is a threat to society that can be cited as a reason for developing other form of social order such as temple, church, schools and most important family. That was only limited to the moral control. For controlling legal behaviour only the criminal justice system has the power to control crime and punish criminals. . The criminal justice system is a tough, expensive, and a lengthy process. It's basically becomes impossible for the poor to take the advantage or even to make use of the system due to the high cost involves even if anyhow he is able to make arrangement of money , the hierarchy of courts with the provision of appeals after appeals makes it impossible for the poor to get true and fair justice . Making the judicial system costlier is a way of denial of justice. That's one of the major reason or the cause that the poorer section has lost its hope on the Indian legal system . 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. Marital rape could be by the use of force only, a battering rape or a sadistic/obsessive rape. It is a non-consensual act of violent perversion by a husband against the wife where she is physically and sexually abused.² Historically, "*Raptus*", the generic term of rape was to imply violent theft, applied to both property and person. It was synonymous with abduction and a woman's abduction or sexual molestation, was merely the

² See http://www.indialawjournal.org/archives/volume2/issue_2/article_by_priyanka.html.

theft of a woman against the consent of her guardian or those with legal power over her. The harm, ironically, was treated as a wrong against her father or husband, women being wholly owned subsidiaries.³ In the present day, studies indicate that between 10 and 14% of married women are raped by their husbands: the incidents of marital rape soars to 1/3rd to ½ among clinical samples of battered women. Sexual assault by one's spouse accounts for approximately 25% of rapes committed. Women who became prime targets for marital rape are those who attempt to flee. Criminal charges of sexual assault may be triggered by other acts, which may include genital contact with the mouth or anus or the insertion of objects into the vagina or the anus, all without the consent of the victim. It is a conscious process of intimidation and assertion of the superiority of men over women.⁴

Section 375, the provision of rape in the Indian Penal Code (IPC), has echoing very archaic sentiments, mentioned as its exception clause- "Sexual intercourse by man with his own wife, the wife not being under 15 years of age, is not rape." Section 376 of IPC provides punishment for rape. According to the section, the rapist should be punished with imprisonment of either description for a term which shall not be less than 7 years but which may extend to life or for a term extending up to 10 years and shall also be liable to fine unless the woman raped is his own wife, and is not under 12 years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to 2 years with fine or with both.

This section in dealing with sexual assault, in a very narrow purview lays down that, an offence of rape within marital bonds stands only if the wife be less than 12 years of age, if she be between 12 to 16 years, an offence is committed, however, less serious, attracting milder punishment. Once, the age crosses 16, there is no legal protection accorded to the wife, in direct contravention of human rights regulations.⁵

There are important areas of the criminal justice system which needs to be addressed for the better understanding of the subject matter:

The criminal justice system consists of three major parts: (1): **LEGISLATIVE** (create law) (2): **ADJUDICATION** (Courts) (3): **CORRECTIVES** (jails, prisons, parole) this further divides into public interest litigation , Bail justice jurisprudence, Prison justice, compensation to the victims and legal aid and legal services.

³ *Ibid.*

⁴ *Supra* Note 1.

⁵ *Supra* Note 1.

II. PUBLIC INTEREST LITIGATION

PIL is the right of the any person for the injury that may cause from breach of public duty or due to the violation of the provisions of the Indian constitution. A PIL can be filed by any of the High court or the Supreme Court. It makes the judicial process a more democratic and free. .the only clause or the condition which needs to be maintained is that person who files a PIL has sufficient interest to maintain an action of public injury.

Bail Justice Jurisprudence

Bail is a term used to release from custodia legis. it is a basic human right of every prisoner to be released for a period of time on sufficient security and bond.

Prison Justice

In the legal world a well-known provision is said “JUSTICE DELAYED IS JUSTICE DENIED”. It is a well-defined precedent that the Indian courts are flooded with cases. Some of those cases stretch over decades and the justice is never served in its true sense.

III. SEXUAL VIOLENCE AGAINST WOMEN

Violence against women is considered the most pervasive yet hidden form of the violence abuses throughout the India. Sexual violence against women not only causes physical harm but also causes shake her emotionally. The scars on her body may disappear after some time but it leaves a permanent scar on her mind. It not only lowers down the human rights of the victim but also affects the society at large by lowering down the development prospects as it directly impinges upon the potential of half of the world population. I.e.: Women.

The concept of sexual violence:

Sexual violence describes the deliberate use of sex as a weapon to demonstrate power over and to inflict pain and humiliation upon another human being.⁶ Sexual violence may be defined as any violence, physical or psychological, carried out through sexual means or by targeting sexuality.⁷ Sexual violence may be homosexual as well as heterosexual. There has been data which proves that sexual violence against men and boys, suggesting that this group are also not a safer end with specific settings. ⁸ Statistics shows that at least one in five of the

⁶ Peter Gordon and Kate Creehan, Dying of Sadness: Gender, Sexual Violence and the HIV Epidemic' SEPED Conference Paper Series at p 2.

⁷ “Contemporary forms of slavery – Systematic Rape, Sexual Slavery and Slavery like practices during armed conflicts”, final report submitted by Ms Gay J . Mc Dougall Special Rapporteur of commissio0n on human rights, 1998, p 6.

⁸ Peter Gordon and Kate Crehan, Dying of Sadness: Gender, Sexual Violence and the HIV Epidemic' SEPED Conference Paper Series at p 3.

world's female population has been physically or sexually tortured or abused at some time in their life.⁸ According to the U.S department of justice, of the 4- 5 million violent crimes against women each year 500000 are rapes or sexual assaults.⁹ A 6 well studied experiments from the United States that one in seven US women will be the victims of rape in her lifetime. In the U.K one in four women has experienced rape or attempted rape and 16 percent of the girls have been abused before the age of 13.¹⁰ This data are that which has been reported and are known. This data can be multiplied many times because a number of cases are not reported due to fear of social stigma and due to lack of faith in the criminal justice machinery. It has also been reported that during trial of these victims they are subject to personal and vulgar question that's add another reason of non-reporting of the cases. In Canada in the year 1993 a study was conducted on 420 random women. A shocking 54 percent of them have experienced intrusive sexual experience and another 16.51 percent reported being victims of rape or attempted rape. ¹¹ It can be observed that of all the rape victims most of them is done by the intimate partners. Women are more likely to be raped or be assaulted by a person whom they already knew. According to the UN Report, 78 percent of all rape victims knew who had raped them, in other words they were either his friends, relatives, or someone who she knew. ¹² In India every seven minutes, violence against women claims yet another victim and another life is destroyed.¹³ The number of Rape has increased significantly in past few years. During the past two decade especially in the year 1990- 2000 it increased by a huge margin of 63.8 percent.¹⁴ It further increased by 15 % in the year 2004 and 5.4 % in the year 2005. ¹⁵

In the city of Delhi alone ,381 rape cases were reported in 2001; it further increased to 403 in 2002 , increased to 466 in 2003 and 200 cases have been reported till 15th may 2004.¹⁶

IV. DETERMINANTS OF SEXUAL VIOLENCE

It all comes down to a single question what drives to commit such offences? There are mainly 4 factors which can be understood for such an offences

⁹ Stephen M Pincus and David M Rosen, 'Fighting Back – Filling Suit under the Violence against Women Act', 33 *Trail* 20.

¹⁰ Liz Kelly and Linda Regan , violence against women – A briefing Document On international Issues and responses, British Council Publication, 2006, P10.

¹¹ UN Pamphlet – 'Focus On Women: Violence against Women'. 1995.

¹² Rape in America – A Report to the nation, national Women studies, 1992.

¹³ Sudeshna Sarkar and Geeta Sharma 'HOPE', *The Telegraph*, 8 December 1996.

¹⁴ Crime in India National Crime records Bureau, New Delhi ,2000, P 192

¹⁵ Crime in India National Crime records Bureau, New Delhi ,2000, Table 5 (A)

¹⁶ This city is unsafe for women, *Hindustan Times*, 30 May 2004

- (1) Economic inequality which exist between men and women
- (2) A pattern of using physical violence to resolve conflicts
- (3) The superiority of male authority and control of decision making
- (4) Restriction on women ability to leave the family settings. ¹⁷

(A) Unequal power relation in society

The most important determinant for any sexual violence can be understood as inequality of power relation between men and women. Violence is not a natural or biological phenomenon rather it is a product of the unequal power distribution in the society. It also reflects the negative mentality. In fact, sexual violence mirrors gender inequalities and reflects other forms of social inequalities. ¹⁸

(B) Cultural practices and ideology

The unequal power equation between the men and the women is the root cause for the violence the women are subject to. This cause is further justified by certain amount of customs, tradition and religion which supports or gives justification to. An example to set forth is the Devadasi system and the female genital mutilations where the society itself proposes or supports such crime or happenings. It is deep rooted in the mentality of the society that masculinity requires that the manhood be equated with the ability to exert power over others, esp. by applying force and over others. . In such a world women is only seen as object of reproduction and a potential sex object.

V. IMPACT OF SEXUAL VIOLENCE

Experiences of violence in any women life are horrifying. The Physical and the emotional scar may disappear after time but the emotional and psychological scar remains throughout her life and every time it reminds of the Hell she went through. We need to understand her dimension from the socio legal, Political and cultural dimensions having interconnections with development, human right and peace in women's life. The worst impact of sexual violence is it creates a threat among the larger society and then the personal insecurity shadows them from cradle to grave. ¹⁸Sexual violence also results in serious health hazard and sometimes physical injuries that are caused to the victim can be fatal. It worst case scenarios the victim may contract sexually transmitted diseases and unwanted pregnancies.

¹⁷ Levinson quoted in Charlotte bunch, Roxanna Carrillo and Rima Shore 'Violence against Women' in women in the third world – An Encyclopaedia of contemporary issues, Nelly P Storquist (Ed) 1998, p 59, at p 63.

¹⁸ UNDP issued the statement in the year 1994.

The Abused women may show high levels of anxiety, somatic disorder or personality disorders. . The family of that woman gets completely out of order, there life become miserable.

VI. SEXUAL VIOLENCE AS A WAR CRIME

Sexual violence during armed conflict is not a new phenomenon. It has existed for as long as there has been conflict.¹⁹ Sexual violence is used as a weapon of war. It has also been widely used during the times of II world War. Thousands and thousands of women and young girls are forced into the military sexual slavery by the Japanese army during World War II. The estimated range was between 80000 and 200000 about 80 % of whom were Korean.²¹ The main purpose of such was to enhance the morale of the military and by providing amenities with recreational activities. In the year 1992, the Japanese government officially abolished for compelling these women into military sexual slavery and has written to each surviving 'comfort women'.²⁰ Sexual violence has been a part of virtually every war the world has known despite the fact that it has neither military nor moral justification. Indeed, sexual violence has long been considered criminal conduct under national criminal laws and international law, yet war related violence has seldom been prosecuted.²¹

VII. MARITAL RAPE

In a majority of countries in the world: Husbands enjoy criminal law immunity for raping their wives. The history of marital rape existed as long as the institution of marriage.²² In the famous words of Lord Mathew Hale , a 17th century English jurist : ‘ The husband cannot be guilty of rape committed by himself upon his lawful wife , for by their mutual understanding and contract, the wife hath given up herself unto her husband , which she cannot retract.’²³ One of the worst problems in the criminal justice system is that Rape in marriage is vastly unrecognised by their husbands.

VIII. CRITICAL ANALYSIS OF RAPE LAWS IN INDIA

The criminal justice system adopts the attitudes of disbelief and hostility and beliefs to treat the victims with suspicion instead of sympathy. The women start to face humiliation at the police station when a set of dirty and shameful question start to pour down on the women

¹⁹ Women 2000 – Sexual Violence and Armed Conflicts: United Nations Response ‘, 1998, P2.

²⁰ Women 2000-sexual violence and Armed Conflicts: United Nation, Response’, 1998, P 3.

²¹ M Cherif Bassiouni and Maria Mc Cormick , Sexual Violence : An Invisible Weapon Of War In Former Yusoslavia,1996,P 1.

²² Diana EH Russell, Rape in marriage, second edn, 1990, p2.

²³ History of the pleas of the crown, vol I, 1736, P 629 quoted in rape – A Legal Study’ by National Commission for Women, 2000, P39.

self-esteem. And then moves to a male dominated system influenced by the notion of victim's precipitation and then end with a clear cut majority of proving that the guilty was never innocent. A Sexist society, Obsolete Rape laws, stereotyped legal notion to show how women should act when attacked and a random concern for the rights of the accused. . The mentality and the sexist behaviour of the criminal justice system that it appears to be more concerned with the threat of being false rapist .and the changes of that are very rare than the horrifying fact that the women has been raped . Our criminal justice system accords a unique position to the rape victims where she is not seen as a victim but as a suspect. If we see into the victim perspective, the whole legal system is an utter failure as the procedure which happens in the court of law supports or advocate male violence instead to protect her rights. The criminal system becomes a hard mountain to climb for the victim. It shifts the men's rea element from the accused to the victim. I.e. she must prove her innocence before the rapist can be convicted. The problem is in the judiciary and society which itself prosecutes rape in contract to other violent crime, mirrors the disparity in our society attitude towards these acts.²⁴ The traditional legal thought continues to be tainted by two misogynistic images of women

- (A) Women as a liar indulging in false accusations of rape.
- (B) Women as a temptress leading to victims precipitated rape.

There was been a constant debate and a particular views of all the legal experts and various feminist groups have consistently demanded that the legal terminology and the scope of the definition of the word "RAPE" should be broaden. In the 172nd Law Commission Report recommends that Rape as understood in section S375 of the IPC , should be replaced with the word of " Sexual assault" this will increase the ambit from penile penetration to the penetration by any other part of the body for example finger or by any other object .²⁵

IX. CASE ANALYSIS OF RAPE IN INDIA

(A) Under unamended law

In *Rameshwar vs State of Rajasthan*.²⁸ The Supreme Court adopted a view of corroboration of victims' testimony is not required and convicted the accused and awarded a punishment of 1 year RI (Rigorous imprisonment) .In *Sidehwar Ganguly vs State of West Bengal* ,²⁹ the Supreme court imposed a five year fine RI – a Comparatively higher level of punishment in those times. In *Ghanshyam Mishra vs State* ³⁰ the high court enhanced the three RI to seven

²⁴ The Response to rape: Detours on the road to equal justice, prepared by the majority staff of the senate judiciary committee, May 1993, p 2.

²⁵ Law commission of India 172nd report on review of rape laws, ministry of laws and justice , government of India , 2000, para 3.1 : see annexure V

years of RI. In *Rafiq vs State of Uttar Pradesh*,²⁶ the Supreme Court upheld the imprisonment for seven years RI for the accused. In *RK Aggarwal v. State of Orissa*²⁷ An 65 year old man raped a 6 year old girl, it was held that no reduction in punishment was possible because of the nature of the act. In *State of Maharashtra vs Ck Jain*²⁸. All these cases are of serious nature, and the judgement of the Supreme Court although looks tough and strong but the punishment didn't support it at all various judiciary judgement shows the careless and the non-sensitive behaviour towards a crime of such high level.

(B) Under amended law

One of the most clause that was added is the mandatory minimum punishment in S 376. A mandatory minimum imprisonment of seven years of either description is to be imposed in rape cases and 10 years RI²⁹ Unfortunately these rules and changes are limited to only law books and are not implemented fruitfully. In the case of *Anki Reddy vs State Of Andhra Pradesh*³⁵ the high court reduced the punishment from seven years RI to five years RI. In *Ashok Nirvriti Desai vs State of Madhya Pradesh*³⁶ again the punishment was reduced from 5 years to 3 years as it was related to the health of accused. All these cases points towards the inability of the judiciary to implement these changes and further demand proper implication of these laws.

X. CONCLUSION AND SUGGESTION

Suggestion relating to Rape law

There is a strong need for reconceptualisation of Rape and reclassification as 'Sexual assault'. The concept of digital rape (Penetration with an object or any part of body) is not recognised under the Indian law although this form of rape is more violent and disastrous in medical terms. The present definition of Rape is inadequate as it avoids Oral, Anal, and digital Rape. The marital exemption has needs to be corrected and the view that the wife is the sexual property of the husband. This form should be immediately penalised and heavy punishment should be enforced. Insertion of a new section defining consent is recommended so that the judiciary can have a fair idea as to what must be looked in the particular case. The present definition of S 90 of the IPC is not enough or substantive to clearly understand the term consent. A Separate section of which defines consent is recommended so that it becomes easier for the judiciary to interpret and provide justice to the victim. In the United

²⁶ AIR 1980 cri Lj 1344 (SC)

²⁷ AIR 1976 SC 1774

²⁸ AIR 1990 SC 658

²⁹ See Annexure I: Indian Penal Code 1860, S 376

Kingdom S 74 of the sexual offences act 2000 defines consent. The UK law may serve as a role model in the Indian consent. S 376 (1) and (2) of the Indian Penal Code has proved to be an escape route to provide lesser and lighter punishment to the accused. This needs to be urgently amended. Before this the fundamental right to speedy trial under article 21 of the Indian constitution must be respected and long periods of investigation should be avoided. Justice delayed is justice denied. Moreover, the refusal by a police officer to record a rape case should be made a penal offence. Section 167-A³⁰ of the IPC as suggested by the 84th Law Commission Report, should be accepted. The complainants of sexual assault should be provided with legal assistance at the police station also. Such legal assistance should also be made available at the police station. In most parts of the world Rape crisis centres are set up, as in Australia, Canada, America or the United Kingdom. They help the victims through their medical help, counselling, and financial assistance by providing jobs.

³⁰ Indian Evidence Act 1872, s 111A: see annexure III.