LexQuest Foundation

Working Document

Penal Laws' Reform in India

LexQuest Foundation

June, 2022

LexQuest Foundation

Reference No.: LQF/2022/4

Disclaimer: The views expressed in this Working Document are those of the authors and do not necessarily reflect the views and policies of LexQuest Foundation.

Index:

LexQuest Foundation

Conceptualised & Edited by:

- ☐ Tanya Chandra, Secretary, LexQuest Foundation
- ☐ Akanksha Arora, President, LexQuest Foundation

Authors:

- ❏ Ripdiman Kaur, Assistant Professor, DGIM Law College, Faridabad, Haryana
- ❏ Dr Deepa Kansra, Human Rights Studies Programme, School of International Studies, Jawaharlal Nehru University, India
- ❏ Shraddha Vemula, Student, Symbiosis Law School, Hyderabad, Symbiosis International (Deemed) University
- ❏ Jaspreet Kaur Grewal, Senior Content Development Officer at Law Xperts India; Law Tutor at UrbanPro
- ❏ Tanya Chandra, Advocate
- ❏ Akanksha Arora, Advocate

About the Organisation:

LexQuest Foundation is a non-partisan, non-profit community development organization established in 2014 in New Delhi. We conduct extensive legal and policy research and analysis to provide transformative solutions to public interest issues. At the core of our work lies our understanding of law as an expression of driving social change & creating a just & equal society.

We defend the rights of the marginalized and seek to extend and secure the civil liberties of all communities through legal & policy reform. We are dedicated to improving the public policy framework in our country to ensure sustainable development and growth for all citizens.

We strongly believe in the emancipatory potential of law, and through our multidisciplinary approach & intersectional initiatives, we ensure that our social & governance interventions have underpinnings of access to justice.

About our Working Document

At LQF, we strive to aid all government efforts to enable better laws in India. We have tirelessly engaged with varied relevant stakeholders to be able to endorse comprehensive and constitutionally sound legal reforms in the country. As a team of Lawyers, we stand for the constitutional ethos and believe in the emancipatory power of law to drive social change. We also believe in the efficient application of our legal training and expertise to ensure improvement in the country's legal landscape through legislative reforms as and when required.

The current Working Document is thus yet another exhibit of our commitment to being agents of change in India's participative democracy. We agree with the government's stance that India's penal laws are in dire need of urgent and compelling reforms. The said intent was publicized through a press note dated 23rd March 2022, wherein the government initiated the process of consultation with stakeholders. We, therefore, encouraged legal professionals, practitioners, researchers, and academicians to make elaborate recommendations regarding reforms they deem necessary in India's penal laws. Having received an overwhelming response for the same, Team LQF sieved through the submissions and identified the most pertinent recommendations made by the legal fraternity. The said recommendations have been duly edited and compiled in this Working Document. The Working Document also consists of LQF's team leaders' very own recommendations for reforms, all of which are based on our research and exposure to the consequences of the current limitations of our penal provisions. As this Working Document is an outcome of rigorous research and efforts of our entire Team, we are confident that it will serve as a valuable piece of document for improving the criminal justice system of our country.

We believe that our work through this Working Document is relevant to aid the government's resolve to improve India's penal laws landscape. If any further assistance is required from our end concerning the contents of this Working Document, we will be readily available for the same at your disposal.

Contributors: Tanya Chandra & Akanksha Arora, Advocates (Team LQF)

Recommendations:

- **Make the language of the penal laws inclusive:** Since our penal laws originated in the colonial era, it is no surprise that the British lawmakers generalized and, in their archaic ignorance, draconian notions, and narrow-mindedness, only used the gender pronoun (he/him) throughout the language of our penal laws. As an outcome, to this day, when India has come as far as to read down certain parts of Section 377 of the IPC and has legally recognized trans & non-binary identities, the language of our penal laws remains non-inclusive. Therefore, we contend that the Indian government's stance on respecting all gender and sexual identities and the Apex Court's resolve to guarantee safety, respect, inclusion, and dignity to the LGBTQIA+ community requires our lawmakers to do away with this limitation of all our penal provisions. To that end, we thus recommend replacing all references to mere he/him/his throughout the IPC, CrPC, and the Indian Evidence Act with they/them/theirs. This small but crucial change in the letter of the law will suggest inclusion, recognition, and a guarantee of equal treatment before the law for all gender identities in India.

- **Ensure appropriate degree and duration of punishments for effective deterrence:** It is our understanding that a plain reading of the text of the Indian Penal Code suggests that the duration and degree of the prescribed punishment for several offenses defined therein remains unsatisfactory. We contend that given the archaic nature of the law in question, the erstwhile colonial lawmakers associated little value to the life and well being of individuals and communities in India. The colonial agenda of treating the Indian population as less valuable is evidenced in the fact that as per the IPC provisions, any crime committed against their body or person, or actions in detriment to their physical and mental well being attracted unreasonably lesser duration and degree of punishment. We further contend that as India has been an independent democratic republic for over 75 years now, there is no reason to continue with inexplicably low degrees and durations of punishment against specific offenses that violate the constitutional goals of maintaining a high degree of law and order for the sustenance of a peaceful, well functioning and growth oriented society that allows individuals and communities to work and live fulfilling, and harmonious lives. We further contend that the aforementioned lesser durations of punishments under IPC defy the idea of conviction being the deterrent for attaining the desirable

levels of peace and harmony in the society. It is our stance that as these penal provisions fail to deter people from committing crimes, the insubstantial punishments ranging from offences of negligence causing injury, death, hurt to offences of buying and selling minors for the purpose of prostitution (among several others) in fact encourage criminal behaviour among people as they know that their actions will amount to very little punishment and hence they can get away without much penalisation. Moreover, in instances where an accused is charged under several provisions of the IPC but gets convicted only under the provisions with the least punishment, we contend that the penal provisions do a grave disservice to the victims of the crimes in question. In the light of the abovementioned contentions, we recommend that provisions of the IPC prescribing very low degree and/or duration of punishments vis-à-vis the consequence of the act/omission in question, should be modified and updated. It is our understanding that such amendments will require due deliberation regarding the appropriate level of degree and/or duration of punishments keeping in mind the goal of effective deterrence against the commission of crimes of varied nature.

- **Do away with Section 309 of the IPC:** The said Section declares that the act of attempting suicide, i.e., to try and end one's own life is a criminal offence. The provision further prescribes a punishment of up to one year of simple imprisonment with or without fine for the said offense. It is our contention that the unbearable, difficult and highly distressing circumstances that compel an individual to attempt suicide need government intervention consisting of urgent help and counselling rather than imprisonment. At a time when India has recognised the significance of mental health and well being, wherein the government has initiated policies to help citizens cope with distressing life circumstances through provisions of affordable counselling and suicide helplines across the country, we cannot continue to treat an attempt to suicide as a crime. We would like to reiterate that India is no more a British colony ruled by outsiders, where the value attached to each of our citizen's lives was weighed only against the need for and cost of cheap labor. It is thus our conclusion that an attempt to suicide deserves empathy, compassion and State support whereas Section 309 is yet another example of the archaic colonial value system that India as an independent democratic republic guaranteeing dignity of life for all its citizens has no reason to continue with. We thus recommend deletion of the said provision from the IPC by way of a repeal of Section 309.

- **Urgently define and codify penal provisions for digital offenses under the IPC:** It is a matter of grave concern that in the age of digital currency, virtual work spaces, digital education, and experiential learning, India's criminal laws are yet to elaborately specify, define and prescribe punishments for digital offenses of myriad nature. We contend that in a country of 1.38 billion people with internet penetration rate of almost 45% (which is expected to rise to 59.5% by the end of 2022) while the vastness of the world wide web makes our population highly vulnerable to unprecedented and complex digital crimes, it is common knowledge that even the digital offenses defined under Chapter XI of the IT Act, 2000 lie beyond the scope of the 511 Sections of Indian Penal Code. It is further our stance that as the specified offenses and prescribed punishments under the IT Act were drafted as early as 2000, 22 years hence the digital technology has advanced to such an extent that the provisions of the said Act fall short in effectively dealing with and deterring the new-age digital crimes. It is thus a matter of serious deliberation that the persistent gaps in the current penal laws of India specially put women, children, teenagers and young girls and boys at a greater risk of falling victims to digital/cyber crimes as they form a substantial chunk of the population that largely depends on the digital space for all aspects of their life. It must be understood that our young working population (aged 25-35), and the present age school and college students use the internet of things for learning, training, working as well as socializing wherein the ambit and connotation of each of these activities can't be restricted to a straight jacket formula anymore. While virtual learning, training, and working platforms today enable live visual interactions, classes, part time work and work from home opportunities, they have also given rise to new means of sexual abuse of children, young adults and women as our laws are yet to determine or define appropriate versus inappropriate, obscene versus dignified and safe versus unsafe/hostile gesturing, demeanour and conduct in the digital space. Individual conduct in the digital space is thus left to the discretion of employers, teachers, trainers, and colleagues with no accountability or monitoring mechanism in place at the moment. Similarly the advancement of the digital space has given socializing a whole new meaning with multiple dating and social media apps that discreetly track and sometimes even reveal individuals' sensitive personal information such as home, workplace address, live location etc., with other users of the said apps and platforms. Our observation and research also suggests that social media platforms barely use a uniform standard mechanism to regulate and discourage open circulation of pornographic, offensive, misogynistic, and obscene graphics, audios, videos and photos on their platforms whereas all these

platforms have a large percentage of young adults, women, teenagers and sometimes even children as their active users. It is our understanding that as the digital space advances further, the opportunities of misusing the same for crimes detrimental to citizens' safety and well being (which includes but is in no way limited to offences of stalking, bullying, sexual assault & abuse alongwith several novel methods of hatching criminal conspiracies) would arise. It is thus our stance that though we can't possibly foresee each instance of crime enabled by the digital space, it's high time that our criminal justice system be prepared to effectively take cognisance of the *status quo* in this regard through thorough reforms to deal with and deter digital crimes. We thus recommend that the IPC be amended to include an extensive Chapter defining digital crimes of varied nature and prescribing stringent punishments for each such crime. We understand that such reforms in the IPC will require extensive deliberations with all the relevant stakeholders. In this regard we would also like to recommend that among others, such stakeholders must include lawyers, cyber cell officials of the police force, data & technology experts, cyber crime investigators and digital evidence analysts.

Contributor: Ripdiman Kaur, Assistant Professor, DGIM Law College, Faridabad

Recommendations:

Carceral feminism, by the book definition, is thought of as enhanced support for policing and imprisonment to solve issues related to gender and sexual violence. It is a commonly held perception that the longer the jail punishments with harsh situations, higher will be the deterrence for people planning to commit crimes against females.

After understanding the concept better, I have come to understand that the scope of carceral feminism has evolved to consist of all genders-with primary focus on violence against females. The concept of carceral feminism is based on punishing the criminal through the individual city or state judicial equipment, especially for the crimes that relegate to a bigger social problem. I believe that the said situation fails to cope with issues of sexual violence against females past the extent of the person.

It is shocking to note that India has made it to the top of a list (as per a survey carried out by the Thomson Reuters Foundation) of countries, wherein the safety of women is at high risk. Our situation, in a way, seems worse than the war-torn countries of Syria and Afghanistan. The one instance through which we finally started engaging in discourse on the issue, is the Delhi gang-rape case of December 2012. This case was a moment of reckoning for India. The nation wide extensive protests ultimately started people's conversations around rape and sexual violence in the mainstream world.

In the aftermath, the government soothed the public anger by passing the Criminal Law (Amendment) Act of 2013. This Act was a way to widen the definition of rape, elevate the prison period in maximum sexual assault and violence cases, and define every possibility that can lead to the death penalty.

It also described more recent offenses, including using criminal pressure on a girl with cause to disrobe and stalking. Maybe this all seemed good on paper, but these reforms did little to clear up the disaster of sexual violence that plagues Indian society even today.

In March 2020, which was over seven years after the incident, the four accused of the Nirbhaya case were hanged. Justice was ultimately delivered, even though the juvenile accused was released from a remand home in 2015. Essentially, that is what carceral feminism appears to be. Proponents of carceral feminism are about justice being served after so long as there's a person who will traverse the course of justice through a vengeful system.

In the December of 2019, a news piece came out about a 27-year-old vet who was raped and then murdered in Hyderabad. It took a week for the information to break out that the

neighborhood police had shot dead four men suspected of this heinous crime, while the criminals were trying to flee (as stated by the police).

The country celebrated the said criminals' deaths because they thought this was a sign of justice prevailing in India. Police were praised extensively on social media. In a country where it could take a long time for justice to be delivered, with almost 1,50,000 or more rape cases pending at an earlier stage than Courts, the short movement through the Hyderabad police appeared to have restored the public's hope and belief in the justice system.

Meanwhile, some voices condemned these killings, however they remained in the minority. The paradox right here is that there is a lot of dissatisfaction prevailing with the penal provisions concerning sexual violence in India. There have hardly ever been conversations about reforming the present criminal justice system, not to mention abolishing it altogether.

There's usually a call for stricter legal guidelines and punishments in the current shape, without ever analyzing the efficacy of the shape itself in the first place. We as citizens can't speak of jail abolition without first assessing our belief in justice. We can't virtually reject carceral feminism without first considering what the viable options should be.

The most common critique of carceral feminism is that it is unnecessary if people can't use it to carve out a course that facilitates justice that is highly inclusive in addition to being transformative. The first leap forward might be to understand the basic fact that violence towards females is systemic oppression perpetuated via politics, social and economic inequalities, and the judicial procedures we depend on for redress.

In today's time, many NGOs in India have also been using practices that portray a sense of duty while facilitating healing. There are different circles- together with peace circles, listening circles, and grieving circles that are employed and rely on what quality facilitates the survivor.

However, those features are strategies for valuable resources, the legal gadget, and now no longer an alternative.

Contributor: Dr Deepa Kansra, Human Rights Studies Programme, School of International Studies, Jawaharlal Nehru University, India

Recommendations:

India is a party to several international laws which speak of the duty to prosecute, investigate, and punish crimes. In light of India's commitments to international law, the scope of its criminal laws appears to be failing on several counts.

The following are a few general and specific recommendations for penal law reforms in India. These have been framed in light of several international developments, international laws, and relevant Indian laws and judgments. The recommendations concern the following themes:

1. Gaps in criminal law
2. Harmonization of Standards
3. Liabilities for Derogations from Fundamental Duties (cultural heritage)
4. A Project for Decolonization

➔ Gaps in Criminal Law

Because practices including acts of torture and harmful traditions have been designated as grave crimes under international law, the following suggestions are being made for amendments to Indian law/s.[1]

Torture

India has not ratified the Torture Convention.

In terms of country-specific laws on torture, there is an onus on States to incorporate new forms of torture including cyber-torture and psychological torture.[2] Further, scholars in the field are advocating for the prosecution of acts of torture committed by private individuals.

[1] Also consider the crimes of genocide and enforced disappearance.

[2] UN Human Rights Council, Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment (March 2020).

Considering that the "universal prohibition of torture is recognized to be of an absolute, non-derogable and peremptory character and has been restated in numerous international instruments of human rights, humanitarian and criminal law"[3], criminal law in India is grossly inadequate for not legislating on the crime of torture.

Harmful Traditions

The international human rights systems have advanced various strategies to curb harmful traditions against women and other vulnerable groups. Female Genital Mutilation, for instance, has been criminalized in many parts of the world.[4] In the absence of a law on torture, and a law on preventing and prosecuting "harmful traditions", several harms against women and other groups remain invisible and unchecked.

In the recent Policy Report of the UNICEF, "Enabling Environments for Eliminating Female Genital Mutilation", a mandate for the criminalization of FGM is provided. On the mandate for criminalization, the report states, that there should be "a legal framework that clearly defines female genital mutilation, prohibits its practice and provides for criminal sanctions against it is an effective way to fulfill a State's obligation under international human rights law. It also sends a strong message that female genital mutilation is an unacceptable harmful practice and creates a positive environment for the transformation of the discriminatory gender and social norms that underpin the practice."[5]

In this regard, the onus for forging culturally specific standards/legislation for the prosecution of harmful traditions (including FGM) in India arises.

➔ **Harmonization of Standards**

India, as a signatory to several international treaties, is required to harmonize international standards with domestic standards.

---

[3] *Ibid.*
[4] Charlotte Proudman, *Female Genital Mutilation: When Culture and Law Clash* (2022).
[5] UNICEF, Policy Brief, Enabling Environments For Eliminating Female Genital Mutilation Towards a Comprehensive and Multisectoral Approach (2021).

Worth noting is the report submitted by the UN Special Rapporteur on Violence against Women, "rape as a grave, systematic and widespread human rights violation, a crime and a manifestation of gender-based violence against women and girls, and its prevention".[6] In the making of the report, the Special Rapporteur received 207 submissions that highlighted the significant gaps between States' obligations and international human rights standards on rape. While defining rape as a "grave, systematic and widespread violation", the Special Rapporteur has made a strong case for closer scrutiny of laws and legal provisions dealing with rape in different legal systems. The report particularly takes into account the lack of harmony in domestic law provisions which deal with the definition and constitutive elements of rape, the mitigating and aggravating factors during sentencing, the prosecution of rape by intimate partners, and the provisions on sanctions and punishments. The report labels the lack of harmony as "gaps between state obligations and international human rights standards" which in the case of rape also include "hidden domestic norms" that protect perpetrators of the crime.[7] In the Indian context, the report advocates for changes concerning there being "no statute of limitation for the prosecution of rape"[8] and others.[9]

➔ **Liabilities for Derogations from Fundamental Duties**

In the last few years, much attention has been given to duties of citizens within constitutions.[10] Derogations from duties have been subject to prosecution, as a part of the broader enforcement strategies adopted by States.

---

[6] UN Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, "Rape as a grave, systematic and widespread human rights violation, a crime and a manifestation of gender-based violence against women and girls, and its prevention" (April 2021). Available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/089/99/PDF/G2108999.pdf?OpenElement

[7] See Deepa Kansra, The Harmonization of domestic and international human rights standards on criminalization of rape, *Rights Compass* (June 2021). Available at https://philpapers.org/archive/KANTHO-3.pdf

[8] *Supra* note 7.

[9] The case for harmonization of standards cuts across several areas governed by Indian criminal laws, including defamation, hateful speech, internet-based crimes, etc.

[10] See Eric R. Boot, Human Duties and the Limits of Human Rights Discourse (2017); Wim Voermans, Maarten Stremler, Paul Cliteur, *Constitutional Preambles A Comparative Analysis* (2017).

Under the Indian Constitution, the enforcement of fundamental duties has been a concern. However, some duties now require a stronger framework for enforcement. Take the example of Article 51-A (Part IVA), clauses (f), and (j).[11] The subject matter of the clauses has been closely reviewed in the international rules and domestic laws of countries. In the Indian context, the case of *Periyanambi Narasimha Gopalan* v. *Secretary to Government*[12] discussed the duties of States and Citizens toward the protection and preservation of cultural heritage. The Court also refers to the international guidelines adopted by the United Nations Educational, Social and Cultural Organization (UNESCO).

On the inadequacies of law, the Court states, "according to Article 51A(f), it shall be the duty of every citizen of India to value and preserve the rich heritage of our composite culture. The Constitution thus, not only brings an obligation on the State, but also a duty on every citizen of this country to value and preserve the rich heritage of the culture of this country, which goes without saying that it includes temples, arts, sculptures and scriptures. However, it is the sorry state of affairs that the Government has miserably failed in its duty not only to protect the places of national importance, but also the properties of temples, such as idols, lands etc. Therefore, the Directive Principles of State Policy must be directed towards protection of the ancient monuments and idols and thwart all attempts to damage and/or smuggle them."

As part of an emerging global ethic on cultural heritage, non-enforcement of applicable criminal laws raises serious concerns.[13]

➔ **A Project for Decolonization**

The process of decolonization has been advanced as a tool in many countries, for the sake of initiating and asserting reform within existing legal frameworks. In 2020, the UN General

[11] Indian Constitution, Article 51-A (Part IVA), clauses (f), and (j). provide- (f) to value and preserve the rich heritage of our composite culture, and (i) to safeguard public property and to abjure violence.
[12] W.P.(MD)No.24178 of 2018
[13] Other duties as provided under the Indian constitution can also be reviewed from the prism of criminal law prosecutions and sanctions.

Assembly announced the Fourth International Decade for the Eradication of Colonialism (2021-2030). [14]

In the context of India, judicial interventions for the decriminalization of begging (beggary laws), homosexuality (IPC), and adultery (IPC) are some notable examples that align with the objectives of the decolonization process. It is of utmost importance to proactively initiate an alignment with the decolonization project by reviewing and assessing the totality of criminal law provisions in India (substantive and procedural). The project should support two objectives namely **the review of existing laws**, and **the creation of new criminal rules in a participatory and culturally sensitive manner**.

Final remarks

Legal reforms not only concern legal rules but also societies and public institutions. This understanding makes a compelling case for introducing long-term thematic projects with academic institutions and other stakeholders committed to critical and interdisciplinary research for legal and social change.

The recommendations mentioned above require a comprehensive set of targets involving a critical study of different aspects of criminal law and justice in India. It is a good cause for encouraging and blending academic research into criminal law policy and reforms. It is also a good cause for aligning with the best practices, models, and rationalities advanced by other countries.

[14] UNGA Resolution adopted by the General Assembly on 10 December 2020, on the Eradication of Colonialism (2021-2030). Avaiable at N2036283.pdf (un.org)

Contributor: Shraddha Vemula, Student, Symbiosis Law School, Hyderabad

Recommendations:

In the 17th century, the then Chief Justice of England, Justice Mathew Hale said that a husband cannot be held guilty of raping his wife and since the Indian Penal Code (IPC) was drafted during the colonial period in India, marital rape was not criminalized. Rape is the fourth most common crime against women in India. Section 375 of IPC defines rape as an incident where a man performs sexual intercourse with a woman under the following conditions:

1. Against her will
2. Without her consent
3. With her consent, provided it has been obtained by putting her or her relative or acquaintance in fear of hurt or death
4. With her consent, when the man knows that he is not her husband, she believes herself to be fully married
5. With her consent, provided such consent is given when she is of unsound mind and not in her consciousness
6. With or without consent, when she is under sixteen years of age

Section 376 states the punishment for rape to be imprisonment of ten years that may extend to life imprisonment and/or fine as decided by the Court. The heart of the matter is the exception to Section 375 that grants immunity to husbands against such a heinous crime as rape – sexual intercourse by a husband with his wife, who is above the age of eighteen, though against her will and without consent, does not constitute rape. In a country like India where patriarchy still exists in various forms, and where it is believed by many that entering a marital relationship is an indication that the woman has consented to sex, marital rape not being criminalized is a matter of concern. In other words, no man can be held guilty of rape, provided his wife is above the age of eighteen years.

Marital rape should be criminalized in India as it violates the following fundamental rights:

I. Article 14: Article 14 states equality before the law – The exception deprives married women of their right to equality. If an unmarried woman complains of rape and the offender is found guilty, he shall be punished following the law while the offender would be let off if the complainant is his wife. There is no justification for differentiating the crime when done by a husband and a stranger. The exception divides the women into categories, with injustice happening to those who are married.

II. Article 15: Article 15 states that no person should be discriminated against based on sex - When the act of marital rape is committed against the will of a woman, Clause 3 of the Article says that the State can make laws for the welfare of women and children, and yet if such laws are not made for the protection of women, it is a clear indication of the breach of her fundamental right.

III. Article 21: Article 21 states the protection of life and personal liberty – The Supreme Court has held that this includes the right to dignity, privacy, and health. An inhuman act like rape deprives a person of their sexual privacy. Article 21 should not be denied to women under the pretext of marriage as every human being has the right to live with dignity. It is pertinent to note that due to this exception, the basic aspect behind fundamental rights gets transgressed every time a marital rape is committed.

In the case of *Independent Thought v The Union of India and Anr.*[15], the Supreme Court held that the exception is also violative of the provisions of the POCSO Act, though the judgment applied to cases only where the wife is below eighteen years of age. Marital rape can be classified as rape by force (where the husband only uses force to enter into intercourse) and obsessive rape (where the husband uses force along with perverse acts against the wife).

In 2013, the Justice Verma Committee was set up to make amendments to criminal laws that deal with various forms of injustice to women. For the recommendation made to amend rape laws, the committee said that the exception to marital rape should be removed and the relation between the accused and the victim should be irrelevant, given the horrific nature of the crime. In any case, whether the rape is through force or not, the mental, physical, and psychological trauma that the victim goes through are the same. Hence, there is no point in not considering marital rape as a crime. Though Article 14 permits reasonable classification, rape cannot be considered a reasonable excuse.

Despite many petitions pending before various High Courts and the Supreme Court, the government has maintained that criminalizing marital rape will affect the family system and that the concept of marital rape cannot be applied in the context of Indian households. Constitutionally speaking, the exception is not right since it nullifies the right of the wives. It degrades the whole idea of marriage by legalizing tolerance of violence in a marital relationship. When triple talaq can be abolished on the ground that it does injustice to women, why should an atrocious and monstrous crime like rape still be legal? Doing away with such legal inequities is the responsibility of legislators.

[15] [2017] 10 SCC 800, AIR 2017 SC 4904

In my opinion, the voices of these women should not be silenced. India is one of the 36 countries where marital rape is legal. Criminalizing such acts will instill fear in the minds of those men who think they have all rights over a woman's body. Though there is an argument from the government's side that such a law will be misused by women through false accusations, the positive impact that it will create by providing relief to the victims and preventing any such incidents from happening further, cannot be ignored. Given the societal norms in India, it is obvious that many cases of marital rape go unreported, and we have no idea how many women have been going through this torture silently. At a time when women are excelling every day in various fields of life, how right is it to deprive them of their fundamental rights?

While countries such as Austria, Finland, Germany, Dominican Republic, Israel, etc., have criminalized marital rape back in the nineteenth century, it's high time the legislature rethinks its stand on marital rape. Rape and assault cannot be seen as equals. No investigation can explain the trauma that a victim goes through during the period of rape, which may even last for her entire lifetime. Recently in *Hrishikesh Sahoo versus State of Karnatka*, the Karnataka High Court refused to acquit a man accused of raping his wife. Justice M Naga Prasanna held that "The contention of the learned senior counsel that if the man is the husband, performing the very same acts as that of another man, he is exempted. In considered view, such an argument cannot be countenanced. A man is a man; an act is an act; rape is a rape, be it performed by a man the 'husband' on the woman 'wife'." Conclusion – Rape is rape, no matter whom it has been committed by.

Contributor: Jaspreet Kaur Grewal, Senior Content Development Officer at Law Xperts India; Law Tutor at UrbanPro

Recommendations:

Indian Penal Code, 1860 is more than 100 years old and originally the provisions were made to deal with the prevailing circumstances of those times. The changing situations attract reforms in the Penal Laws to make them more comprehensive as some provisions serve as dead provisions which need to be removed and some require certain important amendments for removal of doubts.

- ☐ **Insertion of new definitions:**

a) A new Section must be inserted after Section 10 of the Indian Penal Code, 1860 defining the term 'third gender'. Every category that fits under 'third gender' must be provided a comprehensive definition.

In every provision in the Indian Penal Code or Criminal Procedure Code, 1973 or Indian Evidence Act, 1872 where the words 'man' or 'woman' or male or female is mentioned must also be mentioned the words 'person of third gender'.

- ☐ **Imposition of fine under Section 304B of IPC:**

The punishment mentioned for the offense of Dowry death under Section 304B of IPC is imprisonment only. The fine shall also be imposed in addition to the imprisonment for the amount equivalent to dowry the offender or his relatives has received from the deceased or her parents or such amount of fine which that Court may pass in its jurisdiction, whichever is less.

This must be paid to the deceased's parents as compensation for the dowry (whether articles or money) already given or transferred to the accused's family.

☐ **Omission of Sections 359 and 360 of IPC:**

The recommendations of the 42nd Report of the Law Commission must be accepted as no relevance of these provisions remain in the present times. As suggested by the Law Commission the Kidnapping of first kind i.e. Kidnapping from India was a practice in times when this Penal Code was drafted when indentured labor was followed. Secondly, 'Abduction' defined under Section 362 of IPC is similar to the definition of 'Kidnapping from India'.[16]

☐ **Changes in provisions relating to offence of rape**

a) In Section 376, the words "shall be punished with rigorous imprisonment of **either description**" shall be substituted as "shall be punished with rigorous imprisonment which shall not be less than…".[17] The words "of either description" shall be omitted.
b) Section 376 (1)(g) (commits rape during communal or sectarian violence) shall be amended to add "or during natural calamity or when proclamation of emergency continues".
c) After Section 376 (1) (m) a sub clause (ma) shall be inserted to add "while committing rape causing injury to sexual organs by any means".

☐ **Insertion of explanation to Section 410 of IPC:**

Clarity is lacking as to the status of stolen property when it is converted into another property. There are different opinions of the Courts on this matter. Certainty is required as is provided under English law by enacting a Theft Act of 1968 which provides that when the stolen property is converted into another property, it still continues to be stolen property whatever may be the nature of change. Such explanation needs to be added after Section 410 of IPC.

[16] Law Commission of India, 42nd Report on Indian Penal Code, para 16.92.
[17] Indian Penal Code, s. 376.

- ☐ **Cheating in marriage:**

Express provision be enacted providing liability of either husband or wife who breaks the marriage. A clear position should be drafted regarding cases when one spouse flees to another nation and promises to call the other but breaks the marriage ties after settling or reaching foreign land. It also needs to be specified if cheating in a marriage will fall under Section 417 or 420 of the IPC.

- ☐ **Position of Impossible attempts:**

Neither any statutory provision exists under penal law in regard to liability of accused in relation to impossible attempts nor any judicial precedent which can be uniformly applied in all cases of impossible attempts. However, only two illustrations are provided in Section 511 of Indian Penal Code which relate to impossible attempts. But both of the illustrations relate to property offenses and in both the person is held liable for committing those offenses. It just shows that 'evilness of mind of the accused' is the determining factor. So far, the other offenses relating to the human body are concerned by analogy and reasoning, thus, it's the evilness of mind in body offenses too which can be taken to be a deciding factor even if it is not possible to produce the desired results.

Where impossibility is a mixed question of factual and legal impossibility, then the liability will depend upon the nature of offense and likely harmful consequences from that act.

> For example, a man fires at the man who is already dead, thinking him alive. Dead person cannot be killed. Now the question regarding his liability arises although he attempted to commit a deadly offense but in reality no offense has been committed.

In India, the position is not clear in such circumstances, it raises the possibility of conflicting decisions. Sort of clarification is required for such cases.

Under English law, there is a clear position which removed such uncertainty by passing the Criminal Attempts Act, 1981. This principle under the Act mentions that "whatever the

person falsely perceives, suppose that is true then if he is liable for that offense, he shall be liable for attempt in case of impossible attempt.[18] Such kind of clarification is needed under the Indian Penal law as well.

- ☐ **Insertion of certain new provisions and chapters**

The amendment shall be made into penal law inserting new offences such as mob lynching, sexual assault against male, meaning of hate crime, new chapter on sexual offences/ assault against transgenders.

1. Under Section 64 of the **Criminal Procedure Code, 1973**, the words 'adult male member' should be substituted with the words 'adult member of the family'.
2. Certain provisions should be inserted for taking strict action against those who make false allegations under Section 304B, 498A, 354, 354A- D, 375, 376A- E of the IPC.
3. Provision providing strict action against authorities be inserted-
   a) who does not release the person after bail is granted,
   b) who after the Court's order for release of any convict, undertrial prisoner or any other person detained (whether legally or illegally) is not released.

-x-x-x-

[18] Criminal Attempts Act, 1981, Sec.3