



Ms. Dubravka Šimonovic
UN Special Rapporteur on Violence against Women
Office of the High Commissioner for Human Rights
United Nations Office at Geneva
8-14 Avenue de la Paix
1211 Geneva 10,
Switzerland
By email: yaw@ohchr.org

20 May 2020

Re: Information for upcoming report on Rape as a Grave and Systematic Human Rights Violation and Gender-based Violence against Women

Dear Ms. Šimonovic,

We jointly submit this letter to you as the UN Special Rapporteur on Violence against Women in response to your questionnaire on the criminalization and prosecution of rape, and to provide information in advance of the submission of your 2020 report to the UN General Assembly on States' responsibility to criminalize and prosecute rape as a grave and systematic human rights violation and gender based violence against women, in line with international human rights standards.

Equality Now is an international human rights organization with ECOSOC status working for the protection and promotion of the rights of women and girls worldwide. Swabhiman Society is a Dalit-women led organisation in Haryana, which provides paralegal aid and support to survivors of sexual violence from marginalised communities. Wise Act of Youth Visioning and Engagement (WAYVE) Foundation is a national organization which works to empower marginalized youth both women and men by building and strengthening their leadership, and making them aware about constitutional rights and laws to protect them. Dalit Human Rights Defenders Network (DHRDNet) is a coalition project of Dalit human rights defenders from five states in India, whose objective is to combat ineffectiveness of action against rights abuses and to ensure that anti-discrimination mechanisms are properly and thoroughly implemented.

We write to provide information about sexual violence in India, with a focus on the intersectional forms of caste and gender discrimination faced by Dalit women and girls who are subjected to sexual violence. We respectfully request the inclusion of this information about the criminalization and prosecution of rape in India, and recommendations to improve national criminal justice responses, in your upcoming report.

Questionnaire on criminalization and prosecution of rape

Definition and scope of criminal law provisions

- 1. Please provide information on criminal law provision/s on rape (or analogous forms of serious sexual violence for those jurisdictions that do not have a rape classification) by providing full translated transcripts of the relevant articles of the Criminal code and the Criminal procedure code.*

Section 375, Indian Penal Code, 1860 - Rape.—A man is said to commit “rape” if he—

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.—With or without her consent, when she is under eighteen years of age.

Seventhly.—When she is unable to communicate consent.

Explanation 1.—For the purposes of this section, “vagina” shall also include labia majora.

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.—A medical procedure or intervention shall not constitute rape.

Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.¹

Section 3, Protection of Children from Sexual Offences Act, 2012 - “A person is said to commit "penetrative sexual assault" if--

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.”

2. *Based on the wording of those provisions, is the provided definition of rape:*

(a) *Gender specific, covering women only* - YES, in the case of adults.

(b) *Gender neutral, covering all persons* - NO, in the case of adults. For children, the definition of rape is gender-neutral.

(c) *Based on the lack of consent of victim* - YES

(d) *Based on the use of force or threat* - NO

(e) *Some combination of the above.* - YES. Sexual intercourse without “unequivocal voluntary agreement” amounts to rape. While lack of consent is sufficient and additional force or threat is never required, the law further specifies that consent obtained through fear of death or hurt is not considered true consent for the purposes of the offence.

¹ On 11 October, 2017, the Indian Supreme Court in *Independent Thought v. Union of India* [(2017) 10 SCC 800] ruled that portion of Exception 2 to Section 375 which excused marital rape of minors between the ages of 15-18, was unconstitutional. Going forward, a man will be considered guilty of rape if he has intercourse with a wife who is under the age of 18. However, the exception for marital rape of adult women remains.

(f) *Does it cover only vaginal rape?* - NO

(g) *Does it cover all forms of penetration? YES/NO. If yes, please specify.* - YES. Rape is defined as penetration by the penis, other body parts, any object, mouth or manipulation of any body part of the woman to cause penetration of the vagina, mouth, urethra or anus of the woman.

(h) *Is marital rape in this provision explicitly included?* NO

(i) *Is the law silent on marital rape?* NO

(j) *Is marital rape covered in the general provisions or by legal precedent even if it is not explicitly included?* N/A

(k) *Is marital rape excluded in the provisions, or is marital rape not considered as a crime?* YES. There is a specific exception for marital rape, which is not criminalized if the wife is over 18 years old, unless the parties are separated. Though the text of the law states that sexual intercourse with a wife over the age of 15 will not be rape, in 2017, this exception was read down by the Indian Supreme Court which ruled that portion of the law which excused marital rape of minors between the ages of 15-18, was unconstitutional. Going forward, a man will be considered guilty of rape if he has intercourse with a wife who is under the age of 18.² However, the exception for marital rape of adult women remains.

3. *Are there any provisions excluding criminalization of the perpetrator if the victim and alleged perpetrator live together in a sexual relationship/have a sexual relationship/had a sexual relationship? If so, please submit it.* - The only exception is for marital rape. Section 375, Exception 2: "Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape." Section 376B. "Sexual intercourse by husband upon his wife during separation.—Whoever has sexual intercourse with his own wife, who is living separately, whether under a decree of separation or otherwise, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine."
4. *What is the legal age for sexual consent?* - The legal age for sexual consent is 18.
5. *Are there provisions that differentiate for sexual activity between peers? If so, please provide them.* - NO

² *Independent Thought v. Union of India* [(2017) 10 SCC 800

6. *Provide information on criminal sanctions prescribed and length/duration of such criminal sanctions for criminalized forms of rape.* - The criminal sanction for rape is rigorous imprisonment which shall not be less than ten years, but which can extend to imprisonment for life.³ The law also provides for the death penalty as a possible criminal sanction in case of aggravated penetrative sexual assault of a child (the definition of aggravated penetrative sexual assault, which includes cases of penetrative sexual assault of a child below the age of 12 years, assault resulting in the death of the child etc.).⁴
7. *What does the legislation in your country provide in terms of reparation to the victim of rape and/or sexual violence after conviction of the perpetrator?* - Section 357-A of the Criminal Procedure Code requires every State to set a victim compensation fund for compensation to victims of crimes. The amount of compensation can be recommended by the Trial Court after conviction. The law also allows the victim to apply for compensation even when the trial has not taken place, which is especially useful in cases where the offender cannot be traced/identified. As per section 3(2)(va) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) (Amendment) Act, 2015 along with Section 376B of the Indian Penal Code, if there is sexual intercourse by husband upon his wife during separation, then INR 200,000 as compensation is given to the victim. 50% compensation is given after medical examination and confirmatory medical report. 25% is given when the charge sheet is sent to the court and the remaining 25% is given when the accused is convicted by the trial court. Under the same law, under Section 3(2)(va) along with Section 376C of the Indian Penal Code, if there is sexual intercourse by a person in authority, then INR 400,000 compensation is given to the victim. 50% is given after medical examination and confirmatory medical report. 25 % is given when the charge sheet is sent to the court; and 25% is given on conclusion of trial by the trial court. However, victim compensation is often inaccessible in practice because victims are unaware of their rights and the legal procedures for claiming compensation.⁵

Aggravating and mitigating circumstances

8. *Does the law foresee aggravating circumstances when sentencing rape cases? If so, what are they?*
- (a) *Is rape by more than one perpetrator an aggravating circumstance?* - YES
- (b) *Is rape of a particularly vulnerable individual an aggravating circumstance, or the imbalance of power between alleged perpetrator and victims? (for example, doctor/patient; teacher/student; age difference)* - YES. Rape through abuse of a

³ Section 376, Indian Penal Code, 1860.

⁴ Section 6, Protection of Children from Sexual Offences Act, 2012, as amended in 2019.

⁵ Partners in Law and Development, *Towards Victim Friendly Responses and Procedures for Prosecuting Rape*, 2017, available at https://www.academia.edu/34262450/A_STUDY_OF_PRE-TRIAL_AND_TRIAL_STAGES_OF_RAPE_PROSECUTIONS_IN_DELHI_2014-15

position of trust/authority in numerous identified circumstances is considered as an aggravating factor, and is classified as a separate offence for the purpose of sentencing under [Section 376\(2\) of the Indian Penal Code](#). Some of these circumstances as set out under Section 376(2) include rape by a police officer committed on a person in his custody, rape by person working in jails, remand homes, shelters on persons under their custody, rape by relative, guardian or teacher of, or a person in a position of trust or authority towards the survivor, rape by a member of the armed forces deployed in an area by Government who commits rape in such area etc.

(c) *Is rape by spouse or intimate partner an aggravating circumstance?* - NO.

9. *Does the law foresee mitigating circumstances for the purposes of punishment? YES/NO If yes, please specify.* - NO. However, in practice, academics who have studied rape sentencing have found that Courts consider factors such as the married state of the victim (including if the victim marries during the trial), the past sexual history of the victim (though this is not allowed by the provisions of the law itself), and so-called acquaintance rape to be mitigating circumstances which the Courts use in practice to reduce the sentence of the perpetrator.⁶
10. *Is reconciliation between the victim and the perpetrator allowed as part of a legal response? YES/NO If so, at what stage and what are the consequences?* - NO, not under the law.
11. *Regardless of the law, is reconciliation permitted in practice? YES/NO and what is the practice in this regard?* - YES, in fact, reconciliation is an extremely common practice in rape cases. The victim is often pressured by the accused, his family and society in general to settle the case, and as such, there is a “very high incidence of complainants and witnesses turning hostile”, particularly in sexual assault cases.⁷ The lack of a witness protection law leaves victims of rape vulnerable to threats and they are often coerced into changing their testimony and refusing to co-operate with the investigative or judicial process.⁸ This issue is compounded in cases where there is a caste-based hierarchy between the victim and perpetrator. Intimidation of Dalit victims and witnesses in rape cases is extremely common, particularly because dominant caste perpetrators are able to

⁶ See Mrinal Satish, *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India* (2016).

⁷ Jayna Kothari and Aparna Ravi, *The Myth of Speedy and Substantive Justice: A Study of Special Fast Track Courts for Sexual Assault and Child Sexual Abuse cases in Karnataka*, Centre for Law and Policy Research (2015), available at https://clpr.org.in/wp-content/uploads/2015/06/Fast-Track-Court_final.pdf

⁸ Human Rights Watch, *Everyone Blames Me: Barriers to Justice and Support Services for Sexual Assault Survivors in India* (2017), <https://www.hrw.org/report/2017/11/08/everyone-blames-me/barriers-justice-and-support-services-sexual-assault-survivors>

easily apply economic and social pressure on Dalit women and girls and their families.⁹ In many cases, police do not take action against those threatening or intimidating Dalit women and their families, and are sometimes even complicit in filing false cases against Dalit rape survivors and their families to pressurise them into dropping the rape complaint.¹⁰ Traditional village panchayats (a form of informal justice systems), usually made up of caste elders/leaders, also often pressure Dalit women and girls into compromising/reconciling rape cases.

12. *Is there any provision in the criminal code that allows for the non-prosecution of perpetrator? YES/NO If yes, please specify.* - NO. However, the police is not required to proceed with the investigation in any criminal case “if it appears to the officer in charge of a police station that there is no sufficient ground for entering on an investigation”.¹¹
- (a) *if the perpetrator marries the victim of rape?* - NO. The law does not allow for this, though in practice, Courts sometimes take this into account while deciding on sentencing.
- (b) *if the perpetrator loses his “socially dangerous” character or reconciles with the victim?* - NO.

Prosecution

13. *Is rape reported to the police prosecuted ex officio (public prosecution)?* - YES
14. *Is rape reported to the police prosecuted ex parte (private prosecution)?* - NO
15. *Are plea bargain or “friendly settlement” of a case allowed in cases of rape of women?* - NO. The law does not allow settlement, though it often takes place informally as explained in the response to question 11 above.
16. *Are plea bargain or “friendly settlement” of a case allowed in cases of rape of children?* - NO
17. *Please provide information on the statute of limitations for prosecuting rape.* - There is no limitation period applicable for prosecuting rape.
18. *Are there provisions allowing a child who was the victim of rape and to report it after reaching adulthood?* YES. There is no limitation period for filing complaints of rape against children.
19. *Are there mandatory requirements for proof of rape, such a medical evidence or the need for witnesses? YES/NO If yes, please specify.* NO. The Indian Supreme Court has held that the sole testimony of the rape victim is sufficient for conviction. However, in

⁹ Sisters for Change, Karnataka Dalit Mahila Vedike, *Breaking Down Barriers to Justice: Making the Indian Criminal Justice System work for Dalit Women victims of Violence* (2016), available at <https://www.sistersforchange.org.uk/2016/06/11/breaking-down-barriers-to-justice/>

¹⁰ National Campaign on Dalit Human Rights, *Dalit Women Speak Out: Violence Against Dalit Women in India* (2006), available at https://idsn.org/uploads/media/Violence_against_Dalit_Woment.pdf

¹¹ Section 157, Code of Criminal Procedure, 1973.

practice, Courts rely heavily on medical evidence and other corroborating evidence while deciding rape cases.

20. *Are there rape shield provisions aimed at preventing judges and defense lawyers from exposing a woman's sexual history during trial?* - YES

21. *Are there procedural criminal law provisions aimed to avoid re-victimizations during the prosecution and court hearings?* YES/NO. *If yes, please specify.* - YES. Trials for rape cases are to be conducted in camera, preferably by a woman judge. Examination of a rape victim shall be recorded by a woman police officer. Disclosure of the identity of the victim in rape cases is forbidden.¹² In cases of rape of children, the law also provides for child-friendly procedures for recording the statement of a child, both by the police and the Magistrate and for medical examination of the child. The Special Courts set up for trying child sexual offences are required to follow child friendly procedures aimed at supporting minor victims of rape and sexual assault.¹³

War and/or conflict

22. *Is rape criminalized as a war crime or crime against humanity?* - NO. However, commission of rape during sectarian or communal violence is considered an aggravating circumstance.

23. *Is there a statute of limitations for prosecuting rape in war or in conflict contexts?* NO

24. *Is there explicit provisions excluding statutes of limitation for rape committed during war and armed conflict?* N/A

25. *Has the Rome Statute of the International Criminal Court (ICC) been ratified?* - NO

Data

26. *Please provide data on the number of cases of rape that were reported, prosecuted and sanctioned, for the past two to five years.*

Official data from the National Crime Records Bureau (NCRB) from 2018 (the latest year for which data is available)¹⁴, provides the following data on cases of rape:

Rape cases reported to the Police	All women	Victims from Scheduled Castes ¹⁵
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¹² Section 327, Code of Criminal Procedure, 1973; Section 228-A, Indian Penal Code, 1860

¹³ Sections 24 - 40, Protection of Children from Sexual Offences Act, 2012

¹⁴ National Crime Records Bureau, Crime in India (2018),

<http://ncrb.gov.in/StatPublications/CII/CII2018/pdfs/Crime%20in%20India%202018%20-%20Volume%202.pdf>

¹⁵ Scheduled castes are the marginalized castes which are officially designated and protected under the Indian Constitution

Murder with rape/gang rape	294	Cases of murder with rape/gang rape are not separately classified for SC/ST victims
Rape under section 376, IPC	33,356 (of which 24,044 are rape of adult women, and 9312 of girls under 18)	2936 (including rape of women and girls under the age of 18)
Rape under the Protection of Children from Sexual Offences Act (girl child victims only)	21,401 rape cases under sections 4 and 6 (penetrative sexual assault and aggravated penetrative sexual assault)	869 rape cases under sections 4 and 6 of POCSO (penetrative sexual assault and aggravated penetrative sexual assault)

The details for trial and convictions in rape cases are provided below:

Total Rape cases for Trial at the beginning of 2018	Cases disposed of without trial	Cases in which trial was completed	Convictions	Conviction Rate (when trial was completed)	Cases still pending at the end of 2018
156,327	372	17,313	4708	27.2%	138,642

Other

27. Please explain any particular and additional barriers to the reporting and prosecution of rape and to the accountability of perpetrators in your legal and social context not covered by the above.

The main challenges faced by Dalit survivors of sexual violence are with regard to existing impunity for perpetrators, the implementation of the rape law and barriers to accessing the justice system, as opposed to gaps in the rape law itself. A study of 500 Dalit women's experiences of violence across 4 Indian States found that in 40.2% of instances of violence, women have been unable to access legal or community remedies for the violence due to prevailing culture of silence and stigma attached to rape cases. In 26.5% of instances of violence, the women attempt to obtain legal or community redress for the violence, but are prevented from obtaining justice by the perpetrators and their supporters, and the community at large. A further 17.4% of all instances of violence reach the notice of the police, but the justice attempts are blocked by the police themselves. Finally, in only 13.8% of instances of violence in this study, appropriate

police or judicial action was taken. Out of these, there were convictions only in 3 cases, i.e. less than 1% of the total instances of violence.¹⁶

The statistics from this study indicate the massive barriers to accessing justice faced by survivors of sexual violence in India, particularly those from marginalized communities. Some of the barriers faced are set out below:

- *Stigma in reporting*: A vast majority of cases go unreported due to the stigma attached to reporting cases of rape. This problem is compounded for Dalit women particularly when the perpetrator is from a dominant caste due to threats of retaliation and violence by the dominant caste perpetrators, increased lack of support from the wider community, and pressure on Dalit families of victims who speak out about violence.
- *Police Inaction and Discrimination*: There is difficulty in ensuring that the police register cases of rape, delays in registration, procedural irregularities and even instances of the police pressuring the survivor to drop the complaint. Police officials tend to disbelieve victims who complain of rape, particularly those from marginalized communities. Instances of police taking bribes from the victims and using highly inappropriate and abusive language is very common. Policemen display insensitive behaviour towards the victims which in turn victimizes them further. The police take money from the financially influential accused and direct the evidence in their favour which, many times, turns into filing of fake counter cases against the victims. Many times, police also force the victim to compromise.
- Difficulty in getting cases filed under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (meant to protect the Dalit community from caste-based atrocities) and poor implementation of its provisions.
- *Lack of victim and witness protection*: This allows perpetrators and their communities to threaten, retaliate against and pressure victims into changing their testimonies, including by use of physical violence against the victim and her family.
- Extra-judicial mechanisms, particularly traditional systems like panchayats pressure victims to compromise rape cases.
- Lack of legal aid and awareness of victim's rights and the legal process, combined with a huge backlog in rape cases pending before courts and lengthy delays in rape trials.
- Rape stereotypes and myths common in the judicial process, particularly in relation to past sexual history of the victim, compounded by the use of the two-finger test in medical examinations (to determine whether the victim is habituated to sex).
- The defence lawyers, during the trials, ask atrocious questions that are absolutely insensitive and irrelevant. It's not just an attack on a woman's dignity but also an attempt to make her relive the same traumatic experience, when she is forced to describe a horrendous incident like rape again in the court.

¹⁶ National Campaign on Dalit Human Rights, *Dalit Women Speak Out: Violence Against Dalit Women in India* (2006), available at https://idsn.org/uploads/media/Violence_against_Dalit_Woment.pdf

- Lack of victim support services, including counselling, legal support and the like which disincentivizes victims from moving forward with their case
- Apathy and discrimination on part of public prosecutors. They are also many times bribed by the accused.

These barriers often result in impunity when sexual violence is committed, especially when committed against a woman/girl from a marginalized community, with ‘mainstream’ society and the legal system oppressing survivors and protecting/supporting the accused. There is an immediate need for positive systemic change within the Indian criminal justice system, including but not limited to better implementation of existing laws, the introduction of much needed procedural reforms with the police and judiciary, clearing the large backlog of cases pending in criminal courts, handling sexual violence cases with greater sensitivity, ensuring a more accountable police force, and providing for bigger budgetary allocation by the government to end gender-based violence.

Thank you for your attention and please let us know if we can provide further information.

Sincerely,



Yasmeen Hassan
Global Executive Director, Equality Now
Contact: yhassan@equalitynow.org

Manisha Mashaal
Director, Swabhiman Society
Contact: manishamashaal85@gmail.com

Syed Hasan Raihan
Executive Director, WAYVE Foundation
Contact: rehan@wayve.net.in

Manjula Pradeep
Director of Campaigns, DHRDNet
Contact: manjula.hp@gmail.com