

Submissions to the UN SRVAW Thematic Report on Rape as a grave and systematic Human Rights Violation and Gender-based Violence Against Women

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The following is the submission made by the Helena Kennedy Centre for International Justice to United Nations Special Rapporteur on violence against women, its causes and consequences, Ms. Dubravka Šimonović, in her thematic report to be presented to the UN Human Rights Council in June 2021, which will address **States' responsibility to criminalize and prosecute rape as a grave and systematic human rights violation and a manifestation of gender-based violence against women, in line with international human rights standards.**

We believe it is crucial to approach the complex issue of rape as a grave and systematic human rights violation from a holistic point of view, one that includes a robust focus on both survivors of sexual violence as well as those who perpetrate these crimes. There is a strong need for an integrated social-ecologic framework for understanding and preventing sexual violence against women. The information provided here has roots in empirical research on gender-based violence in India which includes police practices, perceptions of culpability in convicted rapists, experiences of survivors and the role of One Stop of Centres.

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.

Until February 2013, the Indian Penal Code's (IPC) definition of rape did not include marital rape, same sex crimes and had recognized the legal age of a minor as sixteen. This definition was modified under the Criminal Law (Amendment) Act 2013, which extended the legal age of a minor to eighteen years. This criminal law amendment was the direct result of the Justice Verma Committee, which was a three-member commission assigned to review laws for sexual crimes submitted its report to the government in the aftermath of the brutal 2012 Delhi gang rape. The report, consisting of 80,000 suggestions, recommended numerous strong changes criticized the government, the police and even the public for its indifference towards violence against women in India.

- Legal Definition of Rape in India

For the purposes of the Indian penal code (IPC), the rape is defined in new Criminal Law Amendments Act (2013) under Sexual Offences as:

IPC 375. *"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:

Firstly.— 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.

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

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.”

Additionally, the amended Indian law, particularly section 376A, also included changes in conviction terms. For example, in case a sexual assault causes an injury, which results in death or leads to a persistent vegetative state, the convicted rapist must be likely to receive rigorous imprisonment of at least twenty years and up to the remainder of the natural life or even a death penalty (Section 376A, Criminal Law (Amendment) Act, Government of India, 2013). In the case of gang rapes, the law now requires the same mandatory sentencing. Section 357 B in the Code of Criminal Procedure also outlines compensation measurements for the victim, which will be a reasonable sum of money utilized for the medical expenses and rehabilitation purposes. Death Penalty, while rare, is also specified for the most extreme rape cases. However, despite many efforts, the law still does not recognize marital rape as a criminal offence.

- Limitations to the Legal Definition

Firstly, this definition is highly gendered and heteronormative. This means it is written with a prior assumption that only women can be victims of rape. For instance, the definition starts with “A man is said to commit “rape” if he....”. This issue however is not unique to the Indian legal system alone. In the United Kingdom, the Sexual Offences Act 2003 defines rape as, “if

he intentionally penetrates the vagina, anus or mouth.... with his penis”, therefore privileging the penis. Non-consensual sexual penetration of men is criminalised under Section 377 of the IPC (*Navtej Johar v. Union of India*) but is not regarded as rape; intersex people are unprotected even under this provision.

Secondly, marital rape is still not criminalised under IPC 375. As you can clearly see, the exceptions include – “Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape”. While it may be appalling that the Indian legal system has not yet recognized marital rape as a sexual offence, it is not particularly surprising. India prides itself for its low divorce rates – less than 1 percent. Out of 1000 marriages, only 13 result in divorce. Furthermore, similar to the Victorian ideals of womanhood, India too has a long-standing history of women being lauded for keeping families together and withstanding any adversity in their marital life. In fact, marital rape was criminalised in the United Kingdom only in 1991 wherein, in *R v R*, a court judgment delivered in the House of Lords, determined that under the English Criminal Law it is possible for a husband to rape his wife. Until then, there were numerous instances where leading criminal justice professionals had claimed that a husband can never rape his wife. For instance, Sir Mathew Hale, a former Chief Justice of the Court of King’s Bench in England famously wrote, “The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract” (*History of the Pleas of the Crown*, 1778). This doesn’t sound that different than what many judges continue to say in Indian courts during divorce trials (perhaps a direct consequence of years of colonization). For instance, while dealing with a case of divorce in India, a division bench of Justices P B Majmudar and Anoop Mohta said, “A wife

should be like goddess Sita who left everything and followed her husband Lord Rama to a forest and stayed there for 14 years," (The Times of India, 2015). That same year Maneka Gandhi, Indian Union Cabinet Minister for Women and Child Development, regarding marital rape in Rajya Sabha said, *"It is considered that the concept of marital rape, as understood internationally, cannot be suitably applied in the Indian context due to various factors like level of education/illiteracy, poverty, myriad social customs and values, religious beliefs, mindset of the society to treat the marriage as a sacrament, etc"*. This highlights the use of culture as an exploitative tool when it comes to condoning violence against women.

- 2. Based on the wording of those provisions, is the provided definition of rape:**
- a. Gender specific, covering women only. **YES/NO**
 - b. Gender neutral, covering all persons. **YES/NO**
 - c. Based on the lack of consent of victim. **YES/ NO**
 - d. Based on the use of force or threat. **YES/ NO**
 - e. Some combination of the above. **YES / NO**
 - f. Does it cover only vaginal rape? **YES /NO**
 - g. Does it cover all forms of penetration? **YES/NO**. If yes, please specify.

(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

- h. Is marital rape in this provision explicitly included? YES / NO
- i. Is the law silent on marital rape? YES/NO
- j. Is marital rape covered in the general provisions or by legal precedent even if it is not explicitly included? YES/NO
- k. Is marital rape excluded in the provisions, or is marital rape not considered as a crime? YES /NO

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

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. **There are no provisions of this nature.**

4. What is the legal age for sexual consent? **18 years**

5. Are there provisions that differentiate for sexual activity between peers? If so, please provide them. **There are no provisions of this nature.**

6. Provide information on criminal sanctions prescribed and length/duration of such criminal sanctions for criminalized forms of rape.

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?

The Code of Criminal Procedure (CrPC), 1973 in 2008 as well as the Criminal Law (Amendment) Act of 2013 acknowledge victim rights in India. Sections 357 and 357-A of the Code of Criminal Procedure, 1973 lay down the procedure for granting compensation to the victims of crime. Under the latter section, each state of the

country is to set up a victim compensation scheme in consonance with the Central Victim Compensation Fund Scheme guidelines. At present, however, state schemes are vastly different from one another in terms of the number of categories under which a victim may apply for compensation as well as the amount of compensation prescribed under each category.

Aggravating and Mitigating Circumstances

8. Does the law foresee aggravating circumstances when sentencing rape cases? **If so, what are they? Yes, they do. For instance, in the 2012 Delhi- case, the penalty for the crime committed was capital punishment which is levied only in the 'rarest of the rare' cases. The aggravating factors that the court considered here included the unnatural intercourse, brutal violence and public protests. However, the sentencing policies remains ambiguous as every day around 90 cases of rape are reported, but only 25% are convicted that too, with minimal punishment.**

a. Is rape by more than one perpetrator an aggravating circumstance? **YES/NO (Yes, in cases of gang rapes).**

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/NO**

c. Is rape by spouse or intimate partner an aggravating circumstance? **NO. Marital rape is not a legal offence.**

9. Does the law foresee mitigating circumstances for the purposes of punishment? **YES/NO**

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? Non-Compoundable Offences under the IPC cannot be settled because of their grave nature and the impact they have on the society. Rape is one such offence. Earlier,**

sexual harassment under IPC Section 354 was compoundable. Then in 2009, settlement under the section was barred via amendment.

a. Regardless of the law, is reconciliation permitted in practice? YES/NO and what is the practice in this regard? **Mediation in cases of sexual harassment, sexual violence and marital violence remain prevalent given the shame, stigma and taboo associated with these crimes. Additionally, these crimes are more rampant in underprivileged and backward groups and their socio-economic conditions prevent them from accessing the same legal resources as the privileged groups, therefore, mediation is sometimes the only option.**

11. Is there any provision in the criminal code that allows for the non-prosecution of perpetrator? YES/NO If yes, please specify. However, pre-trial and post-conviction processes do make concessions for the perpetrator if:

a. if the perpetrator marries the victim of rape? YES/NO

In 2015, the Madras High Court, in a highly criticised order, granted bail to a convicted rapist and advised a “compromise” between him and his unmarried victim, who had subsequently become pregnant.

b. if the perpetrator loses his “socially dangerous” character or reconciles with the victim? YES/NO. **If they show remorse and reform their behaviour.**

Data

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

According to the 2019 annual report of the National Crime Records Bureau (NCRB), 32033 rape cases were registered across the country, or an average of 88 cases daily, slightly lower than 2018 when 91 cases were registered daily. More than 32,500 cases of rape were registered with the police in 2017, about 90 a day, according to the most recent government data. Indian courts disposed of only about 18,300 cases related to rape that year, leaving more than 127,800 cases pending at the end of 2017. In all,

38,947 rape cases were registered across India in 2016, compared to 34,210 in 2015. Gang-rape cases reported in 2016 also increased to 2,167 from 2,113 in 2015.

Other

26. 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.

- Lack of awareness/knowledge – women support helplines, location of One Stop Centres (OSC), accessibility of OSC.
- Lack of women police officers, absence of trauma training and empathetic victim-police communication.
- Police can be more pro-active, creative and take initiatives – sometimes no action/follow up is done despite giving evidence.
- Mahila Ayog (Women’s Commission) can play a greater role and be more involved.
- Child Marriages continue (especially in the tribal areas). Such practices should not be condoned and reported.
- Tribal norms act as a barrier to justice (particularly the Jati Panchayat).
- Registering complaints continues to be an ordeal for the victim and their families – chasing the case in court is a further nightmare.

We would like to express our thanks to Ms. Dubravka Simonovic, Special Rapporteur on violence against women, its causes and consequences, for the opportunity to make a submission and we look forward to further discussions in the area of rape as a grave and systematic human rights violation and gender-based violence against women.

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