

## Questionnaire on criminalization and prosecution of rape

**Partners for Law in Development (PLD)** is a legal resource group pursuing the realization of social justice and equality for women. PLD's thematic focus is on marginalization arising from intersections of gender, sexuality, caste, minority status, class, age and conflict in relation to women's rights. PLD works on issues of sexual violence, having contributed to the law reform processes, as well as on decriminalization of consensual sex in relation to homosexuality, adultery and is currently in relation to adolescent sexuality. Having participated in the processes leading to the rape law reform in 2013, PLD monitored the special courts (for rape cases) in Delhi for their compliance with victim-centric pre-trial and trial procedures for rape prosecutions for the Department of Justice.<sup>1</sup> The findings of the study suggest that the victim-sensitive procedures were not consistently implemented and additionally, fell short of comparative best practices in relation to rape. In 2019, PLD produced a socio-legal study<sup>2</sup> introducing the issue of self-arranged marriages into the debate on child and early marriage in India, offering linkages between underage elopements, tabooed female sexuality and lack of opportunities and alternatives in resource poor contexts – to call for addressing root causes instead of deterrence approaches that inflict unintended harm on young lives.

Redress for rape is primarily defined in terms of conviction and quantum of punishment. Each time an egregious case captures the attention of the national media, the longstanding calls for swift conviction, high sentencing if not death penalty itself, assumes center stage. A comprehensive reform of rape law took place in 2013, amidst calls for speedy trials and death penalty following a homicidal gang rape of a student in Delhi. In 2019, the rape and killing of a veterinarian doctor on her way back from a remote, poorly connected worksite to her home in Hyderabad, caught national attention. Once again, emotive calls for the death penalty sidelined questions about the lack of transport facilities for those working outside city limits, or police apathy to initial alerts about the victim going missing. Subsequently, the police gunned down all accused, re-gaining public acclaim, allegedly to prevent the accused escaping. The clamour for punishment and death in these and similar cases, capture the dissonance between the predominant apathy, even victim blaming towards cases of rape, with the exceptional outrage in cases that capture popular anger; also raising concerns about extra-judicial killings.

We list here three aspects deserving more attention that they get in the context of law reform, and in this questionnaire, are: One, that de facto application of the law, which is plagued by obstacles to reporting, poor investigation and hostile procedures, undermines any legislative advances that exist. Two, the legislative protectionism that denies young populations the right to sexual consent. Three, an undermining if not complete neglect, of restorative aspects of relief, healing and recovery for the victim from the scope of legal redress.

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<sup>1</sup> Partners for Law in Development, *Towards Victim Friendly Responses and Procedures for Prosecuting Rape* [A Study of Pre-Trial and Trial Stages of Rape Prosecution in Delhi], 2017, available at <https://bit.ly/2X8gw4L>.

<sup>2</sup> Partners for Law in Development, *Why Girls Run Away To Marry*, 2019, available at <https://bit.ly/2Zn5Py1>.

## Definition and scope of criminal law provisions

- 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.**

The legal framework in India has different laws to address sexual violence for different categories of persons. Chapter XVI of India Penal Code, 1860 (IPC) provides for offences affecting the human body which includes sexual offences. Section 375 and Section 376, IPC relate to sexual offence of rape against women. Section 377 allows for prosecution of non-consensual ‘carnal’ intercourse against the order of nature, which offers redress to male victims. Protection of Children from Sexual Offences Act, 2012 (POCSO) defines the offence of penetrative sexual assault on children. Transgender Persons (Protection of Rights) Act, 2019 provides for sexual abuse against transgender persons.

<b>Category</b>	<b>Law</b>	<b>Description</b>
<b>Women</b>	Rape- Section 375, Indian Penal Code, 1860 (‘IPC’)	Includes the penetration of the woman’s vagina, mouth, urethra, or anus with a penis or other parts of the body- such as fingers. <i>Until 2013, rape was understood as sexual intercourse by a man with a woman, defined strictly in terms of penile-vaginal penetration.</i>
<b>Children</b>	Penetrative Sexual Assault- Section 3, Protection of Children from Sexual Offences Act, 2012 (POCSO Act)	The offence of penetrative sexual assault on persons below 18 years is defined in this provision.
<b>Men</b>	Unnatural Offences- Section 377, (IPC)	Unnatural offence defined as a voluntary carnal intercourse against the order of nature with any man, woman or animal. <i>Although not specifically for men, this provision criminalized homosexuality, and was subject to successive constitutional challenges. In the case of</i>

		<i>Navtej Singh Johar v. Union of India</i> <sup>3</sup> in 2018, the Supreme Court read down this provision, to allow prosecution of non-consensual sex, and decriminalize all consensual same sex relations.
<b>Transgender</b>	Offences and Penalties- Section 18, Transgender Persons (Protection of Rights) Act, 2019	Sexual abuse against transgender persons. <i>The act does not define 'sexual abuse' under Section 18 making it unclear what acts can be prosecuted.</i>

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

### a. Gender specific/ Gender neutral

Separate laws provide redress for rape/ sexual assault of women, children, men and trans persons. The rape law (for women) is gender specific qua the victim and the perpetrator.

### b. Based on the lack of consent of victim

Category	Law	Description
<b>Women</b>	Explanation 2, Section 375, IPC, 1860	A definition of consent in the context of rape (introduced in 2013) states: “an unequivocal voluntary agreement when the women by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act”. It further states that a lack of physical resistance shall not be regarded as consenting to sexual activity. This introduces the standard of affirmative consent in rape law.
<b>Children</b>	POCSO Act	The consent of a child below 18 years is irrelevant. Any form of sexual activity with a person under 18 years, whether consensual, or manipulated or forced, amounts to the offence of sexual abuse, as they are considered incapable of consenting to sex.
<b>Men</b>	Section 377, IPC	prosecutes unnatural sex, against the order of nature, has been read down by the Supreme Court to prosecute non-consensual carnal intercourse

<sup>3</sup> W.P. (Crl.) No. 76 of 2016.

<b>Transgender</b>		The issue of consent is not outlined in the Transgender Persons (Protection of Rights) Act.
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**c. Based on the use of force or threat**

<b>Category</b>	<b>Law</b>	<b>Description</b>
<b>Women</b>	Section 375, IPC	Sex through use of physical force, i.e “against the will”, or by threats of life of victim or person known to her is considered rape
<b>Children</b>	POCSO Act	Any form of sexual activity with a person below 18 years is criminalized, regardless of the use of force or threat.
<b>Men</b>	377, IPC	Rape by the use of force or threat covered
<b>Transgender</b>	Section 18, Transgender Persons (Protection of Rights) Act, 2019	Punishment for sexual abuse done by harming or endangering life of a transgender person is addressed in this provision.

**d. Some combination of the above. YES**

**e. Does it cover only vaginal rape? NO**

**f. Does it cover all forms of penetration? YES**

Yes, Section 375, IPC covers all forms of penetration of the woman’s vagina, mouth, urethra, or anus with a penis or other parts of the body- such as fingers, or penetration of the mouth with penis or with foreign objects. Similarly, Section 3, POCSO Act covers all forms of penetration with respect to children.

**g. Is marital rape in this provision explicitly included? NO**

**h. Is the law silent on marital rape? NO**

**i. Is marital rape covered in the general provisions or by legal precedent even if it is not explicitly included?**

Marital Rape is partially covered in the offence of rape under the penal code. The amendment in 2013 makes non-consensual sex with a non-cohabiting wife (where spouses are living separately) to be prosecuted as rape [Section 376B, IPC, imprisonment for 2 years to 7 years and fine]. Sex with a wife under 18 years is criminalized even when the spouses are cohabiting by virtue of the Supreme

Court judgment in *Independent Thought v. Union of India*<sup>4</sup> in 2017 as well as POCSO.

The rape by a husband of his wife, while the spouses are living together (during cohabitation), can be redressed through civil and criminal law remedies for domestic violence. The criminal remedy is available under Section 498A, IPC which provides for cruelty against a wife within a matrimonial home, defined to include conduct that causes grave injury or danger to life and health (both mental and physical) of the woman. The civil remedies are provided under Protection of Women from Domestic Violence Act, 2005 (PWDVA) recognizes sexual violence within the scope of domestic violence for seeking civil remedies.<sup>5</sup>

**j. Is marital rape excluded in the provisions, or is marital rape not considered as a crime?**

Partially redressed under rape offence, and partially under domestic violence laws (see answer above).

**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.**

No, there are no provisions excluding the criminalization of the perpetrator if the victim and alleged perpetrator live together in a sexual relationship/have a sexual relationship/has a sexual relationship.

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

The age of consent has changed considerably over the years. Before 2012, the age of consent for a girl was set at 16 years in the IPC. In 2012, with the enactment of the POCSO Act, the age of consent was raised to 18 years for both boys and girls, despite recommendations to the contrary from the National Commission for Protection of Child Rights (NCPCR), women's and child rights organizations.

*As a result, all adolescent sexual activity from caressing to kissing to penetrative sex is treated under law as child sexual abuse and criminalized. Not surprisingly in the context of India, the law is frequently used by the girls' families as a tool for moral policing and retribution (in conjunction with the Prohibition of Child Marriage Act, 2006 (PCMA) to target elopements),<sup>6</sup> punishing the adolescents who the law was enacted to protect.*

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<sup>4</sup> W.P. (Civil) No. 382 of 2013.

<sup>5</sup> Marital rape is typically not prosecuted as domestic violence, as women fear greater backlash and resistance to their claims, especially financial settlements and maintenance. These provisions potentially allow a wider range of sexual violence to be prosecuted, without limiting their scope to penetrative sex alone. See Madhu Mehra, Taking Stock of the New Anti-Rape Law, 2013, available at <https://kafila.online/2013/05/05/taking-stock-of-the-new-anti-rape-law-madhu-mehra/>

<sup>6</sup> See 2.

*Although POCSO is gender neutral, when applied between peers it treats the girl as a victim and the boy as a perpetrator (in conflict with the law).*

**5. Are there provisions that differentiate for sexual activity between peers? If so, please provide them.**

Before 2012, when the POCSO Act was still being debated, the NCPCR made the following suggestions, which were NOT incorporated into the law:

1. The age of consent in the IPC i.e. 16 years (prior to the Criminal Law (Amendment) Act, 2013) be retained so that teenage relationships and consensual sexual activity are not criminalized. However, the legal age of consent was still raised to 18 years in 2013.
2. It has also recommended “close in age” or “in proximal” exemptions, which would protect consensual non-penetrative sexual acts between two children above 12 years of age who are either of the same age or within two years of each other and consensual penetrative sexual acts between children above 14 years who are either of the same age or within three years of each other.
3. The NCPCR Bill also proposed criminalization of non-consensual sexual acts with children between 16 years and 18 years under specified circumstances.<sup>7</sup>

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

<b>Offence/ Section</b>	<b>Punishment</b>
Section 376 (1)- Punishment for Rape, IPC	The Amendment in 2018 increased the punishment to rigorous imprisonment for 10 years to life and fine. <i>The Amendment in 2013 increased the punishment to rigorous imprisonment for 7 years to life and liable to fine. Before 2013, the punishment was imprisonment for 7 years to life or extending upto 10 years and fine.</i>
Section 4- Penetrative Sexual Assault, POCSO	The Amendment in 2018 increased it to imprisonment for a minimum of 10 years extendable to life and liable to fine. If the offence was committed on a child below 16 years of age- imprisonment for 20 years to life and liable to fine <i>In 2012, the imprisonment range was 7 years to life with fine.</i>

<sup>7</sup> Clause 6.7, Rajya Sabha Secretariat, Standing Committee on Human Resource Development, 240<sup>th</sup> Report on Protection of Children from Sexual Offences Bill, 2011, December, 2011, available at <https://bit.ly/3dX3xcL>.

## 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 357A of the Code of Criminal Procedure, 1973, introduced in 2008, calls upon State governments to prepare a 'Victim Compensation Scheme' in coordination with the Central Government. The victim or her dependents are eligible to claim compensation for their injury/loss from the District Legal Service Authority or State Legal Service Authority either on a recommendation made by the Court, or by the legal services as per scales prevailing under the state schemes [Section 357A (2)]. Where the offender is not traced or identified but the victim is identified and where no trial takes place, the victim or dependents can claim compensation under the state schemes too [Section 357A (4)]. Trial courts may recommend compensation under the scheme in cases where the compensation awarded to the victim is inadequate for rehabilitation or where the cases end in acquittal or discharge [Section 357A (3)]. Additionally, the State Legal Service Authority or the District Legal Service Authority may also order for immediate first-aid facility or medical benefits free of cost or other interim reliefs [Section 357A (5)]. For cases of aggravated rape, the Court may impose a fine in addition to the imprisonment and compensation, that shall be just and reasonable to meet the medical expenses and rehabilitation of the victim.

In 2018, following orders given by the Apex Court in *Nipun Saxena v. Union of India*<sup>8</sup>, the National Legal Aid Services Authority set up a committee to formulate guidelines for a central 'Compensation Scheme for Women Victims/Survivors of Sexual Assault/other Crimes'<sup>9</sup> to function as an addition to already existing compensation schemes formulated at different state and central levels.<sup>10</sup> Notably, the recent Scheme raises the minimum amount of compensation to be paid to the victim from Rs. 300,000 to Rs. 400,000 and asks for an amount of at least Rs. 5-10,000 to be paid as interim compensation to the victim at the time of making the application for relief, while also enumerating the factors to be considered to determine the award of compensation.<sup>11</sup>

Additional compensation is stipulated in cases of rape of women from SC/ST communities, which the constitution recognizes as historically oppressed, deeming acts of sexual (and other) targeted violence to be atrocities against them. Section 15A of the SC/ST (Prevention of Atrocities) Act read with Clause 12(4) of the tagged Rules also places obligations on the federal State Governments to devise and disburse relief compensation in cash or in kind to the victim or their dependents. Interim relief is accorded at the time of the filing of the complaint and during trial processes independent

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<sup>8</sup> W.P. (Civil) No. 565 of 2012.

<sup>9</sup> The guidelines and scheme formulated by the Committee and the directions of the Court are notified as effective from 2 October, 2018. The scheme is to be treated as a guide for compensation by Special Courts instituted under POCSO as well. Available at <https://bit.ly/2z0wy8P>.

<sup>10</sup> Ministry of Home Affairs, Central Victim Compensation Fund Scheme, 2015, available at [https://www.mha.gov.in/sites/default/files/CVCFguidelines\\_141015\\_2.pdf](https://www.mha.gov.in/sites/default/files/CVCFguidelines_141015_2.pdf).

<sup>11</sup> See 9.

of the outcome of the trial and is to be availed in addition to existing compensation schemes notified under various laws.

Since the prosecution of sexual offences under the POCSO also prevails in Special Courts, the compensation oversight is slightly different as POCSO prevails over all else. Only a Special Court may direct payment of compensation under Section 33(8) of the Act read with Clause 7 of the Rules alongside Section 357A. Interim compensation may be granted at any time from the filing of the First Information Report (FIR) and the award of compensation as a whole is independent of the outcome of a trial and is focused on the injury of the child.

*Yet, compensation schemes are varied across different states (India is a federation of states), and even the interim compensation (compensation due to the prosecutrix during the trial and regardless of the outcome of the trial is rarely released by the Courts or the Legal Services as reported in a number of studies.*

## Aggravating and mitigating circumstances

### 8. Does the law foresee aggravating circumstances when sentencing rape cases? If so, what are they?

Rape under circumstances that heighten relationship of power and powerlessness is considered aggravated, attracting higher punishment in the IPC:

Category (women)/ Description	Law (IPC)	Punishment
<b>Custodial/Fiduciary</b> 1. Police Officer 2. Public Servant 3. Management or Staff of jail or remand home 4. Management or Staff of a hospital 5. Relative, guardian or teacher  <b>Heightened vulnerability</b> ● communal or	Custodial/Fiduciary 1. Section 376(2)(a) 2. Section 376(2)(b) 3. Section 376(2)(d) 4. Section 376(2)(e) 5. Section 376(2)(f)  Rape during/on ● Section 376(2)(g) ● Section 376(2)(h) ● Section 376(2)(j) ● Section 376(2)(k) ● Section 376(2)(l)	Rigorous imprisonment for 10 years to life (meaning the remainder of the perpetrator natural life of the and liable to fine  <i>*The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (SC/ST Act) prescribes for the sexual abuse<sup>12</sup> by a non-member of SC/ST against a woman</i>

<sup>12</sup> Section 3(1) (w)(i) of the SC/ST Act provides for the offence when a non-member of SC or ST community intentionally touches a woman belonging to SC/ST community when such act is of a sexual nature and against the recipient's consent. Section 3(1)(w)(ii) provides for the offence when words, acts or gestures of a sexual nature are made by a non-member of SC/ST communities towards a woman belonging to one.



<ul style="list-style-type: none"> <li>● sectarian violence</li> <li>● pregnant woman</li> <li>● incapable of giving consent</li> <li>● perpetrator being in a position of control/dominance*</li> <li>● woman suffering from mental or physical disability</li> </ul>		<i>belonging to SC/ST communities.</i> <sup>13</sup>
While committing rape, perpetrator causes grievous bodily harm/maims/disfigures/endangers life of a woman	Section 376(2)(m)	
Commits rape repeatedly on the same woman	Section 376(2)(n)	
Rape on a woman <b>under 16 years of age</b>	Section 376 (3), IPC	Rigorous imprisonment for 20 years to life and fine (2018 Amendment)
When rape results in <b>death or vegetative state</b>	Section 376 A, IPC	Rigorous imprisonment for 20 years to life or death
Rape on a woman <b>under 12 years of age</b>	Section 376 AB, IPC	<i>This provision was introduced via 2018 Criminal Law Amendment.</i> Rigorous imprisonment for 20 years extending to life and fine or with death
<b>Gang Rape</b> When rape is committed by more than one person, all persons involved in this crime, whether they participated or not, can be punished	Section 376 D, IPC	Rigorous imprisonment for 20 years to life and liable to fine
Gang Rape on woman <b>under 16 years</b>	Section 376 DA, IPC	Imprisonment for life and fine

<sup>13</sup> The implementation of SC/ST Act has transformed the meaning of rape as not just a sexual violence but also an atrocity on the constitutionally recognized category of SC and ST.. The term ‘atrocity’ situates acts of individual and collective violence against Dalits and tribals (adivasis) within historical forms of oppression, domination and entitlement that exist within the Hindu caste system.

Gang Rape on woman under 12 years	Section 376 DB, IPC	Imprisonment for life and fine or with death
<b>Category (Transgenders)</b>	<b>Law (Transgender Act)</b>	<b>Punishment</b>
<b>Transgenders</b> (Sexual abuse against Transgenders)	Transgender Persons (Protection of Rights) Act, 2019	Simple imprisonment for 6 months to 2 years and fine.  <i>*Trans communities have opposed the passing of this legislation and criticized the lack of community-based stakeholder consultation/interaction when the legislation was being considered.<sup>14</sup></i>
<b>Category (Children)</b>	<b>Law (POCSO)</b>	<b>Punishment</b>
<b>Aggravated Penetrative Sexual Assault-</b> Offence committed by a person in authority	Section 6, Punishment for Aggravated Penetrative Sexual Assault, POCSO	In 2018, it was increased to rigorous imprisonment for 20 years to life or with death.  <i>In 2012, rigorous imprisonment for 10 years to life and fine.</i>

*Every time there is a case of egregious rape case that makes national headlines, the demands for reforms in rape law tend to focus on higher sentences and death penalty. The above table represents the increase in sentencing within a short time period.*

**a. Is rape by more than one perpetrator an aggravating circumstance? YES**

<sup>14</sup> Sampoorna Working Group, SPWG Statement on Transgender Persons (Protection of Rights) Bill, 2019, 19 July 2019, available at <https://bit.ly/3cI1h92>.

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

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

**10. Is reconciliation between the victim and the perpetrator allowed as part of a legal response? If so, at what stage and what are the consequences?**

Reconciliations are not legally sanctioned but do occur outside the legal process – either on account of pressure exerted by the accused, or threats and social costs of pursuing prosecution or protracted legal processes. The complainants stop cooperating with the prosecution and drop out or turn hostile. In such cases, the case against the accused collapses.

The reconciliation is carried out informally, if at all, in such cases. There is a trend of ‘breach of promise to marry’ cases, which are being filed by the girls and their families against the boys, in the context of consenting relationships. These serve to sometimes exert pressure on the boy to agree to marriage and in other cases, may be a way by which the girl’s family seeks to restore innocence of girl, by claiming rape. In such cases, the girls frequently turn hostile.

- a. Regardless of the law, is reconciliation permitted in practice? YES/NO and what is the practice in this regard?**

See above answer. The court treats a hostile case as one where the prosecution is not able to discharge its allegations – it is not treated as a case of reconciliation.

**11. Is there any provision in the criminal code that allows for the non-prosecution of the perpetrator? NO**

There is no provision in the criminal code that allows for non-prosecution of the perpetrator.

- a. if the perpetrator marries the victim of rape? NO**
- b. if the perpetrator loses his “socially dangerous” character or reconciles with the victim? NO**

### **Prosecution**

**12. Is rape reported to the police prosecuted ex officio (public prosecution)? YES**

**13. Is rape reported to the police prosecuted ex parte (private prosecution)?**  
**NO**

**14. Are plea bargain or “friendly settlement” of a case allowed in cases of rape of women? NO**

**15. Are plea bargain or “friendly settlement” of a case allowed in cases of rape of children? NO**

**16. Please provide information on the statute of limitations for prosecuting rape.**

There is no statute of limitations for reporting rape as it is a criminal offence and reporting cannot be barred by time limit.

**17. Are there provisions allowing a child who was the victim of rape and to report it after reaching adulthood? NO**

Section 468 of Code of Criminal Procedure sets no bar or limitation for rape or any other offence punishable by more than 3 year sentence.

**18. Are there mandatory requirements for proof of rape, such a medical evidence or the need for witnesses? YES/NO If yes, please specify.**

Though there are extensive guidelines for standard sexual assault forensic examination kits and for medico-legal care of the prosecutrix<sup>15</sup>, including the requirement of informed consent and free medical treatment for injuries, it is not mandatory that this be presented as medical evidence in Court. Conviction in rape cases can proceed with the sole testimony of the prosecutrix if the testimony is of sterling quality.<sup>16</sup>

The use of a two-finger test during medical examination of the prosecutrix to determine tears to the injury to the hymen and subsequently conjecture whether she was habituated to sexual intercourse has been struck down as unscientific and unconstitutional in 2013, and replaced by medical examination that is not mandatory but based on informed consent on of the victim, which forbids ascertaining virginity or elasticity of vagina or status of hymen (the common practice earlier).

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

The law makes previous sexual history or character of victim irrelevant to determination of consent in rape cases. The Criminal Law (Amendment) Act, 2013 brought in Section

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<sup>15</sup> Ministry of Health and Family Welfare, Guidelines and Protocols: Medico-legal care for Survivors/Victims of Sexual Violence, March 2014, available at <https://main.mohfw.gov.in/sites/default/files/953522324.pdf>.

<sup>16</sup> *Moti Lal v. State of U.P.*, 2008 8 SCC 271. See also, *Virender v. State of NCT of Delhi*, CrI.A. 121/2008.

53A in the Indian Evidence Act to disregard the evidence of character or previous sexual experience in the cases of rape [Section 375, 376 and 376A-E of IPC].

Section 146 of the Indian Evidence Act allows for questions to test veracity and credibility of person during a cross-examination and makes it impermissible to put questions regarding the general immoral character of the prosecutrix in rape cases.

**20. Are there procedural criminal law provisions aimed to avoid re-victimizations during the prosecution and court hearings? YES/NO. If yes, please specify.**

Revictimization occurs in pre-trial, trial stages and outside of the legal system in the community, in various ways – a) registration of complaint in the police station which exercises jurisdiction over site where crime occurred; b) delay and refusal to register the complaint by the police; c) having to repeat the testimony many times over; d) encountering male officials and doctors in the police station and medical examination stages which trigger trauma; e) two-finger test to determine virginity during medical exam; f) sharing the same space with the accused and his associates during the trial; amongst others; g) being pressurized and threatened by the accused and associates, pressure within family, stigma within community etc. Some not all these have been addressed by law – and the implementation is at best uneven, at worst in the breach.

The following provisions exist in law:

1. Mandatory for a police officer to file a First Information Report (FIR) for cases of rape, regardless of whether the crime occurred within their jurisdiction, failing which he may be punished with imprisonment for a period of 2 years. Called ‘Zero FIR’, this may be forwarded to the relevant station.
2. The complaint must be recorded by a female officer. The complainant is also entitled to a free copy of the FIR. The statement of the complainant must be recorded at a place of her choice/her residence by a female police officer.
3. The identity of the complainant must be kept anonymous. Disclosing information that may lead to the identification of the complainant without her consent is punishable by law.
4. Rape trial is to be held *in camera* (where the general public and press are not allowed in the courtroom).
5. Proceedings should be conducted by courts presided by female judges as far as possible. *State of Punjab v. Gurmit Singh*<sup>17</sup> iterated the importance of these tools to prevent revictimization and further directed Presiding Officers of the Court be more involved in taking evidence of the prosecutrix without allowing for defense counsel to humiliate/insult her.
6. The examination and cross examination of prosecutrix is to be shielded by a screen to ensure the accused is not visible to her, and she is allowed adequate breaks.<sup>18</sup>

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<sup>17</sup> AIR 1996 SC 1393.

<sup>18</sup> *Sakshi v Union of India*, AIR 2004 SC 3566.

7. It also asked that questions during examination/cross-examination be submitted to the Presiding Officer in writing and he/she shall undertake to put the question to the prosecutrix in clear and simple language without embarrassing her.

## War and/or conflict

### 21. Is rape criminalized as a war crime or crime against humanity? NO

Law	Description	Punishment
<b>Section 376(2)(c), IPC-</b> Punishment for Rape by Armed Forces	Rape by a member of armed forces deployed in an area by the Central or State government Explanation to this provision defines “Armed forces” to include naval, military and air forces, paramilitary forces, auxiliary forces.  Rape during conflicts of communal and sectarian violence	Rigorous imprisonment for 10 years to life (remainder of person’s natural life) and fine.
<b>Section 5, POCSO Act-</b> Aggravated Penetrative Sexual Assault (by a member of Armed Forces) <b>Section 6, POCSO Act-</b> Punishment for Aggravated Penetrative Sexual Assault	Penetrative Sexual Assault on a person under 18 years by a police officer, member of armed or security forces or a public servant constitutes Aggravated Penetrative Sexual Assault  Penetrative Sexual Assault on a person below 18 years of age during conflict situations of communal or sectarian violence or natural calamity shall constitute the charge of Aggravated Penetrative Sexual Assault.	Rigorous imprisonment of 20 years to life and fine or with death.

Crimes of rape committed by the armed forces or during instances of conflict are considered as aggravated forms of rape within the criminal code. The impact of this law is hindered in conflict zones of Jammu and Kashmir, Meghalaya, Tripura, Assam, Arunachal Pradesh, Nagaland, Manipur, Mizoram by the Armed Forces Special Provisions Act (‘AFSPA’ in place for over 60 years in the North-Eastern states and close to 30 years in Jammu and Kashmir) as it reportedly

grants impunity from prosecution for sexual violence and other crimes committed by the armed forces stationed in these areas by requiring prior sanction of the Government to prosecute. A report of the OHCHR released in 2018 about the situation in Jammu and Kashmir notes that no sanction has been granted to prosecute an official of the armed forces since 1990 when the Act was put in place.<sup>19</sup> Crimes committed by the armed forces are treated as aggravated rape only since 2013. Sexual violence committed by members of the armed force can be tried by court martial as per laws governing the relevant services, or may be tried under the criminal law.

Sexual violence is common during communal violence and riots, but rarely prosecuted given that the conditions of breakdown of law and order, or acts of omission by the state, pose a barrier to access to the police station, reporting or investigation. As a result, the enactment of a Communal and Targeted Violence law was proposed, which saw several iterations in 2005 and 2011, finally being shelved entirely. The only successful case of rape during communal violence is that of Bilkis Bano which took 15 years since the crime to successfully convict 11 men of rape and murder and 7 policemen and doctors of attempts to cover up the crime, under the oversight of the Supreme Court of India with the Central Bureau of Investigation prosecuting the case and constant monitoring by the National Human Rights Commission. In 2019, 17 she was awarded a compensation of Rs. 5,000,000 with provisions to be made for her employment and a place for her residence.

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

**23. Are there explicit provisions excluding statutes of limitation for rape committed during war and armed conflict? YES/NO**

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

### **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.**

The country wide data on sexual offence of rape show that the reporting rate is abysmally low, the conviction rate being even lower and the convictions which are taking place positively are not even affecting the victimhood of persons. The National Crime Records Bureau's (NCRB) annual report 'Crime in India' states that a total of approximately 34,999 rape instances were reported by women in the year 2018, barely changed from the previous year of 2017. Amongst these cases, approximately 85% cases led to charges being filed and 27% to convictions. Hence, the present submissions have acknowledged the statutory framing of sexual offence of rape while giving equal importance to the de facto realities of how the law is implemented in the country.

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<sup>19</sup> Office of the United Nations High Commissioner for Human Rights, Report on the Situation of Human Rights in Kashmir, 14 June 2018, available at <https://bit.ly/2Tjxyvr>.

Year	Cases Pending Investigation from Previous Year	Cases Reported during the year	Total Cases for Investigation	Charging Rate	Total Cases for Trial	Total Cases Convicted	Conviction Rate
2018 <sup>20</sup>	13762	33356	47139	85.3	1,56,327	4708	27.2
2017 <sup>21</sup>	14406	32559	46984	86.6	1,46,201	5822	32.2

## 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.

#### VICTIM-CENTRIC SUPPORT MECHANISMS FOR RAPE PROSECUTIONS

PLD's study named 'A Study of Pre-Trial and Trial Stages of Rape Prosecution in Delhi' (2017) involved trial observation and interviews with victims, to examine the extent to which the victim-centric procedural law were implemented, and how the victims experience the criminal justice system. Following are some of the findings<sup>22</sup> and concluding observations of the study, in the context of Delhi, are instructive (recognizing that outside of metros and in rural contexts, the implementation gaps are much wider).

#### The Pre-Trial Stage

1. The registration of FIRs is uneven and inconsistent. In some cases, the police discourage the complainant from filing the FIR, and suggesting an (informal) compromise. Complainants also do not consistently receive a copy of the FIR, which is their statutory right.
2. The medical examination emerges as the most problematic aspect of the pre-trial stage, which does not conform to the reformed guidelines. Complainants are not explained the processes involved in the examination, or the purpose behind the tests. This impacts their capacity to give informed consent, even as consent is formally recorded. While the MLCs

<sup>20</sup> National Crime Records Bureau, Crime in India (2018), available at <https://ncrb.gov.in/crime-india-2018>.

<sup>21</sup> National Crime Records Bureau, Crime in India (2017), available at <https://ncrb.gov.in/crime-india-2017-0>.

<sup>22</sup> See 1, page 67.



- 2-finger tests or noting about the victim being ‘habitual to sex’ are not evidenced, insinuations about sexual history remain.
3. Medical treatment for injuries the complainant and counseling are not in evidence. The focus of medical remains evidence-collection over treatment and care.
  4. Throughout the process, complainants experience the need for legal guidance and support, absent which, they go through the distinct processes without information, and with uncertainty and confusion. They are not explained the relevance of the different processes involved, which inhibits their full, informed participation. Without an agency for support, they encounter obstacles in the most basic processes, such as registering the FIR, or obtaining a copy of it. This lack of information impacts their right to avail of victim compensation, and also their rights through trial.

### The Trial Stage

1. All fast-track courts were familiar with guidelines for conducting proceedings in a gender sensitive manner, such as in camera proceedings, use of screen etc, but demonstrate inconsistency in their application.
2. Prosecutrices typically navigate the trial blindly, without information pertaining to the legal processes involved and the role of different actors. They are unaware of their rights to compensation and to have a companion present with them during their deposition, and also have their concerns and queries about the process unaddressed. Currently, there is no specialized agency to fulfil this role, nor is it within the mandate of the existing actors. The Public Prosecutor, Presiding Officer or the Investigating Officer sometimes provide a limited introduction to some aspects of the trial on an ad hoc basis. The lack of information and exclusion from the process sometimes drives prosecutrices into expensive, risky and exploitative arrangements with private counsel. Evidence suggests that the Delhi Commission of Women Scheme to provide rape victims the assistance of empaneled advocates is apathetic, lacking direction, monitoring and unreliable.
3. While prosecutrices are shielded from the accused during their deposition with instruments that vary between traditional style courtrooms and the Vulnerable Witness Deposition Complex (VWDC)<sup>23</sup>, prosecutrices (and their companions) remain accessible to the accused (and their companions) in waiting and other areas of courts, and also outside the court premises.
4. While all the Public Prosecutors in the courts under observation were familiar with the brief, they relied only on the official records. None of the prosecutrices met with the prosecutrix beforehand to know their account of the incident, and their circumstances thereafter. Not all of them introduce themselves to the prosecutrix before the proceedings to put her at ease to recount the incident in court.
5. The defence questions are inevitably hostile, often sexually explicit, intended to insinuate lack of resistance to imply consent. This practice continues. The questions are rarely

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<sup>23</sup> *Ibid.* The VWDC is a progressive innovation in the layout of court complexes to realise a vital aspect of the principle of victim/witness protection. Its layout is such as to ensure complete physical separation and minimise the space for any encounter or interaction between the accused and his associates, and the prosecutrix. This special courtroom is largely sequestered from other courtrooms within the court complex, with a separate passage for the entry/exit of the prosecutrix to prevent her from sharing the same physical space with the accused or his companions. The prosecutrix also has a different waiting room from where she is ushered into the courtroom for her deposition.

routed through the Presiding Officer, so the prosecutrix often endures offensive cross examination.

6. The statutory stipulation of completing the trial within a period of 2 months is not being complied with. The study found that the deposition of the prosecutrix, which is a capsule from the trial, takes longer than 2 months, and on average, takes 8.5 months. In some cases, these are underway after a year since the commencement of the trial. One of the most common causes is the delay in the Forensic Science Laboratory (FSL) Report, which holds up the deposition of the prosecutrix, due to the laboratory being overloaded and understaffed.

#### Availability of Support Services

1. The most pressing lacuna in the justice chain to emerge is the absence of holistic support services for victims of rape, which would enable them to navigate and participate in the justice system with full information, orientation and with access to rights, and also to address the impact of the incident in their personal lives. It is important to establish specialized agencies which provide comprehensive support services to victims under one roof, to cut down on the number of different institutions the victim must visit in the aftermath of the incident to receive basic support. The agency co-ordinates support services and makes them available at one location.
2. It is equally important, that victim/witness protection be envisaged in terms broader than what currently exists, to shield the victim and her family from coercion or inducement by the accused and his associates. In the context of sexual violence, victims/witnesses face coercion and intimidation from the accused and his associates, forced re-location, and stigma in their communities as well as in institutions. Currently, the framework for witness protection in the form of shielding the victim from the accused in court, while useful, is scarce.