Questionnaire on criminalization and prosecution of rape

Definition and scope of criminal law provisions

***Criminal Laws and Provisions of Rape in INDIA***

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.

The legal definition of rape in India is outlined in Section 375 of the Indian Penal Code (IPC) ("Indian Penal Code," 1860). The revised definition of rape in India is (1) the penetration of a man’s penis into a woman’s vagina, anus, urethra or mouth, to any extent or forcing her to engage in such acts with him or any other individual; or (2) the insertion of any object or body part, to any extent, other than the penis into a woman’s vagina, anus or urethra or forcing her to engage in such acts with him or any other individual; or (3) the manipulation of any woman’s body part to penetrate into the vagina, anus or urethra, or any other part of the woman’s body or forcing her to engage in such acts with him or any other individual, “against her will; without her consent;” consent having been obtained through coercion under fear of death or being harmed; consent given under the misconception that the man is her husband; consent given by virtue of unsound mind, under the influence or intoxication, when consent is unable to be communicated and lastly, with or without consent with a woman under the age of 16 ("Indian Penal Code," 1860).

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

(1) the penetration of a man’s penis into a woman’s vagina, anus, urethra or mouth, to any extent or forcing her to engage in such acts with him or any other individual; or (2) the insertion of any object or body part, to any extent, other than the penis into a woman’s vagina, anus or urethra or forcing her to engage in such acts with him or any other individual; or (3) the manipulation of any woman’s body part to penetrate into the vagina, anus or urethra, or any other part of the woman’s body ("Indian Penal Code," 1860).

\* Is marital rape in this provision explicitly included? ~~YES~~ / NO
\* Is the law silent on marital rape? ~~YES~~/NO
\* Is marital rape covered in the general provisions or by legal precedent even if it is not explicitly included? YES/~~NO~~

Marital rape by legal precedent is explicitly considered not a criminal offence, unless the crime occurs during the period when the partners are lawfully separated.

\* Is marital rape excluded in the provisions, or is marital rape not considered as a crime? YES /~~NO~~
Marital rape is not considered a crime

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

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

5. Are there provisions that differentiate for sexual activity between peers? If so, please provide them.
NO

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

The punishment for rape in India is imprisonment not less than seven years with the possibility of an extension to life imprisonment, as well as the liability of a fine ("The Criminal Law (Amendment) Act," 2013). In more serious cases, more rigorous punishment is handed down for a term of no less than ten years with the possibility of an extension to life imprisonment, as well as the liability of a fine ("The Criminal Law (Amendment) Act," 2013). Section 376A, a new section, states that if the incident causes death or a persistent vegetative state of the victim, the perpetrator shall be imprisoned for no less than twenty years, which may extent to life imprisonment, or with death ("The Criminal Law (Amendment) Act," 2013).

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 in the Code of Criminal Procedure, 1973 making it obligatory for the state to provide compensation to the victims or dependents who have suffered loss or injury as a result of crimes and require rehabilitation. Almost all states of the country accordingly set up Victim Compensation Schemes to provide for adequate compensation” (Dube, 2018).

Aggravating and mitigating circumstances

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

In order to determine if the death penalty is warranted, the following tests are employed to the circumstances of the case:

*The crime test:* The crime test in the IPC refers to the exacerbating circumstances of the case.

*The criminal test:* The criminal test refers to a case that shows absolutely no mitigating circumstance in favour of the accused.

*The rarest of the rare test:* Once both the crime test and criminal tests are satisfied, the rarest or rare test is not “judge centric”, rather defined by the perception of society and if society deems the aggravated crime of the confirmed accusers most abhorrent.

\* Is rape by more than one perpetrator an aggravating circumstance? YES~~/NO~~

\* 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~~

\* 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.

Yes. As in most legislations, India’s sentencing structure allows for mitigating circumstances to be proven in a court of law and to be taken into consideration towards sentencing of punishments.

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?

\* Regardless of the law, is reconciliation permitted in practice? YES/~~NO~~ and what is the practice in this regard?

Some police officers or village leaders try to pressure victims of rape to marry their perpetrators as a form of reconciliation.

11. Is there any provision in the criminal code that allows for the non-prosecution of perpetrator? YES/~~NO~~ If yes, please specify.

If the perpetrator is the victim’s husband.

\* if the perpetrator marries the victim of rape? ~~YES~~/NO In India’s Penal Code, the legislation clearly states that the act of marriage of a victim to her perpetrator does not absolve the case of rape (Jolly & Raste, 2006).

\* if the perpetrator loses his “socially dangerous” character or reconciles with the victim? ~~YES~~/NO

Prosecution

12. Is rape reported to the police prosecuted ex officio (public prosecution)? YES/NO UNKNOWN

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

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

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

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

There is no statute of limitations for criminal cases in India therefore there are no stature of limitations for rape cases in India (Amucheazi, 2019).

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

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

“Section 164 A of Cr. P. C. has been added by amendment in 2005, to provide for a medical examination (during the stage when an offence of committing rape or attempt to commit rape is under investigation) of the victim of a rape by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner by any other registered medical practitioner” (Pandey & Dhar, 2018, p. 461).

The principal features of the examination are:

1. Primary data, which is a search for DNA that is collected from evidence such as clothing
2. Physical examination and mental condition of the victim
3. Signs of struggle on clothes and body
4. Local examination of the genitals

Medical practitioners often focus on and document the sexual history of the victim, which is not deemed always be relevant to the case. Doctors also use the archaic two-finger test in order to determine how habituated the survivor is to sexual intercourse which further violates the victim. Such tests have since been made illegal, however it is still being performed in parts of India (Pandey & Dhar, 2018).

19. Are there rape shield provisions aimed at preventing judges and defense lawyers from exposing a woman’s sexual history during trial? YES~~/NO~~

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

Section 327 of the Criminal Code of Procedure allows for in-camera trials of sexual assault victims (Jagadeesh, 2010).

War and/or conflict

21. Is rape criminalized as a war crime or crime against humanity? YES~~/NO~~

Section 376(2)(c) states, rigorous punishment will be sentenced of seven years to life imprisonment to “whomever being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area” ("Indian Penal Code," 1860).

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

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

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

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.

2015-2019

Reported

2015 - 34,651

2016 - 36,068

2017 - 32,559

2018 - almost 34,000
2019 - UNKNOWN

Prosecuted

2015 - UNKNOWN

2016 ­- UNKNOWN

2017 - UNKNOWN

2018 – Over 85%
2019 - UNKNOWN

Sanctioned

2015 - UNKNOWN

2016 - UNKNOWN

2017 - UNKNOWN

2018 – 27%
2019 - UNKNOWN

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. UNKNOWN

References

Amucheazi, C. O. (2019). A critical review of the jurisprudence of laws on rape in Nigeria and the impact of statute of limitations on prompt reporting of rape incidents. *Commonwealth Law Bulletin, 45*(2), 277-295.

The Criminal Law (Amendment) Act, Act 9 C.F.R. § 375-6; 9C (2013).

Dube, D. (2018). Victim Compensation Schemes in India: An Analysis. *International Journal of Criminal Justice Sciences, 13*(2), 339-355.

Indian Penal Code, § 375 (1860).

Jagadeesh, N. (2010). Legal changes towards justice for sexual assault victims. *Gifts to doctors, scientific information and the credibility gap in the Medical Council of India...................... 68, 7*(2).

Jolly, S., & Raste, M. (2006). Rape and Marriage: Reflections on the Past, Present and Future. *Journal of the Indian Law Institute, 48*(2), 277-284.

Pandey, H., & Dhar, P. (2018). Collection of rape evidence in India- an analysis. *Forensic Research & Criminology International Journal, 6*(6), 460-468. doi:10.15406/frcij.2018.06.00245