

## The Oxford Human Rights Hub

The Oxford Human Rights Hub (OxHRH) aims to bring together academics, practitioners, and policymakers from across the globe to advance the understanding and protection of human rights and equality. Through a vigorous exchange of ideas and resources, we strive to facilitate a better understanding of human rights principles, to develop new approaches to policy, and to influence the development of human rights law and practice.

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## Introduction: A Human Rights-Based Approach

This report responds to the UN Special Rapporteur's objective of collecting information on rape laws and providing recommendations on key human rights standards to be integrated into national criminal justice responses. The report covers India, Bangladesh, and Canada. We attach annexes setting out the detailed answers to the questionnaire. Our findings are presented here.

Our findings demonstrate that criminal law on its own, however sophisticated, will never be sufficient to address the underlying causes behind rape and violence against women. Simply relying on harsher penalties can have a counterproductive effect, particularly when access to justice through fair and safe legal procedures is lacking. This is particularly true of the recent reintroduction of the death penalty in some countries, which itself constitutes a human rights breach. Individual prosecutions are inevitably backward looking and unable to address systemic issues embedded in patriarchal structures and attitudes to women.

A human rights-based approach to sexual violence against women offers a promising framework to not only redress individual incidents but to transform institutions and structures that underpin violence. A human rights approach emphasizes women's rights to personal security, life, and dignity. It also includes women's right to substantive equality. Substantive equality requires measures to be taken which simultaneously:

- i. redress gender-based disadvantage;
- ii. address stigma and stereotyping;
- iii. facilitate women's voice; and
- iv. achieve structural change.<sup>1</sup>

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<sup>1</sup> Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 *International Journal of Constitutional Law* 712; Sandra Fredman, 'Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights' in I Boerfijn and others (eds), *Temporary Special Measures*

Redressing gender-based disadvantage requires attention to be paid to the imbalance of power (in families, society and the political sphere), which perpetuates violence, and is fuelled by stereotyping. Gender-based disadvantage is not confined to women, but all whose gender and sexual identities make them vulnerable to violence. It also requires a recognition of intersectional disadvantage, requiring policies to include those who are most disadvantaged by synergies of racism, poverty, homophobia, transphobia, disability discrimination etc.

Policies must also address the deep-seated stigma and stereotyping that permeate the reporting, investigating and prosecuting of violence, as well as the attitudes of judges, prosecutors and police, and most of all, of the men for whom patriarchy legitimates violence against women and other gender groups.

Facilitating voice requires close attention to be paid to the needs and wishes of the victim, including preventing re-victimisation in court. It also requires the voice of women and other oppressed gender identities to be part of decision-making more generally.

Achieving structural change requires a recognition that violence against women is not just a result of individual acts of individual perpetrators, but of social and political structures and institutions. Achieving substantive equality therefore requires more than a focus on individual perpetrators. Instead, responsibility lies more broadly on those institutions, including the State, who are in a position to bring about change.

The inquiry report of the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee) into murdered and missing Indigenous women in Canada stands out in international human rights law as a best practice example.<sup>2</sup> Rather than focusing on accountability for individual acts of violence, the inquiry procedure seeks to identify and remedy grave or systematic violations of women's rights. Campbell argues, that 'by focusing on the severity and magnitude of [gender-based violence against women], the CEDAW Committee can engage from a multi-faceted perspective with laws, policies, institutions, norms and actors that perpetuate' violence.<sup>3</sup>

The CEDAW Committee's report placed Indigenous women's human rights at the centre of its analysis. Using an equality framework, it diagnosed gender and racist stereotypes within the reporting, investigating and prosecuting of violence. It also investigated how the structures and institutions such as the laws and policies in broad fields of life - education, substance abuse, housing, child welfare, poverty and transportation - contributed to high rates of violence against Indigenous women. The CEDAW Committee proposed thirty-eight recommendations to target these underlying causes. At the national level, the national inquiry into murdered and missing Indigenous women also examined the systemic causes of sexual violence

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(Intersentia 2003); Committee on the Rights of People with Disabilities, 'General Comment No 6 on equality and non-discrimination' (2018) CRPD/GC/6/2018.

<sup>2</sup> CEDAW Committee, 'Report of the inquiry concerning Canada of the CEDAW Committee under article 8 of OP-CEDAW' (2015) CEDAW/C/OP.8/CAN/1.

<sup>3</sup> Meghan Campbell, 'Beyond the Courtroom: Accountability for Grave and Systemic Human Rights Abuses' (2019) U of OxHRH J 55, 85.

and the role of institutional policies and practices and provided a series of detailed recommendations.<sup>4</sup>

Below we provide more detail of the three jurisdictions we have investigated: India, Canada and Bangladesh.

## The Definition of Rape

The word “rape” is not used in **Canadian** criminal law. Reflecting the fact that violence against women exists along a continuum, the Criminal Code instead uses the term “sexual assault.” The Code defines sexual assault as the intentional sexual touching without consent.<sup>5</sup> This approach not only criminalises rape but also other forms of sexual violence. There are three categories of offenses in the Criminal Code:

- i. sexual assault;
- ii. sexual assault with a weapon, threats to a third party of causing bodily harm;
- iii. aggravated sexual assault (wounds, maims, disfigures or endangers).<sup>6</sup>

By contrast, rape in the present-day **Bangladesh** continues to be defined as penile-vaginal penetration by male-on-female only, in terms of the colonial code enacted by the British in 1860. The definition is found in Section 375, The Penal Code, 1860.

In **India**, rape is defined in section 375 of the Indian Penal Code (IPC). The Criminal Law (Amendment) Act, 2013 (2013 Amendment) expands the definition of rape beyond penile-vaginal penetration.<sup>7</sup>

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<sup>4</sup> ‘Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls’ <<https://www.mmiwg-ffada.ca/final-report/>> accessed 1 December 2020.

<sup>5</sup> Section 265 of the Criminal Code (RSC 1985 c C-46); *R v Chase* [1987] 2 SCR 293.

<sup>6</sup> Section 271-73 of the Criminal Code.

<sup>7</sup> Section 375 of the Penal Code

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 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.

## Gender Specific

In **India**, the 2013 Amendments retain the gender-specific nature of the offence of rape.<sup>8</sup> Non-consensual anal intercourse between adult males is criminalised under section 377 of the IPC. Section 18(d) of the Transgender Persons (Protection of Rights) Act 2019 makes sexual abuse against transgender persons a specific offence, with punishment extending from six months to two years. This is much lower than the punishment for rape prescribed in section 376 of IPC, discussed below.

In **Bangladesh**, Hijras/transgender persons are not recognized expressly as potential victims of rape under the Penal Code or the 2000 Act. By contrast, at the same time the same laws make it possible to prosecute Hijras for sexual offences.<sup>9</sup>

**Canada's** broad definition of sexual assault is not gender specific.

## Consent

In **Canada**, consent to sexual activity is at the core of the offenses of sexual assault. Consent is the *voluntary* agreement to engage in the sexual activity. It must be *present* at the time of the sexual activity and *continuous*.<sup>10</sup> An individual cannot give consent if she is unconscious as she must have 'a "capable" or operating mind, able to evaluate each and every sexual act committed'.<sup>11</sup> The Supreme Court of Canada rejected the concept of "advanced consent."<sup>12</sup> The accused can argue he had an honest but mistaken belief in consent. However, the Criminal Code has circumscribed this defence. Under section 273.2, the accused must take reasonable steps to ascertain affirmative or actively expressed consent and cannot argue honest but mistaken belief, if the belief in consent arose from the accused's intoxication, recklessness, or wilful blindness.<sup>13</sup>

In **Bangladesh**, the definition of rape is based on lack of consent. It also extends to intercourse where consent has been obtained by putting her in fear of death or hurt.

In **India**, the definition was expanded in the 2013 Amendment:

*Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to*

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<sup>8</sup> Non-consensual anal intercourse between adult males is criminalised under section 377 of the IPC. The Supreme Court in *Navtej Singh Johar and Ors v Union of India* decriminalised consensual anal intercourse. Section 18 (d) of the Transgender Persons (Protection of Rights) Act 2019 makes sexual abuse against transgender persons a specific offence, with punishment extending from six months to two years. This is much lower than the punishment prescribed in section 376 of IPC.

<sup>9</sup> UNDP and International Development Law Organisation, 'A Critical Appraisal of Laws Relating to Sexual Offences in Bangladesh' (2015) [28].

<sup>10</sup> Section 273.1 of the Criminal Code.

<sup>11</sup> *R v JA* [2011] 2 SCR 440 [43].

<sup>12</sup> *ibid.*

<sup>13</sup> See also *R v Ewanchuk* [1999] 1 SCR 330.

*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.*

## Marital Rape

In **Canada**, marital rape has been a criminal offence since 1983. The nature of the relationship between the parties is irrelevant for assessing whether there was consent to the sexual activity in question.<sup>14</sup>

In **Bangladesh**, by contrast, there is a specific exemption for marital rape. Section 375 of the Criminal Code states: ‘Sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape.’ Moreover, in cases where the woman raped is his wife and is between ages twelve and thirteen, the punishment only extends to “two years, or with fine, or with both.”<sup>15</sup>

Reportedly, marital rape is the more prevalent form of rape with 88-89 percent of the Bangladeshi men surveyed in the UN Multi-Country Survey admitted to committing intimate partner rape.<sup>16</sup> This is testimony to the non-recognition of equality for Bangladeshi women and girls in the private sphere. Article 28.2 of the Bangladesh Constitution states that “Women shall have equal rights with men in all spheres of the State and of public life”.<sup>17</sup> This is reflective of the “spheres theory” where women’s right to equality is restricted to the ‘public’ sphere notwithstanding the fact that equality remains elusive even in this constitutionally protected sphere.

Similarly, in **India**, despite the recommendations of the Verma Report, the exemption for marital rape was not removed from the IPC. Section 375 IPC states: ‘Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.’ In 2017, a division bench of the Supreme Court of India in *Independent Thought v Union of India and Anr. WP (Civil) No 382 of 2013* partially read down the marital rape exception, finding that a husband who rapes his minor wife (aged between 15 to 18 years) cannot be exempted from prosecution.

## Rape Shield Provisions

In **Bangladesh**, section 155(4) of the Evidence Act 1872 states that the credit of a witness in a rape prosecution may be impeached by showing that the ‘prosecutrix was of generally immoral character.’ In addition, ‘the court may also take into account any romantic relationship between the accused and the victim or the fact

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<sup>14</sup> *R v JA* (n 11) [64].

<sup>15</sup> Section 376 of The Penal Code, 1860.

<sup>16</sup> E Fulu and others ‘Why Do Some Men Use Violence Against Women and How Can We Prevent It? Summary Report of Quantitative Findings from the United Nations Multi-Country Study on Men and Violence in Asia and the Pacific’ (UNDP, UNFPA, UN Women and UNV 2013) 42.

<sup>17</sup> The Constitution of the People’s Republic of Bangladesh, 1972.

that the victim is a sex worker or of such immoral character as to give in to such intercourse.<sup>18</sup>

In **Canada**, past evidence of sexual history is not admissible to support an argument that the individual is more likely to have consented or is less worthy of belief.<sup>19</sup> However, past evidence is admissible if (i) it is not directed towards these sexual stereotypes *and* is being adduced in relation to a specific alleged sexual activity; (ii) is relevant; and (iii) its probative value is not outweighed by the danger of prejudice.<sup>20</sup> Section 276(3) of the Criminal Code guides the judicial determination of admitting past sexual history evidence that seeks to balance the rights of the accused, the community's interest in increasing the reporting of sexual assault, the need to remove discriminatory biases in the trial process, the prejudice to the complainants dignity, personal security and equality and the risk that evidence may arouse prejudice, sympathy or hostility. However, the rape shield laws which are designed to severely restrict the use of past sexual history evidence have been problematically applied and this type evidence continues to be used to humiliate and undermine women's credibility.<sup>21</sup>

In **India**, in 2002, the Evidence Amendment Act inserted a proviso to section 146 of the Evidence Act, 1872. This amendment disallowed cross-examination of rape victims that raised questions about their general immoral character, which had previously been expressly allowed in Indian procedural law. Parliament in 2003 also repealed section 155(4) of the Evidence Act which permitted the general immoral character of the victim to be admitted in rape trials.<sup>22</sup> The 2013 Amendment introduced new sections (section 53A<sup>23</sup> and a substituted proviso to section 146<sup>24</sup>) to the Evidence Act which help in establishing the principle that a prior sexual relationship with the accused or any other man is not relevant in rape prosecutions.

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<sup>18</sup> UNDP and IDLO (n 9) [15].

<sup>19</sup> Section 276(1) of the Criminal Code.

<sup>20</sup> *R v Darrach* [2000] 2 SCR 443; *R v Goldfinch* [2019] SCC 38.

<sup>21</sup> Elaine Craig, 'Section 276 Misconstrued: The Failure to Properly Interpret and Apply Canada's Rape Shield Provisions' (2016) Canadian Bar Review 45; Karen Busby, Karen Busby, 'Sex Was in the Air: Pernicious Myths and Other Problems with Sexual Violence Prosecutions' in Elizabeth Cormack (ed), *Locating Law* (3<sup>rd</sup> ed, Fernwood 2014)

<sup>22</sup> Prior to its repeal, section 155(4) stated: 'The credit of a witness may be impeached in the following ways by the adverse party, or with the consent of the Court, by the party who calls [her]: when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.'

<sup>23</sup> Section 53A, Evidence Act - In a prosecution for an offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, "section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB or section 376E of the Penal Code (45 of 1860) or for attempt to commit any such offence, where the question of consent is in issue, evidence of the character of the victim or of such person's previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent.

<sup>24</sup> Section 146, Evidence Act – Proviso - [Provided that in a prosecution for an offence under section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB, or section 376E of the Indian Penal Code (45 of 1860) or for attempt to commit any such offence, where the question of consent is an issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the victim as to the general immoral character, or previous sexual experience, of such victim with any person for proving such consent or the quality of consent.]

## Criminal Sanctions

In **Canada**, the death penalty was removed from the Canadian Criminal Code in 1976.

In **India**, however, the law has moved in the opposite direction. The 2013 Amendment included the death penalty for rape committed in particular circumstances, namely causing death or resulting in the persistent vegetative state of the victim (section 376A) and for repeat offenders (section 376E).

The Criminal Law (Amendment) Act, 2018 further increased minimum mandatory sentences. It removed the distinction between rape and aggravated rape, subjecting both to a minimum of ten years.<sup>25</sup> The 2018 Act further expanded the use of the death penalty.<sup>26</sup>

In 2019, an amendment to the Protection of Children from Sexual Offences Act 2012, introduced stringent mandatory minimum punishments and the death penalty for penetrative sexual assault on children. Further, in response to the outrage following a brutal gang-rape and murder in Hyderabad, the state legislature of Andhra Pradesh also amended the Penal Code 1860 to introduce the death penalty for rape (Disha Act).<sup>27</sup> This state amendment to the Penal Code will now require the approval of the President of India under Article 254(2) to come into force in Andhra Pradesh.

In December 2020, the cabinet of the Maharashtra government approved a bill, modelled on the lines of the Andhra Pradesh's legislation.<sup>28</sup> This, too, introduces death penalty for rape. This bill is yet to be cleared by the Maharashtra state legislature. Both these State acts/bills provide for speedy investigation and trial – Andhra Pradesh Act suggests that the investigation should be done within seven working days and the trial to be completed within 14 days. Maharashtra bill suggests a 15-day period for police investigation and a 30-day period for the trial. However, there appears to be no attention paid to whether the police and the judiciary, which already have a high pendency of cases, will be equipped or provided the resources to handle the burden put on them.

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<sup>25</sup> The Criminal Law (Amendment) Act 2018, s. 376.

<sup>26</sup> Now in addition to section 376A and section 376E, section 376(AB) -Punishment for rape on a woman under twelve years of age, and section 376DB – Punishment for gang rape on woman under twelve years of age, can also attract the death penalty.

<sup>27</sup> Abhinay Deshpande, 'Woman veterinarian killed, set afire in Telangana' *The Hindu* (Hyderabad, 28 November 2019) <<https://www.thehindu.com/news/cities/Hyderabad/burnt-body-on-bengaluru-highway-was-of-missing-lady-govt-vet/article30106267.ece>> accessed 15 December 2020; The Andhra Pradesh Disha Bill - Criminal Law (Andhra Pradesh Amendment) Bill 2019 (L.A. Bill No. 47 of 2019; The Andhra Pradesh Disha Bill - Andhra Pradesh Special Courts for Specified Offences against Women and Children Bill, 2019 L.A. Bill No. 46 of 2019) (hereinafter, 'Disha Special Courts Bill'). See Andhra Pradesh Legislative Assembly <<http://aplegislature.org/web/aplegislature/bills>> accessed 15 December 2020

<sup>28</sup> Press Trust of India, 'Death For Crimes Against Women, Children In Proposed Maharashtra Law' *NDTV* (Mumbai, 10 December 2020) <<https://www.ndtv.com/india-news/shakti-act-maharashtra-cabinet-clears-draft-bills-with-death-penalty-for-crimes-against-women-2336606>> accessed 15 December 2020.

In **Bangladesh**, as recently as November 2020, the law was amended to increase the maximum penalty for rape from rigorous imprisonment to include the death penalty.<sup>29</sup> Where the rape victim has died, or gang-rape has been committed, punishment can include the death penalty, life imprisonment and also a fine.<sup>30</sup>

The Bangladesh government has repeatedly responded to the demand for reform in rape laws with provisions for stricter punishments recently including death penalty as the maximum punishment for a rape conviction.<sup>31</sup> The gang-rape of a woman in Noakhali and the subsequent leak of a video of the incident led to large-scale protests erupting all over Bangladesh demanding stricter punishment for the culprits and effective action by government to curtail the rising rapes against women.<sup>32</sup> While protests were brewing over the rape of a student at Dhaka University in January and the gang-rape of a married woman in MC College premises in Sylhet by members of Bangladesh Chhatra League, student wing of the ruling party in Bangladesh, the Noakhali incident brought out the endemic nature of rape even more starkly as the shocking violence was widely witnessed on Facebook.<sup>33</sup> In response, an ordinance was promulgated on 13 October 2020 to increase in punishment for rape to the death penalty, later passed by the parliament on 17 November 2020.

Several studies indicate that death penalty is not an effective deterrent. On the contrary, the death penalty for rapes could induce the rapist to murder the victim in order to destroy the evidence.<sup>34</sup> Over-criminalisation takes the emphasis away from rape as a tool of patriarchy for domination and suppression of women, which violates the human rights of its victims and prevents them from leading a life of equal worth, dignity and freedom.<sup>35</sup>

Considering the situation that the conviction in rape cases is already nominal in Bangladesh and the rate of reporting is very low, the structural and procedural barriers to receiving justice for rape victims cannot be overcome simply by changing the severity of the punishment. The death penalty then seems to be more a knee-jerk reaction to quell the public outrage rather than a serious attempt to engage with rape as 'a grave and systematic human rights violation and gender-based violence against women'.<sup>36</sup>

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<sup>29</sup> Draft Women and Children Repression Prevention (Amendment) Bill, 2020. Ordinance promulgated on October 13, 2020 Passed by the Parliament on November 17, 2020

<sup>30</sup> The Prevention of Oppression Against Women and Children Act, 2000 Amended in 2020

<sup>31</sup> Section 9(1) of The Prevention of Oppression Against Women and Children Act, 2000 was amended in the Women and Children Repression Prevention (Amendment) Bill, 2020 to include death penalty

<sup>32</sup> Hannah Ellis Petersen, 'Bangladesh Approves Death Penalty for Rape After Protests' *The Guardian* (London, 12 October 2020) <<https://www.theguardian.com/world/2020/oct/12/bangladesh-approves-death-penalty-for-after-protests>> accessed 27 December 2020.

<sup>33</sup> Human Rights Watch, 'Bangladesh: Protests Erupt Over Rape Case' <<https://www.hrw.org/news/2020/10/09/bangladesh-protests-erupt-over-rape-case>> accessed 27 December 2020.

<sup>34</sup> Jahnvi Send, 'Seven Reasons Why We Shouldn't Demand the Death Penalty for Rape' (*The Wire*, 31 January 2020) <https://thewire.in/women/rape-death-penalty> accessed 27 December 2020

<sup>35</sup> Susan Brownmiller, *Against Our Will: Women, Men and Rape* (Penguin 1975); Jill Radford, Lynne Harne, and Melissa Friedberg (eds), *Women, Violence and Strategies for Action: Feminist Research Policy and Practice* (Open University Press 2000) 2.

<sup>36</sup> Similar developments noticed in India; Send (n 34).

## Barriers to Accountability of Perpetrators

**Canada** has a sophisticated legal architecture that criminalizes rape and other forms of sexual violence. Despite numerous reforms to the criminal law that were designed to encourage the reporting of sexual violence and to remove patriarchal gender stereotypes, rape continues to be underreported and sexual stereotypes remain deeply embedded within the justice system.

The aims of the reform process that began in the early 1980s was to encourage the reporting of sexual violence and to remove gendered stereotypes within criminal justice system.<sup>37</sup> On both metrics, the law has arguably failed to achieve its goals. First, sexual violence is still woefully underreported to the police.<sup>38</sup> Second, gendered myths, biases, stereotypes, and expectations continue to operate to deny women justice. There remain strong assumptions of consent in the context of intimate partner relationships.<sup>39</sup> Women who do not conform to stereotypes of the ideal victim 'are still treated by police and the courts with suspicion and scepticism.'<sup>40</sup>

Even with a detailed legal framework designed to achieve women's equality, in their application, justice officials can fall back into and perpetuate dangerous prejudices and stereotypes. The rape shield laws which are designed to severely restrict the use of past sexual history evidence have been problematically applied and this type evidence continues to be used to humiliate and undermine women's credibility.<sup>41</sup>

In response to the well-documented failures of criminal law to respond to sexual violence, some feminists have advocated for a victim-centred approach to criminal justice in the context of sexual assault.<sup>42</sup> While reforming the criminal justice system is essential, it will always be an incomplete method for fully redressing sexual violence. The entire enterprise of criminal law is backward looking. It seeks to identify and punish a specific perpetrator of sexual violence. By design it cannot tackle the structures, institutions and cultural norms that underpin sexual violence against women. Rape and other forms of sexual violence are not a series of disconnected events perpetuated against women. Yet the apparatus of criminal law cannot identify let alone redress the gender inequalities as the heart of sexual violence. As Busby observes 'the feminist anti-rape movement has helped us to understand sexual violence as a pervasive, systemic method of creating and

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<sup>37</sup> Kwong-leung Tang, 'Rape Law Reform in Canada' (1998) 42(3) *International Journal of Offender Therapy and Comparative Criminology* 258.

<sup>38</sup> Department of Justice 'Sexual Assault' (2017) <<https://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2017/may02.html>> accessed 30 November 2020.

<sup>39</sup> Ruthy Lazar, 'Negotiating Sex: The Legal Construct of Consent in Cases of Wife Rape in Ontario, Canada' (2010) 22 *Canadian Journal of Women and the Law* 329; Karen Busby, 'Every Breath You Take: Erotic Asphyxiation, Vengeful Wives and Other Enduring Myths in Spousal Assault Prosecutions' (2012) 24(2) *Canadian Journal of Women and the Law* 328.

<sup>40</sup> Lori Haskell and Melanie Randall, 'The Impact of Trauma on Adult Sexual Assault Victims' (2019) Report Submitted to Justice Canada <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3417763](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3417763)> accessed 30 November 2020.

<sup>41</sup> Elaine Craig, 'Section 276 Misconstrued: The Failure to Properly Interpret and Apply Canada's Rape Shield Provisions' (2016) *Canadian Bar Review* 45; Karen Busby, 'Sex Was in the Air: Pernicious Myths and Other Problems with Sexual Violence Prosecutions' in Elizabeth Cormack (ed), *Locating Law* (3<sup>rd</sup> ed, Fernwood 2014)

<sup>42</sup> Haskell and Randall (n 41).

sustaining male dominance over women.<sup>43</sup> The atomised focus, reactive nature and the individualised remedy means the criminal trial process is ill-suited to redress the complex relationship between violence and gender, race, disability, socio-economic class etc.

Transformation of institutional structures and cultural attitudes towards sexual violence may result from a feminist application of the criminal law, but this is not its primary aim. Even the reforms of sexual assault law were only aimed at increasing reporting and removing stereotypes in the prosecuting of violence, not at preventing and eliminating violence.

In the Canadian context, this is most pronounced in respect to Indigenous women. Borrows argues that violence against Indigenous women is inherently linked to 'inequalities Indigenous people face within...Canadian society.'<sup>44</sup> Criminal law is not designed nor well-placed to tackle the deep colonial and racist roots that expose Indigenous women to higher risks of sexual violence. Addressing sexual violence within the paradigm of criminal law also runs the severe risk of denying and excluding Indigenous women from justice as many have troubled relationship with the legal system that has a long history of dehumanising Indigenous peoples.<sup>45</sup>

This is even clearer in Bangladesh and India. The **Bangladesh** government has focussed primarily on the enhancement of punishment for rape. Some legislative reforms such as in-camera trial and time bound procedures were brought in over the last two decades.<sup>46</sup> But most other definitional and procedural issues related to rape remain unaddressed. A recent Human Rights Watch report recognizes that the legislative reforms and the National Action Plan<sup>47</sup> to eradicate violence against women and children by 2025 are far from realised. This is partly due to the 'deeply inadequate' response of the government and partly due to the practical barriers to access to justice faced by sexual violence survivors.<sup>48</sup>

The LGBT community in Bangladesh faces further challenges in accessing justice for the fear of revealing their sexual orientation and gender identity and the transgender

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<sup>43</sup> Busby 'Sex Was in the Air' (n 42).

<sup>44</sup> John Borrows, 'Aboriginal and Treaty Rights and Violence Against Women' (2013) 50(3) Osgoode Hall Law Journal 699.

<sup>45</sup> Tracey Lindberg, Priscilla Campeau and Maria Campbell, 'Indigenous Women and Sexual Assault in Canada' in Elizabeth Sheehy (ed), *Sexual Assault in Canada* (University of Ottawa Press 2011).

<sup>46</sup> The provision for trial procedure is specified in Section 20 (2), (3), (4), (5) of Women and Child Repression Prevention Act 2000 and for in-camera trial in Section 20(6) of Women and Child Repression Prevention Act 2000 (Amendment 2003).

<sup>47</sup> National Action Plan to Prevent Violence Against Women and Children, 2013-2025, <[https://mowca.portal.gov.bd/sites/default/files/files/mowca.portal.gov.bd/page/bcf75e01\\_95e3\\_48ba\\_bfe4\\_3d88ea5f593c/English-National-Action-Plan-to-Prevent-Violence-Against-Women-and-Children-2013-20251.pdf](https://mowca.portal.gov.bd/sites/default/files/files/mowca.portal.gov.bd/page/bcf75e01_95e3_48ba_bfe4_3d88ea5f593c/English-National-Action-Plan-to-Prevent-Violence-Against-Women-and-Children-2013-20251.pdf)> accessed 27 December 2020.

<sup>48</sup> Human Rights Watch, 'I Sleep in My Own Deathbed' <<https://www.hrw.org/report/2020/10/29/i-sleep-my-own-deathbed/violence-against-women-and-girls-bangladesh-barriers>> accessed 27 December 2020.

Hijra community facing harassment and rape by the police.<sup>49</sup> Lesbian women are subjected to forced marriage and rape to punish their sexual identity.<sup>50</sup>

With conviction rates as low as 1 percent, rapists practically face no legal consequences for their actions.<sup>51</sup> Ten percent of the Bangladeshi men interviewed for a 2013 UN Multi-Country Survey admitted to committing rape against a woman or a girl.<sup>52</sup> Even as the prevalent form of rape was that against women, 2-4 percent of the male respondents admitted to perpetrating rape against another man.<sup>53</sup>

It is important to view rape as 'male sexual entitlement' and inspect the underlying structural causes which 'enable men to assert power and control over women (and use violence to do so)' as is evident by the finding that men across the region surveyed enjoyed impunity.<sup>54</sup> An overwhelming majority of men reported not facing any legal consequences (88.1 percent and 95.1 percent in rural and urban respondents respectively)<sup>55</sup> or any negative social consequences or feelings of guilt.

The research and advocacy of anti-carceral feminists points us towards questioning the expansion of punitive state power and the indiscriminate impact of the criminal justice system on poorer and more vulnerable section of the communities.<sup>56</sup> As a corollary to this, rape perpetrated by men of the dominant socio-economic position goes unpunished.<sup>57</sup> Cossman cautions us that a legal victory does not necessarily mean a feminist victory or one that is consistent with international human rights law standards.<sup>58</sup> The carceral push to rape laws especially in the form of heightened punishments such as death penalty need to be rightly opposed. On the other hand, criminal law reform targeting laws which are skewed in favour of the perpetrators remains essential.<sup>59</sup>

So far as **India** is concerned, Kotiswaran argues that any benefits of the 2013 Amendment need to be evaluated alongside costs such as 'lack of sentencing policy

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<sup>49</sup> Global Human Rights Defence and Boys of Bangladesh, 'The Invisible Minority: The Situation of the LGBT community in Bangladesh' (2018) 21

<[https://ghrdorg.files.wordpress.com/2018/10/lgbt\\_report.pdf](https://ghrdorg.files.wordpress.com/2018/10/lgbt_report.pdf)> accessed 27 December 2020.

<sup>50</sup> Ibid 19; Home Office (UK), 'Country Policy and Information Note Bangladesh: Sexual orientation and Gender Identity' (2017) 27 <<https://www.refworld.org/pdfid/59c105de2d.pdf>> accessed 27 December 2020.

<sup>51</sup> Human Rights Watch, 'Bangladesh Erupts' (n 33).

<sup>52</sup> UN Multi-country Survey (n 16).

<sup>53</sup> Ibid 47.

<sup>54</sup> Ibid 35.

<sup>55</sup> Ibid 45.

<sup>56</sup> ME Kim, 'From carceral feminism to transformative justice: Women of color feminism and alternatives to incarceration' (2018) 27 *Journal of Ethnic & Cultural Diversity in Social Work* 219. In the neighbouring country of India, a study has shown that members of the Scheduled Castes (SC) and Scheduled Tribes (ST) are over-represented in India's prisons.: National Dalit Movement for Justice 'Criminal Justice in the Shadow of Caste' (2018) <[http://www.annihilatecaste.in/uploads/downloads/data\\_190118030229\\_21000.pdf](http://www.annihilatecaste.in/uploads/downloads/data_190118030229_21000.pdf)> accessed 27 December 2020.

<sup>57</sup> SM Naznin and Tanjina Sharmin, *Reasons for Low Rate of Conviction in the VAW Cases and Inconsistencies in the Legislative Framework* (BRAC University Press 2015) 21-22.

<<https://core.ac.uk/download/pdf/61806005.pdf>> accessed 27 December 2020.

<sup>58</sup> As cited in Oishik Sircar, 'The Fraught Terrain of Law and Feminism: 20 Years of Subversive Sites (interview with Ratna Kapur and Brenda Cossman)' (2016) 12(1) *Socio-Legal Review* 133.

<sup>59</sup> Pratiksha Baxi, "Carceral Feminism" as Judicial Bias: The Discontents around *State v. Mahmood Farooqui*' (2016) Occasional Paper series Interdisciplinary Law, Hyderabad: CSD.

and its introduction of the death penalty after decades of isolating its use to “the rarest of the rare” cases on constitutional grounds.<sup>60</sup>

Project 39A reports show that the death penalty is being actively used for cases involving murder and sexual violence. In 2019, despite the drop in the total number of death sentences imposed by sessions courts, the proportion of sexual offences in these cases increased from 41.35 percent (67 out of 162) in 2018 to 52.94 percent (54 out of 102 sentences) in 2019.<sup>61</sup> This trend is evident in the High Court as well, with 65.38 percent (17 out of 26) of the confirmations in murders involving sexual offences, with this being the highest number of confirmations by the High Courts in four years.<sup>62</sup> In contrast, offences of murder involving sexual offences comprise only 26.79 percent (15 out of 56) of the commutations by the High Courts.<sup>63</sup> However, the report notes that in the Supreme Court, 64.71 percent (11 out of 17) of the death sentences commuted were cases of murder involving sexual offences, with 57.14 percent (4 out of 7) of the confirmations in cases of murder involving sexual offences.<sup>64</sup> Earlier, the Death Penalty India Report had tried to examine on whom the burden of death penalty falls.<sup>65</sup> The Report noted that the socio-economic profile of prisoners documented during their study demonstrated that these burden have a disparate impact on vulnerable and marginalised sections of society along the lines of economic status, caste, religion, and levels of educational attainment.<sup>66</sup>

The reforms post-2013 have mostly concentrated on increasing the severity of the punishment and on introducing death penalty for more sexual offences. Through such an emphasis on over-criminalisation, the government attempts to divert the focus from the poor implementation of the laws. Baxi noted the common phenomenon wherein survivors of rape are routinely pressurized to turn hostile, through techniques of violence, intimidation and social coercion.<sup>67</sup> A mere broadening of the definition of rape and introducing stringent punishment is not going to change the problematic practices around rape trials.<sup>68</sup> The Verma Committee based its recommendations on the bedrock of concepts such as women’s bodily integrity and sexual autonomy. However, the focus of the post-2013 amendments is on expanding the Indian state’s carceral imagination of sexual violence. Therefore, there is an urgent need to challenge the increasingly punitive approach adopted by the state in responding to sexual violence.

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<sup>60</sup> Prabha Kotiswaran, ‘The Carceral Politics of Sexual Violence: Notes on a Political Economy of Criminal Law’ (2019) Second Annual Lecture in Criminal Law <<https://www.project39a.com/annual-lecture-2>> accessed 15 December 2020.

<sup>61</sup> Project 39A, ‘Death Penalty in India Annual Statistics Report 2019’ (National Law University Delhi 2020) <<https://static1.squarespace.com/static/5a843a9a9f07f5ccd61685f3/t/5e25a02b5dfafe47d399d2ad/1579524149035/Project+39A+Annual-Statistics-04-PG-Web.pdf>> accessed 15 December 2020.

<sup>62</sup> *ibid.*

<sup>63</sup> *ibid.*

<sup>64</sup> *ibid.*

<sup>65</sup> Anup Surendranath, ‘*Death Penalty in India Report*’ (National Law University Delhi 2016) <<https://static1.squarespace.com/static/5a843a9a9f07f5ccd61685f3/t/5e25a02b5dfafe47d399d2ad/1579524149035/Project+39A+Annual-Statistics-04-PG-Web.pdf>> accessed 15 December 2020.

<sup>66</sup> *ibid.*

<sup>67</sup> Baxi (n 60).

<sup>68</sup> Preeti Pratishruti Dash, ‘Rape Adjudication in India in the Aftermath of the Criminal Law Amendment Act, 2013: Findings from Trial Courts of Delhi’ (2020) *Indian Law Review*.

## A Human Rights Approach to Rape

A focus on human rights and equality in evaluating State's response to rape will help in viewing rape as a tool of patriarchy which dominates and suppresses women and violates their right to live with dignity, equality and freedom. Looking at rape through the lens of equality and human rights will help us in understanding the underlying causes and driving forces behind rape and the structural barriers that women face, which would prepare us in identifying the right framework to combat it. A human rights and equality framework would enable us to have further conversations on eliminating sexist prejudices from investigation and trial proceedings, as well as discussions on the role of carceral punishment for sexual offences. This would entail, for example in Bangladesh, a complete overhaul of its rape laws which places the victim as a rights bearer whose dignity, equality and liberty is at the forefront of both substantive and procedural laws concerning rape.

A human rights-based approach to sexual violence against women offers a promising framework to not only redress individual incidents but to transform institutions and structures the underpin violence. The inquiry report of the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee) into murdered and missing Indigenous women in Canada stands out in international human rights law as a best practice example.<sup>69</sup> Rather than focusing on accountability for individual acts of violence, the inquiry procedure seeks to identify and remedy grave or systematic violations of women's rights. Campbell argues, that 'by focusing on the severity and magnitude of [gender-based violence against women], the CEDAW Committee can engage from a multi-faceted perspective with laws, policies, institutions, norms and actors that perpetuate' violence.<sup>70</sup> The CEDAW Committee's report placed Indigenous women's human rights at the centre of its analysis. Using an equality framework, it diagnosed gender and racist stereotypes within the reporting, investigating and prosecuting of violence, it also investigated how a wide range of laws and policies in broad fields of life—education, substance abuse, housing, child welfare, poverty and transportation—contributed to high rates of violence against Indigenous women. The CEDAW Committee proposed thirty-eight recommendations to target these underlying causes. At the national level the national inquiry into murdered and missing Indigenous women also examined the systemic causes of sexual violence and the role of institutional policies and practices and provided a series of detailed recommendations.<sup>71</sup>

## Annex 1-Canada

The word "rape" is not used in Canadian criminal law. Reflecting the fact that violence against women exists along a continuum, the Criminal Code instead uses the term "sexual assault." It defines sexual assault as the intentional sexual touching

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<sup>69</sup> CEDAW Committee, 'Inquiry Procedure Canada' (n 2).

<sup>70</sup> Campbell (n 3) 85.

<sup>71</sup> 'Reclaiming Power and Place' (n 4).

without consent.<sup>72</sup> This approach not only criminalises rape but also other forms of sexual violence. There are three categories of offenses in the Criminal Code: (i) sexual assault; (ii) sexual assault with a weapon, threats to a third party of causing bodily harm; and (iii) aggravated sexual assault (wounds, maims, disfigures or endangers).<sup>73</sup>

Consent to sexual activity is at the core of these offenses. Consent is the *voluntary* agreement to engage in the sexual activity. It must be *present* at the time of the sexual activity and *continuous*.<sup>74</sup> An individual cannot give consent if she is unconscious as she must have ‘a “capable” or operating mind, able to evaluate each and every sexual act committed’.<sup>75</sup> The Supreme Court of Canada rejected the concept of “advanced consent.”<sup>76</sup> The accused can argue he had an honest but mistaken belief in consent. However, the Criminal Code has circumscribed this defence. Under section 273.2, the accused must take reasonable steps to ascertain affirmative or actively expressed consent and cannot argue honest but mistaken belief, if the belief in consent arose from the accused’s intoxication, recklessness, or wilful blindness.<sup>77</sup>

The nature of the relationship between the parties is irrelevant for assessing whether there was consent to the sexual activity in question and since 1983, marital rape has been a criminal offense.<sup>78</sup>

Past evidence of sexual history is not admissible to support an argument that the individual is more likely to have consented or is less worthy of belief.<sup>79</sup> However, if the past evidence is not directed towards these sexual stereotypes *and* is being adduced in relation to a specific alleged sexual activity, is relevant and its probative value is not outweighed by the danger of prejudice it is admissible.<sup>80</sup> Section 276(3) guides the judicial determination of admitting past sexual history evidence that seeks to balance the rights of the accused, the community’s interest in increasing the reporting of sexual assault, the need to remove discriminatory biases in the trial process, the prejudice to the complainants dignity, personal security and equality and the risk that evidence may arise prejudice, sympathy or hostility

## Annex 2-India

India- 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

<sup>72</sup> Section 265 of the Criminal Code (RSC 1985 c C-46); *R v Chase* [1987] 2 SCR 293.

<sup>73</sup> Section 271-73 of the Criminal Code.

<sup>74</sup> Section 273.1 of the Criminal Code.

<sup>75</sup> *R v JA* [2011] 2 SCR 440 [43].

<sup>76</sup> *ibid.*

<sup>77</sup> See also *R v Ewanchuk* [1999] 1 SCR 330.

<sup>78</sup> *R v JA* [64].

<sup>79</sup> Section 276(1) of the Criminal Code.

<sup>80</sup> *R v Darrach* [2000] 2 SCR 443; *R v Goldfinch* [2019] SCC 38.

**do not have a rape classification) by providing full translated transcripts of the relevant articles of the Criminal code and the Criminal procedure code.**

### **INDIAN PENAL CODE 1860**

**Section 375. 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 ~ 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.

Fourth/y.—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.'

**Section 376. Punishment for Rape - 1.** Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.

2. Whoever —

a. being a police officer, commits rape —

i. within the limits of the police station to which such police officer is appointed; or station house; or

ii. in the premises of any

iii. on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

b. being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

c. being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or

d. being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or

e. being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

f. being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

g. commits rape during communal or sectarian violence; or

h. commits rape on a woman knowing her to be pregnant; or

*i. \*Clause (i) omitted by section 4 of Act 22 of 2018.*

j. commits rape, on a woman incapable of giving consent; or

k. being in a position of control or dominance over a woman, commits rape on such woman; or

l. commits rape on a woman suffering from mental or physical disability; or

m. while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

n. commits rape repeatedly on the same woman,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Explanation —For the purposes of this sub-section —

a. "armed forces" means the naval, military and air forces and includes any member of the Armed Forces constituted under any Jaw for the time being in force, including the paramilitary forces and any auxiliary forces that are under the control of the Central Government, or the State Government;

b. "hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation;

c. "police officer" shall have the same meaning as assigned to the expression "police" under the Police Act, 1861;

d. "women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or an institution called by any other name, which is established and maintained for the reception and care of women or children.

(3) Whoever, commits rape on a woman under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim.

Provided further that any fine imposed under this sub-section shall be paid to the victim.

**Section 376A – Punishment for causing death or resulting in persistent vegetative state of victim** - Whoever, commits an offence punishable under sub-section (1) or sub-section (2) of section 376 and in the course of such commission inflicts an injury which causes the death<sup>1</sup> of the woman or causes the woman to be in a persistent vegetative state, shall be punished with

rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, or with death.

**Section 376AB – Punishment for rape on woman under twelve years of age** - Whoever, commits rape on a woman under twelve years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine or with death:<sup>1</sup>

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.

**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<sup>1</sup>.

Explanations

In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375.

**Section 376C – Sexual intercourse by a person in authority –**

Whoever, being—

(a) in a position of authority<sup>1</sup> or in a fiduciary relationship; or

(b) a public servant; or

(c) superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force, or a women's or children's institution; or

(d) on the management of a hospital or being on the staff of a hospital

abuses such position or fiduciary relationship to induce or seduce any woman either in his custody or under his charge or present in the premises to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than 5 years, but which may extend to ten years, and shall also be liable to fine<sup>1</sup>.

Explanations

In this section, "sexual intercourse" shall mean any of the acts mentioned in clauses (a) to (d) of section 375.

For the purposes of this section, Explanation 1 to section 375 shall also be applicable.

"Superintendent", in relation to a jail, remand home or other place of custody or a women's or children's institution, includes a person holding any other

office in such jail, remand home, place or institution by virtue of which such person can exercise any authority or control over its inmates.  
The expressions "hospital" and "women's or children's institution" shall respectively have the same meaning as in Explanation to sub-section (2) of section 376.

**Section 376D – Gang Rape** - Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons<sup>1</sup> shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine; Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim;  
Provided further that any fine imposed under this section shall be paid to the victim.

**Section 376DA – Punishment for gang rape on woman under sixteen years of age** - Where a woman under sixteen years of age is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine:<sup>1</sup>  
Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim;  
Provided further that any fine imposed under this section shall be paid to the victim.

**Section 376DB – Punishment for gang rape on woman under twelve years of age** - Where a woman under twelve years of age is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine, or with death:<sup>1</sup>  
Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim;  
Provided further that any fine imposed under this section shall be paid to the victim.

**Section 376E – Punishment for repeat offenders** - Whoever has been previously convicted of an offence punishable under section 376 or section 376A or section 376AB or section 376D or section 376DA or section 376DB and is subsequently convicted of an offence punishable under any of the said sections shall be punished with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life, or with death.

**PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT 2012**  
**(Latest Amendment in 2012)**

**Section 3 – Penetrative Sexual Act**

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.

**Section 4 – Punishment for Penetrative Sexual Act**

- (1) Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.
- (2) Whoever commits penetrative sexual assault on a child below sixteen years of age shall be punished with imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine.
- (3) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.

**Section 5 – Aggravated Penetrative Sexual Assault**

- (a) Whoever, being a police officer, commits penetrative sexual assault on a child --
  - (i) within the limits of the police station or premises at which he is appointed; or
  - (ii) in the premises of any station house, whether or not situated in the police station, to which he is appointed; or
  - (iii) in the course of his duties or otherwise; or
  - (iv) where he is known as, or identified as, a police officer; or
- (b) whoever being a member of the armed forces or security forces commits penetrative sexual assault on a child--
  - (i) within the limits of the area to which the person is deployed; or
  - (ii) in any areas under the command of the forces or armed forces; or
  - (iii) in the course of his duties or otherwise; or
  - (iv) where the said person is known or identified as a member of the security or armed forces; or
- (c) whoever being a public servant commits penetrative sexual assault on a child; or
- (d) whoever being on the management or on the staff of a jail, remand home, protection home, observation home, or other place of custody or care and

protection established by or under any law for the time being in force, commits penetrative sexual assault on a child, being inmate of such jail, remand home, protection home, observation home, or other place of custody or care and protection; or

(e) whoever being on the management or staff of a hospital, whether Government or private, commits penetrative sexual assault on a child in that hospital; or

(f) whoever being on the management or staff of an educational institution or religious institution, commits penetrative sexual assault on a child in that institution; or

(g) whoever commits gang penetrative sexual assault on a child.

Explanation.-- When a child is subjected to sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to have committed gang penetrative sexual assault within the meaning of this clause and each of such person shall be liable for that act in the same manner as if it were done by him alone; or

(h) whoever commits penetrative sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or

(i) whoever commits penetrative sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or

(j) whoever commits penetrative sexual assault on a child, which--

(i) physically incapacitates the child or causes the child to become mentally ill as defined under clause (b) of section 2 of the Mental Health Act, 1987 (14 of 1987) or causes impairment of any kind so as to render the child unable to perform regular tasks, temporarily or permanently;

(ii) in the case of female child, makes the child pregnant as a consequence of sexual assault;

(iii) inflicts the child with Human Immunodeficiency Virus or any other life threatening disease or Infection which may either temporarily or permanently impair the child by rendering him physically incapacitated, or mentally ill to perform regular tasks;

(iv) causes death of the child; or

(k) whoever, taking advantage of a child's mental or physical disability, commits penetrative sexual assault on the child; or

(l) whoever commits penetrative sexual assault on the child more than once or repeatedly; or

(m) whoever commits penetrative sexual assault on a child below twelve years; or

(n) whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child; or

(o) whoever being, in the ownership, or management, or staff, of any institution providing services to the child, commits penetrative sexual assault on the child; or

(p) whoever being in a position of trust or authority of a child commits penetrative sexual assault on the child in an institution or home of the child or anywhere else; or

(q) whoever commits penetrative sexual assault on a child knowing the child is pregnant; or

- (r) whoever commits penetrative sexual assault on a child and attempts to murder the child; or
- (s) whoever commits penetrative sexual assault on a child in the course of communal or sectarian violence or during any natural calamity or in similar situations; or
- (t) whoever commits penetrative sexual assault on a child and who has been previously convicted of having committed any offence under this Act or any sexual offence punishable under any other law for the time being in force; or
- (u) whoever commits penetrative sexual assault on a child and makes the child to strip or parade naked in public, is said to commit aggravated penetrative sexual assault.

### **Section 6 – Punishment for Aggravated Penetrative Sexual Assault**

- (1) Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine, or with death.
- (2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.

**Section 7 – Sexual Assault** - Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.

**Section 8 – Punishment for Sexual Assault** - Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine.

### **Section 9 – Aggravated Sexual Assault**

- (a) Whoever, being a police officer, commits sexual assault on a child--
  - (i) within the limits of the police station or premises where he is appointed; or
  - (ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or
  - (iii) in the course of his duties or otherwise; or
  - (iv) where he is known as, or identified as a police officer; or
- (b) whoever, being a member of the armed forces or security forces, commits sexual assault on a child--
  - (i) within the limits of the area to which the person is deployed; or
  - (ii) in any areas under the command of the security or armed forces; or
  - (iii) in the course of his duties or otherwise; or
  - (iv) where he is known or identified as a member of the security or armed forces; or
- (c) whoever being a public servant commits sexual assault on a child; or
- (d) whoever being on the management or on the staff of a jail, or remand home or protection home or observation home, or other place of custody or

care and protection established by or under any law for the time being in force commits sexual assault on a child being inmate of such jail or remand home or protection home or observation home or other place of custody or care and protection; or

(e) whoever being on the management or staff of a hospital, whether Government or private, commits sexual assault on a child in that hospital; or

(f) whoever being on the management or staff of an educational institution or religious institution, commits sexual assault on a child in that institution; or

(g) whoever commits gang sexual assault on a child.

Explanation.-- when a child is subjected to sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to have committed gang sexual assault within the meaning of this clause and each of such person shall be liable for that act in the same manner as if it were done by him alone; or

(h) whoever commits sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or

(i) whoever commits sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or (j) whoever commits sexual assault on a child, which--

(i) physically incapacitates the child or causes the child to become mentally ill as defined under clause (l) of section 2 of the Mental Health Act, 1987 (14 of 1987) or causes impairment of any kind so as to render the child unable to perform regular tasks, temporarily or permanently; or

(ii) inflicts the child with Human Immunodeficiency Virus or any other life threatening disease or infection which may either temporarily or permanently impair the child by rendering him physically incapacitated, or mentally ill to perform regular tasks; or

(k) whoever, taking advantage of a child's mental or physical disability, commits sexual assault on the child; or

(l) whoever commits sexual assault on the child more than once or repeatedly; or

(m) whoever commits sexual assault on a child below twelve years; or

(n) whoever, being a relative of the child through blood or adoption or marriage or guardianship or in foster care, or having domestic relationship with a parent of the child, or who is living in the same or shared household with the child, commits sexual assault on such child; or

(o) whoever, being in the ownership or management or staff, of any institution providing services to the child, commits sexual assault on the child in such institution; or

(p) whoever, being in a position of trust or authority of a child, commits sexual assault on the child in an institution or home of the child or anywhere else; or

(q) whoever commits sexual assault on a child knowing the child is pregnant; or

(r) whoever commits sexual assault on a child and attempts to murder the child; or

(s) whoever commits sexual assault on a child in the course of 1[ communal or sectarian violence or during any natural calamity or in any similar situations]; or

(t) whoever commits sexual assault on a child and who has been previously convicted of having committed any offence under this Act or any sexual

offence punishable under any other law for the time being in force; or (u) whoever commits sexual assault on a child and makes the child to strip or parade naked in public, is said to commit aggravated sexual assault.  
(v) whoever persuades, induces, entices or coerces a child to get administered or administers or direct anyone to administer, help in getting administered any drug or hormone or any chemical substance, to a child with the intent that such child attains early sexual maturity.

### **Section 10 – Punishment for Aggravated Sexual Assault**

Whoever, commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.

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

### **a) Gender specific, covering women only**

YES AND NO

The Indian Penal Code provision (Section 375) is gender specific. However, the wording of those provisions in 'Protection of Children from Sexual Offences Act, 2012, is gender-neutral. Therefore, for women above the age of 18 years, the provision is gender-specific.

Non-consensual anal intercourse between adult males is criminalised under section 377 of the Indian Penal Code. The Supreme Court in *Navtej Singh Johar and Ors. v. Union of India* decriminalised consensual anal intercourse. Section 18 (d) of the Transgender Persons (Protection of Rights) Act 2019 makes sexual abuse against transgender persons a specific offence, with punishment extending from six months to two years. This is much lower than the punishment prescribed in section 376 of IPC.

### **b) Gender neutral, covering all persons**

YES AND NO (Refer to above)

### **c) Based on the lack of consent of victim**

YES, for women above the age of 18 years. Please refer to section 375. The age of consent is 18 years old.

### **d) Based on the use of force or threat**

NO, this is specified in Explanation 2 of section 375.

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.**

### **e) Some combination of the above**

### **f) Does it cover only vaginal rape?**

NO.

Section 375 of the Indian Penal Code covers the following –

- 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 ~ 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...

Section 3 of the Protection of Children from Sexual Offences Act covers:

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.

**g) Does it cover all forms of penetration?**

YES, it covers various forms of penetration.

**h) Is marital rape in this provision explicitly included?**

NO.

**i) Is the law silent on marital rape?**

NO. The law specifies a marital rape exemption.

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

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

YES (Explicitly excluded)

Section 375, Exception 2 of the IPC states: Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

In 2017, a division bench of the Supreme Court of India in *Independent Thought v. Union of Indian and Anr.* WP (Civil) No 382 of 2013 partially read down the marital rape exception, finding that a husband who rapes his minor wife (aged between 15 to 18 years) cannot be exempted from prosecution.

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?

Eighteen Years

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

No Information

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

#### INDIAN PENAL CODE

Section 376 of the Indian Penal Code provides for punishment in case of rape.

Section 376(1) provides that –

376 (1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.

Section 376(2) provide that in cases falling under sub-section 2 of section 376 (i.e., sub-clause (a) to (n), refer to section 376(2) in the first question), then the punishment would be - shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Section 376(3) provides that whoever, commits rape on a woman under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Punishment for gang-rape (section 376D) ranges from rigorous imprisonment for a term which shall not be less than twenty years but which may extend to life, which shall mean imprisonment for the remainder of that person's natural life, and with fine.

Sections 376(A) – Punishment for causing death or resulting in persistent vegetative state of victim, section 376(AB) -Punishment for rape on a woman under twelve years of age, section 376DB – Punishment for gang rape on woman under twelve years of age, section 376E – Punishment for repeat offenders, can also attract the death penalty.

#### PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT

#### Section 4 – Punishment for Penetrative Sexual Act

(1) Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever commits penetrative sexual assault on a child below sixteen years of age shall be punished with imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine.

(3) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.

#### Section 6 – Punishment for Aggravated Penetrative Sexual Assault

(1) Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person and shall also be liable to fine, or with death.

(2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.

Section 8 – Punishment for Sexual Assault - Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine.

#### Section 10 – Punishment for Aggravated Sexual Assault

Whoever, commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine.

### **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?**

#### INDIAN PENAL CODE

Various provisions of section 376 (as seen above) provide that fine must be made. Section 376 (3) – punishment for rape on a woman under sixteen years of age, section 376 (D) – Gang Rape, section 376DA – Punishment for gang rape on woman under sixteen years of age, section 376DB – Punishment for gang rape on woman under twelve years of age, specify that the ‘such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim’ and that ‘any fine imposed shall be paid to the victim’.

## PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT (POCSO Act)

Section 4(3) and 6(3) of this Act specify that 'the fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.'

Rule 9 of POCSO Rules 2020 provides for Compensation to victims. It provides such interim compensation paid to the child shall be adjusted against the final compensation, if any, after registration of FIR. The power is given to special court to award compensation at various stages. Where the Special Court, under sub-section (8) of section 33 of the Act read with sub-sections (2) and (3) of section 357A of the Code of Criminal Procedure, 1973 (2 of 1974) makes a direction for the award of compensation to the victim, it shall take into account all relevant factors relating to the loss or injury caused to the victim. The compensation should be paid from by the State Government from the Victims Compensation Fund or other scheme or fund established by it for the purposes of compensating and rehabilitating victims under section 357A of the Code of Criminal Procedure, 1973 or any other law for the time being in force, or, where such fund or scheme does not exist, by the State Government, which is to be paid within 30 days of receipt of such order.

### Aggravating and mitigating circumstances

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

YES

India does not have any legal provisions pertaining to sentencing (in general, or, for rape). However, section 376(2) provides for aggravating circumstances wherein the punishment is higher.

#### **9. Is rape by more than one perpetrator an aggravating circumstance?**

YES. Section 376D – Gang Rape, section 376DA – Punishment for gang rape on woman under sixteen years of age, section 376DB – Punishment for gang rape on woman under twelve years of age, provide for higher punishment.

#### **10. 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. Example, section 376 (2) (a)/(b)/(c)/(d)/(e)/(f)/(k)/(l)

376 (2). Whoever —

a. being a police officer, commits rape —

i. within the limits of the police station to which such police officer is appointed; or station house; or

ii. in the premises of any

iii. on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

b. being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

c. being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or

- d. being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or
- e. being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or
- f. being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or
- k. being in a position of control or dominance over a woman, commits rape on such woman; or
- l. commits rape on a woman suffering from mental or physical disability; or

shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

**11. Is rape by spouse or intimate partner an aggravating circumstance?**

NO. There is a marital rape exemption.

**12. Does the law foresee mitigating circumstances for the purposes of punishment? YES/NO If yes, please specify.**

Not clear. India has no legal provisions which specify sentencing guidelines. Courts consider a range of mitigating and aggravating circumstance. In terms of legal provisions, punishment in case of sexual intercourse by husband upon his wife on separation without her consent, is punishable by a term which shall not be less than two years but which may extend to seven years (section 376B)

**13. 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

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

YES, there are many cases where the complainant withdraws from supporting the prosecution, or turns hostile, as she has reconciled with the accused, or has married the accused.

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

- 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**

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

YES

**17. Is rape reported to the police prosecuted ex parte (private prosecution)?**

NO

**18. Are plea bargain or “friendly settlement” of a case allowed in cases of rape of women?**

NO

Section 265A of the Code of Criminal Procedure specifies that plea bargaining is not allowed in cases for which the punishment of death or imprisonment for life or imprisonment for a term exceeding seven years is provided by the law. Section 265A, also, states that plea bargaining is not applicable where the offence has been committed against a woman or a child below the age of fourteen years.

Hence, plea bargaining is not allowed in cases of rape of a woman or a child.

**19. Are plea bargain or “friendly settlement” of a case allowed in cases of rape of children?**

NO. Refer to the above answer.

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

There is no limitation period for criminal offences.

**21. Are there provisions allowing a child who was the victim of rape and to report it after reaching adulthood?**

There is no limitation period in criminal cases.

**22. 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 legal provisions do not specify as such. The Supreme Court case, *State Of Himachal Pradesh vs Raghubir Singh* (1993) (2) SCC 622, provides that there is no legal compulsion to look for corroboration of the evidence of the woman. The Court held that conviction can be recorded on the sole testimony of the prosecutrix (woman), if her evidence inspires confidence, and there is absence of circumstances which militate against her veracity.

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

YES

### INDIAN EVIDENCE ACT

In 2002, the Indian Evidence Amendment Act inserted a proviso to section 146 of the IEA, 1872. This amendment disallowed cross-examination of rape victims that raised questions about their general immoral character, which had previously been expressly allowed in Indian procedural law. The Parliament in 2003 also repealed section 155(4) of the IEA which permitted the general immoral character of the victim to be admitted in rape trials. The 2013 law inserted section 53A in the Indian Evidence Act which treats evidence of the victim’s character and past sexual behaviour as irrelevant in establishing consent in certain criminal offences including rape.

Section 53, Indian Evidence Act - In a prosecution for an offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, "section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB or section 376E of the Indian Penal Code (45 of 1860) or for attempt to commit any such offence, where the question of consent is in issue, evidence of the character of the victim or of such person's previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent

Section 146, Indian Evidence Act – Proviso - [Provided that in a prosecution for an offence under section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB, or section 376E of the Indian Penal Code (45 of 1860) or for attempt to commit any such offence, where the question of consent is an issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the victim as to the general immoral character, or previous sexual experience, of such victim with any person for proving such consent or the quality of consent.]

### INDIAN PENAL CODE

Section 228A of the Indian Penal Code also makes it an offence to disclose the identity of a rape victim.

Section 228A, Indian Penal Code - Disclosure of identity of the victim of certain offences, etc — (1) Whoever prints or publishes the name or any matter which may make known the identity of any person against whom an [offence under Section 376, [Section 376-A, Section 376-AB, Section 376-B, Section 376-C, Section 376-D, Section 376-DA, Section 376-DB] or Section 376-E] is alleged or found to have been committed (hereafter in this section referred to as the victim) shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

(2) Nothing in sub-section (1) extends to any printing or publication of the name or any matter which may make known the identity of the victim if such printing or publication is.

(a) by or under the order in writing of the officer-in-charge of the police station or the police officer making the investigation into such offence acting in good faith for the purposes of such investigation; or

(b) by, or with the authorizations in writing of, the victim; or

(c) where the victim is dead or minor or of unsound mind, by, or with the authorization in writing of, the next of kin of the victim.

Provided that no such authorizations shall be given by the next of kin to any body other than the Chairman or the Secretary, by whatever name called, of any recognised welfare institution or organization.

Explanation — For the purpose of this sub-section, "recognised welfare institution or organization" means a social welfare institution or organization recognised in this behalf by the Central or State Government.

(3) Whoever prints or publishes any matter in relation to any proceeding before a Court with respect to an offence referred to in sub-section (1) without the previous permission of such Court shall be punished with imprisonment of

either description for a term which may extend to two years and shall also be liable to fine.

Explanation — The printing or publication of the judgment of any High Court or the Supreme Court does not amount to an offence within the meaning of this section.

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

Please see (23). No other provisions to avoid re-victimization.

**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.

Year	Number of Incidents of Rape against Woman & Child	Conviction rate
2019 <sup>81</sup>	32033 incidents (resulting in 32260 victims; 27283 of these were women above the age of 18 years, 4977 were below the age of 18)	27.8 (The conviction rate is 25.6 for women above 18 years of age, 35.3 for girls below 18 years of age)  The conviction rate is 63.2 for murder with rape/gang rape
2018 <sup>82</sup>	33356 incidents (resulting in 33977 complainants/victims; 24544 were women above the age of 18 years and 9433 were girls below the age of 18 years)	27.2 (The conviction rate is 25.6 for women above 18 years of age, 31.5 for girls below 18 years of age)  The conviction rate is 61.2 for murder with rape/gang rape.
2017 <sup>83</sup>	32559 incidents (resulting in 33658 complainants/victims; 23437 are women above the age of 18 years and 10221 are girls below the age of 18 years)	32.2 (The conviction rate is 31.5 for women above 18 years of age, 34.2 for girls below 18 years of age)

<sup>81</sup> <https://ncrb.gov.in/sites/default/files/CII%202019%20Volume%201.pdf>.

<sup>82</sup> [https://ncrb.gov.in/sites/default/files/Crime%20in%20India%202018%20-%20Volume%201\\_3.pdf](https://ncrb.gov.in/sites/default/files/Crime%20in%20India%202018%20-%20Volume%201_3.pdf)

<sup>83</sup> [https://ncrb.gov.in/sites/default/files/Crime%20in%20India%202017%20-%20Volume%201\\_0.pdf](https://ncrb.gov.in/sites/default/files/Crime%20in%20India%202017%20-%20Volume%201_0.pdf)

		The conviction rate is 57.9 for murder with rape/gang rape.
2016 <sup>84</sup>	38947 incidents (resulting in 39068 complainants/victims)	25.5
2015 <sup>85</sup>	34651 incidents (resulting in 34771 complainants/victims)	29.4

Year	Number of Incidents of Attempt to Rape	Conviction Rate
2019	3944 incidents (resulting in 4038 complainants/victims; 3690 were women above 18 years of age, 348 were girls below 18 years of age)	28.9 (The conviction rate is 28.5 for women above 18 years of age, 32 for girls below 18 years of age)
2018	4097 incidents (resulting in 4157 complainants/victims; 3706 are women above the age of 18 years, and 451 are girls below the age of 18 years))	25.2 (The conviction rate is 23.4 for women above 18 years of age, 36.6 for girls below 18 years of age)
2017	4154 incidents (resulting in 4372 complainants/victims; 3907 are women above the age of 18 years, and 465 are girls below the age of 18 years)	26.8 (The conviction rate is 26 for women above 18 years of age, 36.6 for girls below 18 years of age)
2016	5729 incidents (resulting in 5732 complainants/victims)	19.7

<sup>84</sup>[https://ncrb.gov.in/sites/default/files/crime\\_in\\_india\\_table\\_additional\\_table\\_chapter\\_reports/Table%203A.2.pdf](https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%203A.2.pdf)

[https://ncrb.gov.in/sites/default/files/crime\\_in\\_india\\_table\\_additional\\_table\\_chapter\\_reports/Table%203A.7.pdf](https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%203A.7.pdf)

<sup>85</sup>[https://ncrb.gov.in/sites/default/files/crime\\_in\\_india\\_table\\_additional\\_table\\_chapter\\_reports/Table%2005.2\\_2015.pdf](https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%2005.2_2015.pdf);

[https://ncrb.gov.in/sites/default/files/crime\\_in\\_india\\_table\\_additional\\_table\\_chapter\\_reports/Table%205.6\\_2015.pdf](https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%205.6_2015.pdf)

2015	4437 incidents (Resulting in 4442 complainants/victims)	19.8
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## 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.

## 27. Annex 2-Bangladesh

Bangladesh- Questionnaire on criminalization and prosecution of rape

Definition and scope of criminal law provisions

**28. 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 PENAL CODE, 1860 (“PENAL CODE”)

### Of Rape

#### **Section 375. Rape.**

**375.** A man is said to commit “rape” who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions:

Firstly. Against her will.

Secondly. Without her consent.

Thirdly. With her consent, when her consent has been obtained by putting her 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 or without her consent, when she is under fourteen years of age.  
**Explanation.** Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception. Sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape.

## **Section 376. Punishment for Rape.**

**376.** Whoever commits rape shall be punished with [imprisonment] for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, unless the woman raped is his own wife and is not under twelve years of age, in which case he shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

### **Miscellaneous**

#### **Section 100. When the right of private defence of the body extends to causing death**

**100.** The right of private defence of the body extends, under the restrictions mentioned in

the last preceding section, to the voluntary causing of death or of any other harm to the

assailant, if the offence which occasions the exercise of the right be of any of the

descriptions hereinafter enumerated, namely:-

...

Thirdly.-An assault with the intention of committing rape;

...

- THE PREVENTION OF OPPRESSION AGAINST WOMEN AND CHILDREN ACT, 2000 AMENDED IN 2020 (“2000 ACT”)

**Section 2.** Definition: Unless different intention appears from the subject or context, in this Act-

...

e) ‘Rape’ means rape stated under section 375 of the Penal Code 1860 (Act XLV of 1860) subject to section 9 under this Act;

...

#### **Section 9. Punishment for rape or death in consequence of rape:**

i. Whoever commits rape with a woman or a child, shall be punished with rigorous imprisonment for life and with fine.<sup>86</sup>

Explanation: Whoever has sexual intercourse without lawful marriage with a woman not being under fourteen years of age, against her will or with her

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<sup>86</sup> Section 9(1) punishment amended to include Death Penalty as the maximum punishment in Rape Cases

Draft Women and Children Repression Prevention (Amendment) Bill, 2020; Ordinance promulgated on October 13, 2020, Passed by the Parliament on November 17, 2020

consent obtained, by putting her in fear or by fraud, or with a woman not being above fourteen years of age with or without her consent, he shall be said to commit rape.

ii. If in consequence of rape or any act by him after rape, the woman or the child so raped, died later, the man shall be punished with death or with transportation for life and also with fine not exceeding one lac taka.

iii. If more than one man rape a woman or a child and that woman or child dies or is injured in consequences of that rape, each of the gang shall be punished with death or rigorous imprisonment for life and also with fine not exceeding one lac taka.

iv. Whoever attempts on a woman or a child

a) To cause death or hurt after rape, he shall be punished with rigorous imprisonment for life and also with fine.

b) To commit rape, he shall be punished with imprisonment for either description, which may extend to ten years but not less than five years rigorous imprisonment and also with fine.

v. If a woman is raped in the police custody, each and every person, under whose custody the rape was committed and they all were directly responsible for safety of that woman, shall be punished for failure to provide safety, unless otherwise proved, with imprisonment for either description which may extend to ten years but not less than five years of rigorous imprisonment and also with fine.

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

l) Gender specific, covering women only- YES

Hijras/ transgender persons are not recognized expressly as potential victims of rape under the Penal Code or the 2000 Act . “The Penal Code as well as the Act of 2000 does not expressly recognize transgender persons or hermaphrodites (generally known as ‘hijra’ in Bengali) as potential victims of sexual offences.<sup>14</sup> At the same time, under the same laws, transgender persons or hermaphrodites can be prosecuted for sexual offences.”<sup>87</sup>

m) Gender neutral, covering all persons- NO

n) Based on the lack of consent of victim- YES

o) Based on the use of force or threat- YES

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<sup>87</sup> [https://www.idlo.int/sites/default/files/pdfs/publications/idlo-undp\\_sunga-ahmed\\_sexual-offences-in-bangladesh-law-reform-study\\_final\\_2015.pdf](https://www.idlo.int/sites/default/files/pdfs/publications/idlo-undp_sunga-ahmed_sexual-offences-in-bangladesh-law-reform-study_final_2015.pdf), para 28

- p) Some combination of the above- YES
- q) Does it cover only vaginal rape? YES
- r) Does it cover all forms of penetration? NO.
- s) Is marital rape in this provision explicitly included? NO (In fact, it exempted from the definition of rape)
- t) Is the law silent on marital rape? NO
- u) Is marital rape covered in the general provisions or by legal precedent even if it is not explicitly included? NA
- v) Is marital rape excluded in the provisions, or is marital rape not considered as a crime? YES (Explicitly excluded as an exception with wife aged 13 years and above; not considered a crime)

**30. 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.**

Immoral Character of the Victim is relevant to impeach her character in the rape prosecution

**Section 155 (4), The Evidence Act, 1872**

**155.** The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him:-

...

(4) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

...

“The court may also take into account any romantic relationship between the accused and the victim or the fact that the victim is a sex worker or of such immoral character as to give in to such intercourse.”<sup>88</sup>

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

Fourteen Years

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

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<sup>88</sup> [https://www.idlo.int/sites/default/files/pdfs/publications/idlo-undp\\_sunga-ahmed\\_sexual-offences-in-bangladesh-law-reform-study\\_final\\_2015.pdf](https://www.idlo.int/sites/default/files/pdfs/publications/idlo-undp_sunga-ahmed_sexual-offences-in-bangladesh-law-reform-study_final_2015.pdf), para 15

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

The recent amendment increases the maximum penalty for rape from Rigorous Imprisonment to Death Penalty. Thus, the punishment for rape is death penalty or life imprisonment.

No Minimum penalty prescribed in the Penal Code, 1860 but minimums as well as mandatory punishments in Sec 9

**34. 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?**

Not clear? Fine of up to One Lakh Taka (not sure if that goes to the victim, however provisions for maintenance of the child born of the rape impose responsibility on the perpetrator)

**Aggravating and mitigating circumstances**

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

YES; If the victim dies after rape “in consequences of the rape”

*NB: With the latest amendment and death penalty being an option for all rape cases, this aggravating circumstance becomes superfluous.*

36. Is rape by more than one perpetrator an aggravating circumstance? YES and NO; Yes, if it results in death thereafter.

37. 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) NO

38. Is rape by spouse or intimate partner an aggravating circumstance? NO

39. Does the law foresee mitigating circumstances for the purposes of punishment? YES/NO If yes, please specify.

YES; In case where the woman raped is his wife and is between ages twelve and thirteen, the punishment only extends to “two years, or with fine, or with both”.<sup>89</sup>

40. 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

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<sup>89</sup> S. 376, The Penal Code, 1860

41. Regardless of the law, is reconciliation permitted in practice? YES/NO and what is the practice in this regard?
42. Is there any provision in the criminal code that allows for the non-prosecution of perpetrator? YES/NO If yes, please specify.
- a. if the perpetrator marries the victim of rape? YES/NO
  - b. if the perpetrator loses his “socially dangerous” character or reconciles with the victim? YES/NO

#### Prosecution

43. Is rape reported to the police prosecuted ex officio (public prosecution)? YES/NO
44. Is rape reported to the police prosecuted ex parte (private prosecution)? YES/NO
45. Are plea bargain or “friendly settlement” of a case allowed in cases of rape of women? YES/NO
46. Are plea bargain or “friendly settlement” of a case allowed in cases of rape of children? YES/NO
47. Please provide information on the statute of limitations for prosecuting rape.
48. Are there provisions allowing a child who was the victim of rape and to report it after reaching adulthood? YES/NO
49. Are there mandatory requirements for proof of rape, such a medical evidence or the need for witnesses? YES/NO If yes, please specify.
50. Are there rape shield provisions aimed at preventing judges and defense lawyers from exposing a woman’s sexual history during trial? YES/NO
51. Are there procedural criminal law provisions aimed to avoid re-victimizations during the prosecution and court hearings? YES/NO. If yes, please specify.

#### War and/or conflict

52. Is rape criminalized as a war crime or crime against humanity? YES/NO
53. Is there a statute of limitations for prosecuting rape in war or in conflict contexts? YES/NO
54. Is there explicit provisions excluding statutes of limitation for rape committed during war and armed conflict? YES/NO
55. Has the Rome Statute of the International Criminal Court (ICC) been ratified? YES

Signed on 16 September, 1999 and ratified on 23 March, 2010<sup>90</sup>

**Data**

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

As per one of the reports, 95% of the accused in rape cases are acquitted due to faulty investigations or lack of evidence<sup>91</sup> Other reports put conviction rates as low as 1% (HRW). As per Rape Statistics by Country, 11,682 rape cases have been recorded already in the year 2020.<sup>92</sup>

Year	Number of Incidents of Woman & Child Repression	Prosecuted	Sanctioned
2019 <sup>93</sup>	1139	NA	NA
2018 <sup>94</sup>	16253	NA	NA
2017 <sup>95</sup>	17073	NA	NA
2016 <sup>96</sup>	18446	NA	NA
2015 <sup>97</sup>	21210	NA	NA

Year	Number of Incidents Rape <sup>98</sup>	Attempt to Rape <sup>99</sup>	Prosecuted	Sanctioned
2020* <sup>100</sup>	975	204	NA	NA
2019	1080	149	NA	NA
2018	635	73	NA	NA
2017	783	81	NA	NA

<sup>90</sup> [https://asp.icc-cpi.int/en\\_menus/asp/states%20parties/asian%20states/Pages/bangladesh.aspx](https://asp.icc-cpi.int/en_menus/asp/states%20parties/asian%20states/Pages/bangladesh.aspx)

<sup>91</sup> UNB, 'Tough law ineffective: 4,517 women, children assaulted in 2001', *The New Nation*, Dhaka (17 August 2002).

<sup>92</sup> <https://worldpopulationreview.com/country-rankings/rape-statistics-by-country>

<sup>93</sup> [https://www.police.gov.bd/en/crime\\_statistic/year/2019](https://www.police.gov.bd/en/crime_statistic/year/2019)

<sup>94</sup> [https://www.police.gov.bd/en/crime\\_statistic/year/2018](https://www.police.gov.bd/en/crime_statistic/year/2018)

<sup>95</sup> [https://www.police.gov.bd/en/crime\\_statistic/year/2017](https://www.police.gov.bd/en/crime_statistic/year/2017)

<sup>96</sup> [https://www.police.gov.bd/en/crime\\_statistic/year/2016](https://www.police.gov.bd/en/crime_statistic/year/2016)

<sup>97</sup> [https://www.police.gov.bd/en/crime\\_statistic/year/2015](https://www.police.gov.bd/en/crime_statistic/year/2015)

<sup>98</sup> [http://odhikar.org/wp-content/uploads/2020/02/Statistics\\_Rape\\_2001-2019.pdf](http://odhikar.org/wp-content/uploads/2020/02/Statistics_Rape_2001-2019.pdf)

<sup>99</sup> [http://odhikar.org/wp-content/uploads/2020/02/Statistics\\_Attempt-to-rape\\_2014-2019.pdf](http://odhikar.org/wp-content/uploads/2020/02/Statistics_Attempt-to-rape_2014-2019.pdf)

<sup>100</sup> Jan-Sep, 2020; <http://www.askbd.org/ask/2020/10/06/violence-against-women-rape-jan-sep-2020/>

2016	757	128	NA	NA
2015	789	97	NA	NA

**Other**

57. 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.