



Anti-Rape Investigation & Trial Act, 2021

A Policy Brief



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Background:

Committed to promoting gender equality and eradicating structural, socio-economic and cultural disadvantages that marginalize women and endanger their lives, Pakistan has integrated Agenda 2030's Sustainable Development Goals (SDGs) into development planning. This includes SGD 5 (gender equality) and its Target 5.2 to eliminate all forms of violence against women and girls. Since 2016, the Government has enacted numerous laws to strengthen justice for survivors of gender-based violence (GBV), but optimal results remain elusive due to factors such as gaps in the text of the law as well as overlaps and duplication of laws that create confusion in the application of particular laws.

Research indicates that, all too often, laws addressing GBV are passed in haste without a meticulous review of how the law would be implemented. The likely impact of new law on existing legal provisions and how existing provisions will impact the new law is poorly considered. The result is conflicting and/or overlapping laws and lacuna in procedures or institutional arrangements necessary for implementation. This creates confusion for those implementing the law and has a detrimental effect on redress for survivors seeking relief under the law.

This policy brief, based on multi-stakeholder empirical research and careful textual analysis, focuses on the Anti-Rape (Investigation and Trial) Act, 2021 as a prime example of resultant problems.¹

¹The studies carried out in collaboration with the Punjab Social Welfare Department with support from UNFPA and FCDO in Multan, Lahore and Vehari are: (1) *Barriers to Access & Uptake of Public Sector GBV Services by Women Survivors of Violence* and (2) *Comparative Analysis of Three VAW Service Delivery Models in Punjab*. <http://www.pakistanatoday.com.pk/2015/09/14/uncategorized/pilot-programme-to-reduce-violence-against-women-established-in-punjab/>

The Anti-Rape (Investigation and Trial) Act, 2021

The Anti-Rape (Investigation and Trial) Act, 2021 came into force on 19 January 2022 and was preceded by the Criminal Law (Amendment) Act, 2018 that came into force in December 2018. From December 2018 till 13 August 2021, these laws remained in force in the shape of ordinances. In enacting the 2021 Anti-Rape (Investigation and Trial) Act, insufficient attention was paid to the experience of implementing the law as ordinances and of the interplay with the Criminal Law (Amendment) Act, 2018. Gaps in the text of the Anti-Rape Act lead to confusion. For example:

- The title (Anti-Rape Act 2021) is the first source of confusion as rape is not the only crime to be investigated and tried under the provisions of this law.

The schedules of this law specify a list of crimes against women and children other than rape, such as kidnapping a woman to compel her in marriage against her will, stripping a woman naked in public, sexual abuse, buying or selling for prostitution, and such other offences.

- The Act's implementation depends on numerous special arrangements and systems which were not put into place prior to or in conjunction with the law's enactment. This includes establishing Special Sexual Offences Investigation Units that require extensive infrastructure and human resources. In the absence of such mandatory arrangements, ad hoc measures are being resorted to with unsatisfactory results.



- The amended definition of rape in the Criminal Law (Amendment) Act, 2021 has enhanced the challenges of implementation as the prosecution of the crime of rape as redefined requires very sophisticated systems as well as sensitized investigation officials.

Further confusion emanated from the 2021 Anti-Rape (Investigation and Trial) Act and Criminal Law (Amendment) Act both remaining in force in the shape of ordinances from December 2020 till 13 August 2021. The challenges emerging during this period, stemming from the requirements of elaborate, expensive and cumbersome measures in the application of both laws, were not taken into account before they became Acts of Parliament. The challenges in ensuring the required arrangements for implementing the law were vividly showcased in the case of *Yasir vs. The State & another*² before the Lahore High Court in early August 2021. Issues included insufficient budgetary allocations and the non-availability of police officials of the ranks specified in the law for handling such cases. According to reports, the police submitted to the court, in the first seven months of 2021, more than 34,000 cases falling in the ambit of the Anti-Rape law were registered in Punjab, but not even in a single case could the legal provisions stipulated in the law for investigation be adhered to.

Police officials informed the court that following the prescribed procedures requires an initial allocation of PKR 4.9 billion and PKR 2.58 billion annual recurring expenditures. The Court observed:

*“To protect the women in the country against sexual assault, strict implementation of the current law is the first and foremost requirement rather than promulgation of the new laws, because non-implementation of laws already enacted is the actual fault line and major hindrance in realizing the purpose of law. Lack of implementation of legislative measures and non-compliance of judicial prescriptions provided for investigation and trial of rape cases is a major hindrance in providing justice to rape victims.”*³

The Court stressed that, before promulgating a law, the Government should consider the state's resources and capacity to implement the legal provisions being proposed, and should take all stakeholders on board because *“a good law should be viable, clear, publicized and most essentially implemented”*.

²PLD 2022 Lahore 263

³Para 11 of judgment

Confusion about which law will prevail when

The procedural protections provided in the Anti-Rape (Investigation and Trial) Act, 2021 are redundant as they duplicate provisions already incorporated in the Code of Criminal Procedure (CrPC) in October 2016.⁴ The Anti-Rape Act provisions for in-camera trials, protective measures, such as the usage of screens, holding trials through video links, prohibiting the publication or broadcast of court proceedings without the court's explicit permission, are all already covered under section 352 of CrPC.



⁴Criminal Law (amendment) (offences relating to rape) Act, 2016

The Anti-Rape Act mandates the investigation of all the offences mentioned in the two schedules by the Special Sexual Offences Investigation Units (SSOUIs).⁵ However, it distinguishes cases to be tried by the Special Courts⁶ established under this law and those to be tried under previously functioning procedures and courts. The distinction is made on the basis of the explanation given to the definition of the survivor/victim under the Act as a woman, or a female or a male child.⁷ This does not correspond to the definition of rape as amended by the Criminal Law (Amendment) Act, 2021, which is gender neutral and makes no distinction on the basis of the sex of either the victim or the perpetrator.

The Anti-Rape Act omits transgender persons and adult male survivors of rape from the purview of the Special Courts envisaged under the law for unstated reasons. This creates confusion for the police, prosecutors and courts as well as the survivors. Under the amended definition of rape, a woman could be accused of raping another person but would not be able to avail the procedural safeguards provided in the Anti-Rape Act which are only available to her as a victim, not as an accused. Further confusion amongst police officials stems from the fact that the same units are to investigate all cases, but cases are triable by different courts depending on whether the victim is a woman, a child,⁸ transgender person or a man.

Section 16 of the Anti-Rape law dealing with the trial of cases under this law appears to have contradictory provisions. Sub-section 3 states, *“if, in the course of a trial, the Court is of the opinion that any of the offences which the accused is alleged to have committed is not a scheduled offence, the Court shall record such opinion and try the accused only for such offences, which are scheduled offences.”* While sub-section 4 states, *“A Special Court may also try offences, not listed in the schedules, committed in connection with the scheduled offences, as if those offences were scheduled offences.”*

The contradiction concerning precisely which offences are triable by the special courts requires resolution since a plain reading of these subsections indicates an apparent contradiction.

The schedule of the law mentions offences long since removed from the Pakistan Penal Code, like section 369-A (concerning trafficking of persons).⁹ The same Schedule also contains typographical errors. For example, Schedule I mentions sections 498B and 498C, but the instructions regarding the same sections in the Explanation mentions 498A and 498C instead.¹⁰ As no rules have been framed to guide the implementation of the law so far, this adds to the confusion under the law.

⁵Investigation of offences mentioned in schedule II to be carried out by SSOIU under supervision of an officer not below grade 17.

⁶These courts include already existing GBV Courts, Juvenile Courts and special courts for children

⁷See explanation to definition of victim in section 2(K) of Anti Rape Act, 2021.

⁸Here, “child” means a male or female under the age of 18. The case is triable by a Special Court constituted under this Act only if the victim is an adult woman or a child.

⁹The offence is now covered under the Trafficking of Persons Act, 2018.

¹⁰Section 498A provides punishment for depriving a woman of her right of inheritance. 498B provides punishment for forced marriage of a woman. 498C provides punishment for the practice of marriage of a woman to the Holy Quran.

Specific Obstacles in Implementation

Coming into force on 19 January 2022, the implementation of the 2021 Anti-Rape (Investigation and Trial) Act depends on establishing numerous special arrangements and systems. Without mandatory arrangements the resort to ad hoc measures negatively impacts access to justice.

Under the Act, it is mandatory to notify the establishment of Anti-Rape Crisis Cells in public hospitals to facilitate the registration of cases, timely medico-legal examinations and other necessary measures as required in the case. There appears to be hardly any progress in this regard.



Establishment of Special Sexual Offences Investigation Units (SSOIU): SSOIUs have been notified in many districts of Punjab province by the District Police Officers in keeping with the directions issued by the Inspector General Police on 30 December 2021. However, the composition of these units in different districts is far from uniform. One challenge is that all SSOIUs are required to have at least one female police officer whereas there is an acute shortage of female officers in the police force. Consequently, District Khanewal, that has 18 police stations, has formed a single SSOIU consisting of five police officials: a male officer of inspector rank, a woman officer of sub-inspector rank and three women constables.

The SSOIU servicing Layyah's eight police stations, consists of seven police officials: one male police inspector, four women sub-inspectors, one female constable and one male constable. For its 22 police stations, Bahawalnagar has formed the SSOIUs at the police circle level, attaching a female officer in each, except for two circles where one female official is attached to two police units. In Sahiwal, police officers in each of the 17 police stations have been designated as investigation officers under this law. Only three of the 36 officers so designated are women - one each in three police stations.

Lahore district has not yet established any SSOIUs. Instead, the pre-existing GBV Investigation Cells are investigating cases of rape and sexual abuse while other cases in the schedules of the Anti-Rape law are being dealt with as per previous arrangements. However, training of officers to be posted in SSOIUs is underway. Once the trainings are complete, the plan is to establish units at the police circle level.

Other facilitative measures yet to be in place include:

- The provision of legal assistance to victims of the scheduled offences through The Legal Aid and Justice Authority to be established under the Legal Aid and Justice Authority Act, 2020:
- Establishing a fund for legal assistance and panels of advocates and volunteers in each district by the Special Committee established under section 15 of the Anti-Rape Act:
- Developing and putting into place a victim and witness protection system. The law's requirement of in-camera trial in the special courts necessitates measures such as video link facilities and usage of screens, video recording and the preservation of the testimonies and evidence of the victims, accused and witnesses. Hence, trial courts and Magistrates Courts would require video recording facilities.

Guidelines & SOPs for Medico Legal Examination

In Punjab, the Lahore High Court struck down all those directions in the guidelines issued by the Department of Health for medico-legal examination which directly or indirectly asked for or permitted a two-finger test (also called virginity test or digital examination) and directed the Department of Health to issue revised guidelines.¹¹ The revised guidelines have not been issued. The amended definition of rape under the 2021 Criminal Law (Amendment) Act includes many sexual acts as constituting rape. This makes the issuance of new guidelines for medico legal examination urgent, not only for Punjab but for other provinces as well as Islamabad Capital Territory.



¹¹Sadaf Aziz etc v. Federation of Pakistan etc. 2021 PCrLJ 205

Recommendations

To reinforce and ensure the effective implementation of the Anti-Rape (Investigation and Trial) Act, 2021, the following actions are recommended:

- Remove the anomalies identified within the scope of this provision, using the provision of removal of difficulties provided in section 31 of the Act.
- ▶ Eliminate incongruities regarding offences mentioned in the two schedules, especially schedule 1.
- ▶ Delete offences which are no longer part of the PPC, such as 369-A.
- ▶ If the offence of trafficking in person is to be retained within the ambit of this law, then the relevant provisions from the Trafficking in Person law should be mentioned rather than a reference to 369-A which has been deleted from the PPC.
- ▶ Align sub-sections 3 and 4 in Section 16 of the Anti-Rape Act to remove the implied prime facie contradiction.

To reinforce and ensure the effective implementation of the Anti-Rape (Investigation and Trial) Act, 2021, the following actions are recommended:

- Notify at the earliest the mandatory measures for the implementation of the Anti-Rape Act, such as the notification of hospital Anti-Rape Crisis Cells with adequate facilities.
- Immediately formulate rules under the Act spelling out clear guidelines in relation to the list of issues enlisted in section 19 of the law.
- Issue guidelines for medico-legal examination of victims/survivors of sexual assault at the earliest possible, especially keeping in view the amended definition of rape and the Lahore High Court's striking down of sections of the Guidelines issued by the Department of Health related to the two-finger test and order to issue revised guidelines.
- The Special Committee constituted by the Ministry of Law and Justice under section 15 of the Anti-Rape Act, 2021¹² to identify gaps and further measures to be taken in exercise of its powers to seek information about the measures taken for the implementation of the Anti-Rape (investigation and trial) Act, 2021¹³.

¹²A 26-member special committee was constituted by the ministry of law and justice on 22nd July 2022. See <https://www.dawn.com/news/1701077>.

¹³Sub-section 5 of section 15 of the Anti-Rape Act, 2021 empowers this committee to seek or require information from the federal or provincial ministries, divisions, departments, offices, agencies or authorities for effective compliance and proper functioning of this Act.

This Policy Brief reviews the Anti-Rape (Investigation and Trial) Act, 2021 as an example issues hampering the access to justice of women survivors of violence, in particular hasty enactment without a meticulous review of how the new law may impact existing legal provisions and vice versa and without ensuring the mechanisms necessary for implementing the law are in place. Based on multi-stakeholder empirical research and careful textual analysis, conducted by Shirkat Gah - Women's Resource Centre in collaboration with the Punjab Social Welfare Department with support from UNFPA and FCDO, it also provides recommendations for improving the situation.

Shirkat Gah - Women's Resource Centre

📍 Lahore Office

68 Tipu Block, New Garden Town, Lahore.

☎ Ph: 042-35836554, 35838815, 35832448

📍 Other Offices: Karachi, Peshawar, Quetta

Email: sgah@sgah.org.pk

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