

The Anti-Rape (Investigation and Trial) Act, 2021: Inadequacies and Implementation Challenges

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Abstract

The Anti-Rape (Investigation and Trial) Act, 2021, enacted in response to rising gender-based violence in Pakistan, aims for swift justice through special courts and procedures. However, gaps remain, such as the exclusion of transgender victims, the designation of already overloaded Courts of Additional Sessions Judges as Special Courts instead of the establishment of separate Special Courts, and the lack of implementation of special provisions. Despite provisions for free legal aid and special prosecutors etc., practical enforcement is lacking. Suggested amendments and better implementation are crucial for the law to effectively address gender-based violence, ensuring expeditious and just resolutions as intended in the preamble of the Act.

Keywords: Rape, Woman, Child, Investigation, Trial, Act 2021, Challenges, Amendments.

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Introduction

It is a trite that the strength of a society is measured by how it protects its most vulnerable members. Different legislative measures have been taken from time to time to protect vulnerable members of the society in Pakistan. A recent step in this regard is the promulgation of the Anti-Rape (Investigation and Trial) Act, 2021. Every good step in the right direction to protect the vulnerable segments of the society must be appreciated. One way of appreciation is to point out inadequacies in such measures and to highlight the challenges ahead. In the same vein, this article has attempted to pinpoint loopholes and challenges in implementing the above legislation. The purpose is to make this remedial step more robust, ensuring that it properly achieves the objectives for which it was enacted.

The Background

The law mirrors the needs of society. The increase in the offences of sexual abuse and violence especially the ugly incident of the motorway rape case resulted in the promulgation of the Anti-Rape (Investigation and Trial) Ordinance, 2020. This Ordinance was promulgated by the President of Pakistan.²After this temporary legislative measure, the Majlis-e-Shoora (Parliament) of Pakistan stepped in by enacting the Anti-Rape (Investigation and Trial) Act, 2021 (XXX OF 2021), hereinafter referred to as 'the Act'. The Act aims³ to ensure the expeditious redressal of rape and sexual abuse cases involving women and children by establishing special investigation teams, designating special courts, and providing efficacious procedures.⁴ It also aims to provide for effective investigation, victim and witness protection procedures, and expedited trials.⁵ This law was published in the Gazette of Pakistan

²Under Article 89 of the Constitution of the Islamic Republic of Pakistan, 1973.

³Preamble of the Anti-Rape (Investigation and Trial) Act, 2021

⁴Ibid.

⁵ The Anti-Rape (Investigation and Trial) Act, 2021.

on 4-12-2021 and has been extended to the whole country. Nonetheless, Section 1(3) of the Act states that it will come into effect on the date determined by the Federal Government. Now, on 19-1-2022, this law has come into force throughout Pakistan after the notification of the Federal Government vide S.R.O 123(1)/2022. The present Act is slightly different from the Ordinance promulgated by the President of Pakistan.⁶After highlighting the background and objectives of this Act now it is pertinent to pinpoint loopholes and challenges in the implementation of the Act.

Issue of Transgender Individuals

According to the definition clause⁷ of the Act⁸, a woman or child who has been the prey of offences mentioned in the schedule of this special law is considered a victim. Only women and children are the subject of this law who are a vulnerable segment of the society. This means special Courts established under this special law can try scheduled offences committed against only women and children. The definition of “victim” does not include ‘transgender persons’. Transgender persons are also significantly marginalized and deprived in Pakistan. Transgender persons are included in the most recent revision to the definition of "rape" under section 375 of the Pakistan Penal Code, 1860⁹. Therefore, this gap needs to be bridged by inserting the words "transgender person" in the definition of "victim" through an amendment to section 2 (1)(k) of the Act. This would serve as an important safeguard for the transgender community of Pakistan.

⁶ The Anti-Rape (Investigation and Trial) Ordinance, 2020.

⁷ Section 2(1) (k), “victim” means a woman or a child who has been subjected to scheduled offences.

⁸ The Anti-Rape (Investigation and Trial) Act, 2021.

⁹ The Criminal Law (Amendment) Act, 2021 (LVI of 2021).

Issue of Age of Child

A "child" is defined by section 2(1)(b) of the Act as any male or female who has not yet turned eighteen. However, the age for marriage of girls is sixteen years as per the Child Marriage Restraint Act, of 1929.¹⁰ Thus, this anomaly should be removed by amending the child marriage law to fix the age of marriage for girls at eighteen years instead of sixteen years. This amendment or issuance of a revised version is also mandatory because of the direction given in the judgment of the Lahore High Court, Lahore, in the case titled *Azka Wahid v. Province of Punjab & others*¹¹. Notably, the age of marriage for girls is already 18 years in Sindh.¹² The Chairperson of the Human Rights Commission of Pakistan (HRCP) has also suggested this amendment¹³ to improve the child protection mechanisms and he has further stated that violence against children, women and transgender individuals is showing no signs of abatement.¹⁴ This state of affairs has been portrayed three years after the promulgation of this special law.¹⁵ This point of view questions the effectiveness of this special law. This situation points out that either this law has gaps requiring amendments, or there is an implementation problem. However, in any case, steps are needed to plug the gaps in the existing legislation and also to address implementation problems

¹⁰ The Child Marriage Restraint Act, 1929, sec. 2(a).

<http://punjablaws.gov.pk/laws/147a.html>.

¹¹ 2024 LHC 1462,

C:\Users\Director_FJA\Desktop\https://sys.lhc.gov.pk/appjudgments/2024LHC1462 (accessed August 20, 2024).

¹² The Sindh Child Marriages Restraint Act, 2013.

¹³ The *Dawn*, Lahore. (5 April, 2024).

¹⁴ The *Dawn*, Lahore. (5 April, 2024).

¹⁵ The Anti-Rape (Investigation and Trial) Act, 2021.

Establishment of Special Courts

Establishing Special Courts under the Act, as mandated, has also been a challenge. Section 3(1) of the Act mandates that the Federal Government after consultation with the Chief Justice of Pakistan or the High Court concerned, shall establish as many Special Courts as necessary across the country to adjudicate scheduled offences. Furthermore, Section 3(3) of the Act allows the Federal Government, after consultation with the Chief Justice of the relevant High Court, to designate, either in addition to or instead of establishing Special Courts, as many Courts of Additional Sessions Judges or other courts as Special Courts as deemed appropriate. Previously, under Section 3(3) of the Anti-Rape (Investigation and Trial) Ordinance, 2020, all Courts of Sessions Judges were designated as Special Courts.¹⁶ The present state of affairs, where even Additional District and Sessions Judges are notified as Special court, is a step in a backward direction, which in practice is compromising the special and exclusive nature of courts established under this law. Special Courts headed by Additional Sessions Judges in practice are not exclusively dealing with cases under the Act. They, not being master of their docket, in routine are entrusted other cases, in addition to cases under this special Act. It is suggested that Special Courts of only Sessions Judges, instead of Additional Sessions Judges, should be established or designated as was previously intended through the promulgation of the Ordinance by the President¹⁷ to achieve the purpose as set out in the preamble of the Act. Designation of Additional District and Sessions Judges as Special Courts under this Act, is also a hurdle in the implementation of Rules¹⁸ requiring scheduling of cases and their expeditious decisions.

¹⁶ Notification No. F.1(1)/2021(PS) dated 7.5.2021.

¹⁷ The Anti-Rape (Investigation and Trial) Ordinance, 2020.

¹⁸ The Anti-Rape (Trial Procedure) Rules, 2022.

ARCC-A Step in the Right Direction

There are many good initiatives in this legislation. The creation of Anti-Rape Crisis Cells (ARCC) is a defining feature of this new legislation to address gender-based violence¹⁹, through which all necessary services for victims will be provided at one location and under the same roof. These services include the registration of FIRs, provision of medico-legal examination facilities, securing and collecting evidence for forensic analysis without any delay²⁰. These Cells shall be established or designated by the Secretary of the Law Ministry throughout the country, in public hospitals, as many as are deemed necessary, with relation to offences mentioned in Schedule II of the Act.

Special Rules²¹ have recently been framed to provide a legal framework for the operation of Anti-Rape Crisis Cells (ARCCs). These rules include Schedule B which provides necessary guidelines comprising fourteen essential steps for medico-legal officers to perform medico-legal procedures. Each ARCC shall comprise the Deputy Commissioner as its head, a Medical Superintendent, a District Superintendent of Police (DSP), preferably a senior female doctor, and a female nurse.²² The purpose behind the introduction of this structural change in the form of these cells is to provide a coordinated facility to victims of sexual abuse and violence by bringing together all stakeholders of the criminal justice system so that victims do not have to travel in a state of vulnerability from door to door to seek justice. It is pivotal to establish ARCCs in each district throughout the country to provide expeditious services to the victims of sexual abuse without loss of important evidence. These

¹⁹ Section 4 of the Anti-Rape (Investigation and Trial) Act, 2021.

²⁰Section 5 of the Anti-Rape (Investigation and Trial) Act, 2021.

²¹The Anti-Rape (Crisis Cell and Medico-Legal) Rules, 2023, <https://molaw.gov.pk/SiteImage/Misc/files/anti%20rap%20crises%20cell0001.pdf>.

²²The Anti-Rape (Crisis Cell and Medico-Legal) Rules, 2023, R. 4.

ARCCs need to be established as mandated, specifically catering the needs of far-flung areas, otherwise, it will be difficult to meet the objectives of the Act.

Issues of Legal Aid and Representation

The Act has specifically provided a mechanism of legal aid and representation which is also a very important step to meet the dictates of the constitutional right to a fair trial²³ and expeditious decisions. Section 6 of the Act makes it mandatory to provide free assistance in legal matters to the victims. However, in practice, it is difficult to provide this assistance in remote areas, where such help is urgently needed by the victims who are often from the poorest strata of society. Legal aid under this special law is to be provided by: (1) the Legal Aid and Justice Authority which has been established under the law²⁴; (2) the fund created under the said Act; and (3) the creation of panels of advocates. Regular provision of funds for this purpose is vital to meet the objective of the legislation. As per the spirit of the Act, victims must be provided senior advocates of ample experience in the relevant law at state expense instead of leaving them at the mercy of uninterested law officers. Selection of such advocates should be through a structured mechanism to avoid the handing over of the victims or accused in the hands of inexperienced lawyers at state expenses. Any lapse in this regard may result in the acquittal of the real perpetrator or the conviction of an innocent person. The appointment of special prosecutors²⁵ should also consider the above aspects and availability of competent special prosecutors in every Special Court must be ensured.

²³ Article 10A of the Constitution of Pakistan, 1973.

²⁴ The Legal Aid and Justice Authority Act, 2020.

²⁵ Section 7 of the Anti-Rape (Investigation and Trial) Act, 2021.

Victim and Witness Protection

The Act has envisaged a robust victim and witness protection mechanism.²⁶ As a stop-gap measure, provincial or ICT witness protection laws have been applied.²⁷ Section 8 of the Act has provided seven measures to ensure the protection of victims and witnesses, which include security measures, concealment of identity, distance recording of testimonies, re-location, financial assistance, compensation, and other measure which are deemed necessary.²⁸ Section 26 of the Act explicitly bans disclosing details of the victim or family members of the victim in order to prevent social victimization. Despite these statutory measures, there are loopholes in this mechanism. In a recent judgment in *Imdad Ullah vs. The State and Another*, the Lahore High Court noted that "the Additional Sessions Judge repeatedly used the victim's full name instead of employing an acronym."²⁹ The court directed that judges should identify victims using acronyms rather than their full names and emphasized that they must exercise extreme caution while writing judgments in such cases. This aspect points to a need for recurring training of judges and other stakeholders.

Investigation Mechanism

In criminal cases, the conviction of offenders largely depends on the evidence collected through investigation. The higher the quality of the investigation, the greater the chances of conviction, and *vice versa*. To achieve the goal of maximizing convictions of real culprits and deterring the rise of offences related to sexual abuse, special provisions regarding investigation have been incorporated into this

²⁶Section 8 and 26 of the Anti-Rape (Investigation and Trial) Act, 2021.

²⁷Section 8(2) of the Anti-Rape (Investigation and Trial) Act, 2021.

²⁸ Section 8 (1) (i) to (vii) of the Anti-Rape (Investigation and Trial) Act, 2021.

²⁹ *Imdad Ullah v. The State*.

<https://sys.lhc.gov.pk/appjudgments/2024LHC1462.pdf>.

law. Special units³⁰ are to be established to investigate the offences listed in the schedules of this Act. It is suggested that at least one female police officer must be included in each unit, for which the availability of female officers should be ensured. Additionally, it is pertinent to note that a police officer having a minimum rank of BPS-17 shall supervise the investigation of offences in Schedule II of the Act, as stipulated in sub-section 3 of Section 9 of this law. It is a good step to achieve the objective of the Act. Hurdles, like the availability of female police officers in different areas, need to be addressed for practical implementation of the Act.

To improve the quality of investigation, under the Act, it is mandatory to record the victim's statement under section 164 of the code³¹ only once³² and is to be video recorded. This statement can be used as evidence during the trial against the accused or to contradict a witness if he resiles from his statement. The statement recorded at the beginning of the investigation can serve as a safeguard against compromise effected at the bail stage or during the trial, which is a significant cause of the high acquittal rate in such cases. However, implementation of this provision faces practical problems due to lack of infrastructure and sometimes due to lack of awareness of investigation officers. Law requires recording of such statement as soon as practicable but delays caused by over-occupied investigation officers diminish the evidentiary value of such statement.

A statement under section 164 CrPC and other supervisory steps before the submission of Challan in the special courts are dealt with by judicial magistrates, as the Criminal Procedure Code, 1898, applies insofar as they are not inconsistent with the provisions of the

³⁰ Special Sexual Offences Investigation Units (SSOIUs), Section 9 of the Anti-Rape (Investigation and Trial) Act, 2021.

³¹ The Code of Criminal Procedure, 1898.

³² Section 14 of the Anti-Rape (Investigation and Trial) Act, 2021.

Act³³. These steps impact the quality of the investigation and the fate of the case. The magistrates are empowered to handle the physical and judicial remand of accused persons involved in sexual abuse cases.³⁴ Magistrates also have the authority to discharge³⁵ the accused. These provisions, investing magistrates with the power to deal with sexual abuse cases at the initial stage, undermine the very purpose of establishing special courts under the Act. Therefore, it is suggested that the authority for physical and judicial remand be transferred to the Special Courts through an amendment to the Act. This change is necessary due to the sensitivity of such offences to ensure that the objectives of the special law are not defeated. Often, these cases are practically resolved before magistrates at the remand stage through out-of-court settlements, though these offences are not compoundable.

The Act has also provided punitive measures to guard against defective investigation. Section 22(1) of the Act provides penalties, including imprisonment of up to three years and a fine, for Investigation Officers who fail to conduct investigations diligently. However, the real challenge is to actualize this deterrence as a means to ensure effective and honest investigation. Most often, responsibility of acquittals is shared by the investigation agency and prosecution, therefore, implementation of these penal provisions against defective investigation is a practical challenge that needs to be addressed on a regular basis. The Act under Section 22 (2) provides to penalize complainants who falsely register FIRs or falsely involve individuals in sexual abuse cases. Despite these provisions, there are incidents of honey-trapping innocent people and later settling the matter for a substantial amount of money. This

³³ Section 29 of the Anti-Rape (Investigation and Trial) Act, 2021.

³⁴ Section 167 of the Code of Criminal Procedure, 1898.

³⁵ Section 63 of the Code of Criminal Procedure, 1898.

provision was specifically designed to address such incidents and need a robust implementation.

Procedural Safeguards

Trials of accused persons, even those facing murder charges, are typically conducted in open courts according to our criminal justice system. However, due to the nature and sensitivity of sexual abuse cases, Section 12 of the Act requires that trials for the offences mentioned in the schedule be conducted in-camera. Additionally, courts, as specified in Subsection 2 of Section 12, may use screens, video links, or other appropriate measures to protect witnesses and victims. Unfortunately, this mandatory rule for in-camera trials is not followed in letter and spirit by the courts due to various reasons, including but not limited to a lack of infrastructure and IT resources. Section 13(3) of the Act requires the recording and preservation of video evidence of the victims, accused, and witnesses. Implementation of this provision requires sizeable resources to equip the special courts with all modern facilities and an uninterrupted supply of power, failing which these steps can't be implemented in reality, despite being on the statute book.

Expeditious Trials

The Act has certain provisions to ensure expeditious trials. It stipulates that "the Court upon taking cognizance of a case under this Act, shall decide the case expeditiously, preferably within four months."³⁶ The use of the term "preferably" renders this provision ineffective for ensuring the prompt disposal of Schedule cases. It is suggested that this section must be amended by removing the word "preferably" and by adding, "Otherwise, the case shall be referred to the High Court concerned for extension of time with reasons in

³⁶ Section 16 of the Anti-Rape (Investigation and Trial) Act, 2021.

writing, and such High Court shall not extend the deadline by more than two months."

A Special Court may only grant two adjournments throughout a case as per Section 16(2) of the Act. This limit of just two adjournments is neither reasonable nor reflective of practical realities. Therefore, it is recommended that this be increased to four adjournments through an amendment to the law. However, it should be specified that each adjournment should not exceed one week to ensure the expeditious disposal of cases of sexual abuse.

Supporting Rules

The framing of the Anti-Rape (Investigation) Rules 2022, and the Anti-Rape (Crisis Cell and Medico-Legal) Rules, 2022 are significant steps towards the real implementation of the Act. The Anti-Rape (Investigation) Rules 2022 mainly address the duties of the Officer-in-Charge who heads the SSOIUs, and the Investigation Officer.³⁷ These Rules also provide guidelines on the collection of evidence.³⁸ However, the key issue remains the implementation of these Rules including the establishment of SSOIUs as per the mandate of the Act and equipping investigation officers with desired resources. The Anti-Rape (Investigation) Rules, 2022, also need to be aligned with Police Rules³⁹ and the Code of Criminal Procedure, 1898. Currently, they do not adequately address the role of forensic officers and prosecutors in making the investigation process more effective and meaningful. Implementing the fourteen-step process provided in the Schedule of the Anti-Rape (Crisis Cell and Medico-Legal) Rules, 2022 for the examination of victims and accused also needs meticulous and robust training of medical staff. Such aspects must not be compromised on the pretext of lack of resources.

³⁷ Rules 3-5 of the Anti-Rape (Investigation) Rules 2022.

³⁸ Rules 6-8 of the Anti-Rape (Investigation) Rules 2022.

³⁹ The Police Rules, 1934.

Conclusion

In a nutshell, the Anti-Rape (Investigation and Trial) Act of 2021 mirrors progress as well as pitfalls. Amendments as suggested *supra* during the analysis of each section of this Act are required along with implementation of this law in letter and spirit to achieve the goal of the expeditious decision of cases through special courts as outlined in the Act's preamble. In *Imdad Ullah* case⁴⁰, Lahore High Court regretted that even after two years of the passage of this special law⁴¹, some of its provisions have not been implemented, thus defeating its intended goals. This direction should be taken seriously and positively to improve the implementation of this legislation. Nonetheless, amidst the complexities of legal reforms, there is hope that this law stands as both a beacon of hope and a stark reminder of our collective responsibility.

⁴⁰ *Imdad Ullah v The State*

<https://sys.lhc.gov.pk/appjudgments/2024LHC1462.pdf>

⁴¹ The Anti-Rape (Investigation and Trial) Act, 2021.