

**THE LEGAL VALIDITY OF CONSENT IN SEXUAL VIOLENCE SPECIAL  
REFERENCE TO MENTALLY DISABLED WOMEN**

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**Introduction**

Sexual violence have extensive consequences not only by violating its direct victims but also the basic human rights of every women to live. Women with mental disabilities are more likely to experience domestic violence, emotional abuse, and sexual assault than women without disabilities. They are unable to report the abuse, or they may be dependent on the abuser for their care. This problem become more vulnerable in the case when the victim is mentally retarded. Sexual violence against those women is a silent act in our country because in most cases women fail to realize they are victims or fail to communicate the act of violence. Even if it is communicated, seldom does it inspire belief. In most of the cases it is found that the perpetrators are not brought to book. There is also fear that reporting the abuse could snaps bonds with the caretakers. Like many women who are abused, in most of the cases women with disabilities are usually abused by someone they know, such as a partner or family member. Rape survivors with mental disability may see the world as a more threatening place to live in, so they will place restrictions on their lives, interrupting their normal activity. The rape of someone with an intellectual disability remains one of the hardest crimes for police to investigate and one of the hardest for prosecutors to win in court. A victim with an intellectual disability may have trouble to express, or may not have words at all.

**The legal role of consent in sexual assault**

Sexual activity without consent is rape or sexual assault. The problem become more venerable with women with mental whether they should have the legal capacity to consent. A familiar example is children — under the “age of consent” — who are viewed as legally incapable of consenting to sexual.<sup>2</sup> There is no single legal definition of consent. In general, there are three main ways to analyze consent in relation to sexual acts:

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<sup>2</sup> [https://www.washingtonpost.com/news/voikh-conspiracy/wp/2014/06/05/sexual-autonomy-rights-of-the-mentally-ill/?noredirect=on&utm\\_term=.f9564eed6ebb](https://www.washingtonpost.com/news/voikh-conspiracy/wp/2014/06/05/sexual-autonomy-rights-of-the-mentally-ill/?noredirect=on&utm_term=.f9564eed6ebb)

- **Affirmative consent:** Did the person express overt actions or words indicating agreement for sexual acts?
- **Freely given consent:** Was the consent offered of the person's own free will, without being induced by fraud, coercion, violence, or threat of violence?
- **Capacity to consent:** Did the individual have the capacity, or legal ability, to consent  
Examples of some factors that may contribute to someone's capacity to consent include:
  - **Age:** Is the person at or above the age of consent for that state? Does the age difference between the perpetrator and victim affect the age of consent in that state?
  - **Developmental disability:** Does the person have a developmental disability or other form of mental incapacitation, such as a traumatic brain injury?
  - **Intoxication:** Was the person intoxicated? Different states have different definitions of intoxication, and in some states it matters whether you voluntarily or involuntarily became intoxicated.
  - **Physical disability:** Does the person have a physical disability, incapacity, or other form of helplessness?
  - **Relationship of victim/perpetrator:** Was the alleged perpetrator in a position of authority, such as such as a teacher or correctional office?
  - **Unconsciousness:** Was the person sleeping, sedated, strangled, or suffering from physical trauma?
  - **Vulnerable adults:** Is the person considered a vulnerable adult, such as an elderly or ill person? Is this adult dependent on others for care?<sup>3</sup>

World Health Organization in its World Report on Violence and Health 2002, defines sexual violence as “any sexual act, attempt to obtain a sexual act, unwanted sexual comments, or acts to traffic, or otherwise directed, against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited

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<sup>3</sup> <https://www.plannedparenthood.org/learn/sex-and-relationships/sexual-consent>

to home and work. “Violence against women” has been defined in Article 1 of the UN Declaration on the Elimination of Violence against Women, 1993 to mean “any act of gender-based violence that results in or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.” The social context of disability, including factors such as inaccessibility, reliance on support services, poverty and isolation has a powerful impact on individuals’ increased risk for violence.

### **Factors responsible for sexual violence with intellectual disabilities**

A number of factors put people with intellectual disabilities at an increased risk of sexual violence .Some of the major factors are:

- Lack of understanding
- Long-term dependence on services and personal care.
- Emotional and social insecurities. <sup>4</sup>
- Lack of ability to consent to sexual activity.
- Lack of awareness in sex education.
- Lack of knowledge that sexual abuse can cause harm.
- In capabilities to inform about the abuse.
- Learned behavior not to question caregivers or others in authority.
- Fear of not being believed, leading to non-reporting of abuse.
- Feelings of guilt or humiliation that prevent reporting of abuse. <sup>5</sup>
- Difficulty identifying an suitable person to report the abuse to.

### **Legal framework for the protection of mentally retarded person**

#### **Constitutional rights:**

The principle of gender equality is enshrined in the Indian Constitution in its Preamble, Fundamental Rights, Fundamental Duties and Directive Principles. The Constitution, while protecting equality under Articles 14, 15 and 16, does not include disability as one of the categories of non-discrimination. The only mention of protection of persons facing disability

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<sup>4</sup> <https://www.plannedparenthood.org/learn/sex-and-relationships/sexual-consent>

<sup>5</sup> Mencap, Respond, UK Voice, 2001, Behind closed doors: preventing sexual abuse of adults with a learning disability, [http://lx.iriss.org.uk/sites/default/files/resources/behind\\_close](http://lx.iriss.org.uk/sites/default/files/resources/behind_close)

and sickness is made in the Directive Principles of State Policy in Chapter-IV of the Constitution. Article 39A enjoins the State to uphold justice, on the basis of equal opportunities and to provide free legal aid by suitable legislation or scheme or in any other way to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities and under Article 41 the State shall make an effort to provide the right to work, education and to public assistance in case of unemployment, old age, sickness and disablement, within the limits of economic capacity. <sup>6</sup>Hence, there is no guarantee from the State to prevent discrimination due to disability.

After India signed and ratified the UNCRPD in 2007, the process of enacting a new legislation in place of the Persons with Disabilities Act, 1995 (PWD Act, 1995) began in 2010 to make it compliant with the UNCRPD. It was notified on December 28, 2016 after receiving the presidential assent.<sup>7</sup>Principles stated to be implemented for empowerment of persons with disabilities (PWD) are respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons.

#### **The persons with disabilities Act, 1995:**

In this Act, Mental retardation was defined as “a condition of arrested or incomplete development of mind of a person which is specially characterized by sub normality of intelligence.” Mental illness was defined simply as “any mental disorder other than mental retardation.” The Act adopted an approach of social welfare in respect of PWD and the main focus was on prevention and early detection of disabilities, education and employment of the PWD. The Act also provided 3% reservation in Government jobs and educational institutions. It stressed on making the barrier-free situations as a measure of nondiscrimination.

The RPWD Act 2016 contains 17 chapters with 102 sections. All these chapters are important to Psychiatrists while chapters 1,5,10 and 11 hold special importance as the provisions in these chapters are closely associated with the ethics of physical and mental health professionals.

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<sup>6</sup> [http://en.wikipedia.org/wiki/Directive\\_Principles\\_in\\_India#cite\\_note-art41-15](http://en.wikipedia.org/wiki/Directive_Principles_in_India#cite_note-art41-15)

<sup>7</sup> The Rights of Persons with Disabilities Act, 2016, Gazette of India (Extra-Ordinary); 28 December.2016. [Last retrived on 2018 FEB 23]. Available from:<http://www.disabilityaffairs.gov.in/uploaad/uploadfiles/files/RPWD/ACT/2016.pdf> .

### **Mental Health Care Act, 2017:**

In India, the Mental Health Care Act 2017 was passed on 7 April 2017. The law was described in its opening paragraph as "An Act to provide for mental healthcare and services for persons with mental illness and to protect, promote and fulfill the rights of such persons during delivery of mental healthcare and services and for matters connected therewith or incidental thereto."<sup>8</sup>This Act superseded the previously existing the Mental Health Act, 1987 that was passed on 22 May 1987. Additionally, the Act asserts that no person or authority shall classify an individual as a person with mental illness unless in directly in relation with treatment of the illness .

### **Revisions made from the Mental Health Act 1987**

1. The Mental Healthcare Act 2017 aims at decriminalizing the Attempt to Commit Suicide by seeking to ensure that the individuals who have attempted suicide are offered opportunities for rehabilitation from the government as opposed to being tried or punished for the attempt.
2. The Act aims to safeguard the rights of the people with mental illness, along with access to healthcare and treatment without discrimination from the government. Additionally, insurers are now bound to make provisions for medical insurance for the treatment of mental illness on the same basis as is available for the treatment of physical ailments.
3. The Act has restricted the usage of Electroconvulsive therapy (ECT) to be used only in cases of emergency, and along with muscle relaxants and anaesthesia. Further, ECT has additionally been prohibited to be used as viable therapy for minors.
4. The responsibilities of other agencies such as the police with respect to people with mental illness has been outlined in the 2017 Act.
5. The Mental Health Care Act 2017 has additionally vouched to tackle stigma of mental illness, and has outlined some measures on how to achieve the same.

For the first time in the history of sexual violence law reform in India, issues pertaining to disabled women are flagged as important item for reform agenda by Justice Verma

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<sup>8</sup> ["The Mental Health Care Act, 2017"](#) (PDF). Government of India. Retrieved

Committee, constituted by the central government, to look into the sexual assault law reform after December 16th (2013) Delhi gang rape and murder case. The Cabinet on 1st February 2013 approved for bringing an ordinance, for giving effect to for the changes in law as suggested by the Verma Committee Report. Subsequently the ordinance was replaced by a Bill and passed by the Lok Sabha on 19th March 2013.

**Some of the important amendments discussed below:**

- Section 166-A (Cr.P.C, 1973): This section has been inserted which deals about a Public Servant who disobeys the direction under law or fails to record any information given to him under subsection (I) of section 154 of the Code of Criminal Procedure, 1973 and it provides rigorous imprisonment for minimum six months which may extend to two years and fine.<sup>9</sup>
- Section 166-B has been inserted which prescribes imprisonment for one year or fine or both for a person in charge of a hospital public or private, for non treatment of victim.
- Section 228A.(IPC,1860) provides conditions for disclosure of identity of the victim of certain offences etc.
- Section 228A (2) (c) provides that 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 the identity of the victim can be disclosed. Provided that no such authorization shall be given by the next of kin to anybody other than the chairman or the secretary, by whatever name called, of any central or State government recognized welfare institution or organization. Whoever prints or publishes any matter in relation to any proceeding before a court with respect to an offence referred to in subsection (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. Section 375 (IPC,1860): Sections 375, 376, 376A, 376B, 376C and 376D which deals with sexual offences have been substituted with new Sections 375, 376, 376A, 376B, 376C, 376D redefining the offences with substantial changes and also inserted a new Section 376E.

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<sup>9</sup> <https://indiankanoon.org/doc/445276/>

- Section 375 redefines the offence of rape and Section 376 prescribes punishment for rape. Section 375 (Fifthly) & (Seventhly): provides that the consent of the prosecutrix is vitiated if at the time of giving consent, by reason of unsoundness of mind is unable to understand the nature and consequences of that to which she gives consent or when she is unable to communicate consent.
- Explanation 2. of Section 375 provides that ‘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. As per Sub Section (1) of Section 376, person commits rape except in cases provided for in Sub Section (2) shall be punished with rigorous imprisonment of not less than seven years, but which may extend to imprisonment for life, and with fine. Sub Section (2) of Section 376 prescribes the punishment for rape by a Police Officer or a Public Servant or Member of Armed Forces or a person being on the Management or on the Staff of a Jail, remand home or other place of custody or women’s or children’s institutions or by a person on the Management or on the Staff of a Hospital, and rape committed by a person in a position of trust or authority towards the person raped or by a near relative of the person raped or commits rape, on a woman incapable of giving consent (j); or commits rape on a woman suffering from mental or physical disability (l) shall be punished with rigorous imprisonment of not less than ten years, but which may extend to imprisonment for life, which shall mean the remainder of that person’s natural life, and with fine.
- Section 376A deals with a person committing an offence of rape and inflicting injury which causes death or causes the woman to be in a persistent vegetative state and the punishment is rigorous imprisonment of not 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.<sup>10</sup>
- Section 376B deals with sexual intercourse by husband upon his wife during separation and prescribes punishment with imprisonment for not less than two years but which may extend to seven years with fine.<sup>11</sup>

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<sup>10</sup> [http://www.prsindia.org/uploads/media//Recent%20Acts/Criminal%20Law%20\(A\)%20Act%202013.pdf](http://www.prsindia.org/uploads/media//Recent%20Acts/Criminal%20Law%20(A)%20Act%202013.pdf)

<sup>11</sup> idbi

- Section 376C deals with sexual intercourse by a person in authority and prescribes punishment with rigorous imprisonment for not less than five years but which may extend to ten years and with fine.
- Section 376D deals with gang rape and prescribes punishment with rigorous imprisonment for not 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 to be paid to the victim.
- Section 376E deals with punishment for repeat offenders and prescribes punishment with imprisonment for life which shall mean imprisonment for the remainder of that person's natural life or with death.
- Section 54A (Cr.P.C,1973): Under this section provisos have been inserted, that if the person identifying the person arrested is mentally or physically disabled, the process of identification shall take place under the supervision of a Judicial Magistrate and such identification process shall be videographed.
- Section 154 (Cr.P.C, 1973): It is also provided that in Section 154 provisos have been inserted stipulating that if the information is given by the woman against whom an offence under Sections 326A, 326B, 354, 354A, 354B, 354C, 354D, 376, 376A, 376B, 376C, 376D, 376E, or 509 of IPC is alleged to have been committed or attempted, such information shall be recorded by a woman police officer or any woman officer. In the event that the person against whom an offence under the above mentioned under Sections 354, 354A, 354B, 354C, 354D, 376, 376A, 376B, 376C, 376D, 376E or 509 of the Indian Penal Code is alleged to have been committed or attempted, is temporarily or permanently mentally or physically disabled, then such information shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person's choice, in the presence of an interpreter or a special educator and the recording of such information shall be videographed. The police officer shall get the statement of the person recorded by a Judicial Magistrate under clause (a) of Sub Section (5A) of Section 164 as soon as possible.<sup>12</sup>
- Section 160 (Cr.P.C,1973): Section 160 has been amended that no police officer can require attendance of a witness if he is a male under the age of fifteen years or above

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<sup>12</sup> <https://indiankanoon.org/doc/445276/>

the age of sixty five years or a woman or a mentally or physically disabled person at any place other than the place where such person resides.

- Section 161 (Cr.P.C, 1973): Section 161 has been amended by inserting one more proviso stating “that the statement of a woman against whom an offence under Sections 354, 354A, 354B, 354C, 354D, 376, 376A, 376B, 376C, 376D, 376E or 509 of the Indian Penal Code is alleged to have been committed or attempted shall be recorded, by a woman police officer or any woman officer”.
- Section 164 (Cr.P.C, 1973): Section 164 has been amended by inserting Sub Section (5A) (a), that when an offence as stated in that Sub Section has been committed and as soon as the commission of the offence is brought to the notice of the police, the Judicial Magistrate shall record the statement of the victim in the manner prescribed in sub Section 5. It is also provided that the Magistrate shall take assistance of an interpreter or special educator if required. In such cases that shall be videographed.
- Section 357 C (Cr.P.C, 1973): Section 357C has also been inserted that all hospitals, public or private, whether run by the Central Government, the State government, local bodies or any other person, shall immediately, provide the first-aid or medical treatment, free of cost, to the victims of any offence covered under Section 326A, 376, 376A, 376B, 376C, 376D or Section 376E of the Indian Penal Code, and shall immediately inform the police of such incident. Section 119 (Indian Evidence Act, 1872): This section provides that a witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court, evidence so given shall be deemed to be oral evidence: Provided that if the witness is unable to communicate verbally, the Court shall take the assistance of an interpreter or a special educator in recording the statement and such statement shall be videographed.

### **Incidents of sexual violence:**

#### **United States of America**

- In 1989, a mentally handicapped girl was raped with a broomstick and a baseball bat by members of the Glen Ridge High School football team in Glen Ridge, New Jersey. That case, known as the Glen Ridge rape case, was the first time a sexual assault of a woman with an intellectual disability captured widespread national attention. The trial

started in 1992. Four of the young men were convicted in 1993 and three of aggravated sexual assault, the fourth of conspiring with the others. A young prosecutor back then, Robert Laurino, championed the case. "There's probably no more satisfying victory that you can get than to be able to convict a person who is of a predatory nature, that would actually prey on the person with a disability," he says. The Glen Ridge rape case became a national lesson in how people with intellectual disabilities back are victims of sexual abuse.<sup>13</sup>

According to research 15,000 to 19,000 people with intellectual disabilities are raped each year in the United States.<sup>14</sup>

### **Britain**

- A study by McCarthy and Thompson in 1997 found a prevalence rate of 25% for men and 61% for women. A survey by Brown et al. of senior managers in 1992 found an incidence rate of 0.5 per thousand people with intellectual disabilities each year.<sup>15</sup>

### **India**

- Recently on 21<sup>st</sup> February 2018, Indian police have arrested two men over the gang-rape of a mentally-ill woman in West Bengal state who required surgery after enduring the violent assault. The 27-year-old woman remains in a critical condition after being abducted from a carnival and taken to a field where she was assaulted with an iron bar.<sup>16</sup>
- 15th November 2013, in Nagpur, a 40- year-old mentally unstable and physically challenged woman was allegedly raped in Dammanand Nagar locality in the city. The accused, identified as 35-year-old Ramsingh Gopisingh Mehto had been arrested under relevant sections of the IPC.<sup>17</sup>
- Jan 1, 2013, (Noida) : A case was registered in Dadri police station where the prosecutrix in her complaint has alleged that on December 29, 2012 when her mother

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<sup>13</sup>file:///C:/Users/User/Desktop/call%20for%20paper%202018/Convictions%20Are%20Rare%20When%20A%20Person%20With%20An%20Intellectual%20Disability%20Is%20Sexually%20Assaulted%20\_%20NPR.html

<sup>14</sup> Sobsey, Dick (1994). Violence and abuse in the lives of people with disabilities : the end of silent acceptance?. Baltimore u.a.: Brookes. ISBN 1557661480.

<sup>15</sup> Brown, H., Stein, J. and Turk, V. (1995) 'The sexual abuse of adults with learning disabilities: Report of a second two-year incidence survey.' Mental Handicap Research 8, 1, 3-24, cited in Michelle McCarthy, Sexuality and Women with Learning Disabilities, Second Edition, Jessica Kingsley Publishers, 1999.

had gone to Aligarh and she was alone at home, her father gave her some sedatives and she fell unconscious. Later, she was allegedly raped by her father. When her mother reached home, the minor girl narrated the incident to her.

- In 1994, forced hysterectomies were conducted on several mentally challenged women between the ages of 18 to 35 at the Sassoon General Hospital in Pune because they were incapable of maintaining menstrual hygiene and the hospital staff found it strain on their resources and time. Consents were obtained by from the guardians and an intrusive and irrevocable surgery, that was not medically indicated, was carried out.<sup>23</sup> Anita Ghai, a prominent advocate for women with disabilities and a leading disability rights activist, drew the attention to the fact that the hospital made no effort to maintain the basic menstrual hygiene as the women were “prevented from wearing pajamas with drawstrings or sanitary napkins with belts” as it was feared that they may use these to commit suicide.<sup>18</sup>
- In another case, the Supreme Court expressed anguish at the repeated rape of a mentally challenged woman and observed that in such case, apart from physical violence, there is also “exploitation of her helplessness”. Justice Arijit Pasayat drew attention to the fact that while Section 376 (2) (f) of the Indian Penal Code prescribing higher penalty for rape of a woman below 12 years of age, it is exigent on the legislature to prescribe a higher penalty for the rape of a mentally challenged women whose mental age may be less than 12 years.
- In an another case, the Supreme Court had to decide whether the Chandigarh Administration could be permitted to terminate the pregnancy of mentally challenged women who had expressed her wish to continue the pregnancy. The Supreme Court ruled that her pregnancy could not be terminated and held that the state must respect the personal autonomy of the mentally challenged woman with regard to decisions about terminating a pregnancy.<sup>19</sup>

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<sup>18</sup> Anita Ghai, ‘Disabled Women: An Excluded Agenda of Indian Feminism’ *Hypatia* vol.17, no.3 (Summer 2002); [http://www.aifo.it/english/resources/online/books/cbr/ Disabled%20women%20india-AGhai.pdf](http://www.aifo.it/english/resources/online/books/cbr/Disabled%20women%20india-AGhai.pdf)

<sup>19</sup> *Suchitra Srivastva v. Chandigarh Administration* Civil Appeal No. 5845/2009, (Supreme Court), judgment dated 28 August 2009, available at <http://courtnic.nic.in/supremecourt/temp/dc%201798509p.txt>.

### **Concluding remarks**

Sexual Violence against mentally disabled women is a silent act in our country because in majority cases women fail to realize they are victims or fail to communicate the act of violence. Even if it is communicated, seldom does it inspire belief .Hence by way of legislating laws, state should not merely declare rights and entitlements but it should stipulate in detail the mechanisms by which rights can be realized.

### **Suggestive measures**

In this regard, India needs a Disability Law based on gender-sensitive approach. Certain remedial measures are stated below

- There is a need for the enactment of gender- sensitive disability law in India which must comply with the requirements of the Convention on Rights of Persons with Disabilities.
- Persons with disabilities, especially women should be able to access complaints and redressed mechanisms. In the absence of proper complaint mechanism, increasing the penalty for sexual violence will have no substantive outcomes.
- There are no appropriate data with regard to violent against women with mental disabilities. It would therefore be significant that when such cases are registered, crime against women with disabilities be also recorded as sub-category like in the case of crimes against women from other special categories.
- Training and sensitization of police officers, judiciary and medical professionals on issues concerning persons with disabilities, particularly the violence they face, should be made mandatory.
- There must be a standard procedure for investigation and medical examination adopted by the investigative agencies while investigating cases especially of sexual assault against mentally retarded women.
- Forced or non-consensual sterilization must be criminalized. The victim of forced sterilization must be duly compensated.

- Victims of sexual violence have to be provided with adequate and appropriate counseling facilities. In the case of a victim getting pregnant consequent to sexual abuse, appropriate counseling and options should be offered to the victims
- The Indian Penal Law needs to be more stringent to prevent sexual violence against women with disabilities.