

SUBMISSION TO THE MINISTRY OF WOMEN AND CHILD DEVELOPMENT, GOVERNMENT OF INDIA, ON THE DRAFT NATIONAL POLICY FOR WOMEN 2016

Contents

INTRODUCTION	2
RECOMMENDATIONS	4
UNDER-REPORTING OF SEXUAL VIOLENCE TO AUTHORITIES	6
LACK OF DATA ON SCALE OF UNDER-REPORTING	6
DISCRIMINATION FACED BY SURVIVORS WHO CHOOSE TO REPORT	6
VIOLENCE AGAINST WOMEN FROM DISADVANTAGED GROUPS	7
VIOLENCE BY SECURITY FORCE PERSONNEL	10
DISCRIMINATORY PROVISIONS IN LAW	11
REMOVAL OF MARITAL RAPE EXCEPTION	12
CONCEPT OF MODESTY IN CRIMINAL CODE.	14
DEATH PENALTY FOR CERTAIN SEXUAL ASSAULT CRIMES	15
CRIMINALIZATION OF ACTIVITIES RELATED TO SEX WORK	15
CRIMINALIZATION OF SAME-SEX RELATIONS	16

INTRODUCTION

Amnesty International India submits the following information and recommendations to the Ministry of Women and Child Development, Government of India, in response to the Ministry's call for feedback on the Draft National Policy for Women 2016 (the Draft Policy).

This submission focuses specifically on Violence against Women, listed as Priority Area 5 in the Draft Policy uploaded by the Ministry on its website.¹ The Draft Policy states as one of its objectives: "Elimination of all forms of violence against women through strengthening of policies, legislations, programmes, institutions and community engagement". It also states as an objective: "Developing a gender sensitive legal-judicial system".²

The country's last National Policy for the Empowerment of Women, 2001, stated its commitment to eliminating "[a]ll forms of violence against women, physical and mental, whether at domestic or societal levels, including those arising from customs, traditions or accepted practices ... [and] all forms of discrimination against the girl child and violation of her rights".³ The new Draft Policy acknowledges the increasing number of reports of violence against women, and reiterates its commitment to address these forms of violence.⁴ Amnesty International India is concerned at the continuing widespread incidence of violence against women, and deficiencies that remain in Indian law and its implementation.

India is a state party to the International Convention on Civil and Political Rights (ICCPR), and the International Convention on Economic, Social and Cultural Rights (ICESCR). It is also a state party to the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.

¹ National Policy for Women, 2016 (Draft), <http://wcd.nic.in/sites/default/files/draft%20national%20policy%20for%20women%202016.pdf>

² National Policy for Women, 2016 (Draft), p 3. <http://wcd.nic.in/sites/default/files/draft%20national%20policy%20for%20women%202016.pdf>

³ National Policy for the Empowerment of Women 2001, p 6. <http://wcd.nic.in/sites/default/files/National%20Policy%20for%20Empowerment%20of%20Women%202001.pdf>

⁴ National Policy for Women, 2016 (Draft), pp 2-3. <http://wcd.nic.in/sites/default/files/draft%20national%20policy%20for%20women%202016.pdf>

This documentation draws on Amnesty International India's ongoing work in India, which involves interactions with local and international non-governmental organisations, victims and survivors of human rights violations and their families, lawyers, governmental officials and other individuals. It also relies on media monitoring and reliable research on India from other sources. The concerns listed here are not exhaustive.

Amnesty International India would welcome the chance to provide more detailed inputs to the Ministry.

RECOMMENDATIONS

The new National Policy for Women must provide a strong framework to direct the revision, as well as the stronger enforcement, of laws related to violence against women. Below are Amnesty International India's recommendations to inform the formulation of the final Policy.

Under-reporting of sexual violence by authorities:

Direct all state-level police personnel to put in place standard protocols to be followed by the police while registering and investigating sexual violence cases;

Ensure that gender sensitization training is carried out with the police and other criminal justice authorities at all levels;

Launch a nation-wide awareness campaign to address the stereotypes and stigma around the formal reporting of sexual violence, that reaches out to the public as well as to officials who work closely with survivors of sexual violence (police, medical professionals and members of the judiciary);

Hold accountable police officials and other authorities in the criminal justice system who fail to follow due procedure in dealing with crimes involving violence against women;

Regularly collect data on the incidence and prevalence of violence against women to analyze the rates of reporting and the causes of under-reporting.

Violence against women from disadvantaged groups:

Register, investigate and prosecute all crimes involving violence against all women, especially those from marginalized groups, and hold accountable officials who discriminate against survivors;

Introduce laws to specifically address 'honour' killings, and criminally prosecute unelected village councils that order or endorse any form of violence against women.

Ensure the implementation of the SC/ST (PoA) Act to improve access to justice for women from Dalit and Adivasi communities who encounter violence.

Violence by security force personnel:

Repeal the Armed Forces Special Powers Acts and, pending their repeal, remove the requirements for government permission to prosecute in civilian courts soldiers accused of crimes involving violence against women and other human rights violations; grant that permission in all pending cases;

Investigate and hold to account members of security forces suspected of having committed crimes against women, and take all necessary measures to combat the culture of impunity for abuses committed by security forces;

Publicly disclose information about the investigation and prosecution of complaints of alleged human rights violations by members of the armed forces.

Discriminatory provisions in law

Remove the exception on marital rape from the definition of rape in section 375 of the Indian Penal Code;

Revise sections 354 and 509 of the Indian Penal Code to correctly identify assault as a crime against the physical and mental integrity of the woman, not a crime against her modesty;

Remove from the law provisions imposing the death penalty for any offences;

Repeal section 377 of the Indian Penal Code which criminalizes consensual same-sex relations;

Remove Section 8 of the Immoral Traffic (Prevention) Act, which criminalizes the solicitation of the sale of sex in a public place, to ensure that sex workers are not at risk of human rights abuses.

Amnesty International India also recommends that the Policy outlines clear, time-bound strategies for implementation. The inter-ministerial Action Plan mentioned in the Draft Policy should be outlined in advance of the publication of the final Policy, to ensure that it can be implemented by the central and state governments. The role of the Ministry in the implementation of the Policy must also be clear.

Amnesty International India urges the Ministry of Women and Child Development to conduct a comprehensive consultation with civil society and other stakeholders who work with women before it finalises the National Policy for Women.

UNDER-REPORTING OF SEXUAL VIOLENCE TO AUTHORITIES

LACK OF DATA ON SCALE OF UNDER-REPORTING

According to the National Crime Records Bureau (NCRB), a total of 337,922 crimes against women, including 36,735 cases of rape, were reported in 2014, an increase of 9 per cent over 2013.⁵ These statistics are likely to be undercounts of reported cases of violence, because they only consider the ‘principal offence’ in each case.⁶ NCRB figures show that the number of reported crimes against women have been continuously rising since 2009.

It is widely believed that the number of reported crimes against women may be underestimated also because of widespread under-reporting due to issues of security, social stigma and fear of reprisals. The most recent official nationwide survey that carries data on the scale and nature of reporting sexual violence is the National Family Health Survey, 2005-2006. It states, “A large majority of women who have experienced only sexual violence have never told anyone about the violence (85 percent), and only 8 percent have ever sought help.”⁷ Only one in 100 women are estimated to report sexual violence to the police.⁸

DISCRIMINATION FACED BY SURVIVORS WHO CHOOSE TO REPORT

Survivors of sexual violence often battle deep-rooted cultural stigma and bias from society as well as criminal justice institutions. Prejudicial attitudes on the part of police and other officials often contribute to denial of justice for survivors of sexual violence.

There is an absence of standard protocols for police officials to follow in registering and investigating sexual crimes. In 2013, the Indian Penal Code was amended to make the failure to register an FIR for certain crimes against women a criminal offence punishable with imprisonment. However this provision has rarely been used to hold police officials accountable.

In 2014, the Committee on the Elimination of Discrimination Against Women called on the government of India to “ensure that police officers fulfil their duty to protect

⁵ National Crime Records Bureau, Crime in India 2014, p.2.

<http://ncrb.nic.in/StatPublications/CII/CII2014/cii2014.asp>.

⁶ See Rukmini S, “India officially undercounts all crimes including rape”, *The Hindu*, 13 September 2013.

<http://www.thehindu.com/news/national/india-officially-undercounts-all-crimes-including-rape/article5121114.ece>

⁷ International Institute of Population Studies, National Family Health Survey (NFHS-3), 2005-6, p.523. <http://hetv.org/india/nfhs/nfhs3/NFHS-3-Chapter-15-Domestic-Violence.pdf>,

⁸ International Institute of Population Studies, National Family Health Survey (NFHS-3), 2005-6, p.523.

<http://hetv.org/india/nfhs/nfhs3/NFHS-3-Chapter-15-Domestic-Violence.pdf>,

women and girls against violence and are held accountable, adopt Standard Procedures for the police in each State on gender-sensitive investigations and treatment of victims and of witnesses, and to ensure that FIR (First Information Reports) are duly filed.”⁹

In 2015, the government appointed a “High Level Committee on the Status of Women”, which went on to recommend that authorities:

“Adopt a Standard Operating Procedure for making the police force accountable and sensitive as they deal with incidences of violence against women. Gender-sensitive investigations must be enforced, starting with the filing of the FIR (First Information Reports). This way cases can be better reported and conviction of perpetrators assured.”¹⁰

Authorities in the police and the criminal justice system in general must be held accountable for not following due procedure, including not properly registering all reports of rapes and other forms of sexual violence.

VIOLENCE AGAINST WOMEN FROM DISADVANTAGED GROUPS

Another major concern for authorities is the widespread incidence of violence against women from marginalised castes and communities, including Dalits and Adivasis.

The figures for total number of reported cases of violence against women is not disaggregated by caste, ethnicity or religion, so full figures of the extent to which women from these groups report violence is not known. However, there is special legislation relating to crimes committed against Scheduled Castes (Dalits) and Scheduled Tribes (Adivasis) - the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (PoA Act). When specific crimes are registered under this law as well as the Indian Penal Code, then separate figures are available. The NCRB recorded 2,426 cases of rape reported against Dalit women and 933 cases against Adivasi women in 2014.¹¹

These figures are likely to be significant underestimates. Activist groups say that systemic bias against Dalits and Adivasis make it less likely that crimes against women will be reported, investigated and prosecuted effectively. A 2005 study on 500 cases of violence against Dalit women in four states found that two out of five

⁹ Concluding observations on the combined fourth and fifth periodic reports of India, CEDAW/C/IND/CO/4-5, 24 July 2014, p.3.

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/IND/CO/4-5

¹⁰ High Level Committee on the Status of Women, *Report on the Status of Women in India*, 2015, Vol.1, p.183. <http://wcd.nic.in/documents/hlc-status-women-india>.

¹¹ National Crime Records Bureau, *Crime in India 2014*, Tables 7.2 & 7.8. <http://ncrb.nic.in/StatPublications/CII/CII2014/cii2014.asp>

women who had experienced violence did not seek legal remedies, primarily out of fear of the perpetrators or social stigma, ignorance of the law, or the belief that they would not get justice.¹²

Dalit and Adivasi women face multiple levels of discrimination and violence.¹³ Members of dominant castes are known to use sexual violence against Dalit women and girls as a political tool for punishment, humiliation and assertion of power. The killing of Dalit women on allegations of practicing witchcraft also goes unchecked because of lack of political will and widespread prejudice.¹⁴ Police are known to collude with perpetrators from dominant castes in covering up crimes by not registering or investigating offences against Dalits.

For instance, between November 2015 and January 2016, police officials in Chhattisgarh refused to promptly register complaints of sexual assault of Adivasi women in three separate cases.¹⁵

Despite the existence of the PoA Act, Dalit and Adivasi women who attempt to report gender-based violence and discrimination to the police sometimes are refused entry into police stations and are therefore unable to file FIRs.¹⁶ Other barriers include police not registering cases under the appropriate provisions of the Indian Penal Code, or not registering cases under the PoA Act, thereby ignoring the caste dimensions of the incidents.

In May 2016, the rape and brutal murder of a 30-year-old Dalit woman in Kerala highlighted the persistence of caste and gender-based violence.¹⁷ The local police had failed to investigate previous complaints about caste-based discrimination and harassment against the woman's family.

In her observations on this issue, the UN Special Rapporteur on violence against women noted, "Dalit and Adivasi women and women from other scheduled castes and tribes and other "backward classes" are frequent victims of multiple and intersecting forms

¹² A Irudayam, JP Mangubhai, and J Lee, *Dalit Women Speak Out: Violence against Dalit Women in India*, 2006. http://idsn.org/uploads/media/Violence_against_Dalit_Woment.pdf

¹³ See for example, National Coalition for Strengthening SCs and STs (Prevention of Atrocities Act), *National Campaign on Dalit and Human Rights, A report of 20 Years-Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act*, 2010. <http://ncdhr.org.in/latestinterventions/Report%20Card%20Eng.pdf>

¹⁴ Madhu Mehra and Anuja Agarwal, "'Witch-hunting' in India – Do we need special laws?", *Economic and Political Weekly*, 26 March 2016. <http://www.epw.in/journal/2016/13/special-articles/witch-hunting-india.html>

¹⁵ Amnesty International India, "Blackout in Bastar: Human Rights Defenders Under Threat", 2016, p. 12. https://www.amnesty.org.in/images/uploads/articles/Chhattisgarh_Campaign_Digest.pdf

¹⁶ Centre for Alternative Dalit Media, *Research Study on Violence against Dalit Women in Different States of India by studying the Sources of Materials that are Available and Conducting Interview of the Perpetrators, Victims and Witnesses*, pp. 96-97, 100, 125: <http://ncw.nic.in/pdfReports/ViolenceagainstDalitWomen.pdf>

¹⁷ Amnesty International India, "Kerala: Rape and murder of Dalit woman highlights persistence of caste, gender-based violence", 6 May 2016. <https://www.amnesty.org.in/show/news/kerala-rape-and-murder-of-dalit-woman-highlights-persistence-of-caste-gende/>

of discrimination, as well as violence. Caste-based discrimination, which also includes intra-caste hierarchies, continues to be pervasive and widespread.”¹⁸

This problem is also exacerbated by the widespread presence of *khap panchayats*, unelected village councils usually composed entirely of men from dominant castes who prescribe rules for social behaviour and interaction in villages. In 2011, the Indian Supreme Court described these panchayats as ‘kangaroo courts’ and said their decrees were illegal¹⁹; however, these bodies continue to flout the law.

For example, in August 2015, two Dalit sisters in Uttar Pradesh who were ordered to be raped and paraded naked by an unelected, all-male village council, fled their village fearing caste-based discrimination and violence. The Supreme Court ordered police protection for the sisters and their family in September 2015, recognizing the risk that they faced.²⁰

Some public officials and political leaders have contributed to the culture of impunity for violence against women by apparently defending and justifying violence against women. Commenting on the trial of a gang-rape case from Mumbai in April 2014, a former Chief Minister from the state of Uttar Pradesh stated, “Should rape cases be punished with hanging? They are boys, they make mistakes.”²¹ In May 2014, responding to the rape and murder of two Dalit girls, the Home Minister of the state of Madhya Pradesh said rape was a social crime which was “sometimes right and sometimes wrong”.²²

Taking note of some of these statements, in June 2014, the UN Secretary General urged people to, “say no to the dismissive, destructive attitude of 'boys will be boys'.”²³

The mechanisms specified under the SC/ST (PoA) Act and the 1995 Rules for improving access to justice, such as the establishment of state and district level ‘vigilance committees’, are frequently not implemented either. In 2015, the Act and the Rules were amended to ensure a larger range of offences are covered, and better

¹⁸ Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, Mission to India (A/HRC/26/38/Add.1), April 2014, p.5. <http://www.refworld.org/docid/53982c3e4.html>

¹⁹ Supreme Court of India, *Arumugam Servai v. State Of Tamil Nadu*, decided on 19 April 2011. <https://indiankanoon.org/doc/1337458/>

²⁰ Amnesty International India, “Supreme Court recognizes risks to Baghpat Dalit family”, 17 September 2015. <https://www.amnesty.org.in/show/news/supreme-court-recognizes-risks-to-baghpat-dalit-family>

²¹ NDTV, “Mulayam's shocker on rape: Boys make mistakes, why hang them?”, 11 April 2014. <http://www.ndtv.com/elections/article/election-2014/mulayam-s-shocker-on-rape-boys-make-mistakes-why-hang-them-506823?pfrom=home-lateststories>

²² *Hindustan Times*, “Rape sometimes right, sometimes wrong: Gaur”, 5 June 2014. <http://www.hindustantimes.com/india-news/mp-minister-defends-mulayam-akhilesh-over-badaun-rape/article1-1226343.aspx>

²³ *Hindustan Times*, “UN chief Ban Ki-moon slams Badaun gang-rapes”, 4 June 2014. <http://www.hindustantimes.com/india-news/un-chief-appalled-by-badaun-rape-case-demands-action/article1-1225855.aspx>

victim compensation is provided. However, strong political will is needed to ensure effective implementation of the law.

VIOLENCE BY SECURITY FORCE PERSONNEL

Amnesty International India has documented cases of sexual violence allegedly perpetrated against women and girls by members of security forces in areas of conflict.²⁴ Women often face challenges while seeking access to justice, including barriers to registering complaints and impediments to effective investigation and prosecution. This is true of the situation in the state of Jammu and Kashmir and north-eastern states, which have experienced several years of conflict.

Under the Armed Forces Special Powers Act (AFSPA), versions of which are in force in Jammu and Kashmir and parts of north-eastern India, prior permission from the central government is mandatory before a member of the armed forces can be prosecuted.²⁵ Such permission is virtually never granted, providing virtual immunity to members of the armed forces, and violating victims' rights under international law to justice and a remedy.²⁶ In the state of Jammu and Kashmir, not a single soldier has been prosecuted in a civilian court since the introduction of the AFSPA in 1990.²⁷

The Justice Verma Committee, which was set up by the central government to review laws on violence against women, noted that "impunity for systematic or isolated sexual violence...is being legitimized by the Armed Forces Special Powers Act."²⁸ The committee recommended amendments to remove the requirement of prior permission from the government for prosecuting government officials or soldiers for certain crimes involving violence against women.²⁹ While the Criminal Law (Amendment) Act passed in 2013 removed the requirement for prior sanction to prosecute government

²⁴Amnesty International, *Casualties of War: Women's Bodies, Women's Lives*, 2004.

<https://www.amnesty.org/en/documents/act77/072/2004/en/>

²⁵ Section 7 of the Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 states: "No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act." Section 6 of the Armed Forces (Special Powers) Act, 1958 contains an identical provision.

²⁶Amnesty International India, *Denied: Failures in Accountability for human rights violations by security force personnel in Jammu and Kashmir*, 2015.

[http://www.amnesty.org.in/images/uploads/articles/Kashmir_Report_Web_version_\(1\).pdf](http://www.amnesty.org.in/images/uploads/articles/Kashmir_Report_Web_version_(1).pdf)

²⁷ International People's Tribunal on Human Rights and Justice in Indian-Administered Kashmir [IPTK], *Alleged Perpetrators: Stories of Impunity*, December 2012. http://kashmirprocess.org/reports/alleged_Perpetrators.pdf

²⁸ Justice J S Verma, Justice Leila Seth and Gopal Subramaniam, *Report of the Committee on Amendments to Criminal Law*, 23 January 2013, p.149.

<http://www.prsindia.org/uploads/media/Justice%20Verma%20committee/js%20Verma%20committe%20report.pdf>

²⁹ These included rape, sexual assault, sexual harassment, voyeurism and stalking.

officials by amending Section 197 of the Code of Criminal Procedure³⁰, it did not amend the AFSPA.

The legal immunity that members of security forces effectively enjoy under laws like the AFSPA therefore continues. While there are now harsher punishments for certain kinds of rape committed by security forces,³¹ unless the requirements of government permission for prosecution are removed, cases will rarely even make it to the courts. Amnesty International India recommends the removal of the requirement for sanction for all human rights abuses, and not just those involving violence against women.

The UN Special Rapporteur on violence against women has noted that the Armed Forces (Special Powers) Act and its variations “allow for the overriding of due process rights and nurtures a climate of impunity and a culture of both fear and resistance by citizens”³² and called for its repeal. This is in line with the recommendations made by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions³³ and the UN Special Rapporteur on the situation of human rights defenders during their visits to India.³⁴

The High-Level Committee on the Status of Women also recommended that sexual violence against women by members of security forces be brought under the purview of ordinary criminal law.³⁵

DISCRIMINATORY PROVISIONS IN LAW

The Constitution of India guarantees equality under Article 14, which states that ‘the State shall not deny to any person equality before law or equal protection of the laws within the territory of India.’ Article 15(1) states that ‘the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.’ In addition, Article 15(3) leaves scope for affirmative action for women: ‘nothing in this Article shall prevent the State from making any special provision for women and children.’

³⁰ Under the amended Section 197, prior permission for prosecuting government officials is not needed in cases of crimes involving violence against women.

³¹ Section 376(2)(c) of the amended Penal Code makes rape by a member of the armed forces punishable with imprisonment for a period between ten years and the remainder of the person’s life.

³² Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, Mission to India, April 2014, p.7. <http://www.refworld.org/docid/53982c3e4.html>

³³ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, Missions to India, April 2013, p. 19.

http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.47.Add.1_EN.pdf

³⁴ Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, Mission to India, February 2012, p.21. <http://www.ohchr.org/Documents/Issues/Defenders/A-HRC-19-55-Add1.pdf>

³⁵ High Level Committee on the Status of Women, *Report on the Status of Women in India*, 2015, Vol.1, p.278. <http://wcd.nic.in/sites/default/files/Vol%20I.compressed.pdf>

In December 2012, the government constituted the Justice Verma Committee on Amendments to Criminal Law to analyse existing laws on sexual assault and recommend reforms.³⁶ In January 2013, the Justice Verma Committee submitted its report to the Government, after consultations with members of the public and civil society groups.³⁷ The report contained recommendations on a wide range of issues that impact the safety of women and gender discrimination. In April, the government passed the Criminal Law (Amendment) Act, 2013, which, while it contained some positive reforms, also ignored several important recommendations made by the Justice Verma Committee.³⁸

The Act expanded the definition of rape in the Indian Penal Code and criminalized several forms of violence against women including acid attacks, stalking and voyeurism. It was more sensitive to the needs of disabled persons, provided for certain victim-friendly evidentiary procedures and removed the requirement of government permission for prosecution of public servants accused of rape and some forms of sexual violence. However, the Act was seriously deficient in other respects.

REMOVAL OF MARITAL RAPE EXCEPTION

The Indian Penal Code continues to retain the exception for rape committed by a man on his wife when she is over 15 years of age.³⁹ Only rape committed within a marriage when the spouses are living separately can be punished, and then with a lower sentence than that given to rape outside a marriage.⁴⁰

³⁶ The Committee asked members of the public, judiciary, media, public figures, academicians and human rights organizations for their suggestions, and also expanded its mandate to include “connected areas such as gender justice, respect towards womanhood, and ancillary matters”. See Press Information Bureau, “Justice J.S.Verma Committee holds its First Meeting”, 26 December 2012. <http://pib.nic.in/newsite/erelease.aspx?relid=91179>

³⁷ Justice J S Verma, Justice Leila Seth and Gopal Subramaniam, *Report of the Committee on Amendments to Criminal Law*, 23 January 2013.

<http://www.prsindia.org/uploads/media/Justice%20Verma%20committee/js%20verma%20committee%20report.pdf>
The report lists organizations and individuals consulted during drafting.

³⁸ Amnesty International India, “India: New Sexual violence law has both positive and regressive provisions”, 22 March 2013. <http://www.amnesty.org/en/for-media/press-releases/india-new-sexual-violence-law-has-both-positive-and-regressive-provisions-2>; Amnesty International India, “India: vote for a new law on violence against women in India”, 11 March 2013. <http://www.amnesty.org/en/library/info/ASA20/011/2013/en>. See also Amnesty International India, Submission to the Justice Verma Committee, 4 January 2013.

<http://www.amnesty.org/en/library/asset/ASA20/002/2013/en/26fed035-db4a-4873-afbd-b23eceb11fd0/asa200022013en.pdf>

³⁹ Exception 1 to Section 375 of the Indian Penal Code 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.”

⁴⁰ Section 376B of the Indian Penal Code states: “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.” Under Section 376, anyone found guilty of rape can 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.”

International law requires that no exemptions be made for perpetrators of sexual violence because of their marital status. The Committee on the Elimination of Discrimination against Women⁴¹ and the Special Rapporteur on Violence against Women⁴² have called on the Indian government to remove the exception for marital rape and define marital rape as a criminal offence.

The High Level Committee on the Status on Women, in its report submitted to this Ministry in June 2015 noted, “The most significant lapse of the Criminal Law (Amendment) Act 2013 is its continued protection of marital rape. There is no greater symbol of impunity than violence within the private sphere, and the state’s sanction of it”.⁴³ It proceeded to recommend that marital rape be made an offence “irrespective of the age of the wife and the relationship between the perpetrator and the victim”.⁴⁴

The Justice Verma Committee also recommended the removal of the marital rape exception in 2013, noting that “the exemption for marital rape stems from a long out-dated notion of marriage which regarded wives as no more than the property of their husbands”.⁴⁵ The Committee added that the law ought to specify that a marital or other intimate relationship must not be regarded as a mitigating factor to justify lower sentences for rape. It also stressed that the legal prohibition on marital rape must be accompanied by changes in the attitudes of prosecutors, police officers and society, and recommended widespread measures to raise awareness of women’s rights to autonomy and physical integrity, regardless of marriage or other intimate relationship.⁴⁶

However, the Government of India ignored the recommendations of the Verma Committee when it drew up amendments to the criminal law in March 2013. A report prepared by a parliamentary committee opposed the removal of the exception on marital rape, stating:

“The Committee felt that if a woman is aggrieved by the acts of her husband, there are other means of approaching the court. In India, for ages, the family system has evolved and it is moving forward. Family is able to resolve the

⁴¹ Concluding observations on the combined fourth and fifth periodic reports of India (CEDAW/C/IND/CO/4-5), 24 July 2014, p.4.

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW/C/IND/CO/4-5

⁴² Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, Mission to India, April 2014, p.5. <http://www.refworld.org/docid/53982c3e4.html>

⁴³ High Level Committee on the Status of Women, *Report on the Status of Women in India*, 2015, Vol.1, June 2015, p.307. <http://wcd.nic.in/sites/default/files/Vol%20I.compressed.pdf>

⁴⁴ High Level Committee on the Status of Women, *Report on the Status of Women in India*, 2015, Vol.1, June 2015, p.307. <http://wcd.nic.in/sites/default/files/Vol%20I.compressed.pdf>

⁴⁵ Report of the Committee on Amendments to Criminal Law, pp. 113-118:

<http://www.prsindia.org/uploads/media/Justice%20Verma%20committee/js%20Verma%20committee%20report.pdf>

⁴⁶ Report of the Committee on Amendments to Criminal Law, pp. 113-118:

<http://www.prsindia.org/uploads/media/Justice%20Verma%20committee/js%20Verma%20committee%20report.pdf>

problems and there is also a provision under the law for cruelty against women. It was, therefore, felt that if the marital rape is brought under the law, the entire family system will be under great stress and the Committee may perhaps be doing more injustice.”⁴⁷

Courts in India have used the exception provided in Section 375 to acquit men accused of committing marital rape. In May 2014, a ‘fast-track’ court in Delhi designated to hear cases of sexual assault against women relied on this exception to rule that sexual intercourse between a legally wedded husband and wife “even if forcible, is not rape.”⁴⁸

Studies have shown that marital rape is a reality a number of women face in India. In the NFHS survey conducted in 2005-06, 10 per cent of married women – and over 20 per cent in some states - said their husbands had raped them or forced them to commit sexual acts against their will.⁴⁹ A 2011 survey by the International Centre for Research on Women said one in five surveyed men in India had admitted to forcing their partners into sex.⁵⁰ In 2014, in about 86 per cent of reported rape cases, the alleged perpetrators were known to the victims.⁵¹

In March 2016, the Ministry of Home Affairs stated in Parliament that it had requested the Law Commission of India to deliberate on proposals for criminalizing marital rape.⁵²

CONCEPT OF MODESTY IN CRIMINAL CODE

The laws relating to sexual assault passed by Parliament in 2013 did not amend Section 354 and 509 of the India Penal Code, which define crimes based on notions of ‘modesty’ and ‘morality’ rather than emphasizing their effect on the physical and mental integrity of the victim.

⁴⁷ Rajya Sabha Parliamentary Standing Committee on Home Affairs, One Hundred and Sixty Seventh Report on the Criminal Law (Amendment) Bill, 2012, <http://www.prsindia.org/uploads/media/Criminal%20Law/SCR%20Criminal%20Law%20Bill.pdf>. When the bill was debated in Parliament, similar arguments were made about the criminalization of marital rape weakening the institution of the family. See comments by Sumitra Mahajan, BJP MP, in debate on floor of Lok Sabha, 19 March 2013, p.78. Available in Hindi at <http://164.100.47.132/debatetext/15/XIII/1903.pdf>

⁴⁸ Special Fast Track Court, Dwarka, New Delhi, *State v. Vikash*, decided on 7 May 2014. Unique Case ID No. 02405R0349722013.

⁴⁹ International Institute of Population Studies, National Family Health Survey (NFHS-3), 2005-6, , Table 15.8 on p.507 and Table 15.14 on p.519 <http://hetv.org/india/nfhs/nfhs3/NFHS-3-Chapter-15-Domestic-Violence.pdf>

⁵⁰ International Centre for Research on Women, International Men and Gender Equality Survey, 2011, p.46, available at <http://www.icrw.org/publications/evolving-men>

⁵¹ National Crime Records Bureau, Crime in India 2014, p.86. <http://ncrb.nic.in/StatPublications/CII/CII2014/cii2014.asp>.

⁵² Ministry of Home Affairs, Unstarred Question No. 2872, Lok Sabha, 15 March 2016. <http://mha1.nic.in/par2013/par2016-pdfs/ls-150316/2872.pdf>

In 1995, the Indian Supreme Court used the Oxford English Dictionary to understand the meaning of ‘modesty’ as follows: “the quality of being modest and in relation to woman means "womanly propriety of behavior; scrupulous chastity of thought, speech and conduct ... it appears to us that the ultimate test for ascertaining whether modesty has been outraged is, is the action of the offender such as could be perceived as one which is capable of shocking the sense of decency of a woman”.⁵³

The use of the concepts of morality and modesty in legislation and judicial decisions perpetuate stereotypes about women’s expected conduct and behavior and can impede women’s access to justice. Their use does not adequately protect the human rights of women and girls, including their right to live free from violence. They also violate India’s international legal obligations to amend all laws containing gender discriminatory provisions.

DEATH PENALTY FOR CERTAIN SEXUAL ASSAULT CRIMES

The Act introduced the death penalty for sexual assault that results in death or a persistent vegetative state for the victim, or in the case of certain repeat offenders. In April 2014, three men convicted in multiple cases of rape were sentenced to death under the new law.⁵⁴

The punishment with the death penalty of crimes that do not involve intentional killings do not meet the threshold for the use of the death penalty under international human rights standards. Amnesty International India is further concerned that the authorities have justified the use of the death penalty as a solution to ongoing violence against women, despite convincing evidence that the death penalty is not a particular deterrent to crime and its use will not eradicate violence against women in India.⁵⁵

CRIMINALIZATION OF ACTIVITIES RELATED TO SEX WORK

Sex workers face many human rights abuses and violations including rape, violence, trafficking, harassment and arbitrary arrests. Globally, Amnesty International has recorded many instances where police – as well as clients, and other members of the general public – have inflicted abuses against sex workers with impunity.

⁵³ Supreme Court of India, *Rupan Deol Bajaj v. KPS Gill*, decided on 12 October 1995.

<http://indiankanoon.org/doc/579822/>

⁵⁴ BBC, “Mumbai gang rape: Death sentences for India rapists”, 4 April 2014.

<http://www.bbc.com/news/26887723>

⁵⁵ Amnesty International, “India: Death penalty will not end violence against women”, 13 September 2013.

<http://www.amnesty.org/en/news/india-death-penalty-will-not-end-violence-againstwomen>

In India, the Immoral Traffic (Prevention) Act, 1956, that is intended to address the issue of trafficking, criminalizes the soliciting of sex work by individuals. Amnesty International India recommends the removal of all laws or policies that criminalize or penalize sex work, as these laws can enable the abuses of the rights of sex workers, and make them less safe.

The High-Level Committee on the Status of Women in 2015 recommended the deletion of Section 8 of the Immoral Traffic (Prevention) Act, which criminalizes ‘seducing or soliciting for purpose of prostitution’, and Section 20, which authorizes the ‘removal of a prostitute from any place’ by a magistrate.⁵⁶

Amendments proposed in 2006 through the Immoral Traffic (Prevention) Bill, if passed, would mean buying sex is also criminalized. This could create new difficulties for many sex workers, who already face exploitation and discrimination from the police. One sex worker in Kolkata, while speaking with Amnesty International, said:

“We know that the proposals before Parliament since 2006 to criminalize buying sex will make things harder for us and give us more problems with the police. When the police used to raid us, it was very frightening for the children; and if a client behaves badly you cannot report it. More laws against us may bring these problems back.”⁵⁷

Amnesty International India does not seek the removal of laws that criminalize exploitation, human trafficking or violence against sex workers. These laws must remain, and can and should be strengthened. However criminalization of sex work can hinder the fight against trafficking – for example, victims may be reluctant to come forward if they fear the police will take action against them.

CRIMINALIZATION OF SAME-SEX RELATIONS

The government has failed to repeal section 377 of the Indian Penal Code, which makes consensual same-sex relations among adults punishable with imprisonment up to a life term. In a dismaying verdict in December 2013, India’s Supreme Court overturned a historic ruling by the Delhi High Court in 2009 which had decriminalized consensual same-sex activity among adults.⁵⁸ The Supreme Court said that Section 377 - which criminalizes “carnal intercourse against the order of

⁵⁶ High Level Committee on the Status of Women, *Report on the Status of Women in India*, 2015, Executive Summary, p.43. http://wcd.nic.in/sites/default/files/Executive%20Summary_HLC.pdf

⁵⁷ Bharati Dey and Rita Roy, “Strength in Numbers: Sex Workers Collectives in India”, Amnesty International, 27 May 2016. <http://www.amnesty.org/en/latest/news/2016/05/rita-roy-and-bharati-dey-sex-worker-testimony-india/>

⁵⁸ Supreme Court of India, *Suresh Kumar Koushal v. Naz Foundation*, decided on 11 December 2013. <http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070>. See Amnesty International India, “Dismaying top court ruling recriminalizes homosexuality”, 11 December 2013. <http://www.amnesty.org.in/show/news/dismaying-top-court-ruling-re-criminalizes-homosexuality>

nature”- was a matter for the legislature to repeal, not the Court, resulting in Section 377 remaining valid law.

The Delhi High Court had ruled in 2009 that the outlawing of consensual adult same-sex relations was discriminatory and violated the rights to equality, privacy and dignity set forth in the Indian Constitution. It had said the criminalization of homosexuality forced “a sizeable section of society... to live their lives in the shadow of harassment, exploitation, humiliation, cruel and degrading treatment at the hands of the law enforcement machinery”.⁵⁹ In its Universal Periodic Review in 2012, the Government of India had quoted the Delhi High Court’s decision to signify its progress on human rights issues.⁶⁰

⁵⁹ Supreme Court of India, *Naz Foundation v. Government of NCT of Delhi*, decided on 2 July 2009. <http://indiankanoon.org/doc/100472805/>

⁶⁰ National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, A/HRC/WG.6/13/IND/1, 8 March 2012, p.8. <http://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/116/85/PDF/G1211685.pdf>