



*Written Submissions on behalf of
Creating Resources for Empowerment in Action (CREA)*

Address: 7, Mathura Road
Jangpura B
New Delhi – 110014
Website: www.creaworld.org
Email: crea@creaworld.org

1. About CREA

1.1 Founded in 2000, CREA is a feminist human rights organisation based in New Delhi, India. It is one of the few international women's rights organisations based in the global South, which works at the grassroots, national, regional, and international levels. Together with partners from a diverse range of human rights movements and networks, CREA works to empower women to articulate, demand and access their rights. CREA advocates for positive social change through national and international fora. CREA's mission, goals, and programmes are determined by an analysis of the current global conditions for women, girls, sexual minorities, transgender people, sex workers, and disabled women.

2. Introduction

2.1 Over the past decades India made significant effort in recognising human rights in relation to sexuality, sexual and reproductive health, gender equality and gender expression. However, human rights violations remain in laws, policies and practices, despite India's clear international and constitutional human rights obligations. This report is focusing on barriers that constitute severe human rights violations, affecting the life of millions in India on a daily basis, especially the most marginalised and vulnerable.

3. Lack of a comprehensive addressal of sexual violence within marriage

3.1 India's commitments to human rights, in particular under CEDAW, require the establishment of a comprehensive legal, policy and programmatic framework on violence against women, including that it recognizes marital rape as a crimeⁱ. However, India is still failing to fulfil its obligations in this regard.

3.2 With the introduction of the Criminal Law (Amendment) Act, 2013, the definition of rape was expanded, however Exception 2 excludes from its definition marital rape, stating that "*Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age is not rape*". It criminalises marital rape only when the husband and wife are living separately by a decree of separation or otherwiseⁱⁱ.

3.3 In its concluding comments on the 4th and 5th periodic report, CEDAW explicitly recommended to India that it should *remove the exception of marital rape from its Penal Code*ⁱⁱⁱ. The UNSRVAV in her recent visit to India also recommended the same^{iv}. Yet, marital rape as a crime is being still legally unrecognised in India.

3.4 In addition, the Justice Verma Committee,^v established by the Government of India to look into possible amendments of criminal law, clearly stated that merely reforming the law is not enough while addressing marital rape. The argument for criminalizing

marital rape should be seen as a matter of a woman's bodily integrity and sexual consent within and outside of marriage.

Recommendations:

1. The legal exception for marital rape as stated under Section 375, Exception 2 of Indian Penal Code be removed and accompanied by changes in the attitudes of prosecutors, police officers and those in society more generally
2. The law ought to specify that a marital or other relationship between the perpetrator or victim
 - a. is not a valid defence against the crimes of rape or sexual violation;
 - b. is not relevant to the inquiry into whether the victim consented to the sexual activity;
 - c. may not be regarded as a mitigating factor justifying lower sentences for rape.
3. It needs to be recognised and respected that not all women who face sexual violence within a marriage would be willing to approach the formal criminal justice system. Alternate remedies in both the civil law and the informal justice delivery system need to be incorporated to address marital rape.

4. Lack of protection to sexual and reproductive health and rights of women with disabilities

- 4.1 The rights and needs of women with disabilities are significantly neglected in India. As CEDAW recommended, among other concerns, in its 2014 concluding observations: the State should address the causes of the low enrolment rate of girls with disability; should pass the Rights of Persons with Disabilities Bill, 2014 without delay and incorporate a specific section to protect women and girls with intellectual disabilities from forced sterilization, and to repeal laws and prohibit disability-based detention of women, including involuntary hospitalization and forced institutionalization; create a database and ensure regular collection of data on persons with disability, disaggregated by sex, age and types of disability as well as region".^{vi}
- 4.2 The current iteration of the Rights of Persons with Disabilities Bill 2014, which is yet to be tabled before the Parliament, pending since 2012, falls short of ensuring the rights of women with disabilities in several respects. The bill provides specific protections against violence and exploitation of persons with disabilities but does not recognize and address the specific forms of violence faced by women with disabilities, including in homes and institutions.^{vii} It does not provide specific protections for women with disabilities from abuses such as forced sterilization and forced abortion. It also still allows persons with psychosocial disabilities to be placed

under some forms of guardianship rather than providing them with decision-making support, contradictory to the principles of CRPD, which can lead to violations of their rights, including their sexual and reproductive rights^{viii}.

4.3 Violence against women with disability

4.3.1 The most comprehensive legislation which provides a civil relief to women who have been subjected to violence is the Protection of Women from Domestic Violence Act, 2005 (PWDVA). However, the systems and procedures established under the PWDVA do not take into account the rights and needs of women living with disabilities^{ix}.

4.3.2 Further, although the Criminal Law (Amendment) Act, 2013 recognizes rape against women with physical and mental disabilities as an aggravated offence, it continues to perpetuate stereotypes about women with disabilities by stating that those of ‘unsound mind’ cannot consent to sex.^x

4.4 Denial of legal capacity

4.4.1 Laws and policies that address the legal capacity of women with disabilities (particularly for persons with intellectual and psychosocial disabilities),^{xi} provide the system of substitute decision making rather than supported decision making, that is contradictory to CRPD’s principles on the recognition of legal capacity,^{xii} According to this system they can’t make decisions in relation to their sexual and reproductive choices, marriage and accessing justice, remedies and redress^{xiii}.

4.5 Forced institutionalization

4.5.1 Women with disabilities—particularly psychosocial and intellectual disabilities—also face violence in the form of forced institutionalization.^{xiv} Once institutionalized, they are often subjected to several forms of violence, inhumane and degrading treatment and deprived of the ability to make decisions for themselves and have no or little access to redress for violations^{xv}.

4.6 Forced sterilization

4.6.1 Forceful sterilization of women living with disability, especially with psychosocial and intellectual disability is widely documented in India.^{xvi} The Ministry of Health issued guidelines for the sterilization of men and women in India^{xvii}, however it does not include explicit and clear provisions against forced sterilization of girls and women with disabilities.^{xviii}

Recommendations

1. Systemic collection of data on the violence faced by women with disability is required in order to address the rights and needs of them.
2. Service provisions, such as health and judiciary services for violence survivors, should be disabled-friendly. Comprehensive programmes should be implemented for legal, health and social service providers to be sensitive to the rights and needs of women living with disabilities.
3. Both civil and criminal legislative measures should be taken in order to provide comprehensive response to violence against women living with disability.
4. Women's human rights in relation to their sexuality and reproduction should be not restricted under law or practice. 'Unsound mind' under various laws – civil, criminal and administrative – should not be used as an exception to accessing rights, including in relation to sexuality and reproduction.
5. Forced institutionalization or treatment of women with disabilities should be ended. Comprehensive support systems and awareness of care and support services in the local communities, law, policies, health system and education should be established. Informed consent of women with disabilities should be guaranteed in relation to any decision that affects their lives.

5. Criminalisation of Adolescents' Sexuality

- 5.1 Despite the fact that adolescents represent almost 1/4th of the India's population, their sexual and reproductive health needs are poorly understood and ill served^{xix}. Adolescent's capability of making decisions in relation to their sexuality and sexual and reproductive health is recognized by human rights standards.^{xx} When translating such rights and freedoms to laws and policies, States, often focus on protective measures governing sexual activity, while ignoring or consciously restricting sexuality related rights and freedoms.^{xxi}
- 5.2 Till 2012, the age to legally consent to any form of sexual activity in India was 16. However, in 2012, with the introduction of the Protection of Children from Sexual Offences Act, 2012, this was increased to 18. In view of this, with the enactment of the Criminal Law (Amendment) Act, 2013, the Indian Penal Code was amended to state that irrespective of consent, sexual intercourse with a person below the age of 18 would come within the definition of rape – meaning thereby that all consensual sexual activity, amongst adolescents, is criminalised.

5.3 Though the intent of the law might have been to guard children and adolescents against sexual exploitation and other forms of sexual violence, the law does not acknowledge ‘consent’ of any person below the age of 18, restricting adolescents’ right to express their sexuality.

Recommendations

1. Legal and other measures should be taken to respect and protect adolescent’s rights to express their sexuality without being afraid of criminal consequences^{xxii}.
2. It should be recognised, through legal and other measures, that the increase in the age of consent for sexual activity from 16 to 18 with the enactment of the Protection of Children Against Sexual Offences Act, 2012, is unconstitutional as it infringes upon adolescents’ right to privacy and sexual health according to human rights principles.^{xxiii}.

6. Lack of a recognition of sex workers’ rights

6.1 Sex workers are entitled to fundamental human rights that are enshrined in international and regional treaties and in national constitutions. Sex workers should be recognized as rights holders and decision makers, and their choice should be respected in relation to all areas of engagement in life, including in relation to their sexuality, reproduction, employment and access to services and information^{xxiv}. In India, existing legal frameworks and ongoing legislative reforms are falling behind in recognizing these human rights standards.

6.2 Currently, the primary law governing sex work in India is the Immoral Traffic (Prevention) Act, that defines ‘prostitution’ to mean “the sexual exploitation or abuse of persons for commercial purposes.”^{xxv} In May 2016 the Ministry of Women and Child Development, Government of India formulated a draft on ‘Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2016’. The intended objectives and guiding provisions of the Bill remain unclear. It has been re-drafted thrice without any consultation with the sex worker community.

Recommendation

1. Sex worker’s participation in legal, policy and programmatic processes in relation to sex work needs to be guaranteed^{xxvi}.
2. Legislation should recognise sex workers rights as human rights, sex work shall be recognised as voluntary work and clearly separated and distinguished from sexual exploitation, sex trafficking and sex trade.

3. Legislation should recognise the capacity and rights of sex workers to make decision for themselves, including that rehabilitation activities should be offered at the option of the sex worker and not forced upon them.

7. Lack of a comprehensive legal recognition and protection for transgender people

7.1 In India, trans* people face severe violations of their human rights, stigma, discrimination and violence is part of their everyday life. In the case of National Legal Services Authority v Union of India (NALSA), the Indian Supreme Court recognizes transgender persons' and recognizes trans* people's constitutional rights to personal autonomy, self-determination, and freedom of expression. It recognises that all trans* people have the "right to decide their self-identi and gender ... such as male, female or a third gender." It directs central and state governments to legally recognise trans* people's gender identities. Following the Supreme Court's judgment, several states have put in place progressive policies to address the discrimination faced by transgender groups. However, the implementation of this judgment is far from adequate, and a lot more needs to be done^{xxvii}.

7.2 In 2016 the Indian Cabinet approved a draft of the Transgender Persons (Protection of Rights) Bill, 2016. The government did not adequately and comprehensively involve the transgender community during the development process of this Bill.

7.3 The recent Draft is inconsistent with the Supreme Court's directions in the NALSA judgment and with international human rights standards with regard to transgender people's human rights. It does not recognize the diverse transgender expressions and identities in India, require discriminatory verification processes with regard to legal gender recognition and reinforces harmful stereotypes practices. It fails to provide comprehensive protective measures against discrimination on the ground of gender identity and expression.

Recommendation

1. The government should urgently engage in meaningful and inclusive public consultation with members of the trans* community in any legislative and policy process.
2. Legislation should recognise that all trans* people have the right to decide their self-identity and gender, including male, female or a third gender. It should protect against any form of discrimination, stereotyping and violence.
3. Legislation and practices should not set heavy, discriminatory processes in relation to

legal gender recognition and access to transition related health services, rather it should ensure the choice, self determination and informed consent of trans* people.

4. Legislation and all implementation measures should ensure transgender people's rights in all areas of life, including in relation to education, employment, health, marriage, reproduction, sexuality, and parental rights.^{xxviii}

ⁱCCPR/C/76/Add.6

ⁱⁱ376B. *However 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 of a term which shall not be less than two years but which may extend to seven years, and shall also be liable to fine*

ⁱⁱⁱConcluding Comments, 4th and 5th Periodic Report July 2014.

^{iv}Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, mission to India, Human Rights Council, Twenty-sixth session, 1st April 2014 at page 19

^vConstituted by the Government of India notification No. SO (3003) E dated December 23, 2012, .

^{vi}CEDAW Committee, *Concluding Observations: India*, para. 37(b) & (d), U.N. Doc. CEDAW/C/IND/CO/4-5 (2014).

^{vii}The Rights of Persons with Disabilities Bill 2014, art. 24(k), *available at* <http://www.prsindia.org/uploads/media/Person%20with%20Disabilities/The%20Right%20of%20Persons%20with%20Disabilities%20Bill.pdf>

^{viii}The Rights of Persons with Disabilities Bill 2014, art. 6, *available at* <http://www.prsindia.org/uploads/media/Person%20with%20Disabilities/The%20Right%20of%20Persons%20with%20Disabilities%20Bill.pdf>.

^{ix}Submission to the Special Rapporteur on Violence Against Women on Violence Against Disabled, Sex Working and Lesbian Women. Submission to the Special Rapporteur on Violence Against Women on Violence Against Disabled, Sex Working and Lesbian Women. CREA 2013

^xhttp://www.vakilno1.com/bareacts/criminal-law-amendment-act-2013.html#9_For_sections_375376376A_376B_376Cand_376D_of_the_Penal_Code_the_following_sections_shall_be_substituted_namely

^{xi}*See, e.g., National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act (1999), Sec. 14; "Indian Registration Act, 1908," undated, http://lawcommissionofindia.nic.in/1-50/report34.pdf; Bhargavi V. Davar, Legal Frameworks for and against People with Psychosocial Disabilities in ECONOMIC & POLITICAL WEEKLY 47, 123-31 (2012), available at http://www.academia.edu/2457828/Legal_frameworks_for_and_against_people_with_psychosocial_disabilities.*

^{xii}*See, e.g., National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act (1999), Sec. 14; "Indian Registration Act, 1908," undated, http://lawcommissionofindia.nic.in/1-50/report34.pdf; Bhargavi V. Davar, Legal Frameworks for and against People with Psychosocial Disabilities in ECONOMIC & POLITICAL WEEKLY 47, 123-31 (2012), available at http://www.academia.edu/2457828/Legal_frameworks_for_and_against_people_with_psychosocial_disabilities*

^{xiii}CRPD Committee, *General Comment No. 1: Article 12: Equal recognition before the law*, U.N. Doc. CRPD/C/GC/1 (2014).

^{xiv}*See, e.g., CREA, count me IN!: Violence against disabled, lesbian, in sex-working women in Bangladesh, India, and Nepal (2012), available at http://www.creaworld.org/sites/default/files/The%20Count%20Me%20In!%20Research%20Report.pdf*

^{xv}Human Rights Watch, "TREATED WORSE THAN ANIMALS": ABUSES AGAINST WOMEN AND GIRLS WITH PSYCHOSOCIAL OR INTELLECTUAL DISABILITIES IN INSTITUTIONS IN INDIA 69 (2014).

^{xvi}Dr. Sruti Mohapatra and Mr. Mihir Mohanty, *Abuse and Activity Limitation: A Study on Domestic Violence against Disabled Women in Orissa, India* 16 (2004), *available at* <http://swabhiman.org/userfiles/file/Abuse%20and%20Activity%20Limitation%20Study.pdf>.

^{xvii}Standards for Female and Male Sterilization Services, <http://nrhm.gov.in/images/pdf/guidelines/nrhm-guidelines/family-planning/std-for-sterilization-services.pdf>

^{xviii}Standards for Female and Male Sterilization Services, pg. 3-4, <http://nrhm.gov.in/images/pdf/guidelines/nrhm-guidelines/family-planning/std-for-sterilization-services.pdf>

^{xix}<http://www.creaworld.org/publications/primers-adolescent-srhr>

^{xx}Convention on the Rights of the Child

^{xxi}Sexual Health, Human Rights and the Law. World Health Organisation. 2015

^{xxii}General Comment No. 15: The rights of the child to the highest attainable standard of health. Geneva: United Nations Committee on the Rights of the Child; 2013 (CRC/C/GC/15)

^{xxiii}General Comment No. 15: The rights of the child to the highest attainable standard of health. Geneva: United Nations Committee on the Rights of the Child; 2013 (CRC/C/GC/15).

^{xxiv}UN Women. Note On Sex Work, Sexual Exploitation And Trafficking. 2013; UNAIDS Guidance Note On HIV And Sex Work, 2012; UNFPA Guidance Note On HIV/AIDS, Gender And Sex Work – *complete reference*; NSWP Consensus Statement reaffirms NSWP 's global advocacy platform for sex work, human rights and the law, 2013

^{xxv}<http://www.lawyerscollective.org/wp-content/uploads/2010/11/LC-submission-to-WCD-on-ITPA-Amendments-Nov-2012.pdf>

^{xxvi}UN Women. Note On Sex Work, Sexual Exploitation And Trafficking. 2013; UNAIDS Guidance Note On HIV And Sex Work, 2012; UNFPA Guidance Note On HIV/AIDS, Gender And Sex Work – *complete reference*; NSWP Consensus Statement reaffirms NSWP 's global advocacy platform for sex work, human rights and the law, 2013

^{xxvii} Health Policy Project, Asia Pacific Transgender Network, United Nations Development Programme, 2015.

Blueprint for the Provision of Comprehensive Care for Trans People and Trans Communities. Washington DC.: Futures Group, Health Policy Project.

^{xxviii}United Nations Development Programme. Discussion paper: Transgender health and human rights. New York (NY): United Nations Development Programme; 2013.