

A young child with a bindi on their forehead is peering through a blue wooden door. The child is looking upwards and to the left. The door has a metal latch and is made of weathered wood. The background is a blurred blue wall.

Human Rights in India

Status Report 2012

PREPARED FOR INDIA'S SECOND
UNIVERSAL PERIODIC REVIEW AT THE UN

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Foreword

The present report gives a general overview of the most critical human rights issues in India today. It has been drafted as a background document to assist in the preparation of India's second Universal Periodic Review (UPR) scheduled to take place in Geneva on 24 May, 2012.

The UPR is a unique process conducted by the UN Human Rights Council (HRC), involving a review of the human rights record of all 192 UN Member States once every four and a half years.ⁱ

The Working Group on Human Rights in India and the UN (WGHR) submitted a stakeholders' report to OHCHR in November 2011.ⁱⁱ The present report is a more detailed and comprehensive version of WGHR's stakeholders' report that includes:

- Information gathered from five regional and one national consultation held with civil society across India from August to October 2011;ⁱⁱⁱ
- Case studies that illustrate the text of the report;
- WGHR's initial response to the Government of India's national report to the second UPR;
- An up-to-date analysis of the status of implementation of the 18 recommendations made to India during the first UPR.^{iv}

As is amply evident from the report, much remains to be done to improve the human rights situation in India. The scope of the UPR is enormous as it covers all recognised international human rights. If we take almost any of these human rights, the situation in India remains challenging; yet the scope for improvement is immense. If the required positive changes are to take place, however, a radical change in national and regional actions by governments at all levels is necessary. The report highlights some of these required changes.

i For a brief description of the importance of the UPR process, please see Annex B

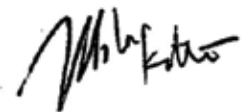
ii Working Group on Human Rights in India and the UN (WGHR), *Human Rights in India – An Overview*, November 2011, available at: www.wghr.org

iii See: Annex D

iv See: Annex C

The opportunity offered by India's second UPR at the HRC should not be underestimated. The clear direction that can emanate from the second UPR's recommendations largely depend, however, on the approach adopted by the Indian delegation during the UPR in May 2012. We all look forward to a shift away from the defensive posture adopted by India in the first UPR to a constructive engagement with the HRC. Such an engagement can only prove fruitful if the deliberations during the UPR debate and the resulting recommendations are placed within the space of the recognition of human rights (through laws, policies, administrative actions and budgetary allocations) and their implementation.

We hope this report will contribute to such a debate at the HRC. India must meet the human rights accountability challenge posed by the contents of its own Constitution and the international human rights instruments it had ratified. To meet this enormous challenge, nothing but a radical shift in economic, security and social policy is needed. It is hoped that India's second UPR will provide solid recommendations to make such a radical change possible, which is urgently required to reverse the adverse human rights situation faced by a significant part of the people of India.



Miloon Kothari

Convenor, WGHR

Acknowledgments

This report is the fruit of thorough collective work. It was compiled and edited by the WGHR Secretariat with extensive input from all WGHR members: ActionAid India, Asian Centre for Human Rights, Citizens for Justice and Peace, Commonwealth Human Rights Initiative, FIAN India, HAQ: Centre for Child Rights, Housing and Land Rights Network, Human Rights Alert, India Alliance for Child Rights, Lawyers Collective, Multiple Action Research Group, National Campaign on Dalit Human Rights, Partners for Law in Development and People's Watch as well as WGHR's independent experts: Vrinda Grover, Prof. Babu Mathew and Dr. Rajkumar.

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List of Abbreviations

(In alphabetical order)

AFSPA	Armed Forces Special Powers Act
BPL	Below Poverty Line
BSF	Border Security Force
CRPD	Convention on the Rights of Persons with Disabilities
CRZ	Coastal Regulation Zone
CSPSA	Chhattisgarh Special Public Security Act
CWC	Child Welfare Committee
DAA	Disturbed Areas Act
ESCR	Economic, Social and Cultural Rights
FCI	Food Corporation of India
FPS	Fair Price Shop
FRA	Forest Rights Act
FTA	Free Trade Agreement
GMO	Genetically Modified Organism
Gol	Government of India
ICCPR	International Covenant on Civil and Political Rights
ICDS	Integrated Child Development Services
ICRC	International Committee of the Red Cross
IDP	Internally Displaced Persons
ILO	International Labour Organisation
INR	Indian Rupee
IPC	Indian Penal Code
IPTK	International People's Tribunal on Human Rights and Justice in Kashmir
J&K	Jammu and Kashmir
JJB	Juvenile Justice Board
MDMS	Mid-Day Meal Scheme
MMR	Maternal Mortality Rate
MNC	Multi National Corporation
MNREGA	Mahatma Gandhi National Rural Employment Guarantee Act


MoU	Memorandum of Understanding
NAP	National Action Plan for Human Rights
NAP-HRE	National Action Plan for Human Rights Education
NCPCR	National Commission for the Protection of Child Rights
NCRB	National Crime Records Bureau
NFHS	National Family Health Survey
NFSB	National Food Security Bill
NHRC	National Human Rights Commission
NRHM	National Rural Health Mission
PCA	Police Complaints Authorities
PDS	Public Distribution System
PSA	Public Safety Act
PTB	Prevention of Torture Bill
PUCL	People's Union for Civil Liberties
RTE	Right to Education
RTI	Right to Information
SC	Scheduled Caste
SCPCR	State Commission for the Protection of Child Rights
SEZ	Special Economic Zones
SPO	Special Police Officers
SSA	Sarva Shiksha Abhiyan
SSB	Sashastra Seema Bal
ST	Scheduled Tribe
TRIPS	Trade Related Intellectual Property Rights Agreement
UN	United Nations
UPR	Universal Periodic Review
USD	United States Dollars
WTO	World Trade Organisation

I



Sandy Ford

**ECONOMIC, SOCIAL AND
CULTURAL RIGHTS AND
RIGHT TO DEVELOPMENT**



77% of Indians live on a consumption expenditure of less than INR 20 (around USD 0.4) a day.

0.8% was the decline in poverty during 2007-11, whereas the average growth rate was **8.2%**.

134 out of **187** countries is India's rank on the UN human development index.

Economic, Social and Cultural Rights and Right to Development

India has an impressive array of laws and schemes aimed at providing social services. These, however, have not succeeded in realising the economic, social and cultural rights for the majority of the population. Although India has achieved a sustained 'growth' rate, the promise of 'inclusion' has not been fulfilled.

As per UPR I Recommendations 10 and 18, India committed to address inequity. However, while the average growth rate over 2007-2011 was 8.2%, poverty declined by only 0.8%.¹ Data indicates that more than three-fourths of the 1.2 billion Indians have faced further marginalisation during this period. According to the *Arjun Sengupta Committee* (2006) appointed by the Prime Minister, 77% of Indians live on a consumption expenditure of less than INR 20 (around USD 0.4²) a day.³ The national poverty rate in India is estimated at 37.2% according to the *Tendulkar Committee* report. The Gol national report for UPR II, while quoting the same Committee, highlights the decline in the poverty rate from 1993-94 (45.3%) to 2004-05 (37.2%).⁴ However, India still ranks 134 out of 187 countries on the UN human development index.⁵ The country's economic policies, driven by the neo-liberal economic paradigm, continue to perpetuate 'exclusion' and violate Fundamental Rights and Directive Principles of the Constitution.⁶

1 Between 2007-2011 according to: Draft Approach Paper for the Twelfth Five-Year Plan, Planning Commission, Government of India, August 2011.

2 1 US dollar (USD) is the equivalent of around 53 Indian Rupees (INR); exchange rate as of April 2012.

3 *Report on Conditions of Work and Promotion of Livelihoods in the Unorganized Sector* (Arjun Sengupta Committee Report), 2006; exchange rate as of November 27, 2011.

4 *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: India, A/HRC/WG.6/13/IND/1*, UN General Assembly, 8 March 2012, para 65.

5 *Report of the Expert Group to Review the Methodology for Estimation of Poverty* (Tendulkar Committee Report), 2009, available at: http://planningcommission.nic.in/reports/genrep/rep_pov.pdf; India: Human Development Indicators, UN human development index report 2011, available at: <http://hdrstats.undp.org/en/countries/profiles/IND.html>

6 Including, *inter alia*, Articles 14, 15, 16, 17, 19, 21, 23, 24, 39, 42, 45 and 47 of the Constitution of India.

Right to Adequate Housing and Land

The human right to adequate housing is guaranteed in international law and in the Directive Principles of the Constitution of India. It has also been upheld by the Supreme Court, in various judgements, as an integral part of the right to life. Majority of the Indian population, in urban as well as rural areas, however, lives in extremely inadequate and insecure conditions.

Not taking into account displacement due to armed and ethnic conflict, India is estimated to have the highest number of people displaced annually as a result of ostensible 'development' projects. Independent experts estimate the number of those displaced by such projects since India's independence (1947), at between 60 and 65 million.⁷ This amounts to around one million displaced every year since independence. Of these displaced, over 40% are tribals and another 40% consist of Dalits and other rural poor.⁸ The vast majority of the displaced have not received adequate resettlement. The National Human Rights Commission's (NHRC) stakeholders' report for India's second Universal Periodic Review (UPR) states that "NHRC's monitoring finds that usually those displaced are given neither adequate relief nor the means of rehabilitation".⁹

Urban Housing and Living Conditions

The current paradigm of urbanisation being promoted by the Indian government, including schemes such as the *Jawaharlal Nehru National Urban Renewal Mission* (JNNURM), contrary to the rhetoric, has extremely limited space and resources for the poor, with a continued focus on large-scale infrastructure development. While urban land is being diverted for profitable real estate and infrastructure projects, legislative tools are commonly used to condemn the urban poor as 'illegal encroachers'. The housing that has been built under JNNURM for economically weaker sections is generally on the peripheries of urban areas, very far from people's work places, schools and hospitals, and is thus not viable and does not meet the criteria of 'adequate housing' either.

The national urban housing shortage estimated during India's Eleventh Five-Year Plan period (2007 – 2012) is 26.53 million, with around 99% of this pertaining to the economically weaker sections and low income groups. No comprehensive housing scheme, however, exists for the urban poor as yet. The current proposed national scheme of *Rajiv Awas Yojana* aimed at providing legal security of

Girl in a slum in Kolkatta



7 Planning Commission, Government of India, *The Draft Approach Paper for the Twelfth Five-Year Plan* [states this number to be 60 million], August 2011.

8 Walter Fernandes, *Development-induced Displacement and Human Rights*, Seven Sister's Post, 24 November 2011, available at: <http://www.sevensisterspost.com/epaper/24.11.11.pdf>

9 NHRC, *India Submission to the UN Human Rights Council for India's Second Universal Periodic Review*, available at: <http://nhrc.nic.in/Reports/UPR-Final%20Report.pdf>. For more details see Annex E.

tenure must also address the acute housing shortage and backlog and focus on the provision of adequate low-cost housing.

In the absence of affordable and low cost housing options, majority of the urban poor (around 60% in Mumbai and 50% in Delhi) are forced to live in overcrowded slums/informal settlements without legal security of tenure and access to basic services, including water and sanitation, and often at great risk to their health. By mid-2011, India's urban slum population was estimated at 158.42 million.¹⁰ Those who cannot afford a space in a slum continue to remain homeless, being forced to live on pavements, railway platforms, under flyovers, and in other precarious conditions. The Supreme Court and the High Court of Delhi have played a very positive role through progressive interim orders protecting the rights of the homeless and calling for state action. While this has resulted in positive responses from a few state governments, the failure to implement these orders is widespread and India's homeless population continues to rise and is excluded from most government schemes. Homeless people are routinely criminalised and brutalised by the police, including through targeted acts of violence and the implementation of the *Bombay Prevention of Begging Act, 1959*.¹¹ India has one of the highest concentrations of street children in the world, with UNICEF estimating their number to be as high as 11 million. However, this figure considered to be a conservative enumeration.¹² They live in grossly inadequate conditions and remain uncounted and largely outside the purview of the *Right to Education Act* and other schemes such as the *Integrated Child Development Services (ICDS)*. The recent announcement of the President of India to introduce a *National Programme for the Urban Homeless* is positive but it remains to be seen how this will be implemented in order to protect the rights of the country's growing homeless population.

CASE STUDY

High Court of Delhi: *Suo Moto* Case on Homelessness

On 22 December, 2009, the Municipal Corporation of Delhi (MCD) pulled down a temporary tent shelter for the homeless at Rachna Golchakkar (Pusa Roundabout). Shortly thereafter, it was reported that two of the evicted persons died due to the cold. Following their deaths, on 4 January, 2010, a coalition of groups working on homelessness in Delhi – *Shahri Adhikar Manch: Begharon Ke Saath (SAM: BKS – Urban Rights Forum: With the Homeless)* organised a press conference on the human rights violations of the homeless. The story received extensive media coverage, and on 6 January, 2010, the former Chief Justice of the High Court of Delhi issued a notice, *suo moto*, to the MCD and Delhi Government, seeking an explanation for the demolition of the shelter.

After the High Court took up the matter [writ petition (civil) 29/2010], the Supreme Court Commissioners in the *Right to Food Case* [I.A. No. 94 in writ petition (civil) No. 196 of 2001], sent a letter to the apex court explaining the vulnerability of homeless citizens to the extreme cold, the increase in starvation-related deaths in winter and the negligence by the Government of Delhi. It proposed the setting up of 100 temporary shelters and 500 community kitchens in the city within a week, and 140 permanent shelters by the end of December 2010.

10 National Buildings Organization, Ministry of Housing and Urban Poverty Alleviation, *Report of the Committee on Slum Statistics/Census, 2010*.

11 *The Bombay Prevention of Begging Act, 1959 is in force in 18 states and two Union Territories in India. Other states have different anti-vagrancy laws.*

12 Consortium for Street Children, *Street Children Statistics*, June-August 2009, page 5, available at: http://www.streetchildren.org.uk/_uploads/resources/Street_Children_Stats_FINAL.pdf

On 20 January, 2010, the Supreme Court ordered the Delhi government to provide both shelter and food to the city's homeless immediately. A week later, the apex court issued notices to all state governments in the country to provide information on the facilities for the homeless in their respective states. According to the order, all state governments are required to build at least one well-equipped shelter per 100,000 population. These shelters are supposed to be functional throughout the year on a 24-hour basis.

The High Court of Delhi has (from January 2010 to January 2012) passed 42 interim orders protecting the rights of Delhi's homeless. This has led to several improvements, including in the number of shelters for the homeless. The Supreme Court continues to monitor the status of services for the homeless across India. Both cases are ongoing and full implementation of the progressive orders of both courts by all state governments could lead to a significant amelioration in the condition of homelessness in the country.

Source: Housing and Land Rights Network

Homelessness and the crisis of inadequate housing are further exacerbated by regular forced evictions and slum demolitions across the country. Most of these are carried out in the name of 'development' such as urban renewal schemes, city 'beautification' projects, real estate development, and sporting events like the *2010 Delhi Commonwealth Games* that displaced around 200,000 people,¹³ of whom Scheduled Caste persons constituted the majority. An illustrative example is the slum cluster of 368 families of Dalit families at Jangpura's Barapullah Nullah, New Delhi, which was demolished to construct a car parking area for the Commonwealth Games. These evictions are generally carried out without due process or any rehabilitation. In the few cases where resettlement is provided, the sites are located very far from people's original places of residence, work, education and healthcare. People are not consulted and the quality of housing and services at most resettlement sites violates human rights standards. Kannagi Nagar, Okkiyum Thoraipakkam, located outside Chennai, is Asia's largest resettlement site in which 15,000 evicted families from 68 slums have already been relocated. The absence of adequate rehabilitation and feasible alternative housing options, forces many to become homeless and live on the streets. *"Given the relentless growth of urban population and the difficult economic environment for the poor, the housing problem will further worsen unless concerted efforts are taken to ameliorate the living conditions of the vast majority of vulnerable sections of society, i.e. the slum dweller/urban poor".*¹⁴



Lakshman Anand/ActionAid

Homeless people sleeping on the streets of Delhi, India

Unchecked real estate speculation contributes to escalating prices, which makes housing and property more and more unaffordable for the majority, resulting in people being forced to live in inadequate conditions and without security of tenure.

¹³ According to a fact-finding mission conducted by Housing and Land Rights Network, Delhi. The report titled, *Planned Dispossession: Forced Evictions and the 2010 Commonwealth Games*, is available at: www.hic-sarp.org.

¹⁴ Ministry of Housing and Urban Poverty Alleviation, Report of the Committee on Slum Statistics/Census, National Building Organisation, 2010.

Rural Housing, Land, and Living Conditions

The total national rural housing shortage for the Eleventh Five-Year Plan period (2007-2012) was estimated at 47.43 million, of which 90% was for 'below poverty line' households. The lack of adequate investment in rural housing, livelihoods and development, along with large-scale displacement, a severe agrarian crisis, and growing landlessness and homelessness, contribute to the majority of the rural poor living in grossly inadequate conditions.

Indira Awas Yojana, a rural housing scheme for 'below poverty line' families, especially of Scheduled Castes and Scheduled Tribes, has failed to reach the poorest of the poor, including the landless. The Gol national report for UPR II provides that "since inception, 27.3 million houses have been constructed at an expenditure of INR 795 billion (USD 14.8 billion) (until January 2012)". It also claims that "there is high degree of satisfaction with this scheme since beneficiaries participate in the construction of their own houses".¹⁵ However, while the scheme contains certain progressive elements such as mandating release of funds in instalments and registration of houses in the names of women, it needs to be implemented better while ensuring that the process of beneficiary selection is accurate and that the neediest, including the landless, are able to benefit. An evaluation done for the Planning Commission has found lack of quality control under the scheme, even in seismic zones. The safety of residents and lack of sanitation remain serious concerns under the scheme.¹⁶

Displacement due to Infrastructure and other Projects

Large infrastructure projects, including dams, ports and mining, environmental conservation projects, and designation of large areas as tax-free Special Economic Zones (SEZs), have been responsible for the displacement of millions of rural families, most of whom have not received rehabilitation. A total of 582 SEZs have been formally approved under the *SEZ Act, 2005* across India.¹⁷

Peaceful march for land to the landless in Bihar.

Majority of natural resource rich areas in India are occupied by indigenous peoples (tribals/*adivasis*) who face the worst onslaught of large dams, mining, and other natural resource extraction projects. States like Chhatisgarh, Jharkhand, Andhra Pradesh, Odisha, and the north-eastern states of Manipur, Meghalaya, Sikkim, Arunachal Pradesh, Mizoram, and Tripura, in particular, face acute threats of displacement due to such projects. In Arunachal Pradesh itself, 148 Memorandums of Understanding have been signed to construct dams. *The Scheduled Tribes and Other Traditional Forest*



Ranjana Rahi/ActionAid

¹⁵ National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: India, A/HRC/WG.6/13/IND/1, UN General Assembly, 8 March 2012, para 57.

¹⁶ NHRC, *Submission to India's Second Universal Periodic Review*, available at: http://www.nfhsindia.org/nutrition_report_for_website_18sep09.pdf. For more details see Annex E.

¹⁷ SEZ India, available at: <http://www.sezindia.nic.in/writereaddata/pdf/StatewiseDistribution-SEZ.pdf>

Dwellers (Recognition of Forest Rights) Act, 2006 (Forest Rights Act), a progressive legislation, aimed at recognising rights of forest dwellers, is not being adequately implemented and many tribals are being denied their right to forest resources. As of 30 September 2011, of the 2,808,494 claims of land titles considered, a staggering 1,577,831 claims (56.1%) have been rejected.¹⁸

Most of the displaced in India constitute the rural poor, marginal farmers, fisher folk and tribals/*adivasis*, who continue to face severe displacement threats.¹⁹ The Eleventh Five-Year Plan clearly identified that, “*Major alienation of tribal land in the scheduled areas has taken place through the means of compulsory acquisition using the government process of land acquisition. The present arrangements of resettlement and rehabilitation are detrimental and prejudicial to the interests of the tribals. The process of erosion of corpus of tribal land continues at an accelerated pace under the new economic dispensation while the policy options are being debated*”.²⁰

CASE STUDY

The POSCO Project, Odisha

In 2005 the Government of Odisha signed a Memorandum of Understanding (MoU) with the South Korean conglomerate Pohang Steel Company (POSCO), the world's third largest steel company, for setting up an export-oriented integrated steel plant, captive power plant, and marine port near Paradeep, Jagatsinghpur District, Odisha. It is supposedly the largest foreign direct investment in India with a total investment of USD 12 billion. The Government of Odisha will grant POSCO mining lease rights for 30 years that will ensure an adequate supply of 600 million tonnes of iron ore to POSCO. The costs of this operation for POSCO have been estimated at less than 1% of the prevailing global market price for iron ore.

4,000 acres of land have been earmarked in Ersama block of Jagatsinghpur District for the purpose of setting up the steel project and associated facilities. The land that would be required for the railway, road expansion and mines is not included in this. The project will have large-scale, irreversible socio-economic and environmental impacts. The proposed plant and port will adversely affect 11 villages and hamlets in three *Gram Panchayats* (village councils) in Jagatsinghpur District, namely – Dhinkia, Nuagaon and Gadakujang. As per the local leadership of the movement against POSCO, more than 4,000 families and a population of around 22,000 will be affected by the project. These include all those persons directly dependent on betel vine cultivation, pisciculture, cashew-nut cultivation and fishing in Jatadhari Muhana – the proposed site of the port. The MoU signed between the Odisha government and POSCO establishes that the government has agreed to transfer resources worth millions for almost no returns to the state exchequer.

For the last six years, villagers of Jagatsinghpur District have been consistently protesting against the establishment of the steel and captive power plant by POSCO. In response to the villagers' protests, the state government and administration, allegedly in collusion with POSCO sent police and paramilitary forces, which in some instances used excessive force against the resisters. The government has engaged in grave violations of laws, democratic processes and human rights, which include use of state force and intimidation to quell dissent

18 Ministry of Tribal Affairs, *Status report on implementation of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 [for the period ending 30th September, 2011]*, available at: <http://www.tribal.nic.in/writereaddata/mainlinkFile/File1317.pdf>

19 Planning Commission, Government of India, *Draft Approach Paper for the Twelfth Five-Year Plan*, August 2011. The Special Rapporteur on the right to food, Jean Ziegler, also stated that around 40-50% of the displaced in India are tribal people though they make up only eight per cent of the population (See report of the Special Rapporteur on the Right to Food, Jean Ziegler, Mission to India, E/CN.4/2006/44/Add.2).

20 Planning Commission of India, Government of India, *Eleventh Five-Year Plan (2007-2012)*, 2007.

against the POSCO project, setting up of barricades to prevent free movement, attempts of forced evictions, and account of loss of land, housing and livelihood. The numerous instances of human rights violations reported against the police include beatings, arrests, shootings, torture of suspected anti-POSCO protestors, filing of false cases against them, as well as arbitrary arrest and detention of one of the leaders of the anti-POSCO movement. To date 152 cases have been registered against the villagers by the government; 825 warrants have been issued, of which 340 are for women.

On 29 November, 2007 a peaceful protest of the anti-POSCO movement was attacked by private/corporate militia and at least 17 anti-POSCO protestors were injured. On 20 June a bomb was thrown on anti-POSCO villagers, killing a villager Dula Mandal, and severely injuring Dhruba Sahani. Similarly, more than 100 injuries occurred on 15 May, 2010, which were caused by blind-firing of rubber bullets by police forces during a cruel dispersal of protestors, violating the constitutional right to dissent. Villagers refrain from moving out of the village, even for medical treatment, for fear of getting arrested.²¹ More recently, on 23 December, 2011, Mr. Narayan Reddy was arrested, brought before a local court, and kept in custody for two weeks after he was falsely charged with murder and is reportedly being held in connection with violent incidents among peaceful anti-POSCO protestors and workers engaged by a contractor group. During the clashes one person died and 25 protesting villagers were seriously injured.²²

In July 2010, a four member committee was set up by the Ministry of Environment and Forests to investigate the status of implementation of existing legislation on environmental issues, including the *Forest Rights Act, 2006* (FRA) and Coastal Regulation Zone (CRZ) rules by POSCO India Pvt. Ltd. Three of the four members of the committee observed that environmental laws were being violated and provisions of the FRA were not followed. The report stated that there are grave violations of environmental laws and forests rights in addition to fabrication of evidence and suppression of information. The committee recommended the prosecution of the responsible authorities who violated the environmental laws, as well as the provisions of FRA. On 2 May 2011, the Government of India instead of accepting these recommendations, gave a forest and environmental clearance to the POSCO project. On 30 March, 2012, the National Green Tribunal, however, suspended the environmental clearance accorded to POSCO.

Source: Housing and Land Rights Network

An estimated 13 to 18 million families in rural India today are reported to be landless, of which about 8 million lack homes of their own.²³ Almost 80% of the agricultural population owns only about 17% of the total agriculture land, making them near-landless workers. Dalits face systemic discrimination in land ownership and are often forced to live on the peripheries of villages. Contract and guardianship laws of the land oust people with disabilities from the right to own property, or other assets.

Land reform measures have not been successfully implemented in most states, neither has surplus land been equitably distributed. The Eleventh Five-Year Plan also acknowledged that: *“The quantum of land declared surplus is far short of land which was estimated to be surplus on the basis of various national surveys. Thus, it is clear that reform measures have not been able to achieve the desired impact.”*²⁴ The Draft

21 Odisha Development Review, *State of Human Rights Due to Corporate Activities*, Stakeholders' Report to the United Nations 2nd Universal Periodic Review of India (2012), November 28, 2011.

22 FIDH, *Arbitrary detention of and judicial harassment against Mr. Narayan Reddy*, January 13, 2012, available at: <http://fidh.org/Arbitrary-detention-of-and-11143>

23 Planning Commission of India, Government of India, *Eleventh Five-Year Plan (2007-2012)*, 2007.

24 Ibid.

Approach Paper to the Twelfth Five-Year Plan, however, does not talk about land reform at all, reflecting a clear lack of priority to the issue.

The forced acquisition of agricultural farmland is further exacerbating landlessness, country's agrarian crisis and threatening food security. Despite the existence of the *National Rural Employment Guarantee Act, 2005*, the loss of homes, habitat and lands is forcing thousands of families across rural India to move to urban areas in search of survival options. 'Distress migration' is one of the most striking findings of India's 2011 census, reflected in the increase of urban population, which is higher than the rural one.²⁵ Natural disasters like the 2004 tsunami, earthquakes, and annual floods have also been responsible for displacing large sections of the population.

Across rural and urban areas, women, children and minorities, especially Scheduled Castes and Scheduled Tribes, suffer disproportionately from the adverse impacts of evictions, homelessness, landlessness, and inadequate housing and living conditions.

Almost 80% of the agricultural population owns only about 17% of the total agriculture land, making them near-landless workers.

Law and Policy

Despite the dismal status of housing and land rights in the country, there is no comprehensive human rights-based national housing law or policy. *The National Housing and Habitat Policy, 2007* while stating 'shelter for all' as a goal does not consider housing to be a human right but focuses more on a market approach to housing. The proposed national urban scheme *Rajiv Awas Yojana* that aims to provide security of tenure for residents of slums/informal settlements also needs to focus on incorporating a strong 'human right to adequate housing' approach in order to be successful.

Several bills, which relate to housing and land are currently in the process of being finalised in India. These include: the *Real Estate (Regulation and Development) Bill, 2011*; the *Land Acquisition and Rehabilitation and Resettlement Bill, 2011*; the *Land Titling Bill, 2011*; and the *Mining Bill, 2011*. All these draft bills need to undergo review and extensive consultation while incorporating a human rights approach.

The draft *Land Acquisition and Rehabilitation and Resettlement Bill, 2011* is at the centre of a debate, as it is premised on the contentious colonial principle of 'eminent domain', under which state can acquire private property for public use, following the payment of compensation to the owner. The Bill does not aim at minimising evictions; does not have a rights-based definition of 'public purpose' and does not include adequate human rights safeguards for rehabilitation. It is also extremely weak with regard to urban eviction and displacement issues and thus needs to be considerably revised and expanded.

²⁵ The Hindu, *Census findings point to decade of rural distress*, September 25, 2011, available at: <http://www.thehindu.com/opinion/columns/sainath/article2484996.ece?homepage=true#.ToAHZ9HBvuV.facebook>

Right to Food

Ensuring access to natural resources and/or income to feed oneself with adequate nutritious food is of crucial importance for the enjoyment of all other rights. India has ratified core international human rights instruments that have strong reference to the right to food.²⁶ Nonetheless, in 2008 the Committee on Economic Social and Cultural Rights expressed deep concern over the high levels of food insecurity in the country, as well as on the reports of corruption, inefficiency and discrimination in distribution²⁷ that impede the realisation of the right to adequate food.²⁸

In 2000, India adopted the *UN Millennium Declaration*, a joint effort to reduce poverty and hunger by 50% before 2015. Yet, high levels of food insecurity, corruption, inefficiency and discrimination in distribution remain. The *Right to Food Guidelines* of the Food and Agriculture Organization (FAO), adopted by the FAO Council in 2004, reiterate the legally binding standards already existing for the right to food and focus on how states can fulfil their obligations under the right to food by developing, implementing and monitoring their public policies, through benchmarking and increased accountability.

The Constitution of India provides a strong framework for the protection and promotion of the right to food. Article 21 secures the protection of life and personal liberty, while Article 47 states that “*the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties*”.

India also has a number of food entitlement programmes like the *Integrated Child Development Scheme* (ICDS) tenable by all children under six, pregnant and lactating mothers, and the *Mid-Day Meal Scheme* (MDMS) available to all primary and upper primary school children. Food subsidy schemes—like the targeted *Public Distribution System*, which guarantees 35 kilogrammes (kgs) per month of subsidised food grains, and the *Annapurna Scheme* that provides for 10 kgs of free food grain for indigent senior citizens of 65 years or above who are not getting old age pension – also exist. However, despite the presence of such programmes and the required available grains, 21% of India’s total



Liba Taylor/ActionAid

26 International Covenant on Economic, Social and Cultural Rights (ICESCR Art. 11), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, Art.24 &27), and the Convention on the Rights of the Child (CRC, Art. 12&14).

27 CESCR’s definition of adequate food availability, apart from the possibilities for feeding oneself, also refers to the possibilities for “*well functioning distribution* (emphasis added), processing and market systems that can move food from the site of production to where it is needed in accordance with demand. - General Comment 12 of the UN Committee on Economic Social and Cultural Rights, 1999, E/C.12/1999/5, para. 12, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G99/420/12/PDF/G9942012.pdf?OpenElement>

28 Concluding Observations of the UN Committee on Economic Social and Cultural Rights, 2008, E/C.12/IND/CO/5, para. 28, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/436/08/PDF/G0843608.pdf?OpenElement>

population remains undernourished,²⁹ with women, girls and older persons being the most affected. Since 1997, the country has experienced an average annual GDP rate of 7%, yet India still has the world's highest number of malnourished.³⁰ Despite a significant decline in malnourishment in the last seven years, the levels of malnourishment are still very high. According to a recent study,³¹ 42% of children under five are underweight and 59% are stunted. Commenting on the issues, the Prime Minister stated: "... what concerns me and what must concern all enlightened citizens, is that 42% of our children are still underweight. This is an unacceptable high occurrence."

Supreme Court Orders

In addition to these national legal entitlements, since 2001, over 40 Supreme Court interim orders have treated the right to food as justiciable.³² In 2001, when the food stocks reached unprecedented levels in the country while hunger in drought-affected areas was immense, People's Union for Civil Liberties (PUCL) filed a petition against the Government of India, the Food Corporation of India (FCI), and six state Governments in the context of inadequate food relief.³³ Consequently, the case was expanded to include issues of chronic hunger and undernutrition and all the states were added under the list of petitioners. In its response, the central government stated that it had nine nutrition-related schemes³⁴ to deal with the situation and the Court started to review the implementation of these schemes. The Supreme Court began issuing orders instructing the central and state governments to implement nutrition-related schemes in letter and spirit, effectively turning the benefits under these schemes into legal entitlements. Over the past decade, the focus of the case has shifted from one scheme to another.³⁵

Starvation Deaths

In a 2002 order, the Supreme Court stated that "[i]t is the duty of each states/Union Territories to prevent deaths due to starvation or malnutrition. If the Commissioner reports and it is established to the satisfaction of the Court that starvation death has taken place, the Court may be justified in presuming that its orders have not been implemented and the Chief Secretaries... may be held responsible for the same."³⁶

"... what concerns me and what must concern all enlightened citizens, is that 42% of our children are still underweight. This is an unacceptable high occurrence."

*Dr. Manmohan Singh,
Prime Minister of India*

29 Food and Agriculture Organization of the United Nations, India, available at: <http://www.fao.org/countries/55528/en/ind/>

30 Percentage of children under age five years classified as malnourished according to three anthropometric indices of nutritional status: height-for-age, weight-for-height, and weight-for-age, according to state, India, 2005-06: (1) Height-for-age (stunting): 48%; (2) Weight-for-height (wasting): 19.8%; and (3) Weight-for-age (underweight): 42.5%- International Institute for Population Sciences and Macro International, National Family Health Survey 3 (NFHS-3), 2005-06: India, Mumbai, available at: <http://www.nfhsindia.org/nfhs3.html>

31 Naandi, *The HUNGaMA Survey Report 2011*, available at, www.hungamaforchange.org/FlierA4copy.pdf

32 *People's Union for Civil Liberties v. Union of India*, Supreme Court, Writ Petition (Civil) No.196 of 2001 (India); Also see: Planning Commission affidavit to the Supreme Court on 20.09.2011.

33 *PUCL vs Union of India and Others*, Writ Petition (Civil) 196 of 2001

34 These were: Integrated Child Development Services, Mid-Day Meal Scheme, Public Distribution System, Annapoorna, Antyodaya Anna Yojana, National Family Benefit Scheme, National Maternity Benefit Scheme and National Old Age Pensions Scheme. Sampoorna Grameen Rozgar Yojana (SGRY) was also in the initial list, but this programme was phased out after the NREGA came into force.

35 Reetika Khera (*Forthcoming*)

36 Supreme Court Order dated 29th October, 2002 – Right to Food Campaign, *Supreme Court on the Right to Food: A Tool for Action*, October 2005.

On 10 May 2011, the Supreme Court directed the Central government to release five million tonnes of foodgrains immediately for distribution in 150 most poverty-stricken districts to ensure that no starvation death takes place.³⁷ Nevertheless, starvation deaths are still regularly reported in India, though officials refrain from acknowledging their occurrence.³⁸

CASE STUDY

Starvation death of tea labourers in Assam

In Bhuvan Valley Tea Estate – a privately owned tea garden in the district of Cachar in the North-East Indian state of Assam – 14 people died allegedly due to starvation, malnutrition and lack of medical care within a five-month period, according to the findings of an investigating team of the Barak Human Rights Protection Committee (BHRPC).

The first series of deaths occurred after the closure of the tea garden in October 2011, when the tea garden was abruptly closed and the workers were abandoned by the state and the estate management. The dismal situation of the workers continued even after the reopening of the garden in February 2012, and new deaths were reported. Actions and inactions of both the estate management and the government drove about 3,000 labourers and their families on the verge of starvation. The management closed the tea garden without paying wages due for nine weeks, dues from provident fund and other benefits and without providing any alternative livelihood options.

Numerous plantation labourers were interviewed by the BHRC. Some of them were employed as permanent workers and paid wages as low as INR 50 (USD 0.95) per day, while the rest were engaged as casual workers and paid even lower wages at INR 41 (USD 0.78). The wages of the labourers remained pending for long under various pretexts, including that the estate was suffering loss but would recover very soon. It is also alleged that the estate management did not provide any housing facilities for the labourers and their families. The management wanted workers to search for alternative livelihoods and overlook their dues. However, the workers demanded their dues, stopped working, and the estate closed down. The workers approached the administration several times and the Deputy Commissioner of Cachar district assured them that the issue would be resolved.

Labourers and their families living in the garden have been deprived of a number of union and state welfare schemes, leading to an overall dismal situation in the tea garden.

(1) Nutrition and health

There are only about seven *anganwadi* centres³⁹ in the whole estate where more than 3,000 people are living. The centres are run under the *Integrated Child Development Services* (ICDS) intended to provide nutrition and health care for children, adolescents, gestating and lactating mothers. According to the local inhabitants, even these few centres are not properly functioning, with workers and helpers of *anganwadi* centres coming only once or twice a month.

37 The Hindu, *Release 5 million tonnes of foodgrains: Supreme Court*, May 14, 2011, available at: <http://www.hindu.com/2011/05/15/stories/2011051555310800.htm>

38 The Indian Express, *Left Union claims starvation deaths in tea gardens*, January 14, 2012, available at: <http://www.indianexpress.com/news/left-union-claims-starvation-deaths-in-tea-gardens/899666/>; India Real Time, *Starving in India: A fight for life in Bihar*, April 10, 2012, available at: <http://blogs.wsj.com/indiarealtime/2012/04/10/starving-in-india-a-fight-for-life-in-bihar/>

39 *Anganwadi* centres come under the Integrated Child Development Scheme. The main objective of this programme is to cater to the needs of the development of children in the age group of 3-6 years. Pre-school education aims at ensuring holistic development of the children and to provide learning environment to children, which is conducive for promotion of social, emotional, cognitive and aesthetic development of the child. – National Portal of India, available at: <http://india.gov.in/citizen/health/health.php?id=62>

A health centre run under the *National Rural Health Mission* of the Government of India is in place but is not functioning properly, according to the inhabitants, who claim it is run by an unqualified practitioner and the medicines are not made available to the patients. Moreover, the district authority is said to have sanctioned INR 1,500,000 (USD 28,300) for primary health care, but there is no sign of its utilisation. There is an ambulance, but the driver demands INR 400 (USD 7.5) fare from each patient, which is unaffordable for them.

(2) Housing and food

There are a few houses constructed under *Indira Awas Yojna* (IAY) – a central government rural housing programme – in the tea garden area. People, however, claimed that most of the installed money for the construction of these houses is granted to labourers who are connected with the management and the labour union, which is affiliated with the ruling party of the state. The poorer are thus completely deprived from IAY benefits. Additionally, the government-run *Public Distribution System* (PDS) is conspicuously absent in the area.

(3) MGNREGA

Work done on the digging of a canal was reportedly claimed under the *Mahatma Gandhi National Rural Employment Guarantee Act, 2005* (MGNREGA). Nevertheless, people stated that this is the only work done under MGNREGA in the tea garden area, which provided only few workdays to a small number of labourers.

When the garden re-opened in February 2012, the labourers joined work as they were left with no other option. Only three out of nine weeks' wages, which were long overdue at the time of closure of the estate, were paid to the workers. The labourers borrowed money or bought food items on credit during the four months when they had no access to income. They had to repay those loans and thus were not in a position to procure food sufficiently. Neither the garden owners nor the administration provided them with any food items. The investigating team of BHRPC was told that some medicines were brought to the health centre in the tea garden but nothing so far has been distributed among the sick people. The team met 42 sick people in three divisions out of the total 10 but the number of people that need immediate medical care in all the districts of the tea garden is much higher.

The Government of Assam is still denying the occurrence of starvation deaths in the tea garden, even though it admitted the occurrence of deaths and the prevalence of hunger. The official position is that these were natural deaths caused by diseases and old age thereby ignoring the underlying causes.

Source (summary): Barak Human Rights Protection Committee (BHRPC), Tea labourers die of starvation due to exploitation of garden management and government apathy in Assam & Deaths continue unabated in Assam tea garden (available at: <http://bhrpc.wordpress.com/2012/02/01/hungeralert1/>; <http://bhrpc.wordpress.com/2012/03/10/hungeralert4/>)

Public Distribution System (PDS)

India's PDS is the world's largest food subsidy programme. It is a major scheme meant to ensure availability of selected commodities at affordable subsidised prices. It operates under the joint responsibility of the central and state governments. The state's responsibilities include the distribution of food grains to consumers through 'Fair Price Shops' (FPSs), the identification of families below poverty line (BPL), the issuance of BPL cards, as well as the movement and the storage of food grains. A 2010 Right to Information (RTI) application revealed serious inefficiencies in the government's monitoring of storage facilities and distribution. In an affidavit to the Supreme Court filed in September 2010, the Ministry of Consumer Affairs, Food and

Public Distribution, admitted that more than 67,000 tonnes of grains were rotting in the godowns of the Food Corporation of India (FCI).⁴⁰

While being a progressive scheme, the shift from universal applicability of the PDS to a targeted one since 1997 – providing subsidised food only to Below Poverty Line (BPL) card holders – has led to the exclusion of genuinely poor households. The Tendulkar Committee was set up in 2009 to look into the methodology for estimating the poverty line. Using the methodology of the Committee, the Planning Commission, in an affidavit to the Supreme Court on 20 September, 2011 [in the case W.P.C. (196/2001)], claims that any person who has a per capita per day expenditure of INR 26 (USD 0.5) in rural India and INR 32 (USD 0.61) in urban areas will be considered ‘above poverty line’, at 2004-05 prices.

Providing subsidised food only to BPL cardholders excludes many genuinely poor households through targeting errors.⁴¹ *“A large proportion of manual workers’ households, households belonging to Scheduled Castes and Tribes, households with little or no land, as well as households in the lowest income classes, are excluded from the PDS today.”*⁴² In fact, in 2004-05, 50% of poor rural households did not have a BPL card, while 18% of households in the richest quintile had one.⁴³ Other problems of implementation include: losses during transportation, poor storage, rotting grains and illegal sale.

The proposal to introduce a ‘cash transfer’ programme in place of the PDS cannot solve the problem of incorrect identification of the poor, and will not benefit the already targeted poor since they would be receiving a fixed sum when prices of essential items, including food, are rising. A plethora of impediments that render cash transfers not a sensible plan to achieve food security: the availability, efficiency and accessibility of banks or post office systems, especially for people living in remote areas of the country; the irregular payments and corruption; the high rates of illiteracy; the lack of decision-making power over the household income by women who are the main providers of food; as well as the adverse impact on agricultural production owing to the lack of demand for subsidised grains. A 2011 survey has shown that people rejected the introduction of cash transfers in states where the PDS is functional, whereas many respondents were more open to the idea in states with a dysfunctional PDS. *“Overall, more than two-thirds of the respondents expressed a clear preference for food over cash; less than one-fifth were in favour of cash over food”*.⁴⁴

40 Hindustan Times, *Rotting grain more than Government claimed*, September 7, 2010, available at: <http://www.hindustantimes.com/News-Feed/India/Rotting-grain-more-than-Govt-claimed/Article1-596981.aspx>. Also see: Hindustan Times, *Not a grain of truth*, September 8, 2010, available at: <http://www.hindustantimes.com/News-Feed/ColumnsSamarHalarnkar/Not-a-grain-of-truth/Article1-597806.aspx>

41 The Planning Commission, *Nutrition and Social Safety Net*, page 135. available at: http://planningcommission.nic.in/plans/planrel/fiveyr/11th/11_v2/11v2_ch4.pdf

42 M. Swaminathan, *The Case of State Intervention*, UN Chronicles, 2008, available at: <http://www.un.org/wcm/content/site/chronicle/home/archive/issues2008/pid/5101?print=1>

43 International Household Survey Network, *India: 2005-National Sample Survey Round 61, 2004-2005*; Jean Dreze & Reetika Khera, *The BPL Census and a Possible Alternative*, Economic and Political Weekly, Vol XLV No 9, February 27, 2010.

44 Reetika Khera, *Revival of the Public Distribution System: Evidence and Explanations*, Economic and Political Weekly, Vol XLVI No 44 & 45, November 5, 2011.

The state of Tamil Nadu, while adopting a universal approach, “has introduced an option for households that do not want to purchase rice from the PDS, and given them scope for buying more sugar or kerosene. There are 100,000 card-holders who have exercised this option, and another 52,000 who have withdrawn from the PDS completely. As the State is buying grain from the centre at higher prices [BPL allocation at the BPL price and APL (Above Poverty Line) allocation at the APL price], it is incurring an additional subsidy to maintain a universal system with rice at specially subsidised low price”.⁴⁵ Contrary to a common belief that the PDS is irreparably dysfunctional, a recent survey (Khera, 2011) has shown that in states where authorities have taken measures and initiatives, such as expanded coverage, reduced prices, computerisation of stock management, etc, the PDS was significantly functional. The system in Himachal Pradesh is also universal with all households having the same access to commodities and quantities, with APL households paying higher prices than the BPL households. Andhra Pradesh and Chhattisgarh have adopted a quasi-universal approach with nearly 80% of the population having access to PDS commodities.⁴⁶ These inclusive, successful systems of PDS should be emulated across the country.

National Food Security Bill

The *National Food Security Bill, 2011* (NFSB) is a very important step towards the elimination of hunger and under-nutrition in India. Its positive features include the recognition of women as heads of the household for the distribution of BPL cards and the statutory recognition of *Mid-Day Meals* and *Integrated Child Development Schemes*. However, the Bill also has shortcomings, as it fails to universalise the PDS and rather opts for a targeted approach. In addition, the current overwhelming focus of the NFSB on the PDS is not adequate. In order to make the right to food a reality, access to productive resources like land, water and forests should also be addressed and incorporated in the ambit of the Bill. The NFSB should include provisions to implement the state’s obligation to facilitate access to resources for people to feed themselves, along with the state obligation to provide food if people cannot access such resources. In order to ensure food security, the NFSB has to be in conformity with India’s human rights obligations and in compliance with orders of the Supreme Court.

On 12 March, 2012, several eminent development economists wrote an open letter to Prime Minister Manmohan Singh welcoming the tabling of the *National Food Security Bill* but also pointing out to its serious shortcomings. The experts suggested a simpler and more effective framework for the PDS that would require only minor amendments to the Bill.⁴⁷ Their suggestions are detailed in the following case study.

45 M. Swaminathan, *Neo-Liberal Policy and Food Security in India: Impact on the Public Distribution System*, available at: <http://www.networkideas.org/ideasact/jan09/PDF/Madhura.pdf>

46 Reetika Khera, *Revival of the Public Distribution System: Evidence and Explanations*, Economic and Political Weekly, Vol XLVI No 44 & 45, November 5, 2011.

47 The Hindu, *A simple proposal on food security*, March 12, 2012, available at: <http://www.thehindu.com/opinion/op-ed/article2985212.ece>

CASE STUDY

Simplifying the National Food Security Bill

In its current form (Plan A), the *National Food Security Bill* (NFSB) is impractical and divisive. It rests on an artificial division of the population into three groups ('priority', 'general' and 'excluded'), without any clarity as to how these groups are to be identified. All recent attempts to devise a sound methodology to identify priority households have failed. The Socio-Economic and Caste Census (SECC) is unlikely to perform much better than earlier BPL censuses in this respect. Exclusion errors are likely to be large, and the entire process is very divisive. Also, Plan A lacks simplicity and transparency, elements that are essential for the success of this Bill.

Proposed Solution: The proposed solution (Plan B) is essentially a simplification of the Bill, as follows: (a) use 'exclusion criteria' only; (b) merge the general and priority groups ('aam log'); (c) give every 'aam' household a 'national assured minimum entitlement' (NAME) of 25 kgs per month at INR 3/2/1 (USD 0.06/0.04/0.02) per kg for rice/wheat/millet;⁴⁸ (d) retain and strengthen the *Antyodaya Anna Yojana scheme*⁴⁹ as it is.

Advantages of this Solution: It is eminently feasible and relatively easy to implement; it provides a sound and durable framework; poor households would be well protected from exclusion errors; entitlements would be simple and transparent; the solution would avoid the divisive effects of 'targeting' and will end the poverty line controversy; and finally the Antyodaya households would be protected from any possible loss of entitlements.

Clarifications: (a) The NAME is a national minimum guaranteed by the central government under NFSB. It does not prevent state governments from providing more, e.g. by giving more than 25 kg to aam households, or by giving something to excluded households; (b) In principle, the NAME need not be the same everywhere, e.g. it could be different in rural and urban areas, or higher in the poorer districts; (c) The *Antyodaya Anna Yojana* programme would be retained and strengthened, either under the NFSB, or simply as a 'scheme'. The SECC's 'automatic inclusion' households (e.g. released bonded labourers) could be automatically added to the Antyodaya list.

Resource Requirements: If 25% of rural households and 50% of urban households are excluded (as in Plan A), the annual resource requirements (including the required provision for the Antyodaya programme) are as follows:

	Grain Requirements (Million tonnes)	Food Subsidy (INR Billion)
Plan A	52.4	779.27 (USD 14.5)
Plan B	51.5	815.24 (USD 15.1)

The Main Hurdle: BPL households are currently entitled to 35 kgs per month; hence to those households that actually obtain 35 kgs plan B would appear detrimental, compared with their current entitlements. However, only some states are actually granting 35 kgs per month to BPL households. Many states have already reduced BPL entitlements to expand the coverage of the PDS, to 25 kgs per month or less. Consequently, BPL households in these states would benefit from Plan B. Even a BPL household currently obtaining the official quota of 35 kgs per month at the official 'central issue prices' would get roughly the same subsidy under Plan B – as the reduction of price would compensate for the reduction of quantity. This applies, for instance, in UP and Maharashtra.

48 If entitlements are in per-capita terms, the NAME would be "5 kgs per person" instead of "25 kgs per household". If food entitlements are replaced with cash transfers under Section 18(2)(h) of the Bill, the NAME would be (at least) the monetary equivalent of these food entitlements at local prices.

49 The scheme is aimed to target the poorest of the poor in rural and urban areas, who are issued special yellow ration cards.

There is still a possible issue in a few states where BPL households receive 35 kgs, and where the issue price has been reduced (by state governments) substantially below the 'central issue prices'. The main examples are Chhattisgarh and Jharkhand. However, these states will accumulate large PDS subsidies if the central government reduces issue prices to INR 3/2/1 (USD 0.06/0.04/0.02) for rice/wheat/millet. These saved subsidies could be used by the concerned states to protect the entitlements of households currently receiving 35 kgs. Alternatively, a provisional 'supplement' of 10 kgs per BPL household could be provided by the central government to all states that currently provide 35 kgs to BPL households, for a limited period of time. This would be effortless, considering the government's large excess stocks at the moment.⁵⁰

Source (summary): The Hindu, Attachment note on food security, March 12, 2012, available at: http://www.thehindu.com/multimedia/archive/00948/Simplifying_the_NFS_948744a.pdf [Drafted by: Dilip Abreu (Princeton University); Pulapre Balakrishnan (Director, Centre for Development Studies, Thiruvananthapuram); Abhijit Banerjee (Massachusetts Institute of Technology); Sangeeta Bansal (Jawaharlal Nehru University); Pranab Bardhan (University of California, Berkeley); V. Bhaskar (University College, London); Ashwini Deshpande (Delhi School of Economics); Bina Agarwal (Director, Institute of Economic Growth); Mahendra Dev (Director, Indira Gandhi Institute of Development Research); Jean Drèze (Allahabad University); Bhaskar Dutta (Warwick University); Maitreesh Ghatak (London School of Economics); Deepti Goel (Delhi School of Economics); Ashima Goyal (Indira Gandhi Institute of Development Research); Himanshu (Jawaharlal Nehru University); Rajshri Jayaraman (European School of Management and Technology, Berlin); K.P. Kannan (former Director, Centre for Development Studies, Thiruvananthapuram); Anirban Kar (Delhi School of Economics); Reetika Khera (Indian Institute of Technology, Delhi); Ashok Kotwal (University of British Columbia); Srijit Mishra (Indira Gandhi Institute of Development Research); Dilip Mookherjee (Boston University); K. Nagaraj (Asian College of Journalism); R. Nagaraj (Indira Gandhi Institute of Development Research); Sudha Narayanan (Indira Gandhi Institute of Development Research); Pulin Nayak (Delhi School of Economics); Rohini Pande (Harvard University); Kirit Parikh (Chairman, Integrated Research and Action for Development); Bharat Ramaswamy (Indian Statistical Institute); Debraj Ray (New York University); Atul Sarma (former Vice-Chancellor, Rajiv Gandhi University); Abhijit Sen (Member, Planning Commission); K. Sundaram (Delhi School of Economics); Jeemol Unni (Director, Institute of Rural Management, Anand); Sujata Visaria (Hong Kong University of Science and Technology); Vijay Vyas (Member, Economic Advisory Council to the Prime Minister)].

Food security in India requires that the government expands its focus beyond welfare schemes and secures access to and protection of natural resources, promotes land reforms and supports production and utilisation of coarse grains grown by local communities for the PDS, which would cut transportation costs and support small and marginal farmers. Food grains should be locally grown in order to support local agriculture and allow proceeds of subsidised foods to flow directly into local communities. According to the UN Special Rapporteur on the right to food: "There is overwhelming agreement that achieving food security in developing countries requires increasing support to enhance the productive capacity of and economic opportunities for, small-scale farmers".⁵¹

50 Foodgrain stocks stood at 54 million tonnes on 1 March 2012 (the highest-ever level for that date, just before the rabi harvest). They are expected to rise to 74 million tonnes by 1 June 2012.

51 *The World Trade Organization and the Post-Global Food Crisis Agenda: Putting Food Security First in the International Trade System*, Briefing note 04, November 2011, available at: http://www.srfood.org/images/stories/pdf/otherdocuments/20111116_briefing_note_05_en.pdf?utm_source=SRFood+Newsletter&utm_campaign=de320c25fb-2011-1116_Trade-rules-must-not-hold-back-efforts&utm_medium=email

CASE STUDY

Special Economic Zone in Madurai district, Tamil Nadu Violates the Right to Food of Peasant Families

With the help of the Madurai district administration, SIPCOT (State Industries Promotion Corporation of Tamil Nadu Ltd) identified around 1,478.71 acres of land in Sivarakottai, Karisalkalpatti and Swamimallampatti (three villages in Thirumangalam Taluk, Madurai district) as suitable to establish a Special Economic Zone (SEZ). Representatives of SIPCOT declared the identified land as dry and concluded that the region fulfills the basic criteria for industrial promotion, namely climate, geography, infrastructure and cheap manpower. After the completion of the acquisition process, the land will be handed over to manufacturing or business establishments as per the provisions of the *Special Economic Zone Act, 2005*. Since 2008, the affected peasants have been opposing the establishment of the SEZ and have formed the *Madurai Mavatta Vivasayi Nala Sangam*, a farmers' struggle committee.

The plots of land under acquisition are under the ownership and cultivation of small-scale farmers, around 1950 families, who have no other source of livelihood and income other than the small land-holding and animal husbandry. Food security standards are remarkably high among the villagers who are totally dependent on agriculture and animal husbandry for their livelihoods, owing to the water management systems and integrated farming that has been practiced over centuries. The agricultural land is rain fed, fertile and surrounded by 15 water bodies intended for underground water recharging and cattle needs. Most of the families have owned the land for three generations, growing 18 varieties of crops as well as medical herbs throughout the year. Farmers own small percentages of the land, they are completely dependent on the yield and some of them manage to sell parts of their crops to wholesale dealers. The income generated through these means is sufficient for the families. A survey conducted by Foodfirst Information and Action Network (FIAN) shows that 95% of the families (1870 out of 1950) involved in agriculture are consuming only food produced by themselves, while 85% of the families are marketing their own agricultural products. Women are actively engaged in agricultural work, and even though most of them do not receive any cash payment, they have access to the harvest for family consumption. Considering that they have only farming skills, entering in another professional branch is not an option for them. The acquisition of land poses a direct threat to the livelihood and subsistence of farmers, and thereby violates their right to food.

According to the *Special Economic Zone Act, 2005* the acquisition of land requires environmental clearance in accordance with pollution control laws. Lands, which are totally excluded from acquisition, include agricultural lands under active and traditional cultivation. Only waste land can be acquired for the establishment of a SEZ. Thus, this excludes agricultural lands or lands which could be converted for agricultural purposes, catchment areas of water bodies, forest and grazing lands. In spite of these provisions, the government of Tamil Nadu passed an order under Section 3 of the Tamil Nadu *Acquisition of Land for Industrial Purposes Act, 1997* (Act 10/99) (GO MS 58 dated 12.6.2009) to acquire the land, with no transparency regarding the type of industries that are planned to be established.

Source: FIAN India

Farmers' Suicides

Since 2001 the country has witnessed an alarming number of farmer suicides with a baseline of 15,000 each year⁵² primarily due to indebtedness and agrarian distress. The most recent year for which official figures are available is 2010, according to which 15,964 farmers committed suicide in the same year – that amounts to one farmer suicide every 43 minutes.⁵³ Liberalised trade,⁵⁴ patenting of agricultural products, and the introduction of Genetically Modified Organisms (GMOs), especially under the draft *Biotechnology Regulatory Authority of India Bill, 2011*,⁵⁵ could further aggravate India's food crisis.⁵⁶

CASE STUDY

Farmers' Suicides

Alleged to be the largest wave of recorded suicides in human history, the number of Indian farmers that have committed suicide in the last 16 years is estimated to be more than a quarter of a million. The most recent year for which official figures are available is 2009, according to which, 17,368 farmers committed suicide in that same year⁵⁷ – that amounts to one farmer suicide every 30 minutes. While these figures are striking on their own, they do not portray the actual number of farmer suicides taking place. For instance, women are often not included in farmer suicides statistics since most of them lack land titles – a common prerequisite for being recognised as a farmer in official statistics and programmes.

The magnitude of farmer suicides and the affected families is a result of India's longstanding agrarian crisis. Over the past two decades, economic reforms and the opening of agriculture to global markets have increased costs, reduced yields and profits, leading to great financial and emotional distress. Thus, smallholder farmers are often trapped in a cycle of debt, taking on more loans and buying more inputs, which in turn can lead to greater debt. It has been said that *"indebtedness is the major and proximate cause of farmer suicides in India. Many farmers, ironically, take their lives by ingesting the very pesticide they went into debt to purchase"*.⁵⁸

The loan waiver scheme of the Union Budget 2008 saw a decrease of just 436 suicides (16,196)⁵⁹ compared to 2007 (16,632 suicides)⁶⁰ based on the National Crime Records Bureau (NCRB) data. Thus, there were no major changes in the trend of suicides considering that there is still a very high number of suicides within a fast decreasing agrarian population.⁶¹ The waiver was a welcome step, but it was flawed, as it dealt only with bank credit without addressing the moneylender debt. Consequently, only farmers with access to institutional credit

52 National Crime Records Bureau, *Accidental Deaths and Suicides in India 2010*, available at: <http://ncrb.nic.in/CD-ADSI2009/ADSI2009-full-report.pdf>

53 Ibid.

54 *The World Trade Organization and the Post-Global Food Crisis Agenda: Putting Food Security First in the International Trade System*, Briefing note 04, November 2011, available at: http://www.srfood.org/images/stories/pdf/otherdocuments/20111116_briefing_note_05_en.pdf?utm_source=SRFood+Newsletter&utm_campaign=de320c25fb-2011-1116_Trade-rules-must-not-hold-back-efforts&utm_medium=email.

55 Raghuvansh Prasad Singh: *BRAI Bill - Bulldozing public opinion*, Business Standard, September 17, 2011, available at: <http://www.business-standard.com/india/news/raghuvansh-prasad-singh-brai-bill-bulldozing-public-opinion/449406/>.

56 See: Concluding Observations of the UN Committee on Economic Social and Cultural Rights, 2008, E/C.12/IND/CO/5, para. 29, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/436/08/PDF/G0843608.pdf?OpenElement>.

57 National Crime Records Bureau 2009, available at: <http://ncrb.nic.in/CD-ADSI2009/ADSI2009-full-report.pdf>

58 Center for Human Rights and Global Justice, *Every Thirty Minutes: Farmer Suicides, Human Rights, and the Agrarian Crisis in India*, NYU School of Law, 2011.

59 National Crime Records Bureau 2008, available at: <http://ncrb.nic.in/ADSI2008/table-2.6.pdf>

60 National Crime Records Bureau 2007, available at: <http://ncrb.nic.in/adsidata/ADSI2007/Table-2.11.pdf>

61 Census of India 2011, available at: http://censusindia.gov.in/2011-prov-results/paper2/data_files/india/Rural_Urban_2011.pdf

could benefit, although many tenant and poor farmers continued to get loans primarily from moneylenders.⁶² The scheme also excluded farmers holding more than five acres of land, while it made no distinction between dry and irrigated holdings.⁶³

The Big Five ‘suicide belt’ States – Maharashtra, Andhra Pradesh, Karnataka, Madhya Pradesh and Chhattisgarh – account for two-thirds of all farmer suicides. Maharashtra remains the state with the highest number of such suicides for the last ten years and, as NCRB data suggests, for 2009 alone there were 2,872 farmer suicides in the state.⁶⁴ There are firm allegations that the committees that have operated in Vidarbha’s crisis districts have been dismissing most of the suicides as ‘non-genuine’ for the last four years.⁶⁵ Farmer suicides in Vidarbha region of Maharashtra have been unique not only in terms of numbers but also for the reason that some of those committing suicides, have addressed suicide notes to the Prime Minister, the Chief Minister or the Finance Minister, speaking of debt, soaring cultivation costs, high cost of living, volatile prices and regressive policies that have impinged on thousands of farmers in the last decade.⁶⁶

Professor K. Nagaraj, who has conducted an in depth study on the farmers suicide phenomenon in India, claimed that the highest numbers of farmer suicides become visible in regions of high commercialisation of agriculture and very high peasant debt, with cash crop farmers appearing far more vulnerable to suicide than those engaged in food crop production. *“The predatory commercialisation of the countryside; a massive decline in investment in agriculture; the withdrawal of bank credit at a time of soaring input prices; the crash in farm incomes combined with an explosion of cultivation costs; the shifting of millions from food crop to cash crop cultivation with all its risks; the corporate hijack of every major sector of agriculture including, and especially, seed; growing water stress and moves towards privatisation of that resource. The government was trying to beat the crisis — leaving in place all its causes — with a one-off waiver”.*⁶⁷ Behind the striking farmer suicide figures lie individual tragedies, the effects of which haunt the families of the deceased – families inherit the debt, children drop out of school to earn an income, while surviving family members may themselves commit suicide out of utter desperation.⁶⁸



Prashanth Vishwanathan/Bloomberg/ActionAid

Drought in Madhya Pradesh.

62 P. Sainath, *Farm Suicides: A 12 year Saga*, The Hindu, May 5, 2010, available at: <http://www.thehindu.com/opinion/columns/sainath/article94324.ece>

63 P. Sainath, *Men of Letters, Unmoved readers*, The Hindu, May 5, 2010, available at: <http://www.thehindu.com/opinion/columns/sainath/article422651.ece>

64 National Crime Records Bureau 2009, available at: <http://ncrb.nic.in/CD-ADSI2009/ADSI2009-full-report.pdf>

65 P. Sainath, *Of luxury cars and lowly tractors*, The Hindu, December 27, 2010, available at: <http://www.thehindu.com/opinion/columns/sainath/article995828.ece>

66 Ibid.

67 P. Sainath, *Farm Suicides: A 12 year Saga*, The Hindu, May 5, 2010, available at: <http://www.thehindu.com/opinion/columns/sainath/article94324.ece>

68 Ibid.

India spends only 4.4% of its budget on health, which is far below the global median of 11.5%.⁶⁹ As a consequence, India's health-care infrastructure is sub-standard and inadequate, lacking doctors and hospital beds. There are six doctors and nine hospital beds per 10,000 people.⁷⁰ Only 15% of the population has health insurance, making quality healthcare in private hospitals inaccessible for a vast majority of the population. The government has announced that the health insurance scheme – *Rashtriya Swasthya Bima Yojana* – will be expanded by the end of the Twelfth Five-Year Plan in order to cover around 70 million families.⁷¹

Access to Health Services

The *National Rural Health Mission* was launched to improve availability and access to quality health care for the rural poor.⁷² While it is an ambitious central government programme, the benefits are not reaching the poorest of the poor. The recent announcement in the Budget 2012 to introduce a *National Urban Health Mission* is a positive step towards providing health care to the urban poor in the course of the Twelfth Five-Year Plan.⁷³ The success of this mission would depend on adequate budgetary allocations, a clear plan of action incorporating a human rights approach, and a monitoring mechanism to ensure that targets are met.

Growing privatisation of health care⁷⁴ in India has resulted in gross disparities in service-distribution between rich and poor, and rural and urban areas. According to a 2011 Supreme Court order, private hospitals are supposed to provide free treatment and hospitalisation to the poor.⁷⁵ The right to the highest attainable standard of health remains unfulfilled for most of India's population, as the health care system has collapsed in several parts of the country. For example, at least 83 children died in West Bengal between June and November 2011, due to lack of basic health care facilities in state run hospitals.⁷⁶ Further, a total of 585 children died due to encephalitis in eastern Uttar Pradesh in 2011, according to official data as of November 2011.⁷⁷

69 2008 statistics quoted in: WHO, *World Health Statistics*, 2011. India's spending on health is lower than Bangladesh (7.4%) and Sri Lanka (7.9%).

70 WHO, *World Health Statistics 2011*, available at: <http://www.who.int/whosis/whostat/2011/en/index.html>

71 The Hindu, *NRHM to be National Health Mission Soon*, March 13, 2012, available at: <http://www.thehindu.com/news/national/article2988618.ece?homepage=true>

72 Ministry of Health & Family Welfare, *National Rural Health Mission (2005-2012), Mission Document*, available at: http://mohfw.nic.in/NRHM/Documents/Mission_Document.pdf

73 Hindu, *NRHM to be National Health Mission soon*, March 13, 2012, available at: <http://www.thehindu.com/news/national/article2988618.ece?homepage=true>

74 See: Concluding Observations of the UN Committee on Economic Social and Cultural Rights, 2008, E/C.12/IND/CO/5, para, 38, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/436/08/PDF/G0843608.pdf?OpenElement>

75 India Today, *Supreme Court Tells Private Hospitals to Provide Free Treatment to Poor*, September 1, 2011, available at: <http://indiatoday.intoday.in/story/supremecourt-tells-private-hospitals-to-provide-free-treatment-to-poor/1/149695.html>

76 The Hindustan Times, *9 more children die in Bengal*, November 10, 2011, available at: <http://www.hindustantimes.com/India-news/Kolkata/9-more-children-die-in-Bengal/Article1-767243.aspx>

77 Zee News, *Encephalitis death toll rises to 585 in UP*, November 23, 2011, available at: http://zeenews.india.com/news/uttar-pradesh/encephalitis-death-toll-rises-to-585-inup_743357.html

Most persons with disabilities are denied health insurance, and many of them have been denied medical treatment in hospitals citing reasons such as inaccessibility, lack of adequate human resources or suitable equipment, and inability to communicate.

Access to Affordable Medicines

The growing neglect of primary health centres and the inability to establish 'compulsory licensing', particularly for essential and life saving drugs, is disturbing. In compulsory licensing, under the World Trade Organization's (WTO) Trade Related Intellectual Property Rights Agreement (TRIPS), the government allows a generic firm to produce a patented product without the consent of the patent owner⁷⁸ on the following grounds: (a) that the reasonable requirements of the public with respect to the patented invention have not been satisfied; (b) that the patented invention is not available to the public at a reasonably affordable price; or (c) that the patented invention is not worked in the territory of India.⁷⁹

The TRIPS Agreement states that compulsory licenses are a legally recognised means to overcome barriers in accessing affordable medicines. In March 2012, the Indian Patent Office has issued the first-ever compulsory license in India to a generic drug manufacturer.⁸⁰ This initiative ends pharmaceutical company Bayer's monopoly on the drug *Sorafenib Tosylate* in India, which is used to treat kidney and liver cancer. This groundbreaking move will help improve the availability of affordable life saving medicine by ensuring that a generic version produced locally is available at a fraction of the current price (i.e. 97% price reduction).

Child Mortality

India's share of child deaths in the world is more than 20%, with approximately 1.83 million children dying before their fifth birthday.⁸¹ As per Census 2011, the mortality rate of children under five in 2009 was 64 per 1,000 live births.⁸² Causes of death include waterborne diseases such as diarrhoea, respiratory diseases, malaria and parasitic infections, which account for nearly half of deaths in children under five years of age.⁸³ As per 2009 estimates, the child mortality under five years was 60 per 1000 for males compared to 69 per 1000 for females.⁸⁴

78 The Economic Times, *Natco Pharma files India's first compulsory license plea*, August 2, 2011, available at: http://articles.economictimes.indiatimes.com/2011-08-02/news/29842834_1_compulsory-licence-sorafenib-tosylate-natco-pharmaa

79 Chapter XVI, Section 84 *Indian Patents Act 1970* (amended in 2005), available at: <http://ipindia.nic.in/ipr/patent/patact1970-3-99.html>

80 The Hindu Business Line, *India's first compulsory licence granted to Natco for Bayer's cancer drug*, March 12, 2012, available at: <http://www.thehindubusinessline.com/companies/article2988464.ece>

81 UNICEF, *The Situation of Children in India, 2011*, available at: http://www.unicef.org/sitan/files/SitAn_India_May_2011.pdf

82 Government of India, *Census 2011: Maternal & Child Mortality and Total Fertility Rates*, available at: http://censusindia.gov.in/vital_statistics/SRS_Bulletins/MMR_release_070711.pdf

83 UNICEF, *The Situation of Children in India, 2011*, available at: http://www.unicef.org/sitan/files/SitAn_India_May_2011.pdf

84 Census of India, 2011, available at: http://www.censusindia.gov.in/vital_statistics/SRS_Bulletins/MMR_release_070711.pdf

Reproductive Rights and Maternal Mortality

Reproductive rights, as recognised throughout various international legal sources, are not yet explicitly guaranteed in India. While some domestic legislative protections have been put in place, reproductive rights are legally encompassed within the Fundamental Right to Life guaranteed by the Constitution, and in right to health legislation. In High Courts throughout the country, various reproductive rights have been upheld. The High Court of Delhi first recognised the right to survive pregnancy and childbirth as a fundamental right.⁸⁵ Indicators of progress in reproductive health include a low or lowered Maternal Mortality Ratio (MMR), decreased numbers of child marriage, low adolescent birth rates, access to contraception, general access to reproductive health education, better nutrition, hygienic living conditions and lower levels of poverty overall. Within India, these indicators and various other indicative statistics vary widely with some states revealing dramatically low overall reproductive health indicators in comparison with the rest of the country, and being at a significantly higher risk. For example, while individuals belonging to Scheduled Castes make up approximately 16% of the country's total population, they represent approximately 25% of all maternal deaths.⁸⁶

Maternal mortality remains a crucial problem despite its reduction. The nation-wide maternal mortality rate (MMR) has significantly decreased in recent decades, dropping from 570 of 100,000 in 1990 to 230 of 100,000 as of 2008.⁸⁷ As per 2011 Census, the MMR for the total population accounted for 212 per 100,000 live births. However, statistics vary widely from state to state. For example, Kerala boasts a MMR much lower than the rest of the country at 81, while Assam's MMR is up to 390. The highest state-wise MMRs in the country include: Assam (390), Uttar Pradesh (359), and Rajasthan (318). The lowest state-wise MMRs include: Kerala (81), Tamil Nadu (97), and Maharashtra (104).⁸⁸ Causes of maternal mortality include: poor health infrastructure, lack of specialists, inadequate budget, and persistent discrimination, including against economically weaker sections, minorities, persons with disabilities, Scheduled Castes and Scheduled Tribes.⁸⁹

A variety of national programmes have been implemented in an effort to reduce maternal mortality and improve overall maternal health. The *National Maternity Benefit Scheme* provided



Sanjit Das/ActionAid

85 *Laxmi Mandal v. Deen Dayal Hari Nagar Hospital*, W.P. No. 8853/2008 of 2010, High Court of Delhi.

86 Institute for Research in Medical Statistics, *Estimates of Maternal Mortality Ratios in India and its States: A Pilot Study*, 25 (2003), available at <http://icmr.nic.in/final/Final%20Pilot%20Report.pdf> [hereinafter *Estimates of Maternal Mortality Ratios in India*].

87 WHO, *World Health Statistics 2011*, available at: <http://www.who.int/whosis/whostat/2011/en/index.html>

88 National Health Profile 2009, Demographic Indicators, available at: <http://cbhidghs.nic.in/writereaddata/linkimages/6%20Demographic%20indicators9490761835.pdf>.

89 Center for Reproductive Rights and Human Rights Law Network, *Maternal Mortality in India – Using International and Constitutional Law to Promote Accountability and Change – 2011 Update*, available at: <http://reproductiverights.org/en/document/maternal-mortality-in-india-2011-update-document-download>; Also see: Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health, Paul Hunt, Mission to India, 2010, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/128/66/PDF/G1012866.pdf?OpenElement>

payments of INR 500 (approximately USD 9.5), per pregnancy, for pre-natal and ante-natal care, to women belonging to poor households.⁹⁰ The payments were limited to the first two live births per woman.⁹¹ Under the *National Rural Health Mission*, the *Janani Suraksha Yojana* (JSY) scheme aimed at increasing institutional deliveries among poor families through an integrated cash-assistance and pre-natal and ante-natal care system.⁹² The Gol national report for UPR II states that “*Janani Suraksha Yojana has seen phenomenal growth in the last 6 years and the beneficiaries have increased from 644,000 in 2005-06 to 10.6 million in 2010-11*”.⁹³ However, women who have not been registered by an Accredited Social Health Activist (ASHA) or other link worker have been denied the benefits of the programme, as illustrated by *Jaitun v. Maternity Home*, where one woman was forced to give birth outside a hospital, while hospital staff looked on, because of her failure to register under the JSY programme.⁹⁴

In *Laxmi Mandal v. Deen Dayal Hari Nagar Hospital* (2010),⁹⁵ the rights of a woman living below the poverty line to have a safe, medically assisted delivery, were addressed by the High Court of Delhi. The woman, Shanti Devi, had been denied medical treatment in four different hospitals throughout Delhi, despite carrying a 32-week old foetus. The hospitals refused to treat her because she was unable to pay the medical fees. The Court immediately ordered that she be admitted to the hospital for treatment. Although she later died from complications, the Delhi High Court ultimately ordered a compensation for her family, calling her death ‘preventable’ and finding the hospitals’ actions to be violative of her rights to life and health.⁹⁶ Less than two months after the historic judgment in *Laxmi Mandal*, the *Hindustan Times* reported the death of a homeless woman in Delhi, who had died on a busy city street four days after giving birth to a baby girl. In September 2010, following media and public criticism of the government, the Chief Justice of the Delhi High Court took *suo moto* cognizance of the case. In its judgment, the Court conclusively established the State’s constitutional duty to protect the life of a mother and child, a pivotal development in reproductive rights law.⁹⁷ The High Court also ordered the state to build homeless shelters where pregnant women would have access to food, drinking water, and medical attention. In another significant judgment in *Suchita Srivastava v. Chandigarh Administration*,⁹⁸ where a mentally disabled woman “*refused to give her consent for the termination of pregnancy, the Supreme Court held that a women’s right to personal liberty includes the right to make reproductive choices and that the state must respect her choice*”.⁹⁹

90 Planning Commission, *National Maternity Benefit Scheme*, available at: http://planningcommission.nic.in/reports/sereport/ser/maker/mak_cht5c.pdf.

91 Ibid.

92 *Janani Suraksha Yojana Guidelines*, available at: <http://india.gov.in/allimpfrms/alldocs/2384.pdf>.

93 *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: India, A/HRC/WG.6/13/IND/1*, UN General Assembly, 8 March 2012, para 56.

94 Human Rights Law Network, *Preventable maternal death is a human rights violation – Delhi High Court announces and orders compensation*, available at: <http://www.hrln.org/hrln/reproductive-rights/pils-a-cases/566-preventable-maternal-death-is-a-human-rights-violation-delhi-high-court-announces-and-orders-compensation-.html>.

95 W.P. No. 8853/2008, High Court of Delhi, 2010.

96 Human Rights Law Network, *Preventable maternal death is a human rights violation – Delhi High Court announces and orders compensation*, available at: <http://www.hrln.org/hrln/reproductive-rights/pils-a-cases/566-preventable-maternal-death-is-a-human-rights-violation-delhi-high-court-announces-and-orders-compensation-.html>.

97 *Court on its Own Motion v. Union of India*, W.P. No. 5913 of 2010.

98 AIR 2010 SC 235.

99 *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: India, A/HRC/WG.6/13/IND/1*, UN General Assembly, 8 March 2012, para 103.

CASE STUDY

Right to Survive Pregnancy: Sandesh Bansal v. Union of India

In 2008, the High Court of Madhya Pradesh passed a landmark judgment in *Sandesh Bansal v. Union of India*, recognising a woman's right to survive pregnancy and childbirth as a fundamental right protected under Article 21 of the Indian Constitution. Filed by Sandesh Bansal, a health activist and member of Jan Adhikaar Manch, the case sought accountability for the government's failure to respect, protect, and fulfill the rights of pregnant women.

Relying upon extensive government research and reports, the Court documented the widespread failure of the government to implement the *National Rural Health Mission* (NRHM); noting dilapidated facility conditions, non-availability of skilled personnel, essential medicines, and access to timely and consistent maternal health services. The Court further rejected the government's claim that financial constraints served as a barrier to full implementation, noting that over INR 1,710,000,000 (around USD 32,465,000) remained unspent at the end of 2009.

The Court held: “... we observe from the material on record that there is shortage not only of the infrastructure but of the man power also which has adversely affected the effective implementation of the [National Rural Health Mission] which in turn is costing the life of mothers in the course of mothering. It be remembered that the inability of a woman to survive pregnancy and childbirth violates her fundamental rights as guaranteed under Article 21 of the Constitution of India. And it is the primary duty of the government to ensure that every woman survives pregnancy and child birth, for that, the State of Madhya Pradesh is under obligation to secure their life.”

In recognition of the fundamental nature of these rights, the Court ordered immediate implementation of the NRHM, with a focus on strengthening infrastructure as well as providing access to timely maternal health services, skilled personnel, effective referral and grievance redressal mechanisms.

Madhya Pradesh is India's third most populous state and, as noted by the Court, “*afflicted with the worst indicators in India*,” such as high rates of illiteracy, mortality, morbidity and people living below the poverty line. Poor socio-economic conditions persist despite the enactment of NRHM, a public health scheme funded by the Central Government to address India's shockingly high maternal and infant mortality.

Source: *Human Rights Law Network*

HIV/ AIDS

Public funding for HIV/AIDS treatment and prevention is inadequate. The government has been unable to ensure the availability of ‘third-line’ and improved treatment varieties for all affected individuals. The Gol's national report for UPR II claims that “*the number of newly detected HIV positive cases has dropped by over 50% in the last decade.*”¹⁰⁰

Some government policies have also deviated from the right to health approach, threatening to exacerbate discrimination of people living with HIV/AIDS. For example, the National AIDS Control Organisation has introduced line listing that violates privacy rights, while the national *Prevention of Parent to Child Transmission*

¹⁰⁰ National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: India, A/HRC/WG.6/13/IND/1, UN General Assembly, 8 March 2012, para 55.

Programme has implemented routine testing of pregnant women in antenatal clinics, in violation of the principle of prior informed consent.

Despite commitment at the domestic and international levels, the government has still not passed the *HIV/AIDS Bill*. The Bill, which is premised in the rights based approach, prohibits discrimination against PLHIV in the public as well as private sector. It also provides for informed consent and confidentiality of HIV status; free of cost access to comprehensive HIV related treatment including antiretroviral drugs, diagnostics and nutritional supplements.¹⁰¹



Orphan and vulnerable child living with HIV/AIDS

CASE STUDY

Right of Access to Affordable Medicines and Treatment without Discrimination on the Ground of HIV/AIDS: Sahara House v. UOI, W.P. (C) 585 of 1998

In 1998 and 1999, PILs were filed in the Supreme Court on the issue of discrimination against people living with HIV (PLHIV) in health care. Later the scope of the PIL was expanded to cover issues of accessibility, affordability and quality with respect to diagnostics and treatment for HIV.

In 2008, the Supreme Court passed orders on anti-discrimination stating: *“All Doctors, nurses and hospital staff, whether in the public sector or private sector shall treat PLHA in a professional and humane manner, treating them always with dignity and care. No Doctor or nurse shall refuse to treat a PLHA on account of his/her positive status. In treating a PLHIV, there shall be no discrimination or stigma whatsoever.”*

The Supreme Court passed further orders on access to treatment, directing the Union of India to:

- Rapidly scale up number of Anti-Retroviral Treatment (ART) centres, increase the number of CD4 machines, and ensure adequate infrastructure in ART centres.
- Ensure universal access to first line ART and provide free treatment for opportunistic infections;
- Ensure availability of universal precautions and post exposure prophylaxis for health care providers in public hospitals

In 2010, in a major breakthrough, the Supreme Court passed further orders directing universal access to second line ART in a phased manner, which was earlier available to certain categories of PLHIV only.

Source: Lawyers Collective, Sahara House v. UOI (available at: <http://www.lawyerscollective.org/hiv-and-law/current-cases.html>)

¹⁰¹ Lawyers Collective, *The HIV/AIDS Bill 2007*, available at: <http://www.lawyerscollective.org/hiv-and-law/draft-law.html>





Woman carrying drinking water in
Sundarban, West Bengal.

Clinical Trials

An RTI application to the Director General of health Services has revealed that between 2008 and 2010, nearly 1,600 people have died during clinical trials of drugs by multinational pharmaceutical companies.¹⁰² As per the records of the office of the Director General of Health Services, compensation was paid only in 22 out of 668 cases that occurred in 2010.¹⁰³ The Human Papillomavirus vaccine ‘demonstration projects’ conducted on young tribal girls living in a hostel, with complete disregard to informed consent, were suspended by the central government in 2010, following the deaths of seven girls and pressure from civil society groups.¹⁰⁴ In Indore, persons with mental disabilities were inducted into clinical trials without their consent.¹⁰⁵

The legal framework in India is presently very weak and inadequate on issues of ethics and human rights in clinical trials. Following the Indore incident, a PIL on illegal clinical trials has been filed in the Supreme Court upon which the Court has issued notice to the Union of India and the Ministry of Health.¹⁰⁶

Right to Water and Sanitation

Though provision of water and sanitation is claimed to be a priority, the situation with regard to access to clean drinking water and sanitation across the country is still dismal. The Gol in its UPR II national report stated that the *Total Sanitation Campaign* – a flagship programme for providing sanitation facilities in rural areas – “has been able to accelerate the sanitation coverage from a mere 22% as per 2001 census to approximately 68% in December 2010”.¹⁰⁷

However, India still has the largest number of people in the world who defecate in the open – 625 million – which represents 51% of India’s population (67% in rural areas and 14% in urban areas).¹⁰⁸ Quoting the 2011 census data, Union Minister for Rural Development, Jairam Ramesh, acknowledged that 60% of rural households still do not have access to proper toilet facilities¹⁰⁹ and called for urgent measures for what he named “another distressing national shame”.¹¹⁰ According to UNICEF, “the combined effects of inadequate sanitation, unsafe water supply and poor personal hygiene are responsible for 88% of childhood deaths from diarrhoea.” 21% of

102 Figures revealed by a Right to Information (RTI) application.

103 Records of the Directorate General of Health Services – 2010.

104 See: *The Hindu*, *A Shockingly Unethical Trial*, May 15, 2011, available at: <http://www.thehindu.com/opinion/editorial/article2021657.ece>

105 See: *Mental Health Care Act, 1987*; See also: *The Times of India*, *233 mentally ill patients subjected to drug trials*, December 20, 2011, available at: <http://timesofindia.indiatimes.com/city/indore/233-mentally-ill-patients-subjected-to-drug-trials/articleshow/11175169.cms?prtpage=1>

106 See: *Economic Times*, *PIL alleges illegal drug trials in India*, SC notice to Centre, available at: http://articles.economicstimes.indiatimes.com/2012-02-06/news/31030964_1_drug-trials-sc-notice-pil

107 *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: India*, A/HRC/WG.6/13/IND/1, UN General Assembly, 8 March 2012, para 62

108 WHO/UNICEF Joint Monitoring Programme for Water Supply and Sanitation, 2010 statistics, available at: www.wssinfo.org/data-estimates/table

109 See: *Indian Express*, *Rural India will banish open defecation in 10 yrs: Ramesh*, available at: www.indianexpress.com/news/rural-india-will-banish-open-defecation-in-1/934406/

110 *The Hindu*, *Jairam urges Manmohan to give highest priority to sanitation*, January 17, 2012, available at: www.thehindu.com/todays-paper/tp-national/article2806719.ece

communicable diseases in India are related to unsafe water.¹¹¹ More than 20% of Scheduled Caste persons do not have access to safe drinking water and the vast majority of them depend on the goodwill of dominant castes for access to water from public wells.

The recently developed draft *National Water Policy, 2012* lacks a human rights approach and focuses more on water as an economic good. Furthermore, it favours privatisation of water while calling for the government to withdraw from its role as service provider. This is a dangerous trend. It is important that the draft Policy recognises, protects and fulfills the right to water as a human right of all, and takes the requisite steps to prevent privatisation in order to ensure affordability and access to clean and potable water for all.

Impact of Trade and Investment Agreements

India is negotiating several proposed Free Trade Agreements (FTAs) and investment agreements. These include with the European Union; Japan; European Free Trade Association (EFTA); New Zealand; Malaysia; Gulf Cooperation Council; BIMSTEC (Bangladesh, Myanmar, Sri Lanka, Thailand, Bhutan and Nepal); Mauritius; Southern Africa Customs Union (SACU: South Africa, Botswana, Lesotho, Namibia). FTAs already signed but under negotiation for expansion are with Sri Lanka (1998), Thailand (2003), South Asian Free Trade Area (SAFTA) (2004) and Association of South East Asian Nations (ASEAN) (2009). In addition, FTAs under consideration and/or at various stages of development include with Australia, Chile, China, Colombia, Egypt, Hong Kong, Israel, Russia, Uruguay, and Venezuela. India has also launched the process for a potential FTA with the United States through the 'Framework for Cooperation on Trade and Investment'.

These agreements include not only trade in goods but also investment, government procurement, intellectual property and competition policy. They could potentially violate human rights to food, health, water, work/livelihood¹¹², housing, land, and development,¹¹³ especially of vulnerable groups.

FTAs create legally binding obligations on the government, severely affecting livelihoods related to agriculture, fisheries and manufacturing. In addition, FTAs' demands in trade, services, investment and intellectual property rights impact the ability to access affordable healthcare as well as water and sanitation.

111 World Bank, *India's Water Economy, Bracing for a Turbulent Future, 2005*, available at: <http://www.worldbank.org.in/WBSITE/EXTERNAL/COUNTRIES/SOUTHASIAEXT/INDIAEXTN/0,,contentMDK:20674796--pagePK:141137~piPK:141127~theSitePK:295584,00.html>.

112 The Hindu, *FTA will hurt livelihoods in India, Europe: civil society*, December 10, 2010, available at: <http://www.thehindu.com/news/national/article942068.ece>

113 Ibid

CASE STUDY

Free Trade Agreement with the EU Threatens the Right to Adequate Food and Work/Livelihood

The Government of India is currently negotiating a bilateral Free Trade Agreement (FTA) with the European Union (EU), which is aimed at liberalising substantially all trade between the two trading blocs. Beyond trade in goods, the FTA entails liberalisation of services, investment, public procurement, and intellectual property rights among other areas. In these negotiations, the European Commission (EC) insists on the principle of 'reciprocity' and seeks to avoid asymmetries in the level of commitments between the two parties, despite the

great imbalances between the EU and India regarding economic development, wealth, poverty and hunger. A Right to Food Impact Assessment (RFIA)¹¹⁴ finds that the EU-India FTA may lead to further violations of the right to food in India.

Apart from being the world's largest producer and consumer of milk, India is home to the largest number of small livestock keepers worldwide. Around 14.08 million Indian farmers are currently involved in dairy production, most of whom are small scale, marginal or landless farmers. Dairy farming provides employment opportunities for around 75 million women and 15 million men, and accounts for a third of gross income of rural households.¹¹⁵ Farmers' access to markets, income, and their right to food would be threatened if tariffs for EU Skimmed Milk Powder (SMP) are cut from 60% to zero as market opening in India for milk was always followed by steep increases in imports from the EU.

With 35 to 37 million people working in the sector, retail is the second largest source of employment and livelihood in India after agriculture. For the estimated 10 million street vendors, retail is often the last resort for earning a livelihood. If multi-brand retail is opened to EU retailers such as Carrefour, Metro and Tesco, as envisaged by the EU, many of these street vendors would lose their jobs within a relatively short period and be exposed to more poverty and hunger.

Poultry supplements the livelihood of around 50% of Indian landless and marginal farmers at the bottom end of small-holder spectrum. A cut in tariffs from currently 100% to almost zero for poultry meat, as envisaged by the EU, would impede market access and food security of many small-scale farmers. The Annual Report of the Department for Animal Husbandry, Dairying and Fisheries (2011) highlights the importance of the poultry sector for the nutritional security of the rural poor, which could be threatened by the internationally highly competitive EU.

Land distribution in India is highly unequal. Almost 80% of the agricultural population owns only about 17% of the total agriculture land, making them near-landless workers. Small and marginal farmers with an average land holding of less than 2 hectares constitute 83% of farmers, own only 41.14% of the total agricultural land. The prohibition of direct and indirect expropriation without compensation makes it very expensive for Indian states to acquire land that is currently used by EU companies, and poses a significant obstacle to future land reforms that are essential for the realisation of the right to food. While the Constitution of India does not prescribe compensation to large land holders in the framework of land reform, the EU-India FTA will. Thus, EU investors will benefit from a higher degree of protection than domestic investors and they may challenge new land reform laws that threaten their projects. India is also obliged to provide 'fair and equitable treatment', and thus meet the 'legitimate expectations' of EU investors, protect their investment and secure their rights to resources required for the investment project, such as land and water. Moreover, under the investor-State dispute

114 Conducted by MISEREOR, Heinrich Böll Foundation, Anthra, Third World Network and Glropolis

115 Government of India 2007: *The Report of the Working Group on Animal Husbandry and Dairying*, 11th Five Year Plan. 2007-2012.

settlement, companies can sue the Indian government for violations of the FTA provisions on investment, and thereby circumvent local and national courts. In summary, increased investment protection through the FTA, especially regarding indirect expropriation, 'fair and equitable treatment' and the investor-State dispute settlement, may become an obstacle to reforms of land that is used by European investors.

Before signing the FTA, both the EU and India must conduct a comprehensive human rights impact assessment (HRIA) following the guiding principles of the UN Special Rapporteur on the right to food, and undertake a meaningful consultation of all stakeholders, particularly the most vulnerable. Both the EU and India have a clear obligation under international law¹¹⁶ to respect, protect and fulfill all economic, social, cultural, civil and political human rights in all areas, including trade policy. Under the Lisbon Treaty, the EU State Members must not ratify any agreement that impedes another state's ability to uphold its human rights obligations, while the Treaty on European Union defines 'respect for human rights' as one of the core values 'on which the Union is founded' (Article 2).

Source (summary): MISEREOR, Heinrich Böll Foundation, Third World Network, Anthra and Glopolis 2011: Right to Food Impact Assessment of the EU-India Trade Agreement; Aachen, Berlin, Penang, Secunderabad and Prague.

India has often been called the 'pharmacy of the world', as it produces a large number of high-quality, affordable generic medicines. Due to competition stemming from Indian generics, the price of first-line antiretroviral drugs (ARVs) dropped from more than USD 10,000 per person per year in 2000 to around USD 150 per person per year.¹¹⁷ The reduction in price has helped facilitate the massive expansion of HIV treatment worldwide: more than 80% of the HIV medicines, used to treat 6.6 million people in developing countries come from Indian producers, and 90% of pediatric HIV medicines are produced in India. Doctors Without Borders/Médecins Sans Frontières (MSF) and other treatment providers also rely on Indian generic medicines to treat other diseases and conditions.¹¹⁸

However, some FTAs greatly restrict the capability of Indian companies to continue producing generic medicines. As a consequence of the FTAs, patent holding multinational drug companies would hold monopolies over a drug variety, barring Indian drug companies to produce the generic variety of the drug. The FTAs as well as acquisition and mergers by multinational corporations of several major Indian generic medicine producers thus become a cause of concern, as they make the drugs available at much higher prices, thereby making the use of existing TRIPS flexibilities more difficult and restricting access to low cost, high quality, generic medicines.

116 The human right to adequate food forms part of Article 25 of the General Declaration of Human Rights of 1948 and Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) of the United Nations (UN). All EU Member States and India have ratified this Covenant, in addition to the International Covenant on Civil and Political Rights, and hence obliged themselves to realise the right to adequate food in all policy areas, including trade policy. – MISEREOR, Heinrich Böll Foundation, Third World Network, Anthra and Glopolis 2011: *Right to Food Impact Assessment of the EU-India Trade Agreement*; Aachen, Berlin, Penang, Secunderabad and Prague.

117 Médecins Sans Frontières, *Briefing Documents: Background on the EU-India FTA*, 9 February, 2012, available at: <http://www.doctorswithoutborders.org/publications/article.cfm?id=5757&cat=briefing-documents>

118 Ibid.

Right to Work and Labour Rights

India's economic policies are steadily eroding human rights, working conditions and living standards for the majority of the labour force, 92-93% of which belongs to the unorganised/informal sector,¹¹⁹ including migrant labour. Construction workers, including women and children, form the majority of those who are worst exploited. Three specific laws that apply to them but lack implementation are: *Building and Other Construction Workers Act, 1996*; *Contract Labour (Regulation and Abolition) Act, 1970*; and *Interstate Migrant Workmen Act, 1979*.

Major challenges for the realisation of labour rights in India include: (i) erosion of real wages due to continuous price rise and failure to compensate for inflation; (ii) absence of basic services and social security, which includes compensation for injury, health, maternity and retirement benefits; and (iii) difficulty to unionise, resulting from the hostility and failure of the state to respect freedom of association. Several progressive labour laws,¹²⁰ including on minimum wages and child labour exist but are not implemented properly.

Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (MNREGA)

The *Mahatma Gandhi National Rural Employment Guarantee Act, 2005* (MNREGA), which guarantees 100 days of work (unskilled manual work) to every rural household, is a very progressive law. Five years after its enactment, it has become a household name, and is one of the better known and understood laws in India. The GoI national report for UPR II states: *"more than 54 million households were provided employment in 2010-11 [through MNREGA], marking a significant jump in coverage."* The report further adds that the GoI *"is conscious of the difficulties in implementation of this ambitious scheme across India and is constantly reviewing it to address shortfalls"*.

Some major challenges that bar MNREGA from achieving its full potential include corruption, inadequate implementation and non-payment of minimum wages to MNREGA workers (For more details see the following case study). The issue of minimum wages was adjudicated by the Karnataka High Court, which passed a direction to the central government to pay MNERGA workers in Karnataka according to the minimum wages fixed by the state (present daily wage rates stand at INR 155 – approximately USD 3 – as compared to NREGA daily



Tom Pietrasik/ActionAid

Local residents employed in digging a pond as part of MNERGA.

119 457 million in 2004-05 according to the National Sample Survey Organization (NSSO); See: Concluding Observations of the Elimination of Discrimination against Women: India, 2007, CEDAW/C/IND/CO/3, para 44.

120 *Trade Unions Act, 1926*; *Payment of Wages Act, 1936*; *Employees' State Insurance Act, 1948*; *Minimum Wages Act, 1948*; *Employees' Provident Funds and Miscellaneous Provisions Act, 1952*; *Maternity Benefit Act, 1961*; *Payment of Bonus Act, 1965*; and *Payment of Gratuity Act, 1972*.

wages which fall way below INR 100 – USD 1.9).¹²¹ This order was challenged by the central government in the Supreme Court, despite an earlier ruling stating that denial of minimum wages to workers tantamounts to forced labor.¹²² In January 2012, the Supreme Court endorsed the Karnataka High Court order and ordered the GoI to pay MNREGA workers in Karnataka as per the directions of the Karnataka High Court, with effect from the date on which the order was passed.¹²³

CASE STUDY

MNREGA – Achievements and Challenges

MNREGA guarantees 100 days of wage-employment to any rural household, whose adult members volunteer to do unskilled manual work. The Act embodies a host of commendable features, which include: (a) work is provided as a matter of legal right, when demanded; (b) there is a minimum share of one-third employment for women; (c) work is provided within 5 kms of residence; (d) at least half of the MNREGA funds are to be spent by elected local councils; (e) village assemblies select and prioritize MNREGA projects; (f) there are strict norms for transparency and accountability (e.g. MNREGA documents are in public domain); (g) workers are entitled to basic worksite facilities including childcare; and (h) workers are to be employed for creation of productive assets such as approach roads, water-harvesting structures, contour trenches, and various works on private land (e.g. leveling and construction of wells).

Despite its many positive aspects, the realisation of MNREGA's main objective of enhancing livelihood security of people in rural areas still remains challenged by some impediments:

Low Levels of Awareness: The providence of manual work under MNREGA is contingent upon such work being demanded by well-informed workers, to whom payment of minimum wages within 15 days becomes due. However, surveys on MNREGA reveal that awareness about the scheme among workers is very low, facilitating denial of their rights under the scheme, for example, denial of minimum wages.¹²⁴ Also, during one such survey, 71% of respondents stated to have passively waited for work to come their way, and were not even aware of the possibility of application for work under MNREGA.¹²⁵

Corruption: To prevent corruption, some transparency safeguards have been built into the Act, for instance, the muster rolls are to be kept at the worksite, read out at the time of wage payment, employment and wage details are to be entered into the labourer's 'job-cards' and the mandatory payment of wages through banks and post-offices was introduced in 2008. Contractors are banned. However, since these safeguards too are to be executed by a machinery that tends to be corrupt, they are incomplete without an independent system of grievance redressal.

Delay in Wage Payment: The Act guarantees payment of wages within 15 days of work being done. However, serious delays in payment of wages have been recorded all over the country. This has forced labourers to resort to lower-paid labour and 'distress migration.'

Source: Reetika Khera (Ed), The Battle for Employment Guarantee, 2011, New Delhi, Oxford University Press.

121 The Economic Times, *NREGA: Wages are often denied or delayed, with corruption rife*, April 21, 2012, available at: http://articles.economicstimes.indiatimes.com/2012-04-21/news/31378994_1_minimum-wages-nrega-hundred-days.

122 Ibid.

123 Down To Earth, *Supreme Court order triggers NREGS wage debate*, January 25, 2012, available at : <http://www.downtoearth.org.in/content/centre-fix-over-court-ruling-minimum-wage-nregs-workers>.

124 Jean Dreze and Reetika Khera, *The Battle for Employment Guarantee*, In Reetika Khera (Ed.), *The Battle for Employment Guarantee*, p 49, New Delhi, Oxford University Press.

125 Survey Conducted in May-June 2008 in sample districts of six states of North India (Bihar, Chhattisgarh, Jharkhand, Madhya Pradesh, Rajasthan, and Uttar Pradesh).

The Unorganised Sector

The unorganised sector constitutes around 92-93% of the total workforce in India. The phenomenon of informalisation of the labour force has been spreading to the formal sector since the 1980s and the number of unorganised workers is on the increase. According to the National Commission Enterprises in the Unorganised Sector (NCEUS), although employment has increased by 8.5 million between 1999-2000 to 2004-05, the increase in the organised sector over the same period has been informal in nature, characterised by casual employment with no social security.¹²⁶

The lack of social security remains one of the most serious problems affecting the unorganised sector, despite the enactment of *Unorganised Workers' Social Security Act, 2008* (UWSS Act). The Act fails to provide 423 million unorganised workers – contributing to 60% of India's national income – their right to social security as it does not provide any specific comprehensive scheme of social security. Rather, it gives a compilation of already existing welfare schemes in its schedule. These schemes remain ill conceived, subject to arbitrary changes and applicable only to BPL workers, thus excluding many unorganised workers from the purview of the Act.¹²⁷ The National Advisory Council (NAC), chaired by United Progressive Alliance (UPA) chairperson Sonia Gandhi, recently wrote to the Gol pointing to its failure to formulate a proper social security package for the informal sector since the adoption of the UWSS Act¹²⁸: “*The centre has not formulated a minimum social security package for all workers in the unorganised sector since three years of the passage of the Act in 2008.*”¹²⁹ Except for the *National Health Insurance Scheme* – which itself has a number of shortcomings – very little has been done to extend other social security benefits to the unorganised sector.

In the construction industry, a cess is collected from contractors before construction work begins¹³⁰ and millions of Indian rupees have already been accumulated in many states under this system.¹³¹ Yet in the majority of states, welfare boards are either not constituted or they are dysfunctional.¹³²

Adivasis migrant workers



Taylor/ActionAid

¹²⁶ National Commission for Enterprises in the Unorganised Sector (NCEUS), *Report on Conditions of Work and Promotion of Livelihoods in the Unorganised Sector*, 2007, p.4.

¹²⁷ See: Social Security Now, *SSN Memorandum Demands Amendment to Social Security Act*, available at: www.socialsecuritynow.org/SSNOW%20WEBSITE/Memorandum-Final_Rawat.pdf

¹²⁸ A summary of recommendations made by the National Advisory Council (NAC) on extending social security to unorganised workers can be found at: nac.nic.in/pdf/summary_recommen.pdf

¹²⁹ The Pioneer, *Why no social security for unorganised workers, NAC asks government*, April 30, 2012, available at: <http://dailypioneer.com/home/online-channel/business-a-finance/61645-why-no-social-security-for-unorganised-workers-nac-asks-government.html>

¹³⁰ Section 3 of the Building and other Construction Workers' Welfare Cess Act, 1996.

¹³¹ The Union Labour & Employment Minister, Mallikarjun Kharge mentioned in an interview that in Karnataka alone, the construction workers' welfare cess had accumulated to INR 10.65 billion (USD 198.5 million) in four years, but the state had spent only INR 29.5 million (USD 550,014), which is the state of affairs in most states. Interview is available at: <http://business.outlookindia.com/article.aspx?278812> (accessed on April 24th, 2012)

¹³² *National Campaign Committee for Central Legislation on Construction Labour v. Union of India & Others*, Contempt Petition Nos 42 & 43 of 2011, decided on March 15, 2011.

Legally eligible and entitled workers in the fast expanding construction industry are thus excluded from statutory benefits.

Workers in the informal sector are denied decent wages, are subjected to hire and fire policies, and are bereft of social welfare measures. Highly disadvantaged workers among the unprotected workers, such as seasonal migrant labourers, child labourers and bonded labourers, are vulnerable to exploitation due to extreme poverty, low social status coupled with low bargaining power. The dismal conditions of work, the long working hours and the meagre wages remain invisible due to the lack of 'designated place of work'.¹³³

All workers are entitled to 'freedom of association' since the trade union law enables registration of trade unions¹³⁴ for all wage workers. Yet, workers refrain from forming trade unions as those who join unions may be victimised as no law compels the recognition of trade unions, and hence workers' right to collective bargaining. There is a considerable weakening of unionisation/bargaining capacity of workers through firing, redesignation, relocation, freezes in allowances and benefits, as well as voluntary suspension of trade union rights for a specific period.

Many workers work under inhuman and undignified conditions deprived of their minimum statutory rights, such as minimum wages or overtime for more than eight hours of work. The ground reality reflects an unprecedented exclusion of more than 393 million¹³⁵ workers in the informal sector.

The unorganised sector constitutes around 92-93% of the total workforce in India.

CASE STUDY

Exploitative and Unhealthy Conditions in the Mines of Rajasthan

More than 95% of mining activities in Rajasthan fall in the domain of the unorganised sector. Silicosis and tuberculosis are two respiratory diseases commonly found among mineworkers and they are both potentially life threatening. In the stone mines of Western Rajasthan that provide essential support to livelihood generation, the co-existence of the two diseases, known as silico-tuberculosis, is prevalent. More than half of the workers affected belong to Scheduled Castes. Poverty, lack of opportunity for alternative employment options, poor working conditions, malnutrition, lack of awareness and training, as well as lack of government monitoring and legal provisions perpetuate the occurrence of the disease.¹³⁶

Female workers are usually paid far less than male workers. Out of the total miners in Rajasthan, 37% are women and most of them are Dalits and tribals. These women mineworkers are underpaid, malnourished, exploited and often harassed physically. The factors behind women's entry into the mining industry are mainly attributed to poverty and the need for additional household income. Displacement and loss of land have adversely affected their lives and livelihoods, economic and social status, health and security.¹³⁷

Source: GRAVIS

133 Jeemol Unni, *Size, Contribution and Characteristics of Informal Employment in India*, The Gujarat Institute of Development Research, Ahmedabad, India.

134 Section 8 of the *Trade Unions Act, 1926*.

135 National Commission for Enterprises in the Unorganised Sector (NCEUS), *Report on Conditions of Work and Promotion of Livelihoods in the Unorganised Sector*, 2007.

136 GRAVIS, *Silico-Tuberculosis: Burdening Lives of Miners – A research study on prevalence and prevention of silico-tuberculosis in stone mines*, 2010.

137 GRAVIS, *Women Miners in Rajasthan, India: A reflection on their life, challenges and future*, 2010.

Scheduled Castes and Discrimination in Employment¹³⁸

Men and women SC workers are present in substantial numbers in the unorganised sector and are also employed as landless agricultural workers in the agricultural sector. In 2007, the *National Commission for Enterprises in Unorganised Sector* set up in September 2004, with Arjun Sengupta as chairman, assessed that the bulk of agricultural workers (90.7%) and rural workers (64.5%) were paid less than the national minimum wage of INR 66 (USD 1.25) a day. Many such socio-economic conditions call for safeguarding the right to social security of all those categories of workers, including SCs, who face systematic discrimination both in the public and private sectors. In the name of downsizing and optimising by the Government of India, employment rate is on the decline. According to the report of the *Working Group on the Welfare and Empowerment of SCs and STs*, over 113,450 job opportunities were lost by SCs in central government in a period of ten years. A decline of 10.07% job opportunities was noticeable. This is in addition to the loss of opportunities in various state government employment sectors.

Disabled Persons and Discrimination in Employment¹³⁹

Another constituency which faces severe discrimination in the field of employment are persons with disabilities. Article 16 of the Constitution of India guarantees equality of opportunity in employment, but does not mention persons with disabilities as a protected group. The national laws are highly inadequate for protecting the rights of persons with disabilities in employment. While India has ratified the *UN Convention on the Rights of Persons with Disabilities (CRPD)*, it remains largely unimplemented. As a result, persons with disabilities are one of the least employed groups in the country.

The *Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995*, mandates 3% reservation in government and public sector jobs, but it is never fully complied with. Moreover, employment is restricted only to certain 'identified' posts, which is discriminatory, and there is no concept of reasonable accommodation for persons with disabilities. Further, the reservation is restricted to people with locomotor, hearing and visual impairments; thus persons with other disabilities like intellectual, psychosocial and multiple impairments, are not even considered employable by the laws of the country.

Similarly, there is rampant discrimination in the private sector, where there is neither a reservation system nor an anti-discrimination law to prevent discrimination against persons with disabilities. About 98% of persons with disabilities registered under the MNREGA have not been given a job. In the year 2011-12, the number of persons with disabilities that were registered was 999,211 and only 16,436 were given work

There is rampant discrimination in the private sector, where there is neither a reservation system nor an anti-discrimination law to prevent discrimination against persons with disabilities.

138 Source: *Joint Stakeholders report on Caste Based Discrimination in India, 13th Session of the Universal Periodic Review of the UN Human Rights Council – India (21st May - 1st June 2012)*, submitted by National Coalition for Strengthening PoA Act, Initiation of National Campaign on Dalit Human Rights (NCDHR).

139 Source: *Universal Periodic Review – India: Key Issues of 120 Million Persons with Disabilities in India*, submitted by National Disability Network.

under the scheme.¹⁴⁰ There is hardly any support from the government for assistive technologies, interpreters, attendants, accessible transport, and rehabilitation, to enable persons with disabilities to take up training and employment on an equal basis with others. There is no system to cover disability costs, while social security/unemployment allowances are meagre or nonexistent in many parts of the country.

Bonded Labour

Despite the *Bonded Labour Abolition Act, 1976*, it is estimated that there are still 40 million 'bonded labourers' in India. SCs constitute a majority of them.¹⁴¹ Dalit children from migrant and bonded families naturally fall into the trap of bondage. Dalits comprise the majority of agricultural, bonded and child labourers in India, with many surviving on less than USD 1 a day. In September 2011, the NHRC reported 1,300 cases of human rights violations pertaining to bonded labour, while over 40% of the 2,800 bonded labour cases reported to the Commission are yet to be solved. The practice exists in multiple non-agricultural industries, such as the *Devadasi* practice of bonded sex workers, and in small-scale industries like firecrackers, textiles, leather goods manufacturing, brick and tile kilns, and granite extraction industries.¹⁴² In addition, the NHRC has also received "reports of bonded labour being used to execute defence projects" in conflict areas.¹⁴³



140 Status Report for XII Plan by Ministry of Social Justice and Empowerment, Government of India (2011).

141 Indian Institute of Dalit Studies (IIDS), *Dalit Children in Rural India: Related to Exclusion and Deprivation*, Working Paper Series, Volume III, Number 5, 2009, available at: <http://dalitstudies.org.in/wp/0905.pdf>

142 Written statement submitted by the Asian Legal Resource Centre, available at: <http://www.scoop.co.nz/stories/WO1008/S00517/india-bonded-labour-in-india.htm>

143 NHRC, *India Submission to the UN Human Rights Council for India's Second Universal Periodic Review*, available at: <http://nhrc.nic.in/Reports/UPR-Final%20Report.pdf>. For more details see Annex E.

Right to Education

In a significant development, the Right to Education (RTE) was made a fundamental enforceable legal right for children under Article 21A of the Constitution by the *Eighty-Sixth Constitutional Amendment Act, 2002*. India thus became one of the few countries in the world where the right to education is a fundamental right. The *Right of Children to Free and Compulsory Education Act, 2009* (RTE Act) guarantees the right to free and compulsory education to every child between 6 and 14.¹⁴⁴ However, it doesn't encompass children between 0 to 6 years old.

The RTE Act, although progressive, is not accompanied either by a well laid-out implementation mechanism of the law or by a financial memorandum. Therefore, its implementation remains a challenge because of inadequate financial allocations and lack of effective enforcement mechanisms. While the Act does have provisions stating that the local authority may take up a complaint, it ignores the fact that this very local authority is also an implementing functionary. This could give rise to conflict of interest in certain instances, which would inhibit the proper enforcement of the right to education. In order to ensure a more efficient implementation of the RTE Act, states are required to frame their own set of rules. To date, only 17 states have prepared drafts of their state rules on the Act but are yet to notify them.¹⁴⁵



Liba Taylor/ActionAid

Situation on the Ground

Surveys have found the following impediments in the realisation of the right to education, especially in rural areas: (i) one-third of all primary and upper primary schools face acute shortage of classrooms and do not comply with the RTE requirement of one teacher one classroom ratio; (ii) about half of primary and upper primary schools face shortage of teachers; (iii) 25% of schools lack office cum store; 48% of schools lack playgrounds; 48% of schools do not have a boundary wall or fence; (iv) 37% of schools do not have a library; (v) mid-day meals are not served in 17% of schools while 19% of schools lack a kitchen shed for mid-day meals; and (vi) 5.9% of girls in the age group of 11-14 years are out of school compared to 4.9% boys across India.¹⁴⁶

In October 2011, the Supreme Court ruled that the denial of the basic right to water and toilet facilities in schools violates the right to free and compulsory education

¹⁴⁴ The constitutional amendment and the RTE Act came in to force on April 2010.

¹⁴⁵ HAQ: Centre for Child Rights, 13th Session of the Universal Periodic Review Working Group of the UN Human Rights Council – India (21st May - 1st June 2012), 28 November 2011.

¹⁴⁶ Pratham, *The Annual Status of Education Report (Rural), 2010*, available at: http://www.pratham.org/aser08/ASER_2010_Report.pdf.

provided under the RTE Act.¹⁴⁷ It directed all schools across the country to have toilet facilities and offer drinking facilities within a short timeline. However, according to a recent study, only 75% of schools have toilets, with merely 60% of schools having girls' toilets. Even when toilets are available, half of them are not usable, thus a major deterrent for girls to attend schools.¹⁴⁸

Public-private partnerships are another grey area, with many private schools having challenged the RTE requirement for every private school to reserve 25% of admissions for students from disadvantaged and economically weaker groups. However, in April 2012, the Supreme Court upheld such requirement under the RTE Act and directed all schools, including those privately-run (except minority and unaided institutions) to admit at least 25% students from socially and economically backward families from the 2012-2013 academic year onwards.¹⁴⁹ Several schools had been holding separate shifts for students from poor families after the regular school timings. However, according to the requirements of the RTE Act, 25% of every classroom has to be composed of students from socially and economically disadvantaged families.

India is one of the few countries in the world where the Right to Education is a fundamental right.

Monitoring Mechanisms

The Act empowers the National Commission for the Protection of Child Rights (NCPCR) and the State Commissions for the Protection of Child Rights (SCPCRs) with the responsibility to monitor implementation of the RTE Act. However, it has been found that the appointment of many Chairpersons and Members of the National and State Commissions is often not open and transparent as suggested by the 'Paris Principles' for NHRIs. Additionally, only 18 states have set up SCPCRs, some of which are not yet functional. It is thus difficult for the NCPCR to keep a vigilant eye on millions of classrooms across India and protect children from corporal punishment, discrimination, lack of quality education and teacher, with the meager infrastructure at its disposal.

Corporal Punishment

Corporal punishment is still widely practised in Indian schools. Some of the forms of punishment include electric shocks, threatening, tying to chairs, slapping and beating with a cane. A recent study conducted by NCPCR¹⁵⁰ has revealed that three out of five school children, falling in the age group of 3-5 years are beaten with a cane as a form of corporal punishment in schools. The study disturbingly reveals that 99% of school children have received some form of corporal punishment.

147 The Hindu, "All Govt. schools must have toilets by November-end", October 19, 2011, available at: <http://www.thehindu.com/todays-paper/tp-national/article2550270.ece>

148 UCAN India, *Lack of toilets keeps girls away from school*, April 26, 2012, available at: www.ucanindia.in/news/lack-of-toilets-keeps-girls-away-from-school/17644/daily

149 The Times of India, *New norms for schools as SC backs right to education*, April 13, 2012, available at: <http://m.timesofindia.com/PDATOI/articleshow/12642231.cms>

150 NCPCR, *Eliminating Corporal Punishment in Schools*, 2010, available at: <http://www.ncpcr.gov.in/Guidelines/Eliminating%20Corporal%20Punishment%20in%20Schools.pdf>

Discrimination against SC Children

SC children are frequently treated in a humiliating and degrading manner in schools and in public places, at times accompanied by severe corporal punishment. Even in government sponsored schemes like the *Mid-day Meal Scheme*, under which every child in every government and government-assisted primary school should be provided with a prepared mid-day meal each day of school for a minimum of 200 days,¹⁵¹ segregation is practiced in seating arrangements and in eating mid-day meals.

SC children are made to clean school toilets and carry their footwear in their hands (at times on their heads) while crossing dominant caste areas in villages. In a village in Tamil Nadu, when a Dalit student was murdered on 9 September, 2011 by dominant castes, 23 Dalit children were compelled to take their transfer certificates from the school because the dominant caste children objected to their presence in the school. Some of these factors have significantly contributed to higher dropout rates among Dalit children who face a hostile environment especially at school.

One of the primary reasons for the increasing dropout rate of SC children from primary schools is due to discrimination being practiced against them in schools, which affects enrolment and retention rates. Dropout rate of SC children is 50% before class eight.¹⁵² The difference in dropout rates between SC youth and all Indian youth has actually grown from 4.39% in 1989 to 16.21% in 2008.¹⁵³ Moreover, the literacy levels are lowest among SC girls at 24.4%, compared to the national average of 42.8% for the general female population. In the Mushahar SC community,¹⁵⁴ barely 9% of women are literate.¹⁵⁵

Caste bias manifests itself also in higher educational institutions, where there have been reports of teachers ignoring SC students and unjustly failing them in exams; social exclusion and physical abuse; and the unwillingness of university administrations to assist SC students and support them. Between 2008-11, the number of SC students in higher educational institutions that committed suicide was 18 across India. This number only represents official statistics without counting all the SC students whose families did not protest against the incessant discrimination that eventually led to their suicide.¹⁵⁶

151 Supreme Court order, *People's Union for Civil Liberties vs Union of India and Others*, Writ Petition (Civil) No 196 of 2001.

152 Planning Commission, *Eleventh Five Year Plan 2007-12, Vol. II - Social Sector: Education*, 2008, available at: http://planningcommission.nic.in/plans/planrel/fiveyr/11th/11_v2/11th_vol2.pdf

153 IDSN, 2010: *Dalit Children in India – Victims of Caste Discrimination*, Briefing Note by Navsarjan Trust, Center for Human Rights and Global Justice and International Dalit Solidarity Network, available at:

154 The Musahar community falling under the category of Scheduled Castes in Northern India, is socially and economically one of the most marginalised communities in India.

155 Economic, Social and Cultural Rights, Girls' right to education, Report submitted by the Special Rapporteur on the right to education, Mr. V. Muñoz Villalobos, 2006, E/CN.4/2006/45, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/106/70/PDF/G0610670.pdf?OpenElement>

156 K.P.Girija, *The Death of Merit: Manish Kumar*, 2011: On Suicides, Caste and Higher Education, documentary available at: <http://thedeathofmeritinindia.wordpress.com/2011/04/26/84/>

CASE STUDY

Exclusion of Dalit Children

Exclusion by Teachers

- a. Segregated seating arrangements in classrooms, with SC children made to sit separately and typically at the back of the classroom.
- b. Undue harshness in reprimanding SC children, especially in relation to upper caste children. For instance, in scolding children for coming late to school, in resolving fights between children, in condoning name-calling by upper caste children.
- c. Not giving time and attention to SC children in the classroom, such as not checking their homework or class work, not answering their queries, even rebuking them for asking questions in class.
- d. Excluding SC children from public functions in the school. These include non-participation in the morning assembly or other public events such as on Republic Day or Independence Day.
- e. Making derogatory remarks about SC children – their supposed inability to keep up with academic work.
- f. Denying SC children the use of school facilities, including water sources. Keeping water segregated; even preventing SC children from using school taps or containers used to store drinking water.
- g. Asking SC children to do menial tasks in school, including cleaning the school premises and even the toilets.

Exclusion by peer group

- a. Calling SC children by caste names.
- b. Not including SC children in games and play activities in the classroom or in break-time when children go out to play; SC children often return to their own neighbourhoods to play with non-enrolled SC children.
- c. Not sitting with SC children in the classroom.

Exclusion by the system

- a. Incentives and schemes meant for SC children not being implemented in full.
- b. Lack of acknowledgement of SC role models in the curriculum or by teachers.
- c. Reinforcing caste characteristics in syllabi and textbooks.
- d. Lack of sensitization of teachers in teacher education and training.
- e. Insufficient recruitment of SC teachers.

*Source: Report of the Committee on Implementation of RTE and revamp of SSA 2010
(available at: <http://www.ssa.nic.in/>)*

Discrimination against Disabled Children

Disabled children also face difficulties at various levels in schools that are not disabled friendly. Promises of 'inclusion' in education remain a lip service in the absence of infrastructure and support. For example, only 47.5% of schools have ramps for access. Only 1.38% disabled children have been reported by the District Information System for Education 2008-09, while a striking 70% of children with disabilities have still not been identified, even though the 'education for all programme' – Sarva

Siksha Abhiyan (SSA) – has been in place for more than 10 years now.¹⁵⁷ Around 28 States have appointed 12,629 resource teachers for 2,694,000 children with disabilities in schools,¹⁵⁸ which translates into only one resource teacher for 213 children. Deaf and blind children are not able to access educational services either in special schools or schemes like SSA due to lack of trained personnel, accessible formats of books and assistive devices.

Government Schemes on Education

The *Sarva Shiksha Abhiyan*, the government's flagship programme aimed at universal primary and elementary education, while positive, has not yet achieved targets like universal primary education (five years of schooling) by 2007 and universal elementary education (eight years of schooling) by 2010. Although promoting education for all, the programme is not designed to provide equal education for all. Much-advertised programmes, such as the *Education Guarantee Scheme*, promote parallel systems of education in which less qualified, under paid and local para teachers are replacing trained professional teachers.



Tom Pietrasik/ActionAid

The *Mid-Day Meal Scheme* (MDMS) and the *National Programme of Nutritional Support* aim at enhancing enrolment, retention and attendance, and simultaneously improving nutritional levels among children. However, despite its good intentions, reports indicate the absence of a proper management structure and inadequate implementation. Additionally, there are serious concerns regarding the quality of food served to the children.

The *Integrated Child Development Services* (ICDS) is the world's largest early child development programme. It was launched in 1975 with the aim of improving the health and well-being of new mothers and children under six by providing health and nutritional education, health services, supplementary food, and pre-school education.¹⁵⁹ Studies have found that despite some unevenness in the quality of services, the ICDS programme has had a positive impact on the survival, growth and development of young children.¹⁶⁰ However, its reach has been called into question on numerous occasions and the third National Family Health Survey (NFHS-3), indicates that only 28% of children received any services from an *anganwadi* centre (the network of centres through which the scheme is implemented). Moreover, the ICDS programme has largely by-passed children with disabilities, Dalits and other minority groups.

157 District Information System for Education 2008-09, available at: <http://www.dise.in/>; Also see: Concluding Observations of the Committee on the Rights of the Child: India, 2004, CRC/C/15/Add.228, para 57.

158 Ministry of Human Resource Development (HRD), *Annual Report 2010-11*, Page 294.

159 Ministry of Women and Child Development, *Integrated Child Development Services (ICDS)*, available at: <http://wcd.nic.in/icds.htm>.

160 UNICEF, *India: Integrated Child Development Services (ICDS)*, available at: http://www.unicef.org/spanish/early-childhood/files/india_icds.pdf.

Human Rights Education

As per UPR I Recommendation 13, India stated that it had adopted a national action plan for human rights education (NAP-HRE). However, to date there is no information available to the public on the NAP-HRE. Also, the government did not respond to the evaluations after the UN decade for human rights education, as well as after the implementation of the first phase of the UN World Programme on human rights education in 2010. The GoI national report for UPR II states: *“The national curriculum for school education of National Council of Educational Research and Training (NCERT) has included the human rights education component in social science subjects. In addition, the Central Board of Secondary Education (CBSE) has also evolved a syllabus for human rights education at lower level, which has come into force in 2008”*.¹⁶¹ However, the current human rights component in the curricula is near insignificant.

CASE STUDY

Institute on Human Rights Education – A Flourishing Precedent

The Institute for Human Rights Education (IHRE) was set-up in 1997 in order to spearhead a programme on Human Rights Education (HRE) in schools. The Institute and the programme were conceived as a pilot project to address the lack of a human rights component in curricula in schools. The objective of the program is to sensitize children and teachers towards human rights, which is aimed at kindling their consciousness of their own rights and the rights of others. This in turn promises to be instrumental in impacting others in the chain of their association. The programme on human rights was first started in a few schools in Tamil Nadu and since 2005, it has expanded to the following states: Odisha, West Bengal, Rajasthan, Tripura, Bihar, Gujarat, Andhra Pradesh, Karnataka, Kerala, Maharashtra, Uttar Pradesh, Assam, Meghalaya, Arunachal Pradesh, Mizoram, Manipur and Nagaland. Currently the programme covers 2,035 schools (of which 1,483 are general schools, 542 are SC/ST welfare schools and 410 are government aided schools) with 2,190 trained teachers reaching out to 171,632 children in 18 states of India.

How it works

The programme begins with a five-day intensive training of teachers. This initial training is followed-up with yearly summer camps and further syllabus. Training of trainers serves to address the entrenched prejudices within the teachers. In some instances, teachers have walked-out of training sessions, owing to disagreements on issues like caste based discrimination. Nonetheless, as suggested by reports from the ground, the trainings under the HRE program have proved to cause a change in attitude and thinking of a considerable number of teachers.

Human rights education is offered by the trained teachers in Classes VI, VII and VIII while using three modules: (a) Introduction to Human Rights; (b) Child Rights; (c) Discrimination. These modules have been translated in many vernacular languages as the program expanded to other Indian states. The translation of each module is entrusted to a group of education, human rights and language experts from respective states. Care is taken in dynamically adapting and rewriting the modules to reflect local human rights contexts. IHRE generally conducts two 45 minute sessions on human rights education per week in each school. This time is taken from the school's regular class timings since HRE is treated as part of the regular class room activity. The programme has enjoyed tremendous support among stakeholders.

¹⁶¹ National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: India, A/HRC/WG.6/13/IND/1, UN General Assembly, 8 March 2012, para 117.

Positive Impact

Human Rights Education at the school level also has a trickle down effect as the child shares his knowledge with parents, relatives, friends, and neighbours. The programme has also benefited teachers, which is evident from the change in their approach towards their students. For instance: (a) teachers have abandoned the practice of subjecting their students to corporal punishment, possibly due to the realisation that doing so is a violation of child rights; (b) they have started acting as facilitators of Human Rights Clubs through which they help poor students in their studies and organize human rights programs; (c) teachers have admitted to changes in their family life due to the impact of the HRE program; (d) they have also started assisting victims of human rights violations in their respective areas to approach various forums for justice.

Students under the programme are also getting involved in human rights advocacy in their respective villages. For example: (a) through their parents and friends, they engage in debates on social evils in their locality thus creating awareness among their family, friends, relatives and neighbours; (b) students are able to identify instances of human rights violations; (c) they have shown increased involvement and interest in the HRE programme as well as studies generally; (d) a study counselling his father on the advice and guidance of his HRE program teacher has resulted in the stopping of consumption of liquor by his father. The father has also stopped beating-up his children.

A large number of students have come out with striking revelations of change in their perception and behaviour as a result of the HRE program in their schools. A young boy, Murugan, who is from a higher sub-caste than some of his peers narrated his experience as follows:

“When HRE was introduced in my school, I wasn’t interested initially, as our HRE teacher used to be very harsh and used to beat us up with a stick. But after attending the HRE training program for teachers, her attitude changed and she declared to us that she would not beat us anymore as she had realised that we all deserved to be treated like human beings. She then started teaching us human rights and my interest was especially aroused by the class on Discrimination. The class helped me realize that we should not discriminate against people on the basis of caste. Before, I would not enter into a lower caste person’s home and I would not allow anyone from a lower caste to enter my home as my grandmother wouldn’t allow it. But after the HRE program, things have changed. I have started mixing with people from all castes. My grandmother still scolds me if I play with Dalit boys or visit their homes. But now, I don’t care. Now I know every person has his right against discrimination.”

Source: Institute of Human Rights Education

The Right to Information Act and Corruption

In a significant legislative development, India enacted the *Right to Information Act, 2005* (RTI Act). This law has given citizens across India the ability to procure information on issues pertaining to their rights – particularly economic, social and cultural rights – thereby also promoting their access to justice and a culture of transparency and accountability in administration.¹⁶² The RTI Act has become a successful mechanism for people to engage with public authorities on matters relating to development and legal entitlements. In 2010-11 alone, two-thirds of the public authorities in the Central Government had received 550,000 information

¹⁶² For more information on the RTI Act and the many challenges in its implementation, see: www.righttoinformation.info

requests from citizens around the country.¹⁶³ Although collated data is not readily available, it may be conjectured that between 2-5 million information requests to public authorities under 27 state governments may have been made. A large number of citizens have used the RTI Act to seek accountability of public authorities on a range of issues, from evaluated answer scripts of public examinations¹⁶⁴ to procurement decisions in mega-scale development projects.¹⁶⁵

While in the initial years the focus of RTI users and activists was on exposing corruption at the village and sub-district level, in recent years RTI has been used to expose big-ticket corruption¹⁶⁶ and diversion of development funds earmarked for vulnerable groups.¹⁶⁷ RTI users have filed information requests questioning public authorities about the poor state of roads in their neighbourhood, diversion of funds for food grains, illegal grant of mining licenses in ecologically sensitive zones, conduct of clinical trials of untested medicines on girl children without informed parental consent, etc. While the information itself may not have been provided in some instances, it has been seen that many public officials were prompted to address the grievance leading to the request for information, and as a result, the proceeding for procuring information had to be disposed off. However, it is also pertinent, that largely, the absence of political will in treating such information requests as symptomatic of the problems of governance, is striking.

A recent global study has rated the Indian RTI Act as one of the strongest of such laws, second only to Serbia.¹⁶⁸ Yet, domestically, its effectiveness is eclipsed by some restrictive rules-regimes adopted by some States that prevent people from seeking information on more than one topic and that too within a limit of 150 words.¹⁶⁹ The Central Government's attempts to impose similar restrictions were rebuffed by a strong civil society campaign in 2010. However, other routes are being explored to curb the transparency regime established by the RTI Act. For example, the government has introduced a Bill in the Parliament to amend the RTI Act to prevent disclosure of sensitive information relating to nuclear safety and radiation hazard issues. The proposed bar on disclosure of information relating to technology holders, will ensure that even corruption-related information will not be disclosed.

Following the receipt of information provided by a RTI application, civil society actors make use of this information on their fieldwork and update it according to their succeeding findings. The government could have employed the civil society

The RTI Act has become a successful mechanism for people to engage with public authorities on matters relating to development and legal entitlements.

163 Central Information Commission, *Right to Information: Empowering Citizens- Annual Report 2010-11*, New Delhi, available at: <http://cic.gov.in/AnnualReports/AR-2010-11/AR2010-11E.pdf>

164 The Telegraph, *Scripts under RTI Act: Apex Court*, August 2011, available at: http://www.telegraphindia.com/1110810/jsp/calcutta/story_14360511.jsp

165 The Pioneer, *NBA Issues Legal Notice on State Government*, February 2012, available at: <http://www.dailypioneer.com/state-editions/bhopal/41755-nba-issues-legal-notice-on-state-government.html>

166 The Times of India, *We used the RTI Act to Expose Several Housing Frauds*, February 2011, available at: http://articles.timesofindia.indiatimes.com/2011-02-25/edit-page/28633690_1_rti-queries-rti-act-adarsh; The Daily News Analysis, *Evidence Shows Manmohan Singh Failed to Avoid 2G Scam*, September 2011, available at: http://www.dnaindia.com/india/report_evidence-shows-manmohan-singh-fails-to-avoid-2g-scam_1591213

167 The Times of India, *Delhi Govt. Diverted Rs. 670 crore of SC Funds for CWG Projects*, August 2010, available at: http://articles.timesofindia.indiatimes.com/2010-08-27/india/28278765_1_cwg-projects-commonwealth-games-projects-funds

168 India scored 130 out of a maximum of 150 points for incorporation of best practice principles of transparency. See: Centre for Law and Democracy, *Global Right to Information Rating Report*, 2011, available at: <http://www.rti-rating.org/countrydata.html>

169 Governance Now, *Activists Decry Maharashtra Move to Amend RTI Act*, April 2012, available at: <http://governancenow.com/gov-next/rti/activists-decry-maharashtra-move-amend-rti-act>

measures involving use of RTI for receiving updated information, and employing that for corrective measures. There have been instances where civil society actors, who obtained information through RTI, cross-verified documentary claims at the grassroots level through social audits, for example in case of the implementation of the MNREGA. The defalcation in spending of funds meant for rural development under the scheme, was publicised through public hearings and corrective action was sought from the administration.¹⁷⁰ However a typically slow-moving bureaucracy and a non-committal political establishment failed to capitalise on this public feedback to take swift and resolute corrective action.

Despite its popular appeal, state and central governments have done little to provide the necessary infrastructural support for the successful implementation of the RTI Act. There is no budgetary allocation for promoting transparency in most states. The State Information Commissions – adjudicators in access disputes – remain understaffed and under-resourced and are financed in large measure by the central government. This has resulted in long delays in the resolution of access disputes.¹⁷¹ Regretably, the appointment of Information Commissioners is often based on political considerations rather than objective criteria linked to a proven track record of supporting transparency and accountability.¹⁷²

Further, government's indifference towards raising awareness about RTI also prevents people from exercising their rights under the Act. This is one of the major reasons why few women seek information under the RTI Act.¹⁷³ A government-sponsored study in 2009 also found that fewer Dalits and tribals/*adivasis* used the RTI Act compared to persons belonging to upper castes.¹⁷⁴ Accounts from around the country also indicate that Dalit and adivasi requestors are more likely to be attacked, intimidated or harassed for seeking information under the Act (see sections on Human Rights Defenders in Part III).¹⁷⁵ In the absence of credible and effective police and judicial reforms, the law enforcement machinery, more often than not, fails to protect RTI activists and their families. The proposed legislation to protect whistleblowers and to redress public grievances about maladministration and poor delivery of services by government departments is likely to add to the institutional mechanisms for tackling corruption. However it appears that political consensus on these measures is difficult to achieve in the near future, given the current divisive nature of the debate around them.

170 Aiyar, Yamini and Samji, Salimah (2009) *Transparency and Accountability in NREGA: A Case Study of Andhra Pradesh*, AI Working Paper No. 1, Accountability Initiative, New Delhi.

171 The Times of India, *Central Information Commissioner Feels Right to Information Dying in Maharashtra*, March 2012, available at: http://articles.timesofindia.indiatimes.com/2012-03-25/mumbai/31236292_1_high-pendency-information-commissioners-rti-act

172 Tehelka, *Andhra Pradesh Governor Rejects four names suggested for Posts of Information Commissioners*, April 2012, available at: http://www.tehelka.com/story_main51.asp?filename=Ws220212RTI.asp

173 Alasdair Roberts, *A Great and Revolutionary Law? The First Four Years of India's Right to Information Act*, *Public Administration Review*, 2010, Vol. 70, No. 6, page 8, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1527858

174 *Understanding the Key Issues and Constraints in Implementing the RTI Act, 2009*, Price Waterhouse Coopers, 2009, Chapter 3, page 38, available at: <http://rti.gov.in/rticorner/studybypwc.htm>

175 India Today, *Rajasthan: RTI Activist attacked with Axes*, March 2011, available at: <http://indiatoday.intoday.in/story/rti-activist-attacked-for-seeking-public-work-in-panchayat/1/131638.html>

II



Showkat Shafi/Al Jazeera

MILITARISATION AND SECURITY - LAWS AND APPARATUS



Despite a clear decrease in insurgency related violence, the state's response to these political issues has remained mainly militaristic, accompanied by draconian security laws that lead to widespread human rights violations.

Militarisation and Security – Laws and Apparatus

Due to historical and political reasons, parts of India including the North-East (Nagaland, Manipur, Assam, Meghalaya, Arunachal Pradesh) and Jammu and Kashmir (J&K) have witnessed insurgency for many years. The Government of India (GoI) responded with increased militarisation.

For the last two years, the Ministry of Home Affairs' Annual Reports have consistently pointed towards the reduction in the levels of violence in conflict areas. The 2009-2010 Annual Report stated that the number of insurgency related incidents and casualties have progressively reduced between 2004 and 2010 in J&K, and that the "*overall security situation in the state has shown perceptible improvement*". Also, recent estimates by the Intelligence Bureau and a census conducted by the J&K police declare that only 119-200 militants are still operative in Kashmir, which is the lowest in the past two decades.¹⁷⁶ The report also added that the situation in the North-East has improved with reduction in the levels of violence and casualties.¹⁷⁷ Between 2008-2010, 1,234 persons were killed in J&K; 932 persons were killed in seven North-Eastern states and 3,798 persons were killed in the Naxal conflict spread over 13 States.¹⁷⁸ A ceasefire is effective in Nagaland since 1997 and a

176 Asian Age, *Intelligence Bureau: Militants in Kashmir Valley just 200, time to strike*, available at: <http://www.asianage.com/india/intelligence-bureau-militants-kashmir-valley-just-200-time-strike-374>; Also see: Indian Express, *119 militants active in Kashmir, lowest in 20 years*, June 6 2011, available at: <http://www.indianexpress.com/news/119-militants-active-in-kashmir-lowest-in-2/799806/>

177 Ministry of Home Affairs' Annual Report (2009-10), available at: [http://mha.nic.in/pdfs/AR\(E\)0910.pdf](http://mha.nic.in/pdfs/AR(E)0910.pdf).

178 Ibid.

major insurgent group, *United Liberation Front of Asom (ULFA)*, operative in Assam, has also declared ceasefire since early 2011. Similarly, according to the Ministry of Home Affairs' Annual Report (2010-2011): (a) there has been a perceptible 30% decrease in the number of terrorist incidents and 34% and 52% decrease in civilian and security forces' fatalities respectively compared to the year 2010 in J&K; and (b) the security situation in the North-East has shown improvement in 2011 as compared to 2010 in terms of violence and casualties of civilians and security forces.¹⁷⁹ The 2011 report also reveals that conflict related casualties have reduced in states experiencing 'left-wing extremism'.¹⁸⁰

Despite this clear decrease in insurgency related violence, the state's response to these political issues has remained mainly militaristic, accompanied by draconian security laws that lead to widespread human rights violations. While violations of international humanitarian law facilitated by these laws are common in these areas, the International Committee of the Red Cross (ICRC), has not been granted access to visit detention centres in any of these states, except, to a very limited extent, in J&K.¹⁸¹

Central India (Chhattisgarh, Andhra Pradesh, Jharkhand, Odisha and West Bengal) is home to impoverished communities of indigenous peoples (*tribals/adivasis*). With government adopting economic policies that promote corporate acquisition and privatisation of land, mineral and other natural resources – primarily affecting the already marginalised *adivasis* – strong resistance movements, both popular protests as well as Maoist ('Naxalite') insurgencies, have grown. Jairam Ramesh, Minister for Rural Development, while recognising the economic undercurrents of the Maoist insurgency has stated: *"The long-festering socio-economic concerns of the weaker sections of society must be addressed meaningfully if the influence of Naxal groups is to be countered effectively."* Instead, the state has launched a major armed offensive, codenamed 'Operation Greenhunt' against the Maoists in Central India, with Dantewada in Chhattisgarh as its epicenter. The Supreme Court strongly condemned the state-sponsored counter-insurgency militia *Salwa Judum* – spearheaded by 'Special Police Officers' (SPOs) – as unconstitutional, and directed the disbandment of SPOs in Chhattisgarh.¹⁸² Grave human rights abuses have been inflicted on the population by these SPOs, security forces and even by the 'Naxalites'. Violating the spirit of the Court's order, SPOs have been reabsorbed into the *Chhattisgarh Auxiliary Armed Force through the Chattisgarh Auxiliary Armed Police Act, 2011*.¹⁸³

"The long-festering socio-economic concerns of the weaker sections of society must be addressed meaningfully if the influence of Naxal groups is to be countered effectively."

Jairam Ramesh, Minister for Rural Development

179 Ministry of Home Affairs' Annual Report (2010- 2011), paras 2.7.2 & 2.8.1, pages 7 & 19, available at: [http://mha.nic.in/pdfs/AR\(E\)1112.pdf](http://mha.nic.in/pdfs/AR(E)1112.pdf)

180 Ministry of Home Affairs' Annual Report (2010- 2011), *State-Wise Left Wing Extremist Violence from 2008-2010*, available at: [http://mha.nic.in/pdfs/AR\(E\)1112.pdf](http://mha.nic.in/pdfs/AR(E)1112.pdf)

181 The State of Human Rights in India: Asian Centre for Human Rights Joint Submission on Behalf of the People's Forum for UPR II.

182 *Nandini Sundar & Ors. v State of Chhattisgarh*, Supreme Court, Writ Petition (C) No.250 of 2007, July 2011, Para 75.

183 Sec 11(3), *Chattisgarh Auxillary Armed Police Act, 2011*.

Special Security Laws

In all the above stated conflict areas, several special security laws operate,¹⁸⁴ which violate national and international human rights guarantees. These laws provide extensive powers of arrest, detention without trial and power to ‘shoot to kill’ on suspicion, to security forces and exempt them from prosecution in absence of executive sanction, spawning a culture of impunity. This militaristic approach and the ongoing conflicts contradict Gol’s position at the UN, that “*India does not face either international or non-international armed conflict.*”¹⁸⁵

In J&K and the North-East, a state of exception exists through the presence of the *Disturbed Areas Act, 1976* (DAA) and the *Armed Forces Special Powers Act, 1958* (AFSPA). Once an area is declared ‘disturbed’, the armed forces in such areas are granted extraordinary powers to use lethal force on mere suspicion and immunity from prosecution. In November 2011, the Attorney General in his legal opinion to the Central Government stated that the Governor of the State, is the final authority for declaration and revoking of the DAA and AFSPA, leaving the reasonableness or otherwise of the declaration of ‘disturbed areas’ outside the purview of judicial review.¹⁸⁶

AFSPA, which provides sweeping powers and immunity to the armed forces, has since its imposition more than half a century ago legitimised a series of gross human rights violations in the North-East and J&K, where it is in operation. Fundamental rights such as the right to life, the right to a fair trial, the right to remedy and reparation, the right against torture, the right against arbitrary detention, freedom of expression, freedom of movement and freedom of association and to peacefully assemble and protest, as well as a series of economic, social and cultural rights have been systematically violated in the areas where AFSPA is in operation. This law has, therefore, come under severe criticism both domestically and internationally, with many voices calling for its repeal.

At the national level, government appointed committees and groups such as the Justice Jeevan Reddy Committee; the Administrative Reform Commission and the Working Group on Confidence-Building Measures in J&K have called for its repeal.¹⁸⁷ Many civil society groups have also



Joe Athalya/Flickr

184 These would include: *The Armed Forces (Assam & Manipur) Special Powers Act (AFSPA), 1958*, and the *J&K Armed Forces Special Powers Act, 1990*, *J&K Public Safety Act, 1978* (PSA), *Chhattisgarh Special Public Security Act, 2005* (CSPSA), *Nagaland Security Regulation Act, 1962*, *Unlawful Activities (Prevention) Act, 1967* (UAPA), and *Enemy Agents Ordinance, 1948*.

185 India’s National Report on the Option Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, available at: http://wcd.nic.in/crc3n4/crc3n4_2r.pdf

186 The Hindustan Times, *AFSPA: Law says Gov, not CM, has the last word*, New Delhi, 23 November 2011, available at: <http://www.hindustantimes.com/India-news/NewDelhi/Afspa-Law-says-gov-not-CM-has-last-word/Article1-772751.aspx>

187 The ‘Jeevan Reddy Committee’ and the Administrative Reform Commission, available at: <http://www.hindu.com/nic/afa/afa-part-iv.pdf>); Praveen Swami, *Bit of Consensus*, Frontline, Vol 24(9), May 5-18, 2007, available at: <http://flonnet.com/fl2409/stories/20070518002902500.htm>

been calling for its repeal for a very long time.¹⁸⁸ Ms. Irom Sharmila, a Manipuri activist and poet, has been on an indefinite hunger strike since 2000 to demand the repeal of AFSPA.¹⁸⁹

At the international level, a large number of UN treaty bodies (Human Rights Committee¹⁹⁰, CEDAW¹⁹¹, CERD¹⁹² and CESCR¹⁹³) and UN Special Rapporteurs have criticised AFSPA for contravening international human rights law and have called for its review or repeal. In 2007, CEDAW reiterated its concerns as expressed in 2000 regarding the review of AFSPA and requested India “to provide information on the steps being taken to abolish or reform the Armed Forces Special Powers Act and to ensure that investigation and prosecution of acts of violence against women by the military in disturbed areas and during detention or arrest is not impeded”. CERD recommended the repeal of AFSPA asking India to “replace it ‘by a more humane Act’, in accordance with the recommendations contained in the 2005 report of the Review Committee set up by the Ministry of Home Affairs”. The Special Rapporteur on the situation of human rights defenders¹⁹⁴ and the Special Rapporteur on extrajudicial, summary or arbitrary executions (SR EJE) both recommended the repeal of AFSPA following their official visits to India. The SR EJE unequivocally stated that AFSPA: “has become a symbol of excessive state power (...) A law such as AFSPA has no role to play in a democracy and should be scrapped”.¹⁹⁵

“AFSPA has become a symbol of excessive state power (...) A law such as this has no role to play in a democracy and should be scrapped.”

Christof Heyns, UN Special Rapporteur on extrajudicial executions

While upholding the constitutional validity of AFSPA in *NPMHR v. Union of India*, the Supreme Court laid down strict guidelines, which are to be followed by the armed forces while acting under AFSPA.¹⁹⁶ However, not only are the *NPMHR* guidelines derogated from by the armed forces, but even the Supreme Court in its judgement

188 In addition to civil society groups from India, prominent international NGOs like Amnesty International and Human Rights Watch have repeatedly called for the repeal of AFSPA. See: Amnesty International, Public Statement: *Parliamentarians must repeal the Armed Forces (Special Powers) Act*, December 10, 2009, available at: <http://www.amnesty.org/en/library/asset/ASA20/022/2009/en/014577cc-00bc-40c7-9177-8571efc0950a/asa200222009en.html>; and Human Rights Watch, *India: Repeal Armed Forces Special Powers Act*, August 18, 2008, available at: <http://www.hrw.org/news/2008/08/17/india-repeal-armed-forces-special-powers-act> In Also see: Human Rights Watch, *Getting Away with Murder: 50 Years of Armed Forces Special Powers Act*, August 2008, available at: <http://www.wghr.org/pdf/HRW%20Report%20on%20AFSPA.pdf>

189 For all these eleven years, Irom Sharmila has been repeatedly arrested for ‘attempting to commit suicide’ and kept in custody in a hospital ward, where she is being forcibly fed through a nasal tube. See: The Hindu, *Irom Sharmila arrested again*, March 13, 2012, available at: <http://www.thehindu.com/news/states/other-states/article2991682.ece>

190 Concluding observations of the Human Rights Committee: India, 08/04/1997. CCPR/C/79/Add.81, para 18, available at: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.79.Add.81.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.79.Add.81.En?OpenDocument)

191 Concluding comments of the Committee on the Elimination of Discrimination against Women: India, Thirty-seventh session, 15 January-2 February 2007, available at: <http://daccess-dds.ny.un.org/doc/UNDOC/GEN/N07/243/98/PDF/N0724398.pdf?OpenElement>

192 Concluding observations of the Committee on the Elimination of Racial Discrimination: India, Seventieth Session, 19 February – 9 March 2007, para 12, available at: https://docs.google.com/viewer?a=v&q=cache:YG7qgei82cYJ:www2.ohchr.org/english/bodies/cerd/docs/cerd.c.ind.co.19.doc&hl=en&gl=in&pid=bl&srcid=ADGEEShUs6pHCw3R-yIqWbqqFQ0SBRBniZML4i0-J_z8rbwt4kLW_dMJNfYQO2XHf55D.JVA3eSlogLC27Mm0qv2xv8O9Cku-T6936y0fW88Khlhph91R64gXoWy17nVjaMXQGkvtL60IO&sig=AHIEtbTwlwqoSHUa9ZVPQBIIIIZUJhZ16_rQ&pli=1

193 Concluding Observations of the Committee on Economic, Social and Cultural Rights, Fortieth Session: India, 28 April – 16 May 2008, available at: <http://www.unhcr.org/refworld/publisher/CESCR/CONCOBSERVATIONS,IND,48b1bdac42,0.html>

194 Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, Mission to India (10-21 January 2011), para 145, available at: <http://www.ohchr.org/Documents/Issues/Defenders/A-HRC-19-55-Add1.pdf>

195 Press Statement, Special Rapporteur on extrajudicial, summary or arbitrary executions: Country Mission to India. March 2012, available at: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12029&LangID=E>. See: Annex G.

196 *NPMHR v. Union of India*, Writ Petition (Cri.) No. 550 of 1982, 27 November 1997, Supreme Court.

in *Masooda Parveen v. Union of India*¹⁹⁷, has tacitly approved digression from the guidelines in certain situations. In addition to the NPMHR guidelines, the army headquarters also issues a list of ‘dos’ and ‘don’ts’ from time to time, which armed forces acting under AFSPA, or in aid of civilian authority, are expected to adhere to. However, even those instructions are routinely derogated from. The Supreme Court while referring to such ‘dos and don’ts’, stated: “*serious note should be taken of violation of these instructions and the persons found responsible for such violation should be suitably punished under the Army Act, 1950*”.¹⁹⁸ However, there are no visible instances of personnel being punished for violation of these instructions.

The Prime Minister and the Union Home Minister have expressed the need for re-examining AFSPA, while the Chief Minister of J&K has been asking for its withdrawal from some parts of the state.¹⁹⁹ The Home Minister recently revealed that the Cabinet Committee on Security under his Ministry is considering three amendments to AFSPA, which will be announced after the Committee has taken a decision.²⁰⁰ However, any amendment to AFSPA that seeks to moderate the power exercised by the armed forces, or even its partial withdrawal, is vehemently opposed by the army and the Ministry of Defence.²⁰¹

Notwithstanding the strong criticisms and debates around AFSPA, the GoI stated in its national report for UPR II, that “*as long as deployment of armed forces is required to maintain peace and normalcy, AFSPA powers are required*”.²⁰²

Custodial Torture

Custodial torture and violence remain an entrenched and routine law-enforcement and investigation practice across India (*also see*: section on Custodial Torture in Part III). However, the practice of torture is even more widespread and condoned in conflict areas, where it is routinely and violently used, leading to physical and mental disability or impotence. Common methods of torture in Kashmir and the North-East include: assault, placement of an iron rod on the legs on which many persons sit, placement of a burning stove between the legs and administration of electric shocks to the genitals. A communication of the ICRC with US officials confirmed the widespread use of torture in Kashmir.²⁰³

197 *Masooda Parveen v. Union of India*, Writ Petition (Civil) 275 of 1999, Judgement dated May 2, 2007, Supreme Court. For more information, see: South Asia Human Rights Documentation Centre, *Masooda Parveen: Judicial Review of India’s Special Security Laws Goes from Bad to Worse*, HRF/168/07, July 7, 2007, available at: <http://www.hrdc.net/sahrdc/hrfeatures/HRF168.htm>

198 *NPMHR v. Union of India*, Writ Petition (Crl.) No. 550 of 1982, 27 November 1997, Supreme Court

199 Siddharth Vardarajan, *A modest proposal on AFSPA*, September 5, 2010, available at: <http://www.thehindu.com/opinion/columns/siddharth-varadarajan/article615837.ece>

200 The Hindu, *Chidambaram flags three amendments proposed to Armed Forces Act*, March 31, 2012, available at: <http://www.thehindu.com/news/national/article3266233.ece>

201 See for example, India Today, *Army opposed Omar’s demand for AFSPA revocation from Jammu and Kashmir*, 16 April, 2012, available at: <http://indiatoday.intoday.in/story/army-opposes-omars-demand-for-afspa-revocation/1/184730.html>. See also: Siddharth Vardarajan, *A modest proposal on AFSPA*, September 5, 2010, available at: <http://www.thehindu.com/opinion/columns/siddharth-varadarajan/article615837.ece>

202 *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: India*, A/HRC/WG.6/13/IND/1, UN General Assembly, 8 March, 2012, para 25.

203 See: The Guardian, *WikiLeaks cables: India accused of systematic use of torture in Kashmir*, December 16, 2010, available at: <http://www.guardian.co.uk/world/2010/dec/16/wikileaks-cables-indian-torture-kashmir>

CASE STUDY

Torture Cases from Conflict Areas

Manipur:²⁰⁴ On the night of 11 August 2010, Naorem Modhu Singh (26 years), son of Mangoljao, died due to alleged torture in the custody of the combined team of 12th Madras Regiment and Manipur Police Commandos at Khoijumantabi village under Kumbi police station in Bishnupur district of Manipur. He and his cousin were picked-up from his residence by the combined team on suspicion of links with a banned militant group. On 12 August 2010, the personnel of 12th Madras Regiment handed-over his dead body to the Kumbi police station. In its report to the police, the 12th Madras Regiment claimed that the deceased had collapsed while in their custody and that he was taken to an army hospital where doctors declared him brought dead. However, the family members of the deceased allege that Naorem Modhu Singh was tortured to death in custody, which is supported by the facts and circumstances of the case.

Assam:²⁰⁵ On 6 March 2009, Asian Centre for Human Rights (ACHR) filed a complaint in the NHRC alleging that personnel belonging to 871st Field Regiment of the Indian Army, picked up Bhadrakanta Baruah, son of late Yogaram Baruah on the night of 31 January 2009 and tortured him in their custody at the Maibela base Army camp in Sivsagar district of Assam on suspicion of having links with the banned United Liberation Front of Asom (ULFA). In his reply to the NHRC, the Superintendent of Police of Sivsagar informed that immediately after the army handed-over Bhadrakanta Baruah and Ghana Neog to the police, they were medically examined and the doctor opined that both of them had “received simple injuries caused by blunt object.” Detailed investigation by the police did not reveal any link of the victims with ULFA and they were released on the same day. Both victims were farmers. The Ministry of Defence denied that the victims were tortured and claimed that they have confessed to having provided shelter to the ULFA. In its order delivered on 4 March 2010, the NHRC rejected this claim of the Ministry of Defence and directed them to pay compensation of INR 50,000 (USD 950) to each of the victims.

Indo-Bangladesh Border: Border Security Force (BSF) soldiers have often been accused of torture and extrajudicial killings near India’s border with Bangladesh. Recently, eight soldiers belonging to the BSF’s 150th Battalion were found brutally beating up a Bangladeshi national, later identified as Habibur Rahman, on a video reportedly filmed by one of them.²⁰⁶ The victim is alleged to have been attempting to smuggle cattle from Bangladesh into India as a part of a group. The video shows the victim being pushed to the ground, with initially his hands and feet being tied with a rope. A soldier is seen putting his foot on his chest, while attempting to tie his hands together. While abusing, jeeringly laughing and making a conscious effort to film the victim, they are seen stripping him naked. They then make him stand up and slide a bamboo stick across his arms tied behind his back, with a portion of his *lungi*, which they had torn into two. They are then seen violently beating him all over his bare body using bamboo sticks, with full force. One of the soldiers is then seen sitting on his back and holding his legs together for the other one to hit him with a stick on the soles of his feet. The victim can be heard to be in seething pain and pleading to be spared. Instead of handing the victim to the police, the BSF soldiers not only illegally detained the victim, but also tortured him as described above. Reportedly, they then left him to make his way back into Bangladesh. A local organisation released the video to local news channels, after which BSF suspended the soldiers and ordered an inquiry. However, despite clear evidence of abuse, no criminal charges have been filed against any soldiers to date.

Kashmir: There has been a phenomenon of detention and torture of youth as young as 10 years old, particularly after the protests of 2008 and 2010 in Kashmir. Sameer Khan (name changed), one such youth was detained

204 See: Asian Center for Human Rights, *Torture in India, 2011; Torture in India, 2010*; Also see: Human Rights Watch, *India: Prosecute Security Forces for Torture*, January 31, 2012.

205 Ibid.

206 The video is available at: www.youtube.com/watch?v=CPDXmhZHP_8

by the armed forces when he was in his late teens.²⁰⁷ According to his account, he was thrown into a dark room, where he was beaten with gun butts, causing his nose and head to bleed. While still in pain, an hour later, the security personnel tortured his genitals by administering electric shocks, using cigarette butts and inserting a copper wire into his penis. After his release, he had to be put on medication for the injuries as well as for displaying signs of depression. Khan said: *“I recovered after almost a year... but I still get nightmares about it almost every week”*.

Another torture survivor, Danish Malik (name changed), now 23 years old, was detained for 3 months and 10 days prior to being produced before the court. Malik described his deplorable treatment during his detention as follows: *“They had rollers, and other implements to administer electric shocks. They hung me upside down naked, with my hands tied at the back. I was sweating and had passed out. When they finally asked me to put my clothes back on, I couldn’t even lift my hand. There was a small window in the lock-up to which I was shifted, which they kept shut at all times. I could see only very little light coming into the lock-up through cracks in the window. I was let out of the lock-up only to wash my face every morning. I had to urinate in the lock-up and sleep with rats”*.²⁰⁸

Enforced Disappearances

The UN Convention for the Protection of all Persons from Enforced Disappearances (CED) defines ‘enforced disappearance’ as: *“the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorisation, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law”*.²⁰⁹ Enforced disappearances²¹⁰ and extrajudicial killings remain widespread in conflict areas,²¹¹ reinforced by extraordinary powers of arrest, detention and immunity available to the security forces. The NHRC received 341 complaints of disappearance in 2010 and 338 by November 2011 and highlighted that these numbers were not comprehensive.²¹² As per UPR I Recommendation 12 and India’s 2011 pledge,²¹³ Gol committed to ratify CED, stating that ratification was ‘underway’. Further, Gol mentioned in its UPR II national report that it was *“actively considering its ratification”*.²¹⁴ However, there are still no visible steps towards the process of ratification.

Mother whose son is amongst the thousands of people who have ‘disappeared’ in J&K.



Showkat Shaif/ Al Jazeera

207 Dilnaz Boga, *Horrific Brutality in Kashmir*, Asia Sentinel, April 28, 2011, available at: http://www.asiasentinel.com/index.php?option=com_content&task=view&id=3156&Itemid=404

208 Ibid.

209 Article 2.

210 Human Rights Alert submitted four cases of enforced disappearances to the Working Group on Enforced Disappearances between 2010 and 2011. It is believed that 8,000 to 10,000 people have been subject to enforced disappearances in Kashmir. See: *Association of Parents of Disappeared Persons’ statement*, available at: <http://www.disappearancesinkashmir.com/>

211 National Crime Records Bureau Report, *Crime in India – 2010*, page 567, available at: <http://ncrb.nic.in/>

212 NHRC, *India Submission to the UN Human Rights Council for India’s Second Universal Periodic Review*, available at: <http://nhrc.nic.in/Reports/UPR-Final%20Report.pdf>. For more details see Annex E.

213 UPR I Recommendation 12: Ratify the Convention on Enforced Disappearances; India’s 2011 Pledge: *“India remains committed to ratifying the Convention on Enforced Disappearances.”*

214 National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: India, A/HRC/WG.6/13/IND/1, UN General Assembly, 8 March 2012, para 30.

In Kashmir, justice evades well-known cases of extrajudicial killings²¹⁵ and enforced disappearance.²¹⁶ For instance: Javed, son of the chairperson of the *Association of Parents of Disappeared Persons*, Parveena Ahanger, was 16 years old when he was picked up by soldiers in 1990 and is since disappeared. Police investigation and judicial enquiry accused three army officers for the disappearance, following which sanction was sought for prosecution in 1997. The sanction was denied by the central government on the ground of 'improper investigation'.

In 2010, a People's Tribunal established the presence of 2,700 mass unmarked graves in Kashmir.²¹⁷ The finding was confirmed by the J&K State Human Rights Commission in 2011.²¹⁸ The Commission took *suo moto* cognizance of the matter and ordered the state government to conduct an investigation for ascertaining the identity of the buried (see case study below).

CASE STUDY

Mass Graves in Kashmir

The International People's Tribunal on Human Rights and Justice in Kashmir (IPTK) documented and established the presence of 2,700 mass unmarked graves in three districts in north Kashmir in 2009. The investigations conducted by the IPTK also revealed the presence of multiple cadavers in some graves. Following widespread condemnation by international human rights organisations, the J&K State Human Rights Commission (JKSHRC) conducted a *suo-moto* investigation on the unmarked graves and confirmed their presence. Its investigation team visited 38 sites in the three districts and found 2,730 bodies in various unmarked graves. The Commission recommended: (a) investigation of identities of the dead bodies by employing forensic techniques; (b) local police stations to cooperate in investigations; (c) prosecution of perpetrators in due course; and (d) constitution of an independent body which will be empowered to intervene in all questions of dead bodies/mass unmarked graves/disappeared persons, including on questions of implementation of the Commission's recommendations.

The IPTK report claims on the basis of "*community, collective testimony and archival evidence*" that in many instances, the bodies are those of victims of 'fake encounters' carried out by the armed forces. The J&K police had then helped them carry dead bodies to the graves that locals were asked to prepare. The issue of mass/unmarked graves has also been discussed in the J&K State Legislative Assembly. Atta Mohammad, 68 years old, a gravedigger in Chehal Bimyar, Baramulla district, in his testimony to the IPTK stated to have buried 203 bodies between 2002 and 2006. The bodies were delivered to him by the police, primarily after dark: "*I have been terrorised by this task that was forced upon me. My nights are tormented and I cannot sleep, the bodies and graves appear and reappear in my dreams. My heart is weak from this labour. I have tried to remember all this... the sound of the earth as I covered the graves... bodies and faces that were mutilated... mothers who would never find their sons. My memory is an obligation. My memory is my contribution. I am tired, I am so very tired.*"

Source: The International People's Tribunal on Human Rights and Justice in Kashmir, Buried Evidence: Unknown, Unmarked and Mass Graves in Indian-Administered Kashmir, 2009

215 See: Kashmir Observer, *Machil Killings Exhumed*, May 2010, available at: http://www.kashmirobservers.net/index.php?option=com_content&view=article&id=4689:machil-killing-victims-exhumed-three-held-so-far&catid=15:top-news&Itemid=2.

216 See: Umar Baba, Tehelka Magazine, *Screams from the Valley*, Vol 7, Issue 52, January 1, 2011, available at: http://www.tehelka.com/story_main48.asp?filename=Ne010111SCREAMS_FROM.asp

217 International People's Tribunal on Human Rights and Justice in Indian-administered Kashmir (IPTK), *Buried Evidence*, December 2, 2009, available at: <http://www.kashmirprocess.org/reports/graves/BuriedEvidenceKashmir.pdf>.

218 *Re – Suomoto regarding nameless/ unmarked graves v. State of J & K and Ors*, SHRC/13/2008.

Extrajudicial Killings

The National Crime Records Bureau (NCRB) Report 2010 reveals higher incidence of police firing and resultant civilian casualties and injuries for all conflict zones, with J&K ranking the highest under each category followed by Uttar Pradesh and Chhattisgarh.²¹⁹ The data reflected in the NCRB report, however, does not indicate the actual number of extrajudicial executions, as the executions by the armed forces and the army are excluded from this enumeration.

In Chhattisgarh, the police, the paramilitary and *Salwa Judum* have all been responsible for extrajudicial killings. Government forces have been reported to extrajudicially execute persons suspected of being Naxalites and to label the extrajudicial executions as ‘encounter killings’ or ‘encounters’, thereby falsely implying that the deaths had occurred during armed skirmishes with the alleged Naxalites.²²⁰ *Salwa Judum* forces have been accused of extrajudicial killings during raids and evacuation of villages while looking for Naxalite supporters and also during reprisal attacks on villagers who have been forcibly evacuated by them. In addition, Naxalites have been accused of killing villagers whom they believed were *Salwa Judum* supporters or their family members, in addition to those, who either refuse to cooperate with them or who they suspect to be police informers.²²¹

Likewise, in Manipur, 789 extrajudicial executions were documented between 2007 and 2010.²²² In January 2010, the NHRC had directed the state government of Manipur to open 111 cases of fake encounters, however no further action has been taken so far.²²³ Most reports of encounters in Manipur are increasingly being attributed to the state police officials, more particularly, a special unit believed to be a part of the state police department, known as ‘Manipur Police Commandos’ (CDOs). Officially, however, there are no such special units in the Manipur police organisational hierarchy or structure. The official website of the Manipur police department²²⁴ gives no narrative or numerical information regarding any such unit or branch acknowledged widely as Manipur Police Commandos.²²⁵ It has been also alleged that the CDOs have committed many summary or arbitrary executions for the mere motivation of robbery. Cash, mobile phones and jewellery believed to have been on the person of deceased victims have been found missing, while they have failed to report such items in their official seizure reports.

219 National Crime Records Bureau, Ministry of Home Affairs, *Prison Statistics 2010*, page 563, available at: http://ncrb.nic.in/PSI_2010/Full/PSI-2010.pdf

220 Human Rights Watch, *Being Neutral is Our Biggest Crime: Government, Vigilante, and Naxalite Abuses in India's Chhattisgarh State*, 2008, page 7, available at: <http://www.hrw.org/sites/default/files/reports/india0708webwcover.pdf>.

221 Ibid.

222 Fact-finding report by Human Rights Alert.

223 National Human Rights Commission, N° 22/14/2004-2005- DB- II/F, available at http://www.achrweb.org/ncpt/compensations/R_K_Sanjoba.pdf

224 Official Website of Manipur Police, available at: <http://manipurpolice.org/>

225 Civil Society Coalition on Human Rights in Manipur and UN memorandum to the Special Rapporteur on extrajudicial, summary or arbitrary executions during his official mission to India, March 29, 2012.

The Assam Police claimed on its website to have killed 129 persons in encounters between January and July 2010.²²⁶ In West Bengal, the Border Security Force (BSF) has been responsible for extrajudicial killings at the Indo-Bangladesh border.²²⁷ Number of alleged killings by the BSF are as follows: 23 killings in 2008, 20 in 2009, 12 in 2010 and 9 in 2011. Because of the near-absent effective accountability mechanisms for abuses carried out by BSF troops, even the most serious abuses committed by those deployed at the border go unpunished.²²⁸

The growing incidence of ‘fake encounters’ in many parts of the country is a worrying phenomenon. According to the SR EJE: *“when this occurs, suspected criminals or those labeled as terrorists or insurgents (...) are shot dead by the police and a scene of a shootout is staged. Those killed are then portrayed as the aggressors who had first opened fire and the police escape legal sanction”*.²²⁹

Further, enquiries ordered into such cases have mostly been by Executive Magistrates and rarely by Judicial Magistrates.²³⁰ This is in violation of guidelines laid down by the NHRC on dealing with encounter deaths, which are scarcely followed.²³¹ In *Andhra Pradesh Civil Liberties Committee v. The Government of Andhra Pradesh & Ors*, the issue of legal action against perpetrators of extrajudicial executions has been discussed. In the instant case, the court ruled that *“whether an alleged perpetrator is named or not”*, the case *“shall be recorded and registered as FIR and shall be investigated”*. It further held that *“a magisterial enquiry (inquest) is neither a substitute nor an alternative”* to recording an FIR and conducting an investigation *“into the facts and circumstances of the case and if necessary to take measures for the discovery and arrest of the offender”*. The Andhra Pradesh Police Association appealed against this judgment to the Supreme Court, where the matter is now pending decision.²³² Regrettably, however, the Supreme Court has granted a stay order against the judgment.

The impunity of ‘men in uniform’, in cases of ‘encounter killings’ is also ensured by other ways. For instance, the police officers who register a First Information Report (FIR) in such cases, name the deceased victim as the accused and close the case file, thereby exonerating the perpetrators from investigation and prosecution.²³³

The growing incidence of ‘fake encounters’ in many parts of the country is a worrying phenomenon.

226 Assam Police Statistics, available at: <http://assampolice.com/archives/press/archpress.php>

227 MASUM, *BSF Enjoy Impunity*, available at http://www.masum.org.in/rabiul_aug2011.htm; Also See: Human Rights Watch, MASUM, Odhikar report, *Trigger Happy: Excessive Use of Force by Indian Troops at the Bangladesh Border*, 2010, available at <http://www.hrw.org/reports/2010/12/09/trigger-happy-0>.

228 Human Rights Watch, MASUM, Odhikar report, *Trigger Happy: Excessive Use of Force by Indian Troops at the Bangladesh Border*, 2010, page 3, available at: <http://www.hrw.org/reports/2010/12/09/trigger-happy-0>

229 Press Statement, Special Rapporteur on extrajudicial, summary or arbitrary executions: Country Mission to India. March 2012, available at: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12029&LangID=E>. See: Annex G.

230 Explanation: An Executive Magistrate is an officer of the executive branch of the government, who is divested with limited judicial powers through some provisions of the CrPC (Sec 107-110, Sec 133, 144, 145, 147 and related provisions).

231 See: National Human Rights Commission, *Revised Guidelines to be followed in dealing with deaths occurring in encounter deaths*, available at: <http://nhrc.nic.in/Documents/RevisedGuidelinesDealingInEncounterDeaths.pdf>

232 See: *Andhra Pradesh Civil Liberties Committee v. The Government of Andhra Pradesh & Ors*, A.P High Court, W.P.No. 15419/2006.

233 Press Statement, Special Rapporteur on extrajudicial, summary or arbitrary executions: Country Mission to India. March 2012, available at: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12029&LangID=E>. See: Annex G.

More recently, in a judgment in the *Pathribal Encounter* case,²³⁴ the Supreme Court has reinforced the immunity available to the armed forces under AFSPA. The CBI had filed charges in a local criminal court for prosecution of eight army officers alleged to have killed five civilians in a fake encounter in Pathribal, J&K. The Supreme Court in its judgment has given an option to the army authorities to choose between criminal proceedings or a court martial against the accused army officials. It also held that in the event the army chooses for a criminal proceeding, the CBI will have to apply for grant of sanction under Section 7 of the *Armed Forces (Jammu and Kashmir) Special Powers Act, 1990* (JKAFSPA).

According to the language of Section 7, for acts done in exercise of the powers conferred on the armed forces under the Act, i.e during performance of their official duty, there can be no prosecution, suit or legal proceeding against them in absence of sanction from the central government. To seek sanction for an encounter, which has been established by the CBI in its investigation is a major set-back, as by implication, it means that the encounter in question is being perceived as an act “done in the discharge of official duty” by the court. Civil society organisations and legal experts believe that the judgment would reinforce immunity from prosecution in other such cases of extrajudicial killings.²³⁵

Conflict Widows

Conflict violence and extrajudicial killings have led to the presence of a considerable number of widows in conflict areas, many of who are denied any assistance by the state. While the widows of those killed by alleged terrorists or Maoists are provided rehabilitation under the *Central Scheme for Assistance to Civilian Victims/Family of Victims of Terrorist, Communal and Naxal Violence*, the widows of alleged terrorists killed by the security forces are not provided any assistance.²³⁶ As of 2007, there were at least 27,000 conflict widows in J&K,²³⁷ 15,000 in Manipur,²³⁸ and over 1000 in Assam.²³⁹

234 *General Officer Commanding v. CBI & Anr*, Criminal Appeal No.55 of 2006, Supreme Court, Judgment dated 1 May 2012.

235 See: Hindustan Times, *SC direction in Pathribal incident: Families guarded, human rights activists unhappy*, May 1, 2012, available at: <http://www.hindustantimes.com/India-news/Srinagar/SC-direction-in-Pathribal-incident-Families-guarded-human-rights-activist-unhappy/Article1-848981.aspx>; Also See: *Amnesty International, India: Pathribal ruling a setback for justice in Jammu and Kashmir*, May 1, 2012, available at: <http://www.amnesty.org/en/for-media/press-releases/india-pathribal-ruling-setback-justice-jammu-and-kashmir-2012-05-01>

236 Ministry of External Affairs, *Annual Report 2008-09*, available at: [http://www.mha.nic.in/pdfs/AR\(E\)0809.pdf](http://www.mha.nic.in/pdfs/AR(E)0809.pdf), page 8

237 The Hindustan Times, *Survey on orphans and widows in Kashmir*, April 28, 2010, available at: <http://www.hindustantimes.com/India-news/JAndK/Survey-on-orphans-and-widows-in-Kashmir/Article1-536651.aspx>

238 The Telegraph, *Manipur 'gun widows' call for end to violence*, June 18, 2011, available at: http://www.telegraphindia.com/1110618/jsp/northeast/story_14126459.jsp

239 Statement of Tarun Gogoi, Chief Minister of Assam, available at: <http://news.webindia123.com/news/articles/India/20070419/640792.html>

CASE STUDY

A Widow from the North-East

Renu Takhellambam (29 years old), who is a resident of Manipur and mother to a four and a half year old son is a widow, whose husband was extrajudicially executed. On 6 April 2007, her husband Thangkhenmung Hangzo (Mung), had left their house for the market on his scooter in order to buy a roll of film for the Good Friday church service, scheduled for later that day. On his way to the shop, he also picked up two of his friends, Bobo

and Paka, on his scooter for a ride. This was at a time when the Chief Minister was travelling out of Imphal and a Parliamentarian was visiting the city. As a result, the security arrangements had been beefed-up.

They were asked to stop by six commandos of the Imphal West Police, who had been following them. The commandoes started shooting at them with blanks first, which attracted a crowd of about fifty people to the spot, including journalists who were covering the parliamentarian's visit. The growing crowd was held at a distance by the soldiers with loose shells and rifle butts. The soldiers shot at the man sitting last on the scooter from behind. All the three fell down from the scooter as the crowd watched. The Commanding Officer, Krishnatombi – who was locally dreaded, and had also received medals commending his counter-insurgency work – together with his men, trained his weapons at Mung and his other friend and made them take-off and put-on their shirts several times and hop like a frog and dragged them by their ears. Krishnatombi then shot Mung in the forehead and one of his men shot Mung's friend in the mouth.

The police report claimed that the three were “driving around suspiciously” and were “attempting to throw a grenade” at the police. None of the fifty odd witnesses confirm this version. The families of the three victims, including Renu, alongwith some local women's organisations formed a Joint Action Committee (JAC). The JAC documented witness accounts and filed a joint case on behalf of the three victim families. The case is pending judgement in the court. Renu sees hope in winning this case, which she thinks will set an important precedent. She said: “We were lucky, as most widows” whose husbands are extrajudicially killed “have a terrible time trying to find anyone who can testify” in their husband's cases. In July 2009, Renu was elected chair of an organisation – the *Extrajudicial Execution Victims Families Manipur* – which she had founded with other widows. About forty widows and mothers of men who were killed in extrajudicial executions meet regularly and aspire to stop violence and restore the rule of law in Manipur.

Source: Frank van Lierde, We, Widows of the Gun, 2011, Manipuri NGO Governance (WinG), Gun Victims Survivors Association, Human Rights Alert, Extrajudicial Execution Victim Families Manipur and CORDAID.

Arbitrary Arrest and Detention

In conflict areas, arbitrary arrest and detention is largely carried-out through the use of special laws like AFSPA and the *Unlawful Activities (Prevention) Act, 1967* (UAPA) as amended in 2008, and preventive detention laws like the *Chhattisgarh Special Public Security Act, 2005* (CSPSA);²⁴⁰ the *J&K Public Safety Act, 1978* (PSA),²⁴¹ the *Prevention of Seditious Meetings Act, 1911* and the *National Security Act, 1980* (NSA). Under CSPSA, there is a seven-year punishment for not only what it lists as

240 Sec 8(4), CSPSA, Detailed analysis of CSPSA by Peoples Union for Democratic Rights, available at: http://cpic.files.wordpress.com/2007/07/memo_on_chattisgarh_bill.pdf.

241 Amnesty International, *A Lawless Law: Detentions under the Public Safety Act, 2011*, available at: <http://www.amnesty.org/en/library/asset/ASA20/001/2011/en/cee7e82a-f6a1-4410-acfc-769d794991b1/asa200012011en.pdf>.

‘unlawful’ but also for the ‘abetment’ or ‘planning’ of those activities.²⁴² Likewise, a person booked under PSA can be detained for up to two years²⁴³, with the possibility of reinstating those charges on expiry of the said period.²⁴⁴ Mainly referring to PSA, the *UN Working Group on Arbitrary Detentions* stated that the use of preventive detention laws by the Indian government should conform to international standards and obligations of the Gol. The Working Group also stated that India should consider bringing domestic law in line with International law.²⁴⁵

CASE STUDY

The Chhattisgarh Special Public Security Act, 2005: Criminalising Dissent and Association

The *Chhattisgarh Special Public Security Bill* was introduced in the Chhattisgarh Legislative Assembly in December 2005 and was passed virtually without any debate since the entire opposition had staged a walkout that day on some other issue. The draft Bill itself was widely criticized by human rights groups nationally and internationally and representations were submitted to the President of India in this regard. Assent was, however, given to the Bill, and the *Chhattisgarh Public Security Act (CSPSA)* came into force in March 2006.

The definition of ‘unlawful activity’ laid down in Section 2(e) of the Act is unacceptably vague and so broad as to be highly amenable to gross abuse and arbitrary or unreasonable action by the state police and administration. For instance, the definition includes “*committing an act by words spoken or written or by signs or by visible representation or otherwise, which constitutes a danger or menace to public order, peace and tranquility, which interferes or tends to interfere with maintenance of public order, which interferes or tends to interfere with the administration of law or its established institutions and personnel and of encouraging or preaching disobedience to established law and its institutions*”. Such activities may be considered unlawful even if they do not have any overt connection with organisations declared as unlawful, with any terrorist activity, armed activity or even violent activity. Thus even protests or dissent carried out peacefully and constitutionally by a political party, trade union, peoples’ movement or NGOs could be penalised under this Act. To this extent, the definition of ‘unlawful activity’ under this Act is grossly at variance with the definition of ‘unlawful activity’ under the *Unlawful Activities (Prevention) Act, 1967* which is a central Act applicable all over India.

A doctor whose prescription was found with a Naxalite, a lawyer who was taking-up the cases of Naxalites, a cloth merchant who sold them olive green cloth, or the tailors who stitched their uniforms, have also been implicated in cases under the Act.

In criminal law ‘*mens rea*’ or the ingredient of intention is considered essential to fix criminal liability, whereas in this Act, the acts of ‘managing’, ‘assisting’ or ‘promoting’ the activities of an unlawful organisation, are made offences in the absence of any criminal intent. This explains why many villagers have been foisted with offences under the Act for ‘giving food’ or ‘showing the way’ to Naxalites or for ‘participating in any meeting of the Naxalites’. A doctor whose prescription was found with a Naxalite, a lawyer who was taking-up the cases of Naxalites, a cloth merchant who sold them olive green cloth, or the tailors who stitched their uniforms, have also been implicated in cases under the Act, whether or not they were aware that they were assisting the member(s) of an unlawful organisation, and whether or not they were doing so of their own free will and volition. Even the

242 Sec 8(4), CSPSA., Detailed analysis of the act by PUDR available on http://cpjc.files.wordpress.com/2007/07/memo_on_chattisgarh_bill.pdf

243 Sec. 18, J&K Public Safety Act, 1978.

244 In 2011, the J&K Cabinet has approved certain amendments to the PSA.

245 The UN Working Group on Arbitrary Detentions Opinion no.45/2008 (India) adopted on 26 November 2008, Human Rights Council Thirteenth Session, 2 March 2010, A/HRC/13/30/add.1, paras 51 & 53, available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-30-Add1.pdf>

left-wing editor of a registered political magazine, and a media person, have been charged under the Act. The possibility of abuse of this Act in the districts of southern Chhattisgarh such as Kanker, Bastar and Dantewada, where a civil-war like situations exist, is very high, leading to the incarceration and criminal prosecution of ordinary citizens and non-combatants.

Several of the offences defined as 'unlawful activities' under the Act are also included as offences in various chapters of the Indian Penal Code dealing with offences against public tranquility, public authority and public

justice, without specifying any special conditions for attracting greater liability. Equality before law guaranteed under the Indian Constitution also includes the equal applicability of all laws. In other words, it would not be constitutional for two persons committing the same offence to be prosecuted under different laws so as to make the act of one a graver offence than that of the other. The Sections on Penalties (Section 8) in the Act define altogether new offences, and again the language is so impermissibly vague that the same act could attract 2, 3, 5 or 7 years of imprisonment, making the Act open to abuse and arbitrary action.

In 2009, as per information granted under the RTI Act to the Chhattisgarh People's Union for Civil Liberties (PUCL), Chhattisgarh, 52 persons were imprisoned under the Act, 67 were absconding and there were a large number of 'unknown offenders'. However these figures promise to have increased manifold, as the intensification of the conflict in southern Chhattisgarh has resulted in a large number of arrests in the past three years, mostly of indigent *adivasis*, who are languishing in jail without proper recourse to legal remedy.

Since April 2006, the CPI (Maoist) and several of its front organisations, namely *Dandakaranya Adivasi Kisan Majdoor Sangh* (Dandakaranya Peasant Workers Organisation), *Krantikari Adivasi Mahila Sangh* (Revolutionary Tribal Womens Organisation), *Krantikari Adivasi Balak Sangh* (Revolutionary Tribal Children's Organisation), *Krantikari Kisan Committee* (Revolutionary Peasants Committee), *Mahila Mukti Manch* (Womens Liberation Platform) have been notified as unlawful organisations under the CSPA. The Advisory Board, which can judicially review such notifications, was only constituted in May 2007. Besides, Section 6 of the Act prohibits any person to appear through a lawyer and only the registered post bearer of the organisation may appear to seek judicial review. In practice, it is virtually impossible that any representative of the said organisations can approach the Advisory Board, hence the said Notification has been mechanically extended from year to year.

The national PUCL and the Chhattisgarh PUCL have challenged the constitutionality of CSPA through a writ petition filed in April 2009.²⁴⁶ The petition is presently pending decision in the High Court of Chhattisgarh.

Source: People's Union for Civil Liberties, Chhattisgarh

As of 2010, 147 persons were reported to have been detained under CSPA.²⁴⁷ Besides, a large number of *adivasis* have been arbitrarily arrested, including under CSPA, in Central India and are languishing in jail.²⁴⁸ Similarly, there have been numerous arrests under PSA following the large-scale 2008 and 2010 protests in Kashmir. The 2010 protests were primarily in reaction to a series of teenager killings by the paramilitary and the police. Minors and their aides suspected of stone – throwing include those arrested and tortured under PSA. The *J&K Juvenile Justice Act, 1997* puts the age of minority at below 16, which contravenes both national²⁴⁹

246 Writ Petition No. 2163/2009, filed on 6 April 2009

247 RTI application filed by People's Union for Civil Liberties (PUCL), Chhattisgarh.

248 An RTI application filed by *Chhattisgarh Mukti Morcha* revealed the presence of 2,499 detainees in Chhattisgarh (including Kanker and Jagdalpur districts). Most of these detainees are *adivasis*.

249 India's *Juvenile Justice (Care and Protection) Act, 2000* sets majority at 18.

and international law.²⁵⁰ This in turn results in the trial and detention of minors charged under PSA, in adult courts and detention centres. Data provided by the J&K Home Department in response to an opposition legislator's question in the Legislative Assembly in March, 2010, revealed that 334 persons were booked under PSA in J&K between January and February 2010 alone. Moreover, estimates place administrative detentions in Kashmir over the past two decades between 8,000 to 20,000.²⁵¹

CASE STUDY

Arrest and Detention of Minors

The J&K state government has been arresting juveniles under the *Public Safety Act, 1978* (PSA) since the insurgency began in the 1990s. However, it was since the summer protests between June 2010 and September 2010 that juvenile arrests became rampant. For instance: Sheikh Akram, a 15 year old, son of Sheikh Zulfikar of Jogi-lanker Rainawari, Kashmir was arrested on 17 June 2010, during the funeral procession of another teenager who had been killed by the paramilitary while out playing. Akram was charged with stone-throwing and conspiring against the State. He was granted interim bail of seven days, which was subsequently extended. However, in order to prolong his detention, on 3 July 2010, the District Magistrate of Srinagar booked him under PSA and sent him to Kote Bhalwal jail in Jammu. Even in 2011, when there were no street protests, hundreds of boys were detained on the pretext of being stone pelters and suffered torture, intimidation and harassment at the hands of the police and paramilitary. Some juveniles are regularly being summoned to police stations without any explanation. To date, significant numbers of minors continue to be arrested under PSA.

In addition to PSA, minors are also booked under the Ranbir Penal Code. For instance: (a) In October 2011, Sajad and Zubair were detained in police custody on charges of sedition, arson and attempt to murder. They have been booked under section 152 of Ranbir Penal Code for waging war against the state, section 307 for attempt to murder and section 336 for arson; (b) Fayaz Ahmad Bhat, son of Ghulam Hassan Bhat, resident of Goori-pora, Palpora, Ganderbal, Srinagar was arrested and charged with murder and acquisition or possession, or of manufacture or sale of prohibited arms or prohibited ammunition in 1995, when he was only nine years old. His lawyers repeatedly claim that his was a case of mistaken identity and that he was a minor at the time of the alleged offence. He spent close to three years in the Central Jail of Srinagar, before finally being transferred to a Juvenile Home in Jammu in 2009. Ever since the denial of his bail application in May 2009; he had not been produced before the court even once, as of 3 July 2010. He is now 25 years old; (c) In May 2011, Murtaza Manzoor, aged 17 years, was released from jail after the High Court intervened and found his imprisonment to be unlawful. He was locked up for more than three months under the PSA; (d) Mushtaq Ahmad Sheikh, aged 14 years, was detained under the PSA on 9 April 2010. He was granted bail after eight days, but was re-arrested on 21 April 2010. He was finally released on 10 February 2011.

Sources: Asian Centre for Human Rights, Juveniles of Jammu and Kashmir: Unequal Before the Law and Denied Justice in Custody, New Delhi, November 2011 and Jammu and Kashmir Coalition of Civil Societies, Human Rights Review - Jammu and Kashmir, 2011.

250 Convention on the Rights of the Child, 1989. For more details See: Asian Centre for Human Rights' report, *Juveniles of Jammu and Kashmir: Unequal Before Law and Denied Justice in Custody, 2011* (It studies 51 representative cases), available at: <http://www.achrweb.org/reports/india/JJ-J&K-2011.pdf>.

251 See: Amnesty International, *A Lawless Law: Detentions under the Public Safety Act, 2011*, available at: <http://www.amnesty.org/en/library/asset/ASA20/001/2011/en/cee7e82a-f6a1-4410-acfc-769d794991b1/asa200012011en.pdf>, page 12; For more details See: Asian Centre for Human Rights, *Juveniles of Jammu and Kashmir: Unequal Before Law and Denied Justice in Custody, 2011* (It studies 51 representative cases), available at: <http://www.achrweb.org/reports/india/JJ-J&K-2011.pdf>.





Girls being trained as Special Police Officers (SPOs) in Chhattisgarh.

Excessive Powers Enjoyed by the Armed Forces and the Police

As discussed above, AFSPA gives extraordinary powers to the armed forces and empowers them to 'shoot to kill', arrest, demolish structures, and conduct warrantless searches, on mere suspicion. Additionally, measures are being taken to further enhance powers of the armed forces. For instance, a new law, the *Border Security Force (Amendment) Bill, 2011*, seeks to widen the scope for deployment of BSF for counter-insurgency and 'anti-Naxal' operations with additional powers of 'search, seizure and arrest'. At present, such operations require state police personnel, who have the power of 'search, seizure and arrest' to accompany BSF personnel. BSF are already under severe criticism for committing torture and killings on the Indo-Bangladesh border (See case study on *Torture Cases*).²⁵²

Another worrying trend is that the police is being increasingly militarised in conflict areas and given charges of counter-insurgency operations. The Ministry of Home Affairs' Annual Report (2009-10) states that the role of the state police in "counter militancy/terrorism operations" in J&K has "progressively increased with commendable results." Also, paramilitary forces are being intensely trained by the army for operations in Central India. About 54,543 hectares of forest land is being used as an army training camp in Narainpur, where training is being imparted in jungle warfare.²⁵³ The establishment of the camp on forest land is being opposed and protested by local human rights groups. Another such camp, known as the 'Counter-Insurgency and Jungle Warfare School' exists in Vairengte, Mizoram since 1970.²⁵⁴

Another worrying trend is that the police is being increasingly militarised in conflict areas and given charges of counter-insurgency operations.

Disproportionate Use of Force

Disproportionate force is routinely used to suppress protest and civilians are routinely killed through the use of firearms by law enforcement officials. The *UN Code of Conduct for Law Enforcement Officials, 1979* and the *UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 1990*, are hardly ever respected in conflict areas. A total of 740 civilians were killed in police firing from 2008 to 2010, including 239 persons in 2010, 184 persons in 2009, and 317 persons in 2008.²⁵⁵

In the North-East, public hearings challenging mega projects have been disrupted and protesters have been tortured and beaten. Peaceful *dharnas*, rallies and sit-in protests against human rights violations are routinely disrupted and dispersed in Manipur using beatings, tear-gas and blank firing by the police. Peaceful protests

252 Masum, *BSF Enjoy Impunity*, available at http://www.masum.org.in/rabiul_aug2011.htm; See also: Human Rights Watch, Masum, Odhikar report, *Trigger Happy: Excessive Use of Force by Indian Troops at the Bangladesh Border*, 2010, available at: <http://www.hrw.org/reports/2010/12/09/trigger-happy-0>

253 As per PUCL Chhattisgarh. For further details see: Telegraph India, *Army Unit in Maoist Hotbed*, April 14, 2011, available at: http://www.telegraphindia.com/1110414/jsp/frontpage/story_13853082.jsp

254 Army Establishments, Counter Insurgency and Jungle Warfare School, available at: <http://indianarmy.nic.in/Site/FormTemplate/frmTemp1PLargeTC1C.aspx?MnId=RQIDAvod5m1Hgme1gycgXg==&ParentID=aisMjYhWXV9GKTqOnBoJew==>

255 National Crime Records Bureau, *Crime in India 2010; 2009; 2008* respectively, Chapter 14.

by *safai karamcharis*²⁵⁶ and *anganwadi*²⁵⁷ teachers were met with disproportionate force and tear gas shelling by the Special Task Force and armed forces in Chhattisgarh. In Kashmir, the use of lethal force against unarmed protestors waist-above is widespread. In 2010, J&K police and armed forces killed 110 unarmed protestors while 800 others, including media personnel, were injured.²⁵⁸ The Divisional Commissioner Kashmir confirmed that 110 protestors were killed during incidents spreading through only a few months.²⁵⁹ The use of supposedly ‘non-lethal’ weapons like ‘tear gas shells’, ‘pellet guns’, ‘rubber bullets’, ‘mock bombs’ and custodial torture have caused serious injuries, physical and mental disability and even death. For example, in Kashmir, Wamiq Farooq (13 years) was killed by a tear gas shell fired by police, while he was out playing.²⁶⁰ Yawar Ibrahim (13 years) was seriously injured in his head by a tear gas shell, when he was on his way to buy butter. He is now speech impaired and the lower half of his body is completely paralyzed.²⁶¹ Psychological disorders, like the ‘Post-Traumatic Stress Disorder’, have been reported in conflict areas.²⁶²



Madhu Chandra

Sexual Violence

Sexual assault by security forces is widespread. However, cases of rape are highly under-reported given the stigma attached to it. As a result, rape in conflict areas rarely gets investigated or punished. In some cases, circumstantial evidence strongly indicates the involvement of armed forces, but investigations are thwarted to facilitate their exoneration. For instance, the investigation in the 2010 rape and murder case of a sister-in-law duo in Shopian (Kashmir), lacks credibility and appears more like a cover-up.²⁶³ Likewise, in West Bengal’s Sunamukhi village, six women were raped and tortured by the police in 2010 with one beaten to death.²⁶⁴ In Chhattisgarh, six women raped by members of *Salwa Judum* still await justice from the court, while many other complaints of sexual violence in Central India are yet to be probed. In Assam’s Kokrajhar district, a deaf and dumb woman, Deobary Basumatary, was raped by the paramilitary in 2011 in front of her husband (see case study below).²⁶⁵

256 *Safai karamcharis* are workers involved in public cleaning work.

257 *Anganwadi* teachers are those working in ICDS centres.

258 *Four Months the Kashmir Valley Will Never Forget: A Fact Finding Report* available at <http://kafila.org/2011/03/26/four-months-the-kashmir-valley-will-never-forget-a-fact-finding-report/>

259 Hindustan Times, *Valley victims accept compensation*, quietly, February 20, 2011, available at: <http://www.hindustantimes.com/Valley-victims-accept-compensation-quietly/H1-Article1-664528.aspx#>

260 Greater Kashmir, *Wamiq Farooq’s 1st Anniversary*, January 2011, available at: <http://www.greaterkashmir.com/news/2011/Jan/31/wamiq-farooq-1st-anniversary-36.asp>

261 Greater Kashmir, *Son paralysed by tear gas shell, poor family finds going hard*, February 26, 2011, available at: <http://www.greaterkashmir.com/news/2011/Feb/27/son-paralyzed-by-tear-gas-shell-poor-family-finds-going-hard-40.asp>

262 See for example: Arooj Yaswi & Amber Haq, *Prevalence of PTSD Symptoms and Depression And Level of Coping Among the Victims of Kashmir Conflict*, Journal of Loss and Trauma, Vol 13, 2008, p. 471-480.

263 Independent Women’s Initiative for Justice, *Shopian: Manufacturing a Suitable Story*, A Case Watch, 2009, available at: <http://kafilabackup.files.wordpress.com/2009/12/iwj-report-shopian-10-dec-2009.pdf>

264 IBN Live, *WB villagers say state forces raped them*, July 12, 2012, available at: <http://ibnlive.in.com/news/rapetorture-by-state-forces-in-naxal-heartland/126538-37-64.html>

265 The Sentinel, *Jawans ‘gang rape’ physically impaired woman in Kokrajhar district*, September 11, 2011, available at: <http://www.sentinelassam.com/mainnews/story.php?sec=1&subsec=0&id=89475&dtP=2011-09-13&ppr=1>

The NHRC went on to state: “because no appropriate action was taken so far to punish the culprits involved in previous incidents, the crimes have been repeated again and again in the district.”²⁶⁶

CASE STUDY

Gang Rape of Disabled Woman in Assam

On 10 September 2011, a group of soldiers from the *Sashastra Seema Bal* (SSB) – one of India’s Central Armed Police Forces – deployed along the Indo-Bhutan border allegedly gang raped Deobari Basumatary (35), a deaf and dumb Bodo woman under Bismuri police outpost in Kokrajhar district of Assam. Deobari’s husband, Amal Basumatary, submitted a written complaint at Bismuri out-post to the effect that on the previous night, in between 11pm to 12 midnight, 4 suspected SSB *Jawans* of Saralpara camp raped his wife. He stated that a group of 4 SSB *Jawans* had forcefully entered his hut. The group of *Jawans* (soldiers) kicked the couple to wake them up and asked Amal to accept a bottle of wine which he categorically refused. They asked him to take out all the household metallic tools, put them behind the kitchen hut and then they forcefully stripped Deobari and gang raped her in front of him. Amal tried to protect his wife but he was violently kicked, beaten-up and forced to flee from the spot. In search for help, Amal reached Balen Basumatary’s hut, and alerted him about the incident. On their way to Amal’s hut, they saw the SSB *Jawans* in full uniforms moving towards their main camp and discovered Deobari outside the hut, struggling to move towards home. She was fully naked, with scar marks and injuries on her body including private parts.

On 11 September, the villagers, along with the village headman took the couple to report the incident to the Bismuri Police outpost, which is about 37 km from the victims’ village, and filed an FIR about the incident with the help of volunteers/members of *All Bodo Student’s Union*, *All Bodo Women Welfare Federation*, *Boro Somaj* and many other social workers of the *Boro Indigenous Peoples* of Kokrajhar. According to Deobari and her husband’s interpretation, following the first phase of gang rape, the perpetrators forcefully dragged Deobari to a nearby place about a quarter mile beside a link road, and repeatedly gang raped her in two different spots. According to Deobari, she was forced by the soldiers to take their genitals into her mouth, she was double penetrated repeatedly, and she was left at the spot in a semi-conscious state. According to Amal, the perpetrators also forcefully dragged Sombari Basumatary, his wife’s elder sister, out of her hut that was located in the same courtyard with the same intention but she managed to free herself and hide.

A delegation team of *Borosa Foundation for Peace, Democracy and Human Rights* that visited the village to investigate the case, was informed by witnesses that 2 SSB *Jawans* went back to the crime scene the next morning of 11 September, in order to disfigure the foot prints that they left behind the previous night. The visiting team was also informed that the government doctor assigned to conduct the medical examination of the rape victim was unfriendly and non-cooperative. According to the doctor’s medical examination report the injury is “*simple injury caused by a blunt object which was more than 12 hours old.*” His report stated that the victim gave the history of sexual intercourse by 2 men and that no marks of violence were seen. Rape cases by the security forces in the district is a frequent phenomenon. On 31 December 2003, five elderly Bodo women had been gang raped by security personnel at Ultapani, however, no action has been taken. On, 20 April 2011, Manek Goyary (38) was also reportedly gang raped in Tharaibari of Choraikolaby by six 15 Dogra regiment, stationed at Adabri. An FIR (119/11) was lodged in this matter and a complaint was sent to the NHRC for necessary action. No action has been taken against the perpetrators so far.

Source: Times of Assam, Human rights group condemns gang rapes by security forces September 20, 2011 (available at: <http://www.timesofassam.com/headlines/human-rights-group-condemns-gang-rapes-by-security-forces-victims-to-visit-president-of-india>)

266 Justicia, *Gang Rape by Indian Army soldiers in front of husband at Indo-Bhutan border*, September 18, 2011, available at: <http://www.justicia.in/gang-rape-by-indianarmy-in-front-of-husband-at-indo-bhutan-border/>

The denial of effective and speedy justice to survivors of rape by armed forces is exemplified by the following two instances: In J&K, more than 30 women and girls from the same village, Kunan Poshpora, were reportedly raped by armed forces in the same night during a search operation in 1991, with the eldest survivor reported to have been 80 years old at the time of the incident.²⁶⁷ Some estimates indicate that the number of rapes could have been as high as 100.²⁶⁸ After many years of the actual incident and seven years after institution of the case (2004) at the J&K State Human Rights Commission, the Commission finally passed an order in 2011.²⁶⁹ The order acknowledges that the then Director Prosecution has severely botched investigations to exonerate the involved armed forces and orders his prosecution, together with ordering compensation to the victims, but passes no direction for prosecution against the soldiers involved.

In August 2010, the Guwahati High Court allowed the state government to reopen the case of the rape and murder of Thangjam Manorama from Manipur. 34 year old Manorama, alleged to be a militant, was brutally raped and murdered on 11 July, 2004, allegedly by the soldiers of 17 Assam Rifles. Enraged by the impunity with which sexual violence was inflicted on women by the armed forces, the *Meira Paibi* (Manipuri mothers) staged a powerful protest, in front of the Assam Rifles headquarters, using their naked bodies to shame the army.²⁷⁰ The Guwahati High Court directed the state to act upon an inquiry report prepared by Justice C. Upendra Singh detailing the facts and circumstances leading to Manorama's killing. The state government did not comply with the order, as a result of which Manorama's family filed a petition in the Guwahati High Court for initiating a fresh probe into her killing by the Central Bureau of Investigation (CBI). However, the central government and the Commandant of 17 Assam Rifles filed a Special Leave Petition in the Supreme Court challenging the Guwahati High Court's ruling.²⁷¹ Justice therefore continues to remain elusive for Manorama's killing and rape .



Protest by Manipuri mothers in front of the Assam Rifles headquarters.

267 Asia Watch & Physicians for Human Rights, *Rape in Kashmir: A Crime of War*, Vol 5, Issue 9, page 7, available at: <http://www.hrw.org/sites/default/files/reports/INDIA935.PDF>; Also See: Majid Maqbool, *The Kunan Poshpora Tragedy: Two decades of inaction*, February 23, 2011, available at: <http://www.kashmirdispatch.com/others/23022031-the-kunan-poshpora-tragedy-two-decades-of-inaction.htm>

268 See: Asia Watch, *Kashmir Under Siege: Human Rights India*, 1991, page 88, available at: <http://books.google.co.in/books?id=jrGwSsSchRUC&printsec=frontcover#v=onepage&q&f=false>.

269 See: J&K State Human Rights Commission, *Complaints regarding Kunan Poshpora atrocities lodged by victims and inhabitants of the village v. J&K State and Others*, SHRC 404/ 2004, Judgement dated April 2, 2011.

270 Tehelka, 'Why I screamed, rape us, take our flesh', Vol 5, Issue 21, May 31, 2008, available at: http://www.tehelka.com/story_main39.asp?filename=Ne310508rape_us_our_flesh.asp

271 The Times of India, *Manorama murder case reaches Supreme Court*, July 11, 2011, available at: http://articles.timesofindia.indiatimes.com/2011-07-11/guwahati/29760275_1_manorama-devi-c-upendra-singh-thangjam

Legal Immunity and Lack of Accountability

Special security laws²⁷² and Section 197 of the Criminal Procedure Code (CrPC) grant immunity to public servants and members of the armed forces for acts committed in the discharge of their official duty. Alleged crimes can be prosecuted only with previous sanction of the state or central government by virtue of these laws (for more details about Section 197, see section on Immunity and Lack of Accountability in Part III). In practice, such sanction is often delayed or not granted at all, leading to a culture of impunity for human rights abuses.

Recent official data confirms that sanction is almost never granted for violations committed by the armed forces. In response to a RTI application, the J&K State Home Department revealed that from 1989 to 2011, the government of J&K sought sanctions for prosecution under section 7 of AFSPA in only 50 cases. Out of these, sanction for prosecution is awaited in 16 and has been declined in 26 cases, while in 8 cases sanction has been 'recommended', without elaborating on what 'recommended' status entails.²⁷³ Thus in effect, not a single unequivocal sanction has been granted in all the 50 cases. Moreover, the NHRC does not have regular investigative powers over offences committed by armed forces, further exacerbating their lack of accountability.²⁷⁴

Militarism and Denial of Economic, Social and Cultural Rights

Militarisation has also led to denial of economic, social and cultural rights with the security apparatus increasingly used to implement the government's 'development' agenda. In the North-East, development sites such as dams are manned by armed forces to suppress protest. For example, the Mapithel Dam area is one of the most militarised zones in Manipur. Security forces beat and tortured 40 women during protests against the construction of the dam (see details in the following case study). It has been seen that public hearings are being controlled through cash payments and heavy militarisation. This phenomenon is particularly acute in Arunachal Pradesh, although it has been seen in many parts of the North-East region, where mega-infrastructure projects are being implemented. Recently, in a national meeting of Chief Ministers on internal security, the Chief Minister of Manipur, Okram Ibobi Singh, requested the Ministry of Home Affairs to sanction a contingent of four Indian Reserve Battalions to provide security for the proposed Tipaimukh Hydro Electricity Project and the Loktak downstream Hydro Electricity Project.²⁷⁵

272 These would include: *The Armed Forces (Assam & Manipur) Special Powers Act (AFSPA) 1958*, and the *J&K Armed Forces Special Powers Act 1990*, *J&K Public Safety Act 1978 (PSA)*, *Chhattisgarh Special Public Security Act 2005 (CSPSA)*, *Nagaland Security Regulation Act 1962*, *Unlawful Activities (Prevention) Act 1967 (UAPA)*, and *Enemy Agents Ordinance 1948*.

273 Information submitted by J&K Home Department under J&K RTI Act, 2009, under RTI Application dated 5 August 2011, filed by Jammu and Kashmir Coalition of Civil Societies (JKCCS), File No. Home/RTI/39/2011/463.

274 *The Protection of Human Rights Act, 1993*, Sec 19, available at: <http://nhrc.nic.in/Publications/HRAActEng.pdf>; Also see: Concluding Observations of the Human Rights Committee, India", 4 August 1997, CCPR/C/79/Add.81, para 22, available at: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.79.Add.81.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.79.Add.81.En?OpenDocument).

275 Seven Sisters Post, *Ibobi demands Govt to improve Manipur's Connectivity*, April 17, 2012, available at: <http://sevensisterspost.com/?p=5654#>

CASE STUDY

Illegal Use of Force by Security and Police Forces against Protesters at Mapithel Dam

North-East India is considered to be the country's 'future powerhouse' with at least 168 large hydroelectric projects set to acutely alter the riverscape and large dams emerging as a primary cause of conflict in the region. A serious challenge posed with the launch of developmental projects in the area is the non-recognition of indigenous peoples' rights to control and manage their own land and resources; define their development priorities and needs; be consulted and provide free and prior informed consent before such projects reach the state of implementation. The use of military and security cover for large-scale infrastructure construction has become a norm in the region.

The Mapithel Dam is one of the detrimental development projects introduced in Manipur. Its construction was approved by the Planning Commission in 1980 and conceived to create additional irrigation potential, augment potable water supply and generate hydroelectric power. The construction of the dam began in 1990, allegedly without prior consultation or free, prior and informed consent of the affected tribal communities who are entirely dependent for their livelihood and sustenance on the lands that will be submerged. The construction of the dam will adversely impact 17 tribal villages, out of which 6 will be entirely submerged, and around 10,000 indigenous people will either be displaced or lose their primary source of livelihood.

As soon as the construction of the dam was initiated, a Rehabilitation and Resettlement (R&R) package was prepared by the government, without any prior consultation with the communities affected. An outbreak of widespread protests against the package and the construction of the dam resulted in the signing of a Memorandum of Agreed Terms and Conditions in 1993 between some of the affected villages and the government, however, the government of Manipur unilaterally modified the terms of the agreement. In 1998, another R&R programme was formulated with significant inconsistencies, excluding from its ambit many of the downstream inhabitants affected by the dam.

On 3 November 2008, a group of approximately 500 women marched towards the dam site in order to submit a memorandum to the government officers, set out their grievances, and to demand the review of the R&R plan but security and police forces stopped them from proceeding. When the women's group insisted on meeting with the officers to submit the relevant memorandum, security forces used violence to disband the protest. Afraid of the brutality that was launched against them, the women (some of whom carried babies on their back) fled to protect themselves, but even as they were dispersing, security forces chased, violently beat them with batons and fired tear-gas into their midst. During the incident, 45 women were injured. Some of the protestors were so brutally beaten that they were either hospitalised or carried home by other protestors on their backs. Even though they pleaded the police to help them take the injured to the hospital (a one and a half hour journey by car), their pleas were rejected categorically. One woman was severely injured on the temple by a tear gas canister. Lungmila Elizabeth was in a critical condition, surviving through artificial life-support, she underwent two surgeries and was left paralyzed. Audiovisual recordings show the policeman intentionally aiming the shots at the protestors. It is worth noting that the use of tear gas and other crowd-controlling weapons is governed by carefully formulated rules and regulations that mandate police forces to use these weapons only when absolutely necessary.

The initiation of the construction of the Mapithel dam came with a massive influx of security forces in the area, with approximately 1000-1500 security personnel of the Assam Rifles, the Border Security Force and the Indian Reserve Battalion stationed in and around the periphery of the dam site.

The initiation of the construction of the Mapithel dam came with a massive influx of security forces in the area, with approximately 1000-1500 security personnel of the Assam Rifles, the Border Security Force and the Indian Reserve Battalion stationed in and around the periphery of the dam site. Three check-posts were set around the dam site while checkpoints were arbitrarily established by the security forces in all the roads leading to the dam site. According to villagers' claims, a curfew was enforced by the security forces, preventing them from venturing out from their houses after 5pm. Villagers were forced to pass through the dam's checkpoints since their paddy fields are located around the dam site. In cases where they have to work later than 5 pm, especially during the harvest season, they have to provide a letter from their Village Secretary, with details such as purpose for the late-ness and number of individuals in the group. In case that they pass a checkpoint the same number of individuals are required to return, otherwise the whole group is subjected to questioning regarding the whereabouts of the missing person. The roads of some villages to Imphal have been blocked interrupting the bus transportation and forcing many to walk long distances to reach their villages.

There are allegations of incidents in which villagers were arbitrarily picked up and interrogated by the security forces or were severely beaten and had to be hospitalised. Some of these documented incidents include the beating of Mr. M. H. Silas, 60 years old at the time of the reporting, and Mr. K. A. S. Ramshim, 64 years, by 19 Assam Rifles on 14 April 2004. In December 1995, Mr. K. S. Enoch was arrested, arbitrarily detained, interrogated and tortured by para-military forces of the 19 Assam Rifles with the accusation of being part of an underground group.

A more recent incident of abuse perpetrated by security forces is the arrest and detention of 4 Mapithel Dam Affected Ching-Tam Organization (MDACTO) members by a contingent of the Manipur Police Commandos who were released only after they renounced their membership to MDACTO.

In 2009, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, called the attention of the GoI regarding the construction of the Mapithel dam, its relevant effects on the indigenous population in the area, as well as the illegal use of force against the protestors. In its response, the GoI reiterated its position on the definition of the word 'indigenous' by stating that the GoI regards the entire population of India as indigenous. It characterised the communication of the Special Rapporteur as incomplete and misleading picture of the actual situation. On the issue of illegal use of force against protestors on 3 November 2008, the GoI maintained that *"the police were left with no alternative but to resort to a mild baton charge after the protestors tried to enter the project area forcibly, and started pelting stones and pushing women constables at the site"*.²⁷⁶

Source: Naga People's Movement for Human Rights, Report of the Fact-finding Team on Mapithel Dam, 19 November, 2008.

Occupation of Public Infrastructure and Private Land by Armed Forces

Occupation of hospitals and schools by the army and paramilitary is common in conflict areas. The Supreme Court has acknowledged the practice and ordered security forces to vacate schools (see following case study). However the orders have not been complied with fully.²⁷⁷

²⁷⁶ Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, 2009, A/HRC/12/34/Add.1, para 171, available at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-34-Add1.pdf>. See: Annex G.

²⁷⁷ See: *Nandini Sundar and Ors V State of Chhattisgarh*, Supreme Court, Writ Petition (C) No.250 of 2007, Paras 18,25,26 ; Also see: *Ibid Interlocutory Appeal No.7 of 2011*, order dated 18/11/2011.

Similarly agricultural land, particularly in border districts, is occupied by armed forces for camps or temporary shelters, denying farmers access to their lands and affecting their livelihood. In Central India, the tribal population living in forests has been forcefully displaced by security forces, including that of 645 villages in Dantewada.²⁷⁸ About 40,000 personnel are posted in Bastar, and have started military training camps, which has caused displacement.²⁷⁹ In Kashmir, agricultural land, particularly in border districts, is occupied by armed forces for camps or temporary shelters, denying farmers access to their lands and seriously affecting their livelihood.

CASE STUDY

Occupation of Schools by Security Forces²⁸⁰

The occupation of schools and hostels for school children by security forces has been a widespread phenomenon in conflict areas. Attracted by their *pucca* (brick and cement) constructions, locations, and, electrical and sanitation facilities, armed forces tend to occupy the premises of schools and hostels for use as barracks, stores and bases, thereby precluding students from their right to education. Some school premises are partly occupied by security forces, endangering lives of teachers and students alike, apart from exposing students to abuse. In some cases, security forces have beaten-up school children for protesting their presence in schools.

For instance, school children at Rajkiya Middle School in Sheikhpura, Bihar, clashed with soldiers of Bihar Military Police (BMP), stationed at the west-wing of their school after the students objected to the occupation of their classrooms and the playing of raunchy songs during school time. The People's Union for Civil Liberties (PUCL) conducted a fact-finding on the incident. The fact-finding report revealed that the personnel regularly gamble, play lewd songs and pass indecent remarks on the girl students, apart from using the already inadequate facilities of the school, including toilets and the tube-well. On the day in question, one student, Ritesh Kumar, of class VI, got into an argument with the policemen while drinking water at the common tube-well. The BMP personnel took him to one of the classrooms and beat him up while bolting the door from inside. On hearing his cries, other students broke the door open and ransacked the rooms of the BMP personnel. The children also blocked the nearby highway in protest, while demanding the removal of the BMP personnel from their school. Ritesh shared with the PUCL fact-finding team that 7 to 8 BMP personnel had beaten him with sticks and gun butts. They also found one of the girl's face still swollen and red from the police beating.

The Public Interest Litigation – *Nandini Sundar & Ors v State of Chhattisgarh* drew attention to the practice of occupation of schools, educational institutions and hostels by armed forces in Chhattisgarh. Recognising the problematic nature of this practice, the Supreme Court has repeatedly ordered vacation of such premises by the armed forces, in the said case. However, the process of vacation of the forces has been slow and inadequate. Moreover, as per order dated 18 November 2011, the Supreme Court granted a period of two months to the state of Chhattisgarh for the security forces to completely vacate the said premises, after which the Court stated “*that no further extension should be prayed for*”. However this has yet to be fully implemented by the State of Chhattisgarh.

The occupation of schools in Jharkhand was brought-up in *Shashi Bhusan Pathak v. State of Jharkhand* and others.²⁸¹ On 21 November, 2008, the court ordered in the instant case, that all occupied schools be vacated by

278 As studied by the *People's Union for Civil Liberties*, Chhattisgarh.

279 Ibid.

280 Supreme Court, Writ Petition (C) No.250 of 2007, paras 18, 25, 26 ; Also see: Ibid Interlocutory Appeal No.7 of 2011, order dated 18/11/2011.

281 W.P.(PIL) No. 4652 of 2008, High Court of Jharkhand at Ranchi See: PUCL Bulletin, Vol XXI No. 6, June 2011; Also see: *Nandini Sundar and Ors v. State of Chhattisgarh*.

the second week of January 2009. It took over two years for this order to be partially honoured by the state. As per order dated 18 October 2011, the court accepted the contention of the state that majority of the schools had been vacated. Similarly, in *Paschim Medinipur Bhumij Kalyan Samiti v. State of West Bengal*,²⁸² it had been alleged that 22 government-run schools were under occupation of security forces. The Calcutta High Court's order of vacating the schools in this case was complied with.

Despite Supreme Court's directions against occupation of schools in the cases discussed above, media reports of occupation of schools by police near the POSCO site have emerged. The National Commission on Protection of Child Rights (NCPCR) conducted a fact-finding at Badagabapur, Balitutha, and Dhinkia near the POSCO site. NCPCR found the Balitutha school occupied by armed police and in its report recommended the vacation of the schools. On 27 July 2011, the NHRC also took *suo-moto* cognizance of the matter and sought reports from the government of Odisha and the Director General of Police.

Conflict Induced Internal Displacement

People internally displaced due to conflict, face various barriers to accessing and enjoying their rights. For instance: displacement results in disruption of the right to livelihood and may also lead to a severe reduction in access to basic necessities of life including food, clean water, shelter, adequate clothing, health services and sanitation.²⁸³ The Internal Displacement Monitoring Centre (IDMC) reports that many of India's Internal Displaced Persons (IDPs) have insufficient access to these necessities. Those in protracted situations still struggle to access education, housing and livelihoods, and even lack security. In Chhattisgarh, for instance, the tribal IDPs in camps face the risk of attacks by government forces and *Salwa Judum* on one hand and the Naxalites on the other.²⁸⁴

In India, there is no national policy, legislation or other mechanism to respond to the needs of people displaced by armed conflict or generalised violence. The central government has generally devolved responsibility for their protection to state governments and district authorities, which are doing precious little to respond to the rights of IDPs. What makes matters worse is that no Ministry or agency at the central level is mandated to ensure the protection of IDPs and monitor their return or local integration.²⁸⁵

In absence of a specific central government agency charged with monitoring the number of IDPs, official statistics on the exact number of IDPs in India are missing. Civil society estimates of internally displaced persons are region specific, and therefore cannot be helpful in establishing a precise overall number of IDPs living in India. Conservative estimates by IDMC place the number of IDPs displaced by

Conflict induced displacement results in disruption of the right to livelihood and may also lead to a severe reduction in access to basic necessities of life including food, clean water, shelter, adequate clothing, health services and sanitation.

282 See: W.P. No. 16442(W) of 2009, High Court of Calcutta.

283 Nina M. Birkeland, *Internal displacement: global trends in conflict-induced displacement*, International Review of the Red Cross, Vol 91 No. 875, September 2009, Page 498, available at: <http://www.icrc.org/eng/assets/files/other/irrc-875-birkeland.pdf>

284 Internal Displacement Monitoring Centre, *Global Overview-2011: Internal Displacement in South and South-East Asia- India*, page 86, available at: [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/0E27234251BE6E48C12579E400369AA9/\\$file/global-overview-asia-2011.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/0E27234251BE6E48C12579E400369AA9/$file/global-overview-asia-2011.pdf)

285 Ibid.

armed conflict and violence in India at around 506,000 as of December 2011.²⁸⁶ This number includes IDPs living in camps alone, while, it is believed that majority of IDPs in India live outside camps.²⁸⁷

In Chhattisgarh for example, as of 2011, around 30,000 *adivasis* were internally displaced, out of whom, 10,000 lived in camps and 20,000 were dispersed in neighbouring Andhra Pradesh and Odisha.²⁸⁸ Another 2012 account states that from the Bastar division (Bastar, Kanker, Narayanpur, Bijapur and Dantewada districts), reportedly over 30,000 families have crossed over to the bordering Khammam and Bhadrachalam districts of Andhra Pradesh.²⁸⁹ There are no official statistics indicating the number of IDPs on the Chhattisgarh-Andhra Pradesh border. However, according to civil society estimates, over 100,000 IDPs have abandoned more than 600 villages in the Bastar division over the last few years.²⁹⁰ Pertinently, the Supreme Court had ordered the petitioners in the *Nandini Sundar* case to prepare a rehabilitation plan, the starting point of which was to conduct a survey but the state government is refusing to act on it.²⁹¹

The majority of those displaced from conflict have been living in displacement for years, as they have not been able to find a durable alternative, be it sustainable return, local integration, or settlement elsewhere in India.²⁹²

286 Internal Displacement Monitoring Centre, *India: IDP Population Figures*, 9 February 2012, available at: [http://www.internaldisplacement.org/idmc/website/countries.nsf/\(httpEnvelopes\)/90E174CA3D9CF14CC1257790002402F2?OpenDocument#22.2.1](http://www.internaldisplacement.org/idmc/website/countries.nsf/(httpEnvelopes)/90E174CA3D9CF14CC1257790002402F2?OpenDocument#22.2.1)

287 Internal Displacement Monitoring Centre, *Global Overview-2011: Internal Displacement in South and South-East Asia- India*, page 86, available at: [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/0E27234251BE6E48C12579E400369AA9/\\$file/global-overview-asia-2011.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/0E27234251BE6E48C12579E400369AA9/$file/global-overview-asia-2011.pdf)

288 Amnesty International, India, *Amnesty International Report-2011*, available at: <http://www.amnesty.org/en/region/india/report-2011>

289 Medha Chaturvedi, *Chhattisgarh's Wandering Tribes: Problems of IDPs on the Chhattisgarh-AP border*, *Mainstream Weekly*, Vol L, No. 16, 7 April 2012, available at: <http://www.mainstreamweekly.net/article3371.html>

290 Medha Chaturvedi, *Chhattisgarh's Wandering Tribes: Problems of IDPs on the Chhattisgarh-AP border*, *Mainstream Weekly*, Vol L, No. 16, 7 April 2012, available at: <http://www.mainstreamweekly.net/article3371.html>

291 See: Details furnished by the government of Chhattisgarh in *Nandini Sundar & Ors. v. State of Chhattisgarh*, Supreme Court, Writ Petition (C) No.250 of 2007.

292 United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA) Guiding Principles on Internal Displacement, 1998, available at: <http://www.ifrc.org/Docs/idrl/1266EN.pdf>; United Nations General Assembly (UN GA), Framework on Durable Solutions for Internally Displaced Persons, December 29, 2009, available at: http://www2.ohchr.org/english/issues/idp/docs/A.HRC.13.21.Add.4_framework.pdf

III



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ACCESS TO JUSTICE



India has an array of laws for the protection for vulnerable groups. However the many structural and practice dysfunctions of the judicial system and the *de jure* and *de facto* impunities seriously undermine the ordinary person's ability to access justice.

Access to Justice

India has an array of laws for the protection for vulnerable groups. However the many structural and practice dysfunctions of the judicial system and the *de jure* and *de facto* impunities seriously undermine the ordinary person's ability to access justice. Though there is ample evidence of the deteriorating ability of the system to deliver justice, there is a deep resistance to change. The inability to ensure just, swift and affordable remedies poses a real challenge to the rule of law and protection of fundamental rights.

A. Barriers to Access to Justice

Regressive Laws

The *Police Act, 1861*²⁹³ and the *Prisons Act, 1894* are two of the oldest remaining statutes in force. Since independence, there have been many well grounded recommendations, both from within and outside the government, on repealing these colonial laws and replacing them with legislation in harmony with the current democratic, constitutional framework. However, to date, these laws remain in place.

Several other regressive legislations deviate from the letter and spirit of the Constitution and international human rights law, such as the *Land Acquisition Act 1894*; the *Bombay Prevention of Begging Act, 1956*, the offence of sedition in the

²⁹³ Policing being a state subject, several states have their own Police Acts which are dated later than 1861. But essentially all these laws are modeled on the 1861 Act.

Indian Penal Code (IPC)²⁹⁴ and the *Mental Health Act, 1987*.²⁹⁵ Unfortunately India is one of the few countries in the world whose Constitution allows for preventive detention without safeguards.²⁹⁶ This itself is a major setback to personal liberty.

Violations by the Police and Resistance to Reform

Despite a range of safeguards, police practice is typified by routine violations of law and human rights. A majority of complaints brought before the National Human Rights Commission (NHRC) between 2008-09 involve police violations.²⁹⁷ In its 2011 stakeholders' report for India's Universal Periodic Review (UPR), the NHRC stated that "35% of the complaints coming to it annually, are against the police, and 9% of the complaints in 2010-11 were on inaction by officials or their abuse of power".²⁹⁸ Police are regularly accused of beatings, torture, abduction, rape, deaths in custody and extrajudicial killings through fake 'encounters'. They have a reputation for corruption, arbitrary arrests and non-registration of cases, which is particularly acute in cases of women reporting domestic violence or rape. Procedural safeguards are routinely violated. For instance, the mandatory requirement to produce arrested persons before a magistrate within 24 hours and guidelines and legal provisions on arrest are routinely derogated from. Socially and economically disadvantaged sections are most vulnerable to police brutality and corruption.²⁹⁹

All states and Union Territories have their separate police force and are governed by state-specific police laws, which are closely modelled on the colonial *Police Act, 1861*. There has been a small inroad in changing police legislation following a 2006 Supreme Court judgement which directed central and state governments to implement specific directives on police reform (see following case study)³⁰⁰. In order to accomplish this, the Court recommended that state governments implement the directives through government orders or notification or pass new Police Acts to ensure incorporation of the Court's directives into legislation and provide an opportunity to modernise police legislation in its entirety at both the state and the central levels. However, compliance to this judgement, across the country, borders on complete disobedience of the Court's orders. Less than twenty states have taken measures to implement the Court's directives, while not a single state has complied in full. The quality of this partial compliance does great disservice to the letter and spirit of the Court's directives. Of the compliant states, a total of 15 states have passed new Police Acts since the *Prakash Singh* judgement. Alarming, the new Police Acts being passed by states are proving to be more retrogressive than the

294 Including Section 124 A of the Indian Penal Code (IPC).

295 The Act allows arrest without warrant of persons with disabilities.

296 Specifically, Article 22 of the Constitution expressly allows an individual to be detained without charge or trial for up to three months and denies detainees him or her the rights to legal representation, cross-examination, timely or periodic review, access to the courts or compensation for unlawful arrest or detention.

297 See: National Human Rights Commission, Annual Report 2008-2009, page 186, available at: www.nhrc.nic.in/Documents/AR/Final%20Annual%20Report-2008-2009%20in%20English.pdf. Also see: Concluding Observations of the Human Rights Committee: India, 1997, CCPR/C/79/Add.81, para 23.

298 NHRC, *India Submission to the UN Human Rights Council for India's Second Universal Periodic Review*, available at: <http://nhrc.nic.in/Reports/UPR-Final%20Report.pdf>. For more details see Annex E.

299 See: Concluding Observations of the Committee on the Elimination of Racial Discrimination: India, 2007, CERD/C/IND/CO/19, para 14 and para 26.

300 *Prakash Singh and Others v. Union of India and Others* (2006) 8 SCC 1

Police Act, 1861 that they replace. They give statutory sanction to the ills that plague policing; they give the executive greater and unfettered control over the police; they claw back established legal safeguards in some circumstances; and they dilute existing oversight mechanisms. But more dangerously, states are using these Acts to enhance police powers without any safeguards. These are worrying trends and in no way contribute to enhance the democratic policing that is desperately needed. To date, only seven states and three Union Territories have functional *Police Complaints Authorities* and even those are not free from problems. Seven states have outrightly refused to establish these bodies.³⁰¹ In effect, the opportunity for police reform is proving counterproductive and bringing-in even worse precedents.

CASE STUDY

Elusive Police Reform

Since independence, despite several fulsome and well-grounded recommendations to reform the police, no significant changes have been made to transform the organisation or culture of policing.³⁰² The 1861 Act is still on the statute books. Accountability of the police remains marginal and immensely difficult for citizens to access and enforce in India. There is visible resistance to all efforts to strengthen the oversight regime.

Recent history confirms the reluctance to bring about systemic reform and, consequently, stronger accountability. In 1996, two retired police chiefs, Prakash Singh and NK Singh, filed a public interest litigation in the Supreme Court, asking the Court to direct governments to implement the National Police Commission (NPC) recommendations. After ten years of litigation, in 2006, in what is popularly referred to as the Prakash Singh case³⁰³, the Supreme Court ordered that reform must take place. The Court laid down directives which, if holistically applied, were designed to kick start the process of reform. These directives pulled together the various strands of improvement generated since 1979. They make up a scheme, which is designed to correct the common ills that create poor police performance and unaccountable law enforcement today.

The directives can be broadly divided into two categories: those seeking to achieve functional responsibility for the police and those seeking to enhance police accountability. Six years later, despite monitoring by the Supreme Court, no state or union territory (including the capital territory of Delhi which comes directly under the Home Ministry) has fully implemented the seven directives. A few have implemented some directives partially, but others have resisted all attempts to create beneficial change. The greatest resistance to change concerns directions that aim to delink police from illegitimate political interference and go toward increasing police accountability.

The Court also advised the passing of new Police Acts to ensure the incorporation of the Court's directives into legislation and provide an opportunity to modernise police legislation in its entirety, at both the state level and the Centre. To date, 13 of 28 Indian states have passed new Police legislation. The Acts do great injustice to the Court's directives. The very problems the directives sought to address are now being given statutory sanction. Certain discernible trends emerge across the new Police Acts, which clearly point to the executive seeking

301 Commonwealth Human Rights Initiative, *Complaints Authorities: Police Accountability in Action*, 2009, available at: http://www.humanrightsinitiative.org/publications/police/complaints_authorities_police_accountability_in_action.pdf

302 The most comprehensive recommendations for systemic reform of the police in India are contained in eight reports produced by the National Police Commission (NPC) from 1979-81. The NPC was an autonomous Commission constituted to recommend systemic changes to the organisation and functioning of the police, following police excesses committed during the Emergency. The NPC also drafted a Model Police Bill to replace the 1861 Police Act. None of these recommendations have been implemented to date, and at the central level, the Police Act of 1861 remains in force. Find the full reports of the NPC at the following link: <http://bprd.nic.in/index3.asp?ssid=407&subsublinkid=134&lang=1>.

303 *Prakash Singh and Others v. Union of India and Others* (2006) 8 SCC 1

unilateral control over the police, and the total dilution of independent oversight over the police. Illustratively, state governments are using Police Acts to: (a) create special security zones wherein police are afforded absolute power without any checks; (b) legalise direct appointment of state police chiefs by the executive, doing away with checks and balances ordered by the Court in the form of objective selection criteria and an independent selection panel; and (c) subvert the independence of new police complaints bodies³⁰⁴ through direct appointments with no independent selection process leading to excessive politicisation, absence of independent investigators, little support for enforcement of their findings, and in extreme cases of defiance to the courts orders, the inclusion of serving police personnel on these bodies.

To date only seven states, and three Union Territories, have functional Police Complaints Authorities. Even these operational Authorities are ridden with flaws. Their composition and membership does not ensure any independence, their powers are diluted and they remain starved of funds. The remaining states have Complaints Authorities only on paper or have chosen to ignore the Court's directive. This deplorable track record reveals the strong resistance to reform. Even more alarming is the manipulation of the Court's directives in implementation to empower the executive's stranglehold over the police and diminish independent oversight.

Source: Commonwealth Human Rights Initiative

Judiciary: Vacancies and Judicial Delay

More than 31% posts of judges in various high courts and the Supreme Court were lying vacant as of 1 August 2011.³⁰⁵ Amongst the high courts, the largest number of vacancies was in Allahabad High Court where 98 out of the sanctioned 160 posts (more than 61%) had not been filled.³⁰⁶

The Law Commission of India recommended in 1987 a ratio of 50 judges per million persons.³⁰⁷ In 2010, over 20 years later, the ratio was still only approximately 17 judges per million.³⁰⁸ The shortage has resulted in longer delays while the petitioner, accused and victim, are finding remedies harder to come by. In 2010, there were more than 32 million cases pending before Indian courts, an increase of more than 830,000 over the previous year.³⁰⁹ According to government statistics, nearly 16 million persons (including those from previous years) were awaiting trials for crimes under the IPC in various criminal courts during 2010.³¹⁰ Pendency of cases has worsened markedly over the past decade. Arrears have increased by 148% in the

304 Called 'Police Complaints Authorities', these bodies have the mandate to inquire into the most serious complaints against the police – namely death, torture, and rape in police custody. The seriousness of the complaints falling under this mandate demands fair and impartial conduct of inquiries, and independence from the police. Yet, in one state, serving police officers are members of the Complaints Authority, entirely defeating any semblance of independence. The Authorities are mired in excessive delay, and have proved ineffective at strengthening police accountability.

305 The Times of India, *31% of judges' posts in SC, HCs lying vacant*, August 8, 2011, available at: http://articles.timesofindia.indiatimes.com/2011-08-08/india/29863790_1_vacancies-high-courts-judges

306 Ibid.

307 Law Commission of India, *One Hundred Twentieth Report on Manpower Power Planning in Judiciary: A Blueprint*, July 1987, available at: http://lawcommissionofindia.nic.in/old_reports/rpt120.pdf.

308 Bar and Bench, *Pending Litigations 2010: 32,225,535 pending cases; 30% Vacancies in High Courts: Government increases Judicial infrastructure budget by four times*, June 3, 2011, available at: <http://barandbench.com/brief/2/1518/pending-litigations-2010-32225535-pending-cases-30-vacancies-in-high-courtsgovernment-increases-judicial-infrastructure-budget-by-four-times->.

309 Exact numbers: 32,225,535 in 2010 and 31,392,453 in 2009. - Ibid.

310 Exact number: 15,885,237 - National Crime Records Bureau, *Arrests and Trials 2010*, available at: <http://ncrb.nic.in/CII2010/cii-2010/Chapter%2012.pdf>.

Supreme Court, 53% in high courts and 36% in subordinate courts.³¹¹ No effective solutions have been put in place to stem the decline, while experiments with ‘fast track courts’ have failed. In the state of Gujarat, for instance, the 2002 riot cases were all tried in fast track courts. To date, ten years after the riots, several cases are still pending in these fast track courts. Another glaring example of delayed justice is the court verdict in the *Bhopal Gas Tragedy* case – the world’s worst industrial disaster – which killed over 15,000 people. In 2010, at the end of a 26-year legal battle, the verdict failed to provide any relief to affected families.

Excessive Pre-trial Detention (under trials)

65.1% of the total number of prisoners in India are pre-trial detainees³¹² with period of pretrial detention varying from three months to over five years.³¹³ Courts are lax in releasing undertrials on bail. Statutory safeguards³¹⁴ have been introduced to check prolonged detention periods. These would help in reducing time spent in pre-trial detention if consistently implemented by the courts. However, both the executive and the judiciary have failed in discharging their oversight functions.

Excessive pre-trial detention is one of the most important factors responsible for over-crowding of prisons in the country. Though India’s incarceration rate is lower than most other countries, its pre-trial prison population is one of the highest in the world.³¹⁵ Instances of people accused of minor offences languishing in prisons awaiting trial for periods more than what is prescribed as the maximum sentence for such offences, are common. Most of these prisoners are poor and unable to hire the services of a lawyer or render sureties or bonds. In 1979, in *Hussainara Khatoon v. Home Secretary, State of Bihar*,³¹⁶ the Supreme Court while adjudicating on undertrials that were detained for periods much longer than what they would have undergone in case of their conviction, held: “*even under our Constitution, though speedy trial is not specifically enumerated as a fundamental right, it is implicit in the broad sweep and content of Article 21*” (right to life and personal liberty). Thereafter, in the *Common Cause v. Union of India* judgements,³¹⁷ the Supreme Court laid down detailed guidelines for release of undertrials. Despite these Supreme Court pronouncements, excessive detention of undertrials remains a serious concern.

65.1% of the total number of prisoners in India are pre-trial detainees with period of pretrial detention varying from three months to over five years.

311 PRS Legislative Research, *Vital Stats: Pendency of Cases in Indian Courts*, July 6, 2011, available at: <http://www.prsindia.org/administrator/uploads/general/1310014291--Vital%20Stats%20-%20Pendency%20of%20Cases%20in%20Indian%20Courts%2004Jul11%20v5%20-%20Revised.pdf>.

312 National Crime Records Bureau, Ministry of Home Affairs, *Prison Statistics 2010*, page 111, available at: http://ncrb.nic.in/PSI_2010/Full/PSI-2010.pdf

313 2,422 undertrials were detained in jails for 5 years or more - National Crime Records Bureau, *Period of Detention of Undertrial Prisoners 2009*, available at: <http://ncrb.nic.in/PSI2009/CHAPTER-6.pdf>.

314 Code of Criminal Procedure. Sections 167, 436, 436A and 437 allow an accused to be released on bail in cases of delay in commencement or finalization of trial.

315 International Centre for Prison Studies, *Entire World – Pre-trial detainees/remand prisoners* (percentage of the prison population), available at: http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=wb_pretrial.

316 AIR 1979 SC 1360, available at: <http://www.indiankanoon.org/doc/1007347/>

317 4 SCC 33 and (1996) 6 SCC 775. An analysis of the directions issued by the Supreme Court in these cases is available at: <http://goo.gl/ZDVPE>

Prisons

Conditions in Prisons

Indian prisons do not meet international standards as laid down in the *International Covenant on Civil and Political Rights* (1966), the *UN Standard Minimum Rules for the Treatment of Prisoners* (1955) and the *UN Directive on Basic Principles for the Treatment of Prisoners* (1990). Overcrowding is one of the problems, which plagues Indian prisons. Overcrowding, which stands at 115.7%³¹⁸ is one of the problems which plagues Indian prisons.³¹⁹ In some states overcrowding is particularly high. For instance, in Chattisgarh overcrowding stands at a staggering 237%.³²⁰ Several prisons are over a hundred years old and many barracks remain closed because they are unsuitable for habitation, making the actual space available significantly less than that suggested by the government, compounding the overcrowding.

Combined with overcrowding is the issue of inadequate staff strength, which goes way below requirements. The current prison staff to inmate ratio stands at 9:1.³²¹ Overcrowding brings with it a denial of health rights, poor sanitation and high prevalence of disease. The living conditions in most prisons, especially sub-jails are appalling, as even basic requirements are not met. Unhygienic conditions arise out of inadequate water supply and supply of essentials like phenol, and lack of proper ventilation.³²² The NHRC and the National Commission for Women have made frequent reports on prison conditions³²³ and found health and living conditions deplorable.

Prisoners are required by law to be medically examined at the time of admission. However, prisoners are rarely examined due to an acute shortage of doctors. Therefore, marks of violence meted out to the prisoner by the police, communicable diseases (such as tuberculosis) and chronic conditions that deteriorate with incarceration, are often not detected until they become acute. Mental illness is frequently undetected or not adequately treated. There are very few studies on monitoring of the patterns of illness in custodial institutions and therefore no institutional remedies are applied. The recently reported case of a mentally ill prisoner held without trial and released after 18 years of imprisonment is indicative of how acute the problem is.³²⁴ While general prisoners face these problems, recent reports of facilities and favoured treatment provided to so-called 'VIP prisoners' credibly demonstrate the pattern of favouritism and corruption within prisons that allows every facility to be purchased for a price.

The NHRC and the National Commission for Women have made frequent reports on prison conditions and found health and living conditions deplorable.

318 National Crime Records Bureau, *Prison Statistics of India, 2009*.

319 National Crime Records Bureau, Ministry of Home Affairs, *Prison Statistics 2010*, page 16, available at: http://ncrb.nic.in/PSI_2010/Full/PSI-2010.pdf

320 Ibid.

321 National Crime Records Bureau, Ministry of Home Affairs, *Prison Statistics 2010*, page (iv), available at: http://ncrb.nic.in/PSI_2010/Full/PSI-2010.pdf

322 See: CHRI, *Maharashtra's Abandoned Prisons: A Study of Sub-Jails*, 2010, available at: http://www.humanright-sinitiative.org/publications/prisons/maharashtra's_abandoned_prisons_a_study_of_sub-jails.pdf

323 See for example: National Human Rights Commission, Minutes and Recommendations of the National Seminar on 'Prison Reform', New Delhi, 15 April 2011, available at: <http://nhrc.nic.in/Documents/Minutes%20&%20Reco%20Prison%20Reform.pdf>.

324 The Times of India, *Mentally ill man walks free after 18 years in Jaipur jail*, February 18, 2011, available at: http://articles.timesofindia.indiatimes.com/2011-02-18/india/28614800_1_solitary-confinement-prison-jaipur

Monitoring Mechanisms

Prisons have built-in statutory oversight mechanisms. Besides those internal to the administration, prisons must have boards of visitors, which include lay visitors known as ‘non-official visitors’. Additionally, district judges and magistrates have the power to periodically monitor prisons. The visits are to monitor conditions of detention, record any complaints of prisoners as well as review overstays. The NHRC has an important role to play in the monitoring of prisons as it has the power to visit any jail or detention centre to study the living conditions of the inmates and make recommendations.³²⁵ Between 2001 and 2011, the NHRC has made several visits to prisons across the country and submitted 53 reports with recommendations to several state governments and the Centre. However, not much has been put into action and a majority of the recommendations remain on paper.

‘Periodic Review Committees’ are another important oversight mechanism mandated to ensure that prisoners awaiting trial do not overstay or remain behind bars except for the barest minimum duration. These Committees are headed by the District Judge, and include the officer-in-charge of prisons and representatives of the District Magistrate, the Superintendent of Police and the Probation Department. Such committees have been set up in a number of states. However, in most states they remain defunct. For example, in Rajasthan, committee meetings are not convened periodically, there is lack of coordination between committee members, cases that come up for review are picked up randomly, and there is little adherence to rules laid down by these Committees.³²⁶

The visiting system is also defunct in most states. Illustratively, in Rajasthan, lay visitors were not appointed since 2009 and in 2011 only 150 were appointed leaving out 30 prisons. Appointed visitors almost universally have close affiliation to the ruling party, no initial training or orientation and there is nothing to indicate the quality of their recommendations or any follow-up action.

Children of Prisoners

Children of prisoners consist of two categories – those who live with their mothers within the jail premises, and those who are living outside in the community. There are no estimates of the actual number of children who are living with their parents in jails, even though these children are forced to grow-up in conditions of deprivation and criminality with lack of proper nutrition, inadequate medical care and little opportunity for education. Such children are forced to live in the jails along with other adult criminals and suspects in a seriously adverse situation. While there is some information on children living with their mothers inside the prisons, there is almost no information regarding children of prisoners who are living in the community.³²⁷

³²⁵ Section 12(c) *Protection of Human Rights Act, 1993*.

³²⁶ The Commonwealth Human Rights Initiative (CHRI) has recently done a study on the prison visitors, which is yet to be published.

³²⁷ Submission to the Committee on the Rights of the Child for the Day of General Discussion on Children of Imprisoned Parents, 30 September 2011 at Palais des Nations in Geneva, Switzerland. Submission by HAQ: Centre for Child Rights.

Though prisons are rought with the problems discussed above, states fail to fully utilize funds allocated to them for prisons. According to Prison Statistics 2009, only 2 out of 28 states of India were able to fully utilize the funds allocated to them.³²⁸

Custodial Torture

Custodial torture and violence remain an entrenched and routine law-enforcement strategy and investigating practice across India. A study conducted in 47 districts for more than two years concluded that an average 1.8 million people are victims of police torture and violence in India every year.³²⁹ Police practices include assault, physical abuse, custodial rape, threats, psychological humiliation, as well as deprivation of food, water, sleep and medical attention.³³⁰ Most torture cases go unreported because victims fear reprisals. They are also not confident that the judicial system can or will punish 'men in uniform'.

From 2001-2010, the NHRC reported a total of 14,231 cases of deaths in police and prison custody (i.e. 1,504 and 12,727 respectively), which represents an average of 43 deaths every day.³³¹ Many of these deaths are a result of torture. These figures represent only a fraction of the actual number of deaths in custody as they reflect only the cases registered before the NHRC.

CASE STUDY

Soni Sori's Case³³²

Soni Sori is a 35 year old *adivasi* school teacher and warden of a government-run school for tribal children in Dantewada, Chhattisgarh – one of the few operational schools in the area. Soni is the aunt of Lingaram Kodopi's, a journalist, who was arrested on 9 September 2011, on charges of being a go-between for the payment of a bribe by the *Essar Group* to the Maoists. The police alleged Soni's involvement in the same case, and also charged her in several other cases including alleging that she was a Maoist supporter and an intermediary, forcing her to flee Chhattisgarh. Evidence however points to the fact that both Soni and Lingaram Kodopi have been falsely implicated.

In October 2009, Lingaram Kodopi had resisted an attempt by the Chhattisgarh police to forcibly recruit him as a 'Special Police Officer' to fight the Maoists. On refusal, he was arbitrarily detained for 40 days in a police station and released after a *habeas corpus* petition was filed in the court. In April 2010, at a public hearing in Delhi, he had detailed violations committed by the security forces against *adivasis* in Chhattisgarh, following which the state police announced that he was the prime suspect in a Maoist attack on a local Congress party leader's residence. Lingaram Kodopi had also highlighted the killing of three *adivasis* by the Central Reserve Police Force and the state police during a confrontation in three villages – Tadmetla, Timapuram and Morpalli.

328 National Crime Records Bureau, *Prison Statistics of India*, 2009.

329 People's Watch, *Torture and Impunity in India*, National Project on Preventing Torture in India (NPPTI), November 2008, available at: www.peopleswatch.org/preventing_torture.php.

330 Ibid.

331 National Human Rights Commission Annual Reports, 2001-2010, In: Asian Centre for Human Rights, *Torture in India, 2011*, available at: www.achrweb.org/reports/india/torture2011.pdf

332 For detailed explanations on many aspects of the Sori Sori case, see the series of articles published in Tehelka, available at: www.tehelka.com/story_main52.asp?filename=Ws030412spLanding.asp

Soni Sori had also been critical of atrocities committed by security forces and the Maoists. She was arrested in Delhi on 4 October, 2011 after she had exposed significant evidence of being framed by the Chhattisgarh Police in multiple cases. Fearing for her safety while in custody, Soni Sori had pleaded before the Additional Chief Metropolitan Magistrate, District Court, Saket as well as the Delhi High Court that she be held in custody in Delhi and had sought to face trial outside the state of Chhattisgarh. However, in October 2011, Soni Sori was remanded to the custody of the Chhattisgarh police by the Additional Chief Metropolitan Magistrate, Saket District Court, Delhi, albeit with directions that ‘due process’ be observed and that a report be filed outlining steps taken to keep her safe. As Soni Sori was remanded to Chhattisgarh, she was victim of custodial torture and sexual violence. On 10 October 2011, she was supposed to be produced before the Court of the Magistrate in Dantewada. However, Soni Sori – who had been in perfect health when she was remanded to the custody of the Chhattisgarh Police in Delhi – was in such terrible physical pain that she could not even stand up or step out of the police van and reach the courtroom. The police claimed “*she slipped in the bathroom and had hurt her head.*”

In subsequent statements, Soni Sori described how she was tortured. She stated that she was pulled out of her cell at the Dantewada Police Station on the night of 8/9 October 2011 and taken to S.P. Ankit Garg’s room, where on his orders, three men stripped her, gave her electric shocks and inserted stones into her private parts, making her lose consciousness. The next morning, she had severe pain all over her body, especially her neck, spine and lower abdomen. A few months later, SP Ankit Garg, far from being questioned for his role in the Soni Sori case, was awarded the Police Medal for Gallantry by the government for his role in a counter-insurgency operation in 2010.

The Supreme Court³³³ called for an independent medical examination of Soni Sori. The medical report stated that stones were found inserted deep inside Soni Sori’s vagina and rectum and the MRI scan revealed annular tears on her spine. In May 2012, the Supreme Court directed a new medical examination to ascertain the charges of torture. The report is due by July 2012. The arrest, torture and framing of Soni Sori has been widely criticised by civil society nationally and internationally.³³⁴

Despite torture being endemic in the country, India does not yet have a domestic law to address the issue and has not yet ratified the *UN Convention against Torture, 1984* (CAT). As per UPR I Recommendation 1 and its 2011 pledge, the Gol committed to expedite ratification of CAT. In India, ratification is to be preceded by the enactment of a domestic law. The *Prevention of Torture Bill, 2010* (PTB) was drafted by the government and passed by the Lower House of Parliament (*Lok Sabha*) in May 2010 without any public consultation and no debate in Parliament. Human rights groups held that the Bill did not conform to CAT and launched a campaign aimed at rectifying this. Consequently, in August 2010, the Upper House (*Rajya Sabha*) referred the PTB to a Parliamentary Select Committee. Considering representations from human rights experts, the Committee substantially revised the PTB, which now more closely complies with CAT. However, the revised Bill has been pending before the Ministry of Home Affairs for approval of the amendments, since December 2010. The Gol national report for UPR II states that the recommendations of the Select Committee are currently “*under examination by the Government*”, with no further details as to its position on the recommendations and the time frame for the adoption of the new law.

333 *Soni Sori & Another v State of Chhattisgarh*, Writ Petition (CRL) No. 206 of 2011.

334 See, for example, the open letter sent by 200 organisations and individuals from India to the Chief Justice of India and other Supreme Court judges: Hardnews, *Soni Sori Case: An open letter to the SC judges*, available at: <http://www.hardnewsmedia.com/2012/01/4295>

The revised PTB addresses many of the pitfalls of the initial PTB and brings India closer to fulfilling its obligations under CAT and the *International Covenant on Civil and Political Rights* (ICCPR). However, the revised PTB still has a number of shortcomings that should be addressed urgently.³³⁵ The definition of torture under the new Bill is an improvement from the earlier version. However, it is still problematic in some aspects, including its narrower definition of ‘cruel, inhuman or degrading treatment’ and its failure to criminalize the same. This should be rectified, especially in light of the recent decision of the Supreme Court in *Prithipal Singh etc v. State of Punjab & Anr.* highlighting the obligation of the state to prohibit torture, and ‘cruel, inhuman and degrading treatment’.³³⁶ Other shortcomings of the revised PTB include: (a) the imposition of the death penalty as a punishment for cases of torture causing death; (b) the absence of provisions for prevention of torture; (c) the non exclusion of evidence obtained by torture; and (d) the presence of a two-year statute of limitation from the date the offence was committed. In order to fulfill its UPR I obligations, the Gol should table the revised PTB before Parliament at the earliest, after addressing its shortcomings.

Immunity and Lack of Accountability

The lack of accountability of civil servants and members of the armed forces leads to continued human rights violations. Statutory provisions granting immunity are among the key factors for this lack of accountability. Sanction to prosecute a public official is required under certain provisions of law, two of which are significant: Section 197 of the *Criminal Procedure Code, 1973* (CrPC) and Section 19 of the *Prevention of Corruption Act, 1988* (PCA).

Section 197 CrPC says that whenever a judge or magistrate or a public servant is accused of any offence alleged to have been committed by him “while acting or purporting to act in the discharge of his official duty”, no court shall take cognizance of that offence without sanction from the concerned government. Sanction would be needed from the central or state government, depending on whether he was employed in connection with the affairs of the Union or a state at the time of the alleged commission of the offence. The Section further debars the court from taking cognizance of any offence alleged to have been committed by a member of the armed forces of the Union while acting or purporting to act in the discharge of his official duty without sanction of the central government. If AFSPA is applicable to any disturbed area, it fortifies the immunity given to members of the armed forces against any criminal prosecution (also see section on Legal Immunity in Part III).



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³³⁵ For a detailed analysis on the revised PTB, see: International Commission of Jurists, *A legal analysis of the revised Prevention of Torture Bill currently before India's Parliament*, available at: http://documents.icj.org/INDIA_ICJ_legal_opinion_Prevention_Torture.pdf

³³⁶ *Prithipal Singh Etc v. State of Punjab & Anr.*, Supreme Court, Criminal Appeal No. 528 of 2009, Criminal Appellate Jurisdiction, 4 November 2011, para 7. See: International Commission of Jurists (ICJ), Submission of the ICJ for the 2012 UPR of India, November 2011. Extracts from the Supreme Court decision: “[I]n view of the provision of Art 21 of the Constitution of India, any form of torture or cruel, inhuman or degrading treatment is inhibited. Torture is not permissible whether it occurs during investigation, interrogation or otherwise... The State must protect victims of torture and ill-treatment, as well the human rights defenders fighting for the interest of the victims... Therefore the State must ensure prohibition of torture, cruel, inhuman or degrading treatment to any persons particularly at the hands of any State agency/police force.”

Section 19 of the PCA states that no court shall take cognizance of an offence punishable under sections 7, 10, 11, 13 and 15 of the PCA alleged to have been committed by a public servant, except with the previous sanction of the concerned government. Sanction for prosecution is however not required under the PCA once the public servant has ceased to be employed in the post, which the public servant is alleged to have abused or misused for corrupt motives and is no longer serving in connection with the affairs of the Union or a state. While sanction is contemplated in Section 197 CrPC in respect to offences committed “*while acting or purporting to act in discharge of duties*”, offences specified in Section 19 of the PCA – like giving or taking bribe – have been held by the Court to have no connection with the discharge of official duties.

In February 2012, the Supreme Court put a four month time-limit for sanctions required under the PCA.³³⁷ If the competent authority fails to take a decision within four months, the sanction for prosecution will be deemed to have been granted. There is an urgent need for such a time limit with regard to other crimes by public servants, particularly offences against the human body, to restrict the abuse of the power of sanction for prosecution by the government.

Courts have had numerous opportunities to demarcate the nature and scope of the protection accorded by section 197 CrPC. A majority of the cases relate to corruption charges against public servants under the PCA. The issue of sanction has also arisen in cases connected with offences by the police, army or other armed forces. The Court has devised tests to determine the application of section 197 CrPC. The broad principle underlying these was articulated by the Supreme Court in *S.B. Saha v. M.S. Kochhar*³³⁸: “*The words ‘any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty’ (...) in Section 197(1) of the Code, are capable of a narrow as well as a wide interpretation. The right approach to the import of these words lies between two extremes.*”³³⁹

Inadequate Legal Aid and Assistance

The right to free legal aid is recognised under Articles 21 guaranteeing the ‘right to life’ and 39A of the Constitution. The *Legal Services Authorities Act, 1987*, gave a statutory base to the fundamental right to legal aid guaranteed under Article 21 of the Constitution. Right to legal aid is also provided for under Section 304 of the CrPC, which provides that if the accused does not have sufficient means to engage a lawyer, the court must provide one for the defense of the accused at the expense of the state.

³³⁷ *Centre for Public Interest Litigation & Others v. The Union of India and Others*, Civil Appeal No. 10660 of 2010, Supreme Court, 2 February 2012.

³³⁸ 1979 (4) SCC 177

³³⁹ The Court has also held that section 197 has to be construed narrowly and in a restricted manner if the public servant has engaged or indulged in criminal activities. For instance, if a police officer uses force in discharge of his duties, then sanction would be necessary for prosecution. But if the same officer commits an act, which is an offence, in course of his service, though not in discharge of his duty, the bar under section 197 CrPC would not be attracted.

Referring to National and State Legal Services Authorities, the Gol national report for UPR II states: “Until March 31, 2009, about 9.7 million people have benefited through legal aid in which about 1.4 million persons belonging to Scheduled Castes and 464,000 persons of Scheduled Tribes communities were beneficiaries. (...) About 725,000 Lok Adalats have been held throughout the country in which more than 2.68 million cases have been settled.”³⁴⁰ The situation on the ground, however, is more grim. There remains a serious lack of awareness amongst litigants on free legal aid services, which often doesn’t reach the most needy. According to a study conducted in seven states - Rajasthan, Chhattisgarh, Madhya Pradesh, Jharkhand, Bihar, Odisha and Uttar Pradesh - only 20% of litigants were aware of free legal aid services and 52.2% of surveyed litigants had to pay money to lawyers appointed by the SLSA.³⁴¹ In addition, legal aid rarely reaches persons with physical, mental and multiple disabilities living in custodial institutions like mental asylums, ‘beggars’ homes and other state institutions for women and children. Moreover, the legal aid services are promoting alternative resolution approaches for women’s/family law issues that tend to compromise women’s statutory rights in the name of expediency and efficiency.

Other key issues related to the functioning of the SLSA are as follows:

- Acute underutilisation of funds – For example, 87.33% underutilisation in Madhya Pradesh, 53.87% in Jharkhand, 44.8% in Uttar Pradesh and 35.16% in the state of Odisha (for more details, see case study below);³⁴²
- Lack of implementation structure with the judiciary being given the responsibility to implement the Act – The judges hold this as an additional charge over and above their existing work;
- Lack of experienced lawyers; and
- Lack of monitoring mechanisms.

CASE STUDY

Underutilisation of funds allotted for legal aid services

A RTI application was with the National Legal Service Authority (NALSA) regarding the following aspects of the State Legal Services Authorities (SLSA) as well as NALSA (all the information is regarding aspects that are covered under the pro-active disclosure clause of the RTI): (a) minutes of meetings held; (b) number of lok adalats held; (c) number of beneficiaries; (d) allocation and expenditure of the various grants received; (e) other activities; and (e) copies of annual reports submitted by SLSA.

NALSA, under the *Legal Services Authorities Act, 1987* (LSAA), is expected to be the nodal body for guiding and supervising the SLSAs. It is expected for it to have the annual reports of all the SLSAs. Moreover, NALSA instead of furnishing information itself, transferred the query to respective SLSAs for providing the information. None of the states were able to provide adequate responses to the questions asked. Neither minutes of the

³⁴⁰ National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: India, A/HRC/WG.6/13/IND/1, UN General Assembly, 8 March 2012, para 32.

³⁴¹ Unpublished Study conducted by Centre For Social Justice, 2010-2011.

³⁴² Data obtained in response to an RTI application regarding the utilization of funds for the year 2009-2010.

mandatory meeting to be held as per the Act nor any annual reports were submitted. None of the States were able to submit details regarding: (a) activities other than lok adalats or awareness camps; (b) number of people who were provided legal aid; and (c) classification of beneficiaries.

S. No.	States	Monetary Allocation	Expenditure	Percentage of Under Utilisation
1	Uttar Pradesh	State – INR 37,112,000	State – INR 32,419,466	Total: 44.88%
		NALSA – INR 21,706,000	NALSA – NIL	
		Total – INR 58,818,000	Total – INR 32,419,466	
2	Odisha	State – INR 1,887,131	State – INR 1,620,297	SLSA: 14.14%
		NALSA – INR 4,500,000	NALSA – INR 2,917,767	NALSA: 35.16%
		NREGS* – INR 1,500,000	NREGS – INR 94,437	NREGS: 93.7%
		Micro legal literacy – INR 1,440,000	Micro legal literacy – INR 764,382	Micro legal literacy: 46.92 %
3	Jharkhand	State – INR 6,000,000	State – INR 3,056,447	SLSA: 49.06%
		NALSA – INR 6,470,055	NALSA – INR 2,984,624	NALSA: 53.87%
4	Madhya Pradesh	State – INR 14,280,000	General – INR 5,937,264	SLSA: 58.42 %
		NALSA – INR 6,060,000	NALSA & NREGS – INR 768,000	NALSA: 87.33 %
		NREGS – INR 768,000		
		Micro legal literacy – INR 960,000	Micro legal literacy – INR 960,000	Micro legal literacy –

* National Rural Employment Guarantee Scheme

The above data reveals under utilisation of funds in four SLSAs, which suggests under performance of the legal services authorities. This is an area of concern since the need for SLSA's to function properly is very high. Under performance results in the vulnerable groups remaining deprived of their right to justice. There is a need to have a computerized information management system that helps not just in ensuring accountability and transparency, but also in improving the quality of services.

Source: Centre for Social Justice

Lack of Witness Protection Programme

To date, India lacks a law or even a scheme for witness protection,³⁴³ except for a few provisions of the *Indian Evidence Act, 1872*. This fact was acknowledged by the Supreme Court in the case *NHRC v. State of Gujarat* (2003), where it said that “no law has yet been enacted, not even a scheme has been framed by the Union of India or by the State Government for giving protection to the witnesses”. To fill this gap, the Delhi High Court has developed principles of witness protection,³⁴⁴ however, none of them encompasses all aspects. Such measures are particularly important in communal violence cases – where conviction is low mainly because witnesses tend to turning ‘hostile’ due to fear of reprisals – and cases against police officials for acts of custodial death and violence. The 198th Report (2006) of the Law Commission of India had recommended the adoption of a separate legislation for witness protection.³⁴⁵ It is important for India to adopt statutes on witness identity protection (seeking to protect the identity of victim-witnesses) and witness protection programs (aimed at the physical relocation and protection of witnesses).

Death Penalty

The UN General Assembly has repeatedly called on all retentionist States, most recently in December 2010, to “progressively restrict the use of the death penalty and to reduce the number of offences for which it may be imposed” and to “establish a moratorium on executions with a view to abolishing the death penalty”.³⁴⁶ The continuation of awarding death penalty and the introduction of death penalty for death by torture under the PTB, contravenes these prescriptions.

In the case of *Bachan Singh v. State of Punjab*, the Supreme Court laid down the policy of awarding capital punishment only in the “rarest of rare cases”.³⁴⁷ However, statistics show that there has been an increase in the number of death sentences awarded by the courts³⁴⁸ with around 100 cases per year.³⁴⁹ In addition, the number of offences punishable by death has also increased. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions (SR EJE) after concluding his India mission in 2012 stated: “It is a matter of concern that the death penalty may be imposed for a (seemingly growing) number of crimes that cannot be regarded as

343 See: Supreme Court, *NHRC v. State of Gujarat* (2003). Over 560 witnesses have been given central paramilitary protection by the Supreme Court before, during, and after the trial following the impleadment application by Citizens for Justice and Peace (CJP).

344 *Neelam Katara v. Union of India*, CrI. W.P 247 of 2002, Judgment dated 14 October 2003, Delhi High Court.

345 See: Law Commission of India, 198th report on witness identity protection and witness protection programmes, 2006, available at: <http://lawcommissionofindia.nic.in/reports/rep198.pdf>

346 General Assembly Resolution 65/206, UN Doc A/Res/65/206 (2010). See also: General Assembly Resolution 62/149, UN Doc A/Res/62/149 (2008); General Assembly Resolution 63/168, UN Doc A/Res/63/168 (2009); Universal Declaration of Human Rights, article 3, adopted under General Assembly Resolution 217A (III); CRC, article 37(a); and ICCPR Article 6.

347 See: (1980) 2 SCC 684.

348 See for example: CNN-IBN, *Hang those guilty in dowry death cases*: SC, June 1, 2009, available at: <http://ibnlive.in.com/news/hang-those-guilty-in-dowry-death-cases-sc/93882-3.html>; Indian Express, *Award death penalty for honour killings*: SC, May 9, 2011, available at: <http://www.indianexpress.com/news/award-death-penalty-for-honour-killings-sc/787987/>; The Times of India, *10 get death for honour killing*, June 9, 2011, available at: http://articles.timesofindia.indiatimes.com/2011-06-09/india/29638189_1_death-sentence-honour-penalty

349 Christof Heyns, United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, Press Statement, Country Mission to India, 19-30 March 2012, available at: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12029&LangID=E>. See: Annex G.

'the most serious crimes' referred to in Article 6 of the ICCPR as internationally understood, namely crimes involving intentional killing"³⁵⁰ The President of India, Pratibha Patil, rejected the mercy petitions of Devinder Pal Singh Bhullar of Punjab, and Mahendra Nath Das of Assam in May 2011 and of Murugan, Santhan and Perarivalan in August 2011. On 10 August 2011, the Ministry of Home Affairs also advised the President to reject the mercy petition of Afzal Guru.³⁵¹

The rationale of death sentence is also challenged by the wrongful sentencing of individuals as a result of the wrong appreciation of law in their cases. The Supreme Court's awarding of a death sentence *per incuriam*,³⁵² has led to many other people being wrongly sentenced to death. In 2009, the Supreme Court admitted in the case of *Santosh Kumar Satishbhusan Bariyar v. State of Maharashtra*,³⁵³ that it had sentenced a prisoner to death *per incuriam* in an earlier judgement awarded in *Ravji alias Ram Chandra v. State of Rajasthan*.³⁵⁴ The court further admitted that this judgement – which as a result of being *per incuriam* would not have been legally binding as a precedent – was cited in seven other cases by the Supreme Court itself, leading to the sentencing of 14 other prisoners to death.³⁵⁵ In *Dilip Premnarayan Tiwari v. State of Maharashtra*,³⁵⁶ the Supreme Court reaffirmed that the earlier judgement in *Ravji's* case was rendered *per incuriam*. As per information available, *Ravji* was executed on 4 May 1996 and Surja Ram, who was sentenced to death as a result of the *Ravji* case, was executed on 7 April 1997. The other 13 prisoners wrongly sentenced to death are still languishing in jail waiting decision on their mercy petitions which have been lying pending with the President/Governor of India for many years. The case of *Ravji* has also been invoked as a precedent by various High Courts leading to people being sentenced to death.

Further, there is a disturbing trend of high incidence of poor persons represented by legal aid lawyers being wrongly sentenced to death. For instance, 10 of the prisoners wrongly sentenced to death on the basis of the erroneous judgement in *Ravji's* case were too poor to afford legal representation and were represented by legal aid lawyers. Legal aid lawyers are paid as little as INR 2,000 (USD 40) in Mumbai to defend the accused in the Sessions Court or to argue a death sentence confirmation case in the High Court. The fee paid to legal aid lawyers in other states is even lower. Only Delhi has recently revised its legal aid rates to INR 12,000 (USD 240) for a murder trial. It is also public knowledge that Afzal Guru accused in the Parliament attack case was sentenced to death after the legal fraternity resolved not to provide legal counsel and the court did not permit him counsel of choice.

350 Press Statement, Special Rapporteur on extrajudicial, summary or arbitrary executions: Country Mission to India. March 2012, available at: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12029&LangID=E>. See: Annex G.

351 The Economic Times, *Rajiv Gandhi assassination: President rejects mercy petition of killers*, August 11, 2011 available at: http://articles.economictimes.indiatimes.com/2011-08-11/news/29876186_1_mercy-petition-hara-kantadas-mahendra-nath-das

352 Literally meaning 'through lack of care', it refers to a decision of a court that is wrongly decided, because the judge was misinformed or ignorant of the law. A judgment *per incuriam* is not binding and has no authority under the principle of *stare decisis* (legal principle whereby judges are bound to follow precedents laid down by earlier judgments).

353 See: (2009) 6 SCC 498

354 See: AIR 1996 SC 787

355 See: *Shivaji alias Dadya Shankar Alhat v. The State of Maharashtra*, AIR 2009 SC 56; *Mohan Anna Chavan v. State of Maharashtra*, (2008) 11 SCC 113; *Bantu v. The State of U.P.*, (2008) 11 SCC 113; *Surja Ram v. State of Rajasthan*, 1997 Cri LJ 51; *Dayanidhi Bisoi v. State of Orissa*, 2003 Cri LJ 3697; *State of U.P. v. Sattan alias Satyendra and Ors.*, (2009) 4 SCC 736; *Ankush Maruti Shinde and Ors v. State of Maharashtra* (2009) 6 SCC 667.

356 See: (2010) 1 SCC 775

B. Discrimination in Access to Justice

Women

Discrimination against women is systemic in India, embedded in socio-cultural norms and laws that structure the family, community, workplace and the state policies. Son preference, which is entrenched in society, continues to lead to female foeticide. The *Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994*, and other measures have failed to curb the phenomenon. According to the provisional census of 2011, the sex ratio (the number of females per 1,000 males) for the 0-6 age group plummeted to 914 from 927 in the 2001 census. Haryana reported the worst sex ratio of 830 females in the country in the 0-6 age group.³⁵⁷

Women and Family Laws

Family laws are codified with reference to religion and custom rather than constitutional rights.³⁵⁸ Despite piece-meal legal reform, women have unequal succession, inheritance, adoption, guardianship rights, and no right to matrimonial property (assets accumulated during the period of marriage). The state justifies this inequality as being essential to respect minorities and cultural diversity. As per UPR I Recommendation 17, India was requested to withdraw its reservations to Article 5 and 16 of CEDAW, undertake modification of customs that subordinate women, and review its refusal to interfere in religion-based family law. The GoI should reform religion-based family laws to bring parity between spouses in divorce, matrimonial property, guardianship, and succession. These changes should be introduced as well through a secular marriage and family law by way of an option. It is recommended that a law on matrimonial property be enacted to entitle women equal share in assets acquired during the period of marriage.³⁵⁹

Discrimination against women is systemic in India, embedded in socio-cultural norms and laws that structure the family, community, workplace and the state policies.

Violence against Women

Violence against women is highly pervasive and perpetrated with impunity. Reports indicate that every 60 minutes two women are raped, and every six hours a young married woman is found beaten to death, burnt or driven to suicide. There were at least 213,585 cases of crimes against women including 22,172 rape cases, 29,795 cases of kidnapping and abduction, and 8,391 cases of dowry deaths in 2010.³⁶⁰ Women are also targeted on account of their caste, sexuality, disability, and other

³⁵⁷ Office of the Registrar General & Census Commissioner, India, *2011 Census Data: Gender Composition of the Population*, page 88, available at: http://www.censusindia.gov.in/2011-prov-results/data_files/india/Final%20PPT%202011_chapter5.pdf

³⁵⁸ See: Concluding Observations of the Human Rights Committee: India, 1997, CCPR/C/79/Add. 81, para 17, available at: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.79.Add.81.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.79.Add.81.En?OpenDocument)

³⁵⁹ See: Concluding Comments to India from the Committee on the Elimination of Discrimination against Women (CEDAW), CEDAW/C/IND/CO/3, 2007, para 55.

³⁶⁰ National Crime Records Bureau, *Crime in India, 2010*

status. Violence against Dalit women is targeted,³⁶¹ and atrocities committed against them include: verbal abuse and sexual epithets, naked parading, pulling out of teeth, tongue and nails, and violence, including murder. Dalit women are also threatened by rape as part of collective violence by higher castes. The National Crime Record Bureau (NCRB) reported a total of 1,349 rape cases of Dalit women for 2010, with the state of Madhya Pradesh reporting 316 cases, followed by Uttar Pradesh with 311 cases. There are cases of kidnapping and abduction of women, with Uttar Pradesh alone accounting nearly 48.5% of the 511 cases for 2010. Notably, there is no disaggregated data collected on atrocities against Dalit women.



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Stigma, systemic persecution, and violence against lesbians, transgenders, and women with disability occur with impunity with little or no legal redress. The targeting of middle aged and elderly single women in tribal as well as non tribal communities as witches, leading to social stigma, displacement, economic boycott, torture and murder must be addressed through a national law on witch hunting.³⁶² Studies suggest that although disguised as superstition, this practice is a means to divest single women of productive resources and land, or to punish those who transgress social norms, or refuse sexual advances.³⁶³ It impacts the most marginalised women, and the official crime records, although under-reported, show prevalence in 13 states in India.³⁶⁴

The *Protection of Women from Domestic Violence Act, 2005* (PWDV Act) provides for protection orders to women victims of domestic violence through a mechanism of 'Protection Officers' and support services. Under the Act, domestic violence is widely defined and includes abuse or the threat of abuse whether physical, sexual, verbal, emotional or economic. It provides protection to the wife or female live-in partner or his relatives, and extends its protection to women who are sisters, widows or mothers. According to the fifth monitoring and evaluation report carried out by Lawyers Collective in 2012, this law has certainly helped to establish the normative principle that domestic violence is unacceptable. However, the law has largely failed in its ambitious mandate. The 'Protection Officers', whose role is to help the victim access justice, are either not sufficiently qualified, lack resources to properly carry-out their duties, or are not appointed at all. Often, the duties of a Protection Officer are assigned as an additional job to existing state functionaries. Generally, the police still consider acts of violence as a private family matter and do not provide accurate information and support to the victim, underlining their lack of orientation on the PWDV Act. Lack of support services and shelter for the victim are other problems that need to be overcome.

361 National Crime Records Bureau; *Also see: Concluding Observations of the Elimination of Discrimination against Women: India, 2007*, CEDAW/C/IND/CO/3, para 29.

362 This is a reiteration of CEDAW Concluding Comments to India, CEDAW/C/IND/CO/3, 2007, para 26-27.

363 See: 2nd NGO Shadow Report to CEDAW coordinated by NAWO, pages 16-17, available at: <http://www.nawoindia.org/Second-NGO-Shadow-Report-on-CEDAW.asp>

364 The National Crime Records Bureau statistics for the year 2010 recorded 182 murders in 11 states, however, the previous reports recorded the same number in 13 states.

In addition, the lack of financial resources available at the state level and poor budgetary allocations for implementation of this Act, also weakens its effectiveness.³⁶⁵ According to a budgeting exercise conducted by the Centre for Budget and Governance Accountability, as many as 19 states did not have a separate budget for the implementation of the PWDV Act, including states like Bihar, Rajasthan and Jharkhand, that have reported a high incidence of domestic violence. The states that have a separate budget for the PWDV Act, have earmarked very little for this purpose, and sometimes not utilised even those modest amounts.

Sexual Violence and the Law

Sexual violence is not fully addressed by penal law – the offence of rape, which is the only significant offence, suffers from a narrow definition that criminalises only penile penetration of the vagina – despite advocacy for comprehensive reform spanning two decades.³⁶⁶ Rape prosecution requires medico forensic investigation, such as the two finger test, that is irrelevant to the determination of rape (as reiterated by judicial pronouncements) and demeaning to women. The legal investigation and process subjects the victim-survivors to moral scrutiny and judgement, without securing victim or witness protection. As a result, sexual violence is rarely reported, and survivors who report, often cannot assist prosecution through the length of long, hostile and demeaning proceedings. A comprehensive law must include all forms of penetrative sexual assault, in aggravated and non-aggravating circumstances, as well as reform in procedure, and rules of evidence.³⁶⁷

Furthermore, there is no reparative justice for sexual violence in peace times or during riots, or conflicts. Although women's bodies are targeted and sexual violence inflicted during sectarian violence – involving targeting of one community by another – there are no rules of evidence or procedures to redress targeted sexual violence do not accommodate the specific circumstances in which this sexual violence occurs. It is therefore all the more crucial that the *Communal Violence Bill* under discussion (see section on Religious Minorities) includes reparative justice, victim-witness protection and command and superior responsibility to dismantle the existing impunity for sexual violence in law.³⁶⁸ The Bill should recognise the acute impact of communal and targeted violence on women and children and introduce crimes of sexual violence in the ambit of the IPC.³⁶⁹

Violence against women (and men) in the name of 'honour' is a serious concern. Family members or community leaders ostracise and kill young couples, who chose a spouse against social, caste and community norms. Killings are frequently

Reports indicate that every 60 minutes two women are raped, and every six hours a young married woman is found beaten to death, burnt or driven to suicide.

365 Lawyers Collective Women's Rights Initiative, *Staying Alive: Fourth Monitoring and Evaluation Report 2010 on the Protection of Women from Domestic Violence Act, 2005*, page 51.

366 Frontline, *Half Measure*, T.K.Rajalakshmi, February 15, 2010, available at: <http://indialawyers.wordpress.com/2010/15/half-measure/>

367 This is a reiteration of CEDAW Concluding Comments to India, CEDAW/C/IND/CO/3, 2007, para 23.

368 This is a recommendation of CEDAW Concluding Comments to India, CEDAW/C/IND/CO/3, 2007, paras 24, 25, 26.

369 Civil society groups reject NAC Communal Violence Bill draft, lay down key features for the new Bill – Statement issued at National Consultation on CV Bill, April 21, 2012, available at: <http://www.anhadin.net/article157.html>

conducted with a collusion of the police with the family and the community³⁷⁰ – even during the course of judicial proceedings. The Gol stated before the Upper House of Parliament in August 2010 that 560 couples have been threatened for marrying into a different caste since 2005. Out of these, a total of 121 persons were murdered including 48 in Uttar Pradesh, 15 in Delhi, 41 in Haryana and 17 in other states.³⁷¹ Most cases of ‘honour’ killings are registered as murder.

Protection of the right to choice needs to be ensured uniformly across the country and changes are sought in the *Special Marriage Act*, a secular civil marriage law codified without reference to religion, to allow young people fleeing their hometown to marry easily. At present, the statutory requirement of domicile and notice period deters couples from marrying under the civil law. The domicile condition make those who pursue their right to choose their partner ineligible to register in a new town, and the mandatory public notice exposes them to risk of violence, as it alerts community leaders and family members. Moreover, dowry deaths of women continue to be widespread, despite the *Dowry Prohibition Act, 1961*. A total of 24,946 dowry deaths were reported during 2008-10, of which 8,172 cases were reported in 2008, 8,383 cases in 2009 and 8,391 in 2010.³⁷²

Sexual Harassment of Women at Workplace

The law on sexual harassment of women at the workplace remains to be enacted, despite a ruling of the Supreme Court in 1997 setting out guidelines for a law.³⁷³ The proposed bill has been widely critiqued for a penalty provision against complaints found to be false or malicious.³⁷⁴ Given the widespread nature of the problem and the silence that surrounds it, such a provision would deter complaints and be used for retribution. After considerable advocacy, the Cabinet has agreed to include female domestic workers within the ambit of the proposed law.³⁷⁵

Human Trafficking

India ranks among the worst countries in tackling human trafficking,³⁷⁶ impinging on the most disadvantaged socio-economic strata such as Scheduled Tribes, Scheduled Castes, other backward castes, ethnic minorities, tribal communities, undocumented migrant workers, stateless people or refugees. Child trafficking is endemic, with children being trafficked for a number of purposes within and outside India.³⁷⁷

370 PUJDR Report, *Courting Disaster: A report on Inter-Caste Marriage, Society and the State, 2003* (New Delhi); AALI Report, National Consultation on Women’s Right to Chose, if, when, and who to Marry: Report and Recommendations, Lucknow (2003).

371 IBNlive.com, *North Indians disapprove of honour killings: study*, August 15, 2010, available at: <http://ibnlive.in.com/news/north-indians-disapprove-of-honour-killings-study/128892-3.html>

372 National Crime Records Bureau, *Crime In India 2009 & 2010*, available at: <http://ncrb.nic.in/>

373 *Vishaka and Ors vs State of Rajasthan* AIR 1997 SC 3011.

374 *The Prohibition of Sexual Harassment of Women at Workplace Bill, 2010*, available at: http://ncw.nic.in/PDFFiles/sexualharassmentatworkplacebill2005_Revised.pdf

375 The Times of India, *Cabinet okays sexual harassment at workplace bill*, May 11, 2012, available at <http://timesofindia.indiatimes.com/india/Cabinet-okays-sexual-harassment-at-workplace-bill/articleshow/13089788.cms>

376 The Hindu, *India among worst ranked countries in tackling human trafficking*, June 16, 2010, available online at: <http://www.thehindu.com/news/article458420.ece>

377 See: HAQ: Centre for Child Rights, *Still Out of Focus, Status of India’s Children 2008*, available at: <http://www.haqrc.org/publications/status-indias-children-2008>

Despite ratifying the *UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (Trafficking Protocol), India is still to bring its law in conformity with international standards³⁷⁸ against trafficking. The *Immoral Traffic (Prevention) Act, 1956* (ITP Act) covers trafficking for prostitution alone, contrary to the Trafficking Protocol, which requires States to address trafficking into all forms of forced labour, slavery and servitude. Police led raid and rescue operations undermine the rights of victims,³⁷⁹ who may be prosecuted for soliciting or engaging in sex work in public places even if they are coerced. Offences under the ITP Act include soliciting and engaging in sex work in public places. These provisions are not directed at trafficking but are meant to safeguard public decency and morality. Almost all convictions are against sex workers, including those who may have been trafficked. The Act undermines sex workers' ability to claim protection by the law, while the absence of safeguards has intensified violence and exploitation by brokers, agents and the mafia.³⁸⁰ Relief, rehabilitation and compensation for victims are non-existent. The Gol national report for UPR II does not comment on these drawbacks of the ITP Act. Rather, it mentions its several "significant efforts on the issue of human trafficking" including the setting up of 104 local anti-trafficking units and increased numbers of convictions of people involved in human trafficking for forced labour.³⁸¹

The rescue and rehabilitation of victims have remained unfriendly, despite the provision in the Act. Due to social and economic inequality, victims often find themselves back into the hands of the same or other traffickers. The landmark judgement in the case of *Prajwala v. Union of India*³⁸² filed in the Supreme Court deals extensively on the issue of rescue and rehabilitation. The need for information, counselling, medical treatment and rehabilitation of victims is completely overlooked. The petition *Prerna v. Union of India* has questioned the existing system, the failure of implementation of enforcement agency, as well as the inadequate guidelines for rescue, relief, rehabilitation and implementation of various acts.³⁸³

The issue of trafficking has been overlooked by the judiciary as well as a result of underreporting of cases by the media. The present law allows criminals to escape with minimum punishment, while the inaction of the police in collecting evidences has rendered the cases weak. Culprits escape and the cases are treated with insensitivity by the machinery. Special courts to deal with cases of trafficking need to be established and judges who deal with the victims of assault need to have special and adequate training. There is a need for a legislation which sets out trafficking as a criminal offence and that covers trafficking for all purposes, as well as a strong need for a human rights framework to combat trafficking, support and empower those

378 See: Concluding Observations of the Human Rights Committee: India, 1997, CCPR/C/79/Add.81, para 31 & Concluding Observations of the Committee on Economic, Social and Cultural Rights: India, E/C.12/IND/CO/5, para 27 & 66.

379 Zeenews, *Sex workers' abuse during raids a concern in Pune*, April 16, 2011, available at: http://zeenews.india.com/news/maharashtra/sex-workers-abuse-during-raids-a-concern-in-pune_700338.html

380 National Network of Sex Workers and Lawyers Collective HIV/AIDS Unit, *Sex Workers Meet Law Makers*, 2011, available at: <http://www.lawyerscollective.org/files/Report%20Sex%20workers%20meet%20Law%20makers.pdf>

381 *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: India*, A/HRC/WG.6/13/IND/1, UN General Assembly, 8 March 2012, para 36.

382 Human Rights Law Network, *Anti-Trafficking PILs & Cases*, available at: <http://www.hrln.org/hrln/anti-trafficking/pils-a-cases/238-prajwala-v-union-of-india.html>

383 Ibid.

who have been trafficked. The right to confidentiality and the right to representation have to be legally guaranteed, while measures need to be taken in order to minimise additional trauma, protect witnesses and victims from intimidation, and provide quick delivery of justice to those who have suffered. The number of Special Police Officers in every state who specifically work on the offences under ITP Act needs to be adequate combined with adequate training.

Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI)

Until recently, homosexuality was criminalised by the law and was punishable with a maximum of life sentence, by Section 377 of the IPC, leading to multiple levels of stigma, discrimination, and violence, without recourse to the law.³⁸⁴ The threat of criminality routinely exposed the transgender and gay men to abuse, violence, extortion, and blackmail. Same sex desiring women experience compulsory heterosexuality, through marriage under family-community pressure, stigma and criminal charges for exercising choice, eviction, violence and report a high rate of suicide.³⁸⁵ In 2009, homosexuality was de-criminalised by the Delhi High Court,³⁸⁶ a landmark step in addressing the worst form of criminalisation and a laudable achievement in terms of affirmation of the rights to life and non-discrimination to all persons regardless of sexual orientation and gender identity. Stigma and discrimination however continue and are common in the family, in housing, employment and other areas of public sphere. Reports of persecution at the workplace, eviction, harassment and murder continue with impunity (see following case study).

The landmark High Court judgement is under appeal in the Supreme Court, challenged by conservative sections of society who seek its reversal. Despite this threat, the state abdicated its role to defend the judgement at the Supreme Court, relegating defence of human rights of the LGBTI to civil society. However, during the hearings, the Govt's stand on the Delhi High Court's judgement has been ambivalent. On 23 February, 2012, the Additional Solicitor General, representing the Govt, called homosexuality 'immoral' before the Supreme Court.³⁸⁷ Later, on 28 February, 2012, the Govt stated that it did not find any 'legal error' in the judgement of the Delhi High

384 Naz Foundation International (NFI) and Centre for Media and Alternative Communication (CMAC), *My Body is Not Mine - Stories of Violence and Tales of Hope, Voices from the Kothi community in India*, 2007; People's Union for Civil Liberties (Karnataka), *Police Violence Against Transgender Community, Bangalore*, September-December 2005 (2nd edition) and 2003 (1st edition); Human Rights Watch, *Epidemic of Abuse - Police Harassment of HIV/AIDS Outreach Workers in India*, Vol.14, No. 5 (c), July 2002; People's Union for Civil Liberties (Karnataka), *Human Rights Violations against Sexual Minorities in India*, February 2001; *Less than Gay: A citizens report on the status of homosexuality in India* ABVA, 1991 (New Delhi). See *Rights in Intimate Relationships: Towards an Inclusive and Just Framework of Women's Rights and the Family* (a resource book by Partners for Law in Development), 2010 (New Delhi) see pages 62-72. See also: Devaki Menon, coordinator of a lesbian support group, Sahayatrika (Kerala), in *India Today*, 25 December 2002

385 Partners for Law in Development, *Rights in Intimate Relationships: Towards an Inclusive and Just Framework of Women's Rights and the Family*, 2010 (New Delhi), pages 62-72. Also see: Devaki Menon, coordinator of a lesbian support group, Sahayatrika (Kerala), in *India Today*, 25 December 2002

386 *Naz Foundation India v. Government of NCT of Delhi and others*, (2009) 160 DLT 277.

387 Lawyers Collective, *News from Section 377 Arguments before the Supreme Court*, available at: <http://www.lawyerscollective.org/news/141-news-from-section-377-arguments-before-the-supreme-court.html>

Court decriminalising homosexuality and 'accepts the correctness of the same'.³⁸⁸ The Supreme Court noted that the Gol was making a "mockery of the system and wasting the court's time" by adopting contradictory stands on the issue.³⁸⁹

CASE STUDY

Professor Siras: A Case of Violation of Privacy, Housing, Employment, Defamation and Uninvestigated Death³⁹⁰

On 9 February 2010, newspapers widely reported the story of Dr. Shrinivas Ramchandra Siras, a 64 year old Reader & Chairman at the Department of Modern Indian Languages in Aligarh Muslim University (AMU) being filmed having consensual sex with another adult male within the confines of his residence. The professor had taught for 22 years at AMU and was on the verge of his retirement.

The day before, a friend (a legal adult) with whom he was having an intimate relationship went to his residence at 6.30 pm. After the arrival of the friend, Dr. Siras sat in the drawing room and chatted for some time and then they went into the bedroom. Without the awareness and permission of Dr. Siras, three people entered his flat with cameras. While intruders permitted the professor's friend to get dressed and leave, they refused to allow him to even wear his clothes. The intruders threatened him, forced him to remain undressed and coerced him into standing in various positions in order to take pictures. They told him that they were from the press and that they were going to publish the pictures. Just as Dr. Siras was pleading with the three persons not to publish the pictures some of the professors from AMU entered his house. Dr. Siras had never called for any help or invited any of the professors to his house that day. The person claiming to be from the press asked Prof. Siras to admit in front of the Proctor that he was having homosexual sex and then they would delete the recording. Dr. Siras apologised and the Proctor told him not to worry and that nothing would happen on the matter.

The next day, the incident was reported in many newspapers and Dr. Siras was shocked when that very day he was served with a suspension notice by AMU and was ordered to vacate his official residence allotted by the University. On 24 February, the University served Dr. Siras with a charge-sheet with the formal charge against him being that he "*has committed act of misconduct in as much as he indulged himself into immoral sexual activity and in contravention of basic moral ethics while residing in Quarter No. 21-C, Medical College, AMU, Aligarh thereby undermined the pious image of the teacher community and as a whole tarnished the image of the University*". Dr. Islam and Dr. Khan, AMU faculty members and RTI activists, were of the opinion that there was a strong probability of the TV crew being in cahoots with the University administration; as no TV crew would have normally entered the premises of a faculty member without the permission of the University authorities.

The AMU administration committed several violations in this case: breach of Dr. Siras privacy, which is a blatant violation of a constitutional right guaranteed under Article 21 (right to liberty); breach of the Delhi High Court landmark decision that decriminalised homosexuality³⁹¹ among consenting adults;³⁹² violation of his right to employment and housing; and consistent defamation. In March 2010, Dr. Siras went repeatedly to the police station to file a First Information Report (FIR) for the various offences perpetrated against him, including criminal intimidation, assault, trespass and wrongful confinement. However, after repeated efforts, the police have refused to file his FIR, thereby, failing to perform their duty of filing an FIR upon the receipt of a complaint which discloses the commission of a cognizable offence.

388 Lawyers Collective, *Anti-gay law is offshoot of British Colonialism: Centre to Supreme Court*, available at: <http://www.lawyerscollective.org/news/149-anti-gay-law-is-offshoot-of-british-colonialism-centre-to-supreme-court.html>

389 Lawyers Collective, *News from Section 377 Arguments before the Supreme Court*, available at: <http://www.lawyerscollective.org/news/141-news-from-section-377-arguments-before-the-supreme-court.html>

390 *Policing Morality at AMU: An Independent Fact Finding Report*, March, 2010.

391 Homosexuality was a criminal offence under Section 377 of the Indian Penal Code.

392 *Naz Foundation v. Government of NCT of Delhi and Others*, WP(C) No.7455/2001, July 2, 2009.

Despite the trauma and harassment that Prof. Siras was subjected to, he filed a case at the Allahabad High Court and challenged the actions of AMU administration as violations of his civil liberties.³⁹³ The Allahabad High Court stayed his suspension and his unlawful removal from his campus residence on 1 April, 2010.³⁹⁴ Despite this order, the AMU administration failed to immediately issue an office memo revoking the suspension of Prof. Siras. The professor was found dead at his Aligarh residence on 7 April, 2010. The post mortem states that the cause of his death was ‘unnatural’. The culpability of the AMU authorities in this incident has not been investigated and no measures have been taken to grant justice. The blatant invasions of Prof. Siras’ privacy, the University’s connivance in the so-called ‘media sting operation’, trespassing, criminal intimidation and subsequent authoritarian action of suspending and evicting him from his AMU residence, raised many concerns about the collective vulnerability of the LGBTI community in India to violations.

Children

Unable to represent themselves, children fall lowest in what could be referred to as a ‘hierarchy of human rights’. However, over the last two decades there has been some progress in the recognition of children as right-holders, particularly with the establishment of a full-fledged *Ministry for Women and Child Development* in 2006. Children’s rights are addressed through 57 laws and 60 legal provisions in the IPC, the CrPC and the *Indian Evidence Act*. There are nine policy documents impacting their lives including the *National Policy for Children, 1974* and the *National Plan of Action (NPAC), 2005*. In addition, many goals and targets were set out under Five Year Plans, 73 central government’s budgeted programmes and schemes operational through 9 Ministries, a National Commission for Protection of Child Rights and 12 State Commissions.

Yet, there are areas of concern requiring immediate attention, especially the lack of a uniform definition of the ‘child’ in policy and legal documents. The *National Policy for Children* is as outdated as 1974, while the NPAC needs to be revised too, as most of its goals were set out to be met by 2010 but with no significant progress reported as yet. The NPAC needs to be supported by state plans; however, only 17 states³⁹⁵ seem to have had some plans of action in place for children, with most of these plans being outdated.

Child Marriage

The earlier child marriage law was replaced with the *Prohibition of Child Marriages Act, 2006*. However, the inadequacy of this Act lies in the fact that if the marriage is not prevented, it can remain legal till the boy (at the age of 21) or the girl (at the age of 18) seeks an annulment. This is most unlikely to happen in a country like India. Implementation of the new law is also very inadequate. In 2009, the National Crime

393 See: Writ Petition No. 17549 of 2010, *Dr. Shrinivas Ramchandra Siras v. Aligarh Muslim University*, Lawyers Collective, available at: <http://www.lawyerscollective.org/files/Siras%20Final%20Petition.pdf>

394 See: Order dated 1.4.2010 in Writ Petition No. 17549 of 2010, *Dr. Shrinivas Ramchandra Siras v. Aligarh Muslim University* Lawyers Collective website, <http://www.lawyerscollective.org/files/Siras%27%20Order.pdf>

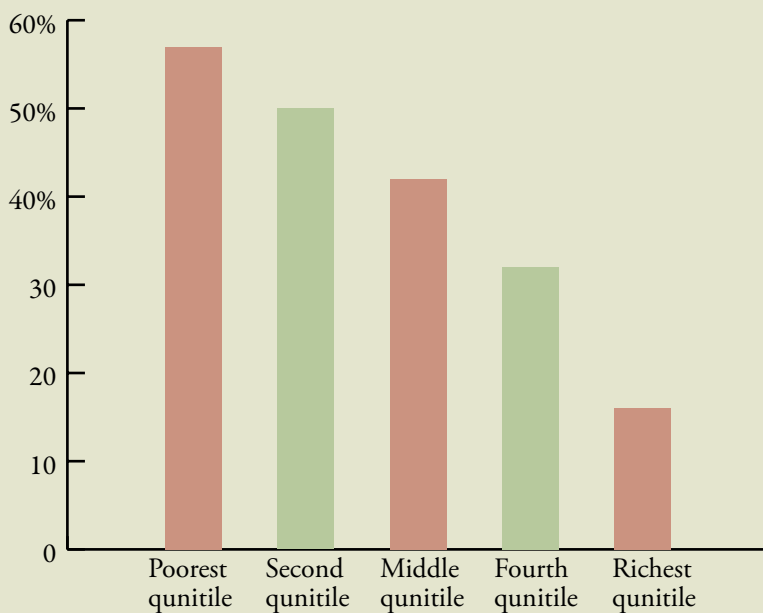
395 These states include Assam, Arunachal Pradesh, Bihar, Delhi, Haryana, Himachal Pradesh, Karnataka, Kerala, Maharashtra, Manipur, Meghalaya, Mizoram, Odisha, Punjab, Rajasthan, Tamil Nadu and West Bengal.

Records Bureau recorded only three cases of violation of the law, while in 2010 the information on child marriage cases was diluted under the broad heading of 'other crimes'. At the same time, in some areas where child marriages are celebrated on a large-scale, there has been a significant decrease in child marriages.

The National Family Health Survey-3 (2004-05) shows 27.1% of children aged 15-19 years as married. India set itself a goal of achieving 100% registration of births, deaths and marriages in the year 2000 and 2005, with an additional goal of eliminating child marriages by 2010. The goals are yet to be achieved as the law does not have a deterrent effect. Registration of marriages is not compulsory in all states while reports suggest that even where it is, child marriages get registered despite the existence of the law prohibiting it.

Girls from poorer households are more likely to be married as children than girls from richer households

Percentage of women 20-24 years old who were married or in union before age 18, by household wealth quintile



Note: Estimates by household wealth quintile are based on 75 countries representing 5.1% of the world's population.

Source: MICS, DHS and other national surveys, 1995-2007

Juvenile Justice

The *Juvenile Justice (Care and Protection) Act, 2000* (JJ Act), which was amended in 2006, is the only law in the world based on a preventative approach to juvenile justice. It identifies two sets of children: those 'in need of care and protection' and those 'in conflict with the law'. However, poor implementation of the law, lack of support structures,³⁹⁶ low conviction rates and inadequate resources lead to

³⁹⁶ For example, the Juvenile Justice Act requires setting up Juvenile Justice Boards and Child Welfare Committees in all districts.

derailment of justice. In furtherance of the principles of diversion, restorative justice and best interests of the child, the *Juvenile Justice (Care and Protection of Children) Rules, 2007* were framed by the Centre and states were required to frame their own rules in consonance with the central ruling. The exact status of formulation of Juvenile Justice state rules as per the *Central Model Rules, 2007* is not available, although information gathered from various sources suggests that the states of Delhi, Gujarat, Karnataka, Madhya Pradesh, Maharashtra, Odisha, Rajasthan and West Bengal have notified new rules. Jharkhand, Tamil Nadu and Uttar Pradesh, have adopted the central rules of 2007, Haryana approved new rules on 22 August 2009 without notifying them, while in Andhra Pradesh draft rules were framed in 2009 but are yet to be notified. Further, despite the proactive orders of the Supreme Court³⁹⁷ requiring Child Welfare Committees (CWCs)³⁹⁸ and Juvenile Justice Boards (JJBs)³⁹⁹ to be set up in every district under the JJ Act, only 14 states and 4 Union Territories are reported to have established such bodies.

Children's ages are often falsified and they are tried in adult courts or sent to adult prisons, and child victims find themselves further victimised in non-child sensitive judicial processes. While children's courts were established by the *Protection of Child Rights Act, 2005*, Delhi was the first state to open such facilities for speedy trials in 2011. According to the response received from Jail No.7, Tihar Jail, New Delhi, 113 children were transferred from the said jail to respective observation homes between October 2010 and August 2011. J&K has only one juvenile home for boys at Ranbir Singh (R.S.) Pura in Jammu. Juvenile girls are sent to police lock-ups or prisons in the absence of a single juvenile home for girls in J&K. Juveniles in Kashmir are detained with adults in prisons and tried as adults due to non-implementation of the *J&K Juvenile Justice Act, 1997*.⁴⁰⁰

The legal requirement of establishment of *Special Juvenile Police Units* (SJPU) in every district and designation of at least one police officer in every police station as *Juvenile Welfare Officers* (JWO) is also not fulfilled. There are no JWOs appointed, as the police department employs the entire force for all kind of duties, varying from security for VIP movement to general law and order. Besides, for example, in Chhattisgarh, the government continues to recruit children of the police personnel killed on duty as '*balarakshaks*' (Child Guards) and these children cannot attend schools for at least three days a week.⁴⁰¹ JWOs also handle other cases in addition to those registered under the JJ Act, therefore, it is difficult to be present in the JJB/CWC with the concerned child. JWOs and SJPU members need appropriate training and sensitisation to handle children's cases. Although the law provides for two social workers in the SJPU, they are yet to be appointed in many places.

397 *Sampurna Behura v. Union of India and Others* [WP (Civil) No. 473/2005] and *Bachpan Bachao Andolan v. Union of India* [WP (Civil) No. 51/2006]

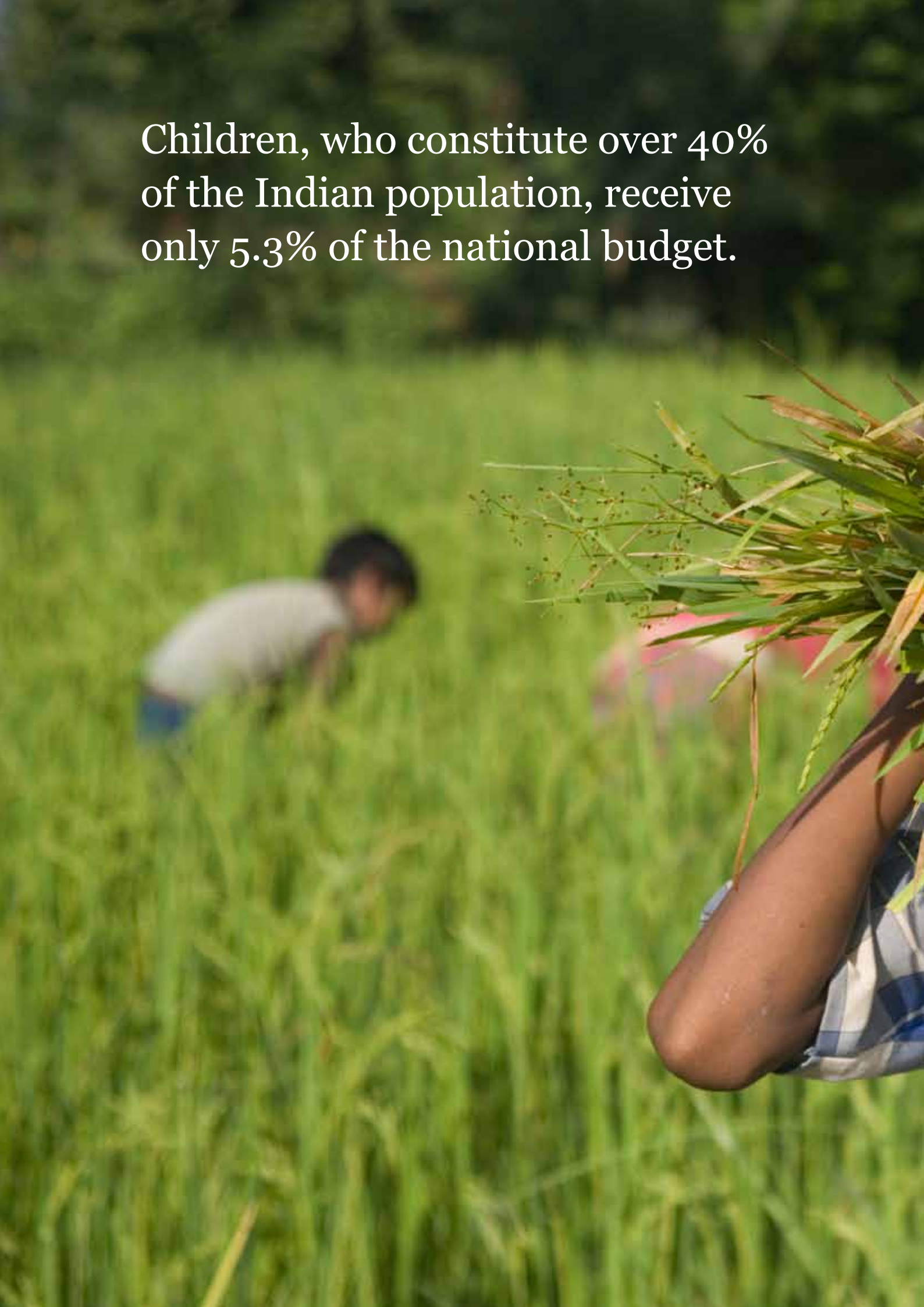
398 CWCs are meant to receive children in need of care and protection and to make appropriate orders for their rehabilitation, restoration and reintegration using their powers as a bench of magistrates.

399 Juvenile Justice Boards (JJB) have to deal with all crimes allegedly committed by children, children's right to bail, speedy inquiry and suitable rehabilitation.

400 Asian Centre for Human Rights, *Juveniles of J&K: Unequal before the Law & Denied justice in Custody*, November 16, 2011, available at: <http://www.achrweb.org/reports/india/JJ-J&K-2011.pdf>

401 The Sentinel, *Chhattisgarh's 'child cops' skip school for police duty*, April 6, 2011, available at: <http://www.sentinel-lassam.com/nationalmain.php?sec=2&subsec=3&ppr=1&dtP=2011-04-06>

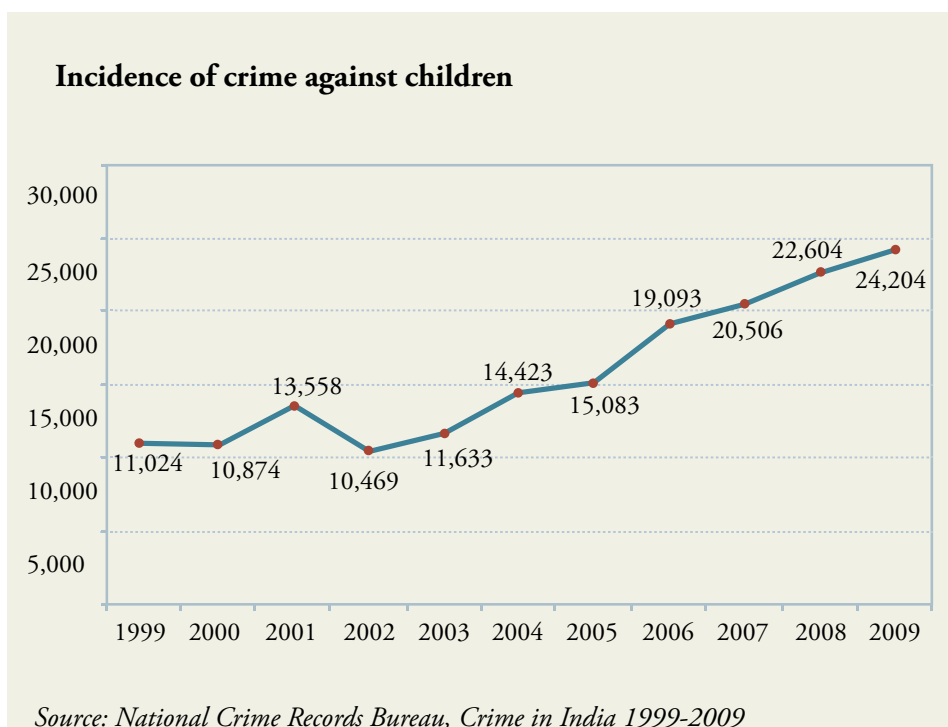
Children, who constitute over 40% of the Indian population, receive only 5.3% of the national budget.





Crimes against Children

Crimes against children have shown a 120% increase between 1999 and 2009 and 60.5% increase in the last five years.⁴⁰² The ratification of the *UN Convention against Transnational Organised Crime* and its two protocols, especially the *UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (also referred to as the Palermo Protocol), is a positive step. However, India is yet to formulate a comprehensive law on all forms and purposes of child trafficking along the lines defined by the *Palermo Protocol*. As of now, the only law that deals with trafficking for sexual exploitation, in particular prostitution, is the *Immoral Traffic (Prevention) Act, 1956* (ITP Act). However, amendments to this Act have been pending for some years now.



Crimes against Children					
SNo.	Crime Head	Year			% Variation in 2009 over 2007
		2007	2008	2009	
1.	Murder	1,377	1,296	1,488	8.06% ↗
2.	Infanticide	134	140	63	52.9% ↘
3.	Rape	5,045	5,446	5,368	6.4% ↗
4.	Kidnapping and abduction	6,377	7,650	8,945	40.3% ↗
5.	Foeticide	96	73	123	28.1% ↗

Source: National Crime Records Bureau, Crime in India, 2009

⁴⁰² National Crime Records Bureau, *Crime in India 1999-2009*.

Child Sexual Abuse⁴⁰³

Various studies in India have indicated high prevalence of child sexual abuse. 53.22% of children have reported some form of sexual abuse, amongst which 52.94% were boys and 47.06% were girls. Abuse started at the age of five years, with the incidence increasing with age, peaking at 12 to 15 years.⁴⁰⁴

Sexual abuse is reported under rape and incest by the NCRB but only in the context of girls. The NCRB does not maintain data on sexual abuse of boys, as it is not covered under the IPC, creating serious gaps in data. Sexual abuse of boys is registered under Section 377 of the IPC, which criminalises homosexuality (see section on LGBTI).

A study conducted in 2006 showed that almost 48% of boys and 39% of girls among the respondents had reported sexual abuse,⁴⁰⁵ thwarting the belief that mainly girls are sexually abused. Street boys are not the only victims of sexual abuse. In the past couple of years there have been several reports of incidences of boys being abused under state care, in children's homes. For example, in May 2007 five boys, younger than 10 years old, were allegedly sodomised in a children's home in Delhi.⁴⁰⁶ Sexual abuse of boys and girls in coastal areas and tourist destinations is a serious issue as it is linked to the lucrative tourism industry.⁴⁰⁷ The challenge is equally great in other cases of child sexual abuse as the law is weak, enforcement is poor and there is lack of awareness.

Sexual exploitation in the name of religion is also rampant in parts of the country. The *Devadasi* system⁴⁰⁸ – wherein a girl, usually before reaching the age of puberty, is ceremoniously dedicated or married to a deity or to a temple – remains common in the poorest towns and villages of provinces of the states like Karnataka and Andhra Pradesh.⁴⁰⁹ The *Karnataka Devadasis (Prohibition of Dedication) Act, 1982* and *Rules, 1987* were meant to abolish the system but lack of awareness among the victims and the enforcement authorities impede its implementation. Moreover, rehabilitation programmes are *ad hoc* and inadequate as they do not provide adequate means of livelihood and skill development for victim-survivors.⁴¹⁰ The *Devadasi* system is particularly prevalent in 10 districts of northern Karnataka and 14 districts in Andhra Pradesh. The National Legal Service Authority (NALSA) stated that 250,000 girls had been dedicated as *Devadasis* to temples on the Maharashtra-Karnataka border,⁴¹¹ including 16,624 girls from Andhra Pradesh, 22,941 from Karnataka and 2,479 from

403 Source (summary): HAQ: Centre for Child Rights and Terre des Homes, *20 years of CRC – A Balance Sheet. Volume II*.

404 Ministry of Women and Child Development, Government of India, *Study on child abuse: India, 2007*.

405 TULIR, *Doesn't every child count? Prevalence and dynamics of child sexual abuse disclosed among schoolgoing children in Chennai*, February 2006, available at: <http://www.tulir.org/images/pdf/Research%20Report1.pdf>

406 Thaindian News, *Five minor boys sodomised in children's home*, May 4, 2007, available at: http://www.thaindian.com/newsportal/uncategorized/minor-boy-sodomised-murdered_100566941.html

407 Nishita Desai, *See the Evil: A study on tourism related paedophilia*, VAK, Goa 2001, 2004.

408 Literally meaning "female servant of god", *Devadasis* usually belong to the Dalit community. Once dedicated, the girl is unable to marry, forced to become a prostitute for upper-caste community members, and eventually auctioned into an urban brothel. – Human Rights Watch, available at: http://www.hrw.org/reports/1999/india/India994-09.htm#P1695_354939

409 The Hindu, *Project Combat, launched to eradicate 'Devdasi system'*, January 30, 2006, available at: <http://www.hindu.com/2006/01/30/stories/2006013020130300.htm>

410 Ibid.

411 Ibid.

Maharashtra. The remoteness of many of the villages, and the continuing rise in demand from organised traffickers for young girls, is thwarting efforts to combat the system.⁴¹²

India is presently in the process of adopting a *Protection of Children from Sexual Offences Bill, 2011* that aims to prevent and protect children from sexual assault, sexual harassment and pornography. In its present form, the Bill has many positive features: it is gender-neutral; it treats sexual offences committed by persons in authority or positions of trust as aggravated sexual offences; it considers the physical/mental disability and the long-term after-effects of the injury inflicted; it provides special provisions for preventing pornographic abuse or even possession of such material; and it also places the media, studio and photographic facilities under obligation to report such matters. While there is general appreciation for the new Bill, there are certain concerns regarding its enforceability. The Bill raises the age of consent to 18 years, which may lead to criminal action even in cases of consensual activity amongst young persons. It penalizes false reporting but limits it to malicious intent, which may prove to be deterrent in a country where sexual abuse is rarely reported. The Bill does not lay down the procedures for appeal, review and revision and is not backed up with a Financial Memorandum that could ensure adequate investment in the implementation of the law. The Bill was tabled in Parliament for the second time in April 2012 after being amended by a Parliamentary Standing Committee.⁴¹³

Trafficking of Children

Trafficking of children, boys and girls, within and across the country continues in many forms, and for many purposes, such as labour, begging, sexual exploitation, pornography, child marriage, adoption and organ trade. Ostensibly legal means such as 'marriage' or 'adoption' are used for buying and selling of children. Trafficking of girls alone has shown a 31% increase between 1999 and 2009,⁴¹⁴ while trafficking of boys for sexual purposes is on the rise as well.⁴¹⁵ Many girls from Nepal and Bangladesh are trafficked into India for sexual exploitation.⁴¹⁶ Children from Nepal are also trafficked to work in embroidery factories, carpet factories, brick kilns and in quarries.⁴¹⁷ There are no exact figures for the number of children trafficked each year in India. The number of trafficked persons is difficult to determine as bribery and corruption that surround the practice render an estimate of its magnitude virtually impossible.⁴¹⁸

412 The Guardian, *Why India's 'devadasi' girls face a wretched life in the name of religion*, January 22, 2011, available at: www.guardian.co.uk/world/2011/jan/22/india-sex-exploitation-girls-devadasi. See also: The Guardian, *Devadasis are a cursed community*, January 21, 2011, available at: www.guardian.co.uk/lifeandstyle/2011/jan/21/devadasi-india-sex-work-religion

413 The Hindu, *Even if consensual, sexual contact with girl under 18 will be criminal offence*, April 27, 2012, available at: www.thehindu.com/news/national/article3357650.ece

414 Ibid.

415 *Still out of Focus, Status of Children 2008*, HAQ: Centre for Child Rights, New Delhi page 217

416 *Stepping up Child Protection*, Save The Children, page 37

417 Ibid

418 SANLAAP, Concept note prepared for South Asia Consultation on care and protection of survivors of commercial sexual exploitation and trafficking, Kolkata, May 2008.

The traditional belief that poverty is the only cause of trafficking is now being challenged by other factors, such as displacement, conflict and gender discrimination which, coupled with economic insecurity, allow the practice to be continued. Social exclusion based on gender can be seen as a major contributing factor to the risks of being trafficked.⁴¹⁹ Within India, girls are trafficked from remote and rural areas to big cities and towns to be sold to brothels for prostitution, while boys are trafficked mostly for labour.

Some of the initiatives that have been taken at the central level to address trafficking are the *Protocol for Pre-Rescue, Rescue and Post Rescue Operations of Child Victims of Trafficking for Commercial Sexual Exploitation, 2005* of the Ministry of Women and Child Development and the Ministry of Human Resources Development as well as the *Protocol on Prevention Rescue, Repatriation and Rehabilitation of Trafficked and Migrant Child Labour, 2008* of the Ministry of Labour and Employment. At the state level, the government of Tamil Nadu through a series of government orders set up various committees and boards at state, district and village level for the prevention of trafficking and combating commercial sexual exploitation of women and children.⁴²⁰

The ITP Act covers sexual exploitation of both girls and boys for commercial purposes and provides enhanced penalties for offences involving children and minors. It prescribes stringent punishment against perpetrators inducting children (below 16 years) and minors (16 to 18 years) in the offences of procuring, inducing or taking such a person for the sake of prostitution. Certain amendments have been proposed to this Act, including raising the age of a child to 18 years, defining 'trafficking', deletion of provisions which criminalize and re-victimize the victims, enhanced punishment for traffickers, pimps, etc., punishment for persons who visit brothels for commercial sexual exploitation, provision for 'in camera' trial to safeguard privacy of victims, and setting up of nodal authorities at the centre and states.⁴²¹ Nevertheless, the law on trafficking remains inadequate, confining itself only to trafficking for prostitution. This is reflected in the recording of the problem. For example, the chapter on human trafficking in NCRB's reports fail to take into account offences under certain provisions in the IPC such as kidnapping, unlawful compulsory labour and habitual dealing in slaves, which if enumerated by age and gender would add to the overall human trafficking figures.

Children's Disappearances

Among other persisting violations of children's rights are disappearances. The Gol has stated that in any given year, an average of 44,000 children are reported missing, out of which 11,000 remain untraced.⁴²² Reported reasons include trafficking, abduction, kidnapping for beggary, child prostitution, bonded or forced

419 Ibid.

420 G.O. no. 73 dated 9th May 2003, G.O. no. 26 dated 16th February 2004

421 Ministry of Women and Child Development, Government of India (2008). *India Country Report to Prevent and Combat Trafficking and Commercial Sexual Exploitation of Children and Women*. World Congress III against Sexual Exploitation of Children and Adolescents (Rio de Janeiro, Brazil, November 2008).

422 Third and Fourth Combined Periodic Report on the Convention on the Rights of the Child, Ministry of Women and Child Development, Government of India, 2011, available at: http://wcd.nic.in/crc3n4/crc3n4_1r.pdf

labour in small-scale manufacturing, services and domestic labour. Sale and slavery camouflaged as marriages are increasingly reported. Child sexual abuse and exploitation is rampant with very few cases being reported. There has been an 70.25% increase in cases of rape of children in the country between 1999-2009.⁴²³ A bill on *Prevention of Sexual Offences against Children* has been drafted by the government that is currently pending finalisation.

CASE STUDY

Children go missing: Can it be linked to trafficking?

The *Times of India*, 4 June 2008 carried an extensive report on children going missing in and around the Delhi-Uttar Pradesh border. The report hints at possibilities of trafficking of children for organs or begging with 46 children going missing from Ghaziabad in Uttar Pradesh between April and May 2008, within only a month. An RTI application by Bachpan Bachao Andolan revealed that 60,000 children go missing in the country every year.

One of the expected outcomes spelt out by the Ministry in its Working Group Report submitted to the Planning Commission of India for the XIth Five Year Plan (2007-2012) is – “*Child Tracking system to be in place by the mid-term of the Eleventh Plan for missing children, child labour, children in institutions and alternate care systems and crimes against children to inform planning of services and prevention at district and state levels*”.

Source: HAQ: Centre for Child Rights

Child Labour

India continues to have the highest number of child labourers in the world. The Eleventh Five Year Plan (2007-12) has acknowledged that there is ample evidence to suggest that more children are entering the labour force and are being exploited by their employers. Moreover, official data on child labour does not include number of children working in family businesses or in agriculture in rural areas. The minimum age of employment is yet to be fixed and the *International Labour Organisation (ILO) Convention 138* is yet to be signed. The current *Child Labour (Prohibition & Regulation) Act, 1986* (CLPR Act) makes a distinction between hazardous and non-hazardous employment, banning employment of children under 14 years of age, only in hazardous sectors. The Act, therefore, directly contradicts the Right to Education Act in as much as, it allows children to work in non-hazardous occupations and processes and, thereby, becomes a vehicle for excluding children from realising their right to education (see page 40). Majority of child labourers are Dalits with many surviving on less than 1 USD a day. Moreover, the listing of occupations as ‘hazardous’ and ‘non-hazardous’ leaves many unsafe forms of labour sheltered behind the assumption that they are ‘safe’.

Additionally, as it is, the implementation of the Act is very poor. Based on information available from various central and state government websites, even after 25 years since its enactment, only 13 out of 35 states and Union Territories (UTs) have framed the state rules for implementation of the said law. These include Bihar, Delhi, Goa,

⁴²³ National Crime Records Bureau, *Crime in India 1999-2009*.

Gujarat, Haryana, Karnataka, Madhya Pradesh, Odisha, Punjab, Rajasthan, Tamil Nadu, and West Bengal, with rules framed between 1988 and 1997. In recent times, Meghalaya is the only state reported to have drafted the state rules, but is yet to notify them.

In response to UPR I Recommendation 9 on the need for India to review its reservation to Article 32 of the *Convention on the Rights of the Child*, the Gol admitted the undesirability of child labour but claimed it was unrealistic to entirely ban it. In its third and fourth combined periodic reports to the Child Rights Committee, Gol has reiterated its position by stating that the “*time is not ripe*” to withdraw the declaration to the Article, given the socio-economic conditions of India. India’s 2012 UPR report speaks of sequential and progressive eradication, but this is not borne out by the law, or by enforcement.

Registration of Births

According to the *Registration of Births and Deaths Act, 1969*, it is mandatory for births to be reported and registered, yet nearly 9 million newborn children remain unregistered in the country every year.⁴²⁴ Disaggregated data by sex of children is also not currently available. The Gol claims that 69% of births are being registered, however government’s own surveys put the percentage at 41%, with only 27% of households having been able to produce a birth certificate.⁴²⁵ The low outreach of birth registration/civil registration services, low awareness about birth registration as well as the lack of resources invested, implies that crores of children are denied birth certificates, which is a protection tool for children. Given the various age-related entitlements in the country, the birth certificate is an important document to protect children against various child rights violations linked to age and identity. Proof of age is essential to ensure that children can access their rights to education and are prevented from entering into child marriage or child labour as per the different laws passed in the country. Marginalised groups in both rural and urban settings are still denied their right to identity provided by registration and certification of birth.

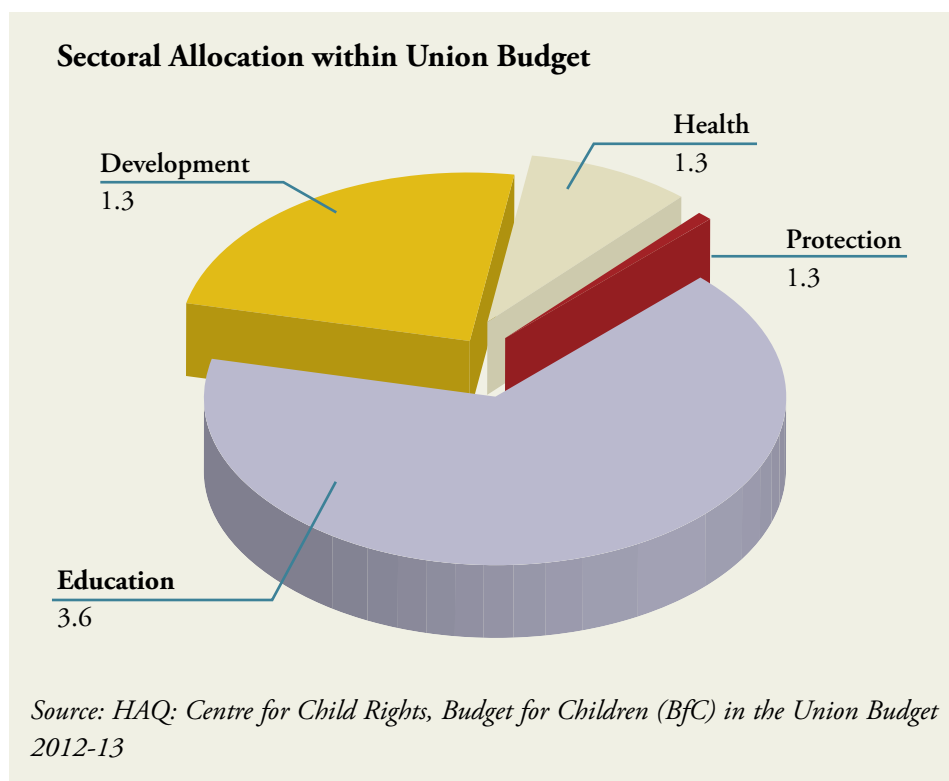
Budgetary Allocation

Since 2008-09, a separate budget statement on children has become part of the *Finance Bill* presented in and passed by the Parliament every year. However, the analysis conducted by HAQ: Centre for Child Rights’ on the Budget for Children shows that in the Central Government’s budget, the share of budget allocations for children, has increased marginally from 5.03% to 5.33% between 2011-12 and 2012-13. The share of expenditure on children has decreased from 4.28% to 4.11% between 2007-08 and 2009-10, reflecting under-utilisation of the meagre funds allocated for children’s rights. Child protection, indeed, received the lowest share

⁴²⁴ The Week, *India’s Invisible Children*, May 17, 2011.

⁴²⁵ Ministry of Women and Child Development, Government of India, *Third and Fourth Combined Periodic Report on the Convention on the Rights of the Child, 2011*, available at: http://wcd.nic.in/crc3n4/crc3n4_1r.pdf

of only 0.04% in 2012-13.⁴²⁶ A significant proportion of the resources are being raised for education through a cess imposed on public services. The 1966 Kothari Commission recommendation of investment of 6% of GDP on primary education remains unmet. In fact, public spending on overall education was 3.23% of GDP in 2009-10.⁴²⁷



Institutions for Protection of Child Rights

In 2005, the *Commissions for Protection of Child Rights Act, 2005* was enacted to set up the National Commission for Protection of Child Rights (NCPCR) and the State Commissions for Protection of Child Rights (SCPCR). The first NCPCR was set up in March 2007 to protect, promote and defend child rights in the country. Subsequently, state commissions have been constituted in 12 out of the 35 states and Union Territories,⁴²⁸ namely Assam, Bihar, Chhattisgarh, Delhi, Goa, Karnataka, Madhya Pradesh, Maharashtra, Odisha, Punjab, Rajasthan and Sikkim. The Act and the rules that govern the setting up of the National and State Commissions for Protection of Child Rights do not lay down the rules for selection of members to these bodies, while in 9 out of 12 states where state commissions exist, the commissions were established without formulation of rules meant to govern both the establishment and the functioning of these bodies. Only three states framed the requisite rules prior to setting up of the commissions (Chhattisgarh, Delhi and Odisha). Both the NCPCR and the state commissions lack in infrastructure, staff and resources, and have come into question on the issue of lack of transparency in the selection of the members of these bodies. In states like Madhya Pradesh

⁴²⁶ HAQ: Centre for Child Rights, *Mr. Finance Minister, what have you got for me this year?*, available at: http://www.haqcrc.org/sites/default/files/BfC%202012-13_5.pdf

⁴²⁷ Centre for Budget and Governance Accountability, *Union Budget 2010-11: Which Way Now? Response to the Union Budget*, Serial No. C 1, Education.

⁴²⁸ National Commission for Protection of Child Rights, available at: <http://www.ncpcr.gov.in/scpcr.htm>.

and Chhattisgarh, the financial powers vest with the secretary-in-charge of the concerned government department, thus undermining the financial independence of these bodies. Salaries offered to the members of these commissions are not in line with the ranks they hold. In Chhattisgarh and Madhya Pradesh, the rules fail to specify the salary and allowances of the Chairperson and members. In Delhi, Goa, Karnataka, Maharashtra, Odisha, Rajasthan and Sikkim, there is no parity in remuneration, whereas Punjab and Assam are yet to frame their state rules. Bihar is the only state where the rules provide for the Chairperson and members to receive a salary equivalent to that of the Chief Secretary and Secretary of the State Government respectively.

Scheduled Castes and Scheduled Tribes

Scheduled Castes

Dalits – officially known as ‘Scheduled Castes’ (SCs) – constitute 16.23% of India’s population. They have historically occupied the lowest status in the Indian society. A central feature of caste discrimination is the concept of ‘untouchability’ based on the notion that certain caste groups are considered ‘impure’ and ‘polluting’ to other caste groups, leading to social ostracism, economic exploitation and denial of human dignity. Article 17 of the Constitution outlaws the practice of ‘untouchability’. However, despite legal and constitutional provisions as well as affirmative action schemes, SCs continue to face many forms of untouchability practices as well as social, economic and institutional deprivations.

The Planning Commission highlighted the fact that nowhere else in the world *“has any particular section [of society] been devoid of basic human rights, dignity of labour and social equality on the basis of classification that finds its root in religious writings.”*⁴²⁹ The Commission added: *“Since the caste system attains its sanctity in religious writings, emancipation from the rigid classification has been difficult to achieve. (...) The consequences of these traditional restrictions in the past are to be seen, even today.”*⁴³⁰

Discrimination against SCs

Dalits face different forms of discrimination in rural and in urban areas. In rural areas, some of the most common practices include: denial of entry into non-Dalit houses, prohibition against food sharing, denial of entry into places of worship, denial of access to water facilities and denial of barber services (see details in the following table). Dalits are also disenfranchised, beaten, abused and even sometimes killed

⁴²⁹ Planning Commission, *Schedules Caste Sub Plan – Guidelines for Implementation*, New Delhi 2006, available at: planningcommission.nic.in/sectors/sj/SCSP_TSP%20Guidelines.pdf

⁴³⁰ Ibid

for voting or contesting elections.⁴³¹ Even in schools, Dalit children are stigmatised with instances of children being asked to clean toilets and to eat separately (for more details about Dalit children in schools, see page 42). In urban areas, Dalits face persistent forms of discrimination such as denial of: health services, safe drinking water, education and adequate housing. There is still reluctance to rent out houses to Dalits merely because of their identity, even if they are economically prosperous and well educated. Dalits are known to be paid less, ordered to do the most menial work, and rarely promoted, except in the government jobs reserved for them.

Overview of the Forms/Sites of Untouchability Practices in Rural India, by Degree of Prevalence in a Study done in 4000 Villages

<p>More than 50% of villages</p> <ul style="list-style-type: none"> • Denied entry into non-Dalit houses • Prohibitions against food sharing • Denied entry into places of worship • Ill-treatment of women by other women 	<p>45-50% of villages</p> <ul style="list-style-type: none"> • Denied cremation and burial grounds • Denied access to water facilities • Ban on marriage processions • Not allowed to sell milk to cooperatives • Denied barber services • Denied laundry services • Ill-treatment of women by non-SC men
<p>30-40% of villages</p> <ul style="list-style-type: none"> • Schools-separate eating • Payment of wages: no contract • Denied entry in to village shops • Denied work as agricultural labour • Cannot sell things in local markets • Denied visits by health workers • Separate seating in hotels • Separate utensils in hotels • Discriminatory treatment in police stations 	<p>25-30% of villages</p> <ul style="list-style-type: none"> • Separate seating in <i>Panchayats</i> • Separate seating in schools • Not employed in house building • Denied entry into police stations • Denied entry in to PDS shops • Forced to stand before upper-caste men
<p>20-25% of villages</p> <ul style="list-style-type: none"> • Paid lower wage rates for same work • Ban on festival processions on roads • Segregated seating in schools • Denied entry into private health clinics • Separate drinking water in the schools 	<p>15-20% of villages</p> <ul style="list-style-type: none"> • Cannot wear new/bright cloths • Denied access to public roads/passage • Denied entry in to Primary Health Centres • Discriminatory relationship by non-SC teachers towards SC students • Discriminatory relationship by non-SC teachers towards SC teachers.
<p>10-15% of villages</p> <ul style="list-style-type: none"> • Denied entry in to Panchayat offices • Schools: SC teacher and non-SC student • Separate lines at polling booth • Discriminatory treatment in Primary Health Centres 	<p>Less than 10% of villages</p> <ul style="list-style-type: none"> • Denied access/entry to public transport • Cannot use cycles on public roads • Denied entry/seating in cinema halls • Compulsion to seek blessing in marriages

Source: Ghanshyam Shah, Harsh Mander, Sukhadeo Thorat, Satish Deshpande and Amita Baviskar, *Untouchability in Rural India: A survey conducted in 565 Villages of 11 states*, Sage Publications, 2006.

431 UNHCR, Refworld, *Broken People: Caste Violence Against India's "Untouchables"*, available at: <http://www.unhcr.org/refworld/docid/3ae6a83f0.html>

The following cases of discrimination against known public figures illustrate the gravity of the problem. In November 2011, a Justice of the Madras High Court stated that he had been humiliated by fellow judges due to his caste since 2001.⁴³² In June 2011, the Chairperson of the National Commission for Scheduled Castes – himself a Dalit – was denied entry into a Hindu Temple in Puri, Odisha.⁴³³ In July 2011, a Dalit Member of the Legislative Assembly in Odisha, was allegedly not allowed to eat food along with his colleagues at an official meeting.⁴³⁴

Government policy of reservations in services broadly envisages representation of Dalits in public services in proportion to their population. However, many of the sectors, which were traditional domains of the government, are now being taken over by the private sector, where there are no reservations. In practice, more than 75% of Dalit workers are still connected with land, with 25% of them working as marginal and small farmers and 50% as landless labourers. In urban areas, Dalits work mainly in the unorganised sector. Out of the total Dalit population, the number of Dalits in services falling in the domain of reservations does not exceed a mere 0.8%.⁴³⁵



Tom Pietrasik/ActionAid

A girl from the Musahar community, socially and economically one of the most marginalised communities in India.

Manual Scavenging

Despite the *Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993*, more than 770,000 'manual scavengers' in India,⁴³⁶ 80% of which are Dalit women, continue to clean human excrement with their bare hands for little or no wages. This practice exists in the military engineering services, the army, as well as public sector undertakings and particularly the Indian Railways.⁴³⁷ The highest numbers of manual scavengers are found in Uttar Pradesh (213,975), followed by Madhya Pradesh (81,307), Maharashtra (64,785), Gujarat (64,195), Andhra Pradesh (45,822) and Assam (40,413). As stated by the Gol national report for UPR II, so far only 428,000 persons have been assisted under the *National Scheme of Liberation and Rehabilitation of Scavengers (NSLRS)*.⁴³⁸ For the remaining 342,468, the Self Employment Scheme for Rehabilitation of Manual

432 The Times of India, *Judge rubbed his shoes against me, says Justice Karnan*, November 4, 2011.

433 The Daily News and Analysis, *Dalit denied entry in temple: Orissa government steps in to resolve issue*, June 25, 2011, available at: http://www.dnaindia.com/india/report_dalit-denied-entry-in-templeorissa-government-steps-in-to-resolve-issue_1559008

434 IBN News, *Orissa: Dalit MLA faces discrimination*, July 23, 2011, available at: <http://ibnlive.in.com/news/orissa-dalit-mla-faces-discrimination/169542-3.html>

435 Dr Anand Teltumbde, *Globalisation and the Dalits*, available at: <http://www.ambedkar.org/research/GLOBALISATIONANDTHEDALITS.pdf>

436 Annual Report of the Ministry of Social Justice and Empowerment, 2009, available at: <http://socialjustice.nic.in/ar10eng.php?pageid=3>; Also See: Concluding Observations of the Committee on the Elimination of Racial Discrimination, India, 2007, CERD/C/IND/CO/19, 23, available at: <http://www2.ohchr.org/english/bodies/cerd/cerds70.htm>

437 A large number of 'manual scavengers' are still employed in the Indian railways. The Ministry of Railways has chosen to deny the existence of manual scavenging in the Indian Railways entirely, most recently in the affidavit dated 21.3.2011 filed before the Court. The Court ordered a change of the toiletry system in the trains, raising public awareness on public hygiene, and prohibited manual carrying of human excreta. - *Safai Karamchari Andolan & Ors v. Union of India & Ors*, Writ Petition (C) No. 845 of 2011

438 National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: India, A/HRC/WG.6/13/IND/1, UN General Assembly, 8 March 2012, para 65.

Scavenging (SRMS), was launched in 2007.⁴³⁹ However, the scheme has failed in achieving targets. The Ministry of Social Justice & Empowerment tabled the progress report of the scheme on 28 April 2011 during the meeting of the National Advisory Council. The report reveals that only 78,941 persons had received the loan for self employment under the SRMS.⁴⁴⁰ Absence of disaggregated data further complicates the rehabilitation processes.

Violence against SCs

SCs face persistent discrimination and serious crimes are committed against them ranging from abuse on caste name, murders, rapes, arson, social and economic boycotts, naked parading of SC women, force to drink urine and eat human excreta.⁴⁴¹ Between 2008 and 2010, more than 115,000 cases of atrocities were committed against them⁴⁴² with an increase of 10.6% in 2009.⁴⁴³ *“As per Crime Statistics of India, every 18 minutes a crime is committed against SCs; every day 27 atrocities against them, (3 rapes, 11 assaults and 13 murders); every week 5 of their homes or possessions burnt and 6 persons kidnapped or abducted”*.⁴⁴⁴ In 2007, the Committee on the Elimination of Racial Discrimination (CERD) raised concerns about *“reports of arbitrary arrest, torture and extrajudicial killings of members of scheduled castes and scheduled tribes by the police, and about the frequent failure to protect these groups against acts of communal violence”*.⁴⁴⁵

Certain kinds of violence are traditionally reserved for Dalit women (see section on Violence against Women), who are also threatened by rape as part of collective violence by higher castes. The UN Special Rapporteur on Violence against Women noted that Dalit women *“face targeted violence, even rape and death, from state actors and powerful members of dominant castes who employ these methods to inflict political lessons and crush dissent within the community”*.⁴⁴⁶ Similarly, in its 2007 concluding comments, CERD noted its concern about the alarming number of allegations of acts of sexual violence against Dalit women, primarily by dominant caste men.⁴⁴⁷

439 Annual Report of the Ministry of Social Justice and Empowerment, 2009, available at: <http://socialjustice.nic.in/ar10eng.php?pageid=3>

440 Unpublished Note from *Rashtriya Garima Abiyan*.

441 National Coalition for Strengthening the PoA Act, Initiation of National Campaign on Dalit Human Rights (NCDHR), Joint Stakeholders' Report on Caste Based Discrimination, November 2011.

442 This includes 2,208 murders, 5,974 rapes, 15,603 cases of hurt, 1,764 cases of kidnapping and abduction, 687 cases of arson, 572 of other Untouchability practices and 53,174 of other IPC crimes – National Coalition for Strengthening the PoA Act, Initiation of National Campaign on Dalit Human Rights (NCDHR), Joint Stakeholders' Report on Caste Based Discrimination, November 2011.

443 National Crime Records Bureau, Ministry of Home Affairs, *Prison Statistics 2008; 2009; 2010*.

444 National Coalition for Strengthening the PoA Act, Initiation of National Campaign on Dalit Human Rights (NCDHR), Joint Stakeholders' Report on Caste Based Discrimination, November 2011.

445 Concluding Observations of the Committee on the Elimination of Racial Discrimination: India, 2007, CERD/C/IND/CO/19, para 14.

446 UN Special Rapporteur on Violence against Women, Ms. Radhika Coomaraswamy, Cultural Practices in the Family that are Violent towards Women, 2002, E/CN4/2002/83, Para 53.

447 Concluding Observations of the Committee on the Elimination of Racial Discrimination: India, 2007, CERD/C/IND/CO/19, para 15.

Scheduled Tribes

In India, 698 ethnic groups are recognised as ‘Scheduled Tribes’ (STs), and are considered to be the country’s indigenous peoples. With an estimated population of 84.3 million, they comprise 8.2% of the total population. There are, however, many more ethnic groups that could qualify for ST status but are not officially recognised. In addition, 75 tribal communities have been identified as ‘primitive tribal groups’ (PTG) in different states. The largest concentrations of indigenous peoples are found in the eight states of North-east India and the so-called ‘central tribal belt’ stretching from Gujarat and Rajasthan to West Bengal. India has several laws and constitutional provisions, which recognize indigenous peoples’ rights to land and self-governance. However, these laws have numerous shortcomings and their implementation is far from satisfactory.

The Gol’s stated position at the UN is that it considered the entire population, including tribal people, at its independence and their successors as indigenous. This would put India in a unique position as the only country in the world populated entirely by indigenous peoples. This position of India is problematic because it amounts to a denial of the existence of distinct indigenous peoples within its territories and is also, in itself, an expression of discrimination to the indigenous peoples of the country.



Sanjit Das/ActionAid

Violations against STs

Despite protective laws and constitutional provisions, the rights of indigenous peoples (tribals/*adivasis*) to self-determination, land, and culture, continue to be seriously violated.⁴⁴⁸ They also face: (a) denial of control over their development, based on their values, needs and priorities; (b) political under-representation and lack of access to social and other services; and (c) marginalisation resulting from mega projects exploiting their lands and natural resources, causing large scale evictions and loss of livelihoods. In 2009, a *Minority Rights Group International* report revealed that indigenous or tribal communities are among the poorest in India. They barely enjoy basic socio-economic rights and face entrenched and endemic discrimination.⁴⁴⁹

Indigenous peoples are the most affected by large-scale development-induced displacement, with many of their fundamental human rights being grossly violated in the process (see details page 7). There is no effective consultation with the communities, or concurrence before such development projects are implemented. There is an unprecedented plunder of natural resources in tribal areas, often without mining licenses as it was revealed by the Lokayukta’s report in the District of Bellary,

448 See: Concluding Observations of the Committee on the Elimination of Racial Discrimination, India, 2007, CERD/C/IND/CO/19, paras 19, available at: <http://www2.ohchr.org/english/bodies/cerd/cerds70.htm>

449 Minority Rights Group International, *State of the World’s Minorities and Indigenous Peoples 2010 – India*, available at: <http://www.unhcr.org/refworld/country,,MRGI,,IND,,4c33311631,0.html>

Karnataka.⁴⁵⁰ Many tribals/*adivasis* are being denied their right to forest resources, despite the existence of the *Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006* aimed at undoing 'historical injustice' and recognising the rights of forest dwellers who have been living in the forests for centuries (see Section on the Right to Adequate Housing and Land in Part I).

STs or indigenous peoples cannot participate in public life because of the non-implementation of the *Panchayats (Extension to the Scheduled Areas) Act, 1996* (PES Act). The nine concerned states – Andhra Pradesh, Chhattisgarh, Gujarat, Himachal Pradesh, Jharkhand, Maharashtra, Madhya Pradesh, Odisha and Rajasthan – where the Act is applicable, have not framed the rules to implement the Act to date.⁴⁵¹ Under the PES Act, the Chairmanship of the *Panchayats* (village councils) should be held by tribals. However, non-indigenous peoples are still being elected as head of the Panchayat in tribal areas.

Indigenous women are particularly vulnerable. On the one hand, they face hardship within their own communities, often ruled by customary patriarchal structures. For example, although indigenous women depend primarily on community lands for survival, the ownership and management of these resources is often controlled solely by men or laws and policies that deny women's participation. On the other hand, since many tribal areas are highly militarised, indigenous women face severe forms of discrimination and violence by army officials.

Issues common to SCs and STs

Legal Framework

SCs and STs have long been targets of entrenched and acute discrimination and violence, requiring a special law to offer them increased protection. The *Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989* (PoA Act) seeks to provide such protection, in addition to the safeguards available under the Constitution (Article 21, 17 and 46), the *IPC and the Protection of Civil Rights Act, 1955*. The PoA Act aims at preventing and protecting SC/STs from atrocities committed against them. It provides for special courts for the trial of such offences as well as for the relief and rehabilitation of the victims. However, the implementation of the PoA Act remains weak⁴⁵² and conviction rates alarmingly low. Another concerning issue is the police's refusal to register cases under the Act.⁴⁵³ Atrocities and cases of discrimination against SC/STs are on the rise. In 2008-10, around 117,000 atrocities were committed against them⁴⁵⁴ with an increase of 10.6% in 2009. As noted by

450 See: The Hindu, *Report details Reddys' rule over 'Republic of Bellary'*, July 28, 2011, available at: <http://www.thehindu.com/news/states/karnataka/article2302226.ece>

451 Governance Now, *Implement PESA for a quick cure for Maoism - Centre to states*, 8 June 2010, available at: <http://governancenow.com/news/regular-story/implement-pesa-quick-cure-maoism-centrestates>

452 See: Concluding Observations of the Committee on Economic, Social and Cultural Rights: India, 2008, E/C.12/IND/CO/5, para 19 & 59, available at: <http://www2.ohchr.org/english/bodies/cescr/cescrs40.htm>

453 Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, mission to India, 2011, A/HRC/19/55/Add.1.

454 This includes 2208 Murders, 5974 Rapes, 15603 cases of Hurt, 1764 cases of Kidnapping and abduction, 687 cases of Arson, 572 of other Untouchability practices and 53174 of other IPC crimes.

the UN Special Rapporteur on the situation of human rights defenders, impunity for atrocities against Dalits remains a chronic problem in India.⁴⁵⁵

Given some of the shortcomings of the PoA Act, the Ministry of Social Justice has initiated an important process aimed at amending the Act and its rules. The new *Scheduled Castes and Schedules Tribes (Prevention of Atrocities) Rules* have been adopted in December 2011. Among the amendments made to the rules, the relief amount in the case of atrocities against SC/STs has been significantly increased. Amendments to the PoA Act itself are yet to be tabled before Parliament. Among them is an attempt to simplify the process of hearings and strengthen investigation mechanisms.

Diversion of Funds from SCs and STs Sub Plans

The *Tribal Sub Plan* (TSP) and the *Scheduled Caste Sub Plan* (SCSP) were formulated in 1976 and 1978 respectively in order to provide equal opportunities and growth to the most vulnerable sections of the population, namely SCs and STs. According to these plans, budget at the Union and state levels should be allocated for the welfare and development of SCs and STs in proportion to their population (i.e. for every INR 100 spent, INR 16 should be spent on SCs and 8% on STs). Funds should be used for such schemes that will directly benefit SC/STs individuals, households, *bastis* or localities. However, both formulation and implementation of the SCSP and TSP has been poor and have not achieved their objectives, both at the Union and state levels.

In reality, a large share of the money is either diverted to general schemes hardly benefitting SC/STs or unspent. Massive diversions were discovered in 2010 and 2011, both at the Union and state levels, where funds earmarked for SCs were used for general infrastructure projects. For example, the Delhi government diverted money from the SCSP for building stadia and other infrastructures for the 2010 Commonwealth Games,⁴⁵⁶ while Madhya Pradesh used the funds for large dams and Uttar Pradesh for the construction of engineering and medical colleges. During the financial year 2011-12, only 55.4% of the central government's funds meant for SCs were actually allocated to benefit SCs. A 2007 study conducted in seven states reveals that the guidelines of the Ministry of Social Justice and Empowerment, Ministry of Tribal Affairs, and Planning Commission on the implementation of the Scheduled Caste and Tribal Sub Plans are not being followed. It also states that funds to the tune of 60-65% are being allocated in 'indivisible' sectors like irrigation, industry, roads and bridges which have only 10-15% coverage of SCs and STs areas and even less percentage of actual beneficiaries.⁴⁵⁷ The budget 2012-13 allocates only 14.7% of the funds for SCSP and TSP, whereas the legitimate allocation should be 24.4%.

455 See: Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, mission to India, 2011, A/HRC/19/55/Add.1.

456 See: Housing and Land Rights Network, available at: www.hic-sarp.org

457 Planning Commission, *Research Study on Livelihood Options and Asset Creation in SCSP and TSP Schemes and Impacts among SCs and STs*, November 2007, available at: http://planningcommission.nic.in/reports/sereport/ser/stdy_scp.pdf

According to the Planning Commission, only 17 out of 83 ministries and departments have made budgetary allocations under the Plans. 23 of these have pleaded indivisibility, while all the others have neither allocated nor given reasons for non-allocation.⁴⁵⁸ In a letter written to the Prime Minister in December 2011, Ms. Sonia Gandhi, Chairperson of the National Advisory Council stated: *“The SCSP/TSP set apart are not meant to be parked with any ministry, but needs to be allocated to ministries and departments for implementing such schemes which are directly benefiting SC/ST individuals/households or SC/ST localities. (...) The practice of showing notional outflows by ministries/departments to account for SCSP/TSP should be discontinued.”*⁴⁵⁹

In order to address the shortfalls mentioned above, civil society is calling for a central legislation on SCSP and TSP, which would clearly direct a proportion of the total Plan outlays at the Union and state levels – equivalent to the proportion of SC/STs – to be set apart for the SCSP and TSP. These funds should be deployed only to implement schemes with a clear objective of bridging socio-economic gap between SC/STs and the general population, with particular focus on education, employment, entrepreneurship and access to basic amenities.

Persons with Disabilities

Four Acts are specifically directed towards the protection, welfare, rehabilitation and development of people with disabilities – the *Mental Health Act, 1987*; the *Rehabilitation Council of India Act, 1992*; the *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995* (PWD Act) and the *National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disability Act, 1999*. Despite the existence of national legislation and India’s ratification of the *UN Convention on the Rights of Persons with Disabilities* (CRPD), all major issues including accessibility, education, employment and health continue to remain neglected. The PWD Act has brought little improvement in terms of physical accessibility and defines accessibility not as a right but rather as a conditional entitlement where the State is obliged to provide accessibility *“within the limits of its economic capacity and development”*. Also it is applicable only to government owned public buildings and does not apply to privately owned public spaces or services such as banks, educational institutes, hospitals, etc.

Lack of Accessibility

Lack of accessibility is a major barrier for the full citizenship participation of persons with disabilities. The majority of people with disabilities are confined to their homes because they are unable to access any of the public places, transportation or services. Persons with mobility and communication challenges face difficulties to exercise, not only their socio-economic rights, but also their civil and political rights,

⁴⁵⁸ Ibid.

⁴⁵⁹ SC/ST Budget Adhikar Andolan, Memorandum to the Prime Minister of India on the Special Component Plan, May 9, 2012

as the existing infrastructure for redress (courts, police stations, etc) and voting (polling booths) are inaccessible for persons with disabilities. Moreover, a plethora of civil laws in the country, including the Constitution, deprive persons with ‘unsound’ mind of their rights and legal status. Thus, the right to marry, right to adopt, right to manage property, right to contract and a host of other rights continue to be denied to persons with disabilities.

Violence against Disabled Persons

The instances of torture and abuse of people with mental impairments in various state-run institutions are many, with violence against women being particularly acute. *“There are cases of wrongful or fraudulent confinement, overuse of shock treatment, solitary confinement, sexual exploitation, forced sterilisation, hysterectomies, abortions and denial of treatment. Many Psychiatric Units continue to use direct Electro-Convulsive Therapy (commonly known as shock treatment) on persons with mental impairment”*.⁴⁶⁰

Violence against people with disabilities is also perpetrated by families and communities. There are several cases of house arrest, neglect, teasing, taunting, abuse, chaining and beating.⁴⁶¹ However, since people with disabilities are dependent upon the family and community, they rarely access the justice system for protection. Obtaining state support in filing a complaint against the family is very difficult since the police are not cooperative and filing an FIR becomes very difficult. The poor and homeless are the most vulnerable and experience atrocities on the streets, including police harassment, arrest without warrant, abuse, being taken afar and left to die far away from the city.⁴⁶²

Protection Mechanisms

Where established, state disability commissions have not been effective. There is a lack of proper planning and implementation of disability programs and schemes. Grievance redressal remains within the structures of the State Commissioners and the Chief Commissioner. These bodies remain as quasi-judicial bodies with powers of a civil court and no enforcement mechanisms exist within these structures. Since disability in India remains a state subject, states continue to disregard grievance redressal mechanisms, and it is alarming that 16 years since the enactment of the PWD Act, more than half of India’s 22 states are yet to have full-time dedicated Commissioners to address grievances of persons with disabilities.

460 National Disability Network, *Key Issues of 120 million Persons with Disabilities in India*, report submitted for UPR II.

461 India Today, *Families chain mentally ill patients*, October 20, 2010, available at: <http://indiatoday.intoday.in/video/families-chain-mentallyill-members/1/117158.html>

462 Deccan Herald, *Scores flee beggars’ home after 22 deaths in three days*, August 20, 2010, available at: <http://www.deccanherald.com/content/90110/scores-flee-beggars-home-22.html>

Exclusion of Disabled Persons

Data on disability is mostly unavailable or inaccurate and hence, resource allocation and facilities are highly inadequate. Most people with disability in India do not even have a *disability certificate*, which is required to claim and procure benefits from the government. Disability is not taken properly into account while counting people Below Poverty Line (BPL). As a result, most people with disabilities are excluded from poverty alleviation measures or schemes. Rights of people with psychosocial disabilities like intellectual disability, autism, cerebral palsy and persons with multiple disabilities and high support needs continue to be ignored. A widespread shift from a charity to a rights based approach is required.

Religious Minorities

Article 25 of the Constitution guarantees freedom of conscience and the right to freely profess, practice and propagate religion. Right to freedom of conscience ensures that a person is not liable to be questioned or made accountable for his/her religious beliefs, by the state or any other person.⁴⁶³ The right extends to acts done in pursuance of religious belief;⁴⁶⁴ to follow a particular faith; ceremonies, rituals and observances;⁴⁶⁵ and most importantly, to transmit one's religion by the exposition of its tenets. Moreover, Article 26 guarantees the freedom of every religious denomination to manage its own religious affairs, subject to public order, morality and health. Freedom of religion is also discussed in the IPC – where acts related to promoting enmity between different groups on the ground of religion are punishable offences⁴⁶⁶ – and several other domestic laws.⁴⁶⁷

Targeted Violence against Religious Minorities

Despite these legal guarantees, religious minorities are targets of mass crimes and acute discrimination. Through systematic mobilisation of hate and divisive politics, communal pogroms against minorities have been masterminded in complete impunity.⁴⁶⁸

In the 1984 Delhi mass massacre of over 3,000 Sikhs, following the assassination of Prime Minister Indira Gandhi, there has been a high level of complicity in the non-punishment of perpetrators. Twenty-five years later, people behind the attacks, including senior political leaders and police officers guilty of dereliction of duty remain unpunished. The genocidal carnage in Gujarat in 2002, killing over 2000 Muslims,

⁴⁶³ Explained by the Supreme Court in *Sardar Syedna Taher Saifuddin Saheb v. State of Bombay* AIR 1962 SC 872.

⁴⁶⁴ *Commissioner, Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Sirur Mutt* AIR 1954 SC 282.

⁴⁶⁵ *N. Adithyan v. Travancore Devaswom Board (2002)* 8 SCC 106; *H.H. Srimad Perarulal Ethiraja Ramanuja Jeeyar Swami v. State of Tamil Nadu* AIR 1972 SC 1586

⁴⁶⁶ Section 153A and Section 504 of the IPC.

⁴⁶⁷ *The Unlawful Activities (Prevention) Act, 1967 (UAP Act)*; *the Religious Institutions (Prevention of Misuse) Act, 1988*; *the Places of Worship (Special Provisions) Act, 1991*; and *the Representation of the People Act (ROPA), 1951*.

⁴⁶⁸ See: Asma Jahangir, *Report of the Special Rapporteur on Freedom of Religion or Belief: Mission to India, 2009*, A/HRC/10/8/Add.3, para 63, available at: http://reliefweb.int/sites/reliefweb.int/files/reliefweb_pdf/node-301456.pdf

is still being prosecuted though several efforts have been made to undermine the justice effort underway.⁴⁶⁹ Over 2000 cases were closed due to insufficient evidence, demonstrating the high levels of prejudice and complicity within the investigating agencies. It was only after a Supreme Court direction to reopen these cases that the investigation commenced. However, vital evidence was lost and it is unlikely that prosecutions will result in convictions on the basis of delayed, partisan and shoddy investigation. Christian minorities are another targeted group. In 2008, mobs torched Christian homes in Kandhamal (Odisha), killing at least 38 people.⁴⁷⁰ Here again, few have been prosecuted and even less convicted. On a lower scale, attacks against religious minorities take place on a regular basis in various parts of the country. During those attacks, violence against women is particularly acute. Gender-based violence has played a fundamental role as an engine for mobilising hatred and destruction against religious minorities.⁴⁷¹

CASE STUDY

Kandhamal Violence

Kandhamal is one of the poorest districts of Odisha in Central India. 71% of its land is covered by forests and its population comprises *adivasis* and Dalits. The Dalits of Kandhamal, otherwise known as the *panas*, constitute 19% of the district population according to the 2001 census report. More than 90% of them are Christians. The *adivasis* of Kandhamal are also known as *Kandhas*. 78% of them live below poverty line.

Throughout India, Christians, Muslims, *adivasis* and Dalits have been targets of violent attacks and discrimination by the organisations with a ‘Hindutva ideology’, collectively referred to as the *Sangh Parivar*. Reports of violence against religious minorities across Odisha date back to as far as two decades, with religious conversions being used as a divisive issue in many such attacks. In one such instance, an Australian Christian missionary, Graham Staines, was burnt alive, along with his two sons (aged 10 and 6) in 1999. Besides, instances of burning, destruction and looting of churches, Christians’ houses, convents, vocational centres abound. In addition, the Christian minority community continues to face discrimination, harassment and threats of violence at the hands of the *Sangh Parivar*. What makes matters worse is the immunity accorded to the perpetrators of this violence by the state. In the Graham Staines case for instance, the Commission of Enquiry established by the government held an individual, Dara Singh, personally liable, when all evidence pointed to the involvement of the *Sangh Parivar*, which was exempted from criminal liability.

The violent events of Kandhamal on 24 August 2008 are located in the context explained above. Violence against Christians in December 2007, in the same district, had set the prelude for these events. The purported trigger to the violence of 2008 was the killing of Swami Lakshmanananda, a Hindu religious leader, and his four disciples at his ashram, on 23 August 2008. The attackers were suspected to be Maoist insurgents based on the manner of attack and the letter found at the ashram. Quoting police sources, the media announced the next day that Maoist involvement in the killings was suspected. However, the *Sangh Parivar* alleged that “*extremist Christian groups*” were responsible.

In so called ‘reprisal’ attacks by organisations associated with the ‘*Hindutva* ideology’, 5000 houses belonging to Christians were destroyed, partially or fully. At least 264 Churches and prayer halls were fully or partially

469 See: *Zakia Ahsan Jafri & Anr v. State of Gujarat & Ors*, Supreme Court, Special Leave Petition No. 1088 of 2009.

470 See: Report of National People’s Tribunal on Kandhamal, 2011, New Delhi, available at: <http://orissaconcerns.net/2010/08/kandhamal-interim-report/>

471 *Threatened Existence: A Feminist Analysis of the Genocide in Gujarat*: Report by the International Initiative for Justice (IIJ), December 2003; Also see: Tanika Sarkar and Urvashi Butalia (eds.), *Women and the Hindu Right*, New Delhi: Kali for Women, 1995.

demolished and hundreds of philanthropic institutions such as schools, orphanages, old age homes and NGO establishments were looted and burnt down. Valuables were looted and cattle and crops stolen. Between 75 and 123 people were killed in the violence, although the official figure is a mere 54. Majority of those killed were Christians. Scores of others were injured. In the Kandhamal district alone, approximately 25,000 to 40,000 people were displaced and started living in 25 relief camps. The National Commission for Minorities reported: “there is no doubt that the Christian community and its places of worship were the principal target of attack”. Survivor testimonies at the National People’s Tribunal on Kandhamal, held in August 2010, reveal the gruesome details of brutality meted out to the Christians of Kandhamal in the 2008 attacks. One such survivor, Priyatama Nayak, wife of the deceased Abhimanyu Nayak, described the shockingly brutal killing of her husband:

“The attackers approached my husband heavily armed and started to beat him up with sticks. We were crying, but were helpless. He was taken to a mango tree, kerosene oil was splashed over him and he was set on fire. He somehow didn’t burn. Thereafter, they covered him with paper from head to toe, and tried to burn him alive for 2 to 3 hours. All this while, my husband kept praying to God to save him. The rioters jeered at his prayers by saying: ‘Yes, your God is coming to save you and help you’. As he fell to the ground, they thought he had died. They then went away shouting slogans like ‘Jai Bajrang Bali Ki’. He continued burning with his flesh falling off from his body. He reached home calling out for me. I felt helpless as I cut the hanging flesh from his body... For five days I stayed alone with his dead body, unable to bury him. Dogs ate half of his burnt body. It was only after I promised that I won’t file a case, that the Hindus helped me bury my husband’s dead body.”

The legal machinery’s response to this targeted violence has been piecemeal. Firstly, there has been an indordinate delay in lodging of FIRs as the survivors had to, perforce, stay in jungles for many days after fleeing their villages and then had to move to relief camps. Many survivors stated that the police had refused to lodge their FIRs against perpetrators. Even in cases where FIRs were lodged, very few perpetrators were arrested after a delay. The government’s appointed Commissions of Inquiry appointed to investigate both the 2008 and 2007 violence do not enjoy victim-survivor confidence, while survivors continue to be threatened by perpetrators to withdraw their complaints. Two fast track courts were also established in Phulbani, where prosecutions are underway. Recently 24 persons were convicted for the violence by one of the fast track courts. Notwithstanding these small number of convictions, statistics as of 2010 underline a pattern of impunity afforded to the perpetrators. Of 3,232 complaints filed with the police, only 832 were registered. The police was complicit in the acts of violence with multiple acts of omission and commission, as highlighted by the report of the National People’s Tribunal. Therefore the impartiality of investigations in registered cases is also undermined. The lack of forensic evidence in these cases creates another hurdle in effective prosecution. The victim-survivors at the Tribunal have also revealed that the perpetrators have been convicted of lesser crimes than those they actually committed. The destruction of evidence by mutilation of bodies and removal of debris of burnt and destroyed structures has facilitated this.

The government has announced a compensation package but many households are not enlisted in the official records for compensation. In addition, issues concerning determination, adequacy, conditions for payment, procedural and administrative hurdles plague the disbursement of compensation.

Sources: National People’s Tribunal on Kandhamal, Waiting for Justice: A Report, 2011; Vrinda Grover (ed), Kandhamal: The Law Must Change its Course, Multiple Action Research Group, 2010 and UPR Submission on the Freedom of Religion by Pax Romana and six other NGOs.

A major area of concern is the complicity of state and public officials through culpable actions and failure to act.⁴⁷² Lack of political will to prosecute perpetrators, inadequacy of laws and procedures to deal with mass crimes, lack of impartial

472 See for example: Human Rights Watch, *We Have no Orders to Save You*, available at: <http://www.hrw.org/reports/2002/india/>

investigation and prosecution, lack of sensitivity to survivors' experiences and needs have been among some of the major hurdles in victims' and survivors' access to justice and accountability. While provisions exist in criminal procedural law for payment of compensation to victim-survivors of crimes,⁴⁷³ there is neither comprehensive legislation nor a well-designed statutory scheme or a policy statement permitting a victim to seek compensation from an offender or the state as a matter of right.⁴⁷⁴ The ad hoc and arbitrary compensation in targeted religion-based crimes has been a token gesture rather than a means of substantial relief or an enforceable right. Legal recognition of rehabilitation for victim-survivors of religion-based crimes is absent, with no uniform criteria set-out for soft loans and grants for housing, education, livelihood and income generation. Restitution, including rebuilding places of habitat, worship and education destroyed during outbreaks of violence, and ensuring conditions conducive to the victims' return to their homes, is also not an enforceable right.

The Prevention of Communal and Targeted Violence Bill

In 2004, the *Common Minimum Programme* adopted by the Gol, promised a comprehensive legislation to protect religious minorities against targeted mass crimes to adequately protect the life, security, and dignity of religious minorities.

However, the *Communal Violence (Prevention, Control and Rehabilitation of Victims) Bill, 2005*, introduced in Parliament in December 2005, placed before the Rajya Sabha, was deeply flawed and only further enhanced the powers of the State authorities, who were complicit in the orchestration and perpetration of the targeted crimes. Despite a number of attempts, this promise of the government remains unfulfilled even as it completes its second term in office. The outlines of a new Bill proposed by civil society are that, "*the primary focus of the Bill should be to secure accountability of public servants and to hold them responsible for communal and targeted violence, as well as make provision for providing reparative justice to the victims and survivors of such violence.*"⁴⁷⁵ Persons holding senior and key positions of political, administrative and civil authority including all public servants, should be held criminally liable for acts of omission or commission, in relation to their duties through the inclusion of the legal principles of 'superior responsibility', 'command responsibility', constructive responsibility and culpable inaction. Principles of just, fair and uniform reparation and compensation should be applicable to all victims and survivors. The Gol should draft a Bill along these lines at the earliest, which should then be adopted by Parliament without further delay.

473 Section 357 of Cr. PC allows a court to direct the accused to pay compensation even in situations where fine is not imposed as part of its sentence. Other provisions include Section 250 (compensation to people accused by complainant without reasonable cause), Section 265A (compensation to victim in plea bargaining), Section 358 (compensation to persons arrested without sufficient grounds) and 359 (costs to complainant). A victim-survivor may also approach a higher court under Section 482 of the Cr. PC to claim compensation, as the said provision vests inherent power in courts in the interests of justice, as laid down by various judgments of the Supreme Court, including *Shri Bodhisattwa Gautam v. Ms. Subhra Chakraborty* AIR 1996 SC 922

474 K. I. Vibhute, *Justice to Victims: Emerging Trends and Legislative Models in India*, in K.I.Vibhute(ed.), *Criminal Justice*, Lucknow: Eastern Book Co., 2004.

475 *Civil society groups reject NAC Communal Violence Bill draft, lay down key features for the new Bill* – Statement Issued at National Consultation on CV Bill, April 21, 2012, available at: <http://www.anhadin.net/article157.html>bid.

Caste among the Minorities

Dalit Christians and Muslims retain a caste system even after conversion (though it varies somewhat with the caste system among Hindus). However, Dalits who convert to Christianity or Islam are denied access to affirmative action benefits and face discrimination on account of both caste and religion. Dalit Christians form around 75-80% of the Indian Christian population and in the recent years their places of worship have been often targeted with physical attacks and violence. The rhetoric of 'religious conversion' engineered by the religious fundamentalist forces has been pivotal in fomenting violence against Dalit Christians,⁴⁷⁶ as was evidenced in the Kandhamal violence in 2008.

In 1950, the first Indian Cabinet passed a resolution excluding Muslims, Christians, Sikhs and Buddhists who are Dalits from the benefits of affirmative action provided to Dalits. Since then, Sikh and Buddhist Dalits have been included within policy frameworks for affirmative action, but Christians and Muslim Dalits continue to remain excluded. A Public Interest Litigation challenging the denial of affirmative action to Dalit Christians and Muslims is pending before the Supreme Court.⁴⁷⁷

Economic and Social Rights of Minorities

In addition to targeted violence, religious minorities in India (mainly Muslims, Christians, Sikhs, Buddhists and Jains) also face severe discrimination.⁴⁷⁸ They are economically disadvantaged and socially discriminated. Only 6.5% of religious minorities have access to institutional finance, 40% lack health facilities, 35% do not have education facilities and 65.02% live in huts or temporary shelters.⁴⁷⁹

Religious minorities also face the acute problem of being under-represented at all levels in public and private employment, institutions of governance and the structures of political parties.

In order to better understand the social, economic and educational status of Indian Muslims, the government constituted a seven member committee in 2005, led by Justice Rajender Sachar, to prepare a report covering these aspects. Popularly known as the *Sachar Committee*, it submitted its report in 2006⁴⁸⁰ and highlighted the economic, social and educational backwardness of the Muslim community in India. It also confirmed the absence of diversity within the Indian Administrative Service, the Indian Police Service, the Indian Foreign Service, the judiciary and state

476 IIDS, *Caste-based discrimination & Atrocities on Dalit Christians and the Need for Reservation*, 2007

477 The Hindu, *Supreme Court to examine quota benefit to Dalit converts*, January 21, 2011, available at: <http://www.thehindu.com/news/national/article1108895.ece>

478 See: Report on the Social, Economic and Educational Status of Indian Muslims (Sachar Committee Report), 2006, available at: http://minorityaffairs.gov.in/sites/upload_files/moma/files/pdfs/sachar_comm.pdf; Also See: Report on the National Commission for Religious and Linguistic Minorities (Ranganath Misra Commission Report), 2007, available at: <http://minorityaffairs.gov.in/nclrm>

479 Sachar Committee Report 2006, available at: http://minorityaffairs.gov.in/sites/upload_files/moma/files/pdfs/sachar_comm.pdf

480 Prime Minister's High Level Committee, *Social, Economic and Educational Status of Muslims in India*, November 2006, available at: http://minorityaffairs.gov.in/sites/upload_files/moma/files/pdfs/sachar_comm.pdf

appointed public prosecutors.⁴⁸¹ Recognising an overall absence of diversity caused by institutionalised discrimination, a key recommendation of the Sachar Committee was the setting up of a National Data Bank (NDB) and an Autonomous Assessment and Monitoring agency, to continually analyse this primary data and the impact of policy correctives. However, the GoI does not seem to have made progress on the setting up of the NDB.

Diversity and Pluralism in Indian Textbooks

The ‘othering’ of religious minorities is also achieved through the medium of school curricula. Educational material, especially textbooks of social studies and history reveal a selective and manipulated rendering of the syllabus, which results in both the exclusion and demonisation of India’s religious minorities in general. There has been a determined public discourse around this trend since the mid 09’s resulting in changes at the level of the central government after 2004, while some states still continue with sectarian teaching. There is also a pending demand for the establishment of a Statutory National Textbook Council to enable educational material used by aided as well as non-aided schools being put up for public scrutiny.

The ‘Terror’ Discourse

There is a move in a few states to introduce special terror laws. The *Rajasthan Control of Organised Crime Bill, 2006*, and the *Andhra Pradesh Control of Organised Crime Bill, 2006*, are pending with the Central government for its approval before they can be introduced in the respective state legislatures. The *Gujarat Control of Organised Crime Bill, 2003*, and the *Uttar Pradesh Control of Organised Crime Bill, 2007*, have been passed by the legislatures of those states and have been reserved by the respective Governors for the President’s consideration under Article 200 of the Indian Constitution. All the four Bills are modelled on the *Maharashtra Control of Organised Crime Act, 1999* (MCOCA) – which has since been extended to Delhi from 2002 – and the *Karnataka Control of Organised Crime Act, 2002*. All the proposed state bills contain draconian provisions. These are: i) considering certain confessions made to a police officer as admissible evidence; ii) presumption as to the guilt of an accused until he proves himself to be innocent; and iii) stringent bail provisions ensuring a long period of detention of an accused. Since the repeal of the *Prevention of Terrorist Activities Act* (POTA), there exists no central law with such draconian provisions today. While amending the *Unlawful Activities (Prevention) Act* in 2004, Parliament consciously avoided including in it the draconian provisions of POTA. Thus, the provisions contained in state laws are clearly contrary to Parliament’s intention in repealing POTA and amending the *Unlawful Activities (Prevention) Act, 1967* (UAPA).

⁴⁸¹ In the 12 states (where the Muslims’ population share is 15.4%) the Muslims hold a tiny 5.7% government jobs. In the elite cadre services such as the IAS, IFS and the IPS, the Muslim representation is dismal- that is 2.2%, 1.6% and 3.0% respectively. Participation of Muslim workers in Public Sector Undertakings or with the government is the least among all SRCs (Socio Religious Communities) and does not exceed 5%. Among Muslim male workers, less than 6% are engaged in such work as against more than 10% for all male workers and 13 per cent for all-Hindu male workers. Even the shares of OBC and SC/ST workers in such jobs are significantly higher than that for Muslims. (Sachar Committee)

The victims of these laws have undoubtedly been Muslims. Muslims are often targeted following any terror attack. A number of Muslim men have been falsely implicated, illegally detained and tortured in custody for terrorist cases. For instance, seven men were falsely implicated by the police in the 2006 Malegaon bomb blasts (Maharashtra), where investigations later revealed the involvement of groups associated with the Hindutva ideology.⁴⁸² Similarly, such groups were found involved in the 2007 Mecca Masjid blast (Hyderabad, Andhra Pradesh), the 2007 Samjhauta Express train bombing (Haryana), the 2007 Ajmer Sharif Dargah blast, and the 2009 Goa blast.⁴⁸³ However, extremism perpetrated by Hindutva groups is absent from the mainstream terror discourse.

Legislative Curbs on Religious Freedom

Since 1996, a number of laws pertaining to freedom of religion or belief have been amended and new ones adopted both at the central and state levels. A number of states have adopted specific laws to govern religious conversion and renunciation. Five states have passed and implemented the so-called *Freedom of Religion Acts* (Odisha, Madhya Pradesh, Chhattisgarh, Gujarat and Himachal Pradesh). Despite their name, these laws in effect put a legislative curb on freedom of religion as they as they set pre-conditions to and penalise the act of religious conversion.

The National Commission for Minorities in its report for 1998-99 noted that “prohibition of conversion from one religion to another by use of force, by allurement or by fraudulent means”, provided for in these state laws, in practice, seems to apply only in case of conversion to Christianity or Islam and not to ‘Suddhikaran’ (the purificatory ritual of reconversion to Hinduism) or ‘Operation Ghar Wapsi’ (Operation ‘Return Home’) conducted by the Sangh Parivar leaders. In cases of forced conversions to Hinduism, it has been documented that certain rituals involve torture, cruel and degrading treatment, such as forcible tonsuring of the hair of the head, forcibly making victims eat cow dung and drink cow urine as purification routines.⁴⁸⁴

The religion-based matrimonial laws in India contain many provisions that adversely impact a person’s exercise of freedom of religion. Under Hindu law, if the husband gets converted to a non-Hindu faith, the wife is entitled to live separately without forfeiting her right of maintenance but if she herself also ceases to be Hindu, she loses her claim to maintenance.⁴⁸⁵ A Hindu wife will lose her right to maintenance if she converts to Islam and Christianity. Conversion also constitutes a ground for divorce.⁴⁸⁶

482 The Hindu, *Malegaon blasts accused want dignity back*, November 17, 2011, available at: <http://www.thehindu.com/news/states/other-states/article2633599.ece>

483 The State of Human Rights in India: Asian Centre for Human Rights Joint Submission on Behalf of the People’s Forum for UPR II.

484 *From Kandhamal to Karavali: The Ugly Face of the Sangh Parivar*, A fact-finding report of nine human rights organizations that visited Orissa & Karnataka in September – October 2008, (March 2009).

485 Section 80 of the Hindu Adoption and Maintenance Act, 1956

486 Section 4 of the Dissolution of Muslim Marriages Act 1937; Section 13(1)(j) of the Hindu Marriage Act 1955 and Section 32(i) of the Parsi Marriage and Divorce Act 1936

Refugees

India has the highest influx of refugees in the world because of its geographical location, which makes it the most accessible destination for refugees coming from neighbouring countries going through political turmoil. Reportedly, India had about 330,000 refugees in 2010, of which 97,000 were from Sri Lanka and 109,000 from Tibet.⁴⁸⁷ 31,600 refugees were under the care of the UN High Commissioner for Refugees (UNHCR) in 2011.⁴⁸⁸ The figure provided by UNHCR of the number of refugees in India in 2011 (184,821 refugees)⁴⁸⁹ is problematic, as it does not encompass all categories of refugees. The Gol mainly recognises refugees from Tibet and Sri Lanka, and the Chakmas from Bangladesh.

Despite a high concentration of refugees in India, and a record for *refoulement*, India has not yet ratified the UN Convention on the Status of Refugees and its Protocol 1951, while refugees under the UNHCR mandate are not considered to be 'refugees' under Indian law at all. The government has recognised large-scale refugees from neighbouring countries, however, such recognition has been based on temporary policies. Although, the government recognised that refugees attract limited protection under these *ad hoc* policies, the status of refugees remains vulnerable and depends mainly on political will and administrative discretion.

Despite not being party to the 1951 Convention and its 1967 Protocol, there are no instances, so far, of deportation of UN mandate refugee to their country of origin. Notwithstanding the various constraints faced by South Asia, including the lack of available resources and the security concerns that refugees tend to generate, India has, to some extent, conformed to the international standards regarding refugees.⁴⁹⁰ There are several instances where a progressive view has been taken and protection has been extended by courts under the Constitution of India and its obligation under other international instruments dealing with human rights, to which India is a state party.

The lack of equal protection has led to varying treatment of different refugee groups, further complications and failed to address the larger issues of refugees. For example, some groups are granted benefits, including legal residence and the ability to be legally employed, whilst others are criminalised and denied access to basic social resources. This piecemeal and selective approach has led to further complications and failed to address the larger issues of refugees.

Unless the Gol signs existing international instruments relating to refugees, the gap in the mechanisms for dealing with refugee protection will remain.⁴⁹¹ To effectively protect the human rights of the refugee population, it is crucial that domestic laws and policies provide a framework that respects the rights and needs of the refugees.

487 Ministry of Home Affairs, Annual Report, 2010-2011.

488 2011 UNHCR country operations profile – India, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/page?page=49e4876d6>

489 United Nations High Commissioner for Refugees (UNHCR) 2011, available at: <http://www.unhcr.org/pages/49e45b156.html>

490 UNHCR Publication, *Refugee and the Law*, 3rd Edition.

491 Ibid.

Human Rights Defenders

Human rights defenders (HRDs) are key to India's vibrant civil society; yet, they have faced increased threats, victimisation and harassment in the past few years.⁴⁹² The Special Rapporteur on the situation of human rights defenders (SR HRDs) made an official visit to India in January 2011. In her final report, she highlights the numerous testimonies she heard of female and male human rights defenders, and their families who are threatened, ill-treated, disappeared, arbitrarily arrested and detained,⁴⁹³ falsely charged with offences raided and files stolen,⁴⁹⁴ and in extreme cases even tortured and killed.⁴⁹⁵ HRDs and their families also face surveillance, such as tapping of phones, surveillance of emails and tracking of activities of human rights defenders on social networking sites.⁴⁹⁶ For example, states have used popular social networking sites, such as Facebook, to identify and to track their activities.⁴⁹⁷

Most of the violations against human rights defenders “are commonly attributed to law enforcement authorities; however, they have reportedly also shown collusion and/or complicity with abuses committed by private actors”.⁴⁹⁸ Lack or inadequacy of police training, failure to register and/or investigate violations against defenders and impunity of perpetrators have been widely reported.⁴⁹⁹

The NHRC focal point for protection of HRDs, has received complaints from a range of human rights defenders, including those working on minority rights and the rights of SCs and STs, who have faced harassment and arbitrary detention in several states, as highlighted by the NHRC's UPR stakeholders' report.⁵⁰⁰ The NHRC has registered at least 73 cases of violations of the rights of the HRDs between 2010 and 2011.⁵⁰¹

492 See: Concluding Observations of the Committee on Economic, Social and Cultural Rights: India, 2008, E/C.12/IND/CO/5, para 12 & 50.

493 See for example, case of human rights defender Gautam Navlakha from Peoples' Union for Democratic Rights (PUDR) detained by the police at Srinagar airport on 28 May, 2011 and denied entry into J&K. See: www.pudr.org/old/index.php?option=com_content&task=view&id=283&Itemid=60

494 For example, the house of reputed human rights defender Kavita Srivastava (General Secretary, People's Union for Civil Liberties) was raided by the Chhattisgarh police on 3rd October, 2011. See: *PUDR condemns the raid on the house of Kavita Srivastava, a noted human rights activist and General Secretary of People's Union for Civil Liberties*, available at: <http://www.pudr.org/content/pudr-condemns-raid-house-kavita-srivastava-noted-human-rights-activist-and-general-secretar-0>

495 See: Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, mission to India, 2011, A/HRC/19/55/Add.1.

496 See: Statement of the Special Rapporteur on the situation of human rights defenders following her visit to India in 2011, available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10660&LangID=E>

497 In his annual report, the Special Rapporteur (SR) on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, expressed deep concern “by actions taken by States against individuals communicating via the Internet, frequently justified broadly as being necessary to protect national security or to combat terrorism. While such ends can be legitimate under international human rights law, surveillance often takes place for political, rather than security reasons in an arbitrary and covert manner”. - Frank la Rue, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, May 16, 2011, A/HRC/17/27, para. 54, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

498 Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, Mission to India, 2011, A/HRC/19/55/Add.1.

499 Ibid.

500 NHRC, *India Submission to the UN Human Rights Council for India's Second Universal Periodic Review*, available at: <http://nhrc.nic.in/Reports/UPR-Final%20Report.pdf>. For more details see Annex E.

501 Action taken by the NHRC on human rights defender cases up to September 30, 2011, available at: http://www.nhrc.nic.in/Documents/hrd_update_sep_2011.pdf

Women human rights defenders are at a particular risk of persecution as they face the same human rights violations as their male counterparts in addition to gender-based violations, such as rape and sexual violence.⁵⁰²

Defenders working on economic, social and cultural rights are particularly vulnerable to violations committed by state agents and/or private actors. They engage in denouncing development projects that threaten the land, natural resources and the livelihoods of communities, bypassing the legal requirements of consultation and rehabilitation.⁵⁰³ One such case of arbitrary arrest is that of Abhay Sahu, the leader of POSCO *Pratirodh Sangram Samiti* (PPSS) on 25 November 2011 in Odisha.⁵⁰⁴ As discussed at page 8, the Pohang Steel Company (POSCO) from South Korea is setting up a steel plant at Paradeep, Odisha, with a total investment of USD 12 billion. The proposed plant and port will adversely affect 11 villages and hamlets. According to the local leadership of the movement against POSCO, more than 4,000 families and a population of around 22,000 will be affected by the project. Since POSCO launched the project, villagers have been opposing the project, and calling for the protection of their land and the forest where they have been living for generations.

Human rights defenders are often mislabeled among others as 'Naxalites/Maoists', 'militant sympathizers', or 'anti-national'.⁵⁰⁵ For instance, human rights defender Arun Ferreira, who works on the rights of tribals, slum dwellers and poor farmers, was first arrested in 2007 on charges, among others, to be a Naxalite and was tortured in prison. He was later acquitted of all eight cases lodged against him in September 2011 and was released from the Nagpur central jail on 27 September 2011. However, he was seized outside the prison gate by a group of men in civil clothes moments after his release, and re-arrested in a fresh case and finally released on bail in January 2012.⁵⁰⁶

Defenders in conflict areas face these problems more acutely; passports are denied and colonial sedition legal provisions are used against them.⁵⁰⁷ For example, the well-known doctor and human rights activist Binayak Sen from the Peoples Union for Civil Liberties (PUCL) was imprisoned for almost two years under the *Unlawful Activities (Prevention) Act, 1967*, the *Chattisgarh Special Public Safety Act, 2005* and sedition provisions of the IPC. He was primarily accused of having Maoist connections. A trial court in Raipur convicted him to life imprisonment in December 2010. He was later released on bail by the Supreme Court several months after his conviction. Journalists who work in conflict areas have reported that authorities exerted pressure on them in order to suppress a certain type of information or the journalists' work. Six journalists were killed in the last decade in Manipur, and at

502 Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, Mission to India, 2011, A/HRC/19/55/Add.1.

503 Ibid.

504 First Post, *Anti-POSCO leader Abhay Sahu arrested*, November 26, 2011, available at: <http://www.firstpost.com/india/anti-posco-leader-abhay-sahu-arrested-140774.html>

505 See: Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, mission to India, 2011, A/HRC/19/55/Add.1.

506 Free Binayak Sen, *Petition: Release human rights defender Arun Ferriera immediately*, available at: www.freebinayaksen.org/?p=2697

507 Sec 124 (Sedition) and Sec 122 (waging war against the state) of Indian Penal Code, The Prevention of Seditious Meetings Act, 1911.

least ten journalists killed in Jammu and Kashmir since 1990, allegedly by armed forces and by non-state actors.⁵⁰⁸

The SR HRDs stated that she was “*deeply disturbed by the situation of Dalits’ rights activists*” and that “*the range of human rights violations that they face is appalling*”.⁵⁰⁹ Cases of threats of physical assault and murder, as well as insults to Dalit human rights defenders in public places by using caste-based abusive language have been reported.⁵¹⁰ There are also allegations about summary executions, pressure to abandon their work in fear of reprisals from the dominant castes, invasion of their privacy as well as direct and indirect destruction of their property and belongings.⁵¹¹ Another worrying trend is the targeting of activists seeking implementation of progressive laws/schemes such as the RTI Act and MNREGA.⁵¹² RTI activists are particularly vulnerable to be targeted for exposing human rights violations and poor governance, including corruption of officials. Since 2010, 12 RTI activists have been murdered (see case study below).⁵¹³

CASE STUDY

Targeting of RTI activists

The *Right to Information Act, 2005* (RTI Act) was enacted in order to “*promote transparency and accountability in the working of public authority*”. However activists asking for information under the Act and seeking to achieve that objective have come under serious attacks and threat over the last few years. Since 2010, a considerable number of RTI activists have been murdered; scores have faced serious physical attacks and prosecution under false charges. The RTI Act itself does not provide protection for activists acting under it. When threats to such activists have been brought to the notice of Central and State Information Commissions, their interventions have been ineffective. The police are reported to be not only refusing to lodge the FIRs of RTI activists, and not conducting investigations, they also turn out to be perpetrators. The frequency of threats and attacks against RTI activists, make them one of the most vulnerable category of HRDs in India.

Examples of the most common abuses against RTI activists are listed below:

Murder: At least 12 RTI activists were killed between 2010 and September 2011.⁵¹⁴

- (a) On 2 March 2011, a NREGA activist, Niyamat Ansari, was beaten to death by unidentified persons after he was dragged out of his house at Jerua village in Latehar district of Jharkhand. Through his RTI applications, he had exposed corruption by contractors in the NREGA. Based on his complaints three persons, including Block Development Officer Kailash Sahu were arrested for defalcation of funds.⁵¹⁵

508 Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, mission to India, 2011, A/HRC/19/55/Add.1.

509 Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, mission to India, 2011, A/HRC/19/55/Add.1.

510 Report on Dalit Human Rights Defenders by NCDHR-National Dalit Movement of Justice (NDMJ). Submitted to the Special Rapporteur on Situation of Human Rights Defenders, 15 January 2011

511 Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, mission to India, 2011, A/HRC/19/55/Add.1.

512 NDTV, *Activist beaten to death for exposing NREGA scam in Jharkhand*, March 3, 2011, available at: <http://www.ndtv.com/article/india/activist-beaten-to-death-for-exposing-nrega-scamin-jharkhand-89038>

513 See: Asian Centre for Human Rights, *RTI Activists: Sitting Ducks of India*, 2011, available at: <http://www.achrweb.org/ihrq/issue3-4/India-Sitting-Ducks-2011.pdf>

514 See: Report of the Special Rapporteur on the situation of human rights defenders, Margaret Sekaggya, Mission to India, 2011, A/HRC/19/55/Add.1.

515 See: Asian Centre for Human Rights, *RTI Activists: Sitting Ducks of India*, 2011, available at: <http://www.achrweb.org/ihrq/issue3-4/India-Sitting-Ducks-2011.pdf>

- (b) On 8 December 2011, Mr. Ram Vilas Singh, an elected member of Amhara panchayat samiti (sub-district level local self-governing body) of Lakhisarai district, Bihar was shot dead allegedly for demanding information about corruption in the implementation of social development programmes.⁵¹⁶ The alleged killers had been implicated in an earlier case of murder whose progress Mr. Singh had been pursuing with the police department by making repeated requests for information. The NHRC took *suo moto* cognizance of this case and issued a notice to the Deputy Inspector General of Police (Human Rights) for a report.⁵¹⁷
- (c) On 25 July 2010, a Uttar Pradesh home guard policeman identified as Babbu Singh was killed allegedly for seeking information about government funds and work done by his village pradhan (chief) at Katghar village in Bahraich district of Uttar Pradesh.
- (d) On 20 July 2010, two unidentified assailants shot dead Amit Jethwa, RTI and environment activist, near the Gujarat High Court. Mr Jethwa, who was the president of Gir Nature Youth Club, had filed several petitions against the Forest Department and also filed a PIL on illegal mining in the Gir forests of Junagadh district.

Attempts on Lives of Activists: Several RTI activists have been attacked, although many of these attacks go unreported.

- (a) On 26 January 2011, Amarnath Pandey (55 years) was seriously injured after being shot at for trying to expose corruption in Deepnagar locality in Sonebhadra in Uttar Pradesh.
- (b) On 21 August 2011, RTI activist Jaisukh Bambhania (39 years), a resident of the Union Territory of Diu, was attacked with sharp weapons and pipes and acid was thrown on him by unidentified persons alleged to be officials and politicians at Una in Junagadh district of Gujarat. He had sought information in connection with the construction of an alleged illegal restaurant and bogus licenses issued by Road Transport Office to bike vendors.
- (c) On 14 July 2010, RTI activist Ashok Kumar Shinde was beaten up by unidentified persons for seeking information under the RTI Act and filing a PIL against the Public Works Department in Mumbai, Maharashtra.

False Cases and Harassment: Many RTI activists have been harassed and false cases have been instituted against them in order to stifle their voices.

- (a) On 11 April 2011, RTI activist Pawan Sharma, a resident of Shalimar Garden-II in Ghaziabad, Uttar Pradesh, was arrested allegedly on false charges of extortion and criminal intimidation. He had exposed the nexus between builders and officials of the Ghaziabad Development Authority (GDA) to allow illegal construction through the RTI Act. He was later released on bail. However, another FIR was filed and Mr. Sharma was re-arrested on the same charges on 11 July 2011.
- (b) On 9 March 2011, RTI activist Mary Anne Pohshna was arrested by the police in an alleged false case in Meghalaya. She was framed with another activist Agnes Kharshiing in a false criminal case at the behest of police officials. Agnes Kharshiing had filed an RTI application in 2009, seeking information pertaining the jailbreak and subsequent custodial killing of an undertial, Fullmoon Dhar in June 2009, who was allegedly killed in a fake encounter.

The lack of protection of RTI activists is a critical issue that needs addressing. Amendment of the RTI Act can be a useful step in achieving that. Civil society actors have proposed that any amendment should include provisions for physical protection of the activists under threat, time-bound disposal of their complaints to the police in case of attack or harassment and timely investigation of their complaints by the police.

Source: Asian Centre for Human Rights, RTI Activists: Sitting Ducks of India, 2011.

⁵¹⁶ India Today, *RTI Activist Ram Vilas Singh Shot Dead in Bihar*, December 10, 2011, available : <http://indiatoday.intoday.in/story/rti-activist-shot-dead-in-bihar/1/163664.html>

⁵¹⁷ Email alert circulated by Commonwealth Human Rights Initiative, December 2011, available at: http://www.human-rightsinitiative.org/programs/ai/rti/india/national/2011/email_alerts/RTI7.html

Other groups which are at particular risk include: *adivasis*, who democratically protest against acquisition of their land and other natural resources and the consequent displacement and dispossession; defenders who promote and defend the rights of LGBTI persons; church workers that defend the rights of marginalised communities; defenders seeking accountability for communal pogroms; as well as defenders engaged in monitoring human rights violations on border areas.

The stringent provisions under the *Foreign Contribution Regulation Act, 2010* (FCRA) threaten the functioning of human rights organisations, especially those differing with the government. Section 12(6) provides for the expiry of the FCRA certificate after five years, after which permission to receive foreign funds has to be sought again from the Central Government. Further, the *Foreign Contribution (Regulation) Rules, 2011* adopted for implementation of the FCRA violate the freedom of association and expression of HRDs. Under Rule 3, any voluntary organization can be branded as “*organization to be of a political nature, not being a political party*”, and therefore prevented from receiving foreign grants. The SR HRDs recommended that the FCRA “*be critically reviewed or repealed*”.

IV



MECHANISMS FOR THE PROTECTION OF HUMAN RIGHTS

Mechanisms for the Protection of Human Rights

National Human Rights Institutions

As per UPR I Recommendation 3, the Gol accepted to strengthen existing mechanisms for the protection of human rights. India has eight different institutions at the national level mandated to protect rights of various groups.⁵¹⁸ In addition, it has over 180 institutions at the state level charged with protecting and promoting human rights. Although these institutions have great potential, systemic impediments affect the functioning of many. A number of National Human Rights Institutions (NHRIs) have interpreted statutory provisions as implying that they can not make their annual reports public without the same being first placed before the Parliament. For example, not a single annual report of the National Commission for Scheduled Tribes has been made public since 2004, despite submissions of four reports to the President of India.⁵¹⁹ According to the National Human Rights Commission (NHRC), its Annual Reports for 2008-09 and 2009-10 have been submitted to the Gol, but as the government has not developed its responses to the recommendations contained in those reports, it has not yet tabled the reports in Parliament.⁵²⁰

518 National Human Rights Commission (NHRC), National Commission for Women, National Commission for the Protection of Child Rights, National Commission for Scheduled Castes, National Commission for Scheduled Tribes and National Commission for Minorities, Central Information Commission, and Central Commissioner for Persons with disabilities.

519 NCST Reports, National Commission for Scheduled Tribes, available at: <http://ncst.nic.in/index2.asp?slid=490&sublinkid=280&langid=1>

520 See: Report and Recommendations of the Session of the Sub-Committee on Accreditation, International Coordinating Committee of National Institutions for the promotion and protection of Human Rights, 2011, page 15, available at: <http://nhri.ohchr.org/EN/WhoWeAre/News/Lists/News/DispForm.aspx?ID=38&ContentTypeld=0x0104006A3D2D731523E24B9C932DE5D6E5EDFF>

There is no legal obligation to ensure plurality in the composition of members of NHRIs⁵²¹ and many lack representation from women and vulnerable groups. The NHRC, set up under the *Protection of Human Rights Act, 1993* (PHR Act), for instance, has no female member since September 2004. Further, under Section 19 of the PHR Act, the NHRC cannot investigate human rights violations by the army and other armed forces. In addition, under Section 36 (2) of the PHR Act, the NHRC is barred from inquiring “into any matter after the expiry of one year from the date on which the act constituting violation of human rights is alleged to have been committed”.⁵²²

The NHRC stakeholders’ report for India’s UPR, further spells out that the central government has not given the National Commissions “any added powers or greater resources, while the State Human Rights Commissions (SHRCs) are mostly moribund and very few Human Rights Courts have been set up”.⁵²³ A number of state commissions are yet to be set up (for example, State Commissions for the Protection of Child Rights have been established in only 12 states) and 7 out of 20 SHRCs lack Chairpersons (Himachal Pradesh, Jammu and Kashmir, Madhya Pradesh, Maharashtra, Manipur, Rajasthan and Tamil Nadu).⁵²⁴

The International Coordinating Committee of NHRIs (ICC) and its Sub-Committee on Accreditation examined the NHRC in May 2011. They granted the NHRC an ‘A’ grade status but with a few recommendations to be implemented – three of them before 2013 and two others before the re-accreditation in 2016. These conditions pertain to: (i) composition and pluralism; (ii) the appointment of the Secretary General and the Director of Investigations; (iii) the relationship with civil society; (iv) the NHRC’s complaint handling function; and (v) the NHRC’s Annual Report.⁵²⁵

The 1993 World Conference on Human Rights “recommended that each State consider the desirability of drawing up a national action plan identifying steps whereby that State would improve the promotion and protection of human rights.”⁵²⁶ This concept is based on the view that “lasting improvements in human rights ultimately depend on the government and people of a particular country deciding to take concrete action to bring about positive change”.⁵²⁷

Nearly 20 years later, India is yet to adopt its first National Action Plan for Human Rights (NAP). The NHRC has been tasked with drafting a NAP. In 2008, the Commission stated that the NAP was “under preparation” but there has been no visible output. In its UPR stakeholders’ report, the NHRC pointed out that it had “started to draft

521 Commonwealth Human Rights Initiative (CHRI), *A Rapid Study of Information Commissions: Established Under the Right to Information Laws in India*, May 2012, available at: www.humanrightsinitiative.org/postoftheday/2012/ICs-compstudy-Delhi-final-May12-VenkatN&AmikarPs.pdf

522 *Protection of Human Rights Act, 1993* as amended in 2006, available at: www.nhrc.nic.in

523 NHRC, India Submission to the UN Human Rights Council for India’s Second Universal Periodic Review, available at: <http://nhrc.nic.in/Reports/UPR-Final%20Report.pdf>. See Annexure E

524 For the full list of State Human Rights Commissions and vacant positions, see: www.nhrc.nic.in

525 See: Report and Recommendations of the Session of the Sub-Committee on Accreditation, International Coordinating Committee of National Institutions for the promotion and protection of Human Rights, 2011, pages 13-15, available at: <http://nhri.ohchr.org/EN/WhoWeAre/News/Lists/News/DispForm.aspx?ID=38&ContentTypeld=0x0104006A3D2D731523E24B9C932DE5D6E5EDFF>

526 Vienna Declaration and Programme of Action, Part II, paragraph 71.

527 OHCHR, *Handbook on National Human Rights Plans of Action*, August 29, 2002, available at: www.ohchr.org/Documents/Publications/training10en.pdf

a plan, on which it will consult civil society and other stakeholders".⁵²⁸ It is very important for the the Gol and the NHRC to prioritise the drafting of the NAP through broad-based consultations with civil society across India.

International Human Rights Mechanisms

Reporting to Treaty Bodies

As per UPR I Recommendation 4 and its 2011 pledge, the Gol committed to continue its constructive engagement with international human rights bodies. However, one major cause of concern remains the government's delays in reporting to Treaty Bodies, especially to the Human Rights Committee, to which a report has been pending since 2001 (see table below).

Treaty Body	Due Date of Last Report	Latest Report Submitted	Due Date of Next Report
International Covenant on Civil and Political Rights (CCPR)	March 1992	November 1995	December 2001
Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)	August 2002	October 2005	August 2010
International Convention on the Elimination of All Forms of Racial Discrimination (CERD)	January 1998	January 2006	January 2010
International Covenant on Economic, Social and Cultural Rights (CESCR)	June 1991	October 2006	June 2011
Convention on the Rights of Persons with Disabilities (CRPD)	-	-	June 2010
Convention on the Rights of the Child (CRC)	July 2008	August 2011	-
Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (CRC-OP-AC)	December 2007	August 2011	-
Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography (CRC-OP-SC)	September 2007	August 2011	-

⁵²⁸ NHRC, India Submission to the UN Human Rights Council for India's Second Universal Periodic Review, available at: <http://nhrc.nic.in/Reports/UPR-Final%20Report.pdf>. See Annexure E.

Ratification of International Treaties

Since UPR I, India has only ratified the UN *Convention Against Corruption, 2003*. It has failed to ratify some major human rights treaties, including: United Nations Convention against Torture (UNCAT), the UN *Convention relating to the Status of Refugees, 1951*; the *International Convention on the Protection of the Rights of Migrant Workers and Members of their Families, 1990*; the *International Convention for the Protection of All Persons from Enforced Disappearance, 2009*; the *Optional Protocol to CEDAW, 1999*; and *Optional Protocols I (1966) & II (1989) of ICCPR, 1966*; the *Rome Statute of the International Criminal Court, 1998*; *ILO Convention No. 169, 1989*; *Convention Concerning Indigenous and Tribal Peoples in Independent Countries, 1989*; *Anti-Personnel Landmines Convention, 1997*; *Additional Protocols I & II to the Geneva Conventions, 1949*.⁵²⁹

On 23 August, 2011, the Office of the President of India issued a directive stating that “accession to, or ratification of such Conventions/Treaties, be undertaken only after the relevant domestic laws have been amended, or the enabling legislation has been enacted in cases, where there are no domestic laws on the subject”.⁵³⁰ The notice is silent with respect to the treaties already ratified by India on which there are no domestic laws.

Special Procedures

As per UPR I Recommendation 14 and its 2011 pledge, the GoI announced in September 2011 that it was extending a standing invitation to Special Procedures, which is a very significant and welcome step. The two last visits by Special Procedures to India were those of the Special Rapporteur on the situation of human rights defenders in January 2011 and that of the Special Rapporteur on extrajudicial, summary or arbitrary executions in March 2012. During both visits, the GoI demonstrated commendable support and openness.

529 The State of Human Rights in India: Asian Centre for Human Rights Joint Submission on Behalf of the People's Forum for UPR II.

530 Government of India: Cabinet Secretariat, Rashtrapati Bhawan, No.1/13/2/2010-Cab, 23rd August 2011, available at: http://cabsec.nic.in/showpdf.php?type=circulars_23august_2011&special

Conclusion

The situation of persistent human rights violations across the country presents manifold challenges. A number of progressive legal and policy initiatives have been taken by the GoI. However, the lack of implementation of these measures due to bureaucratic inertia, lack of adequate allocation of resources, contradiction between economic policies, 'development priorities' and national and international human rights commitments, continue to act as obstacles to the realisation of human rights for India's most vulnerable.

This report has attempted to highlight the many gaps that exist between the recognition of human rights in the country and their implementation. The report has also attempted to illustrate the devastating impact of the ongoing cycle of human rights violations in India. WGHR hopes that the second cycle of the UPR will highlight the need for more concerted actions on the part of India to meet its human rights obligations.

Annexes

Annex A

List of WGHR Members

Organisations

- ActionAid India** | www.actionaid.org/india
- Asian Centre for Human Rights** | www.achrweb.org
- Citizens for Justice and Peace** | www.cjponline.org
- Commonwealth Human Rights Initiative** | www.humanrightsinitiative.org
- FIAN India** | www.fian.in
- HAQ: Centre for Child Rights** | www.haqcrc.org
- Housing and Land Rights Network** | www.hic-sarp.org
- Human Rights Alert**
- India Alliance for Child Rights**
- Lawyers Collective** | www.lawyerscollective.org
- Multiple Action Research Group** | www.ngo-marg.org
- National Campaign on Dalit Human Rights** | www.ncdhr.org.in
- Partners for Law in Development** | www.pld-india.org
- People's Watch** | www.peopleswatch.org
-

Independent experts

- Ms. Vrinda Grover** | Lawyer
- Dr. Rajkumar** | Advisor to human rights organisations
- Prof. Babu Mathew** | Visiting Professor, National Law University, Delhi
-

Advisers

- Ms. Indira Jaising** | Member, UN Committee on the Elimination of Discrimination against Women
- Mr. Anand Grover** | Special Rapporteur on the right to health, UN Human Rights Council
-

Convenor

- Mr. Miloon Kothari** | Former Special Rapporteur on adequate housing, UN Human Rights Council

Annex B

Overview of WGHR national and regional consultations on the UPR

1. Consultative workshop on the UPR process (April 2011)

WGHR organised a national consultative workshop on the Universal Periodic Review (UPR) process in New Delhi on the 4 and 5 April, 2011. It brought together representatives from the Ministry of External Affairs, the National Human Rights Commission (NHRC), various UN agencies, diplomats and civil society.*

The workshop achieved three main objectives, namely:

- Provided training to all the actors on how best to engage with the UPR process;
- Examined contemporary and critical human rights issues in India;
- Provided a first of its kind forum for dialogue between various stakeholders (government, national human rights institutions and members of civil society) on the UPR process both in terms of implementation of UPR I recommendations and preparation for UPR II.

2. Regional UPR consultations (August-September 2011)

In order for the WGHR stakeholders' report to reflect the current human rights challenges in the country as precisely as possible, WGHR held a series of five regional consultations with civil society actors across India from 28 August to 28 September 2011. These consultations aimed at creating a broad and inclusive movement around the UPR process and gathering precise information that would feed into WGHR's stakeholders' report.

Apart from training participants on the UPR process, the regional consultations aimed at gathering testimonies, documentation and information on the most pressing human rights challenges in each region. In order for the consultations to be as effective as possible, WGHR chose a thematic approach, where a series of five themes were suggested to the participants as basic framework for group discussions. The given themes were:

1. Access to Justice
2. Economic, Social and Cultural Rights and the Right to Development
3. Discrimination
4. Militarisation and Security – Legislation and Apparatus
5. Human Rights Defenders

The groups conducted discussions on these themes looking at how they affect constituencies most vulnerable to human rights abuse. These constituencies include: (1) Dalits, (2) Indigenous People, (3) Economically Most Disadvantaged, (4) Women, (5) Children, (6) Religious or other Minorities, (7) Persons with Disabilities, (8) Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI).

* For full report on the consultation, see: www.wghr.org/pdf/Report%20on%20UPR%20Workshop.pdf

Further details about the regional consultations held:

North-Eastern Consultation

- Place: Shillong (Meghalaya)
- Dates: 28-30 August, 2011
- States covered: Meghalaya, Assam, Arunachal Pradesh, Nagaland, Manipur, Mizoram, Sikkim and Tripura

Northern consultation

- Place: New Delhi
- Dates: 15-16 September, 2011
- States covered: Uttar Pradesh, Uttarakhand, Himachal Pradesh, Jammu & Kashmir, Punjab, Haryana and Delhi

Western consultation

- Place: Ahmedabad (Gujarat)
- Dates: 18-20 September, 2011
- States covered: Gujarat, Rajasthan, Madhya Pradesh, Maharashtra and Goa

Eastern consultation

- Place: Puri (Odisha)
- Dates: 22-24 September, 2011
- States covered: Bihar, Jharkhand, Chhattisgarh, West Bengal and Odisha

Southern consultation

- Place: Bengaluru (Karnataka)
- Dates: 26-28 September, 2011
- States covered: Andhra Pradesh, Karnataka, Tamil Nadu and Kerala

3. National consultation (11 - 12 October, 2011)

In collaboration with the National Law University, Delhi (NLUD), WGHR organized a two days National Consultation on the UPR at the NLUD campus. It brought together more than 60 participants from across the country; representatives from each of the UPR regional consultations, WGHR members, and representatives from the National Human Rights Commission, the National Commission for Protection of Child Rights and UNICEF. WGHR's national consultation aimed at the following objectives: (i) consolidate the findings from the regional consultations, (ii) establish national patterns of human rights violations, (iii) prioritize the most pressing human rights issues, and (iv) continue a constructive engagement and dialogue between civil society and National Human Rights Institutions around the UPR process.

At the national consultation, consensus was reached that the final WGHR stakeholders' report should focus on three main themes:

- Economic, Social and Cultural Rights and the Right to Development
- Militarisation and Security – Legislation and Apparatus
- Access to Justice

The WGHR stakeholders' report and the present status report reflect the highlights of the main outcomes of the regional and national consultations.

WGHR Assessment of Implementation of UPR I Recommendations

Last updated: 18 May, 2012

S. No.	Recommendation	Response of India in its UPR II Report	Current status	Further measures required
1.	Expedite ratification of the Convention against Torture (United Kingdom France, Mexico, Nigeria, Italy, Switzerland, Sweden) and its Optional Protocol (United Kingdom)	To enable ratification of the UNCAT, the "Prevention of Torture Bill 2010" was introduced and passed by the Lower House of Parliament (Lok Sabha) in May 2010. The Select Committee of the Upper House (Rajya Sabha) has made certain recommendations which are currently being examined by Government. Although India has not yet ratified the Convention, Article 21 and other Articles of the Constitution of India and the relevant provisions under the Indian Penal Code, 1860, provide for adequate safeguards. The Supreme Court of India, through its judgements, has also laid down exacting standards on this issue.	The Rajya Sabha Select Committee finalised its recommendations as well as an alternate draft of the <i>Prevention of Torture Bill (PTB)</i> in a report which was presented to the Rajya Sabha in December 2010. To date, more than a year later, the Ministry of Home Affairs has not publicly released any comment on the Committee's draft. As the Bill has been significantly altered in the Committee's draft, it has to be placed before, discussed, and passed by both Houses of Parliament. A new Bill has not been introduced in Parliament as yet.	It is crucial that there is no dilution of the Bill as amended by the Select Committee. Any dilution will stand foul of India's obligations under CAT and undermine meaningful ratification. In addition, there is an urgent need to address the shortcomings that remain, in spite of the Committee's suggested amendments. It is imperative that the Bill is revised with due deliberation that fully takes into account all the remaining gaps to ensure that PTB is in total conformity with CAT.
2.	Continue to fully involve the national civil society in the follow-up to the UPR of India, as was done for its preparation (United Kingdom);	The various Ministries/ Departments involve the national civil society, as appropriate, in the formulation, implementation and assessment process relating to their respective policies, programmes and schemes. These include the process to operationalise of the recommendations of the UPR process. We will continue to involve the national civil society in this process. For e.g. with respect to the highly successful national employment programme initiative namely Mahatma Gandhi National Rural Employment Guarantee Act, 2005, it is worth mentioning that states have reported that social audit has been conducted in 91% of the Gram Panchayats. 244,000 reports on Social Audit have been uploaded on the MGNREGA website.	There were no debriefing sessions or consultations, initiated by the government, with civil society after UPR I in 2008 until early 2012. However, due to concerted civil society efforts, GoI representatives participated actively in a national workshop on the UPR organised by civil society in April 2011. The GoI upheld its commitment of posting its draft report for UPR II on the Ministry of External Affairs (MEA) website in January 2012, inviting comments from civil society. The MEA also held a number of meetings with civil society in New Delhi but very few of the recommendations made at these meetings were incorporated into the government's final UPR II report.	The government should initiate, soon after UPR II hearings, public efforts to hold regional and national broad-based consultations with civil society and independent experts on the implementation of recommendations made at UPR II. In addition, GoI's draft report for UPR III should be made available at the MEA website, for comments well before the deadline for its submission to OHCHR. The NHRC is strongly recommended to continue to consult civil society and submit its own independent reports for India's UPR III.
3.	Continue energizing existing mechanisms to enhance the addressing of human rights challenges (Ghana);	Government has continued to energize the various institutions/ mechanisms for protection and promotion of Human Rights. Some of the legislative and other initiatives address directly the human rights challenges India faces. The judiciary has also played its part to impart new momentum through its far-reaching pronouncements. In spite of a number of serious challenges, India will continue to promote and strengthen human rights.	There is no real evidence of the government continuing to 'energise' the various institutions/mechanisms for protection and promotion of human rights. In fact, much remains to be done with regard to India's human rights institutions. For instance, most basically, at present, state-level human rights commissions are established only in 20 states, so there is not even a human rights commission in every state of the country. Of the established commissions, many are short-staffed and/or do not have a Chair. Long-standing grievances of the lack of independence, transparency in appointments, diversity, and inadequate responses of India's human rights institutions have not been addressed to date. The judiciary continues to play its role actively, but the perennial problem of lack of implementation of judicial pronouncements has not been properly tackled.	In brief, WGHR suggests that any further action to 'energize' existing mechanisms is geared towards strengthening institutional responses. Close attention should be given to the appointment procedures to ensure independence and autonomy of these institutions, in line with India's pledge at the UN GA regarding the independence of national human rights institutions. It is strongly recommended that the national and state human rights commissions are made to draft and submit their annual reports on time every year, and central and state governments make it a practice to table and debate the reports in Parliament and state assemblies. Concerted efforts are needed to ensure the executive branch properly implements the orders and judgments of the courts.
4.	Encourage enhanced cooperation with human rights bodies and all relevant stakeholders in the pursuit of a society oriented towards the attainment of internationally recognized human rights goals(Ghana);	GoI is engaging with domestic and international Human Rights procedures/ mechanism at various levels so as to attain internationally recognized human rights goal. Judiciary in India has also played an important role in taking cognizance of international instruments on human rights through its judgments. For e.g. in 2007, the National Commission for the Protection of Child Rights (NCPCHR) was established to ensure that all legislative and administrative measures are in consonance with the child rights perspective as enshrined in the Constitution of India and the Convention on the Rights of the Child.	This is a broad recommendation which requires a sustained approach on many levels. The recent announcement by the GoI to extend a standing invitation to special procedures is a very good step. However, the continued and endemic delay in the GoI's reporting to treaty bodies, in particular to the Human Rights Committee, is an issue of concern.	In brief, WGHR recommends that the government strengthens the level and quality of engagement with both domestic and international human rights bodies, and increases consultation on human rights issues with all relevant stakeholders. The GoI should submit all its reports to treaty bodies in time, in line with India's pledge at the GA to cooperate with UN treaty bodies. It should submit its long overdue report to the Human Rights Committee at the earliest.

S. No.	Recommendation	Response of India in its UPR II Report	Current status	Further measures required
5.	Maintain disaggregated data on caste and related discrimination (Canada, Belgium, Luxembourg);	India's programme of affirmative action is without parallel in scale and dimension in human history. In the Census of 2011, extensive data has been collated. Indian Census has always provided data/investigations of anthropological nature such as the socio-economic survey of villages, preparation of ethnographic notes on SC/ST etc. Data on weaker sections/minorities in the society is also available extensively in the public domain.	Some of the key areas where disaggregated data on caste is still missing are: (i) crimes committed against SC and ST women; (ii) position of employment in the private sector and entrepreneurship; and (iii) access to health and civic amenities. Regarding crimes against SCs and STs, the existing data collected by the National Crime Records Bureau (NCRB) does not reveal the true nature and extent of violence as many crimes against SCs don't fall under the NCRB's official category of 'crimes against SCs'. For example, there is no official disaggregated data on: custodial violence, illegal detention, torture, violence against women other than rape, bonded labour, child labour, manual scavenging (no data available at all).	It is strongly recommended that the government monitors through its surveys/ alternative mapping exercises the current practices of caste-based discrimination (CBD) as well as economic and social conditions of communities affected by CBD, disaggregated gender wise.
6.	Consider signature and ratification of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (Brazil);	The Constitution of India provides for direct access to the Supreme Court and High Courts for redressal of violations of any fundamental right, for any individual or group of individuals. In addition, we have several other statutory mechanisms to address such violations including the National Human Rights Commissions and the State Human Rights Commissions. There is also a separate National Commission and State Commissions for Women which <i>inter alia</i> have a mandate to address cases of violations of women rights. There exists, therefore, effective legal and constitutional framework to address individual cases of violations within India. Also India has been supportive and responsive to the various international Human Rights mechanism such as that of confidential complaint and of visits of Special Rapporteur.	There is still no move from the government to sign and ratify the CEDAW Optional Protocol.	The CEDAW Optional Protocol (OP) provides mechanisms to enhance state compliance to CEDAW. It is a remedy available where justice remains wanting despite exhaustion of all domestic remedies, and not prematurely or in substitution of domestic remedies. The recommendations of CEDAW under the OP typically provide structural solutions, and cannot be viewed as disturbing the hierarchy of the judicial system, or being parallel to them, or indeed substituting the domestic mechanisms. Indeed, countries with strong and multiple mechanisms of redress, similar to India, have ratified the OP CEDAW for this reason. WGHR fully supports signature and ratification of the OP.
7.	Consider signature and ratification of ILO Conventions No. 138 and 182 (Brazil, Netherlands, Sweden);	Government of India fully subscribes to the objectives and purposes of the Convention on the Rights of the Child (to which India is a party) as well as the ILO Conventions No. 138 and 182. At the time of accession to Convention on Rights of Child, Government made a declaration to Article 32 of the Convention stating <i>"Measures would be undertaken to progressively implement the provisions of Article 32 since it is not practical immediately to prescribe minimum age for admission to each and every area of employment in India."</i> Given the socio-economic conditions in the country, a multi-pronged strategy for elimination of child labour has been adopted, which emphasises on Legislative measures; general development programmes for the benefit of families of child labour; and project-based action in areas of high concentration of child labour. As per Child Labour (Prohibition & Regulation) Act, 1986, children below the age of 14 years are prohibited for employment in hazardous occupations/processes specified in the Act. Consequently, India has not ratified these two ILO Conventions since minimum age is fixed at 18 years. The Government is working on the modalities of ratifying these ILO Conventions, particularly on No. 182. However, it is pertinent to point out that the Government issued three notifications in the last five years, expanding the list of banned and hazardous processes and occupations in Schedule II of the Child Labour (Prohibition and Regulation) Act, 1986. The number of occupations listed in Part A now is 18 and the number of processes listed in Part B is 65. Further, the worst forms of child labour are already prohibited under various Acts such as Bonded Labour System (Abolition) Act, 1976, Immoral Traffic Prevention Act-1956, the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substance Act, 1988 and Child Labour (Prohibition & Regulation) Act.	The government has not yet ratified ILO Conventions No. 138 and 182. Not only is there is very poor implementation of the law in the newly prescribed 'hazardous' sectors, but the current child labour law itself stands in direct violation of the Constitution and a child's fundamental right to education. The National Commission for the Protection of Child Rights is a Commission, not a court; and hence does not have the power to conduct speedy trials.	Current inconsistencies within all child-related laws need to be addressed immediately. The government needs to invest in child labour elimination programs, better child tracking systems, inter-departmental coordination and convergence of services, legislative provisions to regulate placement agencies and other such measures. There needs to be better functioning of Child Welfare Committees, proper rehabilitation of rescued children, and prosecution of the accused employers.
8.	Share best practices in the promotion and protection of human rights taking into account the multi-religious, multi-cultural and multi-ethnic nature of Indian society (Mauritius);	Best Practices are being included in the body of UPR – II for sharing with Human Rights Council.	India's national report for UPR II is a reiteration of existing law, policies and programmes, which do not, in themselves, constitute best practices, unless there is a clear recognition of the obstacles faced in their implementation and evidence that the GoI is moving towards overcoming these.	See <i>current status</i> .

S. No.	Recommendation	Response of India in its UPR II Report	Current status	Further measures required
9.	Review the reservation on article 32 of the Convention on the Rights of the Child (the Netherlands);	Response at S.No. 7 above applies to this issue as well.	The government admits child labour is undesirable, but claims poverty and ignorance perpetuate it. It also admits child labour-related laws are poorly enforced. Current official thinking holds it is 'not realistic' to ban all child labour.	The legal scenario has changed as being at school and not at work is now a Fundamental Right for all children (Art. 21A) backed by a powerful <i>Right to Free and Compulsory Education Act, 2009</i> . The logical corollary to this far-reaching change in the legal regime is for the GoI to revisit its earlier declaration and follow it up by amending 'The Child Labour (Prohibition and Regulation) Act, 1986' in order to make it fully compliant with the new Fundamental Right.
10.	Consider new ways of addressing growing economic and social inequities arising out of rapid economic growth and share experiences/results of best practices in addressing poverty (Algeria);	The central vision of the 11th Plan (2007-2012) is to trigger a development process which ensures broad-based improvement in the quality of life of the people in an inclusive manner. It includes several inter-related components, including rapid growth that reduces poverty and creates employment opportunities, access to essential services in health and education, equality of opportunity, empowerment through education, environmental sustainability, recognition of women's agency and good governance. In fact, there is now a mandatory requirement that all Cabinet proposals should specifically mention how 'equity' will be served by the proposal under discussion. As can be seen from our UPR – II, several policies and programmes have been put in place to address such inequities.	While it is true that the GoI is aware of the urgent need for inclusive development, the government has not addressed the root causes that are responsible for exclusion. This is leading to deepening growing economic and social inequities, even while a strong economic growth rate is sustained.	The root causes of exclusion are embedded in the current economic growth model. The 11th Plan (2007-2012) remains obsessed with the 'growth at all costs' approach. The government must consider revisiting the current model of development. The alternative is to achieve growth through social justice which has never been given any serious consideration. Unless a radical rethinking takes place, that places the realisation of human rights as a primary objective of government policies, there is every likelihood that economic and social inequities will grow in the coming years.
11.	Take into account recommendations made by treaty bodies and special procedures, especially those relating to women and children, in developing a national action plan for human rights which is under preparation (Mexico);	India has always taken into account the recommendations made by the treaty bodies and special procedures and, in accordance to our socio economic conditions, we have strived to implement these recommendations. While the National Human Rights Commission (NHRC) is in the process of drafting a National Action Plan for Human Rights, various Ministries have fully integrated human rights issues in their own National Plans in their respective spheres. For e.g. India has a National Action Plan for Children. This has led to focus on promotion and protection feeding into the overall national commitment to protect and promote of human rights.	The NHRC has been tasked with drafting a national action plan for human rights (NAP). In 2008, the NHRC stated that the NAP was under preparation and that a draft would be circulated to members of the NHRC core group of NGOs for comments. However, the process seems to have been abandoned, with no visible outputs. The NHRC's stakeholders' report for UPR II states that the NHRC "has started to draft a plan, on which it will consult civil society and other stakeholders". The GoI report for UPR II as well as its Annexure I containing the action taken report on UPR I Recommendations make no mention of the NAP. There has clearly been no forward movement on the NAP for many years. Regarding the NAP for Children, referred to in India's UPR II report, there is an existing plan dated 2005 which set numerous targets to be achieved by 2010. Most of these targets have not been achieved.	WGHR strongly recommends that the NHRC monitors the implementation of recommendations made by UN treaty bodies and special procedures. It is strongly suggested that the government requests the NHRC to prioritise the drafting of a NAP. The finalisation of this plan, however, has to be based on broad-based consultations with civil society across India. A new NAP for Children will also have to be drafted with new targets.
12.	Ratify the Convention on Enforced Disappearances (Nigeria);	India has signed the Convention for Protection of all Persons from Enforced Disappearance. Government is studying the extent of changes in the domestic laws that would be required to bring domestic legislation compatible with the Convention. The Constitution, however, continues to provide strong protection in such matters and guarantees the right to approach the higher courts by way of Habeas Corpus petitions. Indian courts have also been awarding compensation in such cases even though our domestic laws do not have any such provision.	Since UPR I, there have been no signs of a process of ratification, including any visible discussions on an enabling legislation, despite large-scale enforced disappearances in the country. The government is also yet to undertake an attempt to codify enforced disappearance as a criminal offence in domestic law. Existing provisions are not being used to penalize those implicated in enforced disappearances. In cases where initial progress is made, the government does not grant the required sanction to prosecute security forces personnel.	The government should expedite the process of ratification of the <i>Convention on Enforced Disappearances</i> .
13.	Strengthen human rights education, specifically in order to address effectively the phenomenon of gender-based and caste-based discrimination (Italy);	The National curriculum for school education of National Council of Educational Research and Training (NCERT) has included the human rights education component in social science subjects. In order to create human rights education sensitivity and skills amongst the teachers in schools, a module for teacher training programme has also been prepared by the taskforce of the NHRC for this purpose. NHRC has continued to play an active role in raising all round human rights literacy and awareness including month-long internship programmes for University students and programmes focussed on public servants especially police in collaboration with the Administrative Training Institutes and Police Training Institutions. Human rights education, as indeed every aspect of our policies and schemes, is sensitive to gender and Scheduled Castes and Scheduled Tribes and Other Backward Classes.	There is no official proof of a national action plan of action for human rights education being in place. Moreover, the government did not respond to the evaluations after the UN decade for human rights education, as well as after the implementation of the first phase of the UN World Programme on human rights education in 2010.	The development of a national policy and action plan for human rights education in schools and colleges, is urgently required.

S. No.	Recommendation	Response of India in its UPR II Report	Current status	Further measures required
14.	Extend standing invitation to special procedures (Latvia, Switzerland);	India has extended a standing invitation to Special Procedures in September 2011 in accordance to our voluntary pledges and commitments made to the HRC in May 2011.	WGHR very much welcomes the significant step taken by the GoI to extend a standing invitation to special procedures. It also commends the government's openness and support during the visit of the UN Special Rapporteur (SR) on the situation of human rights defenders in January 2011 and the visit of the SR on extrajudicial, summary or arbitrary executions in March 2012. The visit of the SR on sale of children, child prostitution and child pornography – initially scheduled for April 2012 – has been postponed.	WGHR urges the GoI to ensure that there are regular visits of Special Rapporteurs to India, including in priority mandates that have made repeated requests. For example, Working Group on arbitrary detention (5 requests); SR on torture (3); Working Group on enforced or involuntary disappearances (2); SR on racism (2) as well as mandates on economic, social and cultural rights such as the SR on adequate housing. The visit of the SR on sale of children should be rescheduled at the earliest.
15.	Receive as soon as possible the Special Rapporteur on the question of torture (Switzerland);	Since we have extended a Standing Invitation to the Special Procedures, we will schedule this visit depending on mutual convenience.	The Special Rapporteur on Torture made a request in 1993, followed by reminders in 2007 and 2010. As far as we are aware, there has been no response as yet from the government.	Given the fact that custodial torture remains endemic in India, and torture prevention legislation appears to be a standstill, it is crucial for the government to allow the SR on torture to visit India without further delay and demonstrate the same openness that was shown to the SR on human rights defenders and the SR on extrajudicial executions.
16.	Fully integrate a gender perspective in the follow-up process to the UPR (Slovenia);	Women related issues and gender perspective has been fully integrated into India's policies in various spheres and in the follow-up to the UPR process. A detailed account of all our policies, including gender budgeting, and legislative developments has been given in the UPR II report. It will be seen that all policies have strong gender perspective.	Although the government has accepted this recommendation, no consultations or reviews with civil society organisations to discuss the process of integrating a gender perspective have been organised following India's first review.	It is crucial to integrate a gender perspective in the UPR process, so that women's concerns are well represented, and thereby addressed. WGHR strongly recommends that the government prioritises the holding of consultations with civil society organizations, and women's groups in particular, at the earliest.
17.	Follow up on CEDAW recommendations to amend the Special Marriage Act in the light of article 16 and the Committee's general recommendation 21 on giving equal rights to property accumulated during marriage (Slovenia);	India is working towards making registration of all marriages compulsory. This direction comes from the Supreme Court which in its judgment in the case of Seema v. Ashwini Kumar (2006) directed that registration of marriages of all persons, irrespective of their religion, who are citizens of India should be made compulsory in their respective States. In this context, 19 States have already taken necessary legislative measures for compulsory registration of marriages. Mandatory registration of the wife in all property owned or acquired by the husband is another progressive step taken by many State Governments. Further, government financed asset ownership schemes have women's ownership of assets. Accordingly, in housing schemes like the Indira Awas Yojana (IAY) or the Rajiv Gandhi Gramin LPG Vitrak (RGGPLGV) Scheme, the allotment is done in the name of the female member of the households or in the joint names of husband and wife. Further, the amendment of the Hindu Succession Act in 2005 was an important legal reform which will contribute towards economic empowerment of women, giving daughters equal rights in the ancestral property.	It must be noted that this recommendation is tied to India's declarations to articles 5 (a) and 16 (1) of CEDAW. There has been no follow-up on these recommendations to date.	The issue of equal rights to property accumulated during marriage remains unanswered. GoI must provide clarity on the steps it has taken to ensure that women have an equal share to matrimonial property. The schemes outlined by GoI pertain to assets provided by the state to households, and does not answer the recommendation in question. Likewise, the question of compulsory registration of marriage is not related to joint ownership of matrimonial property. It is important to mention however, that there are divergent views regarding the merits of compulsory registration of marriage, which in the context of India, will adversely impact women whose marital status is unclear. It is of great concern that the government's report links marriage registration to citizens, and not persons – this is inconsistent with the marriage laws that are not limited to citizens alone. It must be mentioned that the CEDAW Committee in 2007, has strongly recommended withdrawal of India's declarations to articles 5 (a) and 16 (1) of CEDAW, and called for the review its policy of non-interference in personal laws. It is clarified here that the <i>Special Marriage Act, 1954</i> is a secular law, not a personal law. This recommendation needs to be reiterated to allow equality within marriage and family, including in relation to matrimonial property. .
18.	Continue efforts to allow for a harmonious life in a multi-religious, multicultural, multi-ethnic and multi-lingual society and to guarantee a society constituting one-fifth of the world's population to be well fed, well housed, well cared for and well educated (Tunisia).	Constitutional guarantees, legislation, judicial pronouncements, policies and programmes and civil society have strived to address the issue of providing its diverse population fundamental rights, justice, welfare, protection, human rights, affirmative action, inclusive economic growth and all requirements to lead a life of dignity and prosperity as well as promoting the unity and integrity of the Nation. In spite of a number of serious challenges, India remains deeply committed to human rights and has taken significant strides towards these goals. Our recent efforts have been documented in the UPR – II report.	This is a broad recommendation which requires a sustained approach on many levels. India's UPR II report fails to outline such a sustained approach. What is required, in addition to a listing of laws, policies and programmes, is an honest recognition of the tremendous human rights realisation gaps that exist in the country.	The extensive range of measures needed to fulfill this recommendation require a comprehensive 'indivisibility of human rights approach' at all levels of government. Given India's disturbing socio-economic realities, a sustained effort to implement economic, social and cultural rights, including the right to food, housing, education and health, is required. Details of measures needed to achieve this enormous task are too extensive to be summarized here.

Annex D

The Universal Periodic Review (UPR)

The Universal Periodic Review (UPR) is a unique process conducted by the UN Human Rights Council (HRC), involving a review of the human rights record of all 192 UN Member States once every four and a half years. The UPR is a peer review process, whereby UN Member States monitor each others' human rights record. It provides an opportunity for all States to declare the actions they have taken to improve the human rights situation in their countries and overcome challenges. The ultimate goal of the UPR is the improvement of the human rights situation in every country (see UN factsheet on following page).

The main engagement of civil society actors in the UPR process is through submission of a 'stakeholders' report', submitted to the Office of the High Commissioner for Human Rights (OHCHR), which then prepares a summary of all relevant stakeholders' reports. This summary is one of the three documents that form the official basis for the countries' reviews. The three documents on which the reviews are based are:

- Document 1: Information provided by the State under review, which can take the form of a 'national report'.¹
- Document 2: Information contained in the reports of 'Special Procedures', human rights treaty bodies, and other UN entities.²
- Document 3: Information from 'other stakeholders' including non-governmental organizations (NGOs) and national human rights institutions.³

The reviews are conducted by the UPR Working Group (consisting of the 47 members of the HRC) and take place through an interactive discussion between the State under review and other UN Member States.

The UPR assesses the extent to which States respect their human rights obligations set out in: (1) the UN Charter; (2) the Universal Declaration of Human Rights; (3) human rights treaties ratified by the State under review; (4) voluntary pledges and commitments made by the State and, (5) applicable international humanitarian law.

India was part of the first series of States to be reviewed by the HRC in April 2008. It will be reviewed again in May 2012. Following India's first review, the Government of India accepted 18 recommendations (see Annex C). The second review will examine the implementation of these recommendations as well as the development of the human rights situation in the country.

1 See national report of India for its second UPR, available at: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/INSession13.aspx>

2 See compilation of UN information for India's second UPR, available at: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRINUNContributionsS13.aspx>

3 See summary of stakeholders' reports for India's second UPR, available at: <http://daccess-dds-ny.un.org/doc/UN-DOC/GEN/G12/118/60/PDF/G1211860.pdf?OpenElement>



Fact Sheet:

Human Rights Council – Universal Periodic Review

“By your first anniversary in June, the wheels of the Council should be in full motion, including the Universal Periodic Review. This mechanism has great potential to promote and protect human rights in the darkest corners of the world.” – Ban Ki-moon, UN Secretary-General

The Universal Periodic Review (UPR) is a unique process which involves a review of the human rights records of all 192 UN Member States once every four years. The UPR is a State-driven process, under the auspices of the Human Rights Council, which provides the opportunity for each State to declare what actions they have taken to improve the human rights situations in their countries and to fulfil their human rights obligations. As one of the main features of the Council, the UPR is designed to ensure equal treatment for every country when their human rights situations are assessed.

The UPR was created through the UN General Assembly on 15 March 2006 by resolution [60/251](#), which established the Human Rights Council itself. It is a cooperative process which, by 2011, will have reviewed the human rights records of every country. Currently, no other universal mechanism of this kind exists. The UPR is one of the key elements of the new Council which reminds States of their responsibility to fully respect and implement all human rights and fundamental freedoms. The ultimate aim of this new mechanism is to improve the human rights situation in all countries and address human rights violations wherever they occur.

Objectives...

- To address human rights violations all over the world
- To improve the human rights situation everywhere
- To encourage States to fulfill their human rights obligations and commitments
- To assess positive developments and challenges faced by States
- To enhance the State's capacity to ensure the enjoyment of human rights by all
- To provide technical assistance to States, when requested
- To share best practices between States and other stakeholders

How it works...

- All UN Member States will be reviewed every four years
- 48 States will be reviewed each year
- All Council members will be reviewed during their term of membership
- The reviews are carried out by the UPR Working Group composed of the 47 Council members
- The UPR Working Group will hold three two-week sessions per year
- The Working Group sessions take place at the UN Office at Geneva at the Palais des Nations
- Each review is facilitated by groups of three States, or “troikas”, -drawn by lot - who act as rapporteurs

Schedule of review...

- On 21 September 2007, the Human Rights Council adopted a [calendar](#) detailing the order in which the 192 Member States of the United Nations will be considered during the first four-year cycle of the UPR
- The 1st and 2nd sessions of the UPR Working Group took place in April and May 2008, respectively. The 3rd session will take place from 1 to 15 December 2008

Basis of review...

- Three reports serve as a basis for each State review and provide the following information:
 - Information from the State under review (“national report”) including information on achievements and best practices, and challenges and constraints, as well as key national priorities in addressing shortcomings
 - Information contained in the reports of the independent human rights experts and groups, known as the [Special Procedures](#), human rights treaty bodies and other UN entities
 - Information from non-governmental organizations, national human rights institutions and “other stakeholders”

- The review should assess to what extent States respect their human rights obligations contained in:
 - The United Nations Charter
 - The Universal Declaration of Human Rights
 - Human rights instruments (covenants, conventions and other treaties) to which the State is a party
 - Voluntary pledges and commitments made by the State
 - Applicable international humanitarian law

How the review will be conducted...

- An interactive dialogue between the State under review and the Council takes place in the Working Group
- The “troikas” may compile questions submitted in advance by other States to be shared with the State under review to ensure an effective interactive dialogue
- Any of the 192 UN Member States may participate in the reviews, including in the interactive dialogue. Other relevant stakeholders, such as NGOs or national human rights institutions, may attend the reviews in the Working Group
- The duration of the review is three hours for each country in the Working Group. An additional half hour is allocated for the adoption of the report of each country under review in the Working Group
- After the troika presents the report to the UPR Working Group the Working Group adopts the report

The adoption of the outcome...

- Time is allocated during the next regular session of the Human Rights Council following the State review in order to consider the outcome of each review (up to one hour per State)
- Member and observer States, as well as NGOs and other stakeholders, may participate in these plenary meetings to consider the UPR reviews
- The final outcome of the review is adopted by the entire membership of the Human Rights Council at this plenary session

Follow-up to the review...

- The outcome of the UPR should be implemented primarily by the State concerned and, as appropriate, by other stakeholders
- The follow-up review to take place during the 2nd cycle (2012-2015) should focus on the implementation of the recommendations of the previous review
- The international community will assist in implementing the recommendations and conclusions regarding capacity-building and technical assistance in consultation with, and with the consent of, the country concerned
- In considering the outcomes of the UPR, the Council will decide if and when any specific follow-up is necessary

Cooperation with the universal periodic review...

- The Council will address, as appropriate, any cases of persistent non-cooperation with the UPR mechanism after exhausting all efforts to encourage a State to cooperate

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OHCHR, November 2008

Annex E

NHRC Submission for India's UPR II

NHRC-India Submission to the UN Human Rights Council for India's Second Universal Periodic Review

Introduction

Any assessment of India's human rights record must begin with the acknowledgment that no other country as large and populous or as diverse, ethnically and economically, has had to tackle the challenges of development using only democratic methods. The Indian experiment is so unique that it must be judged by its own benchmarks, which are set by a powerful and activist judiciary, a free media and vigilant civil society, which are guardians of human rights in an open society run by the rule of law. However, while there have been many successes, much remains to be done, including on the eighteen recommendations made at the first UPR to the Government of India. Since the same government remains in power, these lapses are its responsibility.

2. The NHRC has continued to monitor the full range of human rights on the basis of complaints received and on suo motu cognizance. The issues it monitors and the recommendations it makes go well beyond those of the first UPR, which addressed a narrow band of problems. However, since the second UPR will assess the government's performance on those, this paper focuses on them, though placed in the wider perspective, which the UN should not ignore.

3. To prepare for this report, the NHRC has held five regional consultations and a national consultation with NGOs, academics, officials and State Human Rights Commissions (SHRCs), even though its mandate and work involve a continuing dialogue with the Central and State Governments, whose performance on human rights it evaluates, and with civil society, from which the more serious complaints are received. It did so for two reasons: given the diversity of India, to ensure that regional priorities were captured, and to focus on the points on which the UPR will concentrate.

4. Around 350 people took part in these consultations, where the local or specialized knowledge that civil society shared was invaluable. Governmental participation was patchy, nor has the NHRC received from most Ministries the action-taken report on the recommendations of the first UPR which it sought in 2010. The SHRCs contributed almost nothing, confirming that most are still inchoate, and must be strengthened.

Civil and political rights

5. India has a comprehensive framework of laws and the Government remained willing to draft new laws to respond to domestic demands or to meet international obligations. However, the implementation of laws, the weakness of new Bills and the law's delay were areas of concern, among which the NHRC will highlight some:

- An anodyne Prevention of Torture Bill was passed by the Lower House of Parliament. It has been greatly strengthened by a Select Committee of the Upper House, and it would be a travesty if the original Bill is adopted.

- The Armed Forces Special Powers Act remains in force in Jammu & Kashmir and the North-Eastern States, conferring an impunity that often leads to the violation of human rights. This, despite the fact that India's 2011 report on the Optional Protocol to the CRC states that "India does not face either international or non-international armed conflict situations".
- 35% of the complaints to the NHRC annually are against the police. In 2006 the Supreme Court issued seven binding directives to start reform, but little has been done, though the need is urgent.
- 9% of the complaints to the NHRC in 2010-11 were on inaction by officials or their abuse of power, confirming that laws are often not implemented or ignored.
- Custodial justice remained a problem. Jails are overcrowded and unhygienic, disease rampant and treatment poor. 67% of prisoners are under trial, either unable to raise bail or confined far longer than they should be because of the huge backlog of cases.
- There are inordinate delays in the provision of justice. 56,383 cases were pending in the Supreme Court at the end of October 2011. At the end of 2010, 4.2 million cases were pending in High Courts, and almost 28 million in subordinate courts.
- The scheduled castes and scheduled tribes remain particularly vulnerable despite laws to protect them, because of the indifference of public servants.
- The practice of bonded labour continues despite laws that ban it, and is taking new forms. The NHRC has received reports of bonded labour being used to execute defence projects in difficult areas.
- The degrading practice of manual scavenging festers on. Some States are in denial over this. The Indian Railways are the largest users of manual scavengers.
- The focal point set up in the NHRC for the protection of human rights defenders received complaints that several, including those working on minority rights and the rights of the scheduled castes and tribes, faced harassment in several States, including arbitrary detention.

Economic, social and cultural rights

6. Though, as the Government had reported at UPR 1, it has set up ambitious "flagship programmes" to provide these rights, they remain precarious:

- A massive public distribution system has not assured the right to food because malnutrition is endemic. The National Advisory Council has recommended that legal entitlements to subsidized foodgrains be extended to at least 75% of the population. This is not acceptable to the Government, which sets arbitrary ceilings on the numbers who can be declared as being below the poverty line.

- The official estimate that 27.5% of the population was below the poverty line in 2004-05 grossly understates the incidence of poverty. The expert committee set up by the Planning Commission put the figure at 37.2%. Other committees set up by Ministries peg it even higher.
- Over 90% of the workforce is in the unorganized sector, has no access to social security, is particularly vulnerable in the cities, and is therefore driven into permanent debt, often leading to conditions of bonded labour.
- The National Rural Employment Guarantee Scheme guaranteed 100 days of work a year to any rural household that needed it. Government data showed that 56 million households applied, 55 million were given work but on average received half the wages guaranteed. The Scheme has not therefore made enough of an impact, very large sums of money have been siphoned off, and it does not provide long-term employment or build permanent assets.
- Public spending on health continues to be abysmally low, at about 1% of GDP, despite Government's commitment to raise it to 2-3%. The public health system is riddled with problems; vast numbers in the villages get little or no medical care. A performance audit by the Auditor General and an evaluation done for the Planning Commission have both found serious deficiencies in the National Rural Health Mission.
- The current National Family Health Survey reports that "the percentage of children under age five years who are underweight is almost 20 times as high in India as would be expected in a healthy, well-nourished population and is almost twice as high as the average percentage of underweight children in sub-Saharan African countries." A huge programme called the Integrated Child Development Services was set up in 1975, but an evaluation done in 2011 for the Planning Commission found that 60% of the annual budget for supplementary nutrition was being diverted. (A study done for the NHRC confirms this.)

The quality of education, particularly in the villages, is dismal; the infrastructure is appalling, teachers are absent, para-teachers are poorly trained. Learning levels and literacy are both very low.

- The Indira Awas Yojana, set up to provide rural housing, requires that an applicant have a plot of land. Millions of landless are excluded. The scheme does not give enough to build a house, and there is some evidence that those who take the money end up in debt. An evaluation done for the Planning Commission found that there was no quality control, including in seismic zones. Neither is there an insistence that toilets be built. The safety of residents and sanitation remain serious concerns.
- The NHRC, which monitors human rights in 28 representative districts across India, finds in its field visits that none of the flagship programmes function well.

- Rapid growth, the development of infrastructure and the expansion of mining industries, have all led to massive displacements of populations, often without their informed consent. The NHRC’s monitoring finds that usually those displaced are given neither adequate relief nor the means of rehabilitation.
- The denial or the abuse of, or the inability to access, their rights hit the most vulnerable the hardest – women, children, the scheduled castes and tribes, and the minorities.

Implementation of Recommendations in UPR 1

7. The NHRC’s assessment of how far the Government has responded to the recommendations made in UPR 1, which follows, should be read in the context of these larger failures.

8. On Recommendation 1, the Prevention of Torture Bill, 2010 was weak. If the Act eventually adopted dilutes the revisions made by the Select Committee, it will call into question the Government’s commitment to the Convention against Torture.

9. On Recommendation 2, Government has not involved civil society in the follow-up to UPR 1, but some Ministries do consult it in the formulation and implementation of their programmes.

10. On Recommendation 3, to energize “existing mechanisms to enhance the addressing of human rights challenges”, the record is uneven because:

- The Central Government has continued to let the National Commissions function independently, but given them no added powers or greater resources;
- the State Human Rights Commissions are mostly moribund;
- very few Human Rights Courts have been set up.

11. On Recommendation 4, the Government has taken a belated step to “encourage enhanced cooperation with human rights bodies” by issuing a standing invitation to Special Procedures mandate-holders, in response to Recommendation 14, so it should not be difficult for it to act on Recommendation 15, which asked it to receive the Special Rapporteur on the question of torture.

12. The Government’s decision is welcome, but it still sends delayed reports or none to treaty bodies, and its apathy on Recommendations 2 and 3 (both of which it accepted) reflects a reluctance to engage “relevant stakeholders”.

13. On Recommendation 5, the Human Development Report 2011 of the Planning Commission has some disaggregated data, but not on caste and related discrimination, though from its experience the NHRC believes this is essential, not least in key areas such as :

- crimes committed against women and children from the Scheduled Castes and Scheduled Tribes;
- violence against women other than rape;
- bonded labour, child labour and manual scavenging;
- custodial violence, illegal detention and torture.

14. On Recommendation 6, ignoring a request from the NHRC, the Government has taken no steps to sign and ratify the Optional Protocol to CEDAW.

15. On Recommendation 7, which asked the Government to consider signing and ratifying ILO Conventions 138 and 182, it claims that, though it accepts the spirit of the Conventions, it cannot ratify them because socio-economic conditions make it difficult to prohibit the employment of children. This is an argument now even less tenable after the passage of the Right to Education Act in 2009. India now has a law that makes it compulsory for children to be at school till they are 14, and another that lets them work.

16. Despite this absurdity, the Government has not acted on Recommendation 9, which asked it to review its reservation to Article 32 of the CRC. The NHRC has seconded this recommendation but received no response. Child labour therefore flourishes, the right to education will languish.

17. On Recommendation 8, while the NHRC shares with other NHRIs its experience in the promotion and protection of human rights, it is not aware if the Government has any programmes to do so, though it accepted this recommendation.

18. On Recommendation 10, the Government accepts the need for inclusive development, but the implementation of the flagship programmes through which it addresses “economic and social inequities” has not been encouraging. These programmes, which take the poor as targets rather than as agents of change, are well-meant but not well-conceived, have been lavishly funded but have also been looted by the corrupt. The intended beneficiaries get a small proportion of their supposed entitlements.

19. On Recommendation 11, accepted by the Government, there is still no national action plan for human rights. Since the Government has ignored its requests, the NHRC has started to draft a plan, on which it will consult civil society and other stake-holders.

20. On Recommendation 12, there is no evidence that the Government intends to ratify the Convention on Enforced Disappearance. Enforced disappearance is not codified as a criminal offence in domestic law, nor are extant provisions of law used to deter the practice. The NHRC received 341 complaints of disappearance in 2010, 338 so far in 2011; these are by no means comprehensive but still significant numbers, which underline the need for the Government to act.

21. On Recommendation 13, there has been little progress on strengthening human rights education (HRE). Education is primarily the responsibility of the States in India,

and almost none has given this priority. The NHRC works with schools, colleges, universities and NGOs to promote HRE, and has made recommendations to the Second Phase of the World Programme for HRE on the possible target groups and thematic issues for India.

22. On Recommendation 16, which the Government accepted, the NHRC is not aware that it has had a formal follow-up process to the UPR; the question of integrating a gender perspective in it does not therefore arise. This should be corrected after UPR 2. Gender budgeting is, however, now an integral part of the budgetary process.

23. On Recommendation 17, to amend the Special Marriage Act and give equal rights to property accumulated during marriage, there have been no developments.

24. Recommendation 18 asked the Government to continue its efforts “to guarantee a society... well fed, well housed, well cared for and well educated”. The NHRC’s overview of the state of human rights in India will show that these efforts have met with very limited success.

The Naxal movement

25. The spread of this violent left-wing extremist movement is a cautionary tale. It claims to speak for, and recruits from, the adivasis, forest-dwelling tribals who have suffered years of such neglect and exploitation that some of them have been alienated enough to join a movement that calls for the violent overthrow of democracy. Estimates are that 200 out of the 600 districts in India are affected, though the Government puts the figure at around 60 districts; even so this means that perhaps 120 million people are affected. Belatedly, the Government is trying to bring the fruits of development to these areas, but the violent opposition of the Naxals, who destroy even schools and attack officials, means that in the areas they control, human rights have become even more parlous: governance and the rule of law rarely function. The villagers are the victims of Naxal violence, and collateral damage in the counter-insurgency operations. It will be an immense challenge for a democracy to defeat a movement that respects no human rights, through means that safeguard and do not violate the rights of the citizens it must protect.

Annex F

The Armed Forces (Special Powers) Act, 1954

THE ARMED FORCES (SPECIAL POWERS) ACT, 1958

INTRODUCTION

Violence became the way of life in north-eastern States of India. State administration became incapable to maintain its internal disturbance. Armed Forces (Assam and Manipur) Special Powers Ordinance was promulgated by the President on 22nd May of 1958. In which some special powers have been given to the members of the armed forces in disturbed areas in the State of Assam and Union Territory of Manipur. Later the Ordinance was replaced by the armed Forces Special Powers Bill.

STATEMENT OF OBJECTS AND REASONS

An ordinance entitled the Armed forces (Assam and Manipur) Special Powers Ordinance, 1958, was promulgated by the President on the 22nd May, 1958. Section 3 of the Ordinance powers the Governor of Assam and the Chief Commissioner of Manipur to declare the whole or any part of Assam or the Union territory of Manipur, as the case may be, to be a disturbed area. On such a declaration being made in the Official Gazette, any Commissioned Officer, Warrant Officer, non-commissioned officer or any other person of equivalent rank in the armed forces may exercise, in the disturbed area, the powers conferred by section 4 and 5 of the Ordinance. The Bill seeks to replace the Ordinance -See Gazette of India, 11-8-1958, Pt. II-Sec. 2, Ext. p.714 (No.26).

ACT 28 OF 1958

The Armed Forces (Special Powers) Bill was passed by both the Houses of Parliament and it received the assent of the President on 11th September, 1958. It came on the Statute Book as THE ARMED FORCES (SPECIAL POWERS) ACT, 1958 (28 of 1958).

LIST OF AMENDING ACTS

1. The State of Mizoram Act, 1986 (34 of 1986).
2. The State of Arunachal Pradesh Act, 1986 (69 of 1986).
3. The Armed Forces (Assam and Manipur) Special Powers (Amendment) Act, 1972 (7 of 1972).
4. The Armed Forces Special Powers (Extension to Union Territory of Tripura) Act, 1970.
5. The Repealing and Amending Act, 1960 (58 of 1960).

THE ARMED FORCES (SPECIAL POWERS) ACT, 1958

(28 of 1958)

[11th September, 1958]

*An Act to enable certain special powers to be conferred upon members of the armed forces in disturbed areas in the State of * [Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura].*

Be it enacted by Parliament in Ninth Year of the republic of India as follows:-

1.Short title and extent - (1) This act may be called **[The armed Forces (Special Powers) Act, 1958].

[(2)] It extends to the whole of the State of *[Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura].

2. Definitions: In this Act, unless the context otherwise requires-

- (a) “armed forces’ means the military forces and the air forces operating as land forces, and includes other armed forces of the Union so operating;
- (b) ‘disturbed area’ means an area which is for the time being declared by notification under section 3 to be a disturbed area’;
- (c) all other words and expressions used herein, but not defined and defined in the Air Force Act, 1950 (45 of 1950), or the army Act, 1950 (46 of 1950) shall have the meanings respectively to them in those Acts.

3.Powers to declare areas to be disturbed areas - If, in relation to any state or Union Territory to which this act extends, the Governor of that State or the administrator of that Union Territory or the Central Government, in either case, if of the opinion that the whole or any part of such State or Union territory, as the case may be, is in such a disturbed or dangerous condition that the use of armed forces in aid of the civil power is necessary, the Governor of that State or the Administrator of that Union Territory or the Central Government, as the case may be, may by notification in the Official Gazette, declare the whole or such part of such State or Union territory to be a disturbed area].

*Subs. By Act 69 of 1986,sec.43 for “Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura and the Union territory of Arunachal Pradesh” (w.e.f. 20.2.1987.)

**Subs by Act 7 of 1973, sec. 3 for ‘the armed forces (Assam and Manipur) special Powers Act, 1958” (w.e.f 5.4.1972).

***Subs by Act 7 of 1972, sec. 4 (w.e.f 5.4.1972).

****Subs by Act.69 of 1986,sec. 43 for ‘Assam, Manipur, Meghalaya, Mizoram, Nagaland and Tripura and the Union Territory of Arunachal Pradesh’(w.e.f 20.2.1987).

COMMENTS

- (i) The Governor is empowered to declare any area of the State as "disturbed area". It could not be arbitrary on ground of absence of legislative guidelines; *Inderjit Barua v. State of Assam*, AIR 1983 Del. 514.
- (ii) Section 3 cannot be construed as conferring a power to issue a declaration without any time limit. There should be periodic review of the declaration before the expiry of six months; *Naga People's Movement of Human Rights v. Union of India*, AIR 1998 SC 431.

4. Special Powers of the armed forces - Any commissioned officer, warrant officer, non-commissioned officer or any other person of equivalent rank in the armed forces may, in a disturbed area,-

- (a) if he is of opinion that it is necessary so to do for the maintenance of public order, after giving such due warning as he may consider necessary, fire upon or otherwise use force, even to the causing of death, against any person who is acting in contravention of any law or order for the time being in force in the disturbed area prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of fire-arms, ammunition or explosive substances;
- (b) if he is of opinion that it is necessary so to do, destroy any arms dump, prepared or fortified position or shelter from which armed attacks are made or are likely to be made or are attempted to be made, or any structure used as a training camp for armed volunteers or utilized as a hide-out by armed gangs or absconders wanted for any offence;
- (c) arrest, without warrant, any person who has committed a cognizable offence or against whom a reasonable suspicion exists that he has committed or is about to commit a cognizable offence and may use such force as may be necessary to effect the arrest;
- (d) enter and search without warrant any premises to make any such arrest as aforesaid or to recover any person believed to be wrongfully restrained or confined or any property reasonably suspected to be stolen property or any arms, ammunition or explosive substances believed to be unlawfully kept in such premises, and may for that purpose use such force as may be necessary.

COMMENTS

- (i) Conferment of power on non-commissioned officers like a Havaldar cannot be said to be bad and unjustified : *Inderjit Barua v .State of Assam*, AIR, 1983 Del 514.
- (ii) The armed forces must act in cooperation with the district administration and not as an Independent body. Armed Forces could work in harmony when they deployed in disturbed area: *Luithukia v.Rishang Keishing*, (1988) 2 Gau LR 159.

5.Arrested persons to be made over to the police -Any person arrested and taken into custody under this Act shall be made over to the officer in charge of the nearest police station with the least possible delay, together with a report of the circumstances occasioning the arrest.

In case of arrest of any person, army authority is duty bound to handover to the officer-in-charge of the nearest police station with least possible delay: *Horendi Gogoi v. Union of India*, (1991) Gau CR 3081.

6. Protection to persons acting under Act - 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.

7. Repeal and Saving - [*Repealed by Amending and Repealing Act, 1960 (58 of 1960),First Schedule, sec.2 (26.12.1960)*].

Annex G

Press Statement by Christof Heyns, UN Special Rapporteur on extrajudicial, summary and arbitrary executions

Press Statement

Country Mission to India

Christof Heyns, United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions

19 – 30 March 2012

At the invitation of the Government of India, I conducted an official visit to this country from 19 to 30 March 2012. I travelled to New Delhi, as well as to five States, namely: Gujarat; Kerala; Jammu and Kashmir, where I had meetings in the cities of Jammu and Srinagar; Assam; and West Bengal.

I am grateful to the Government of India for extending an invitation to my mandate. I am further particularly thankful to the United Nations Resident Coordinator, Mr. Patrice Coeur-Bizot, and his team, for having facilitated the preparation and conduct of my mission.

During this country visit, I had the opportunity to meet with Secretaries from the Ministry of External Affairs, the Ministry of Home Affairs, and the Ministry of Law and Justice, officials from the Ministry of Defence and other Ministries at Union level. At State level, I met the Lieutenant Governor of Delhi, State Chief Secretaries and other Secretaries; Commissioners, Directors General and other relevant officers of the Police; and other senior officials. I also visited the Supreme Court, the National Human Rights Commission and the Assam Human Rights Commission. In addition, I held meetings with the United Nations agencies, as well as a wide range of domestic and international non-governmental organisations, lawyers, witnesses, and victims and their families.

My mission focussed in particular on the right to life in the context of the use of force by the police and the armed forces, and on the possible impact on the right to life of cultural practices.

My provisional conclusions are as follows:

A) General comments

India, often described as the world's largest democracy, has a Constitution that guarantees a wide range of human rights, and is a living document, supported by broad public endorsement and enforced by a strong Supreme Court, whose human rights jurisprudence is respected worldwide. The right to life (article 21 of the Constitution) in particular has been given an extensive interpretation by the courts. There is a robust press, and a vibrant and engaged human rights civil society. India has ratified a number of international human rights instruments, including the International Covenant on Civil and Political Rights.

At the same time India faces many challenges to the realisation of human rights, including movements aimed at separation or greater local autonomy, Maoist or Naxalite, insurgency, organised crime, and communal organisations opposed to secularism, plurality and equality. India accommodates a huge diversity in terms of religion, languages and culture, largely in a remarkably peaceful way. The state structure is federal in nature.

The challenge to protect, promote and respect the right to life is undeniably a real one. It is of concern however that despite constitutional guarantees and a robust human rights jurisprudence,

extrajudicial killings is a matter of serious concern in India. However, it is important to emphasise the solution to these issues largely lies within the system itself.

While data available on extrajudicial executions in India is not easy to obtain, in some parts, particularly in conflict areas where political dialogue has been initiated by the government, or where there has been a concerted shift to move away from such occurrences, the last couple of years appear to have seen a drop in respect of unlawful killings. This momentum – and the general commitment to human rights in the country – should now be captured to obliterate the unacceptable levels of deadly violence that remain, and assume higher moral ground.

While I will make some concrete proposals about changes to be affected, I will also propose a process to be followed to address this issue.

India has not hosted many Human Rights Council special procedures. In 2011 it extended an open invitation to special procedures, and to its credit it admitted, for the first visit under this open invitation, the mandate on extrajudicial, summary and arbitrary executions, a mandate covering an area in which it faces well-documented challenges. This reflects a commendable willingness to engage with the issue of unlawful killings in a constructive manner – giving further credence to the view that there may at the moment be a window of opportunity to take significant and decisive steps forward on this issue.

B) Concerns

I have the following concerns about unlawful killings, both in terms of prevention and accountability:

1) Use of force by State actors

a) Police

There are complaints of use of excessive force by the police against unarmed demonstrators and protestors, with scant adherence to the principles of proportionality and necessity.

Disproportionate use of force during demonstrations has resulted in over 100 deaths, in 2010 in Jammu and Kashmir, while elsewhere, such as in New Delhi, many demonstrations occur without bloodshed. I have been told by the police of a few states that they have recently started using less lethal weapons and other more modern methods of crowd control.

Salutary guidelines laid down by the Supreme Court in the *D.K. Basu* judgment on arrest, detention and interrogation, many of which have been incorporated through amendments in the Code of Criminal Procedure, are not sufficiently complied with.

Significantly, problems concerning excessive and arbitrary use of force by the police are further aggravated by statutory immunities that restrict accountability. Section 197 of the Criminal Procedure Code requires prior sanction from the concerned government before cognizance can be taken of any offence by a public servant for criminal prosecution.

A practice of what is called 'fake encounters' has developed in parts of the country. Where this occurs, suspected criminals or those labelled as terrorists or insurgents, and in some cases people on

whose head there is a prize, are shot dead by the police, and a scene of a shootout is staged. Those killed are then portrayed as the aggressors who had first opened fire and the police escape legal sanction. According to the National Human Rights Commission (NHRC) 2 965 cases of 'encounters' have been reported between 1993 and 2010, though there is possibly under-reporting.

While the use of 'encounters' to eliminate criminals has decreased since the 1990s, it is nevertheless being deployed to target others.

A seminal case from Andhra Pradesh is currently pending before the Supreme Court wherein the High court had held that in situations where deaths occur at the hands of police in cases of alleged returning fire, a first information report (FIR) must be registered, the case investigated and the claim of self-defence by the police proven in a trial before the court.

In a positive development, the Supreme Court and the NHRC have issued guidelines on the Armed Forces (Special Powers) Act and on encounters.

b) Custodial deaths

There have been a large number of cases recorded on deaths that have occurred in police as well as judicial custody, often in the context of torture. I have been assured by Government representatives that the process of passing the legislation on torture as proposed by the Select Committee of the Upper House is well under way, which will allow the ratification of the Convention Against Torture. Needless to say this proposed legislation must be compliant with CAT and must include the mandatory provisions of training of police, prison cadre and other forces as well as orientation of the judiciary.

c) Armed Forces

The Armed Forces are deployed in so-called 'disturbed areas' in the North East and in Jammu and Kashmir.

The Armed Forces (Special Powers) Act (AFSPA) in effect allows the state to override rights in the 'disturbed areas' in a much more intrusive way than would be the case under a state of emergency, since the right to life is in effect suspended, and this is done without the safeguards applicable to states of emergency.

AFSPA – continuously in force since 1958 (different states have their own versions as well) in the North East and since 1990 in Jammu and Kashmir – has become a symbol of excessive state power. I have heard extensive evidence of action taken under this law that resulted in innocent lives being lost, in Jammu and Kashmir and in Assam, where witnesses from neighbouring states also assembled. This law was described to me as 'hated' and a member of a state human rights commission called it 'draconian'.

A law such as AFSPA has no role to play in a democracy and should be scrapped. The repeal of this law will not only bring domestic law more in line with international standards, but also send out a powerful message that instead of a military approach the government is committed to respect for the right to life of all people of the country.

The government-appointed Jeevan Reddy Committee and the Administrative Reform Commission have both called for its repeal; as have political leaders of states where the Act applies. The NHRC told me during our meeting that they are in favour of its repeal and that they have commented in their submission to the 2012 UPR that AFSPA often leads to the violation of human rights. It is therefore difficult to understand how the Supreme Court, which has been so progressive in other areas, also concerning the right to life, could have ruled in 1997 that AFSPA did not violate the Constitution – although they tried, seemingly with little success, to mitigate its impact by issuing guidelines on how it is to be implemented.

AFSPA clearly violates International Law. A number of UN treaty bodies have pronounced it to be in violation of International Law, namely HRC (1997), CEDAW (2007), CERD (2007) and CESCR (2008). My predecessor has also called for its repeal.

The widespread deployment of the military creates an environment in which the exception becomes the rule, and the use of lethal force is seen as the primary response to conflict with a concomitant permissive approach in respect of the use of lethal force. This is also difficult to reconcile in the long run with India's insistence that it is not engaged in armed conflict.

Accountability is circumvented by invoking AFSPA's requirement of obtaining prior sanction from the Central government before any civil prosecutions can be initiated against armed forces personnel. The information received through Right to Information applications, shows that this immunity provision effectively blocks any prosecution of members of the armed forces. The Centre has for example never granted sanction for civil prosecution of a member of the armed forces in Jammu and Kashmir.

d) Death penalty

Indian law continues to provide for the death penalty, and in around 100 cases per year this sentence is imposed. However, once imposed, there seems to be little appetite to execute. The last execution was in 2004, although another execution has just been stayed at the last minute during the writing of this report.

It is a matter of concern that the death penalty may be imposed for a (seemingly growing) number of crimes that cannot be regarded as 'the most serious crimes' referred to in article 6 of the ICCPR as internationally understood, namely crimes involving intentional killing. For example, the death penalty may be imposed for kidnapping for ransom under Sec. 364A IPC and has also been proposed in the Prevention of Torture Bill and for drug-related offences. I intend to follow up on the concerns expressed that the categories of capital crimes are being expanded.

The phrase 'rarest of the rare cases' (taken from *Bachan Singh v State of Punjab*) is often used to describe the Indian approach to the death penalty. However, this may create the wrong impression, since the list of crimes for which this sentence may be imposed is still much wider than the one provided for under international law. Even if the death penalty is not implemented, those who had been sentenced to death remain on death row for extraordinarily long periods, while, as one interlocutor put it, 'they remain hanging there'.

My attention was drawn to the case of *Ravji alias Ram Chandra v. State of Rajasthan (1996) 2 SCC 175*, where the Supreme Court upheld the death sentence and held that circumstances pertaining to the criminal need not be considered, in spite of earlier authority to the contrary. Subsequently, in seven cases, the Supreme Court invoked the precedent of *Ravji Rao's* case to foreclose inquiry into the circumstances pertaining to the prisoner. A total of 14 prisoners were sentenced to death by the Supreme Court on the basis of flawed legal reasoning. Out of these 14 prisoners, two – including Ravji – have been executed.

2) Use of force by non-state actors

a) Terrorists, criminals and others

Deadly violence has been used by Maoists, insurgents, and terrorists. The callous nature in which lives, often of innocent civilians, are taken by these non-state actors needs to be condemned strongly. The state has a right to defend itself against such aggression, provided it abides by the international standards in this regard. The state however cannot adopt unlawful or unconstitutional means or create a vigilante force to counter such violence.

b) Communal violence

I have heard evidence regarding a number of instances where inter-community violence has occurred, resulting in large-scale loss of life. In particular I have met with a large number of people who lost relatives during the Gujarat killings of Muslims in 2002 and the Kandhamal killings of Christians in 2007/8, during which between 1200 – 2500 people and between 50 and 100 people, respectively, were reportedly killed. It is a matter of regret that the Gujarat authorities at the last minute cancelled the meetings we had scheduled during the mission.

In these cases grave allegations of direct state involvement in the killings has been made; moreover in all cases the state has the responsibility to protect citizens against such violence.

The phenomenon of mass and targeted communal violence clearly poses a significant threat to the right to life, also because it sets into motion a cycle of violence that stretches over the years. One of the problems here is that the role of the police and other agencies of the state in these situations could involve bias against minorities. I will further examine this issue.

A number of people have proposed the introduction of the doctrine of some form of 'command responsibility' and 'superior responsibility', in domestic law, to hold culpable persons in positions of political, civil and administrative power and authority, complicit in the communal violence. I will also examine this matter further.

c) Traditional practices affecting women

'Honour' killings occur where a woman is killed by her family or community because she has exercised her right to choose a partner, particularly when the partner belongs to a different community, caste or religion. This crime is reportedly on the ascendance. It is currently dealt with as murder under the Indian Penal Code. There have been suggestions that this be dealt with under a separate piece of legislation so as to highlight the unique nature of such killings.

Dowry deaths occur where a husband or his relatives are dissatisfied by the amount of dowry brought by the wife, and cause her death. Special legal provisions have been enacted to punish this crime in the Indian Evidence Act. The unnatural death of a wife within seven years of marriage, under suspicious circumstances, including burning or other bodily injuries, and where she is known to have been harassed and treated cruelly by her husband or his relatives on account of dowry, creates a presumption that a dowry death has been committed by the husband or his relatives.

The branding of elderly and single women as witches, while largely associated with tribal areas is no longer confined to these regions. Property reasons often underlie these killings.

This is a difficult area for any state to address. While accountability and punishment is important in the context of the above gender-based killings, it is not clear that increasing the punishment, however severe, will lead to prevention. Ensuring certainty of conviction and some form of consequence to establish the norm seems to be more important. This is often difficult for a host of reasons, including the fact that there is general social sanction for the crime, and the police often do not address these killings as crimes. The values at stake are often viewed as more important than life itself. A change in the values themselves is therefore required, a task for which an institution such as the NHRC should be eminently suited.

3) Systemic challenges

a) Justice delayed is justice denied

The complaint is widely raised that the wheels of justice, when they turn, often do so too slowly. Legal proceedings drift for years, while the alleged perpetrators are out on bail and back in the community. The Nanavati Commission of Inquiry in Gujarat has now taken 10 years without any concrete results. This is exacerbated by the symbolic importance of the events that are being investigated, and inevitably the conclusion will be drawn that this is not a matter of priority. Similarly, the Supreme Court in 2006 issued a directive for the establishment of Police Complaints Authorities, but in many cases this has not been done.

b) Perpetrators receive awards

Many of the people I interviewed whose family members had been killed, pointed out that the alleged perpetrators, belonging to the police or the armed forces, have been awarded out of turn promotions, or have in other ways been rewarded.

c) Compensation instead of prosecution

While in some cases of custodial death and death due to excessive use of force compensation is paid by the state, criminal investigation and prosecution against the perpetrators is rarely initiated. Consequently few if any are punished for violating the right to life. This is also a manifestation of a military as opposed to a rights based approach. It blunts the deterrent effect of the law and encourages impunity.

d) Burden on the victim

The burden of initiating civil, criminal or writ proceedings in cases of custodial deaths or 'encounter' killings, for compensation or securing accountability and punishment, is placed on the victim's family. Their marginalised and vulnerable status cripples their ability to secure accountability for the violation of the right to life.

e) *Form over substance*

Standards such as the Supreme Court and NHRC guidelines mentioned above are often not followed in practice. On most occasions, where the alleged accused are men in uniform, belonging to the police or the armed forces, registration of First Information Reports (FIR) is refused, further deterring access to justice. In case of 'encounter' killings, the police lodge the FIR under Sec. 301 IPC, for attempt to murder, naming the deceased as the accused and close the case. Families are also unable to access and secure autopsy reports. Laws and policies are mostly in place, but they are not implemented.

f) *Statutory immunities and good faith clause*

The statutory provisions of requirement of prior sanction, for a Court to take cognizance of offences committed by public servants, including the police and armed forces, while discharging official duty, coupled with the presumption of good faith for acts done, effectively renders them immune from criminal prosecution.

g) *Marginalised groups*

Groups such as the *dalits* and the *adivasis* are particularly vulnerable, also in respect of the right to life. The increased targeting of 'right to information' activists and human rights defenders by land, forest and mining interest groups has also been reported to me.

h) *Witness and victim protection*

The lack of a systematic witness and victim protection system places them at risk, and leads to impunity.

4) *The role of the human rights institutions*

The National Human Rights Commission has a proud record and has a critical role to play in the protection of the right to life, especially with reference to ensuring strict compliance with its Guidelines on Encounter Killings.

The NHRC presently seems, from my interaction with them, to be taking a largely legalistic and deferential approach. During our discussions the approach on a number of points was that there are laws in place to deal with matters, and nothing more is required.

The state human rights institutions inspire little confidence. The Manipur Human Rights Commission was for all practical purposes closed after it challenged abuse of power by the police. A member of another state commission told me the commission was 'subordinate' to the government – there was not even pretence of independence. In West-Bengal, NGOs showed me how the number of cases they refer to the Commission has dropped to zero for 2012, because it serves no purpose.

The fact that lodging a complaint with a state commission blocks access to the NHRC raises the question whether their presence helps or hinders complainants.

C) Conclusions

There is reason for serious concern about extrajudicial executions. The National Human Rights Commission has on occasion said 'extrajudicial executions have become virtually a part of state policy'. The position may have improved in some respects, but has not been resolved, and the legacy of the past is bound to continue into the future.

To a large extent the required structures to decrease extrajudicial executions are already in place. The steps to be taken have also by and large been identified within the system. What is required is a concerted and systematic effort by the state, civil society and all others concerned to eradicate its occurrence. In this process some of the best practices that are already followed in the country should be used as models for reform elsewhere. I have been impressed, for example, by the measures taken in Kerala State to make the police force more responsive to the needs of the public.

Impunity for extrajudicial executions is the central problem. This gives perpetrators a free reign, and leaves victims in a situation where they either are left helpless, or have to retaliate. The obstacles to accountability that are in place – in particular the need for prior sanction of prosecutions – should be removed.

Women and minorities – religious minorities, as well as *dalits* and *adivasis* – as well as human rights defenders, including right to information activists, are especially at risk, and their protection deserves special measures.

Almost everyone interviewed said that the courts, and the Supreme Court in particular, play a central role in the fight against unlawful killings. The same applies to the role of the media. I was also struck by the level of expertise and responsibility in civil society.

It is evident that the killings of people take place in the context of other abuses, such as torture and enforced disappearances. Preventing these other abuses can under some circumstances prevent the taking of life.

It is clear that in general the underlying causes of some of the violence need to be addressed, including the levels of development of those who are currently using force to oppose state policies. Andhra Pradesh was mentioned to me as an example in this regard.

There is a strong need for victims to speak about their experiences. A large number of the almost 200 victims who made presentations to me emphasised the need to know the truth, and to 'clear the names' of their loved ones who had been killed in 'fake encounters'. However, a credible

national process will have far greater legitimacy in this regard than an international one. Some form of – internal – transformative justice is called for. In Jammu and Kashmir the Chief Minister called for a truth and reconciliation commission. It must be underscored that justice for the victims, accountability and punishment of the perpetrators, that is a real end to impunity for extrajudicial executions, enforced disappearances and torture, are essential elements of any such process.

A public commitment to the eradication of the phenomenon of unlawful killings is needed. In this context it could be valuable to highlight to the public and to those in the structures of the State the historical and global role the country has played in promoting non-violence worldwide, including non-violent demonstrations, and the fact that extrajudicial executions is its opposite. A Commission of Inquiry, drawing on some of the outstanding jurists and other figures that the country has produced, can play this role.

There should be a special focus on the areas of the country where specific forms of unlawful killings take place. In some instances some form of transitional justice may be required, to ensure justice to the victims, break the cycle of violence, and to symbolize a new beginning. Specific and targeted attention should be given to the following issues: challenging the general culture of impunity; addressing the practice of ‘fake encounters’, to ensure that it is rooted out; and ensuring that swift and decisive action, with concrete outcomes, is taken when there are mass targeted killings. The Commission has to be required to complete its work within a reasonably short period of time, also to demonstrate that a new approach is being followed. In this respect it will be useful to look at possible lessons to be learned from the recent appointment of a judge to investigate extrajudicial executions in Gujarat, which at this stage appears to be a positive development.

D) Provisional recommendations

- 1) A credible Commission of Inquiry that inspires the confidence of the people, into extrajudicial executions in India should be appointed by the Government which also serves a transitional justice role. The Commission should investigate allegations concerning past violations, propose where relevant measures to deal with those, and work out a plan of action for the future to eradicate practices of extrajudicial executions. The Commission must submit recommendations on legal reform, and the reform of state structures, security apparatus and processes that encourage impunity.

Without waiting for the Commission, the following steps should be taken as a matter of priority:

- 2) Ratification of the following international instruments should take place without further delay: Convention Against Torture; OP-CAT; and the Convention on Enforced Disappearances. Ratification of the following instruments should be considered: The two Optional Protocols to the ICCPR; Optional Protocol to CEDAW; Rome Statute of the International Criminal Court; and the two Optional Protocols to the Geneva Conventions.
- 3) Repeal the Armed Forces (Special Powers) Act, 1958 and the Jammu and Kashmir Armed Forces Special Powers Act, 1990. To tie this to the announcement of the Commission

mentioned above will send a powerful signal about the State's commitment to a new dispensation.

- 4) Repeal the following laws or bring them otherwise into conformity with the applicable international standards, including the Code of Conduct for Law Enforcement Officials, the Basic Principles on the Use of Force and the Basic Principles on Extrajudicial Executions: Jammu and Kashmir Public Safety Act; Jammu and Kashmir Disturbed Areas Act, 2005; Section 197 of the Code of Criminal Procedure Act; provisions of Unlawful Activities Prevention Act, 1967; and the Chhattisgarh Special Public Security Act 2005;
- 5) Enact the Prevention of Torture Bill, along the lines of the amendments proposed by the Select Committee of the Upper House of Parliament (*Rajya Sabha*) ensuring its compliance with CAT.
- 6) There should be regular review and monitoring of the status of implementation of the directives of the Supreme Court and the NHRC guidelines on arrest, custodial violence, encounter killings and custodial death. In particular, the establishment of the independent Police Complaints Authorities by the States should now be made a priority.
- 7) To counter impunity for extrajudicial executions, where the police cause the death of a person in an 'encounter', there must be mandatory registration of FIR under Sec.302 IPC against the police and there must be an independent investigation of the same. Whether the police acted in self-defence or committed culpable homicide is to be decided by the competent court.
- 8) Families of victims should have full and easy access to autopsy reports, death certificates and other relevant documentation to allow them to proceed with their lives.
- 9) The practice of inviting UN special procedures should be continued, especially in areas where international concern has been expressed, such as torture, counter-terrorism measures, and minority rights.
- 10) Increased sensitizations and orientation programmes in respect of gender-based killings, 'honour' killings, dowry deaths and witch killings should be undertaken, both for the police, judiciary and public especially in the areas of the country that most affected.
- 11) An effective witness and victim protection programme should be established.
- 12) The National Human Rights Commission should be given the mandate to investigate the actions of the Armed Forces, and there should not be a year cut-off date on the cases they can consider. The Commission should develop a strategy to enhance its contribution towards protecting the right to life which goes beyond mere references to laws and procedures, and focuses on actual impact. The NHRC should undertake a review of compliance with its guidelines on 'encounter' killings, and whether their guidelines work in practice. They should also issue guidelines on inquests and autopsies. The independence and working of state human rights commissions should be reviewed.
- 13) Place a moratorium on the death penalty in accordance with General Assembly resolution 65/206.

The Working Group on Human Rights in India and the UN (WGHR)

is a national coalition of fourteen human rights organizations and independent experts from India. WGHR works towards the realization of all civil, cultural, economic, political and social rights in India and aims at holding the Indian government accountable for its national and international human rights obligations. At the national level, WGHR seeks to engage with relevant human rights, government, parliamentary, judicial and academic institutions. At the international level, WGHR seeks to facilitate Indian civil society's engagement with the United Nations' human rights instruments and mechanisms.

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