

South Asia Human Right Documentation Centre

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SAHRDC Submission to the 27th UPR Working Group session on India

1. The South Asia Human Rights Documentation Centre (SAHRDC) works for the protection and promotion of human rights by collecting, verifying and disseminating information on civil and political rights in the South Asian region. It is independent of any government, political ideology, economic interest or religious creed.
2. SAHRDC, in association with its sister organisations, played a key role at the UN Commission on Human Rights (CHR), where it brought out a special series of *Human Rights Features* focusing on CHR-specific issues. *HRF* in Geneva was the only publication of its kind at the CHR, reporting on the developments at the CHR session, analysing the issues on the CHR's agenda and providing focused recommendations. All issues are available at: <http://www.hrdc.net/sahrdc/hrfeatures.htm>.
3. We are happy to learn that India will be up for its third periodic review next year. We trust that this review will be beneficial for India and strengthen existing institutional mechanisms for the protection and enhancement of Human Rights in India.
4. We are aware that many of you will be take this opportunity to address some of the concerns that go to the heart of common democratic ideals that all member states of the United Nations cherish.

Patterns of domestic human rights abuses in India are relatively well documented thanks to a brave, but increasingly beleaguered civil society. Here are eight examples, amongst numerous issues, that are most relevant and important. With the exception of the issues of the Armed Forces Special Powers Act (AFSPA) and the issue of the Freedom to convert, the other issues have not figured in previous cycles of the UPR on India.

Issue 1

Anti Conversion Laws

Strengthen the Federal Government's efforts to guarantee freedom of religion to everyone in this world's largest democracy. (Holy See) A/HRC/21/10/Add.1

138.124. Abolish anti-conversion laws in relation to religion and grant access to justice to victims of religious violence and discrimination (Italy); A/HRC/21/10

138.125. Strengthen the Federal Government's effort to guarantee freedom of religion to everyone in this world largest democracy (Holy See); A/HRC/21/10

138.49. Reconsider laws and bills on religious conversion in several Indian states in the light of freedom of religion or belief in order to avoid the use of vague or broad terminology and discriminatory provisions (Germany); A/HRC/21/10

138.50. Reconsider current local legislation on freedom of religion, that uses vague or broad terminology and discriminatory provisions, and impedes the possibility for conversion of faith for those who wish to do so (Netherlands); A/HRC/21/10

5. The anti-conversion laws in many states of India, both by their design and implementation, favour Hinduism over minority religions. This represents a significant challenge to Indian constitutional secularism. The erosion of the principles of secularism and toleration risks fanning inter-religious tensions. It is no exaggeration to say that India stands at a crossroads and must be careful to reassert its commitments to the tenets of religious toleration and secularism.
6. Supporters of the laws argue they are intended to prohibit conversions or conversion attempts that are conducted by allurements, force or fraud. They suggest that such conversions are presently taking place, and that these laws are designed to criminalize such activities. The anti-conversion acts are therefore presented as if their purpose were to protect the 'freedom of religion.'
7. These laws, however, actually serve to infringe upon religious freedom and contradict rights protected within international agreements and the Indian Constitution. Such laws are motivated by irrational and insecure Hindu xenophobia that is antagonistic to religious minorities. Please see **Annexure 1**

Recommendation for consideration: All such laws must be revoked.

Issue 2

Ending Police Immunity

8. Earlier recommendations have restricted the discussion to the issue of immunity arising out of torture. The issue is much wider.
9. According to the Indian Code of Criminal Procedure (CrPC) Section 197 and its current interpretation and implementation, courts may not hear a case against a police officer unless Central or State government gives authorization for prosecution. Requiring government approval for any prosecution of a police officer is a major impediment to bringing justice for serious abuses committed by police officers. Furthermore, the unsurprising regular refusal of police officers to register First Information Reports (FIRs) and the threats and abuse faced by those who attempt to submit an FIR for police misconduct, further impedes the pursuit of justice.
10. Additionally, the Indian Supreme Court has interpreted Article 300(1) of the Indian Constitution to mean that individuals cannot sue the government in tort or damage suits. While the Supreme Court has allowed some individuals to receive compensation for cases of constitutional violations brought under Article 32 or Article 226 of the Constitution, the Court has created difficult standards for obtaining compensation and has left the payment of any such compensation at the discretion of the presiding judge in a particular case.
11. Given that a) prosecution of police officers requires government sanction and simply filing an First Information Report (FIR) brings threats and intimidation, and b) an individual is not able to sue the State or Central government for police abuses, and can only receive any compensation at the discretion of presiding judges, victims of police abuses have little incentive to bring cases to achieve vindication of their rights and, in turn, police officers enjoy de facto immunity for serious abuses. In order to ensure effective accountability and an end to police impunity, individual police officers who commit serious abuses must face criminal prosecution, and individual victims of police abuse must have the opportunity to receive just compensation. Indeed, both international law and the Indian Supreme Court have recognized the importance of such criminal and civil remedies for making victims' whole, effectuating a system of justice, and deterring future abuse. **See Annexure 2**

Recommendation for consideration: No executive prior sanction for official perpetrators must be necessary. The decision to prosecute or not to prosecute must be only lie with a judicial authority.

Issue 3

The Unlawful Use of Pellet Guns –

The Lethal Use of Allegedly Non- Lethal Weapons

12. The Government of India and the state government in Kashmir must immediately order police forces to halt forthwith the usage of Pellet Guns and the lethal cartridges that they use. Any further usage of such weapons would not just be callous, but a criminal act.

13. Since 9 July 2016, in the aftermath of the killing of Mr. Burhan Wani, a Hizbul Mujahedeen leader, large scale protests and funeral gatherings have been taking place across the Kashmir Valley. The apparently indiscriminate usage of allegedly “non-lethal” weapons, such as pellet guns, to control the crowds has resulted in 87 civilians having lost their lives so far. Hundreds have been blinded and a few thousand injured. **See Annexure 3**
Recommendations for consideration: a. The usage of pellet guns be stopped immediately and all stocks be destroyed under Parliamentary supervision. b. Compensation be provided to all victims of pellet injuries. c. A judicial commission with publicly announced terms of reference be constituted to identify police and other public officials for the use of excessive force. All such individuals so identified, be prosecuted expeditiously.

Issue 4

The Right to Compensation

14. Indian citizens, who are unlawfully arrested, detained, tortured, and even killed while in police custody are not guaranteed a right to compensation. International standards require reparations and compensation for victims of violations of fundamental rights. Nevertheless, in India compensation for these offences is only issued at a judge’s discretion.
15. In India, compensation is not an enforceable right. An effective compensation system would deter government officials from criminal activity and encourage victims to bring their cases to court. Currently, the system or lack thereof does neither in India. A mandatory right to compensation must be established for the victims of State imposed abuse. **See Annexure 4**
Recommendation for consideration: The right to mandatory compensation be introduced.

Issue 5

Judicial Delay

16. As of 26 April 2016, “the current judges-to-population ratio in India is estimated at 17 judges for every million citizens.” This number is far lower than the United States, which has 151 judges per million and China, which has 170 judges per million people. *The Business Standard* stated that, “some experts estimate that at current rates of disposal the backlog would take 466 years to clear.” Currently the backlog stands at 30 core cases, 60,000 of those cases are pending before the Supreme Court, 30 lakh (3 million) before High Courts, and 2.7 crore (270 million) before subordinate judiciaries.

To add to the disparate ratio, there are currently around 5,000 vacancies on the bench that need to be filled. As retired Chief Justice Shri Y.K. Sabharwal stressed in his 2006 Justice Sobhag Mal Jain

Memorial Lecture, "Delay in the disposal of cases not only creates disillusionment amongst the litigants, but also undermines the very capability of the system to impart justice.

It was poignant to see the present Chief Justice of India with tears in his eyes pleading with the executive for additional human and material resources earlier this year.

Recommendation for consideration: A minimum of 1 per cent of the GDP of India be allocated to strengthening the judicial system for the next 10 years and a review be undertaken at that point.

Issue 6

The Need to Repeal the Armed Forces Special Powers Act (AFSPA)

17. Calls for the repeal of the AFSPA have recently come from across the political spectrum and civil society. The calls grew more strident following a 2004 report of the Indian Home Ministry.
18. The Armed Forces (Special Powers) Act of 1958 (AFSPA) is one of the more draconian legislations that the Indian Parliament passed in its 64-year history. Under this Act, all armed forces personnel are given unrestricted and untrammelled power to carry out their operations, once an area is declared disturbed. Even a non-commissioned officer is granted the right to shoot to kill based on mere suspicion that it is necessary to do so in order to "maintain the public order."
19. The AFSPA gives the Indian armed forces including para military forces, wide powers to shoot, arrest and search, all in the name of "aiding civil power." It was first applied to the North Eastern Indian states of Assam and Manipur and was amended in 1972 to extend to all the seven states in the North East. It is presently in force in Assam, Manipur, parts of Meghalaya, parts of Arunachal Pradesh and Nagaland. It is also in force in the northern state of Jammu and Kashmir. The enforcement of the AFSPA has resulted in innumerable incidents of arbitrary detention, torture, rape, and looting by armed forces personnel. The Government of India seeks to justify this legislation on the plea that it is required to stop these states from seceding from the Indian Union.
20. In November 2004, the Government constituted a five-member Committee under the chairmanship of Justice B.P. Jeevan Reddy to undertake the review of the AFSPA and advise the Government as to whether the Act should be amended or replaced by a "more humane Act." It is clear that this Committee was a placatory exercise. The Government has yet to react to its recommendation that the Act be repealed.
21. The Committee described the Act as being "too sketchy, too bald and quite inadequate in several particulars." They questioned the appropriateness of a separate Act for the North-East, and based on its interactions with the stakeholders concluded that the AFSPA had become "a symbol of oppression, an object of hate and an instrument of discrimination and high-handedness." The Committee observed the constitutional validity of the Act upheld by the Supreme Court in *Naga People's Movement of Human Rights v Union of India* (AIR 1998 SC 431), but did not agree that the decision signifies

AFSPA's "desirability or advisability." In unequivocal terms it dismissed the option of retaining the Act by amending it and called for repeal.

See Annexure 7.

Recommendation for consideration: Repeal the AFSPA.

Issue 7

Democratic Accountability and Intelligence Agencies

22. The Supreme Court of India did little for democracy on 23 February 2016 when in a terse order it stated, "We find no merit in the writ petition as well as in the transferred case. The writ petition and the transferred case are dismissed accordingly" (Writ Petition (Civil) No. 505 of 2012).
23. The writ petition filed by the Center for Public Interest Litigation had sought Parliamentary control of Intelligence Agencies and fiscal oversight through the Comptroller and Auditor General of India (CAG). Under Section 14 of the CAG Act, all entities that draw monies from the Consolidated Fund of India are to be audited by the CAG.
24. No reasoning, no analysis. This decision will be remembered in history books as a turning point in India's hurtling towards an authoritarian order. When historians revisit this period the case will receive the same opprobrium the habeas corpus case of the emergency period received.
25. The judiciary plays an important role in ensuring the accountability of intelligence agencies. Its core tasks are to determine whether intelligence activities conform to constitutional and statutory law and to compensate individuals for inappropriate infringements on civil liberties. Judicial oversight is crucial in maintaining the appropriate balance between security and civil liberties, "Such judicial scrutiny has two clear strengths: first, judges are perceived to be independent of government, while, second, the traditional role of the courts is to protect individual rights. Therefore, they are well-suited to oversight tasks in areas such as the surveillance of individuals" (Hannah, O'Brien, Rathmell 2005: 13).

Balancing Interests: National Security versus Civil Liberties

26. The two prominent issues related to intelligence regulations are: (1) how to deal with the sometimes conflicting needs of national security and civil liberties; and (2) how to achieve democratic oversight without compromising intelligence efficacy.
27. Democratic nations regularly struggle to protect their citizenry and the state against external and internal threats while simultaneously fighting to preserve fundamental democratic civil rights and liberties. A delicate balance between these competing needs is difficult, especially when protection against terrorism, hostility, and physical attacks often demand limiting the guarantees of privacy and liberty that are at the heart of democratic rights. Secrecy and operational discretion are necessary for the government to respond to potential security threats while transparency and curbing civil liberties abuses are essential to a thriving democracy (Hans and Leigh 2011).

Recommendation for consideration: a. Constitute a Parliamentary Committee for Intelligence oversight in line with International standards on the issue. b. Have the Comptroller and Auditor General of India to audit Intelligence agency accounts and make such a report part of its regular annual reports to Parliament.

28. Issue 8- Refusal to facilitate visit of OHCHR delegation to study the human rights situation in Kashmir.

- See- *Continue cooperating with Special Procedures and accept, in particular, requests for visits from Special Rapporteurs. (Belgium) A/HRC/21/10/Add.1*

In September 2016, the government of India has denied permission to an OHCHR delegation to visit Kashmir to study the human rights situation there. In view of Issue 2- Ending Police Immunity, above and Issue 6- The Need to Repeal the Armed Forces Special Powers Act (AFSPA), the Indian Government's assertions that domestic accountability mechanisms exist carry little credence. In fact, the Government of India informed the Supreme Court of India on 7 September 2016 that the National Human Rights Commission (NHRC) cannot investigate alleged excesses by armed forces in militancy-affected areas such as Manipur and Jammu and Kashmir.

In spite of India's Standing invitation on 14 September 2011 to thematic UN Special Procedures, the following key procedures are yet to be accorded permission at the time of this submission. The listing is illustrative not exhaustive.

1. Special Rapporteur in the field of Cultural Rights
2. Special Rapporteur on extreme poverty and human rights
3. Special Rapporteur on contemporary forms of slavery, including its causes and consequences.
4. Special Rapporteur on the Right to Privacy
5. Special Rapporteur on Contemporary forms of Racism, racial discrimination, xenophobia and related intolerance
6. Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment
7. Working Group on Enforced and Involuntary Disappearances.
8. Special Rapporteur on the Independence of Judges and lawyers

Recommendation for consideration: Immediately facilitate the visit of OHCHR to the state of Jammu Kashmir without let or hindrance.

Conclusion

29. We have for reasons of brevity chosen to highlight only eight key concerns for your consideration. In addition to the Annexures, we would be happy to furnish detailed notes on any of the subjects mentioned above. We could also furnish notes on other major violations on civil and political rights in India on request.

Annexures: As above