wghr Working Group on Human Rights in India and the UN

ACCESS TO JUSTICE

Background Note for Regional Consultations on UPR II

Access to justice implies the existence of a normative framework of justice, access to mechanisms of justice and delivery of equitable justice, without bias or blindness. It encompasses the following elements:

a) A **normative framework** (compatible with human rights and constitutional standards) implemented through statues, policies and other measures meant to ensure a meaningful application of the norms to the specific realities of diverse groups, particularly the most disadvantaged. Special provisions and measures, including through affirmative action, are necessary to ensure equality of outcomes in realization of fundamental rights to all.

b) It implies **access to the mechanisms of justice to all**, particularly the most disadvantaged and marginalized, through special procedures where necessary to make justice accessible to them.

c) It includes the **freedom from bias or blindness** to socio economic realities, or other disabilities, in the substantive law, the interpretation and the application of the law, and in access to mechanisms of justice, as it reinforces pre-existing inequalities, disadvantages and barriers to justice.

d) Deliverance of equitable justice is also evaluated from the **quality and level of judicial pronouncements** on contestations that raise the issue of the human rights of all, and especially the most marginalized of the population. Representation of a plurality of opinions and faces within the structures of justice delivery, if based on sound and tested principles are also guarantors of a profound justice delivery system and mechanism.

MECHANISMS FOR ASSISTANCE TOWARDS ACHIEVEING ACCESS TO JUSTICE

There are constitutional and statutory guarantees which enable access to justice. These include:

- The *Legal Services Authorities Act*, 1987 to give a statutory base and uniformity to legal aid programmes throughout the country. The Act came into force on 9th of November, 1995. The *Legal Services Authorities Act* deals with the role of Lok Adalats and Legal Aid in India. It is necessary to note that Section 20 (4) of the Legal Services Authorities Act ensures that a Lok Adalat cannot side with any one party but rather aims to arrive at a compromise.
- Section 89 of the Civil Procedure Code was amended in 2002 to enlarge the power of the courts to refer cases to Lok Adalats. It is now possible for a court to steer cases into Lok Adalats on the basis of judicial opinion even if the parties concerned do not wish to transfer their case to a Lok Adalat.
- Section 12 of The *Legal Services Authorities Act* determines who is entitled to legal aid. [1] The Legal

1 "Every person who has to file or defend a case shall be entitled to legal services under this Act if that person, is-
(a) A member of a Scheduled Caste or Scheduled Tribe;
(b) A victim of trafficking in human beings or beggar as referred to in Article 23 of the Constitution;
(c) A woman or a child;
(d) A mentally ill or otherwise disabled person;
(e) A person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster; or

Services Authorities, after examining the eligibility criteria of an applicant and the existence of a prima facie case in her favour, provide her a counsel at state expense, pay the required court fee in the matter and bear all incidental expenses in connection with the case.

- For children in contact with law, special mechanisms have been designated under the justice system, The *Juvenile Justice (Care and Protection) Act*, 2000. These include setting up of: (1) Juvenile Justice Boards, (2) Child Welfare Committees and (3) Children Courts.

REALITIES OF ACCESS TO JUSTICE GUARANTEES

Systemic impediments: The criminal justice system is generally flawed with many systemic impediments. Some of main issues of concern are the following:

- In practice, people face **everyday difficulties in accessing** the justice system. The Indian legal system is complex and difficult to understand, with no major effort by the state, the police and the courts to assist the common man in understanding the law and claiming their rights. Because of the way the legal system is constructed (expensive, bureaucratic and involving endemic delay), it tends to become discriminatory and victimizes the poor and the rural population.

- Instead of facilitating access to justice, **the police is often a major impediment**. On the one hand, the police is regularly accused of not registering complaints (First Information Reports, FIR), which blocks access to the entire justice delivery system. On the other hand, the police is often associated to gross violations of human rights, including: illegal arrests, detention, filing of false cases, fakes encounters, custodial death, torture, rape, extortion and corruption.

- A strong **culture of impunity of the powerful** is being perpetuated by section 197 of the Code of Criminal Procedure, which requires prior sanction of the state (often a guilty party or collaborator) for prosecution of individuals who come under the category of "public servant." In practice it is almost impossible to fill complaints against a police officer, a magistrate, or a prison official.

- **Jails are overcrowded** and there are long drawn delays between charging and conviction of accused. D K Basu guidelines and Jail Manuals are flagrantly violated throughout the country.

- Justice delivery also relates to the establishments of Directorates of Prosecution in various states since in the all pervasive culture of Impunity, the state that is meant to prosecute crimes and punish the guilty is often the main subvertor of this deliverance by **weakening investigations**. This process takes place through pressure and influence as well as by the appointment of inefficient or compromised lawyers as prosecutors.

- The quality of **legal aid** is also a matter of concern. The continued relevance and appeal of accessible customary adjudication mechanisms, in conjunction with the inaccessibility of the formal legal system (and its limited notions of justice) has led many community organizations and NGOs to work with the customary systems, or establish alternative forums of dispute resolution/ mediation. Access to justice interventions by donor agencies have also sought to work with customary mechanisms of adjudication. However, there are concerns about ways in which such mechanisms reinforce and legitimize social inequalities, through their composition, norms and approaches.

New legislation and policy – There are many relevant laws, which have been drafted and are awaiting discussion to address some of the issues mentioned above, for instance the *Right to Justice Bill*, the *Judicial Accountability*

(f) An industrial workman; or

(g) In custody, including custody in a protective home within the meaning of clause (g) of section 2 of the Immoral Traffic (Prevention) Act, 1956 (104 of 1956), or in a juvenile home within the meaning of clause (j) of section 2 of the Juvenile Justice Act, 1986 (53 of 1986), or in a psychiatric hospital or psychiatric nursing home within the meaning of clause (g) of section 2 of the Mental Health Act, 1987 (14 of 1987); or

(h) in receipt of annual income less than rupees nine thousand or such other higher amount as may be prescribed by the State Government, if the case is before a court other than the Supreme Court, and less than rupees twelve thousand or such other higher amount as may be prescribed by the Central Government, if the case is before the Supreme Court."

Bill, and amendments to criminal law on sexual violence. Some states have recently passed (while some others are adopting) a *Right to Services Bill*, which seeks to guarantee the delivery of public services within stipulated time frames. The proposed *Prevention of Torture Bill*, and the overall push for police and prisons reforms can also provide a considerable check on excesses by the police in custody. There is also a dire need for a robust Witness Protection Programme and mechanisms to ensure time bound trials. In all these legislatives efforts, it is crucial that the state engages in adequate and comprehensive pre-legislative consultations. This is also a requirement under the RTI Act.

Access to justice is particularly problematic to those constituencies most vulnerable to human rights abuse, specifically: (1) Dalits, (2) Indigenous People, (3) Economically Most Disadvantaged, (4) Women, (5) Children, (6) Religious and other minorities, (7) Persons with Disabilities (PWD), (8) Lesbian, Gay, Bisexual and Transgender people (LGBT).

Barriers to access to justice may also be caused by specific contexts such as under:

- Communal or caste based violence.
- Structural disadvantages such as low literacy levels, lack of requisite social and economic resources.
- Barriers specific to the legal system, for example, inaccessible language of the law, delays, and the long, cumbersome, and expensive legal process.
- The failure of the Legal Aid and Legal Redressal Authorities often deeply affects the access of the most marginalized sections of the society.

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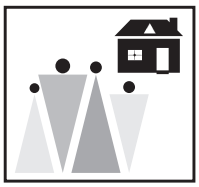
ECONOMIC, SOCIAL AND CULTURAL RIGHTS & THE RIGHT TO DEVELOPMENT



Briefing Note for the Regional Consultation on UPR II

International human rights law guarantees the progressive and full realization of Economic, Social and Cultural Rights (ESCR) to every Indian citizen under the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966, to which India is a signatory.[1] Besides, ESCR are also guaranteed under the Constitution of India, national laws and other international instruments such as the Convention on Elimination of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC). The international legal framework notwithstanding, tangible realization of ESCR remains a challenge that the state needs to address. Four areas of particular concern are the right to food, the right to adequate housing and land, the right to education and the right to health.

RIGHT TO FOOD

India has the largest number of undernourished people in the world, and one of the highest levels of child malnutrition.[2] The Food Security Bill, to be tabled in the Parliament during its winter session, plans to give legal entitlement to highly subsidized foodgrains to 70% of India's population.[3] However, the Bill is already criticised for being flawed at many levels. Some of the main points of contention are: (1) It cuts down the eligible households under the Public Distribution System (PDS), by setting a cap of 75% households BPL in rural India and just 50% in urban India. This effectively excludes lakhs of families with "Above Poverty Line" (APL) cards from the PDS. (2) It puts a cap on Below Poverty Line (BPL) households at 46% in the rural areas and 28% in the urban areas. This in the wake of State Governments' estimation of BPL households to be 11.03 Crores as opposed to 6.52 Crores recognized by the Central Government. (3) Section 21 of the Bill recognizes the same poverty line as set up by the Planning Commission (Central Government), which is Rs 13 for rural India and Rs 18 in urban India. (4) It cuts down on allocation by slashing the present quota of 35 kgs per family to 7 kgs per person. This system can prove to be counter-productive for households with fewer members. (5) Food prices under the Bill are more than what is available in some of the states.[4]

RIGHTS TO ADEQUATE HOUSING AND LAND

Although the right to adequate housing is an internationally recognized right, including under the ICESCR, majority of the Indian population continues to live in inadequate and insecure housing conditions. Some critical issues of concern regarding housing and land rights are summarised below.

Lack of low cost housing for urban poor: An average of 55% of the population in cities like Delhi and Mumbai live in slums/informal settlements, without legal security of tenure and access to basic services, including water and sanitation. The government has failed to provide low cost housing options to the urban poor. Schemes

1 Art 2 (1), ICESCR, 1966.

2 Report of the Special Rapporteur on the Right to Food: Mission to India, Page 2, 20th March 2006, available at http://www.unhcr.org/refworld/country,,,MISSION,IND,,45377b210,0.html

3 Food Security Bill to be tabled in winter session, Financial Express, available at http://www.financialexpress.com/news/Food-security-Bill-to-be-tabled-in-winter-session--says-Thomas/833357/

4 For example, rice is being provided for Rs 2/kg as opposed to the price under the Bill being set up at Rs 3/Kg. Brinda Karat, Food Security Bill needs amendments, The Hindu, 22nd July 2011, available at http://www.thehindu.com/opinion/lead/article2285546.ece

such as the Jawaharlal Nehru National Urban Renewal Mission (JNNURM), have not invested adequately in basic services for the urban poor. While urban land is being diverted for profitable real estate and infrastructure projects, legislative tools are used to condemn the poor as 'illegal residents.'

Homelessness: There is no government data or policy on homeless people at the either the national or state level. Even though homelessness across the country is increasing, homeless people are routinely criminalised and brutalized by the police who routinely commit violence against them. A large number of arrests of beggars and homeless persons took place in the run-up to the Commonwealth Games in Delhi in 2010.

Evictions and Displacement: Massive eviction drives have been mounted by state governments in India's large cities – generally without due process or any resettlement. In the few cases where resettlement is provided to displaced families, it is on the margins of the city, and the quality of housing and amenities is generally in violation of human rights standards. Evictions also directly increase homelessness, as the absence of rehabilitation and feasible alternate options for housing, forces many to live on the streets. Also development induced displacement due to urban renewal schemes, city 'beautification', sporting events, large infrastructure projects, including dams 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 families, most of whom have not received rehabilitation. Natural disasters like the 2004 tsunami and floods have also been responsible for displacing large sections of the population.

The forced acquisition of agricultural farmland, apart from pushing millions to urban areas, is also exacerbating the country's agrarian crisis and threatening food security. This practice continues in the context of almost 80% of the agricultural population in India owning only about 17% of the total agriculture land, making them near-landless workers. Land reform measures have not been successfully implemented, neither has surplus land been equitably distributed. Over 131 million people are landless as per figures from the Ministry of Rural Development.

Lack of adequate legislation and policy: Despite the dismal status of housing in the country, there is no comprehensive rights-based national housing legislation. The draft *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. India also does not have a human-rights based rehabilitation policy. The current *National Rehabilitation and Resettlement Policy 2007* was approved without due process and did not take into account concerns of civil society and social movements. Further, it does not aim to minimize displacement or promote alternatives. The draft *Land Acquisition and Rehabilitation and Resettlement Bill 2011,* does not include adequate human rights safeguards, nor do they meet India's international legal commitments or standards expounded by international guidelines. It is also extremely weak with regards to urban evictions and displacement issues. The new central government scheme of *Rajiv Awas Yojana* also needs to be grounded in the human rights approach in order for it to be effective in providing affordable housing and legal security of tenure for the urban poor. The *Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (Forest Rights Act)* while progressive in its provisions needs to be adequately implemented across the country.

RIGHT TO EDUCATION

The enforcement of the fundamental right to free and compulsory education guaranteed by the Indian constitution is facilitated by the *Right of Children to Free and Compulsory Education Act, 2009 (RTE)*, which provides for right the right to free and compulsory elementary education to every child between 6 and 14 years of age. However, the *Child Labour Act 1986,* allowing children below the age of 14 to be employed in certain occupations and providing for non-formal education to them is in direct contradiction towards realization of the right to education of ALL children under RTE. After all, right to education means right to opportunity for equal access to education of equal quality. Also, limiting free and compulsory education to only this age group through the RTE and the 86th Amendment to the Constitution, is excluding millions of children below the age of 6 and above the age of 14 from educational opportunities, and makes the realization of this right contingent

upon the economic capacities of their families, thereby diluting the initial commitment in the Constitution that spoke about education for all children up to the age of 14 years.

The budgetary allocation for the provision of free and compulsory elementary education, although increasing every year, is still not adequate to ensure that every child is in school and stays there. The children out of school are evidence of that.

There are also serious problems with respect to infrastructure, lack of access to education and quality deficit. There is lack of an adequate number of schools and in several areas of the country, they are not located according to the SSA norm of having a primary school within one sq km and an upper primary school within 3 sq km of the domicile of every potential student. According to the District Information System for Education (DISE) flash statistics 2008-09, lakhs of teacher posts remain vacant. Besides, the laying down of the right to education cannot provide "quality" education in the absence of measurable standards and lack of accountability.

RTE also lacks a stringent enforcement mechanism, by providing for a complaint mechanism involving the local authorities, which also happen to be the implementation authorities. The Act empowers the National Commission for the Protection of Child Rights (NCPCR) and the State Commissions with the responsibility to monitor the RTE, but does not provide them with the statutory power to take direct action, other than investigate and receive complaints. Currently only seven states and Delhi have their own State Commissions. In any case, it is operationally complex for the commissions to monitor the quality of education.

RIGHT TO HEALTH

International recognition of the right to health can be found in the ICESCR, [5] and has been explained to include the right to appropriate health care, access to healthcare facilities, access to safe and potable water, adequate sanitation, healthy occupational and environmental conditions, and access to health-related education and information – including sexual, maternal and reproductive health.[6] Provision of preventive health care is also an important part of the right to health.

In India, the realization of this right has to side-step many roadblocks. The state spends only 1% of its GDP on the healthcare system which is very low as compared to other countries which spend almost 3 % .There continues to be a general lack of a well-trained and sufficient health workforce, especially in rural areas. Even though the National Rural Health Mission (NRHM), has improved that to an extent by employing around 6000 workers, it has also suffered failures at achieving targets. In any case, the Government of India's project under which it is running is ending in 2012.[7]

India continues to have one of the highest maternal mortality rates in the world.[8] There is a wide gulf between setting up of policies for maternal healthcare and their implementation. India also has the second highest number of people living with HIV/AIDS and there isn't any secure infrastructure to measure the virus' spread and impact, particularly with women in rural areas. India also has the highest TB prevalence in the world; over 1.5 million children die each year before their first birthday; and nearly 500 millions lack sufficient nutrition. Another critical issue is the lack of national healthcare infrastructure. Public hospitals have insufficient funds to support their communities, and since only 15% of Indian citizens have health insurance, quality healthcare remains unattainable for millions in dire need. 49% of women are anaemic, and about a third of children are born with low birth weight.

Only 14% of children between twelve and twenty-three months receive the necessary vaccinations to prevent diseases such as small pox and polio. During the Bal Adhikar Samvad convention on 19th December 2006 in New Delhi, Nobel Prize winner and eminent welfare economist Professor Amartya Sen said, "It is now clearly

5 Article 2, ICESCR.
6 General Comment 14 of the Committee on Economic, Social and Cultural Rights.
7 http://pib.nic.in/newsite/erelease.aspx?relid=51322
8 Report of the Special Rapporteur on the Right to Health: Mission to India, 2007, available at http://righttomaternalhealth.org/sites/iimmhr.civicactions.net/files/India.pdf

established reality that even after gaining high growth rate and increasing per capita income, we have failed to protect our children from hunger and diseases. I feel the question of resources is not the biggest one, a lot of money is being spent but the situation is not improving in accordance with the expenditure because our system delivery systems are worst, un-accountable and non-responsive towards the most marginalized like children".[9]

Nearly 80 per cent of the total health care costs are met through private expenditure and virtually all of the private expenditure is out-of-pocket (almost 97 per cent). The increased privatisation of health care in India seriously reduces the availability of health care for the poorest and most marginalized sectors of society. The economically deprived are bound to suffer in a private health system. [10] The introduction of user fees and the increased privatisation of health care leads the poor to postpone seeking attention for medical conditions – and thus increases the probability of death from treatable illnesses.

According to a World Health Organisation survey, 16 per cent of Indian families have been pushed below the poverty line by high health costs. These families have been made more prone to ill-health by their inability to access or afford clean water, sanitation and nutritious food. Lacking any kind of health insurance, more than 40 per cent of low-income families in India had to borrow money from outside the family in order to meet their health care costs and 12 per cent of families had to sell their assets to cover the medical expenses of family members. While the average expenditure on health of a middle-class Indian family is Rs. 116.7 a month, the figure rises to Rs. 202 for the poor, which is half their monthly income.[11]

The local administrations are lax in controlling the sale of spurious drugs, providing proper facilities for sanitation, and a safe and healthy environment. Exercise of reproductive rights by women and controlling illegal abortions also remain a challenge in view of the loose implementation of the PCPDNT and MTP Acts.

Apart from these broader rights, some other ESCR issues of importance include: (1) implementation of social security schemes (particularly in the unorganized sector where 90% of the workforce is employed), (2) employment guarantees and (3) livelihood. India has pledged to the UN General Assembly that it will expand the implementation of its National Rural Employment Guarantee Act, which provides for 100 days of assured employment annually to every rural household in the country, and also that it will strive for the full realisation of civil, political, economic, social and cultural rights, including the right to development.

RELATED UPR I RECOMMENDATIONS, 2008

There are constitutional and statutory guarantees which enable access to justice. These include:

- Recommendation n° 3: Continue energizing existing mechanisms to enhance the addressing of human rights challenges (Ghana).
- Recommendation n° 7: Consider signature and ratification of ILO Conventions No. 138 and 182 (Brazil, the Netherlands, Sweden).
- Recommendation n° 9: Review the reservation to article 32 of the Convention on the Rights of the Child (the Netherlands).
- Recommendation n° 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).
- Recommendation n° 18: Continue efforts to allow for a harmonious life in a multi-religious, multicultural, multi-ethnic and multilingual 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).

9 Indian Express, Maternal audit project taken up in several districts, Sachin Jain, 18 February 2007.
10 Surinder Jindal, Privatisation of health care: new ethical dilemmas, Indian Journal of Medical Ethics, http://www.issuesinmedicalethics.org/063or085.html.
11 Hindustan Times, 5 February 2007, 16per cent of Indians pushed into poverty by rising health costs.

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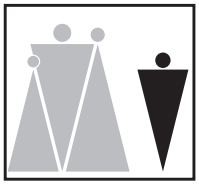
DISCRIMINATION



Briefing Note for the Regional Consultations on UPR II

Article 15 of the Indian Constitution prohibits discrimination on grounds of religion, race, caste, sex or place of birth. However, the Constitution goes beyond providing a mere declaration of equality that would assume all persons are similarly placed and can progress through provisioning of same approaches, programmes and policies. It also recognises that people are socially and economically unequal, or differentially situated, and as a consequence the need for addressing specific areas of inequalities, or obstacles and disadvantages relating to specific population groups.

Therefore under the Constitution, the Indian state is not only obliged to prohibit discrimination, but is also required to take proactive steps or affirmative action to overcome historic disadvantages and barriers. Nevertheless, despite numerous legal provisions, discrimination is still visibly blatant in many areas, examples of which are listed below.

CASTE- BASED DISCRIMINATION

The Indian Constitution outlaws caste-based discrimination as well as the practice of "untouchability", and puts in place affirmative action schemes for "Schedules Castes". However, Dalits continue to suffer social and institutional deprivations.

Employment: Government policy of reservations in services broadly envisages representation of Dalits in proportion to their population in public services. However, many of the sectors, which were the traditional domains of the government, are now being taken over by the private sector, where there is no reservation. In practice, more than 75% of Dalit workers are still connected with land: 25% as marginal and small farmers and 50% as landless labourers. In urban areas, Dalits work mainly in the unorganized 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%.[1]

Access to education: Poor access to primary education coupled with social discrimination against Dalit children in schools, leaves many of them illiterate with high levels of drop out rates. One of the major reasons for high drop out rates among Dalits are stigmatization of their identity. Moreover, with privatization of education and elite institutions raising their fee structure, accessing affirmative action guarantees becomes problematic.

Denial of health services: The infant mortality rate for Dalit children is as high as 66.4 per thousand live births as compared to 48.9 per thousand for children from "other social groups". 18.5% Dalit children fall under the category "severely undernourished" in comparison to 11% among other children.

Denial of access to safe drinking water: More than 20% of Dalits do not have access to safe drinking water and only 10% of Dalit households have access to sanitation (as compared to 27% for non-Dalit households). The vast majority of Dalits depend on the "goodwill" of upper-caste community members for access to water from community wells.

1 Dr Anand Teltumbde, Globalisation and the Dalits
Available at: http://www.ambedkar.org/research/GLOBALISATIONANDTHEDALITS.pdf

Denial of adequate housing: Dalits face systematic discrimination regarding the right to adequate housing, which is a primary reason for their deprivation of other opportunities. People are still reluctant to rent out a house to Dalits merely because of their identity even if they are economically capable and well educated.

Atrocities against Dalits: Certain kinds of violence are traditionally reserved for Dalit women: extreme filthy 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. In rural areas, Dalits are disenfranchised, beaten, abused and even sometimes killed for voting or contesting elections. [2] There are also weaknesses in the implementation of the SCST (Prevention of Atrocities) Act, which retains a shockingly low conviction rate. [3]

Problems faced by Dalit Human Rights Defenders (DHRDs): DHRDs face many forms of discrimination, including: (i) insults and assaults to DHRD in public place by using caste based abusive words, (ii) death threats for taking up Dalit atrocity cases and for supporting victims to access justice, (iii) direct and indirect destruction/blocking pathways on the property of DHRDs, (iv) implicating DHRDs in false cases and filing counter cases against them, and (v) physical assault, torture, illegal detention, and other forms of harassment.

VIOLENCE AND DISCRIMINATION AGAINST WOMEN

Despite the overarching mandate of equality and non-discrimination contained in the Indian Constitution, and regardless of the enactment of women specific laws, discrimination against women is systemic and shapes all structures of the state and the society. The impact of social values on all institutions and the workplace, inadequate laws, poor implementation of laws, and the absence of effective interventions to tackle the roots of discrimination against women, shapes women's realities, impacting women on the margins most. Reference must be made to Dalits, tribals, women in unorganized and informal labour, women from minority communities, women with disability, poor migrant women, lesbian, transgender and bisexual women, and women living in conflict areas.

The main areas of critical concern under discrimination against women are: (1) Violence against women (in public and private spheres); (2) None or little protection of women in employment, particularly in the unorganized sector where the majority of women are employed; (3) Neglect of and poor access to education and housing; (4) Neglect of healthcare, including sexual and reproductive rights; (5) Discrimination and denial of economic security, including in relation to wages, inheritance, and recognition of unpaid labour; (5) Trafficking; and (6) non existent or skeletal support services for women.

While family and community violence affects all women, especially in the form of domestic violence, including sexual violence, the violence against marginalized women is aggravated and comes with least legal protection. In particular, caste based atrocities against Dalit women, 'witch hunting' or the targeting of mainly single women from SC/ST and OBC communities in rural areas to divest them of the land and productive resources, violence against lesbian, transgender and bisexual women are areas that merit special attention. Context specific violence against women is also inadequately protected in law – as for instance, sexual violence targeting women of the other community in communal and sectarian riots, targeting of women for sexual choices, or inter-caste/ inter-community marriages (for example in western U.P and Haryana, where the khap panchayts have opposed law against honour killings).[4] It should be noted with concern that more than 1000 honour killings take place in India every year. [5]

Gender specific violence against women is also widespread in areas of armed conflict.

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2 Broken People: Caste Violence Against India's "Untouchables".
Available at: http://www.unhcr.org/refworld/docid/3ae6a83f0.html
3 http://idsn.org/country-information/india/scst-poa-act-1989/
4 http://news.rediff.com/report/2010/jul/12/khap-panchayat-body-opposes-law-against-honour-killings.htm
5 http://articles.timesofindia.indiatimes.com/2010-07-04/india/28273812_1_honour-killings-marriages-heinous-crime

DISCRIMINATION AGAINST INDIGENOUS PEOPLES

In India, 698 ethnic groups are recognized as "Scheduled Tribes", and are considered to be the countries' indigenous peoples. With an estimated population of 84.3 million, they comprise 8.2% of the total population according to the 2001 Census. There are, however, many more ethnic groups that could qualify for Scheduled Tribe status but are not officially recognized. In addition, seventy-five 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.

In practice, indigenous peoples face many challenges and their rights are frequently violated: (i) they are denied control over their development based on their own values, needs and priorities; (ii) they are politically under-represented and lack access to social and other services; and (iii) they are often marginalized when it comes to projects affecting their lands and have been victims of forced displacement as a result of ventures such as the exploitation of natural resources.

Indigenous peoples are the worst victims of "development" induced displacement of very large scale and gravity. Many of their human rights are grossly violated in the process. There is no effective consultation with the communities, let alone concurrence, before such "development" projects are forced on inhabitants resident of the region from time immemorial. Such displacements always lead to destruction of livelihood of the displaced. There is an unprecedented plunder of natural resources in tribal areas, often without even mining licenses as is revealed by the Lokayatha's report in the District of Bellary, Karnataka. In 2009, a *Minority Rights International* Report revealed that indigenous or tribal communities are among the poorest in India, barely enjoy basic socio-economic rights, and face entrenched and endemic discrimination. [6]

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 very much depend 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.

The government of India's stated position in the UN (ECOSOC and Human Rights Council, as well as in extending support to the adoption of the UN Declaration on the Rights of Indigenous Peoples) 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.

DISCRIMINATION AGAINST RELIGIOUS, ETHNIC AND LINGUISTIC MINORITIES

According to the *Sachar Committee* report, the status of Indian Muslims lies even below to that of Scheduled Castes and Tribes. Religious minorities in India have historically been deprived of equal opportunities of living and development. Systemic prejudice and bias have consolidated in large measure due to a pervasive culture of impunity. This culture allows perpetrators of violence, hate speech and discrimination to continue holding positions in the administration and has made the struggle for minority rights even more challenging.

6 http://www.unhcr.org/refworld/country,,MRGI,,IND,,4c33311631,0.html

This is coupled with a spate of communal violence that keeps erupting every few years. The *Prevention of Communal and Targeted Violence (Access to Justice and Reparations) Bill, 2011*, which seeks to outlaw communal violence, is being opposed by the Hindu right wing. The reason for this opposition is that it to task, in a chain of command responsibility, those in the police and bureaucracy who fail to protect minority lives and property.

Similarly, Christians have also suffered communal violence in the past, and there have been instances where they have been forced to convert. They, a smaller minority, have been deprived of their livelihoods and homes. India was placed on the United States Commission on International Religious Freedom (USCIRF) watch-list of countries with violations of freedom of religion.[7]

Struggling against impunity of the perpetrators of communal violence and ensuring that the Constitutional and international principles of diversity are incorporated in structures and institutions of governance and education are the tasks ahead.

DISCRIMINATION ON THE BASIS OF DISABILITY

There are more than 70 million disabled people in India. Despite the existence of the *Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995* and the ratification in 2007 of the United Nations Convention on Rights of Persons with Disabilities, disabled people continue to face severe forms of discrimination across the country.

Most of India's disabled people remain confined in their homes, as any attempt on their part to travel or enter buildings, parks, shops, etc. can be unsafe and humiliating. Not having equal access to public places, they remain unseen, unheard and unaccounted for. Access to education, employment and public spaces remain key areas of concern.

Aside from these themes, there are other critical areas where discrimination is blatant in India. For example:

- **HIV/AIDS stigmatisation**
- **Discrimination against sexual minorities** (including on grounds of sexual orientation and gender identity)

RELATED UPR I RECOMMENDATIONS, 2008

There are constitutional and statutory guarantees which enable access to justice. These include:

- Recommendation n° 5: Maintain disaggregated data on caste and related discrimination (Canada, Belgium, Luxembourg).
- Recommendation n° 6: Consider signature and ratification of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (Brazil).
- Recommendation n° 8: Share best practices in the promotion and protection of human rights taking into account the multi-religious, multicultural and multi-ethnic nature of Indian society (Mauritius).
- Recommendation n° 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).
- Recommendation n° 13: Strengthen human rights education, specifically in order to address effectively the phenomenon of gender-based and caste-based discrimination (Italy).

7 Ibid

- Recommendation n° 16: Fully integrate a gender perspective in the follow-up process to the UPR (Slovenia).
- Recommendation n° 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).
- Recommendation n° 18: Continue efforts to allow for a harmonious life in a multi-religious, multicultural, multi-ethnic and multilingual 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)

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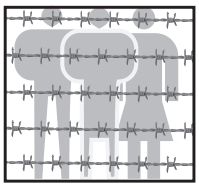
MILITARISATION & SECURITY LEGISLATION AND APPARATUS



Briefing Note for Regional Consultations on UPR II

During the past five decades, the Indian state has increasingly used militarization as a policy to counter armed insurgencies and resistance movements in Jammu & Kashmir, North-East and in the Central Indian states of Chattisgarh, Orissa, Jharkhand, West Bengal and Andhra Pradesh. In J & K there has been a long standing demand for self determination, based on its political history, which witnessed the emergence of an armed resistance in 1989. The past decade has seen a rapid decline in violent resistance, with only 119 militants active presently, lowest in the last twenty years. [1] The movement has since morphed into a strong non-violent call for the exercise of the right to self-determination. In North-Eastern states like Nagaland, Manipur, and Assam, armed insurgent groups are seeking independence or autonomy from India.

The conflict in Central India has aggravated due to the adoption of neo-liberal economic policies by the Indian government from 1990's onwards, that actively promote corporate acquisition and privatization of land and other resources in the region, thereby dispossessing Adivasis of control and access over their lands and natural resources, over which they have special rights guaranteed by the Indian Constitution and laws such as PESA and FRA.

Rather than looking for political solutions, the state has responded to these diverse conflicts by heavy militarization of these regions, together with introducing special security legislations that dump international human rights guarantees and supply sweeping impunity to its armed forces.

SECURITY LEGISLATIONS AND HUMAN RIGHTS

The Armed Forces Special Powers Act, operational in 'Disturbed Areas' like North-Eastern states (since 1958) and J&K (since 1990) provides the armed forces with powers to shoot to kill, arrest, demolish structures, conduct warrantless searches, on the basis of mere suspicion.[2] These powers operate within provisions according sweeping impunity to the armed forces. [3] Similarly, the Public Safety Act, widely and often arbitrarily used in J&K, provides for detention without trial for up to two years with the possibility of fresh slapping of charges at the expiry of those two years.[4] It is reported that even children below the age of 18 have been charged under PSA, tortured, and kept under detention for long periods of time with adults.[5] All of these legislations have been repeatedly criticized by international organizations like Amnesty International and Human Rights Watch for violating International Human Rights guarantees.

Central India is witnessing an armed resistance, particularly in areas that are home to Adivasis, by Maoists who are challenging the forcible acquisition of their lands and natural resources and minerals and causing dispossession and displacement. The union government has responded with a heavy paramilitary offensive

1 119 Militants active in Kashmir, lowest in 20 years, Indian Express,06/06/2011, available at http://www.indianexpress.com/news/119-militants-active-in-kashmir-lowest-in-20-years/799806/

2 Refer to Sec 4 of the Armed Forces Special Powers Act ,1958, available at http://mha.nic.in/pdfs/armed_forces_special_powers_act1958.pdf

3 Sec 6 of AFSPA: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.

4 Refer to Sec 18 of the J & K Public Safety Act,1978, available at http://www.unhcr.org/refworld/country,,,LEGISLATION,IND,,3ae6b52014,0.html

5 See Amnesty International Report, A 'Lawless Law': Detentions under the J &K Public Safety Act, 2011, available at http://www.amnesty.org/en/library/asset/ASA20/012/2011/en/b0cf8603-e47c-4070-82d3-713d8f873a42/asa200122011en.pdf

named 'Operation Greenhunt' in coordination with state governments- Dantewada in Chattisgarh being its epicentre. The state armed Adivasis against to form a counter-insurgency army named 'Salwa Judum' which it uses against Maoists and for terrorizing non-cooperative Adivasi villages.[6] Salwa Judum was recently declared as illegal by the Supreme Court, which also ordered it's disbanding. [7] Scores of human rights defenders and activists have been prosecuted under laws like the Unlawful Activities Prevention Act, the Chattisgarh Special Public Security Act, and Indian Penal Code provisions of waging war against the state, sedition, all of which not only trump life and personal liberty guarantees but also render the right to freedom of expression meaningless.

The severe militarization of the North East and Kashmir reflects itself in the everyday life of people and the high rate of psychological disorders like Post Traumatic Stress Disorder (PTSD) is indicative of the severe toll that militarization is taking on the populace.

IMPUNITY

The security forces in these regions in conjunction with extraordinary "security" legislations - routinely carry out violations of human rights like custodial torture, enforced disappearance, extrajudicial killings and sexual violence against women in particular. Despite the national and international call for the repeal of impunity laws like the AFSPA, which facilitate the commission of these abuses, the Indian state continues to condone and allow flagrant violations of human rights encouraged by these laws.

RELEVANT UPR I RECOMMENDATIONS, 2008

- Recommendation n° 1: Expedite ratification of the Convention against Torture (United Kingdom, France, Mexico, Nigeria, Italy, Switzerland, Sweden) and its Optional Protocol (United Kingdom).
- Recommendation n° 12: Ratify the Convention on Enforced Disappearances (Nigeria).
- Recommendation n° 14: Extend standing invitation to special procedures (Latvia, Switzerland).
- Recommendation n° 15: Receive as soon as possible the Special Rapporteur on the question of torture (Switzerland).

6 People's Union for Civil Liberties fact finding reports: http://www.pucl.org/Topics/Human-rights/2005/salwa-judum-report.htm
7 Salwa Judum is illegal, says Supreme Court, available at: http://www.thehindu.com/news/national/article2161246.ece

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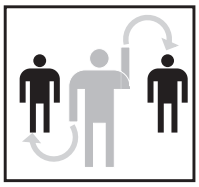
HUMAN RIGHTS DEFENDERS



Briefing Note for Regional Consultations on UPR II

The UN Declaration on Human Rights Defenders, 1998, codifies the international standards that protect the activity of human rights defenders around the world. It recognizes the legitimacy of human rights activism, its need and the state obligation in protecting those who carry it out to be protected. [1] The Declaration considers anyone working for the promotion and protection of human rights as a human rights defender. This broad definition encompasses professional as well as non-professional human rights workers, volunteers, journalists, lawyers and others who engage in human rights activism, even on an occasional basis.

In India, the security and protection of human rights defenders has been a cause of concern over many years. The UN Special Rapporteur on the situation of human rights defenders carried out a first-ever fact-finding mission to India, between 10th and 21st January, 2011. Her report will be presented to the Human Rights Council in March 2012. In her preliminary observations she has pointed out with concern the vulnerable situation of human rights defenders in India, particularly of those working in the following areas:[2]

- Defenders engaged in denouncing development projects that threaten or destroy the land, natural resources and livelihoods of communities.
- Defenders working for the rights of marginalized people (Dalits, Adivasis), religious minorities and sexual minorities.
- Right to Information activists.
- Defenders working on women's and child rights, particularly women human rights defenders.
- Defenders fighting impunity for human rights violations.
- Defenders seeking accountability for communal pogroms.
- Defenders upholding the rights of political prisoners, journalists, lawyers, labour activists, humanitarian workers, and church workers.
- Defenders working in insurgency and conflict affected areas.
- Defenders working in rural India, who according to the Special Rapporteur, are "often more vulnerable".

Some of the obstacles faced by human rights defenders, more particularly in conflict areas, are:

- Being subject to death threats and torture
- Being persecuted through the use of the judicial system
- Getting silenced by restrictive laws and special security legislations
- Being subject to enforced disappearance or murder.[3]

1 http://olddoc.ishr.ch/hrdo/documents/DeclarationHRD.pdf
2 http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10660&LangID=E
3 http://www.amnesty.org/en/human-rights-defenders/background

There are widespread deficiencies in the full implementation of Constitutional guarantees, the Protection of Human Rights Act, the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, and the Right to Information Act, all of which have a direct bearing on the protection of human rights defenders. There are flaws in implementation at both central and state levels, adversely affecting the work and safety of human rights defenders.

Aside from male and female human rights defenders, even their family members are being targeted and have been killed, tortured, ill-treated, and harassed. [4]Defenders are also often falsely charged, forcibly displaced, or their offices raided and documents stolen. These violations are mainly attributed to law enforcement authorities. Although there is no express mention of human rights defenders in India's pledges to the Human Rights Council, it reiterated its commitment to processes leading to the promotion and protection of human rights. The UPR I recommendations also underline that India should involve all relevant stakeholders in the attainment of international human rights goals.[5]

RELATED UPR I RECOMMENDATIONS, 2008

- Recommendation n° 1: Expedite ratification of the Convention against Torture (United Kingdom, France, Mexico, Nigeria, Italy, Switzerland, Sweden) and its Optional Protocol (United Kingdom)
- Recommendation n° 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)
- Recommendation n° 12: Ratify the Convention on Enforced Disappearances (Nigeria)

4 http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10660&LangID=E
5 http://www.wghr.org/pdf/WGHR-chart-status-implementation-18-recommendations.pdf