



## **Submission by the Asian Legal Resource Centre to the Human Rights Council's Universal Periodic Review on human rights in the Republic of India**

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### **Background information**

India covers 3.3 million square kilometres and is home to an estimated 1.2 billion people speaking 844 different dialects. India has 22 officially recognised languages. Of the 1.2 billion strong population, an estimated 80.5% are Hindus, 13.4% are Muslims and the rest consist of a mixture of Christians, Sikhs, Buddhists, Jains and other religious sects. While predominantly a Hindu-dominated society, India has the third largest Muslim population in the world.

India has a federal structure of governance with the central government in Delhi and state governments holding jurisdiction over 28 states. In addition to the states there are also seven centrally administered territories. The legislative framework includes the Union Parliament and the respective state legislatures. The administration of justice is primarily performed through the courts, of which the Supreme Court and State High Courts entertain constitutional, original and appellate jurisdictions, while the lower courts, ranging from the District and Sessions Courts to the Munsiff and Magistrate Courts, comprise the lower judiciary. The courts are in addition to various tribunals and the National and State Human Rights Commissions. India has ratified most major international human rights instruments, with a few glaring exceptions such as the Convention Against Torture. Its reporting record to the treaty bodies however is poor, irregular and often delayed.

Often referred to as the world's largest democracy, India is a true democracy only in theory. With one of the best constitutions in the world and equipped with domestic mechanisms to fulfil the constitutional guarantees to protect, promote and fulfill human rights and dignity, India in theory must be a bastion for human rights fulfillment. However, theory is different from practice. India's human rights record is good only in comparison to some of its ailing neighbours like Sri Lanka or Burma.

The Asian Legal Resource Centre (ALRC) wishes to bring to the attention of the Office of the High Commissioner for Human Rights (OHCHR), the following aspects concerning human rights in India, which the ALRC believes need to be considered as part of the Universal Periodic Review (UPR) process.

### The primary areas of concerns are as follows:

- Caste based discrimination
- Policing and custodial torture
- Right to food

## Caste based discrimination

Caste based discrimination is one of the most heinous forms of discrimination practiced by humans. Entities such as the European Parliament have expressed concern about the issue.<sup>1</sup> Caste based discrimination can be brutal and haunts a person from cradle to grave.<sup>2</sup> Caste based discrimination is practiced in educational institutions, places of work, homes, villages, towns and even in courts of justice.

In a case reported from the state of Uttar Pradesh, an 8-year-old boy Suresh Musahar was discriminated by his teacher in school for being born into the Musahar community.<sup>3</sup> The teacher and other students are of the view that as Suresh is a member of the untouchable community he will pollute the rest of the class. Caste based discrimination and untouchability is prohibited by law in India.<sup>4</sup> Other domestic legislations, like the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989, criminalize certain acts against members of the Scheduled Castes and Scheduled Tribes. However, a violation of these laws requires the effective functioning of two specific elements within the justice dispensation system in India – the police and the judiciary. The police are required to register and investigate a case, and an independent judiciary are needed to try the case. Owing to the contamination of both the police and the judiciary with caste-based discriminatory practices, justice frequently becomes a meaningless word for victims.

Pavan Kumar, a 11-year-old student attending the Mahatma Budha Shikshan Sansthan situated at Gaura Kala village in Varanasi district, Uttar Pradesh, was beaten up by Sub Inspector of Chaubepur Police Station, Mr. Devendra Singh, and police constable, Mr. Ramashrya Chaurasia, when they found Pavan urinating by the side of the road, thus polluting the road and making it non-usable for the high caste Hindus.<sup>5</sup> If these cases are taken to the court the victim faces caste-prejudiced judges like those who dismissed Ms. Banwari Devi's case in Rajasthan.<sup>6</sup> Such judges are not a rarity in India. A high caste judge in Uttar Pradesh High Court got his chamber washed with water from the river Ganges to purify it since the earlier occupant of the chair happened to be a Dalit. These are not rare incidents from the past. The Indian judiciary is dominated by upper caste Hindus. Recently a High Court Judge, Justice S N Srivastava, while deciding a temple property case, ruled that "...It is the duty of every citizen of India under Article 51-A of the Constitution of India, irrespective of caste, creed or religion, to follow dharma as propounded by the Bhagawat Gita..."<sup>7</sup>

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<sup>1</sup> European Parliament Resolution on the human rights situation of the Dalits in India P6\_TA-PROV(2007)0016

<sup>2</sup> House of Commons Hansard Debates for 8 May 2007

<sup>3</sup> UA-269-2007: INDIA: Untouchability practiced in government school in Uttar Pradesh

<sup>4</sup> Please see Article 17 of the Indian Constitution

<sup>5</sup> UA-118-2007: INDIA: Caste prejudiced police officers beat up an 11 year old dalit boy

<sup>6</sup> In this case the trial court judge dismissed the prosecution case acquitting the accused of the charges including rape on the ground that the judge could not believe that a lower caste woman like Banwari will be raped by upper caste Hindus. Ms. Sushila Naggar, the first female Dalit judicial officer in Rajasthan reported sexual harassment from a colleague soon after assuming charges as a judicial officer. Naggar was forced to resign from the service in 2001. "Woman Judicial Officer Quits," The Statesman (India), May 1, 2001.

<sup>7</sup> Bhagawat Gita, a Hindu religious text in chapter 4, verse 13 says: "The fourfold caste has been created by Me according to the differentiation of Guna [good] and Karma [duty]"

Yet another brutal form of caste based discrimination is the practice of manual scavenging in India.<sup>8</sup> For example, in the state of Tamil Nadu, the Dalit community Arunthathiyar is forced to work as manual scavengers. Manual scavenging is prohibited by law in India. The government of India had declared that the practice of manual scavenging would be completely eradicated in the country by 2007. While government estimates suggest that there are about one million manual scavengers in India, 95 percent of whom are women, unofficially the figures are much higher more than a decade since the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993.

In addition to the constitutional guarantees and domestic laws like the Protection of Civil Rights Act, 1955 and the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989, The Bonded Labour System (Abolition) Act, 1976, caste based discrimination continues to affect more than 17% of the Indian population. This is evident from the concluding observations made by the Committee on the Elimination of Racial Discrimination after reviewing the report submitted by India during the CERD session held in Geneva from 19 February to 9 March 2007.<sup>9</sup>

What is evident is that there are no effective mechanisms in place in India to prevent caste based discrimination. **To put an end to this practice the ALRC suggests that the government of India must:**

1. Implement the constitutional guarantees and relevant domestic laws without failure to ensure the prevention of caste based discrimination in India;
2. Give complaints of caste based discrimination priority treatment and properly investigate and prosecute such cases. Officers refusing to do so must be disciplined or even terminated from service if they are found to be intentionally negligent in dealing with these cases;
3. Revamp the functioning of the National Commission for Scheduled Caste and Scheduled Tribes and revise its mandate to also include effective intervention into reported cases of caste based discrimination;
4. Take appropriate assistance from international bodies and mechanisms, such as the Rapporteur on the issue of Racial Discrimination and the CERD Committee, to find ways to ensure the effective prevention of caste based discrimination. For this a preliminary step would be to at least reply to the enquiries sent by the Rapporteur on cases.

### **Policing and custodial torture**

Instances of custodial torture are reported from all over from India and the ALRC has documented numerous such cases. In general, investigation of a crime begins and ends with a confession. In most cases the arrest of a suspect precedes the investigation of a case. The arrest is often followed by a prolonged period of illegal detention during which the detainee is tortured.

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<sup>8</sup> In spite of several schemes and promises to put an end to the practice of manual scavenging by the government of India, it is practiced in India in almost all states. The Indian Railway, a central government entity employs the maximum number of manual scavengers in India

<sup>9</sup> Concluding observations of the Committee on the Elimination of Racial Discrimination CERD/C/IND/CO/19/5 May 2007

The case of Mr. Pahallu Musahar is a classic example.<sup>10</sup> Pahalu was arrested and tortured by the Cholapur police in order to force his brother Umesh to surrender to the police. Torture is not expressly prohibited in law in India. There are currently only indirect means through which torture can be addressed in India. For example, the Criminal Procedure Code, 1973, which lays down the rules of arrest, detention and enquiry does not prohibit the use of torture, but only prohibits 'unnecessary use of force'.<sup>11</sup> Section 50 of the Code requires the officer to inform the person arrested of the reason for the arrest, including the alleged offence for which the person is being taken into custody. The statutory requirements have been reiterated by the Supreme Court of India in the D. K. Basu case.

In spite of dozens of directions from the courts and also recurring orders from the state, the police still stick to their habit of torturing suspects. The case of Mr. Giasuddin Mandol is a grim example.<sup>12</sup> Mandol is an iron scrap dealer from the North 24 Parganas district of West Bengal and was taken into custody on August 2, 2007 at about 7:30pm, by Sub Inspector of Police Mr. Ayub Ali from Deganga Police Station. Later, in custody, the officers poured acid into Mandol's anus to force him to confess crimes alleged against him. In spite of several complaints against the concerned officer, the officer was not prosecuted.

The criminal justice dispensation system of India depends much upon the policing and the proactive role played by the judiciary, especially officers from the lower ranks of the judiciary. This interdependency continues all the way through from the stage of the institution of a criminal case to the prescribing of punishment, if the accused is ultimately convicted and sentenced to imprisonment or acquitted.<sup>13</sup>

"Encounter killings," yet another corollary of custodial torture are increasing alarmingly in India. It appears that the government is increasingly tolerating this misuse of authority by law enforcement agencies. The cases of "encounter killings" reported from the states of Gujarat, Uttar Pradesh, Karnataka, Chhattisgarh and Andhra Pradesh show a consistent and alarming pattern of tolerance for the use of violence by state agencies. Even though the use of violence and imparting fear among the populace are considered among the worst methods of crime prevention in many countries, they are widely practiced in India. This is because the concept of law and order remains based on the principle of imparting fear. The state has neglected the need to modernise and humanise the police.<sup>14</sup>

Widespread use of custodial torture in India is not the result of government neglect alone. It is also the result of the lack of seriousness in approaching this issue by the other justice mechanisms in India. Meagre compensations awarded after decades-long court cases provide no better deterrent. There is no law in India at present to punish a law enforcement officer who has engaged in torture. Concerns expressed by various agencies in India, such as the National Human Rights Commission and the National Police Commission, are not heard by the

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<sup>10</sup> UA-234-2007: INDIA: A mother running pillar to post to get her son released from illegal detention < <http://www.ahrchk.net/ua/mainfile.php/2007/2503/>>

<sup>11</sup> Please see Section 49 of the Criminal Procedure Code, 1973

<sup>12</sup> UA-296-2007: INDIA: Torture by pouring acid on the suspect in West Bengal < <http://www.ahrchk.net/ua/mainfile.php/2007/2615/>>

<sup>13</sup> Ensuring The Actual Protection of The Indian People; The Impact (or Non-Impact), of The D.K. BASU Decision ; Bijo Francis, Protection and Participation: Volume 3, number 4

<sup>14</sup> Police reforms: creative dialogue needed: India Together, February 1, 2006

government.<sup>15</sup> A recent directive of the Supreme Court of India in the Prakash Singh case to de-link policing from political interference, has not been effectively implemented.

In spite of heavy pressure, India has not ratified the Convention against Torture. This behaviour is also reflected in the country's refusal to reply to any cases referred to the government by the Special Rapporteur on Torture. Torture is not a crime in India. To convict a law enforcement officer concerning torture, the act has to qualify for all the requirements for any other crimes under the Indian Penal Code, 1890. To prove a crime, meeting all standards and that can be punished under the Indian Penal Code is difficult because of the absence of independent investigating agencies. The absence of an independent agency to investigate cases of custodial torture is exploited by the offenders since they know that even if a complaint is made regarding torture it will not be properly investigated.

Ordinary Indians do not trust the law enforcement agencies. The use of torture has also considerably reduced the morale of the law enforcement agencies. In the remote villages of India, the government is the local police constable. The atrocities committed by these uniformed state agents create fertile ground for anti-social and anti-state elements to propagate and advocate violence. This has also resulted in the loss of a middle ground for those who do not support violence.

**The ALRC therefore recommends that the government of India should:**

1. Immediately ratify the UN Convention against Torture and produce domestic legislation to implement the convention at the domestic level;
2. Constitute a separate and independent mechanism to investigate complaints against the country's law enforcement agencies;
3. Take immediate steps so that officers who commit torture are disciplined and appropriate punishment is awarded to the perpetrators within the shortest possible time;
4. Respond to all the questions sent by the UN Rapporteur on Torture and also accept the request of the Rapporteur for a country visit, thereby showing India's commitment and openness to prevent custodial violence

**Right to food**

India as a country is not poor, even though 70% of Indians are. India's projected defence budget for 2007-08 is 24 billion US\$ and it plans to spend further on its weapons upgrade programme.<sup>16</sup> The UN Rapporteur on the Right to Food has highlighted this contradiction of priorities in his report, following his mission to India in 2005.<sup>17</sup> A country that has a projected 9% development index performs worse than some Sub-Saharan countries with regard to addressing starvation and malnourishment within its territory. The National Minimum Programme promulgated by the Government of India in 2004 speaks about the Rural Employment Guarantee programme, which is also reflected in India's voluntary pledge to the United Nations Human Rights Council.<sup>18</sup> However, millions of Indians in rural villages are not benefiting from this programme and remain unemployed. The programme is not properly

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<sup>15</sup> National Police Commission of India, 8<sup>th</sup> Report

<sup>16</sup> Statistical Outline of India: Tata Services

<sup>17</sup> Report of the Special Rapporteur on The Right to Food: E/CN.4/2006/44/Add.2; 20 March 2006

<sup>18</sup> Note Verbal dated 1 December 2006 from the Permanent Mission of India to the United Nations addressed to the Secretariat of the Human Rights Council

implemented and in places where there are possibilities of implementation and thus employment, recruitment to the programme is based on caste bias and nepotism.

Poverty and resultant starvation in India is not limited to the lower caste, although they suffer the most. The lower caste forms only about 20% of the Indian population, whereas starvation and malnourishment affect about 53% of its entire population. Starvation and malnourishment are the direct result of the failing administrative system in India. A malfunctioning administrative system has a direct bearing upon the living conditions of the poor. For example, for the distribution of food to a targeted section of the population the government has established the Public Food Distribution System (PDS). However, the management of this system suffers from corruption, particularly black-marketing, as well as caste prejudices and the utter failure of the local governments.

The case of 18-month-old Alina Sahin, the youngest daughter of Mr. Ansar Ahmed, is an example. Ansar has two daughters and a son, but his wife died and Alina was being taken care of by her paternal grandmother. Even though a worldwide hunger alert was issued on September 3, 2007 expressing concern about Alina's situation, she died from acute malnourishment on September 14, 2007.<sup>19</sup>

Acute poverty and deaths from starvation are not reported from across the spectrum in Indian society. They only occur in select minority communities, tribes and the scheduled castes and scheduled tribes. The targeted Public Food Distribution System (PDS) which was introduced in India in 1997, with the intention of avoiding the misuse and wastage of subsidised food materials. However, owing to a lack of proper screening methods and transparency in the procedure, the PDS is a failure. For example, the licensing procedure for running a PDS shop is plagued by corruption. Licenses are awarded by the respective state governments and the authority to issue them is delegated to the district administrations, which are notoriously corrupt. To receive subsidised food a family is required to possess a ration card, which also serves the purpose of determining the family's financial status. This process involves obtaining certificates from the village-head and officers at the district administration. While the village-heads often refuse to issue such certificates, district administration officials demand bribes.

In addition to poverty caused by human interference, large-scale poverty exists in remote regions of the country. One such example is the Murshidabad district of West Bengal where land erosion by flooding of the river Padma takes peoples' land and livelihood away. So far the response of the state government to those who lost land and livelihood is negligible. Several instances of starvation deaths were reported from the district in the past few years.

The government of India has formulated and is executing several welfare programmes intended to prevent starvation and malnourishment. While proper planning and implementation of these programmes are necessary, what has been mostly ignored is the poor state of functioning of the PDS. The system itself, as claimed by the government, covers only 16% of the total population.<sup>20</sup> The actual number of households using the PDS is around 91 million, significantly less than the 160 million being claimed by the government. 78% of these persons are trying to make use of the system - 26% are from urban areas while 52% are rural households.<sup>21</sup> Of these 91 million households an alarming 61% claim that the PDS is plagued

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<sup>19</sup> For further details please see HA-011-2007: INDIA: A 18-month-old girl may die soon from starvation in Uttar Pradesh

<sup>20</sup> Corruption in PDS : Business Out of Poverty; Economics and Politics: Wall Street Journal 1 May 2007

<sup>21</sup> Ibid

by corruption and 49% claim that corruption has increased in the past year.<sup>22</sup> The PDS is viewed as being the most corrupt institution in India.

The prevention of corruption within the PDS cannot happen in a vacuum. It will require equipping the criminal justice mechanisms in India to specifically address this problem. In addition to an increase in the number of special courts to try offences related to the distribution of rationed food articles, a separate and independent mechanism must be constituted to investigate such cases. This must be independent from the local police, since the latter is itself corrupt and will therefore fail to effectively investigate crimes related to food distribution. There is also a need to change domestic law, in particular the Essential Commodities Act, 1955.

**The ALRC therefore recommends that the Government of India should:**

1. Take immediate steps to eliminate corruption in the Public Food Distribution System and to increase the reach of the system to benefit all sections of the population that require it;
2. Take appropriate steps to rule out the possibility of the non-implementation of welfare programmes for the poor, particularly by monitoring and accounting for the implementation of the Food for Work Programme and the National Rural Employment Guarantee Act, 2005;
3. Liaise with international agencies such as UNICEF and the ILO to find effective ways of eliminating starvation among children and women, and to effectively prohibit bonded labour;
4. Urge the provincial governments to effectively implement the central government schemes for the benefit of the rural poor and monitor the implementation of these schemes through independent bodies.

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***About ALRC:** The Asian Legal Resource Centre is an independent regional non-governmental organisation holding general consultative status with the Economic and Social Council of the United Nations. It is the sister organisation of the Asian Human Rights Commission. The Hong*

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<sup>22</sup> Transparency International : India Corruption Study 2005

*Kong-based group seeks to strengthen and encourage positive action on legal and human rights issues at local and national levels throughout Asia.*