



Submission by the Asian Legal Resource Centre on the Universal Periodic Review (Second Cycle) of India

Name of the stakeholder: Asian Legal Resource Centre (General Consultative Status with the ECOSOC)

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Annexure:

- 1. Public debates required for a better law against torture* Published by ALRC/AHRC
- 2. Sanctioning Repression in Violation of India's Human Rights Obligations : The Armed Forces (Special Powers) Act, 1958 in Manipur and Other States of India* Published by ALRC/AHRC/Redress/HRA

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1. Background:

1.1 The first Universal Periodic Review (UPR) of India was on 10 April 2008. The Working Group of the Human Rights Council on the UPR has prepared the conclusions and recommendations made by the delegations that participated in the interactive dialogue on the UPR of India.¹ The Government of India after examining the recommendations responded to the recommendations on 25 August 2008.²

1.2 Protection, promotion and fulfilment of human rights requires an effective architecture of justice delivery. The interactive dialogue in 2008 demonstrated the lack of understanding and focus of this fundamental, thereby missing out vital issues in India like (i) decades long court delays in adjudication; (ii) lack of competence and independence of the country's prosecution and law-enforcement agencies; and (iii) widespread and omnipresent corruption that prevents the reach of government welfare programs to the poor.

1.3 Though some of the stakeholders' reports, including the one submitted by the ALRC highlighted these aspects; it was not a point of discussion during the interactive dialogue. This lack of focused engagement on some of the vital issues that adversely affects human rights in India is reflected in the concluding recommendations, thereby rendering nine out of 18 recommendations, broad and general, which even if complied would not have a direct, immediate and positive impact upon the lives of the people in the country.

1.4 The concluding recommendations³ on India could be summarised into four main limbs:

- i. Curb entrenched practice of torture by an effective domestic mechanism;
- ii. Take effective actions to prevent all forms of discrimination, including those based on caste, gender or against the minorities;
- iii. Ensure that development priorities respect the needs of the extremely poor and marginalised, in particular children and take affirmative actions to prevent distress migration of the rural poor;
- iv. An overall improvement in the architecture of justice delivery.

1.5 The government's response to the Council to the recommendations was mixed as expected of concurrence and denial. The domestic implementation of the recommendations has been almost absent, or at the most, half-hearted. This submission attempts to assess the compliance of India of the four main limbs of the recommendations from the first review and to once again suggest issues that should be seriously considered during the second cycle of the UPR of India.

¹ Universal Periodic Review, Report of the Working Group on the Universal Periodic Review, India; A/HRC/8/26 dated 23 May 2008

² Universal Periodic Review, Report of the Working Group on the Universal Periodic Review, India; Addendum, Response of the Government of India to the recommendations made by delegations during the Universal Periodic Review of India; A/HRC/8/26/Add.1 dated 25 August 2008

³ Id.1

2. On torture:

2.1 India has not ratified CAT. There has been no serious debate within the Indian parliament concerning ratification, an essential requirement in a dualist system that practices parliamentary democracy. This is despite promises, by none other than the Prime Minister, that the country would ratify the convention, as early as 2009.⁴

2.2 India has not moved forward since then on the issue other than the introduction of a Bill in the parliament, the Prevention of Torture Bill 2010.⁵ The Lok Sabha passed the Bill on 6 May 2010. The Rajya Sabha, constituted a Parliamentary Select Committee to review the Bill.⁶ The Committee suggested wide-ranging changes to the Bill. The Bill is now with the government and nothing is heard about it since then.

2.3 It is expected that the government would highlight the Bill as an important and vital step forward towards the ratification of CAT and the criminalisation of torture in India. However, the ALRC, like the Parliamentary Select Committee, is of the opinion that the proposed law is eyewash. The law requires substantial revision, including its definition of 'torture', which currently fails to meet the definitional standard prescribed in the CAT. The proposed law limits the operation of the definition to "causing grievous hurt" or "danger to life, limb or health (mental or physical)".

2.4 An action against torture will require prior sanction from the government as per Section 6 of the Bill. The rider in Section 6 is a limiting clause that could delay or even deny prosecutions. The bill also enforces a period of limitation of six months for filing a complaint *vide* Section 5.⁷

2.5 In the meanwhile the practice of torture continues unabated, and is widespread in India. The ALRC has documented more than three hundred cases of torture from India during the period 2008-11. Torture happens in all forms of custody - judicial, police, military and inside prisons. The number of successful prosecution is extremely low, estimated to be one case for every 125 cases.

2.6 Rampant use of torture and the lack of prosecution demoralises the law enforcement officers. It creates a culture of fear and discourages victims from filing complaints. There is no government agency in India that specialises in providing psychological assistance to victims of torture. There is no independent agency to investigate complaints of torture either.

2.7 The use of torture as a common tool for criminal investigation has a direct bearing upon maintaining law and order and upon criminal trials. The use of enforced confessions as the primary tool for criminal investigation is one of the reasons for the mere 4% rate of conviction since the past two decades.

⁴ INDIA: Act now, stop pretending!; AHRC-STM-084-2011, 24 June 2011

⁵ http://notorture.ahrchk.net/profile/india/Prevention_of_Torture_Bill_India_2010.pdf

⁶ Lok Sabha is the lower house of the Indian parliament and the Rajya Sabha is the upper house of the parliament.

⁷ Kindly read Annexure 1

2.8 Law-enforcement agencies are neither capable nor equipped to deal with the increasing and diverse security threats the country face. This is reflected in their operative legal framework. The Indian Police Act, 1861 is the product of the colonial rule that fits the requirements of a police force essential to run a colony.

2.9 India's police today is unfit to serve a democracy. The police are under resourced; lacks training and is unfit to operate in a democratic state. The government conceive the law enforcement agencies as rule enforcers and not as a public service. In international *fora* the government maintains the position that since the country's judiciary is largely independent, corrective measures could be taken through the courts to address the problems in policing and that it serves as a strong deterrent against torture.

2.10 The D.K. Basu judgment quoted by the government during the first session is an example.⁸ But the ALRC wishes to reiterate that all the cases documented by the ALRC since the D.K. Basu judgment, some 790 cases of torture, violates the dictum in the case. Yet, NOT a single police officer or a state government has been held on contempt by the court. On a similar vein, the Police Complaints Authority to be constituted by virtue of yet another judgment, the Prakash Singh case, is not constituted in most states so far.⁹

2.11 It is therefore expected that during the UPR, the interactive dialogue would focus among other issues, requesting the government of India to reform the operative framework of its law enforcement agencies. Towards this end, it is not enough that the agencies provided with adequate physical and financial operative resources, but further, torture has to be criminalised and an independent agency that is not associated with the police, should be constituted in every state of India to accept and investigate complaints of torture.

3. On caste-based discrimination

3.1 Caste-based discrimination is the Indian variant of apartheid and continues unabated in India.¹⁰ The stoning to death of 22-year-old Swapna, and her husband, 28-year-old Sunkari Srinivas on 23 May 2010 by Swapna's family near Krishnajiwadi village, Nizamabad, Andhra Pradesh state is one more proof to the stark reality of the continuing practice of caste-based discrimination and caste prejudices in India. Swapna belongs to a Hindu dominant caste family. Her parents and relatives were opposed to Swapna's marriage with Srinivas, a Dalit.

3.2 While India has been defiant and opposed to national and international criticism on everything related to caste-based discrimination, it has refused to show similar sensitivity in dealing with the issue at the domestic level. Though the country had enacted laws to counter caste-based discrimination, of which some are currently under review, like the Scheduled Castes and Tribes (Prevention of Atrocities) Act,

⁸ D. K. Basu Vs. State of West Bengal, Writ Petition (Civil) No. 539 of 1986 decided on 18-12-1996

⁹ Praksah Singh and others Vs. Union of India and others, Writ Petition (Civil) No. 310 of 1996 decided on 22-09-2006

¹⁰ Tearing down the wall of caste, Ms. Navanethem Pillay, United Nations High Commissioner for Human Rights, 8 October 2009

1989; it is a reality, the implementation of these legislations are half hearted and often left at the mercy of caste-prejudiced law enforcement officers.

3.3 Though India boasts about some of its senior bureaucrats, a former President, Chief Ministers and judges, including the former Chief Justice, as members of the Dalit community, in reality, the effect has been only symbolic. The ordinary Dalit continues to face discrimination and social stigmatisation throughout the country. The fact that the parents of a woman went to the extent of stoning their own daughter to death for marrying an untouchable Dalit, underlines the fact that mere legislations will not end caste-based discrimination. The incident also is the grim reminder to the fact that caste prejudice is deep-rooted in India. To deal with such a deep-rooted violence mere law making is not enough.

3.4 A legal text is only the mere codification of certain principles, norms and rules. In punitive jurisprudence, a law could also be a deterrent against a crime. But the deterrence factor of the crime, in this case, caste-based discrimination as referred to in the Act, depends upon the effectiveness in the execution of the law. This is where India and its entire justice institutions and policies have failed.

3.5 The ALRC has documented cases over the past three years, where atrocities committed against the Dalits were refused to be registered as crimes at police stations. This is also reflected in the low number of cases registered across India for offenses punishable under the SC & ST Act.¹¹ The general failure of the law-enforcement mechanism in the country coupled with the caste prejudice of the officer who runs the system poses a double walled challenge to a complainant who would want to register and investigate his complaint and prosecute a person who has committed a crime that is covered under the Act.

3.6 In addition to the lack of willingness of the government to root out caste prejudice is the omnipresence of the caste-prejudiced mind in government policies. One example is the continuing practice of manual scavenging. In spite of a dozen laws preventing manual scavenging the practice continues in India due to more than one reason, of which an important one is the lack of adequate sanitary facilities in most parts of the country. Investment in proper sanitation facilities is a factor overlooked even in the national capital, New Delhi.

3.7 The ALRC expects that the government of India will be encouraged in the UPR to take affirmative actions, beyond legislations, like implementing mandatory requirements of acceptance of complaints, prompt investigations and fast prosecutions of crimes committed against the oppressed castes (Dalits).

4. Need for an all-inclusive policy of development

4.1 The Republic of Korea engaged India during the 2008 UPR upon India's policies on development. Today unfortunately a South Korean registered entity, the

¹¹ For instance in the state of Tamil Nadu, a place where caste-based discrimination is rampant according to state government statistics, only 761 cases were registered under the SC/ST Act in 2010 out of which only 20% cases ended in a conviction. This is opposed to the high number of total cases registered, which stands at 185678 for the same year. Source: Home, Prohibition and Excise Department, Tamil Nadu Police, Policy Note on Demand No. 22

POSCO (formerly Pohang Iron and Steel Company), accounts to the single largest destruction of natural environment and displacement by a foreign direct investment led industrial project in India. The project negates all premises of sustainable development, respect to the rights of indigenous communities and enforces distress migration and violates the guarantees of the acclaimed The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006.

4.2 The ALRC has reported cases where the POSCO itself has been allegedly employing criminals to silence anti-POSCO movements. Human rights activists who oppose break-neck-speed development are accused by the state government as anti-state forces or Naxalites or Maoists and are arrested and detained indefinitely. This is a pattern observed throughout the country.

4.3 It is from states, like Orissa, Madhya Pradesh, Bihar, Uttar Pradesh and West Bengal that large numbers of people migrate to other parts of the country, in search for job and livelihood. A substantial number of them end up being exploited and work as bonded labourers. Of the worst affected are women and children.

4.4 When the representatives of the ALRC met Justice Ms. Sheela Khanna, the Chairperson of Madhya Pradesh State Commission for Protection of Child Rights to seek intervention on this scenario as well as to address child malnutrition that is rampant among the children of the tribal community in the state, the Chairperson opined that those children brought to the Nutrition Rehabilitation Centres should be asked to produce their horoscope and if they are found to become worthy citizens of the state by a Brahmin priest reading their horoscope, then only state resources should be spent to recover their life.¹²

4.5 Development is essential for any country to progress. What is required however is to bring transparency, accountability and public audit into development schemes that the private and public sector are competing to implement in India. Even before conceiving a project, it must be mandatory to conduct a public audit of the project proposal. It is built into a reasonable extent in the local self-governance framework in India. However, corruption has so far prevented this proviso from being properly implemented.

4.6 The ALRC expects that the second cycle of the UPR would be an opportunity where India is urged to bring functioning, transparent mechanisms to prevent widespread corruption in India, which is the singular factor that denies benefits of development and government welfare schemes to the rural poor. Instead of stifling whistleblowers like those who use the Right to Information Act, 2005 - which is a widespread pattern in India - the country should provide a safety mechanism to protect them.

¹² INDIA: Democratic Pretensions and Administrative Follies, AHRC Annual Report 2010, available at www.humanrights.asia/resources/hrreport/2010/4%20India_2010.pdf

5. On justice architecture and draconian legislations like the Armed Forces (Special Powers) Act, 1958

5.1 The Prime Minister of India, addressing the sixth annual convention of Information Commissioners in New Delhi said that the government would be critically reviewing the Right to Information Act, 2005 (RTI) so that the legislation does not "affect the deliberative process in the government". In his speech delivered on 14 October 2011, addressing the conference the Prime Minister indicated some areas where the law should be recalibrated according to the government, so that genuine public interests could be upheld. The Prime Minister also emphasised the need to protect RTI activists as they are often subjected to extreme forms of threats.¹³ The risk is higher in states where the AFSPA is enforced.

5.2 The AHRC congratulates the government for its openness to acknowledge that improvement in administration - translate into governance - and prevention of corruption can only be realised through legal and administrative reforms aided by technology. However, such reforms to materialise, drastic reforms of the justice-rendering framework is required.

5.3 The most important of all is the drastic change that need to be brought into the functioning of the courts. The country's judiciary will take at least 365 years to complete the present backlog of cases. The present Chief Justice of India, Justice Mr H S Kapadia has reaffirmed this, stated by twenty-two of his predecessors, in May 2010. Yet, neither the judiciary, nor the government has made it a realistic priority to address the backlog of cases. In essence, the judiciary is incapable of delivering justice.

5.4 When the investigative limb of the state suffers from low morale, inefficiency and the lack of public appreciation and the adjudicative limb suffers from enormous amounts of delay and incapacitated to deal with the sheer volume of work; chaos, confusion and inefficiency is a natural consequence. Translating this into the context of maintaining the rule of law implies that injustice is the norm and justice an exception in the society. Drastic measures are required to bring an end to this 'organised lawlessness'. The resultant environment is exploited not only by armed secessionist forces that operate in India, but also by the law-enforcement agencies that enjoy impunity.

5.5 Where the government feels that its writ is threatened and the integrity of the state challenged, a draconian legislation like the AFSPA is not an answer. The AFSPA is synonymous with injustice, discrimination and impunity. The law has attracted, repeatedly, wide-ranging criticisms from jurists, human rights activists, and even politicians within India and abroad.¹⁴

5.6 The ALRC has documented more than two hundred cases, over the past eight years, where the state agencies operating under the statutory impunity provided by the

¹³ Between January 2010 and November 2011, 15 RTI activists have been murdered in the state of Maharashtra alone.

¹⁴ A thorough review of the law entitled "The Armed Forces (Special Powers) Act, 1958 in Manipur and other States of the Northeast of India: Sanctioning repression in violation of India's human rights obligations" is available at www.humanrights.asia/countries/india/reports/AFSPARReviewAugust2011.pdf

Act has committed serious human rights violations in states like Manipur.¹⁵ So far not a single military or police officer has been prosecuted for the human rights abuses they have committed under the cover of impunity provided by this law.

5.7 A discussion on the fundamental that for a country to protect the principles of the rule of law requires functioning justice institutions, that could accept and investigate complaints and deliver justice is absent in India. However, India today is at a crossroad. Should India fail in nurturing human rights and democratic values, it can adversely impact the region and can have global consequences.

5.8 The ALRC expects that the second UPR on India will be an opportunity to encourage the government to redefine its restructuring priorities so that reforming justice institutions would be the priority for the government, thereby doing justice to its voluntary pledge the country has made to its people and to the international community.

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¹⁵ Id. 13, see Annexure 2