

## **INDIA: Democratic pretensions and administrative follies**

### **Introduction**

*"It is true that too many children die from malnutrition each year in this country. Some of their parents also die from starvation and hunger. But the children are more vulnerable ... one of the reasons is the widespread 'irregularity' in the state and central government services ... the Chief Minister of Madhya Pradesh state is a very kind person ... the Nutrition Rehabilitation Centres is not a solution for the millions of malnourished children. These centres are not cost effective. But now that the centres are there we must effectively use them. My suggestion is to appoint a Brahmin priest in each of these centres and require the priest to verify the horoscope of every child brought to the centre. After studying a child's horoscope if the priest is of the opinion that the child will grow into a good citizen of this country, it must be provided treatment at the centre. For the rest, I would say, let us just leave them to their fate ... if not where do we stop? ... We cannot spend government money like this..."* (Statement and opinion of Justice Ms. Sheela Khanna, the Chairperson of Madhya Pradesh State Commission for Protection of Child Rights, made to the AHRC staff members during a visit to the Commission in October 2010).

The Government of Madhya Pradesh appointed Justice Ms. Sheela Khanna as the Commissioner at the State Commission for Protection of Child Rights, after Justice Khanna's retirement from the judicial service. Justice Khanna was the Chief Justice of Madhya Pradesh High Court.<sup>1</sup> The state cabinet's decision, taken in September 2008 to institute a Child Rights Commission took one more year to be implemented, at a limited level, of the appointing of a commissioner. The Chief Minister of the state, Mr. Shivraj Singh Chouhan, while informing the public and the media about the decision of his cabinet to set up the Commission said that the Commission is mandated to help generate an atmosphere conducive to the all-round development of children.<sup>2</sup> The reality today is that Justice Khanna, who entertains the above view of child development chairs the Commission, while the government is yet to appoint the rest of the six members that the Commission requires to function.

India is today a necropolis of human rights for the poor, the marginalised and the underprivileged.<sup>3</sup> Many countries in the world might be the same. What makes India an alarming case is that its poor makes up more than 60 percent of its

<sup>1</sup> The Commissioner, throughout her discussion with the staff members of the AHRC, used the word 'irregularity' referring to corruption. For the Commissioner, corruption is a mere irregularity, not a crime. When a corrupt act, like selling of subsidised food grains intended to be distributed to the poor in black markets, denying it to the poor, that directly results in the death of dozens if not hundreds of children each year in many districts in Madhya Pradesh the act is nothing less than culpable homicide. Yet, for the Commissioner, these are mere irregularities.

<sup>2</sup> *Madhya Pradesh to setup a child rights commission*; Hindustan Times, 24 September 2008

<sup>3</sup> *Field Notes on Democracy : Listening to Grasshoppers*; Arundhati Roy, Haymarket Books, 2009

population, estimated to be 421 million in number<sup>4</sup>, which is a third of the world's poor and more than the entire poor living in 26 poorest African states.<sup>5</sup> The Indian government however, wants to claim that the percentage of poor in India living below the poverty line is a mere 25 percent. It has remained so for the past 64 years, the period after the country's independence, and for many years before 1947, particularly under the colonial rule. The colonial government was not concerned about poverty in India, even during the devastating Bengal Famine of 1943 that claimed an estimated three million lives.<sup>6</sup> In fact independence has brought nothing much to this 60 percent of the country's population, other than a ritualistic change of guards in New Delhi and at the state capitals.

For some unfortunate sections of the country's population, this change of rulers has brought far worse. Since 1947, those living in the state of Jammu and Kashmir and northeastern states like Manipur have faced atrocious forms of human rights violations. Independent India and its various governments have killed, raped and tortured its own people in such large numbers in the past 64 years, in these two states alone to suppress dissent and political opposition, that the atrocities committed by the colonisers for over two hundred years today look like mere squabbles.<sup>7</sup>

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<sup>4</sup> For further details please see Oxford Poverty and Human Development Initiative, a study that used Multi-dimensional Poverty Index (MPI)

<sup>5</sup> *Identity and Violence : The Illusions of Destiny*; Amartya Sen, W.W. Norton & Company, 2006. There are no credible statistics available regarding the exact state of poverty in India. The census data is highly corrupted since many citizens are not counted, due to various prejudices, including but not limited to caste, gender and religion. The district collectors, an apex authority in each district that is responsible for maintaining statistical data of the poor are often under pressure from the state administrations that require these officers to underestimate the severity of poverty so that these states are not categorised as 'under performing' states. In addition, the Government of India has used every trick out of its hat to bring down poverty, statistically, by making calculations after bringing down the per-capita purchase capacity from Rs. 44 per person per day to Rs. 12 per person per day. The government's Millennium Development Goals Report, claims that India has addressed poverty effectively thus by bringing down the number of the poor from 36 percent to 25 percent between 1994 - 2009. Such is development in India.

<sup>6</sup> British Prime Minister Winston Churchill and the government he led deliberately let millions of Indians starve to death during the Bengal Famine, motivated in part due to his racial hatred. Churchill's only response to a telegram from the government in Delhi about people perishing in the famine was to ask why Gandhi has not died yet. British imperialism had long justified itself with the pretence that it was conducted for the benefit of the governed. Churchill's conduct in the summer and fall of 1943 gave the lie to this myth. *I hate Indians*, he told the Secretary of State for India, Leopold Amery. *They are a beastly people with a beastly religion. The famine was their own fault*, he declared at a war-cabinet meeting, *for breeding like rabbits*. For further information please read *Ugly Briton*, Sashi Tharoor, 29 November 2010, Times, commenting on *Churchill's Secret War: The British Empire and the Ravaging of India During World War II*; Madhusree Mukerjee, Basic Books, 2010

<sup>7</sup> A clear statistics regarding the atrocities committed against civilians and suspected extremists in the Indian-Administered Kashmir is not available. Yet UN High Commissioner for Refugees estimates that about 400,000 persons have migrated out of Kashmir due to fear of violence into India since 1947 and about 2 million persons into Pakistan-Administered Kashmir. Estimates made by various agencies and organisations suggest that each year about 400 to 700 persons are murdered extra-judicially in the Indian-Administered Kashmir. None of these cases are investigated and the reports of the officers engaged in these encounters are held to be final. In Manipur on the other hand, the state government itself admits that the state police alone murders about 300 persons extra-judicially each year. Indeed the state administration claims that all of those who get murdered are extremists killed in armed encounters. There has been no inquiry into these claims whatsoever and the state

The world's largest democracy is today extremely polarised between the traditional haves and have-nots.<sup>8</sup> Its administration is opportunistic and favours multinational corporations and family-run business empires while conceiving and implementing policies against its own people and their welfare. It is a country that claims itself a democratic republic but authorises the widespread use of torture. It is a state that had once resolved to be a secular democratic republic, but its demographic fault lines are drawn with the crayons of caste and religious prejudices, where millions of its citizens are still considered to be untouchable. It is a country of extreme paradoxes where hundreds of domestic and foreign banking and IT experts queue up for employment in its metros while at the same time, thousands of citizens, women and children included, in the early hours of everyday, work with bare hands cleaning sewers, and often carrying human faeces on their head.

The 2010 Commonwealth Games was *the* showcase where this anomaly was recently exhibited, where billions of tax money was spent to show the prowess of the so-called modern India. Little did the world know, nor was it concerned, that the money earmarked for the development of the Dalits and the poor were spent by the government to undertake the construction of the Games village and sporting venues to host the multinational sporting event.<sup>9</sup> Yet many athletes refused to participate in the games since the games villages where they were supposed to be hosted were found uninhabitable for humans. Many rooms had bathrooms with washbasins stinking with human faeces since the poor construction employees did not know where to defecate and used washbasins to relieve themselves.<sup>10</sup> They had no idea what a water closet is, having only ever used the roadside or the cover of a shrub to answer nature's call.

Corruption in procurement and construction was so rampant that a bridge connecting the main games venue and the car park collapsed a week before the grand opening ceremony.<sup>11</sup> In a country where its 820 million citizens earn less than two USD a day, the government spent 6.8 billion rupees of tax money to organise the Commonwealth Games.<sup>12</sup> Together with corruption, impunity corrupt allowed the organisers and the contractors to inflate expenses on paper so that the cost of a roll of toilet paper was shown 80 USD and that of a soap dispenser 61

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administration for the past ten years has been using countering insurgency as an excuse for claiming and receiving huge amounts of secret funds from the central government. Counter insurgency has become a tool for extracting money by the political administration in Manipur. No wonder, the petty civil contractor, Mr. Ibobi, who became the Chief Minister of Manipur a few years before is now on records the richest person in the Northeast of India.

<sup>8</sup> Regional Disparities in India, Planning Commission of India Report, 2010

<sup>9</sup> *In my view, prima facie, that using of 67.891 million rupees out of Schedule Caste Sub Plan (SCSP) to contribute for CWG appears to be wrong*, P. Chidambaram, Union Home Minister, in a speech he made at the Rajya Sabha, August 2010

<sup>10</sup> *The games villages are filthy and unfit for human habitation. Sinks stinking with human faeces and street dogs sleeping on beds*, Time of India, September 2010

<sup>11</sup> See generally: Corruption rid CWG games, Members of the CWG Organising Committee investigated for widespread corruption, Times of India

<sup>12</sup> *Still Game*, Manu Kaushik, Business Today, 1 September, 2010

USD.<sup>13</sup> Yet, the organising committee of the games, in a miserable gesture of arrogance, justified the horrid state of affairs, accusing the 'west' that their expectations are too high and their hygiene standards abnormal and beyond reasonable human requirements for sanitation.

The explanation perfectly mimed India's position concerning caste based discrimination, the worst form of discrimination known to human history; that it is an internal matter. This position has so far justified social evils like manual scavenging, the cleaning of dry latrines with bare hands and carrying human excreta on their heads, a job conveniently and forcibly allocated to the lowest among the Dalits.<sup>14</sup>

Those amongst the poor who survived the forced eviction prior to the Games and succeeded to remain in New Delhi's slums, found themselves encircled with huge 30-foot-tall plastic hoardings with messages like '*Welcome to India, the world's fastest growing democracy*' so that the unhappy and uncomfortable reality of India was kept away from the world's eye.

Manual scavenging is an extreme derivative of caste-based discrimination that prevails unabated in India despite having more than two dozen government orders, interventions by courts and legislations against it. In fact, many upper caste Hindus -- politicians, judges, journalists, academics and some 'Commissioners' included -- believe that being born a Dalit and thus by default often poor, is one's *karma*, and hence argue that it is not a social evil incompatible with the very notion of liberty, equality, justice and democracy. For these proponents of the *Brahminical* order, caste defines the very existential essence of humans. Fortunately for them, this reasoning has found resonance within the government, irrespective of its political colour; the Congress, the fundamentalist and rightwing Bharatiya Janatha Party, and the Communists, including the so-called central left for the past six decades have supported this.<sup>15</sup> This condition is not likely to change in the near future.

The term 'development' in India is restricted within the four corners of its rigid caste system, an order India's upper caste cherishes and promotes. The perceived notion of wider people's participation and the *much trumpeted* village level administration implemented thorough the Panchayat Raj after the 73rd amendment of the Constitution, has also fallen prey to the deep-rooted caste psyche of India; so much so that decisions made by these bodies are overshadowed with caste prejudice.

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<sup>13</sup> *Toilet paper scandals in India shames Commonwealth Host*, Mehul Srivastawa, Business Week, 19 August 2010

<sup>14</sup> For further details please see AHRC Annual Report 2009, India

<sup>15</sup> Manual scavenging continues unabated in West Bengal, a state ruled by the CPI (M) for the past 33 years. The CPI (M) has more upper caste members in their Polit Bureau. In the state of Kerala however, such practices have ceased to exist since the past 30 years, thanks to the reasonable implementation of the land reforms that ended feudalism and educational opportunities made available to the poor, irrespective of caste or religious colours.

The decision of the Lank village panchayat in Muzaffarnagar district of Uttar Pradesh state made on 22 November this year prohibits the use of mobile telephones by unmarried girls, since the panchayat as well as parents are of the opinion that the use of mobile telephones allows girls to have affairs with boys outside their 'caste defined' limits of who marries who.<sup>16</sup> It is alarming that such restrictions are considered to be perfectly normal and even necessary to preserve so-called Indian virtues.

Torture of the poor is one of the pillars of India's social hierarchical structure. It is so widely practiced that none of India's 12,618 police stations and 7,535 police outposts are an exception to it.<sup>17</sup> Other agencies operating in India, like the paramilitary units also engage in brutal forms of torture and other human rights violations like rape and extrajudicial executions. Yet not more than three officers of the Indian paramilitary establishments were subjected to prosecution this year.<sup>18</sup> Draconian laws like the Armed Forces (Special Powers) Act, 1958 provide statutory impunity to paramilitary forces, allowing them to kill anyone on mere suspicion.<sup>19</sup>

Torture has become not just a crude tool for criminal investigation, but also an instrument used with near absolute impunity for social control in the country.<sup>20</sup> The fear generated in society through its widespread use is employed to retain and enforce authority. All political parties encourage torture, so much so that all of them are unified in thwarting attempts to ensure accountability to police actions. So far torture is not defined as a crime in India and the attempt to legislate on this issue has been farcical; the proposed law to criminalise torture, the Prevention of Torture Bill, 2010 neither defines torture in its true sense nor prescribes any independent mechanism that can investigate a crime of torture.

Despite the absence of a proper law or any independent mechanism that can do justice in a complaint against a police officer by a citizen, it is estimated that slightly more than 50,000 complaints are filed each year against police officers in India. It is no surprise however that out of this large number of complaints only a minuscule two percent result in prosecution. Immediately superior officers inquire into 99 percent of the complaints. In collusion with the accused officer, these officers summarily dismiss 60 percent of the complaints. Of the rest, less than 10 percent are recommended for departmental sanctions, whereby the punishments range from transferring the accused officer from one station to the other or the temporary suspension of a salary increment. Of the two percent of officers prosecuted each year, only a small number, estimated to be less than 30, are convicted by the courts. It is thus no surprise that between 2008-10 only 26 cases of human rights abuses were registered against police officers in India. Even according to the Union Home

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<sup>16</sup> *Indian village bans single girls from using mobile phones over forbidden marriage fears*; Daily Mail UK, 24 November 2010

<sup>17</sup> Statistics provided by *IndiaStat* - Revealing India Statically [www.indiastat.com](http://www.indiastat.com)

<sup>18</sup> Id.

<sup>19</sup> *Armed Forces (Special Powers) Act, 1958 : A Study in National Security Tyranny*, South Asia Human Rights Documentation Centre,

<sup>20</sup> Please read further, AHRC statement on India released on 26 June 2010 available at [www.humanrights.asia](http://www.humanrights.asia)

Ministry, the number of cases registered against police officers in states like Assam, Jammu and Kashmir, Manipur and Chhattisgarh, is far too small; these are states notorious for police brutality and where an alarmingly large number of persons are killed each year in police actions.

A critical analysis of human rights in India therefore must deal with the following three elements -- the widespread use of torture, the denial of the right to food and caste based discrimination.<sup>21</sup> These three issues are also the AHRC's key areas of engagement in the country. The following chapters examine the extent to which these three issues have negated the fundamental premises of democracy. In this process, how these fundamental human rights violations have affected the life of ordinary Indians and what attempt the government has made to address them will also be examined.

This report does not however, claim (and nor is it within the capacity of any single organisation) to thoroughly examine the entire human rights scenario of India. Like the socio-cultural and geopolitical landscape and vastness of the country itself, human rights issues in India are diverse and vary in intensity from region to region. The attempt in the following pages is to present what the AHRC has learned from its engagement in India during the past 12 months. It is in no manner an absolute or all inclusive human rights report on India. Sincere such attempts by several organisations interested in India and its people, could together provide one such comprehensive analysis.

## Custodial violence and torture

On 23 May 2010, police officers, including a woman police constable tortured and abused a mother and her 12-year-old son in Rajouri Garden Police Outpost in Delhi. The officers forced Mala (*name changed*) to strip naked in front of her minor son who was detained at the station, and ordered her to have sex with him. Upon refusal, one of the police officers demanded Mala to have sex with him. Mala, a slum dweller from Delhi's Mayapuri area had gone to the police outpost with her husband to enquire as to why her two sons were detained at the police station.

The police on May 22 arrested Mala's two sons, aged 12 and 10, on the accusation that they had stolen Rs. 6,000 from a car. The torture and abuse was reportedly to force the 12-year-old boy to confess the crime and return the money. As the result of a complaint lodged by Mala with the help of a local human rights organisation to Mr. Y. S. Dadwal, the Delhi Police Commissioner, the Commissioner suspended the Woman Head Constable, Amrita Singh, from service, as well as Constables Mr. Pramod Kumar and Mr. Santosh of Rajouri Garden Police Post. The Assistant Sub Inspector who was in-charge of the outpost was transferred.

Mala's case in essence reflects what policing in India today has become. An analysis of the case raises several serious issues; first of all, what law allows the police to

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<sup>21</sup> Torture and the right to food are analysed separately, with caste based discrimination discussed as a common factor as it is closely interrelated and interwoven with both issues to a certain degree of inseparability in India

detain two children aged 10 and 12 in a police lock-up overnight instead of sending them to a juvenile home or presenting them immediately before a magistrate having jurisdiction to deal with cases involving minors? What authorised the police to extract a confession through torture, instead of investigation? After being approached by the human rights group that took up the matter, the police were compelled to take action against the officers. Rather than seeing the case as a horrific indication of what the country's police have become, the superior officers for their own convenience termed the case an instance of *'not following proper procedure while handling juveniles'*. A probe by the Vigilance Department of Delhi Police was ordered to look into the allegations of stripping. What this probe will achieve, as the investigating agency is the same police, is anybody's guess.

The statement of the senior police officer while briefing the media only reaffirms the fear of bias in the probe since he only acknowledged the 'likelihood' of 'extreme verbal abuse' while refusing any possibility of stripping. By saying *'we could have hushed the case up, but the fact that we have suspended the officers involved in the case implies that an impartial investigation will be undertaken'*, the officer inadvertently shed light on what the establishment could do. Impartiality in the Indian context means the exact opposite -- the accused investigating the crime, with the judge being the prosecutor, accused, plaintiff, witness and jury. It is unfortunate to note that at present there is no other process available in India where an iota of impartiality can be attributed to police investigations of crimes committed by police officers.

On a deeper level, the case raises serious concerns regarding the rule of law and the notion of democracy.

Most importantly and unfortunately, the case is not a standalone incident of some rogue police officer going astray. Indian police and paramilitary units are infamous for sexually assaulting, including stripping and parading women in public spaces, to instil fear among the masses and to quell dissent.<sup>22</sup> They are also known for looking the other way when locally dominant people, especially from the upper caste and class in rural India, commit crimes.<sup>23</sup> After all, if some police officers can do it in Delhi, the national capital, despite the presence of all its media and civil society organisations, who can guarantee the safety and security of women in faraway places where there is no presence of any similar safety mechanisms? The AHRC this year alone has documented more than 40 such cases, spanning the length and breadth of the country that proves this point.<sup>24</sup>

The case also exposes the culture of silence when the victims belong to the Dalit or tribal communities, who are among the country's most poor, disadvantaged and vulnerable.<sup>25</sup> Rather than being actively supported by the government and civil society, including the media, they are in fact abandoned and left to fend for

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<sup>22</sup> The Indian Police: A Study in Fundamentals; Deoki Nandan Gautam, p. 32-33

<sup>23</sup> *Cultural roots of police corruption in India*; Arvind Verma, 1999 Policing: An International Journal of Police Strategies & Management, volume 22 issue: 3, pp. 264 - 279

<sup>24</sup> For further information please see: <http://www.humanrights.asia/news/urgent-appeals>

<sup>25</sup> *The state of the republic is showcased in Manipur*; AHRC-STM-012-2010, 26 January 2010

themselves against all odds. Only a few Indian print media reported Mala's case in their inner pages among several other articles in the 'city news' section. But the 'news value' awarded to the incident was not strong enough to carry it beyond the first day. Apart from the media, there were no women groups or Dalit NGOs interested in the case.

Mala and her family experienced this traumatic incident on May 23. The family was so terrified by the events that they kept silent for more than two weeks and could not gather the courage to make any complaints to the authorities. It was only when the story reached a local NGO through neighbourhood whispers that the incident came to light and a complaint was filed. Clearly, for every such case that reaches the doors of law, there would be many pushed under the carpet.<sup>26</sup> And with them would be shattered dreams, disbelief in government institutions and perhaps democracy itself.

The case clearly spotlights the ideologies of violence, caste and gender based discrimination that rule India, despite its many claims of being the world's largest democracy.<sup>27</sup> It also reveals that these prejudices are as strong today as they were hundreds of years ago. Even worse is the fact that the caste based value system has remained internalised even amongst educated elites, who are primarily responsible for the constitutional mandate of eradicating it.<sup>28</sup>

What operates in these cases is neither the free and fair implementation of the rule of law, nor even a critical engagement with the issues. When it comes to justice for the poor and the downtrodden -- belonging to the lower castes in most cases as the boundaries between lower caste and lower class in India are very thin -- the reactions often make up two extremes. One is utter disregard and contempt for the idea of justice, while seeing the victims as dehumanised creatures bereft of any dignity. The other is highly patronising benevolence offered in response to qualified inclusion by various ways like *Sanskritisation*. Even this patronising attitude is missing however, when the victim is a Dalit, tribal or a minority woman suffering with the double burden of two underprivileged identities.

The Mathura rape case shows how gender discrimination in India is superimposed on and organised along the skeleton of caste. The basis of the Supreme Court's decision was that the complainant -- an illiterate, orphaned tribal girl -- was of loose character because she had eloped with her boyfriend and was brought to the police station only because of her brother's complaint, and that she was lying about rape. The conditions of 1979 have not changed though the decision caused enormous outrage and led to strong movements for gender justice culminating in a reform of the laws relating to rape in 1983. Unfortunately, the amendment in the law meant little positive change on the ground. Even today the first defence offered by the

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<sup>26</sup> For instance lawyers refuse to appear for victims of police abuse in Manipur. Those who dared are threatened or intimidated. For further details please see Jiten Yumnam's case, reported by the AHRC, AHRC-UAC-098-2009

<sup>27</sup> *Dubey represents a decaying system*; AHRC-STM-031-2010, 19 February, 21010

<sup>28</sup> *Caste and Affirmative Action in an Indian College*; Shobana Sonpar; Centre for the Study of Violence and Reconciliation, 20th Anniversary (1989-2009) papers



accused in rape and other cases of sexual assault is the 'loose' character of the woman. In 1995, in the Bhanwari Devi rape case, a trial judge observed that because Hindu scriptures do not allow upper caste men to touch a low caste woman, the accused could not have raped the Dalit victim.

Close to 30 years later, there is little substantial change in the position and practices facing India's downtrodden, particularly the women. This is so in spite of India having a Dalit Chief Justice.<sup>29</sup> To complicate matters further, Justice K. G. Balakrishnan, after retiring as the Chief Justice of India is now serving as the Chairperson of the National Human Rights Commission. In one of his statements soon after assuming office at the NHRC, Justice Balakrishnan justified capital punishment. According to his opinion, in countries like India, law and order cannot be enforced without severe penalties like capital punishment. It is a pity that India's top judge was unaware of the basic principles of criminal law jurisprudence; it is not the severity of punishment that deters crime, but the certainty of it.<sup>30</sup>

Mala's case, together with thousands of other similar ones, is evidence that the project of nation building through democratisation of society has failed. The India today is not what Dr. B. R. Ambedkar envisioned it to be. The idea of nation to him, and to every rational individual, was not just of political sovereignty but one where the people feel socially bound as a group, not divided by a regressive and pre-modern mode of social organisation. India today is a democracy where any police officer can strip any woman, more so those from the disadvantaged backgrounds with impunity; knowing well that the officer would get the support of the superior officers.

The officers accused in Mala's case knew that in most cases the victim, terrorised and traumatised, would never knock at the doors of law. And even if she does, the case would not get anywhere since the systems of investigation and prosecution are so much biased and rigged in favour of the police. And there are no efforts to change this. As for Mala's case, it is certain that the case would be buried under the files, to be dismissed after a decade or so, because of the lack of evidence.<sup>31</sup>

## The so-called reforms

In 2007 the Prime Minister, Dr. Manmohan Singh, promised the nation that India would soon ratify the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>32</sup> While nothing is heard about the ratification of the Convention any more in New Delhi, the Government of India, after protracted discussions in the Union Cabinet has drafted a Bill, the Torture and Custodial Death (Prohibition) Act, 2010 to criminalise torture.<sup>33</sup> The lack of

<sup>29</sup> For further analysis please see: *Is Justice Balakrishnan holding a devil's brief?*, ALRC-STM-004-2010, 30 July, 2010

<sup>30</sup> *Dei delitti e delle pene*, Cesare Marquis Beccaria-Bonesana

<sup>31</sup> *Country's democracy stripped naked by Delhi police*; Avinash Pandey Samar, AHRC-ART-060-2010, 14 June 2010

<sup>32</sup> *India will soon ratify CAT*; The Hindu, 3 January 2010

<sup>33</sup> The complete text of the Bill is reproduced in the latter part of this chapter

conceptual clarity and seriousness in approaching the issue is evident in the *two-page and 466 worded text* of the Bill, which the government proposes as a comprehensive law to deal with one of the most serious issues plaguing India today.

When the Union Cabinet debated the Bill in 2008, one of the objections raised by the ministers for enacting a comprehensive law against torture was that such a law, if enacted, would discourage the law enforcement agencies. The ministers argued that criminalising torture will pose an obstruction to law enforcement, particularly in the context of the state agencies fighting Naxalism and other violent insurgent movements. Such parochial views against criminalising torture only suggest the paucity of knowledge of the Indian legislators and further the colonial mindset of India's elite. There is not a single country in the world that has effectively prevented crime or succeeded in containing armed insurgency by the sheer use of force and allowing state agencies to engage in torture. On the contrary, polices followed by countries like Iran, Israel and Burma that allow systematic use of torture upon suspects on various pretexts are criticised worldwide. India has at least half a dozen reasons beyond its despicable records in Kashmir, Manipur and Chhattisgarh to be included in this *exclusive club*.<sup>34</sup>

The outlook of condoning torture illuminates the drastic changes required in the policing policy in India. The Indian Police Act, 1861, by all means a colonial law, and its existing state law variants like the Kerala Police Act, 1960 are legislations that need to be scrapped and rewritten with a view to enable a legislative framework suitable for the police to function within a democratic set up.<sup>35</sup> However, under the pretext of modernising the law, the endeavour is to award unprecedented arbitrary powers to the police in the name of crime control. The Kerala Police Bill, 2010 if enacted into a law will become a statutory framework to create a police state.

This newly proposed law awards the state police authority to infringe almost all fundamental rights of a citizen with statutory impunity. It allows even a police constable to infringe personal privacy at will, arrest and detain persons arbitrarily and interfere in civil disputes, and creates a statutory framework that requires the prior agreement of an accused police officer if a complaint against the officer is to be investigated. This is a proposition unheard so far in the legislative history of the country, even during colonial times. Not a single human rights organisation, opposition political parties or the media were interested in this new law. The only study on the Kerala Police Bill, 2010, with comments and recommendations, was made by the AHRC.<sup>36</sup>

Unfortunately, not many human rights organisations or other civil society groups in India are concerned about police torture and the impact it has upon the democratic norms the country decided to practice 64 years before. India has however an influx of self-proclaimed policing experts who lobby for changes in Indian laws. Short-sighted and ill-informed attempts like introducing community policing into a

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<sup>34</sup> *India Briefing : Staying the Course*, Philip Oldenburg Ed., Asia Society

<sup>35</sup> *The law can be an ass*, Manoj Mitta, Times of India, 28 November 2009

<sup>36</sup> Kerala, a police state in the making : Act now!, ALRC-PRL-005-2010, 21 June 2010

system that has not evolved beyond baton charging everyone in the vicinity to gain control or extra-judicially executing suspects to create a fear psychosis in the community has not benefited anyone other than those who are the proponents of cosmetic police reforms.<sup>37</sup> While such shoddy reforms are referred to with marketable titles in states like Kerala ('community policing'), they are also used to divide the population and gain control based on caste and religious prejudices in states like Chhattisgarh ('Salwa Judum'). Even the mainstream media regularly publish articles justifying the practice of torture. Articles like *Speak Up to Be Silent*, written by a self-proclaimed expert on the subject, lobbying for the relaxation of fundamental principles like the right to remain silent and the presumption of innocence of the accused, will have drastic effects upon the fundamental rights of every citizen.<sup>38</sup> These articles portray the impression that Indian police require more impunity to combat terrorism than their counterparts in the US or the UK.

Each failure by the police affects mostly the poor -- more than 60 percent of the country's population. Most of the so called experts on policing in India have failed to understand what this segment of society sees as necessary changes to be brought into the policing institution.

### The proposed law against torture

On 31 August 2010, the upper house of the Indian parliament, the Rajya Sabha, constituted a Parliamentary Select Committee to review the Prevention of Torture Bill, 2010.<sup>39</sup> The Committee, chaired by Mr. Ashwini Kumar has Dr. E. M. Sudarsana Natchiappan, Mr. Shantaram Laxman Naik, Ms. Brinda Karat, Mr. Naresh Gujral, Dr. Janardhan Waghmare, Mr. Ahmad Sayeed Malihabadi, Dr. Vijaylaxmi Sadho, Dr. Ashok S. Ganguly, Ms. Maya Singh, Mr. S. S. Ahluwalia, Mr. Kalraj Mishra and Mr. Satish Chandra Misra as its members.<sup>40</sup>

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<sup>37</sup> The Commonwealth Human Rights Initiative, a New Delhi based NGO is a big-time advocate of 'community policing'. The CHRI, along with the Government of Kerala are seen proposing the so-called *Kerala Model* in policing in national and international seminars. CHRI has no understanding about what policing in Kerala is. Had the retired police officers and other bureaucrats employed by the CHRI taken time to critically examine the functioning of Kerala police -- a state service with senior officers like IGP Mr. Tomin Tachankiri undertaking foreign trips to extract bribes from criminal groups operating in the middle eastern countries -- the CHRI would not have dared to make a proposition that Kerala police is a model policing system to emulate for the rest of India. Unfortunately, the so-called mainstream human rights groups like the CHRI and their careless approach to work causes more hindrances to human rights work than any real work

<sup>38</sup> *Speak up to be silent*; R. K. Raghavan, Frontline, Volume 27, Issue 13; June-July 2010

<sup>39</sup> Please see Rajya Sabha Debates dated 31 August 2010, also reproduced by the AHRC with the title *Conscientious review required on the draft law against torture*; ALRC-STM-001-2010, 21 July 2010

<sup>40</sup> The Chairperson of the Committee, Mr. Ashwini Kumar is a Senior Advocate of the Supreme Court of India. Kumar was the Additional Solicitor General of India and has also served as a State Minister in Government of India. Dr. E. M. Sudarsana Natchiappan is also a Senior Advocate of the Supreme Court of India and a former minister. Dr. Natchiappan is a member of FIAN International and has participated and lectured at Geneva-based International Agricultural and Allied Workers Organisation. Mr. Shantaram Laxman Naik is a lawyer and was a member of the Indian delegation to the Special Session of United Nations on Disarmament in 1986. Ms. Brinda Karat is a politician from West Bengal and a member of the Committee on Empowerment of Women. Mr. Naresh Gujral is an industrialist and is a Fellow Chartered Accountant (FCA). Dr. Janardhan Waghmare is the former Vice-Chancellor of Swami Ramanand Teerth Marathwada University. Mr. Ahmad Sayeed Malihabadi is a

A notification issued by the Committee invited suggestions and opinions about the Bill to be submitted to the Committee on or before 22 September 2010. The following is the review and suggestions concerning the Bill submitted to the Committee by (1) Nervazhi; (2) the AHRC and (3) the Asian Legal Resource Centre (ALRC), AHRC's sister organisation. Nervazhi is a registered NGO operating in Kerala, India, registered under the Travancore Cochin Literary Scientific and Charitable Societies Registration Act, 1955.

## Bill on the anvil

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### *The Prevention of Torture Bill, 2010*

*A BILL to provide punishment for torture inflicted by public servants or any person inflicting torture with the consent or acquiescence of any public servant, and for matters connected therewith or incidental thereto.*

*WHEREAS India is a signatory to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;*

*AND WHEREAS it is considered necessary to ratify the said Convention and to provide for more effective implementation*

*Be it enacted by Parliament in the Sixty-first Year of the Republic of India as follows:-*

*1. (1) This Act may be called the Prevention of Torture Act, 2010.*

*It extends to the whole of India.*

*It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.*

*In this Act, unless the context otherwise requires,*

*(a) words and expressions used in this Act shall have the same meanings respectively assigned to them in the Indian Penal Code; and*

*(b) any reference in this Act to any enactment or any provision thereof shall in any area in which such enactment or provision is not in force be construed as a reference to the corresponding law or the relevant provision of the corresponding law, if any, in force in that area.*

*3. Whoever, being a public servant or being abetted by a public servant or with the consent or acquiescence of a public servant, intentionally does any act for the purposes to obtain from him or a third person such information or a confession which causes,*

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politician from West Bengal. He is the member of Committee on Social Justice and Empowerment and the Consultative Committee for the Ministry of Information and Broadcasting. Dr. Vijaylaxmi Sadho is a qualified medical doctor and a former minister in Madhya Pradesh State Government. Dr. Ashok S. Ganguly (C.B.E) is a Fellow of the Royal Society of Chemistry and an Honorary Fellow of Jawaharlal Nehru Centre for Advanced Scientific Research. Ms. Maya Singh is a politician from Madhya Pradesh. Mr. S. S. Ahluwalia is a lawyer and politician from Jharkhand. Mr. Kalraj Mishra is a politician from Uttar Pradesh. Mr. Satish Chandra Misra is a lawyer from Uttar Pradesh.

*(i) grievous hurt to any person; or  
(ii) danger to life, limb or health (whether mental or physical) of any person, is said to inflict torture:*

*Provided that nothing contained in this section shall apply to any pain, hurt or danger as aforementioned caused by any act, which is inflicted in accordance with any procedure established by law or justified by law.*

*Explanation. For the purposes of this section, 'public servant' shall, without prejudice to section 21 of the Indian Penal Code, also include any person acting in his official capacity under the Central Government or the State Government.*

*4. Where the public servant referred to in section 3 or any person abetted by or with the consent or acquiescence of such public servant, tortures any person*

*(a) for the purpose of extorting from him or from any other person interested in him, any confession or any information which may lead to the detection of an offence or misconduct; and*

*(b) on the ground of his religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, shall be punishable with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.*

*5. Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no court shall take cognizance of an offence under this Act unless the complaint is made within six months from the date on which the offence is alleged to have been committed.*

*6. No court shall take cognizance of an offence punishable under this Act, alleged to have been committed by a public servant during the course of his employment, except with the previous sanction,*

*(a) in the case of a person, who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of that Government;*

*(b) in the case of a person, who is employed in connection with the affairs of a State and is not removable from his office save by or with the sanction of the State Government, of that Government;*

*(c) in the case of any other person, of the authority competent to remove him from his office.*

*Statement of objects and reasons:*

*The Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment was adopted by the United Nations General Assembly on 9th December, 1975 [Resolution 3452(XXX)]. India signed the Convention on 14th October, 1997. Ratification of the Convention requires enabling legislation to reflect the definition and punishment for "torture". Although some provisions relating to the matter exist in the Indian Penal Code yet they neither define "torture" as clearly as in Article 1 of the said Convention nor make it a criminal offence as called for by Article 4 of the said Convention. In the circumstances, it is necessary for the ratification of the Convention*

*that domestic laws of our country are brought in conformity with the Convention. This would necessitate either amendment of the existing laws such as Indian Penal Code or bringing in a new legislation.*

*2. The matter was examined at length in consultation with the Law Commission of India and the then Learned Attorney General of India. After considerable deliberations on the issue, it was decided to bring in a stand alone legislation so that the aforesaid Convention can be ratified. The proposed legislation, inter alia, defines the expression "torture", provides for punishment to those involved in the incidents of torture and specifies the time limit for taking cognizance of the offence of torture.*

*The Bill seeks to achieve the above objects.*

*P. Chidambaram  
New Delhi  
19 April 2010*

## Comments on the Bill

Torture being a crime committed by state agencies, it has remained and will remain a subject of intense discussion and condemnation, internationally. It is a crime considered with such seriousness that today, torture is considered as a crime against humanity. At the moment, there is no functioning legal framework in the country that can adequately address the question of torture. Tackling the question of torture involves creating a respectable and independent mechanism where a complaint of torture can be lodged without fear of repercussions to the complainant; whereupon the complaint will be investigated promptly with the assistance of all modern crime investigation tools and the investigation leading into an impartial prosecution that could render a reasonable sentence as punishment to the perpetrator. There must be also a procedure by which a victim of torture can access and receive redress and adequate rehabilitation to regain the balance in life, which every victim of torture is certain to lose, irrespective of gender, social status, race and nationality.

For this framework to be established in India, what is required is a law that forms the basic legislative outline to deal with torture. As mentioned earlier, such a framework does not exist in India at the moment. The Bill under consideration is far too inadequate to pave the foundation for such a legislative and/or procedural framework.

## Purpose of the Bill and the definition of 'torture':

The Preamble of the Bill states that the purpose of the Bill is "... to provide punishment for torture inflicted by public servants or any persons inflicting torture with the consent or acquiescence of any public servant, and for matters connected therewith or incidental thereto..." and "... whereas it is considered necessary to ratify the said Convention and to provide for more effective implementation..." of the United Nations Convention against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment (CAT). For this to be realised, the primary requisite is to define what amounts to torture.

Section 3 of the Bill defines the 'act' of torture. The Section however qualifies torture to those acts which cause (i) grievous hurt or (ii) danger to life, limb or health (whether mental or physical) of any person. The Bill in Section 2 draws meanings to words and expressions used in the Bill from the Indian Penal Code, 1860.

'Grievous hurt' however, is defined in Section 320 of the Penal Code as "(f)irst - Emasculation; Secondly - Permanent privation of the sight of either eye; Thirdly - Permanent privation of the hearing of either ear; Fourthly - Privation of any member or joint; Fifthly - Destruction or permanent impairing of the powers of any member or joint; Sixthly - Permanent disfiguration of the head or face; Seventhly - Fracture or dislocation of a bone or tooth; Eighthly - Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits."

Reading Section 3 of the Bill with Section 320 of the Penal Code, will exclude several forms of torture that are routinely practiced in India. For instance, some of the most common forms of torture practiced in India at the moment are beating, slapping, punching, sleep deprivation and forcing a person to sit, stand or lie down in uncomfortable positions, often generating pain for prolonged periods. All these methods of torture need not always qualify as 'grievous hurt' as envisaged in Section 320 of the Penal Code. Yet all of them would be considered as torture according to the CAT.

Additionally, the test of what amounts to torture has to be subjective as well as objective. It is a settled position in international human rights law since 1978.<sup>41</sup> Indians deserve equal treatment in law in comparison to anyone else, elsewhere in the world.

The Bill fails to address mental torture. A person can be tortured mentally, without the perpetrator having to be in physical contact with the victim. Such practices are widely used particularly against vulnerable communities like religious or racial minorities, children and women. For instance, threatening a woman or girl of rape

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<sup>41</sup> Per Judge Zekia in the European Court of Human Rights (ECHR) trial Ireland v. the United Kingdom; Case No. 5310/71. Here the Court in simple terms establishes the point by comparing the effect of similar treatments that can have different effects upon an old fragile person and upon a wrestler or a boxer.

or forcing a person of any particular religious belief to eat prohibited food -- like a Muslim to eat pork or a Brahmin to eat beef can amount to severe mental torture, which the Bill at the moment omits.

The definition of torture, in its simplest form is provided in the CAT. We urge the Committee to suggest a revision of Sections 2, 3 and 4 to incorporate the letter and spirit of Article 1 of the CAT in the Bill, without which the purpose of the Bill will be defeated.

In this context the UN General Assembly Resolution sponsored by India in 1977 is relevant. The Resolution requested the then UN member states to make unilateral declarations of intent to implement and comply with the Principles of the Declaration on Torture.<sup>42</sup>

### On statutory limitation

Section 5 of the Bill places a statutory limitation of six months for taking cognisance of an offense punishable under the Bill. India has acceded to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity on 12 January 1971. It is well settled that torture is a crime against humanity. Being party to the above convention, India is bound by the principle of *pacta sunt servanda* not to legislate a law that vitiates its treaty obligations.

It is true however that 'torture' is not explicitly mentioned in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. It must not be for India to pose hindrance to the development of customary international law.<sup>43</sup> In fact it cannot.

Law is not static. By virtue of the developments in international human rights jurisprudence post 1947, culminating in the drafting of the Rome Statute that established the International Criminal Court, torture can now be safely considered as a crime against humanity. Indeed, India has neither ratified nor acceded the Rome Statute. However, India's refusal to accede to the Rome Statute and to submit to the jurisdiction of the International Criminal Court was not because -- at least on records -- of the fact that torture was considered a crime against humanity.

The principal objections by India against ratifying the Rome Statute is mentioned in an explanatory statement on a vote on the adoption of the Statute of the International Criminal Court issued by India's then Additional Secretary to the UN, Mr. Dilip Lahiri, on 17 July 1998. While enumerating India's position against the Rome Statute, Lahiri did not argue against the inclusion of crimes like torture as a crime against humanity, triable by the ICC.

<sup>42</sup> General Assembly Resolution 32/64, 8 December 1977

<sup>43</sup> India however was the only country that abstained from voting on 22 December 2003, from the UN General Assembly Resolution, 'Protection of Human Rights and Fundamental Freedoms While Countering Terrorism', A/Res/58/187



To substantiate further, the settled position of law in India is that the right against torture has attained the status of a fundamental right by virtue of the interpretation of Article 21 by the Supreme Court of India.<sup>44</sup> However, the Constitutional provision to have a 'procedure prescribed by law', which the current Bill is, should not be a procedure to proscribe the scope of a victim to pursue remedies against torture.

Often, as it has been proved in instances where brutal atrocities are committed against persons, victims take time to speak about it, for reasons like fear, extreme state of trauma, displacement, lack of adequate knowledge or sheer absence of congenial circumstances to lodge a complaint. Further, prescribing a statutory period of limitation in the law contradicts certain existing propositions of law. For instance, at the moment, there is no prescribed period of limitation for initiating prosecution in a case of murder. Torture could often result in murder.

The purpose of the legislation must be to criminalise torture, encourage complaints of torture, prescribe a reasonable procedure for investigation and prosecution and provide punishment for the crime. All this must be conceived as aiming towards ending the practice of torture.

The quotient of reasonableness of a legislation, which is intended to prevent a heinous crime, is judged in the backdrop of the country where the legislation is implemented and the nature of the crime itself. At the moment, India is not a country where a victim of torture has all the congenial circumstances to lodge a complaint. From experience and by virtue of sheer statistics, victims of torture are from the poorest of the poor and from marginalised communities. This stratum of the Indian population itself make up an estimated 60 percent of the total population amounting to millions. Expecting everyone who are otherwise marginalised or having limited or even no resources at all to lodge complaints and pursue them to do so within a short window of time, is destined to defeat the very purpose of the law. Further, this defeat will imply that a victim's right to prosecute a torture perpetrator will be circumscribed by the operation of limitation, unfortunately built into an enabling law.

## Requirement of prior sanction

No Indian statute condones the commission of a crime in the course of employment. Neither is torture an act that could be committed 'in the course of employment', since it is expressly barred by existing departmental orders and by virtue of judicial decrees.

Requiring prior sanction from the government to take cognizance of a crime of torture implies that in cases where the government denies the sanction, torture is condoned. It could also mean that if the Bill is enacted, the right against torture and that of a victim to seek redress will be at the mercy of an executive decision. This is a proposition that will defeat the purpose of the law and further, the CAT.

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<sup>44</sup> AIR 1980 SC 1579 Sunil Batra v. Delhi Administration

Moreover, Section 6 will be used as an excuse for preventing the initiation of an investigation on a complaint. This will end in the destruction or in the erosion of evidence, which will adversely affect the rights of the victim. Torture can be part of a state regime's clandestine policy, particularly to silence political opposition. Should Section 6 be enacted, it implies the outright denial of prosecution of perpetrators in states where torture is widely used as state policy. No Indian state is an exception to this practice at the moment.

Additionally, the right against torture being interpreted as a fundamental right, requiring a prior sanction to initiate prosecution of the case will imply that Section 6 of the Bill is worded to restrict the realisation of a right. Further, Section 6 will only contribute to the existing delay in the prosecution of cases and will increase the number of cases before the High Courts and the Supreme Court. At the minimum, taking a cue from the Bikari Paswan case from West Bengal and many thousands more, Section 6 of the Bill is destined to defeat the victim and protect the perpetrator.<sup>45</sup> The settled position of law in India at the moment is that public servants can face prosecution without prior sanction of the appropriate authorities, as all their acts in the purported discharge of the official duties cannot be brought under the protective umbrella of Section 197 of the Criminal Procedure Code, 1973 (Cr.P.C).

The Supreme Court of India in January 2009 has settled the law concerning the requirement of prior sanction while deciding, once again a case involving a police officer from West Bengal, Deputy Superintendent of Police Mr. Sahabul Hussain, who was thus far protected from prosecution by the state government. The Court said: "... all acts done by a public servant in the purported discharge of his official duties cannot as a matter of course be brought under the protective umbrella of Section 197 Cr.P.C. On the other hand, there can be cases of misuse and/or abuse of powers vested in a public servant which can never be said to be a part of the official duties required to be performed by him".

Justice Kabir, a judge in the Sahabul Hussain case, perusing an earlier ruling of the apex court said: *"...the underlying object of Section 197 Cr.P.C is to enable the authorities to scrutinise the allegations made against a public servant to shield him/her against frivolous, vexatious or false prosecution initiated with the main object of causing embarrassment and harassment to the concerned official."*

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<sup>45</sup> Bikari Paswan disappeared in 1993 from West Bengal. Lakichand Paswan, the father of Bikari Paswan contended that Additional Superintendent of Police Mr. Harman Preet Singh and three of Singh's subordinate officers had murdered his son. A complaint filed by Lakichand Paswan was stopped from being investigated or prosecuted due to a misinterpretation of Section 197 of the Code of Criminal Procedure, 1973. The West Bengal State Government never issued a sanction order to prosecute the police officers, despite repeated attempts by Lakichand. A writ application filed by Lakichand at the Kolkata High Court took ten years to decide, though the court only took less than half an hour to decide the case on the final hearing date, 8 July 2004, to conclude that murder is not an act that comes under 'in the course of employment' and directed prosecution of accused. A day prior to the decision of the High Court, Lakichand passed away. This is a thousand times repeated story in India. Section 6 is a yet another attempt to statutorily cement this unfortunate fate of the victims.

*"However, if the authority vested in a public servant is misused for doing things which are not otherwise permitted under the law, such acts cannot claim the protection of Section 197 Cr.P.C and have to be considered de hors the duties which a public servant is required to discharge or perform. Hence, in respect of prosecution for such excesses or misuse of authority, no protection can be demanded by the public servant concerned."* At the minimum, Section 6 of the Bill under review by the Committee is a reintroduction of the 'ruled out' protection of Section 197 of the Cr.P.C, which must not be permitted.

## Aspects missing in the Bill relevant to torture and the CAT

The Bill falls short of specifying a mechanism to investigate torture, and any witness protection arrangements. Given the nature of the crime, it is imperative that torture must be investigated by an investigating agency independent of the police and having no officers on deputation from any other law enforcement agencies.

One of the reasons for the failure of successful prosecution of complaints against police is that the investigation is conducted either by police officers directly or indirectly involved in the crime or by their superiors. There is no need to enumerate why a victim or witness having a complaint against a government servant like a police officer in India requires protection. In countries where the practice of torture has been reasonably contained, both these requirements are met. In jurisdictions where these basic requirements are not followed, like in Sri Lanka, the corresponding law has become useless.

## Conclusion on the bill

Torture is practiced by law enforcement agencies in India as a crude short-cut for crime investigation. Investigating agencies justify the use of torture arguing that they often lack advanced training and equipment for crime investigation. The concept of modern policing is still a mirage in India, where the police is expected to function as a tool for social control, rather than to serve the citizens.

It can be argued that a large number of law enforcement officers in the country believe that the deterrence quotient against a crime is the possibility of being tortured, rather than the crime being detected, prosecuted and punished in the legal process. Extensive delays in court proceedings and the repeatedly demonstrated professional and intellectual paucity of the country's prosecutors appears to justify the widespread belief among law enforcement officers that torture at the hands of the investigator is the only punishment a criminal might get in India.

In this manner, police officers and other law enforcement officers generally consider torture as an essential investigative tool for investigation. Policy makers and bureaucrats believe that there is nothing wrong in punishing a criminal in custody, not realising the fact that a person under investigation is only an accused, not a convict and further, that even a convict must not be tortured. This is due to the lack of awareness about the crime, its nature and seriousness.

As early as 1981, the Supreme Court of India has said "*...(n)othing is more cowardly and unconscionable than a person in police custody being beaten up and nothing inflicts deeper wound on our constitutional culture than a state official running berserk regardless of human rights*" (Kishore Singh V. State of Rajasthan).<sup>46</sup> Internationally, torture is considered as one among the most heinous crimes like slavery, genocide and maritime piracy against which there is an absolute prohibition and the principle of *jus cogens* applies.

When torture is committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, torture can also be treated as a crime against humanity under the Rome Statute.

The National Human Rights Commission of India has repeatedly recommended the government to criminalise torture. The Commission said "*(d)aily the Commission receives petitions alleging the use of torture, and even of deaths in custody as a result of the acts of those who are sworn to uphold the laws and the Constitution and to ensure the security of its citizens. Such a situation must end, through the united efforts of the Government...*".<sup>47</sup>

The UN Human Rights Committee as early as 1997 has expressed its concern about the widespread use of torture by the law enforcement agencies in India.<sup>48</sup> The Committee on Elimination of Racial Discrimination has expressed similar concerns in 2007,<sup>49</sup> and the Committee on Economic Social and Cultural Rights in 2008.<sup>50</sup>

In a democratic framework, torture undermines democracy and the rule of law. Its open or clandestine use undermines the fundamentals of democratic governance. Law enforcement agencies, particularly the police, practicing torture reduce itself into an instrument of fear. This image and torture often diminish criminal investigation into a mere charge based on confessions. Fair trial, an important part of the rule of law framework, has no place in such an environment. The practice of torture is not limited to policing. Paramilitary and military units also resort to torture, often brutal. Whether torture is practiced by a military detachment or by the local police, the possibility for a victim of torture to complain is very limited in India.

The absence of witness protection laws, proper investigation mechanisms including medico-legal facilities, and prosecution mechanisms, render complaint making suicidal for a victim. This allows torture to also be used for blackmailing, as a form of revenge and for monetary gain.

A domestic law against torture that is capable to deal with the central deficit in India's policing must address all these issues. A proposed Bill that fails to address any of the above concerns is thus a sham.

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<sup>46</sup> AIR 1981 SC 625

<sup>47</sup> Annual report of the National Human Rights Commission 2007

<sup>48</sup> CCPR/C/79/Add.81

<sup>49</sup> CERD/C/IND/CO/19

<sup>50</sup> E/C.12/IND/CO/5

## The culture of state-sponsored violence

On August 25 this year the Union Home Minister, Mr. P. Chidambaram's call to ordinary citizens in the country to come forward to assist law enforcement officers in combating armed militancy and terrorism is unfortunately an illusion. The minister was reiterating his wish and request to his fellow citizens while addressing the top police officers of the country in a meeting organised by the home ministry in New Delhi. The Prime Minister also addressed the two-day meeting, convened to discuss terrorism and armed militancy. It is true that the Union Home Ministry has been consistent in its position of inviting armed groups operating in the country for discussions with the government to end extremist militancy, particularly of the leftist origin.

The approach, in theory, indicates the maturity of a government and underscores the importance of dialogue to resolve issues within a democratic framework. It is unfortunate that the Naxalites operating in the country have refused to accept the call, though they have their own reasons to trash the government's requests for dialogues. The AHRC however is of the opinion that the Naxalites and other armed militia are merely exploiting democratic failures.<sup>51</sup> Unfortunately in India, the list of issues open for exploitation is quite a few, ranging from poverty and malnutrition to loss of livelihood options and brutal forms of caste based discrimination. While it is the duty of a citizen to assist the government and its various agencies to counter anti-national activities, it is equally a citizen's right to expect that the government execute its democratic mandate as promised by the constitution. The government of India has largely failed thus far in complying with this mandate, and governments' failures consistently exploited by corrupt politicians and law enforcement agencies throughout the country. For instance, the public perception of a police officer is that of a uniformed criminal, paid by the exchequer. The practice of torture is consistent and widespread in the country. In places like Jammu and Kashmir and Manipur, extrajudicial executions - encounter killings as it is referred to in India - are rampant. Witness protection is impossible in India due to the absence of any legal framework to provide protection to persons who are willing to depose in courts against criminals.

Going by the widely accepted definition of terrorism - premeditated use or threat of use of violence to obtain political, religious, or ideological ends - the Chief Minister of Manipur, Mr. Okram Ibobi Singh and his government could be prosecuted for engaging in terror acts. So could the Chief Minister of Gujarat, Mr. Narendra Modi, who allegedly masterminded the Gujarat pogrom of 2002. While the state police in Gujarat was plentifully used to facilitate what could be defined as genocide of Muslims, in Manipur, the state police have become a synonym of terror. Yet, those responsible for injuring and murdering citizens at the behest of their political masters and for sheer corrupt means have been largely left free and allowed to continue in their service. While some police officers in Gujarat faced investigation and prosecution, in Manipur none have been prosecuted yet, though every day the

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<sup>51</sup> Please read further for an deeper analysis on this issue

state police, in what is often claimed as encounter killing, reportedly murder someone or the other.

The very fact that despite the murder of an estimated 700 'suspected terrorists' each year in Manipur by the security agencies, armed militancy in that state has not reduced. Going by the state government's own reports, armed militancy in the state has instead increased over the past two years. In this backdrop there are also serious allegations against Ibobi and his government that the Chief Minister is posing terrorism as a means to extract money from the central government in the pretext of countering it. The extrajudicial executions carried out by the Manipur state police are suspected to be undertaken at the behest of the Chief Minister and his political allies, to prove to the union government that they need money to counter terrorism, together with statutory impunity in the form of the Armed Forces (Special Powers) Act, 1958 to prevent the security agencies from being investigated or prosecuted for their criminal acts.

The union government's financial aid to state governments amounts to several millions of rupees each year. It is not required to be audited by the Comptroller and Auditor General of India, leaving it to be spent at the absolute whims of the state government. While the tax money is spent in such a fashion, the law enforcement agencies, particularly the state police, continue to remain one of the worst in the world. True, the Indian police might be better in comparison to some of their counterparts in the region, but Indians definitely deserve better.

Yet, it is no one's concern in India to address deep-rooted organisational and performance issues concerning police. Political parties of all colours continue to meticulously resist any attempt to free the police from political control. The police on the other hand let the politicians exploit them and have unilaterally declared their perpetual servitude to the politicians since they also benefit from the resultant cycle of corruption and nepotism. The furore in the Indian parliament about the nuclear bill was not visible when the Prevention of Torture Bill, 2010 was discussed. On the contrary legislators of all colours tried to water down the already weak law. This important piece of legislation is useless if it is enacted in the current form.

The national media have also ignored the subject. There was literally no discussion at all about the proposed Bill against torture in the national press when the Bill was debated in the lower house of the Indian parliament, the Lok Sabha. Today the Bill is pending consideration of the upper house of the parliament, the Rajya Sabha. Yet, no one is interested in raising this issue. Those who lament that democracy warrants public discussions on proposed legislations through media articles have remained silent about the complete lack of discussion about the proposed law against torture.

The logical question is why is this law against torture so important and what is its connection to the depleting national security? Rampant use of torture is the singular tool with which the police have generated fear among the citizens, so that the average citizen today fears to approach the police even when they are in need. It

is the absence of a proper investigating and prosecuting mechanism against torture that lets the police resort to torture even in cases where they can investigate crimes with whatever little training and facilities the police have in India today. While international condemnation of torture today is as serious as that against genocide and other crimes against humanity, a large section of police officers in India still believe that torturing a suspect is their right and that torture is a legitimate form of punishment and tool for crime investigation. These officers receive support from legislators with the 18th century mindset like Mr. K. Radhakrishnan, the current Speaker of the Kerala Legislative Assembly, who has repeatedly addressed police officers assuring them that in a country like India, third degree methods are required to police the people and that human rights is an 'occupational hazard' for the police.

While expecting and requesting support from the common citizens, the Union Home Minister should bear in mind that the people from whom the government expects support are greatly alienated from their police due to the fear the police have generated among the people. For the citizenry there is hardly any difference between the colonial police and that of independent India. Though 1950 gave Indians a democratic socialist republic, the republic still carries the burden of having to be administered with the police and their political masters who operate with a coloniser's mindset. Calling for people's participation without clearly articulated and enforced police reforms will only result in a retarded response from the citizenry. Unless affirmative and visible steps are taken to change the unacceptable status quo, expecting the citizens to perform their duty while the state agencies engage in brutal crimes is sheer illusion.

## Extremists exploit democratic failures

In two separate incidents on 7 April 2010 and 17 May 2010, the Maoists operating in India killed 98 Central Reserve Police officers and 11 civilians in Chhattisgarh state. In at least one incident that resulted in the murder of civilians, the Maoists used an Improvised Explosive Device (IEV). Both attacks seriously injured several persons. It is reported that immediately after the explosion that killed 11 civilians on May 17, the Maoists fired indiscriminately at the injured and at those who tried to escape. The use of IEDs similar to landmines in circumstances as reported in Chingavaram is prohibited in international humanitarian law.<sup>52</sup> The attack also violates Common Article 3 of the Geneva Conventions of 1949, a law that applies to non-international armed conflicts and to extremist groups like the Maoists and Naxalites in India.

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<sup>52</sup> Second Protocol to the *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects*.

## The magnitude of the extremist problem, its root causes and the development paradigm

It is estimated that 156 districts in 15 states face 'threats' from armed movements with the states of Uttar Pradesh, Bihar, Orissa, West Bengal, Jharkhand and Chhattisgarh the worst affected. Today the Maoist and Naxalite movements in the country have evolved into an armed and rebelling group, well organised and fighting locally against the 'state'. Though the theory and practice of these movements are questionable, they liberally exploit the anger and frustration from decades of neglect and oppression of the rural populace in India, particularly the tribal communities. Parallels of this form of emotional exploitation can be drawn also to the insurgent activities in the northeastern states in India. The Maoist and Naxalite movements in the country are mostly rooted in the government's failure to guarantee the basic norms of a democratic state to a large section of the country's population, particularly in rural regions and remote villages. This explains why these parallel extremist movements are mainly spread across the remotest villages in the country.

Many such villages are home to various tribal groups. These communities depend upon forest and agricultural produce for their survival. Owing to negligent government policies and the drastic exploitation of natural and forest resources, with complete disregard for the population that depended upon these products for hundreds of generations, large sections of the rural population have lost both their habitat and livelihood options. Brutal police actions were taken to 'deal' with those who resisted.

Many tribal communities today are on the verge of extinction and the government is in no mood to listen or engage in dialogue, as evidenced in the recent attack upon the Anti-POSCO movement in Orissa. Voices of protest, and requests by the native population for consultations with the government, have faced not just rejection, but stiff oppression where state forces were used plentifully. In fact in some incidents, the police officers were hired by private companies to 'deal' with the leaders of protest movements. Police were used to gather information about local resistance movements, thereby reducing the state police to the role of mere mercenaries.

The situation is also plentifully exploited by the extremist movements as evidenced in the events prior to the police assault on the Anti-POSCO protesters. It is reported that minutes before the police charged against the protesters, shots were fired and country bombs hurled at the police.

The government policy on mining is spelled out in the National Mining Policy released in April 2008.<sup>53</sup> The policy aims at boosting national development through mining and disregards completely the concerns and welfare of the original inhabitants of the land. Accepting tenders from corporations with deplorable

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<sup>53</sup> Please see Government of Orissa Department of Steel and Mines, released in 2008, in conjunction with National Mining Policy 2008



records and supporting their activities using state resources stands proof to the government's lack of commitment to the people.

Left with no means to survive and their original habitats rapidly being depleted, the rural populations in the country have become more vulnerable to exploitation by landlords and corrupt politicians. Exploitation often takes the shape of bonded labour, a practice criminalised in laws that are hardly enforced. Police and other state agencies, like the forest department, are easily bought over by landlords owing to the widespread corruption in the system. In frustration, the oppressed populations fall prey to extremist ideologies like those promoted and professed by the Maoists and the Naxalites, finding in them a means of fighting back to regain dignity at the very minimum. Such fights, of varying intensity, have spread to an alarmingly large area of the country. Unfortunately, the government response has been equally violent, resulting in murders and widespread loss of property. The legal and moral question the government must answer is can development be forced upon a population?

## Exploitation of violence

Lopsided, religiously coloured and politically motivated defence tactics - like the formation of the '*Salwa Judum*'- have resulted either in standoffs between government-backed forces like the *Judum* and the extremists or in combat, in which lives are lost on both sides. In some parts of the country, the *Judum* has replaced the state and those leading the *Judum* are using it as a tool for oppression in the excuse of fighting extremism. It is reported that groups like the *Judum* as well as the Maoists and the Naxalites are armed with weapons that cannot be procured from licensed arms dealers in India and for which no private licences are issued. Procuring weapons and the ammunition required for these weapons is a matter that the state as well as the central government must investigate and plug holes with immediate priority. It could be a hard task since even some parliamentarians and other local political leaders in the extremist affected regions employ private militiamen and armed private guards who brandish imported unlicensed weapons. Any attempt to disarm these private armies will be sabotaged by the local politicians. At the core of this is an important question regarding the quality of law enforcement in the country. The Maoists and Naxalites are only exploiting the failure of an important state apparatus, the local police.

An equally worrying factor is the recruitment of tribal youth as members of the village defence forces. On the periphery, volunteering to become a member of the village defence force is a mere gesture to assist the state in combating violence. However the constitution of the village defence force has deeper implications. Often becoming a member of the village defence force is not a matter of choice, but an issue of survival for the tribal youth.

The extremist groups force the tribal youth to join their cadres accusing those who refuse of being state agents. Incidents are common where those who refused to take up arms are murdered, their houses burned, or they are dispossessed of their

livestock and forced to flee the villages. On the other hand the state agencies, in particular the state police, seek information from the members of the tribal communities and once again those who refuse to cooperate are accused of being Maoist or Naxalite cadres and are arbitrarily detained, tortured and even executed. Such murders are whitewashed as 'encounter killings', a convenient euphemism used by the state agencies for murdering civilians and circumventing the due process of law in the excuse of combating violence. Caught between these two opposing and equally violent forces, the unemployed tribal youth finds the government's offer as a means of employment and a source of security.

The very concept of village defence force defies accepted norms of state responsibility to offer protection and security to the life and property of the citizens. The members of the village defence force are given inadequate combat training; they are not considered as the employees of the state and their acts, irrespective of its nature, are offered implied impunity. This unique position exposes the members of the village defence force to exploitation to carry out the 'dirty work' for the state agencies. Many tribal youth are recruited with the false promise that after the operation, they would be inducted to the state police. On these grounds the recruitment and deployment of the village defence force have no higher morale or legitimacy than the recruitment strategies used by the Maoists and Naxalites.

In the fight between the state and the extremists, both sides have committed atrocities, as would be the case in any unregulated war where might and connivance make right. Hundreds of policemen have lost their lives or been seriously injured in these wars; a similar number of extremists have also been killed or injured. This is in addition to the large number of innocent persons killed by both sides because of mere accusations and suspicion. Worst of all is the number of innocent persons killed in fake 'encounter killings' organised by the state agencies. Men and women are almost daily arrested, tortured and killed by state agencies in the name of fighting extremism. Such murders are in no way different from those carried out by the extremist groups. They are equally cold-blooded and criminal. However, so far not a single such case has been investigated or the perpetrators punished.

Encounter killings and the use of torture defy the basic premise of democracy and it negates the fundamentals of fair trial. Encounter killings violate India's legally binding obligations as mandated in the *International Convention on Civil and Political Rights*, an international document to which India is a party. By all means encounter killings have no place of acceptance within the existing legal framework in the country. The National Human Rights Commission of India has repeatedly required state agencies to conduct independent investigations and video document the autopsy of victims of encounter killings and file reports on each incident to the Commission. Though a rule sought to be enforced by the Commission, filing of these reports thus far has remained an exception.

Murder and violence cannot be justified for any reason. On that ground alone, extremist activities in the country have no moral basis, even though they would

define their activity as a radical political movement, necessary to fight oppression. When murdering innocent persons and imparting fear among the populace becomes a means to political ends, the Maoist and Naxalite movement runs parallel with other terrorist organisations in the world.

The Naxalite and Maoist problem is complex. A concoction of caste issues, feudalism and lawlessness in rural India intoxicates the people, so their minds become fertile ground for extremist ideologies. The government has responded by opting principally to counter violence with violence, adding fuel to the fire. Between these two diametrically opposing forces is no middle ground, which leaves the common people no way to avoid violence. The murder of civilians and police officers, destruction of private and government property including vital transportation links like the rail network by the Maoists and Naxalites has to be analysed and understood as part of a well calculated and executed strategy to increase state offensive. It appears that the Maoists and the Naxalites look forward more towards the state's use of aerial combat operations, an option the state has refused to initiate until today.

The continuing offer by the Union Home Minister for dialogue and a peaceful way of settling disputes with the extremists shows the intention to deal with the issue in a mature way, a democratic principle the Maoists, Naxalites and the leading opposition parties like the Bharatiya Janata Party and the Communist Party of India (Marxist) repeatedly fails to understand. This is no surprise since the ideological framework based on violence of these two political groups runs parallel to that of the Maoists and the Naxalites. Arbitrary violence used by the state in combating extremism will only inflate the situation, an opportunity eagerly awaited by the extremists. It will also further alienate the citizens affected by the violence from the state, an essential requirement for the extremist group to expand and sustain.

## The democratic way forward

The expanding network of Maoist activities in the country and their improving sophistication in attacks must be an eye-opener to the government. The Prime Minister and the Home Minister have been lamenting against the Maoists, accusing them as "the single largest threat to India's internal security" since 2006. Other than for the failed attempts to engage in a peaceful dialogue with the Maoists, the government's response to the Maoist threat has been largely offensive in nature, with repeatedly demonstrated lack of coordination resulting in loss of life among the security forces, Maoists and that of innocent villagers.

Probably a way of dealing with the Maoists is for the government to take immediate measures to address Maoist recruitment in rural India. Sheer use of force and other ill-conceived tactics adopted by the government so far, like the formation of village defence forces and forced migration of villagers into guarded camps with limited freedom have not only divided the rural population, but has also resulted in generating grievances against the state. Such steps have only benefited the local

landlords and those politicians with tainted credentials like some in the Chhattisgarh State Assembly.

It is not only the Maoists who promote violence. The statement issued by Mr. Rajeev Prathap Rudy, the national spokesperson of the Bharatiya Janata Party (BJP), immediately after the April 7 incident demanded an immediate end to the offer of dialogues by the government, and an all-open offensive against the Maoists is an example. Rudy cannot however wash his hands by placing an irresponsible demand on behalf of his party demanding the government to engage the Maoists in an all-offensive war. The Maoist movement gained momentum when Rudy was the Union Minister of State for Commerce and Industry in 1999. Some of the industrial policies Rudy emulated from the Singapore model and conceived and executed in the country have sumptuously helped the Maoists to spread out in the country, expanding the length and breadth of the Maoist red-corridor. Indeed, an offensive as called by the BJP against the Maoists will get complete cooperation from the Chhattisgarh state administration. This is not only because the state is ruled by a BJP led government that has shamelessly lobbied for Maoist support during the election, but also since some of the state's corrupt politicians can use the fight against Maoists as an excuse to wipe off the remaining tribal population from their dwellings. The Chhattisgarh state government has been doing this in the past few years and has a record of selling much of the state's natural resources, including rivers and forests, to private corporations.

Among the manifold causes for the Maoist insurgency in India are extreme poverty, loss of livelihood options, feudalism and caste-based discrimination. Unfortunately, some of the state governments, like the one in Chhattisgarh, have a large number of corrupt politicians who have not spared an opportunity to steal whatever little the poor landless peasants have. While emphasising the country's need to develop, the government must also take measures to provide reasonable and just options for those who do not want to support at all costs the development paradigm. For instance, industrial and infrastructure development must not be an excuse to force distress migration of the rural population and end in loss of livelihood options as the case in Chhattisgarh, Orissa, Madhya Pradesh and West Bengal.

Development that lacks the emotional ownership of the ordinary people cannot sustain itself. Such forced developments alienate the people from the state. Secessionist forces reap the benefit of this intellectual animosity between the state and the citizens, and the Maoists are no exception.

The government of India has a constitutional mandate to guarantee the security and prosperity of its citizens. The constitution that empowers the state to use force to contain internal threats also requires the state to address the threat within the framework of the constitution. Ending feudalism, extreme poverty and landlessness are as equally important as containing internal insecurity. These responsibilities are not to be prioritised by the government at will, but rather given immediate attention.

It is likely that a solution to the Maoist insurgency in India also lies in this. It requires however, the government to have the resolve to address these real problems that affect ordinary Indians. The Maoists know that many of India's mainstream politicians will find it difficult to give away their rural power banks that rest in feudal and corrupt frameworks. It will not be surprising if it is exposed later that the Maoists are in fact supported by some of these corrupt politicians who pretend that they are fighting internal insecurity.

The moral ground for the state to fight the extremist group must not be thus based on the use of counter violence. The fight against extremism must begin from a considered approach of gaining confidence of the citizens, the worst affected rural population in particular. In doing so the government must be able to prove that the country is a matured democracy and not a chaotic state of intense vested interests. One of the important steps towards this is the enactment and prompt implementation of a national land reforms policy augmented by the revision of some existing laws, such as those limiting the rights of the tribal community to use the forest and forest produce as they did for hundreds of generations in the past.

## Conclusion

Combating violence has to begin within government agencies. Strict action must be taken against state agents, in particular officers of the police force and the forest department, who commit crimes against innocent civilians. But so far no such action has been taken. In addition there must be a credible and transparent mechanism to listen to the grievances of people caught in the crossfire, and a policy of welcoming armed civilian combatants, including the Maoists and Naxalites, to surrender and be reintegrated into society. The policy of using a village defence force must be reviewed with inputs from civil society organisations that work with tribal communities and the ordinary people who are affected by extremist violence. State run essential services like medical and educational facilities must be provided to the rural population, and state institutions at the rural level should be free from corruption and discriminatory practices like caste based discrimination.

Fundamentalist religious forces resorting to violence in the name of vigilante groups rooted in the extremist affected regions must be banned and actions taken against political parties that support these groups. Policies behind current and future industrial development programmes in extremist affected regions must be reviewed with an intention to realistically assess the environmental as well as human impact of these programmes. Assessments must respect the rights of indigenous communities affected by these programmes. Until the government takes these steps, the Maoist and Naxalite extremism in India has the potential to flare up and burn down the democratic norms the founders of the nation promised to successive generations.

As of now, the country's worst enemy is its own police. The continuing practice of torture and the possibilities that exist for a police officer to carry on committing the offense with relative impunity is the central deficit in realising the true standards of

democracy in the country. So far no attempt has been made to change this unacceptable status quo. Unless the government changes its policies on policing, India will continue to remain a pseudo democracy ruled by the whims of its elite. This, for millions of Indians means only that brown skinned Sahibs replaced the British.

## Government has no interest to eradicate hunger and child malnutrition

The Government of India's attitude and approach to ensure food security and to eradicate child malnutrition showed no changes this year. For the records, the government's effort in 2009 was pitiable. The government's responses and policies, despite a few positive attempts<sup>54</sup>, neither paid attention to the root causes nor suggested a long-term solution. Despite India being the county that has the highest number of starvation deaths and child malnutrition, and the highest rate of child mortality in Asia, the government has not put the right to food and health as an issue of priority.<sup>55</sup>

Government agencies and officials from different departments related to the right to food and health do not have a comprehensive and unified policy to eradicate extreme poverty or child malnutrition.<sup>56</sup> There have been no steps to change this situation. Those who have been facing starvation depending on nothing but poorly paid hard labour, or the Dalits, are still the poorest. Communities like the tribals living in the central plains and states like Orissa, who depend on natural resources, are pushed further towards extinction. One of the main reasons for this is the aggravated depletion of natural resources, thanks to government policies concerning mining and exploitation of natural resources.<sup>57</sup>

The tribal communities in India today are increasingly deprived of their natural resources such as forest and land, which they have been economically and socio-culturally dependent on for generations. The government as well as multinational corporations are equally responsible for this.<sup>58</sup> The process of deprivation is often illegal and violent, driving the tribes into extreme poverty and hunger. The deprivation of resources aggravates their food insecurity and further destroys their living pattern and culture. On the other hand, the resistance to protect their lives and resources are either labelled as anti-state activities or extremist acts, or put down by force.<sup>59</sup> Democracy and participatory dialogues are thrown out of the window by the government when it comes to exploitation of natural resources,

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<sup>54</sup> There has been an increase in the issue of employment cards to the poor this year. But as explained later in this chapter, the implementation of the MNREGS is plagued with corruption and caste prejudices.

<sup>55</sup> UNDP reports on India, 2007,08,09

<sup>56</sup> Primary Health Care in India : Review of Policy, Plans and Reports, WHO, 2005

<sup>57</sup> See further National Mining Policy 2009, Government of India

<sup>58</sup> *Korean civil society expects the Committee to make a fair and prompt decision on POSCO project in Orissa*, AHRC-FOL-013-2010, 17 September 2010

<sup>59</sup> *Orissa Poverty, Corporate Plunder and Resistance : Reflections of a Rebel*, Prafulla Samantra & Asit Das, Counter Currents, 24 July 2010

particularly Bauxite ores in states like Orissa. Neither the government, nor the corporate giants that seek to invest in India are interested in any process that adheres to the principles of the rule of law. Even the World Bank and the UK Department of International Development (DFID) support such steps.<sup>60</sup> Tribal communities having subsistence cultivations in and around forest areas are also confronted with acute hunger and their children are mostly undernourished. Most of these communities as well as farmers with smallholdings depend on natural irrigation, or rainwater. Destruction of natural irrigation sources due to mining and other industrial projects like construction of dams or excavation of land has resulted in distress migration of millions from rural India to the urban areas. There they end up as bonded labourers, and within a year perish due to acute poverty, malnutrition and hunger.<sup>61</sup> Government schemes like the construction of village ponds, implemented often with the help of entities like the UNDP under the right to work program, Mahatma Gandhi National Rural Employment Guarantee Scheme (MGNREGS) are often unfinished and useless due to widespread corruption of government servants as well as that of the UNDP officers working in India.<sup>62</sup>

Instead of ensuring food security at home by providing substantial and sustainable resources such as land or other agricultural assistance for the landless or small-scale farmers whose children are malnourished, the government appears to be emphasising on the child health care system.<sup>63</sup> This is a failing strategy to address child starvation deaths however, as it does not address the root causes of feudalism, caste based discrimination and emergency relief.

In November, the Minister of State for Agriculture, Prof. K. V. Thomas stated in the Parliament that there were no cases of starvation deaths reported to the central government by the state administrations during the past three years.<sup>64</sup> Externally, the government of India still denies that starvation or malnutrition deaths in India take place.<sup>65</sup> In fact the government after being informed about facts concerning certain cases, have taken repressive actions against the victims' families, which is also borne out from the government's reply to the UN Special Rapporteur on the right to food. Yet, the Prime Minister of India recently admitted that malnutrition in

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<sup>60</sup> *India: Corporate Crimes and Environmental Plunder*, Champa – the Amiya and B.G.Rao Foundation, 25 December 2009

<sup>61</sup> Bonded Labour in India, ALRC-CWS-15-12-2010, 30 August 2010

<sup>62</sup> In a field visit of the staff members of the AHRC, they were able to visit three such ponds in Orissa where the ponds were half constructed, but money fully paid. The NGO and the UNDP that was responsible for the construction of the ponds have fixed boards advertising the completion of the project. In one site, there were only three walls for the pond, as the pond was constructed by building earthen walls over a large land area, whereas in two others there was no pond at all. It is a matter of sad irony that UNDP is a UN agency that has conducted the largest number of studies about corruption in India and made recommendations to the government as well as other agencies like the UN itself. There is hardly anything however on the ground to show that the UNDP is not corrupt, whereas the reality is otherwise

<sup>63</sup> Government of India, Health and Family Welfare Department, Policy Document 2009

<sup>64</sup> *No starvation death in India in last 3 years, says minister, others say it is a cover-up*; Bijay Kumar Singh, Tehelka, 12 November 2010

<sup>65</sup> Report of the Special Rapporteur on the right to food, Olivier De Schutter, A/HRC/13/33/Add.1, 26 February 2010, pp. 14-15

India is unacceptably high.<sup>66</sup> However, the Prime Minister, like his predecessors and the government he leads did not spell out any specific actions to address this issue. The fact is, the government does not have a reasonably ironed out process or policy by which the issue can be addressed. This is because such an approach will hamper the interests of the Union and State Governments' 'break-neck-speed' development strategies, the vested interests of the country's politicians - a majority being feudal landlords - and caste based politics - a factor that decides who rules India for how long.

## No redress for 'emergency'

In Madhya Pradesh, the Nutrition Rehabilitation Centres (NRC) were established to treat severely malnourished children. The districts from where the AHRC reported cases of child malnutrition this year, like Khandwa, Sidhi, Jhabua, Rewa, and Satna have NRCs running either at the Community Health Centres (CHCs) or at the district government hospitals. Many cases taken up by the AHRC shows that the malnourished children taken to the NRC were denied admission at the NRC due to lack of facilities. In a case reported from Khalwa block of Khandwa district, despite facilities being available and information of severe malnutrition made available to the district administration, the children were not taken to the NRC.<sup>67</sup>

Owing to difficult realities, parents are sometimes not eager to take their children to the NRC, as happened in the case of two-year-old Dewa, son of Kumar Singh, a Korku tribesman. Failing to produce enough food from one-acre of non-irrigated land affected by drought, Kumar Singh was about to migrate to the distant city seeking work as a bonded labourer. According to him, if his wife took his son to the



*Two year old Dewa, Salidhana village, Khalwa Block in Khandwa district, October, 2010*

NRC, there would be no one else to take care of the other children at home. This would force Kumar Singh to stay at home and prevent him from seeking a job, which is essential to the survival of the rest of his family. Kumar Singh was thus willing to *sacrifice* Dewa, letting him die of hunger and malnutrition, so that the rest of the family could be saved.

<sup>66</sup> Dr. Manmohan Singh speaking at Prime Minister's National Council on India's Nutrition Challenges on 24 November 2010. He said that the problem of malnutrition was a complex, caused by multiple factors and with long-term consequences on the growth, development and well being of the nation.

<sup>67</sup> It is the responsibility of the district administrations to ensure that the children requiring treatment at the NRC are brought to the NRC



Even if a parent is willing to take his child to the NRC, often the NRC remains closed or refuses children from being admitted on any day of the month. Most of the severely malnourished children are undernourished from birth. The 14-day treatment such a child might receive at the NRC is no more than temporary relief. The child discharged after two weeks of treatment at the NRC is brought back to the same living conditions, resulting in the death of many children prior to their discharge from the NRC.

Nanchu, a 16-month-old child from Kirahaipukhri village, Singhpur Panchayat, Majhgawan Block, Satna District of Madhya Pradesh, was refused by the NRC due to a lack of facilities. Nanchu was diagnosed as suffering from Severe Acute Malnutrition (SAM) or grade III malnutrition at that time. Without getting any treatment, the child died on 19 March 2010. This small village, where 42 Mawasi tribe families live, has lost seven children since 2008 due to acute malnutrition. At this moment, five other children in this village are severely malnourished and may die any day, probably even before the report is published, if nothing else is done.



Another district in Madhya Pradesh, Rewa, also exposes similar situations. For instance Java block of Rewa has reportedly 80 percent of the total children malnourished in 2008. Despite constant complaints and reports about child deaths and malnutrition, the state administration has done nothing to address the situation. Two severely malnourished children of the Kol tribe, living in Dhakra village, Laxman (16 months) and Ranjeet (18 months) were refused admission at the local NRC in September this year since the centre did not have adequate facilities. There are eight more children severely malnourished in the same village. The NRC that has to cater to several such villages has merely 10 beds. The facilities in this NRC, like all others in Madhya Pradesh have not improved since 2008.

*Ajay Kol, suffering Severe Acute Malnutrition, Dhakra village, Java block, Rewa district, Madhya Pradesh, October 2010*

Apart from the lack of facilities, a more fundamental issue is whether the NRCs have the capacity to function as an emergency response system. Mothers often complain that their children show no improvement after the treatment at the NRCs.

The villages having a high number of malnourished children are those belonging to the tribal, Dalit or other lower caste communities. This is due to a series of reasons: (1) the consistent denial of facilities like clean drinking water, sanitation, educational and medical institutions; (2) the bonded labour system widely practiced against the tribal and Dalit communities; and (3) the landlessness of the tribals and the Dalits. In most villages of Uttar Pradesh, Madhya Pradesh and Orissa, landed Dalits and tribals work as bonded labourers in their own land since they are

either denied possession of the land by the landlord, who often is from an upper caste community, particularly from the Brahmin caste, or are forced out of their land by the upper caste community in the locality with the help of the local police. Most of these villages do not have an Anganwadi Centre (AWC; child care centre) or only have sub-AWCs that merely provides supplementary food. Furthermore, most of the AWCs reported by the AHRC do not function well. Either the building for the AWC is not completely constructed, or the workers are not properly trained or they discriminate against the tribal and Dalit communities and refuse entry to their children or their mothers. Many centres do not have enough food to meet the requirements of the children in the village where they operate. In many cases when the Anganwadi worker referred children to the NRC, the district administration reprimanded them for reporting such cases. As mentioned earlier, most district administrators are under instructions from their respective state governments to *'under report'* the state of poverty. Under these circumstances, the Anganwadi workers are not able to do anything further and often complain about a demoralised work environment.

### No co-responsibility

Whenever a case of child malnutrition or death is reported, the usual practice of the district administration is to suspend the Anganwadi worker. This is an easy way adopted by the district collectors to escape responsibility and to show action has been taken. The district collector of Khandwa in 2008 directed all the state government officials under his jurisdiction that they should provide their vehicle if a child is to be taken to the NRC. The collector issued the order in response to a series of cases reported by the AHRC. Despite the passing of two years, when the AHRC visited villages in the district, it was revealed that in many villages the Anganwadi workers had never visited since they were far off from their area of work, or in cases where the Anganwadi workers have requested for a vehicle to transfer a child from its home to the nearest NRC, no vehicles were made available not only by other departments, but even the district collector himself.

An intervention on the issue by a local human rights group resulted in the suspension of an Anganwadi worker responsible for the village from which the case was reported. Fearing such actions, Anganwadi workers often remove the name of severely malnourished children from their registers. Even until today, not a single district level officer has been punished for a case of starvation death in India.

It appears that for the Government of India, malnutrition and starvation deaths are the responsibility of the victims, a few local NGOs, the UN Rapporteur on the question of right to food and at the most an Anganwadi worker. Beyond that the issue is only good for the Prime Minister to make a statement, affirming that it is unacceptable, or for a Prime Minister in the making, Mr. Rahul Gandhi, to visit a few

villages and speak about it for cheap political gains, or for corrupt politicians like Ms. Mayawati of Uttar Pradesh to contest an election, and indeed win it.<sup>68</sup>

## No comprehensive policy

The union budget for 2010-11 has increased the budgetary allocation for the Ministry of Health and Family Welfare from Rs. 19,534 Crores to Rs. 22,300 Crores.<sup>69</sup> This however, is only two percent of the total budget. Some of the proposed schemes for which this money will be spent are to introduce a universalised Integrated Child Development Scheme (ICDS) targeting all children under the age of six by March 2012; to conduct a survey at the district level to identify the beneficiaries and to ensure the overall health insurance of the families living below the poverty line. However, the cases documented by the AHRC prove that these schemes are not properly implemented due to administrative neglect, deep-rooted and widespread corruption, and above all, due to discriminatory practices, particularly those based on gender and caste.

Thus, the policies as well as the programs designed for the poor still do not reach the intended targets. And there are no plans for the government to change this situation. The villagers report that the functioning of institutions like the AWC and public food distribution shops have not improved a bit this year. Neither do they expect that it will improve the next year, or the years after. Despite the increase in the budget for public health care and for the health ministry, all the public health institutions such as the AWC, NRC, Primary Health Centres (PHC) and Community Health Centres (CHC) have unfilled vacancies and they all lack basic facilities to function, even safe drinking water.

The conditions in Sidhi district of Madhya Pradesh state specifically reflect this scenario. While child malnutrition has been alarmingly increasing for the last five years, not a single PHC has been built in the district during this period. Of 4,708 medical officers posts, 1,659 are left vacant, while 1,098 posts of Auxiliary Nursing Mothers (ANM) are yet to be filled. Similar anomalies exist in other government programmes. For the Reproductive and Child Health Programme that aimed at reducing infant and maternal mortality, the government made a budgetary provision of Rs. 650 million between 2005 and 2010. Only Rs. 379.6 million has been spent from this budget so far. The unspent money had to be returned at the end of the project period.

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<sup>68</sup> Starvation deaths of children in Uttar Pradesh were a campaign issue for Mayawati during the state assembly elections and at the same time for some NGOs in Uttar Pradesh. Mayawati won the election and like any other politician soon forgot it. Then came Mr. Rahul Gandhi who opposed Mayawati during the Parliamentary elections. With the help of a local NGO, which the NGO plentifully and happily provided for cheap publicity, Rahul Gandhi made use of a couple of cases reported by the AHRC as a political campaign tool against Mayawati. After the elections, the Congress that Rahul Gandhi leads forgot that children continue to die in Uttar Pradesh. So did the local NGO. This NGO is now interested in providing psychological help to victims of torture to recover from trauma, since the funding money is in it. Project driven and short sighted human rights activism, undertaken merely for fame and/or sheer survival or employment is a curse of India's human rights movement

<sup>69</sup> 100 Crore is 1 Billion

In August, once again tons of rotten food grains from the government warehouses were to be thrown away in states like Madhya Pradesh, Punjab, West Bengal and Gujarat, an act the country has repeated shamelessly for the past seven years. Indeed, the government has throughout denied that anyone in India has died from a lack of food. In the past ten years, between 1997 and 2007, more than 10 million tons of food grains were damaged in the Food Corporation India (FCI) godowns. More than one billion tons of food grains were reportedly damaged this year.<sup>70</sup> Coming to know about this, the Supreme Court of India ordered the government to immediately distribute food grains to the poor and reprimanded the government for this colossal and shameful waste. The government's response was literally to say "mind your business," to quote the Prime Minister of India.<sup>71</sup> The same person, without an iota of shame, within 90 days said that the present situation of malnutrition is unacceptable. Probably someone in New Delhi should inform the Cambridge and Oxford educated economist; who served as the Governor of the Reserve Bank of India, the Deputy Chairman of the Planning Commission, the Finance Minister and now is the 14th Prime Minister of India, that malnutrition and death from starvation, reported almost daily in India is the result of those policies that results in tons of food grains rotting in the granaries of the country.

The Madhya Pradesh state government on its part initially denied the reports on child death and malnutrition. Later the Union Minister of Public Health and Family Welfare acknowledged in March that 30,000 children under the age of six die of malnutrition every year,<sup>72</sup> whereas the Union Minister of State for Agriculture stated in November that no state government has reported deaths of children from malnutrition during the past three years. The government of Orissa also resorts to such tactics of denial, although after AHRC's intervention, the Nuapada district administration provided help to victims' families, unfortunately after the death was reported.<sup>73</sup>

## Endemic corruption

Corruption has eaten up the implementation of the Mahatma Gandhi National Rural Employment Scheme (MGNREGS) like termites in a mud wall. Massive misappropriation of government funds was discovered in the construction of village ponds in Kusmal village of Nuapada district, Orissa. Villagers who worked for the ponds' construction are yet to receive wages amounting to Rs. 178,764. The muster rolls prepared for the completion of the work show that the wages have been paid however. A closer examination of the report shows that even government officers like police constables and teachers and even deceased persons were paid money as wages for the construction of the ponds under the MGNREGS.

<sup>70</sup> AHRC-STM-188-2010, INDIA: Country rotten with rotting food grains.

<sup>71</sup> *The Supreme Court should not get into the realm of policy formulation*, Dr. Manmohan Singh, 7 September 2010

<sup>72</sup> AHRC-STM-053-2010, INDIA: Confessions and blaming will not save 30,000 children destined to die this year.

<sup>73</sup> AHRC-STM-042-2010, INDIA: Government of Orissa trying to cover holes with darkness.

Wages for similar work for villagers in Kirahaipukhri village also were denied due to corruption. They are yet to get Rs. 31,147 as wages for the construction of a well. The money was disbursed to those whom the district administrators were close



*Multi-purpose pond unfinished with UNDP fund, Bharya, Orissa, October 2010*

with, mostly Brahmins in the locality. The district administration though was awarded the state award for the best district for implementing the MGNREGS this year. Underpayment, delay of payment and the denial of full employment are very common in the implementation of MGNREGS. The government has so far shown no interest to contain corruption.

Most of the villages in which the AHRC have documented cases of unfinished ponds or wells were constructed under the MGNREGS. They are either dried off or the water is not fit for human use. The drought this year has aggravated the situation. Wells or ponds and even deep-water tube wells have dried off. The basic facility for safe drinking water supply in rural areas is one of the key requirements to ensure food and health security as the unsafe drinking water or lack of drinking water causes various diseases such as diarrhoea or cholera resulting in death.

The official death toll from malnutrition induced diarrhoea this year hit 39 in Rayagada district, 27 in Nuapada district, 10 in Nabarangpur, 5 in Koraput, 4 in Kalahandi and 8 in Malkangiri in Orissa. About 355 persons were found infected in Rayagada alone. Cholera has reportedly claimed 140 deaths in Rayagada and Kalahandi. All deaths happened in July and August. Rayagada particularly faces deaths from diarrhoea and cholera every year.

Despite these repeated outbreaks claiming lives in alarming numbers, the administration each year has only taken temporary actions, and this year too was no exception. The Collector of Rayagada district visited the affected villages and ordered drinking water to be supplied by tankers, which stopped coming after just four days. As a result, the villagers were forced to drink water from a contaminated pond. Then the state government sent doctors, medicines, and food, and set up emergency camps in the affected villages. Government funds invested in tube wells to supply drinking water is Rs. 133.85 Crores to dig 65,680 tube wells. As the depth of the tubes did not meet the standard, many of them were useless. Corruption is the most serious element depriving citizens of their right to food and health.<sup>74</sup>

<sup>74</sup> AHRC-STM-196-2010, INDIA: Diarrhea and cholera are social disasters in Orissa.

## Not distribution but deprivation or forced displacement

The distribution or re-distribution of resources aggravates the food insecurity of vulnerable communities. Most of the cultivable lands have been occupied by landlords and never re-allocated to landless farmers suffering from food insecurity for generations. In forestland areas where most of the tribal communities reside, it is often found that forest officials exploit the poor tribes by extracting bribes for almost everything, or abusing their power in various ways, including the use of torture, fabrication of charges or even cases of rape.

The Mawasi tribe living in the Kirahaipukhri village of Satna district of Madhya Pradesh are deprived of their right to land after other upper caste persons encroached upon their land. These upper caste persons obtained title to the land by bribing forest department officers. The Mawasi however, did not have any money, so they have no land. In July 2009, twenty-six Mawasi families applied for land titles under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006. But the forest department responded only in September 2010, that too by dismissing their claim. The poor Mawasi families were discouraged and only seven families prepared the documents for an appeal. In the process, the Mawasi were threatened and abused by the officials. The Kol tribe living in Dhakra village of Rewa district also applied for land titles under the Forest Rights Act. Only ten out of the 250 Kol families who applied in 2008 were allotted land. The village committee who is supposed to facilitate the proper processing of the land claim is not formed till today. So the families had to depend upon human rights groups to prepare the documents.

Development projects like the construction of dams cause further havoc in rural areas, in this case affecting everyone, irrespective of caste or tribe. Unfortunately again, most of the people living in the catchment areas of these dams are the poor and often the tribal communities.<sup>75</sup> Whether small or big, these projects are often launched without proper consultation or participation of the villagers who are affected by them. In most cases compensation is simply denied, and in cases where it is paid, only paltry sums are paid out. These projects have caused such devastation and destruction to India's rural population, that their continued existence surpasses common sense.<sup>76</sup> The Suktel Dam project launched in Balangir and Sonapur districts of Orissa affected 29 villages and covers 29,850 hectares of land in Balangir alone. In 2005, the police attacked the villagers and nine women including five minors were assaulted, tortured, and detained for 25 days to threaten the villagers who were by then organising protests. According to the government, the purpose of the dam is to provide irrigation for farmlands. However, even the government's own calculations show that the submerged land for the project is double the size of the land that will benefit from the dam. In any case, the beneficiaries are the rich upper caste farmers, whereas those who are forcibly evicted are the Dalit and tribal villagers. The villagers also suspect that the dam is

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<sup>75</sup> Ibid. 3

<sup>76</sup> For instance the Narmada valley project is estimated to render 30 million people landless

constructed to provide water for a new nuclear power plant. Without proper consultation and due process concerning land acquisition or payment of compensation, the government tries to force people out of their hut and hearth. These projects are one of the major causes of hunger, malnutrition and distress migration in India.

The residents of Chutka village of Madhya Pradesh were relocated to Chutka in 1980 when their original habitat was lost for the construction of a dam. They are now facing the threat of a second relocation since a new power plant is being constructed where their village will have to be evicted. Though the villagers are yet to receive any notice or information from the government authorities, they came to know through newspaper reports that the survey for a power plant was going on and that they will have to be evicted from Chutka too. Earlier, when the dam was constructed, the villagers were told that they would be provided houses, employment and electricity. Nothing materialised. Thirty years later, the villagers are again in danger of relocation. Mr. Shiv Prasad Thakur living in Chutka is now 64 years old and has once experienced relocation due to the dam project and does not want to be displaced again. Once he had sufficient agricultural land to support his family. But now he depends on daily labour and fishing to fetch food for his family. In the past ten years, the food security of his family has been gradually deteriorating. He does not know what is exactly going on since the information about the project is not shared with the villagers.

### Conclusion

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Non-transparent and non-participative processes in what the government calls development is one of the biggest poverty creators in India. During the past decade it has played a significant role in aggravating food insecurity in rural India, of which the Dalits, tribals and the rural poor are the primary victims. Coupled with widespread corruption and the complete disregard of the central and state governments for the rural economy, the living conditions of the poor in India, amounting to an estimated 60 percent of the country's 1.2 billion population, is in peril today.

Following the decision of the Ministry of Environment and the Forests concerning the Vedanta Mining Corporation, it had to withdraw from a major project in Orissa. Important committees like the Forest Advisory Committee, N C Saxena Committee and Meena Gupta Committee also recommended the withdrawal of forest clearance for yet another multinational corporation, POSCO. The reports of the Committees pointed to the grave violations of the Forest Rights Act, and other forest related laws by the Orissa state government while undertaking acquisition of land for the project. In the process of land acquisition, the government also used brute police force in May this year to disperse peaceful protests by destitute farmers. Vedanta or POSCO projects are just one of the many illegal development projects that creates food insecurity in the name of 'development' in India.

### The National Food Security Act

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Civil society groups have been discussing the proposed National Food Security Act and making strong suggestions for the universalisation of the Public Food Distribution System (PDS). The government on the other hand has refused to adopt these suggestions. From the beginning, the government did not undertake open discussions with civil society and more importantly with the general public concerning food security in India. Despite the fact that those who suffer from hunger and malnutrition are not the government agencies but the poor, there was no public space for discussion in the process. The final draft will be submitted to the Parliament soon.