

## SUBMISSIONS BY NGOs TO THE OHCHR TOWARDS INDIA'S UNIVERSAL PERIODIC REVIEW BY THE HUMAN RIGHTS COUNCIL IN APRIL, 2008

The submissions have prioritized two areas of law reform currently before the state and prepared with inputs from and consultations with NGOs and individuals endorsing the submissions. Both these law reform matters are pending before the state for revision. The first matter relates to the penal provision that criminalizes what is called 'unnatural sex' [section 377 of the Indian Penal Code]. There is a petition in the High Court of New Delhi seeking judicial review of this provision so as to de-criminalise adult same sex consensual sex that falls within the scope of 'unnatural sex', on grounds of discrimination and violations resulting from it. The second matter relates to enacting a law seeking to prevent and protect against communal violence. Communal violence is a form of sectarian violence, perpetrated by religiously defined communities – largely by Hindus against Muslims, the largest minority community in India. The regularity of mass crimes perpetrated as part of communal violence is facilitated by near complete impunity it enjoys. In recognition of the need for a special statutory framework, the state proposed the draft Communal Violence Bill of 2005. This Bill has been widely debated by civil society members and strongly criticized for its failure to dismantle impunity, state collusion or redress gender based crimes – the three critical aspects that have marked most communal violence in India. The recommendations from the HRC during India's UPR in both the matters will be timely in influencing and guiding government action at this juncture. Both matters are contemporary and currently awaiting government action.

### PART I:

#### DE-CRIMINALISATION OF ADULT SAME SEX CONSENSUAL SEX

Consensual sexual acts between adults of the same sex that are criminalized under section 377 of the Indian Penal Code. This law by criminalizing same sex desire affects the most intimate aspect of the personality of lesbian, gay, bisexual and transgendered (LGBT) persons in India, as well as the recognition and exercise of their human rights. Sec 377 of the IPC reads, "**Unnatural Offences:** - *Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*  
*Explanation - Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.*"

Health and human rights groups have argued for a long time that criminalising same-sex desire impedes HIV/AIDS outreach work, making it much more difficult for LGBT persons to access material and information that is aimed at educating and promoting safe sex practices among the LGBT community. Criminalising same sex activity also constitutes a clear violation of human rights law as set out by the Human Rights Committee. See *Human Rights Watch Report on Police Harassment of HIV/AIDS workers in India*, <http://www.hrw.org/reports/2002/india2/>,

In view of the human rights violations and the impediments caused to HIV/ AIDS outreach work, a petition has been filed in the Delhi High Court: Naz Foundation (India) Trust vs. Government of NCT of Delhi & Ors [Writ Petition no. 7455 of 2001], challenging the constitutional validity of Sec 377. A coalition of Delhi based human rights, women rights, sexuality rights, LGBT and child rights groups called 'Voices Against 377' supporting the challenge is impleaded as interested party. This legal challenge has come after two decades of LGBT and human rights activism in India that has documented the gross discrimination and range of violations facilitated by the existence of Sec 377 in the penal code. The penal provision attaches stigma to all LGBT persons, labeling them as deviant, criminal and as a consequence, unworthy of protection of fundamental rights. Actual violations of fundamental rights ranging from discrimination to violence, sexual assault,

extortion and intimidation are impossible to report or redress because of shadow of criminality cast by Sec 377. A disclosure by the victim itself amounts to an admission of criminality making redress inaccessible to LGBT persons, attaching impunity to many grave forms of violence against them. Attached is a report of the coalition, Voices Against 377 called Rights for All, as **Annex A**. The government of India and its agencies are respondents to the writ petition and are bound by the court process to submit its position on Sec 377. We urge the HRC to make recommendations that help secure support of the state and state agencies in facilitating the judicial review and not obstructing it on account of lack of information/ misinformation and prejudice.

#### **HUMAN RIGHTS VIOLATIONS**

The following categories of violations that have been documented are therefore just indicative and not exhaustive of the range of violations and the number of victims.

**Arbitrary arrest and detention** - Sec 377 lends itself as a convenient tool in the hands of the police to arbitrarily and repeatedly harass LGBT people or those they suspect to be LGBT. These motivated and malicious arrests, may on some occasions not even be accompanied formal complaints as illustrated by the two cases noted below:

- The arbitrary harassment and arrest of LGBT persons, is demonstrated by the Fact Finding conducted by the National Coalition For Sexuality Rights (NCSR) in the case of the arrest of four men by the Lucknow police in, January 2006 under Sec 377 for allegedly “indulging in unnatural sex in a picnic spot”. The fact finding team found that “none of the men involved were having public sex, much less present at the alleged spot of the crime”, but rather, the men had been deceptively called by the police to a restaurant and arrested. The Fact Finding Report by the NCSR is attached as **Annex B**. Also see Human Rights Watch Report, <http://hrw.org/english/docs/2006/01/11/india12398.htm>
- The arbitrary use of the law is similarly substantiated by the arrest of 4 members of the hijra community in September 2006, under Sec 377 IPC in Bangalore. A reading of the First Information Report (FIR) shows that the police conflate public presence of LGBT persons with immoral acts and criminality even when no offence is made out. **Annex C** is a translated true copy of the said FIR [dated 11.9.2006, FIR no151/06] in English.

The penal provision motivates non state actors such as the community and families of LGBT persons to coerce and harass with impunity. For example, in a case in Gujarat in 1990 Tarulata was threatened by his father-in-law with criminal action for marrying his daughter, Lila Chavda, although Tarulata had successfully undergone female to male sex change operation in 1987 [April 18, 1999: India Today]. LGBT persons are routinely picked up by the police, illegally detained, victimized by extortion/ blackmail and assaulted in custody.

**Torture, Rape of LGBT persons** - LGBT persons particularly those from a lower socio-economic background, being more vulnerable, are subject to brutal torture and rape by members of the law enforcement agency, as borne out by the testimonies quoted in ‘Human Rights Violations Against the Transgender Community’ by the Peoples Union for Civil Liberties-Karnataka, <http://www.pucl.org/Topics/Gender/2004/transgender.htm> [attached as **Annex D**]:

- "They took me to Cubbon Park Police station ..... Eight policemen together beat me up and put me in the lock up. They were so curious to know if I had a penis that they stripped me. They hung me up horizontally with ropes and beat me black and blue."
- "The police constantly harassed me and extracted amounts of Rs.50-150 six to seven times in a month. They have arrested and detained me in police stations without booking a case and verbally, have sexually and physically tortured me .... Sometimes they would beat us ..... strip us to see our genitals and make fun..."

**Impunity for Violations and barriers to accessing justice** - The inability to register a complaint for legal remedies flows from the fear of persecution by state as well as society. The effect of Sec

377 is that all homosexual desire is seen as tainted and the whole LGBT community is branded with deviance and criminality that severely compromise the ability of LGBT persons to access to justice for redressing violations.

**Obstruction to Life Saving Information on Protection from HIV/ AIDS** - Sec 377 infringes upon the ability of LGBT persons to receive information with regard to safe sexual practices, HIV/AIDS etc. This inability to access such information puts them at greater risk of HIV/ AIDS and other diseases. In July 2001, the Lucknow police raided a park and arbitrarily arrested ten people including HIV/ AIDS health workers, one from an NGO, Bharosa (working with the LGBT community). Thereafter the police raided the offices of two NGOs working on safer sex issues, seized safer sex material and sealed their offices, and filed criminal cases against those arrested.

**Suicides** - The extreme stigmatization fuelled by the penal law on LGBT persons has pushed lesbian women to despair in face of social prejudice, resulted in cases of lesbian women committing suicide. Many such suicides have been documented by the Alternative Law Forum, Bangalore [filed in the writ petition before the Delhi High Court], attached as **Annex E**.

**RECOMMENDATIONS** - The above violations and abuse stem from the virulent homophobia sanctioned by Sec 377. The social climate fostered by Sec 377 makes it difficult, if not impossible, to publicly own and express one's sexuality thereby silencing a core aspect of one's personhood. Criminal provisions against same sex activity has been held to be against human rights law by the Human Rights Committee, so the HRC must urge the government to urgently take steps to decriminalize of adult consensual same sex activity in India.

## **PART II:**

### **LAW AGAINST COMMUNAL VIOLENCE**

India has had a long history of communal violence marked by horrific crimes committed against collectivities on the basis of their religious identity. Beginning with communal violence marking the birth of the nation during the partition of India [1947], some of the major communal violence have been the massacres of Bengali-speaking Muslims in Nellie, Assam [1983], the pogrom against the Sikhs in Delhi [1984], violence in Mumbai, Surat and many other places after the destruction of Babri Masjid in 1992 and the pogrom in Gujarat which targeted the Muslim community, particularly women, [2002]. Three distinguishing features of communal violence are state complicity (actions and inactions), impunity and gender based crimes that target women. Against this backdrop, the present United Progressive Alliance government in India promised to enact "a model comprehensive law" and drafted the Communal Violence Bill, 2005. This Bill does not address the three features that have plagued communal violence. Instead, it seeks to strengthen the state. The bill was introduced twice in the Parliament, and has been widely critiqued, following which it was referred to a Parliamentary Standing Committee for review. Civil society groups submitted their critiques to the Standing Committee which tabled its recommendations to the Parliament in 2007. In its report the Parliamentary Standing Committee has not accepted the recommendations and critique of the civil society groups, and the Bill in its original form is expected to be re-introduced in the Parliament. Although a law on the subject is urgently needed in the context of large-scale impunity that has existed for recurring incidents of communal violence in India, NGOs and human rights activists have expressed serious concerns over the draft Bill proposed by the government.

**Current Legal Framework in relation to state impunity and in the draft Communal Violence Bill:** Indian Constitution, in its chapter on Fundamental Rights, guarantees right to life, equality and non-discrimination against the state. However, the Indian criminal law does not cater to crimes against collectivities or crimes by the state and its agencies. For the past several years, the government has preoccupied itself with reforms in the criminal justice system, as reflected by the Malimath Committee report in 2003 and the Draft National Policy on Criminal Justice prepared by a committee appointed in March 2007. However, the suggested reforms have been largely state-centric, that further empower an already powerful state, without adequate provisions

for its accountability and transparent functioning. An example of this trend is the recently proposed Model Police Act, which preoccupies itself with freedom of the police force from executive control but fails to create strong institutional mechanisms for its accountability to rule of law and human rights principles.

The Communal Violence Bill does not dent the shield of impunity entrenched in law through Section 197 of Criminal Procedure Code, which requires prior sanction from the state government for prosecution of any public officials, thereby shielding perpetrators against lawful prosecutions. The provision has not been repealed despite the call of many human rights groups based in India and abroad, including Amnesty International and Human Rights Watch, to do so. In addition, the concept of command/ superior responsibility does not feature in Indian criminal law and rather than introducing it in the Bill, it remains absent. The proposed Bill will continue to retain the existing impunity making it extremely difficult to prosecute the political leaders who have often planned and under whose supervision, instructions and incitement incidents of communal violence are carried out.

Although some major incidents of communal violence fall within the contemporary understanding of genocide and crimes against humanity, and despite having ratified the Genocide Convention in 1959, India is yet to enact an implementing legislation to facilitate domestic prosecutions for genocide. The concept of crimes against humanity does not feature under Indian criminal law.

**Critique of the Communal Violence Bill** – There is a disjuncture between the provisions of the proposed Bill and India's 60 years' experience with communal violence, based on survivors' testimonies, documented history, reports of Commissions of Inquiry and court documents. Detailed critiques by eminent citizens, civil society groups and retired judges are attached [as mentioned below]. This Bill is dangerous for the following reasons:

- It makes the citizens more weak and vulnerable by further strengthening the state and central governments;
- It strengthens the shield of protection enjoyed by the State, its political leaders and its officials for their acts of omission and commission in these crimes;
- It provides arbitrary, unfettered powers to the government which could be misused against vulnerable groups;
- It borrows provisions generously from other draconian internal security laws such as POTA, TADA, AFSPA and Disturbed Areas Act; and
- It fails to create new crimes which are absent in the existing penal statute and in particular is silent on gender based crimes against women, in particular mass sexual brutality that accompanies communal violence.

**Civil Society's Engagement with the Communal Violence Bill** - The civil society, including concerned citizens, lawyers, activists, jurists, academics and representatives of NGOs, have engaged with the Bill since 2004 in the following ways:

- Drafting and submitting to the government alternative drafts of the Bill;
- Writing to and deposing before the Parliamentary Standing Committee on Home Affairs which was entrusted with the task of receiving feedback from the civil society to the proposed law; (Please refer to **Annexure 1**)
- Organizing public meetings, seminars and press conferences to disseminate information related to the Bill and to evolve a consensus among members of civil society; (Please refer to **Annexure 2**)
- Signature campaigns rejecting the Bill in its present form and calling for drafting a new process through an inclusive, transparent manner; (Please refer to **Annexure 3**)
- Shadow reports to the CEDAW committee for India's review in January 2007; (Please refer to **Annexure 4** for Concluding Observations of the CEDAW committee on the issue)
- Delegations that met with senior policy makers to express their serious concern over the provisions of the Bill.

- Critiquing the drafts advanced by the government, and recommending amendments (**Annexure 5 and 6**)

### **Recommendations**

1. To call upon the Government of India to immediately set up a Drafting Committee to formulate an entirely new law on communal violence;
2. The Bill should base itself on the experiences of victims / survivors of communal violence over the past 60 years; and take into account the recommendations of various Commissions of Enquiries, international covenants to which India is a signatory and new emerging standards in international law;
3. The drafting should be undertaken through an open, transparent and public process involving jurists, activists, academics and legal experts working on communal violence on the ground and in court rooms;
4. Such a Bill should incorporate new crimes particularly gender based crimes against women and address issues of state complicity and impunity.

### **THE UNDERSIGNED ENDORSE THE ABOVE SUBMISSIONS:**

1. Partners for Law in Development, New Delhi
2. Women's Research and Action Group, Mumbai
3. Indian Campaign for International Criminal Court, Mumbai
4. Alternative Law Forum, Bangalore
5. Nirantar, New Delhi
6. TARSHI, New Delhi
7. South and South East Asia Resource Centre on Sexuality, New Delhi
8. Creating Resources for Empowerment and Action, New Delhi
9. Saheli Women's Resource Centre, New Delhi
10. Nigah, New Delhi
11. People's Watch, Madurai
12. ANHAD, New Delhi
13. Prism, New Delhi
14. Geeta Ramaseshan, Lawyer, Chennai High Court
15. S.K. Priya, Lawyer, Chennai High Court
16. Breakthrough, New Delhi
17. Action India, New Delhi

*Dated: November 20, 2007*