

## **Sexuality Policy Watch Newsletter N.12**

### **Is the UPR achieving (what it demanded/expected) for women on sexuality issues in India?**

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In light of widespread initial skepticism about the independence and usefulness of a peer review mechanism to protect human rights, India's second Universal Periodic Review (UPR II) provided an opportunity not only to evaluate the nature and extent of concerns about gender and sexuality, but also the overall effectiveness of the UPR process itself. This article will outline the development of the first and second UPR processes in India through the questions and recommendations relating to gender and sexuality issues. This article will address the Indian government's response to the sexuality-related challenges for India, which emerged from the UPR II

#### **1. Development of UPR as a Review Mechanism**

During the UPR II, 80 delegations made statements,<sup>i</sup> almost doubling the member states engaged from the 42 statements made during India's first UPR process.<sup>ii</sup> UPR II featured a higher degree of engagement by member states with sexuality issues in India than was evident during the first UPR in 2008. However, attention to gender and sexuality issues was defined by generalized statements and recommendations rather than specific and nuanced ones. Accordingly,

suggestions such as ‘eliminating harmful traditional practices’ and ‘making efforts,’ set the tone as opposed to drawing upon the more specific recommendations made in submissions by civil society groups and UN institutions. Overly broad recommendations lack the specificity necessary to hold a state accountable to achieve real progress in the protection of human rights. Unfortunately, this has been a feature of UPR contributions since the UPR mechanism began in India. The table below deconstructs the way in which UN member states engaged with India on sexuality issues in both UPRs.

Comparative Consideration of Gender and Sexuality Issues in India’s Universal Periodic Reviews (UPR)				
Recommendation:	Made in ‘12 by:	Made in ‘08 by:	Further Notes:	Government Response in Draft Working Group Report ‘12:
Decriminalization of homosexuality	Argentina, Brazil, the United States, the United Kingdom, Sweden and Slovenia. <sup>iii</sup>	Sweden	Only Argentina made a formal recommendation in regards to pursuing decriminalization of all same-sex relations, however Sweden also focused heavily on the criminalization issue during the interactive dialogue, warning of serious consequences should the Delhi High Court ruling in the case <i>Naz Foundation v Government of NCT of Delhi</i> , which effectively legalized homosexual intercourse, be reversed on appeal. <sup>iv</sup> The number of countries engaging with the issue during UPR II was a clear improvement from India’s first UPR, where only Sweden raised the issue, but no formal recommendation was made.	“...article 15 of the Constitution clearly prohibited discrimination on grounds of religion, race, caste, sex or place of birth. Article 16 provided for equality of opportunity in matters of public employment. The Delhi High Court judgment in 2009 had decriminalized consensual sex between adults of the same sex in private. Transgender persons also had the right to be listed as “other” rather than “male” or “female” on electoral rolls and voter identity cards.” <sup>v</sup>
Consider signature and ratification of OP-CEDAW	Brazil, <sup>vi</sup> Czech Republic, <sup>vii</sup> Costa Rica, <sup>viii</sup> Republic of Korea, <sup>ix</sup> Timor-	Brazil <sup>xi</sup>		“...effective legal and constitutional framework to address the violations of the rights of individuals exists. The Constitution provided direct access to individuals of the Supreme Court and the

	Leste <sup>x</sup>			High Courts. Other statutory mechanisms also provided adequate redress.” <sup>xii</sup>
Generalised recommendations to improve laws and law enforcement to prevent violence and discrimination against women and girls	Liechtenstein, <sup>xiii</sup> Kyrgyzstan, <sup>xiv</sup> Canada, <sup>xv</sup> Chile, <sup>xvi</sup> Mexico, <sup>xvii</sup> and Iran <sup>xviii</sup>	None	In UPR II only the United States of America and Canada explicitly extended their recommendations related to preventing violence and discrimination to the protection of LGBTI citizens from violence. <sup>xix</sup> The only specific recommendations on this issue in UPR II came from UN and civil rights bodies; for instance, CEDAW encouraged India to widen the definition of rape in the <i>Penal Code</i> . <sup>xx</sup> Nonetheless this was an improvement of UPR I, where only the United States of America raised the issue of violence against women and no formal recommendation was made.	“...reiterate India’s commitment to strengthen the implementation of the Domestic Violence Act of 2005.” <sup>xxi</sup>
Generalised recommendations to ‘intensify efforts’ to work towards MDG5	Sweden, <sup>xxii</sup> Austria, <sup>xxiii</sup> Egypt, <sup>xxiv</sup> Norway, <sup>xxv</sup> Finland <sup>xxvi</sup> and Honduras <sup>xxvii</sup>	None	More specific suggestions made in country recommendations on this issue included withdrawing the reservation to Article 16 in the <i>Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)</i> , <sup>xxviii</sup> ensuring access for all women to adequate delivery services and sexual and reproductive health services, <sup>xxix</sup> and taking further steps to stop child marriage <sup>xxx</sup> and unsafe abortions. <sup>xxxi</sup> The issue of maternal mortality was not included in the report of the Working Group of UPR I.	No response recorded in draft Working Group report.

## 2. Engagement by the Indian Government in the UPR II process:

### 2A. Generalised narrative of laws and schemes

The Indian government's approach has consistently been one of avoiding discussion on the *effectiveness* of their interventions in relation to gender and sexuality issues. Instead, they rely on simply narrating the government schemes which have already been established. The absence of any analysis of the impact and outcomes of government schemes and laws were noticeable. The overly generalized approach to sexuality issues in both the Indian government's report and its responses to questions raised by UN member states during the interactive discussion unfortunately reflect a lack of genuine engagement with the UPR process.

In relation to the criminalization of homosexuality, the Indian delegation emphasized that the government fully support the High Court judgment. Furthermore, the Supreme Court was considering an appeal of this judgment.<sup>xxxii</sup> While this response is more positive, the Indian government's previous contradictory positions on criminalization of homosexuality calls for a more explicit statements of support for addressing discrimination arising from sexual orientation and gender identity. For instance, in 2008 at UPR I, the Indian government stated that the prohibition of sexual offences against the order of nature' was "essentially a Western concept, which has remained over the years," but failed to take initiative towards the legalization of homosexual intercourse subsequently. Four years later, the Indian government is still failing to take definitive steps towards protecting LGBTI rights, abdicating its responsibility for actively defending the challenges to the High Court decision during the Supreme Court of India appeal (an issue raised during the UPR solely by the Working Group on Human Rights).<sup>xxxiii</sup> In this context, an explicit assurance by the government on its intent to fight SOGI related discrimination in all fields would have been reassuring, rather than limiting itself to the Supreme Court's verdict in the appeal for the reversal of decriminalization of homosexuality. The protection of homosexual rights goes far beyond the single issue of decriminalization, and it was disappointing to see no indication from the Indian delegation of an intention to look beyond issues of legality to the broader social and structural needs of the LGBTI community in India.

In relation to the strong suite of recommendations addressing different aspects of violence against women, the Indian delegation similarly reiterated India's commitment to strengthening the implementation of the *Protection of Women from Domestic Violence Act (2005)*,<sup>xxxiv</sup> but refused to address any other issues within the violence against women spectrum. For example, there were no responses to the recommendation from CEDAW for widening the definition of rape in the Indian law. This concern is part of the debate relating to comprehensive law reform relating to sexual assault in India.

Domestic violence is one of many violent challenges facing women in India, and yet the Indian government gave no indication that it intends to tackle other forms of violence, or the protection gaps relating to them. The Indian delegation refused to consider ratification of the Optional Protocol to CEDAW because “there exists...effective legal and constitutional frameworks to address cases of violations of women’s rights within India.”<sup>xxxv</sup> This ignored the fact that the Optional Protocol compliments rather than substitutes domestic redress mechanisms, and comes into play only after exhaustion of domestic remedies. There was also no response to the issue raised by CESC and UNCT that India’s fourth and fifth reports to CEDAW have been overdue since 2011.<sup>xxxvi</sup>

Similarly, in relation to maternal health, the Indian delegation noted the growth in beneficiaries of the *Janani Suraksha Yojana* program<sup>xxxvii</sup> and the launch of the ‘Indira Gandhi Matritva Sahyog Yojana’ pilot program in 2011,<sup>xxxviii</sup> but failed to provide any detail on the effectiveness and impact of these schemes at the grassroots level. They also failed to address concerns about conditionalities currently imposed on maternal health care and nutrition schemes, which can exclude young mothers and mothers with more than two children. This approach completely ignored the Special Rapporteur on the Right to Health’s observation that India’s maternal mortality policies were not being implemented in practice.<sup>xxxix</sup> It also arguably contributed to the generalized nature of the UN member state recommendations in this area, which did not address specific associated issues such as recent reports of forced sterilization in Madhya Pradesh and Bihar.<sup>xl</sup> Such an approach is not in the spirit of CEDAW’s focus on *de facto* outcomes.

## **2B. Lack of a structural approach and gender perspective**

As well as taking an overly generalized approach unsupported by impact assessments and statistical analysis, the government also failed to demonstrate an understanding of the ways in which state structures and conceptions of gender impact the situation for women on the ground in India. For instance, violence against women is symptomatic of broader gender inequality and patriarchal perspectives within society. However the Indian government failed during UPR II to commit itself to tackling the underlying structural inequalities contributing to all forms of violence against women in India. The government’s narrow focus on domestic violence law reform ignores the structural challenges in terms of the law enforcement machinery and more broadly, for the empowerment of women in a more general sense.

Similarly, the government’s responses on the issue of maternal mortality, delinked the health of mothers from broader issues of gender inequality within India. The government chose to focus on the symptoms of the issue (poor health care, unsafe abortions) instead of the structural problems of gender inequality such as reduced importance of investing in social sector reform and the provision of quality public health care. It is

arguable that, without a structural approach, the government's interventions to reduce maternal mortality will ultimately be ineffective. Addressing the effects but not the causes of female inequality, while also failing to recognize that persistent high maternal mortality and violence against women rates reflects a general lack of prioritization of gender equality by the Indian government.<sup>xli</sup>

### 3. Conclusion

Although it is clear that the UPR has grown positively since India's first engagement with the process in 2008, stronger and more specific recommendations from the process would assist India in effectively tackling its sexuality-related challenges. Many member countries limited their engagement on sexuality issues to expressing appreciation for developments made by India in relation to sexual rights and gender equity<sup>xlii</sup>. This approach did not take seriously the challenges remaining for India in sexual rights and gender.

India is scheduled to provide its official response to the Working Group report no later than the 21<sup>st</sup> session of the Human Rights Council to be held in September 2012. It is hoped that India's response will include a gender-based analysis and will recognize that a two-pronged approach to maternal health, homosexual rights and gender-based violence is required, which both strengthens the implementation of existing laws and addresses gaps in legal entitlements with a view to *de facto* effectiveness and structural change. The development of a National Human Rights Plan, as recommended during the UPR by Spain,<sup>xliii</sup> the National Human Rights Commission<sup>xliv</sup> and the Working Group on Human Rights<sup>xlv</sup> among others, would be an excellent tool with which to develop a structural, outcome-focused approach in India.

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<sup>i</sup> *Report of the Working Group on the Universal Periodic Review India* (9 July 2012) UN Doc A/HRC/21/10 at 33

<sup>ii</sup> *Report of the Working Group on the Universal Periodic Review India* (23 May 2008) UN Doc A/HRC/8/26 at 17

<sup>iii</sup> *Report of the Working Group* (2012), above n 1, at 138.89

<sup>iv</sup> *Report of the Working Group* (2012), above n 1, at 64

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- v *Report of the Working Group* (2008), above n 2 at 78
- vi *Report of the Working Group* (2012), above n 1, at 138.9
- vii *Report of the Working Group* (2012), above n 1, at 138.21
- viii *Report of the Working Group* (2012), above n 1, at 138.38
- ix *Report of the Working Group* (2012), above n 1, at 138.23
- x *Report of the Working Group* (2012), above n 1, at 138.27
- xi *Report of the Working Group* (2008), above n 2 at 17
- xii *Report of the Working Group* (2008), above n 2 at 130
- xiii *Report of the Working Group* (2012), above n 1, at 138.88
- xiv *Report of the Working Group* (2012), above n 1, at 138.105
- xv *Report of the Working Group* (2012), above n 1, at 138.41
- xvi *Report of the Working Group* (2012), above n 1, at 138.85
- xvii *Report of the Working Group* (2012), above n 1, at 138.106
- xviii *Report of the Working Group* (2012), above n 1, at 138.79
- xix *Report of the Working Group* (2012), above n 1, at 138.72, 138.90
- xx *Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: India* (11 April 2012) UN Doc A/HRC/WG.6/13/IND/2 at 39-40
- xxi *Report of the Working Group* (2008), above n 2 at 86
- xxii *Report of the Working Group* (2012), above n 1, at 138.2
- xxiii *Report of the Working Group* (2012), above n 1, at 138.150
- xxiv *Report of the Working Group* (2012), above n 1, at 138.151
- xxv *Report of the Working Group* (2012), above n 1, at 138.152
- xxvi *Report of the Working Group* (2012), above n 1, at 138.153
- xxvii *Report of the Working Group* (2012), above n 1, at 138.154
- xxviii *Report of the Working Group* (2012), above n 1, at 138.2
- xxix *Report of the Working Group* (2012), above n 1, at 138.153
- xxx *Report of the Working Group* (2012), above n 1, at 39
- xxxi *Report of the Working Group* (2012), above n 1, at 73
- xxxii *Report of the Working Group* (2012), above n 1, at 78
- xxxiii *Stakeholder Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: India* (12 March 2012) UN Doc A/HRC/WG.6/13/IND/3 at 73
- xxxiv *Report of the Working Group* (2012), above n 1, at 86
- xxxv *Report of the Working Group* (2012), above n 1, at 130
- xxxvi *Compilation Report*, above n 20, at 11
- xxxvii *National Report*, above n 1, at 56
- xxxviii *National Report*, above n 1, at 96
- xxxix *Compilation Report*, above n 20, at 59
- xl The Guardian, 'UK Aid Funds Forced Sterilisation' (15 April 2012), Available at <<http://www.guardian.co.uk/world/2012/apr/15/uk-aid-forced-sterilisation-india?fb=ative&CMP=FBCNETT9038>>
- xli *Stakeholder Summary*, above n 33, at 85
- xlii *Report of the Working Group* (2012), above n 1, at Sri Lanka (37), Sudan (38), Trinidad and Tobago (43), Uruguay (49), Uzbekistan (50), Bahrain (58), China (68), Iraq (99), Maldives (109), Nepal (115), Saudi Arabia (125), Senegal (126), Slovakia (128)
- xliii *Report of the Working Group* (2012), above n 1, at 138.54
- xliv *Stakeholder Summary*, above n 33, at 5
- xlv *Stakeholder Summary*, above n 33, at 40