



# The Equal Rights Trust

126 North End Road  
London W14 9PP  
United Kingdom

Tel.: +44 (0) 20 7610 2786  
Fax: +44 (0) 20 3441 7436  
info@equalrightstrust.org  
www.equalrightstrust.org

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Executive Director

## **The Equal Rights Trust (ERT)**

Stakeholder Submission:

### **Universal Periodic Review of the Republic of India, 2011**

1. The Equal Rights Trust (ERT) is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. ERT works from the unified perspective on equality, which emphasises the integral role of equality in the enjoyment of all human rights, and seeks to overcome the fragmentation of the field of equality law and policies.

2. In this submission, ERT highlights some of the most significant challenges and problems facing the government of India in fulfilling its obligations to promote equality and combat discrimination. Despite progress in recent years, inequality pervades many sections of Indian society. There is inadequate equality legislation in force and the enforcement of existing equality-related legislation remains weak. It is our view that in order to meet its international legal obligations, India must amend or repeal discriminatory laws and introduce comprehensive anti-discrimination legislation.

### **International Obligations**

3. India is party to six United Nations treaties relevant to equality – the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Rights of Persons with Disabilities (CRPD) and the Convention on the Rights of the Child (CRC) – all of which establish duties on states to prohibit discrimination.<sup>1</sup>

4. Common Article 2 of the ICCPR and ICESCR obliges state parties to ensure that the rights set out in the Covenants are exercised without discrimination on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>2</sup> In addition, both Covenants require all state parties to take steps, in particular through the introduction of legislation, to give effect to the rights contained therein.<sup>3</sup> Under Article 26 of the ICCPR, India has a duty to ensure equality of all persons before the law, equal protection of the law without any discrimination and to prohibit discrimination on “any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>4</sup> Further, under Article 2 of CRC, India is obliged to guarantee all rights under the convention “to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status”.<sup>5</sup>

5. CEDAW, CERD and CRPD create further specific obligations upon state parties with respect to discrimination on grounds of gender, race and disability. Under these treaties, India has obligations to refrain from discriminatory practice,<sup>6</sup> introduce legislation prohibiting discrimination on the protected ground,<sup>7</sup> and modify, amend or abolish legislation which discriminates on the protected ground.<sup>8</sup>

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<sup>1</sup> Status of India's international legal obligations established from the UN Treaty Body Database (available at: <http://www.unhchr.ch/tbs/doc.nsf>).

<sup>2</sup> International Covenant on Civil and Political Rights (ICCPR), Article 2(1) and International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 2(2).

<sup>3</sup> ICCPR, Article 2(2) and ICESCR, Article 2(1).

<sup>4</sup> ICCPR, Article 26.

<sup>5</sup> Convention on the Rights of the Child, Article 2.

<sup>6</sup> Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Article 2(d) and Convention on the Elimination of All Forms of Racial Discrimination (CERD), Article 2(1)(a).

<sup>7</sup> CEDAW, Article 2(b); CERD, Article 2, 1(d); and Convention on the Rights of Persons with Disabilities (CRPD), Article 4(1)(e).

<sup>8</sup> CEDAW, Article 2(f); CERD, Article 2(1)(c); and CRPD, Article 4(1)(b).

6. It is regrettable, however, that India has a poor record of ratifying the Optional Protocols to the treaties to which it is party and is not, therefore, bound by many of the enforcement mechanisms relating to such treaties.

## **National Law**

7. Articles 14, 15 and 16 of the Indian Constitution form the cornerstone of the constitutional protection of the rights to equality and non-discrimination in India.<sup>9</sup> Article 14 guarantees “equality before the law” and “equal protection of the laws”.<sup>10</sup> Article 15 provides limited protection from discrimination based on religion, race, caste, sex, and place of birth.<sup>11</sup> Article 16 provides for equality of opportunity in relation to public employment, and prohibits discrimination based on religion, race, caste, sex, descent, place of birth, or residence in relation to such employment.<sup>12</sup>

8. The constitutional protections offered in Articles 15 and 16 are insufficient to adequately protect the right to non-discrimination for the following reasons: (i) they include a closed list of protected grounds of discrimination which notably fails to include, *inter alia*, sexual orientation, gender identity, disability, political or other opinion and age; (ii) the protection is only offered to citizens of India rather than to all people within the territory or under the jurisdiction of India, (iii) no protection from multiple discrimination is provided; (iv) there is a lack of elaboration of the meaning of discrimination and, more specifically, what behaviours (such as direct and indirect discrimination, harassment, victimisation and failure to provide reasonable accommodations) will be prohibited; and (v) the protection granted is limited in scope to discrimination by the state in relation to “access to shops, public restaurants, hotels and places of public entertainment”, “the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public” and “state employment”.

9. The constitutional “affirmative action” regime, found in Articles 15 and 16, which allows for positive action to be taken in relation to women, children, socially and educationally backward classes, and the Scheduled Castes and Scheduled Tribes, is arguably permissible under international human rights law provided it addresses “systemic discrimination”. It is submitted, however, that this regime is deficient to the extent that (i) it applies only to certain categories of disadvantaged persons in India whilst failing to address the “systemic discrimination” faced by others such as persons with disabilities and LGBTI persons; and (ii) the quota system which has dominated the Indian approach to positive action neglects many areas of life where discrimination is encountered, and is unable to address the complexities of disadvantage.

10. Aside from the Constitution, legislation prohibiting discrimination is limited. The Equal Remuneration Act 1976 provides for equal pay for equal work among men and women,<sup>13</sup> and prohibits discrimination in the recruitment of men and women workers.<sup>14</sup> Whilst such a broad prohibition of discrimination on the ground of gender in employment is a welcome inclusion, it is notable that there is a failure to elaborate on the definitions of prohibited conduct such as direct and indirect discrimination, harassment, lack of reasonable accommodation and victimisation. The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995<sup>15</sup> governs the rights of persons with disabilities in India, yet falls considerably short of meeting India’s obligations under the CRPD. Most

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<sup>9</sup> Constitution of India 1949 (as amended), available at: <http://indiacode.nic.in/coiweb/welcome.html>.

<sup>10</sup> *Ibid*, Article 14.

<sup>11</sup> *Ibid*, Article 15.

<sup>12</sup> *Ibid*, Article 16.

<sup>13</sup> Equal Remuneration Act 1976 (Act No. 25 of 1976), Section 4, available at: <http://www.vakilno1.com/bareacts/equalremunerationact/equalremunerationact.htm>.

<sup>14</sup> *Ibid*, Section 5.

<sup>15</sup> Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995 (Act No. 1 of 1996), available at: <http://socialjustice.nic.in/pwdact1995.php>.

significantly, it does not include a prohibition of discrimination, as required under Article 5 of CRPD. Several legal provisions protect women from gender-based violence which has been defined by the Committee on the Elimination of Discrimination against Women as a form of discrimination.<sup>16</sup> The Dowry Prohibition Act 1961<sup>17</sup> prohibits the giving and taking of, and the abetting of giving and taking of, a dowry. Section 498A of the Indian Penal Code makes it an offence for a husband (or a husband's relative) to subject his wife to cruelty,<sup>18</sup> and Section 304B of the Indian Penal Code criminalises "dowry deaths".<sup>19</sup> The Domestic Violence against Women (Prevention and Protection) Act 2005 provides civil law protection from domestic violence<sup>20</sup>, and runs in parallel to the criminal law regime under Section 498A of the Penal Code. A number of laws aim to protect the rights to equality and non-discrimination of the Scheduled Castes and Scheduled Tribes. Most significantly, the Protection of Civil Rights Act 1955<sup>21</sup> protects people from discrimination on the ground of "untouchability", and the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989<sup>22</sup> aims to prevent atrocities against members of the Scheduled Castes and Scheduled Tribes and to provide for Special Courts for the trial of such offences. Finally, Sections 153A and 153B of the Indian Penal Code<sup>23</sup> criminalise hate speech. Section 153A establishes the offence of promoting enmity between different groups on grounds of religion, race, place of birth, residence and language and doing acts "prejudicial to the maintenance of harmony", whilst Section 153B establishes the offence of making imputations or assertions which are prejudicial to national integration.

11. The protection offered by the aforementioned provisions is piecemeal, to the extent that it only covers certain of the disadvantaged groups who suffer discrimination in India (e.g. persons with disabilities, women, the Scheduled Castes and the Scheduled Tribes) and only in certain areas of life (e.g. employment and personal security). Further, a number of the above provisions have been poorly enforced, allowing the discrimination which they seek to prevent to continue. For example, the Committee on the Elimination of Discrimination against Women has raised concerns regarding the failed enforcement of both the Dowry Prohibition Act 1961<sup>24</sup> and the Domestic Violence against Women (Prevention and Protection) Act 2005.<sup>25</sup> The failure of the Protection of Civil Rights Act 1955 to protect adequately the Scheduled Castes and Scheduled Tribes from discrimination has also been highlighted by the National Human Rights Commission<sup>26</sup> and the Committee on the Elimination of Racial Discrimination.<sup>27</sup> Finally, the Asian Human Rights Commission has raised concerns regarding the failed implementation of the Scheduled Castes and Tribes (Prevention of Atrocities) Act 1989.<sup>28</sup>

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<sup>16</sup> UN Committee on the Elimination of Discrimination against Women, General Recommendation 19: Violence against Women, 11th session, 1992, Para 1.

<sup>17</sup> Dowry Prohibition Act 1961 (Act No. 28 of 1961), available at: <http://wcd.nic.in/dowryprohibitionact.htm>.

<sup>18</sup> The Indian Penal Code (Act No. 45 of 1860), Section 498A, available at: <http://www.netlawman.co.in/acts/indian-penal-code-1860.php>.

<sup>19</sup> *Ibid.*, Section 304B.

<sup>20</sup> The Domestic Violence against Women (Prevention and Protection) Act 2005 (Act No. 43 of 2005), available at: [http://mahilaayog.maharashtra.gov.in/new/pdf/domestic\\_voilence\\_act\\_05.pdf](http://mahilaayog.maharashtra.gov.in/new/pdf/domestic_voilence_act_05.pdf).

<sup>21</sup> Protection of Civil Rights Act 1955 (Act No. 22 of 1955), available at: <http://tribal.gov.in/writereaddata/linkimages/pcract955E2701676142.pdf>.

<sup>22</sup> Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 (Act No. 33 of 1989), available at: [http://indianchristians.in/news/images/resources/pdf/sc\\_and\\_st\\_prevention\\_of\\_atrocities\\_act\\_1989.pdf](http://indianchristians.in/news/images/resources/pdf/sc_and_st_prevention_of_atrocities_act_1989.pdf).

<sup>23</sup> The Indian Penal Code (Act No. 45 of 1860), Sections 153A and 153B, available at: <http://www.netlawman.co.in/acts/indian-penal-code-1860.php>.

<sup>24</sup> Committee on the Elimination of Discrimination against Women, Concluding Comments of the Committee on the Elimination of Discrimination against Women: India, CEDAW/C/IND/CO/3, 2 February 2007, Para 21.

<sup>25</sup> *Ibid.*, Para 20.

<sup>26</sup> Saxena, S., *Report on Prevention of Atrocities Against Scheduled Castes*, National Human Rights Commission, 2004, available at: <http://nhrc.nic.in/Publications/reportKBSaxena.pdf>.

<sup>27</sup> Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: India*, CERD/C/IND/CO/19, 2007, Para 13.

<sup>28</sup> Asian Human Rights Commission, *INDIA: Country's conscience nailed in the gutter of caste*, 28 May 2010, available at: <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-087-2010>.

12. These provisions notwithstanding, the system of legal protection from discrimination is weak, characterized by gaps and inconsistencies. Notably, the country lacks non-discrimination provisions in key fields such as education and healthcare; there is no implementing legislation providing protection from discrimination and promoting equality on grounds of disability, race, religion, sexual orientation, gender identity and political opinion, despite the obligations arising under ICCPR, ICESCR, CERD and CRPD; and there is no legislation providing for the establishment of an independent national agency with responsibility for monitoring, enforcing or promoting the right to equality. The absence of comprehensive anti-discrimination legislation means that India is failing to give effect to its international obligations.

### **Discrimination Issues**

13. Despite the enactment of legislative provisions aimed at protecting certain categories of individuals from discrimination in certain areas of life, a significant number of discriminatory laws remain in force in India which undermine such efforts.

14. Despite constitutional protection under Articles 14 and 15 of the Constitution, **women** are discriminated against through laws governing several areas of their lives. Some personal laws are discriminatory towards women, and many of the provisions result in unequal treatment of women according to the specific customs of their religion. This is particularly the case under the Muslim Personal Law (Shariat) Application Act 1937,<sup>29</sup> the Hindu Marriage Act 1955,<sup>30</sup> the Hindu Minority and Guardianship Act 1956,<sup>31</sup> the Muslim Women (Protection of Rights on Divorce) Act 1986<sup>32</sup> and the Dissolution of Muslim Marriages Act 1939.<sup>33</sup> Restrictions are placed on the ability of women to enter certain forms of employment by Section 66 of the Factories Act 1948,<sup>34</sup> the Contract Labour (Regulation & Abolition) Central Rules 1971,<sup>35</sup> and the Mines Act 1952,<sup>36</sup> which limit the hours during which women are permitted to do certain types of work. In the area of personal security, married women are not protected from rape by criminal law, as section 375 of the Indian Penal Code defines “rape” narrowly so as to exclude marital rape.<sup>37</sup> The Citizenship Act 1955<sup>38</sup> also discriminates against women by restricting the citizenship rights of individuals born to Indian mothers and non-Indian fathers in a manner which is not applied to the citizenship rights of individuals born to Indian fathers and non-Indian mothers.

15. **Lesbian, Gay, Bi-sexual, Transgender and Intersex (LGBTI) people** do not benefit from the protection afforded by Articles 15 and 16 of the Constitution, and evidence suggests that the LGBTI community remains highly vulnerable. “Unnatural offences”, including “carnal intercourse”, is still an offence under Section 377 of the Indian Penal Code<sup>39</sup> despite the landmark decision in the case of *Naz*

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<sup>29</sup> Muslim Personal Law (Shariat) Application Act 1937 (Act No. 26 of 1937), available at: <http://www.jeywin.com/wp-content/uploads/2009/12/Muslim-Personal-Law-Shariat-Application-Act-1937.pdf>.

<sup>30</sup> Hindu Marriage Act 1955 (Act No. 25 of 1955), available at: [http://indianchristians.in/news/images/resources/pdf/hindu\\_marriage\\_act\\_1955.pdf](http://indianchristians.in/news/images/resources/pdf/hindu_marriage_act_1955.pdf).

<sup>31</sup> Hindu Minority and Guardianship Act 1956 (Act No. 32 of 1956), available at: [http://www.law.yale.edu/rcw/rcw/jurisdictions/assc/india/india\\_hindu\\_minor.pdf](http://www.law.yale.edu/rcw/rcw/jurisdictions/assc/india/india_hindu_minor.pdf).

<sup>32</sup> Muslim Women (Protection of Rights on Divorce) Act 1986 (Act No. 25 of 1986), available at: <http://www.gujhealth.gov.in/images/pdf/legis/muslim-women-protectn-of-rts-on-divorce-act-1986.pdf>.

<sup>33</sup> Dissolution of Muslim Marriages Act 1939 (Act No. 8 of 1939), available at: <http://www.sdobishnupur.in/Acts%20and%20Rules/Dictionary/0407.pdf>.

<sup>34</sup> Factories Act 1948 (Act No. 63 of 1948), available at: [http://pblabour.gov.in/pdf/acts\\_rules/factories\\_act\\_1948.pdf](http://pblabour.gov.in/pdf/acts_rules/factories_act_1948.pdf).

<sup>35</sup> Contract Labour (Regulation & Abolition) Central Rules 1971, available at: [http://hrlabour.org/docs/labourActpdfdocs/Contract\\_Labour\\_Central\\_Rules.pdf](http://hrlabour.org/docs/labourActpdfdocs/Contract_Labour_Central_Rules.pdf).

<sup>36</sup> Mines Act 1952 (Act No. 35 of 1952), available at: [http://coal.nic.in/weboflife-minesafety/ma\\_1952.pdf](http://coal.nic.in/weboflife-minesafety/ma_1952.pdf).

<sup>37</sup> The Indian Penal Code (Act No. 45 of 1860), Section 375, available at: <http://www.netlawman.co.in/acts/indian-penal-code-1860.php>.

<sup>38</sup> Citizenship Act 1955 (Act No. 57 of 1955) as amended.

<sup>39</sup> The Indian Penal Code (Act No. 45 of 1860), Section 377, available at: <http://www.netlawman.co.in/acts/indian-penal-code-1860.php>.

*Foundation v Government of NCT of Delhi and Others*<sup>40</sup> in which the Delhi High Court decriminalised the act of sodomy. This has not been followed by the necessary amendment to the Indian Penal Code.

16. Despite the enactment of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995, **persons with disabilities** are still subjected to discriminatory legislative provisions in certain areas of life. For example, the Mental Health Act 1987<sup>41</sup> is discriminatory against persons with disabilities as it provides for the involuntary detention of persons with mental illness in a manner which fails to deal appropriately with issues of capacity and consent. Section 52 of the Copyright Act 1957<sup>42</sup> is arguably discriminatory as it lists those forms of publications which do not constitute breaches of copyright but fails to include reproduction for the purposes of those with visual impairments. This is indirectly discriminatory to the extent that persons with visual impairments are unable to access certain publications as a result of the failure to provide for such an exception.

17. Despite India's obligations under Article 2 of ICCPR and ICESCR, discrimination on the ground of **political or other opinion** is not prohibited under Articles 15 and 16 of the Constitution. The laws of sedition in India are demonstrative of the use of restrictions of freedom of speech to discriminate on the ground of political opinion. Section 124A of the Indian Penal Code criminalises attempts to bring the Government into hatred or contempt "by words, either spoken or written, or by signs, or by visible representation".<sup>43</sup> Section 4(1) of the Indian Press Act 1914 imposes similar restrictions on the expression of opposition opinions.<sup>44</sup>

18. Despite the constitutional protection against discrimination on the ground of **race**, provisions which are discriminatory on the grounds of race and ethnicity are found in several pieces of domestic legislation. The Habitual Offenders Act 1952<sup>45</sup> refers to certain denotified and nomadic tribes for their alleged "criminal tendencies". Further, the Armed Forces (Special Powers) Act 1958<sup>46</sup> provides extraordinary powers (including arrest without warrant, destruction of property and the use of lethal force against anyone breaching laws) to members of the armed forces in "disturbed areas", many of which are dominated by tribal populations. Finally, the Forest Act 1980<sup>47</sup> discriminates against members of the Scheduled Tribes: it fails to meet the requirements of the International Labour Organisation's Convention on Indigenous and Tribal Populations 1957<sup>48</sup> which requires that tribal peoples are only removed from their lands with their free consent and on the provision of equivalent lands as an alternative.

## **Conclusion**

19. The right to non-discrimination is inadequately protected and enforced in India. The above examples show that the legal framework is inadequate in a number of ways, including:

- a. **Discriminatory laws are in force.** The continuing existence in force of laws which discriminate on various prohibited grounds, including gender, sexual orientation, gender identity, disability, political or other opinion and race, contravenes India's obligations under Article 26 of the ICCPR to provide equality before the law and equal protection of the law.

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<sup>40</sup> WP(C) No.7455/2001.

<sup>41</sup> Mental Health Act 1987 (Act No. 14 of 1987), available at: <http://www.disabilityindia.org/mentalact.cfm>.

<sup>42</sup> Copyright Act 1957 (as last amended by Act No. 49 of 1999), available at: [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=128098](http://www.wipo.int/wipolex/en/text.jsp?file_id=128098).

<sup>43</sup> The Indian Penal Code (Act No. 45 of 1860), Section 124A, available at: <http://www.netlawman.co.in/acts/indian-penal-code-1860.php>.

<sup>44</sup> Indian Press Act 1914.

<sup>45</sup> Habitual Offenders Act 1952.

<sup>46</sup> Armed Forces (Special Powers) Act 1958.

<sup>47</sup> Forest Act 1980.

<sup>48</sup> International Labour Organisation, C107 Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, available at: <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C107>.

- b. **There is inadequate legal protection for some categories of persons.** LGBTI persons and persons with disabilities are not protected from discrimination by Articles 15 and 16 of the Constitution. Discrimination is not prohibited on grounds of age or political opinion. The failure to provide legal protection from discrimination for these groups contravenes obligations to provide protection from discrimination under Article 26 of the ICCPR and – in the case of persons with disabilities - CRPD.
- c. **There is insufficient legal protection from discrimination in different areas of civil, cultural, economic, political and social life.** The constitutional protection against discrimination is not translated into implementing legislation and policies, with the effect that disadvantaged groups are inadequately protected in crucial areas of life such as employment or healthcare. The failure to ensure the enjoyment of the rights to work and health without discrimination is a violation of Article 2 of the ICESCR, while failure to enact legislation to provide protection from discrimination contravenes specific obligations under CERD, CEDAW and CRPD.
- d. **Existing legal provisions prohibiting discrimination are inadequately enforced.** It is clear that despite Constitutional and legislative protection from discrimination for some groups, including women and the Scheduled Castes and Scheduled Tribes, discrimination prevails because laws are inadequately enforced.

### **Recommendations**

- 21. India's failure to ensure effective protection from discrimination for all within its territory or under its jurisdiction represents a failure to give effect to its obligations under the ICCPR and ICESCR. Further, the state has failed to meet obligations to enact appropriate legislation to ensure comprehensive protection from discrimination on grounds of gender, race and disability arising under CEDAW, CERD and CRPD respectively.
- 22. ERT therefore recommends that the government of India:
  - a. Undertake a comprehensive review of domestic legislation to identify discriminatory laws and take immediate steps to amend or repeal such laws to ensure compliance with its international obligations.
  - b. Take steps to develop and adopt comprehensive equality legislation and policies. Equality legislation should provide for protection from discrimination on all relevant grounds, in all areas of life governed by law and should provide for the establishment of a national institution to ensure effective implementation and enforcement of the law and develop guidance for good practice in the area of equality.