



# General Assembly

Distr.: General  
4 September 2017

English only

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## Human Rights Council

Thirty-sixth session

11-29 September 2017

Agenda item 6

Universal Periodic Review

### **Written statement\* submitted by the Association for Progressive Communications (APC), a non-governmental organization in general consultative status**

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[18 August 2017]

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\* This written statement is issued, unedited, in the language(s) received from the submitting non governmental organization(s).

GE.17-15278(E)



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## Criminalisation of Online Expression in Asia

The Association for Progressive Communications (APC) and organisations supporting this joint statement express concern over the lack of attention to the shrinking space for human rights online in India during the 3rd cycle of the Universal Periodic Review (UPR).

Despite the explicit recognition by the Government of India of the need and importance of extending free speech guarantees to activities on the internet in the National Report,<sup>1</sup> several issues remain unaddressed. As pointed out in multiple submissions by civil society,<sup>2</sup> significant challenges persist in the exercise of human rights in online spaces for individuals and groups in India.

The Country Team of the OHCHR (UNCT) reported on the application of penal provisions relating to “hate speech”, “sedition” and the use of section 144 of the Criminal Procedure Code to prohibit the rights to assemble and to protest peacefully.<sup>3</sup> The UNCT report went on to discuss and raised concerns about the reduced space for free speech and expression.<sup>4</sup> The shrinking space for the exercise of civil and political rights, and more specifically the rights to expression, assembly and association, also extend to online spaces in India. As noted in the coalition submission to the Universal Periodic Review of India, “Internet Rights, Freedom of Expression (FOE) Online and Freedom of Association and Assembly (FOAA) Online in India”, by Digital Empowerment Foundation, Internet Democracy Project, Point of View, Nazdeek and APC (JS3),<sup>5</sup> in addition to specific cyber and technology laws like the IT Act, provisions in traditional penal laws such as those addressing hate speech, criminal defamation and sedition in the Indian Penal Code (IPC), are used by authorities disproportionately and arbitrarily to shut down dissent and criminalise expression.

The Government of India in its National Report states that “In order to prevent arbitrary use of this power to block content on the internet, the Supreme Court of India has put in place various adequate procedural safeguards such as the right to appeal a blocking decision, and the requirement for reasons in writing for issuing a blocking order.”<sup>6</sup> However, the reality is far removed. For instance, according to a transparency report on requests to block content released by Facebook in December 2015, India was named one of the top countries to request content blocking from the social networking site. The reported requests were received from law enforcement agencies.<sup>7</sup> Google also reports a similar trend with over 1,600 item removal requests from June to December 2015.<sup>8</sup> JS3 observes that the increase in instances

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1 A/HRC/WG.6/27/IND/1 Available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/INIndex.aspx> para 53

2 See Joint Submission 35, submitted by Privacy International, London, UK and the Centre for Internet and Society India, India; Joint submission 3, from the coalition on Internet Rights, submitted by: Digital Empowerment Foundation, Internet Democracy Project, Point of View, Nazdeek and Association for Progressive Communications, New Delhi, India; Access Now; and Internet Democracy project referenced in the Summary of Stakeholders’ submissions on India, A/HRC/WG.6/27/IND/3 Available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/INIndex.aspx> para

3 Joint Submission of India, UN Country Team (UNCT) For the Universal Periodic Review of India, 3rd Cycle para 52

4 Joint Submission of India, UN Country Team (UNCT) For the Universal Periodic Review of India, 3rd Cycle para 53

5 Available at <http://defindia.org/universal-periodic-review-india-human-rights-council-2/>

6 National Report submitted by the government of India, A/HRC/WG.6/27/IND/1, Available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/INIndex.aspx> para 53

7 “India tops list of requests for blocking content on Facebook” Indian Express, April 13, 2014 (<http://indianexpress.com/article/lifestyle/life-style/india-tops-list-of-requests-for-blocking-content-on-facebook/>)

8 <https://www.google.com/transparencyreport/removals/government/IN/>

of website blocking is clearly indicative of the heightening of censorship of online spaces and that often, such blocking is done in an arbitrary manner without following due process.<sup>9</sup>

The Government of India cautioned that the internet has the potential for misuse for inciting violence, spreading rumours and hatred or committing other illegal activities,<sup>10</sup> yet many violations committed by non-state actors against those expressing dissent remain unchecked. We emphasise the need to ensure that only activities that meet international standards in relation to hate speech are restricted, while other forms of limitations must meet the standards of proportionality, legitimacy and necessity as explained in General Comment No. 34. As pointed out in JS3, instead of condemning attacks on free speech, several violations are propagated by elected politicians<sup>11</sup> and ministers<sup>12</sup> perpetrating hate speech against minorities. The Supreme Court has intervened in some of the cases.<sup>13</sup>

Another key issue sidelined in the UPR process related to the indiscriminate use of power by the provincial and central governments to shut down internet and communication services in India. Increasingly, civil society groups and activists are using the internet to mobilise, disseminate information and resources, and campaign online. As noted in JS3<sup>14</sup> several network shutdowns have been imposed in several provinces of India for reasons ranging from public order to preventing students from cheating in exams. The UNCT report has also noted the disruption to normal life as a result of these shutdowns and clampdown on media.<sup>15</sup> Network shutdowns and the negative impact they have on many rights have been recorded in HRC/RES/32/13.

The Government of India has also stated that it has decided to set up the Centralized Monitoring System to automate the process of lawful interception and monitoring of telecommunications<sup>16</sup> and that it believes that its surveillance programme furthers its national security interests, and that these interceptions are carried out through authorisation from senior officials with the existence of a Review Committee to oversee such authorisations.<sup>17</sup> However, as JS3 points out there is no information about checks and balances and there is no legislative or judicial oversight to ensure that human rights are not violated.<sup>18</sup>

The Government of India also noted that it is in the process of legislating on the right to privacy.<sup>19</sup> While there is no explicit recognition of the right to privacy in the Constitution of India, an examination of jurisprudence over the years shows that the right to privacy has been read into Article 21 (right to life) by Indian courts.<sup>20</sup> However, this

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9 JS3 para 33

10 A/HRC/WG.6/27/IND/1, Available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/INIndex.aspx> para 53

11 “In Dadri, BJP legislator Sangeet Som warns: ‘Befitting reply if innocents framed’”, Indian Express, Oct. 5, 2015 (<http://indianexpress.com/article/india/india-news-india/in-dadri-sangeet-som-accuses-up-govt-of-framing-innocent-for-lynching-incident/>)

12 “Dalit Children Deaths: Union Minister VK Singh's 'Dog' Remark Sparks Controversy”, NDTV Online, Oct 22, 2015 (<http://www.ndtv.com/india-news/not-governments-fault-if-one-stones-a-dog-vk-singh-on-dalit-childrens-killings-1235137>)

13 “Hate speech: Supreme Court names Raj Thackeray, Owaisi, Togadia”, Indian Express, April 9, 2013 (<http://indianexpress.com/article/news-archive/web/hate-speech-supreme-court-names-raj-thackeray-owaisi-togadia/>)

14 Paras 47 to 50

15 Para 43

16 Para 54

17 Para 55

18 JS3 paras 34-36

19 Para 55

20 Right to Life and Liberty

interpretation has now been challenged by the government in a writ petition, Justice K.S Puttaswamy & Another vs. Union of India and Others, with the Attorney General of India arguing in the Supreme Court that the right to privacy cannot be read into the Indian constitution. Intelligence agencies in India are exempt from transparency enhancing laws like the Right to Information Act, and insist on remaining exempt from any attempts at legislative protection of privacy like the Privacy Bill of 2013.<sup>21</sup>

While a number of recommendations have been made by states to safe guard the rights of women, many barriers remain for women and sexual minorities to use the internet /ICTs to exercise their rights, including gender-based violence online.<sup>22</sup>

It is with great disappointment that we note that the Government has failed to accept the recommendation made by Sweden to uphold freedom of expression, assembly and association on the internet<sup>23</sup> and the recommendation made by Liechtenstein to ensure that surveillance meets international human rights standards.<sup>24</sup> In the second cycle of the Universal Periodic Review (UPR), in 2012, India had received two recommendations on human rights online: one recommendation on taking measures to ensure that any restrictions on the right to freedom of expression on the internet are in line with international standards and obligations (no.126) and one recommendation on ensuring a safe environment for journalists (no. 127). While the recommendation on safety of journalists was accepted in revised form, the recommendation on restrictions on the internet was not accepted by the GoI.<sup>25</sup>

We call on the Government of India to consider the following recommendations to uphold rights of the people online:

1. Ensure that restrictions placed on the exercise of human rights including the right to freedoms of expression, assembly and association on the internet need constitutional and international guarantees.
2. Ensure removal of restrictions for expression of political and religious dissent without the fear of persecution.
3. Ensure that a comprehensive legislation is put in place to provide strong protections of the right to privacy.
4. Immediately end the use of section 144 of the IPC to justify network shutdowns in the name of law and order, as such shutdowns negatively affect access to information, transfer and crucial communication services in the area, in addition to emergency humanitarian services.
5. Take steps to respect, promote and protect full access for all women, particularly in contexts where non-legal restrictions are imposed on access to the internet.

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21 (2014) 6 SCC 433

22 JS3 paras 51-61

23 Draft report of the Working Group on the Universal Periodic Review, A/HRC/WG.6/27/L.8 available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/INIndex.aspx> - 5.131. Ensure that any measure limiting freedom of expression, assembly and association on the internet, is based on clearly defined criteria in accordance with international law including international human rights law (Sweden)

24 5.145. Bring all legislation concerning communication surveillance in line with international human rights standards and especially recommends that all communication surveillance requires a test of necessity and proportionality (Liechtenstein)

25 Report of the Working Group on the Universal Periodic Review: India, 2012, A/HRC/21/10, available at: <http://daccessdds-ny.un.org/doc/UNDOC/GEN/G12/151/08/PDF/G1215108.pdf?OpenElement>

We further implore all States to pay greater attention to the protection and promotion of human rights in the online environment, as well as the violation of human rights online, when reviewing the State in the UPR process and make necessary recommendations.

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