

Submission of the Commonwealth Human Rights Initiative (CHRI) to National Human Rights Commission (NHRC) for the National Consultation for 3rd Universal Periodic Review of India

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The Commonwealth Human Rights Initiative (CHRI) is an independent, non-partisan, international non-governmental organisation, mandated to ensure the practical realisation of human rights across the Commonwealth. CHRI was founded in 1987 by the Commonwealth professional associations. It is headquartered in New Delhi, India and has offices in Accra, Ghana and London, UK. CHRI is an NGO in Special Consultative Status with the Economic and Social Council of the United Nations.

Full information can be found at: www.humanrightsinitiative.org

This CHRI submission to the National Consultation of National Human Rights Commission of India (NHRC) for India's 3rd Universal Periodic Review (UPR) includes information on the following areas: overcrowding of jails, strengthening legal aid services, custodial violence, access to prison, access to information, transparency in criminal justice, sedition law etc.

ACCESS TO JUSTICE	
1.	OVERCROWDING
	<p>Indian prisons are overcrowded by more than 17%¹. In some states it is more than 100%. Undertrials form two-third of this prison population. A significant reason for the high number of pre-trial detainees can be accorded to arbitrary arrests by police as well as lack of regular review of undertrial cases.</p> <p>a) Mechanism- Undertrial Review Committee The Supreme Court in the <i>Re Inhuman Conditions in 1382 prisons</i> writ petition in April 2015 directed National Legal Services Authority (NALSA) along with Ministry of Home Affairs and State Legal Services Authority to ensure that Undertrial Review Committees are constituted in every district in India to review cases eligible for release. CHRI's national study shows that as of November 2015, only 98 meetings held in 26 States across the country followed the complete mandate as laid down by the Supreme Court. Moreover, the number of released are not being tracked by the committees or the State Legal Services Authority and there are no standard reporting and monitoring formats for the committees to function effectively.</p> <p>b) In order to address the issue of arbitrary/unreasonable arrests, the legislature through Section 41A of Code</p>

¹ Prison Statistics India 2014, NCRB.

	of Criminal Procedure, 1973 and judiciary in various judgements, latest being <i>Arnesh Kumar v State of Bihar</i> ² , have laid down clear guidelines on the role and responsibility of the police officials and magistrates. However as the safeguards are neither followed nor checked, there is an increase in pre-trial detention and thus overcrowding.
2.	STRENGTHENING LEGAL AID SERVICES
	<p>Early and Effective Access to Legal Aid are extremely important to ensure equal access to justice. Out of the total beneficiaries of schemes under the Legal Services Authority Act, 1987, persons in custody only form 3%.³</p> <p>a) Ensuring legal aid for persons in custody and ensuring quality of legal aid services rendered – CHRI’s studies in Rajasthan⁴ and West Bengal⁵ have shown that Legal Aid Clinics are not in place in all jails. Where constituted, they lack trained paralegal volunteers and jail visiting lawyers who are mandated to timely identify prisoners who do not have legal representation. Also, NALSA (Free & Competent Legal Services) Regulations 2010 provide for Monitoring Committees which are responsible for tracking the quality of legal representation of panel lawyers. These committees are not in place and where constituted, they do not have a dedicated staff to maintain registers to record and review the daily progress of legal aid cases. The condition of these mechanisms in the rest of the country is not very different as evidenced in the experience of several other civil society groups and legal professionals on the ground.</p> <p>b) Remand Advocates, whose responsibility is to oppose unnecessary remand have not been appointed in each court in most States. The same has been envisaged in the NALSA model scheme.</p> <p>c) The recent amendment to Section 41 of the Code of Criminal Procedure, 1973, (S.41D) guarantees to an arrestee the right to legal representation during interrogation. However NALSA has not issued any guidelines to ensure legal representation during interrogation at police station so that this right can be exercised.</p>
3.	CUSTODIAL VIOLENCE
i.	RATIFICATION OF THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT (UNCAT)
	<p>India has not finalised the ratification of UNCAT. The Prevention of Torture Bill as amended by the Parliamentary Select Committee in 2010 has not been tabled in Parliament; in fact it has never been released into the public domain. The original Prevention of Torture Bill lapsed in 2014.</p> <p>In 2015, the Ministry of Home Affairs replied to a starred question in Parliament to say as the original Bill lapsed in 2014, the government is considering bringing in amendments to the Indian Penal Code, presumably to define and codify the offence of torture. It is of serious concern that there was no mention made in the Ministry’s response to the redrafted Prevention of Torture Bill by the Parliamentary Select Committee.</p> <p>CHRI strongly cautions against piecemeal amendments to criminal law as an alternative to holistic torture prevention legislation which is fully compliant with UNCAT. A piecemeal approach will not be effective to either reduce torture or provide proper redress to victims.</p> <p>CHRI recommends the MHA should release the Prevention of Torture Bill as amended by the Parliamentary Select Committee into the public domain. This must be the basis for legislation. Before this is introduced in Parliament, the MHA must ensure a process of pre-legislative consultation on this Bill by posting it on its website and giving sufficient time for public comments. It must be ensured that any remaining lacunae in this</p>

² Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273.

³ Annual Report 2015, The Supreme Court of India.

⁴ Legal Aid for Prisoners : Status Report on Implementation of three schemes in Rajasthan (<http://www.humanrightsinitiative.org/publication/legal-aid-for-prisoners-status-report-on-implementation-of-three-schemes-in-rajasthan#sthash.5Fow61bb.dpuf>).

⁵ Legal Aid Services : In Correctional Homes Of West Bengal 2015 (<http://www.humanrightsinitiative.org/publication/legal-aid-services-in-correctional-homes-of-west-bengal-2015#sthash.DvH0Fp2l.dpuf>).

	Bill in terms of non-compliance with CAT is addressed and repaired.
ii.	IN POLICE STATION
	<p>There have been more than 300 deaths in police stations in India in the last 3 years. Insertion of Section 41D to the Code of Criminal Procedure, 1973, ensuring the presence of a lawyer can deter the possibility of violence during interrogation at police station. However without any mechanism/guidelines by NALSA to ensure access to legal aid at police station/during interrogation, Section 41D exists just on paper.</p> <p>Also, the presence of CCTV cameras in police stations, as recommended by the Supreme Court in the 2015 order in the <i>D.K. Basu v State of West Bengal</i> case, would go a long way in reducing the possibility of custodial violence. However, the same has not been implemented in most police stations yet.</p>
iii.	IN PRISON
	<p>There have been 4644⁶ deaths in prison in the last 3 years. 436 of them have been un-natural. In order to keep a check on the violations inside custody, it is important to make prisons more open and transparent.</p> <p>a) Mechanism- Board of Visitors</p> <p>Board of Visitors (BoVs) is composed of seniors from the local administration, judiciary and legislative assembly and people of good standing from the community. It is mandated to visit the jails regularly, hold meetings and report to the higher authorities. CHRI's 2015 national study⁷ that focused on BoV found that not even 1% of the jails are monitored according to the law. Only 4 states had BoV constituted in all their jails. Besides the existence of outdated jail manuals, the dismal state of prison monitoring could also be attributed to the non-ratification by States of 2011 MHA advisory that lays down standards on the appointment, functioning and training of visitors for making the prisons open, transparent and accountable.</p> <p>b) The use of solitary confinement in Indian prisons is well known and reported in the media. While there are rules mandated to regulate the use of solitary confinement, the experience of ex-prisoners reveals that these rules are not followed in practice.</p> <p>c) There has been consistent and enormous shortages in guarding staff and correctional staff.</p> <p>d) There is an absence of a complaints authority to check the impunity of prison officials.</p>
4.	NON PRODUCTIONS OF PRISONERS IN COURT
	<p>It is the responsibility of the prison to ferry undertrials to court on their date of hearing. The police authorities have to provide guards to escort these prisoners from the prison to the court and back. CHRI's studies⁸ and PIL in Rajasthan have shown that during 2015, more than 40% of undertrials were not taken to court for their hearing, a clear violation of their fair trial rights. The reason for this non-production is the lack of investment of the state in employing adequate police guards to take prisoners to court. Media reports also show that undertrials in other parts of the country have protested about the fact that they have not been taken to court regularly.</p> <p>Additionally, our research in West Bengal indicates that prisoners even though taken to court on hearing dates, are not physically produced before magistrates even at the time of first production. Infrastructural and</p>

⁶ Prison Statistics India 2012, 2013 and 2014, NCRB.

⁷ Looking Into the Haze - A Study on Prison Monitoring in India

(<http://www.humanrightsinitiative.org/publication/looking-into-the-haze-a-study-on-prison-monitoring-in-india#sthash.eo9DLWsm.dpuf>).

⁸ The Missing Guards - A Study on Rajasthan's Court Production System –

(<http://www.humanrightsinitiative.org/publication/the-missing-guards-a-study-on-rajasthans-court-production-system#sthash.EpwP732l.dpuf>)

	caseload are among the many reasons cited by judicial officers for such a situation.
5.	ACCESS TO PRISON
	In July 2015, MHA came up with an <u>advisory</u> ⁹ which poses unreasonable restrictions on the civil society to access prisons making an already opaque system more closed. This advisory is incongruent with MHA's own 2011 advisory on prison visits and Supreme Court. The little transparency gained through efforts of the media, oversight bodies and information commissions is unfortunately being lost as experienced in the restrictions faced by several civil society groups across the country.
6.	FOREIGN NATIONAL PRISONERS
	<p>Foreign national prisoners, after the completion of their sentence are to be repatriated/deported to their home country. CHRI has dealt with multiple cases where these prisoners have had to spend months, and often years in detention after the completion of their sentence due to delay in their nationality verification. The delay is a result of lack of timely consular access provided to prisoners which should ideally be at the time of admission to a prison (A. 36, Vienna Convention on Consular Relations, 1963). In an absolutely contrasting practice, consular access is generally facilitated after the completion of sentence deferring the actual release of such a prisoner and leading to overstaying often in a prison itself since most States do not have separate detention centres for housing foreign prisoners. For instance, West Bengal that houses second largest population of foreign prisoners still does not have a detention centre. Besides aggravating the vulnerability of such prisoners, it also adds to overcrowding in prisons.</p> <p>Another important factor is the lack of implementation of Repatriation of Prisoners Act, 2003 that allows a convicted foreign prisoner to be transferred to his/her home country for spending the rest of their sentence. Till December 2013, only 6 prisoners were transferred from Indian prisons to UK, France and Israel (Lok Sabha Unstarred Question No. 6599). Even though India signed an agreement with Bangladesh in 2010 under the Act, not even a single Bangladesh national has been transferred till date knowing well that Bangladesh nationals form the highest proportion of the foreign prisoner population (Prison Statistics 2014, National Crime Record Bureau). The debilitating provisions of the Agreement that require at least 6 months of sentence left to be served at the time of transfer impedes the implementation in cases of immigration offenders who are mostly sentenced for over a year out of which 6-8 months are set off against the time spent as an undertrial leaving just about a few more months of imprisonment. Making the situation worse, the outdated jail rules, policies and procedures are completely negligent in taking care of the need for family contact and communication of such prisoners who are additionally vulnerable owing to their alienation from their homeland and native law and language.</p>
7.	TRANSPARENCY AND INTERLINKAGES IN THE CRIMINAL JUSTICE SYSTEM
	<p>There is poor compliance to Section 4(1) (b) of the Right to Information Act, i.e Proactive Disclosure of the information relating to the functioning on the oversight mechanisms, legal aid machinery, information about the criminal justice actors and participants of the criminal justice system.</p> <p>Also there is a lack of use of technology to ensure inter-linkages in the functioning the criminal justice actors who all collectively deal with/are responsible for persons in the different stages of judicial proceedings.</p>
8.	STRENGTHENING POLICE COMPLAINTS AUTHORITIES

⁹ Guidelines for allowing visit inside jails by individuals/ NGOs/ Company/Press for the purposes of undertaking research, making documentary or interviewing the inmates, etc.

	<p>The Supreme Court of India ordered the establishment of Police Complaints Authorities (PCAs), in all states and Union Territories, in its 2006 judgment in the Prakash Singh case. PCAs are mandated to inquire into public complaints against the police, including the most serious of death, torture and rape in custody. They are to be set up at both state and district levels, and to be made up retired judges as Chairpersons and a mix of retired government and police personnel and civil society as members. To date in 2016, there are only nine Police Complaints Authorities operational on the ground. Kerala is the only state in which Complaints Authorities are operational at both the state and district levels, though some others are now beginning to follow suit. In four of the currently operational PCAs, serving police and government officials are adjudicating members (as laid down in the Police Acts of those states). Serving officials as members not only stands in violation of the Court's directive, it also defeats the purpose of an independent police complaints mechanism. Only one operational PCA has independent investigators on staff, and only one PCA operates according to notified Rules of Procedure. In spite of some sincere individual initiatives by some of the PCA Chairs, as they are currently established and designed, the PCAs are struggling to be effective models of police oversight.</p>
9.	ACCESS TO INFORMATION
	<p>Since 2005, more than 50 instances of murder have been reported of users of Right to Information law for exposing corruption and wrongdoing and more than 250 men and women have survived physical assault and mental harassment from vested interest for demanding corruption free governance, social justice and protection of human rights for most vulnerable¹⁰. Though the Parliament enacted the whistle blowers protection law in 2014, it has failed to put in place a comprehensive mechanism for protecting human rights defenders and whistle blowers. Rather than implementing the law, the government is pressing retrograde amendments which if implemented, will effectively discourage any potential whistle blower especially citizen whistle blower to come forward for exposing corruption and wrongdoing in government.</p>
10.	SEDITION LAW
	<p>The recent spate in instances of invoking sedition laws in the country have raised important questions on the undemocratic nature of sedition laws. Sedition laws include not just Section 124A of the Indian Penal Code, 1860, but also Section 95 of the Code of Criminal Procedure, 1973, which refers to Section 124A; Prevention of Seditious Meetings Act, 1911; and Section 2(o) (iii) of the Unlawful Activities (Prevention) Act, 1967 which refers to 'disaffection'. The law is particularly used to harass and intimidate media personnel, human rights activists, political activists, artists, and public intellectuals despite Supreme Court rulings¹¹ narrowing its application. These instances show that the very existence of sedition laws in the statutes is a threat to democratic values.</p>

¹⁰ NHRC's Updated List of Human Rights Defender Cases accessible on its website at: http://nhrc.nic.in/Documents/HRD_CASES_2013_09.pdf

¹¹ Kedar Nath vs. State of Bihar (1962); Also in Balwant Singh and Another vs State Of Punjab case (1995), the Supreme Court told the police to not to use Section 124A of the IPC without proper application of mind.