



Submission of Commonwealth Human Rights Initiative (CHRI) for the 2012 Universal Periodic
Review of India
28 November 2011

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Access to Justice in India

Word count: 2773

Introduction

1. The deteriorating ability of people to access justice requires the Government of India's urgent attention. Rights without effective and available remedies have little meaning.
2. On paper, the Indian Constitution guarantees fundamental rights and freedoms. Progressive legislation also effectuates these guarantees. Long-established institutions exist to dispense justice and provide remedies at all levels. In addition, there exist a plethora of laws targeted at vulnerable groups and special institutions designed to advantage the disadvantaged.
3. In practice, however, the increasing dysfunction of the criminal justice system has become a major factor in perpetuating rights violations. Nonfeasance, misfeasance and malfeasance by agents of the state, along with measures of impunity built into the system, combine to ensure that violations are frequent, egregious and continuous. Resistance to reform compounds the situation.
4. This submission looks at selected aspects of the dysfunction of the criminal justice system by focusing on the police, judiciary and prisons. It concludes by examining India's implementation of selected recommendations from its last review in 2008.

Police

5. Since independence, despite several fulsome and well-grounded recommendations to reform the police, no significant changes have been made to transform the organisation or culture of policing.¹ Accountability of the police remains marginal and immensely difficult for citizens to access and enforce in India. There is visible resistance to all efforts to strengthen the oversight regime.
6. Each Indian State/Union Territory has its separate police force, governed by state-specific Police legislation. All such laws are modelled closely on **the colonial Police Act of 1861**, which designed a strongly hierarchic force, closely bound to those in power, oppressive and intolerant of dissent, and meant to be deployed by the erstwhile colonial regime to police subjects in the subcontinent.
7. **Despite a range of safeguards, routine violations of law and human rights typify police practice.** Custodial torture, illegal detentions, hostage taking and illegal arrests are frequently reported but often go unpunished. The prosecution of rights violations, corruption, illegal actions or neglect and abuse of power by police officers is made doubly difficult by the way in which protections at law are used and abused. This is with specific reference to the requirement in Section 197 of the Code of Criminal Procedure,

¹ The most comprehensive recommendations for systemic reform of the police in India are contained in eight reports produced by the National Police Commission (NPC) from 1979-81. The NPC was an autonomous Commission constituted to recommend systemic changes to the organisation and functioning of the police, following police excesses committed during the Emergency. The NPC also drafted a Model Police Bill to replace the 1861 Police Act. None of these recommendations have been implemented to date, and at the central level, the Police Act of 1861 remains in force. Please find the full reports of the NPC at the following link:<http://bprd.nic.in/index3.asp?sslid=407&subsublinkid=134&lang=1>.

1973 for prior sanction from the government to prosecute any offences committed by public servants in the course of “official duty”. Prosecution of public servants (including police) has become almost impossible as sanction is never granted, or its granting is unduly delayed. This, in turn, has created a culture of impunity. The ‘prior sanction’ requirement continues to apply with respect to all offences, even though all allegations of torture, for instance, indisputably fall outside the scope of Section 197, as no act amounting to torture can be connected to “official duty”.

8. Recent history confirms the **reluctance to bring about systemic reform** and, consequently, stronger accountability. After ten years of litigation, in 2006, the Supreme Court of India laid down directives which, if holistically applied, were designed to kick start the process of reform. The Court also advised the passing of new Police Acts to ensure the incorporation of the Court’s directives into legislation and provide an opportunity to modernise police legislation in its entirety, at both the state level and the Centre. Six years later, despite monitoring by the Supreme Court, no state or union territory (including the capital territory of Delhi which comes directly under the Home Ministry) has fully implemented the seven directives. A few have implemented some directives partially, but others have resisted all attempts to create beneficial change.² The greatest resistance to change concerns directions that aim to delink police from illegitimate political interference and go toward increasing police accountability.
9. Thirteen of twenty-eight Indian states have passed new Police legislation. The Acts do great injustice to the Court’s directives. The very problems the directives sought to address are now being given statutory sanction. Certain discernible trends emerge across the new Police Acts, which clearly point to the executive seeking unilateral control over the police, and the total dilution of independent oversight over the police. Illustratively, state governments are using Police Acts to:
 - create special security zones wherein police are afforded absolute power without any checks;
 - legalise direct appointment of state Police Chiefs by the executive, doing away with checks and balances ordered by the Court in the form of objective selection criteria and an independent selection panel; and
 - subvert the independence of new police complaints bodies³ through direct appointments with no independent selection process leading to excessive politicisation, absence of independent investigators, and little support for enforcement of their findings.
10. To date **only eight states have functional Police Complaints Authorities. Even these eight Authorities are ridden with flaws.** Their composition and membership does not ensure any independence, their powers are diluted and they remain starved of funds. The remaining states have these Authorities only on paper or have chosen to ignore the Court’s directive.

² A summary of national-level compliance with the Court’s directives, up to October 2010, is available here: http://www.humanrightsinitiative.org/programs/ai/police/Seven%20Steps%20to%20Police%20Reform_OCTOBER%202011.pdf.

³ Called Police Complaints Authorities, these bodies have the mandate to inquire into the most serious complaints against the police – namely death, torture, and rape in police custody. The seriousness of the complaints falling under this mandate demands fair and impartial conduct of inquiries, and independence from the police. Yet, in one state, serving police officers are members of the Complaints Authority, entirely defeating any semblance of independence. The Authorities are mired in excessive delay, and have proved ineffective at strengthening police accountability.

11. The non-willingness to strengthen accountability is further illustrated by the **failure on part of the Government of India (GOI) to pass an anti-torture law.** **Recommendation 1** from India's 2008 UPR called on the GOI to expedite the ratification of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). Despite having signed UNCAT in 1997, and strong evidence of the widespread practice of torture in India, specific legislation has not been passed. A Prevention of Torture Bill, passed by the lower house of Parliament in 2010, had to be referred back to a Parliamentary Select Committee for further scrutiny after a civil society campaign pointed out that the Bill was in total non-conformity with UNCAT. In December 2010, the Select Committee released a strengthened version of the Bill, but this has not been re-introduced in Parliament. Since then, the Ministry of Home Affairs has declined to comment on the Select Committee's alternate Bill or give any indication of its willingness to ensure that the Committee's Bill, without dilution, is tabled in Parliament.

12. Recommendations to the GOI

- Table and pass the Select Committee's Draft of the Prevention of Torture Bill with no dilution or any further delay.
- Undertake police reforms in the spirit of the Court's orders in the 2006 Supreme Court judgement and along the lines of recommendations made by the National Police Commission.

Judiciary

13. In 2010, India experienced a **shortage of 3457 judges at the High and lower court levels – a vacancy rate of 19%.** At the high court level in 2010, 287 seats were vacant out of 895 sanctioned positions and at the lower court level 3,170 out of 17,151 sanctioned positions were vacant. The shortage is worsening. There was an 8% increase in vacancies at the high court level and a 2% increase at the lower court level over the previous year. In 1987, the Indian Law Commission recommended a ratio of 50 judges for every million people,⁴ but over 20 years later in 2010, the ratio was still only approximately 17 judges per million people.⁵

14. The shortage has ensured that delays are getting longer and that the petitioner, accused and victim are finding remedies harder to come by. In 2010, there were more than **32 million cases pending before Indian courts**, an increase of more than 830 thousand over the previous year.⁶ In 2010, there were over 54,500 cases pending in the Supreme Court, 4,200,000 cases pending in India's 21 high courts (an increase of 150,000 cases over the previous year) and nearly 28 million cases pending in lower courts across the country (an increase of more than 700,000 cases over the previous year). According to government statistics, nearly 16 million persons (including those from previous years)

⁴ Law Commission of India, *One Hundred Twentieth Report on Manpower Power Planning in Judiciary: A Blueprint*, July 1987, available at: http://lawcommissionofindia.nic.in/old_reports/rpt120.pdf.

⁵ Bar and Bench, *Pending Litigations 2010: 32,225,535 pending cases; 30% Vacancies in High Courts: Government increases Judicial infrastructure budget by four times*, 3 June 2011, available at: <http://barandbench.com/brief/2/1518/pending-litigations-2010-32225535-pending-cases-30-vacancies-in-high-courts-government-increases-judicial-infrastructure-budget-by-four-times->

⁶ Exact numbers: 32,225,535 in 2010 and 31,392,453 in 2009. Source: *ibid*.

were awaiting trials for crimes under the Indian Penal Code in various criminal courts during 2010 (an increase of 3.3% over the last year).⁷

15. **Pendency of cases has worsened markedly over the past decade.** Arrears have increased by 148% in the Supreme Court, 53% in High Courts and 36% in subordinate courts.⁸ No effective solutions have been put in place to stem the decline. Experiments with 'fast track courts' have failed. In the state of Gujarat, for instance, the 2002 riot cases were all tried in fast track courts. To date, nine years after the riots, there are some cases still ongoing in these fast track courts.
16. The High Courts and the Supreme Court are where most writs for the enforcement of fundamental rights are decided. **Delays in these courts essentially defeat justice.** Delays percolate down to the subordinate judiciary, which is the backbone of the judicial system and carries the heavy burden of fulfilling the public's expectation of fair and speedy justice. A glaring example of delayed justice is the court verdict in the Bhopal gas tragedy case – the world's worst industrial disaster, which killed over 15,000 people. In 2010, at the end of a 26-year legal battle, the verdict failed to provide any relief to affected families. Other glaring examples can be found in cases arising out of the Gujarat communal riots that took place in 2002 – many are still pending. The very high profile murder of Parliamentarian Ehsan Jafri during the riots is still winding its way through courts. For almost 10 years, Mr Jafri's wife has been fighting for justice. The lack of easy, accessible remedies is most evident in these cases.

17. Recommendations to the GOI

- Make serious efforts to reduce the pendency of cases.
- Prioritise the appointment of judges at all levels in order to urgently reduce vacancies.

Prisons

18. Sixty-six percent of India's prison population are those awaiting trial,⁹ with periods of pre-trial detention varying from three months to over five years.¹⁰ Courts are lax in releasing such prisoners on bail. Recognising that long overstay are a reality, statutory safeguards¹¹ have been introduced to check prolonged detention periods. These would help in reducing time spent in pre-trial detention if consistently implemented by the courts. However, the judiciary has failed in its oversight function.

⁷ Exact number: 15,885,237. Source: National Crime Records Bureau, *Arrests and Trials - 2010*, available at: <http://ncrb.nic.in/CII2010/cii-2010/Chapter%2012.pdf>.

⁸ PRS Legislative Research, *Vital Stats: Pendency of Cases in Indian Courts*, July 6 2011, available at: <http://www.prsindia.org/administrator/uploads/general/1310014291~~Vital%20Stats%20-%20Pendency%20of%20Cases%20in%20Indian%20Courts%2004Jul11%20v5%20-%20Revised.pdf>.

⁹ Of the total prison population of 376,969 prisoners in 2009, 250,204 were pre-trial detainees. Source: National Crime Records Bureau, *Inmate population and overcrowding in prisons - 2009*, available at: <http://ncrb.nic.in/PSI2009/CHAPTER-2.pdf>.

¹⁰ 2,422 undertrials were detained in jails for 5 years or more. Source: National Crime Records Bureau, *Period of Detention of Undertrial Prisoners – 2009*, available at: <http://ncrb.nic.in/PSI2009/CHAPTER-6.pdf>.

¹¹ Code of Criminal Procedure. Sections 167, 436, 436A and 437 allow an accused to be released on bail in cases of delay in commencement or finalization of trial.

19. Though India's incarceration rate is lower than most other countries, its **pre-trial prison population is one of the highest in the world.**¹² Prison overcrowding is another serious concern. Nationally, prisons in India are 122% overcapacity. The extent of overcrowding is not uniform in all states. Prisons in the state of Chattisgarh are overcapacity by 232 percent¹³ and in Uttar Pradesh by about 197 percent.¹⁴ Overcrowding brings with it a denial of health rights, poor sanitation and high prevalence of disease.
20. Oversight within prisons is written in the law. Established safeguards ensure there is periodic review of long stays, over stays, prison conditions and grievances of prisoners. However, these **oversight mechanisms have failed in most states.** An important oversight mechanism is the Board of Visitors – official and non-official – which exist to monitor all aspects of prison functioning. Statutory non-official visitors are to be appointed in every state in all prisons, yet this is not a reality. Even where functional non-official visitors are appointed, they are often affiliated to the ruling party, appointed as patronage, are untrained, are unaware of their roles and seldom visit prisons. Though their tasks are well defined in the prison rules in most states, they fall short of creating an effective oversight mechanism. Illustratively, in the state of Rajasthan, the government stopped nominating non-official visitors in January 2009. The appointment process was resumed in February 2011 after severe criticism from civil society groups. However, appointments were made in only 62 of the 108 prisons.¹⁵
21. **Periodic Review Committees are important oversight mechanisms** mandated to ensure that prisoners awaiting trial do not overstay or remain behind bars except for the barest minimum duration. These Committees are headed by the District Judge, and include the officer-in-charge of prisons and representatives of the District Magistrate, the Superintendent of Police and the Probation Department. Such committees have been set up in a number of states. However, **in most states they remain defunct.** For example, in Rajasthan, committee meetings are not convened periodically, there is lack of coordination between committee members, cases that come up for review are picked up randomly, and there is little adherence to rules laid down by these Committees. They fail to deliver their mandate as a result.¹⁶
22. The National Human Rights Commission and women's commission have made frequent reports on prison conditions¹⁷ and found **health and living conditions deplorable.** Illustratively, in Madhya Pradesh, out of the total 147 sanctioned posts of medical

¹² International Centre for Prison Studies, *Entire World – Pre-trial detainees/remand prisoners (percentage of the prison population)*, available at:

http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=wb_pretrial.

¹³ In the state of Chhattisgarh, the prison capacity was 5219 in 2009, but the prisons held 12,142 inmates. Source: National Crime Records Bureau, *Inmate population and overcrowding in prisons - 2009*, available at: <http://ncrb.nic.in/PSI2009/CHAPTER-2.pdf>.

¹⁴ In the state of Uttar Pradesh, 83,805 inmates were held in prisons meant to accommodate 42,527. Source: National Crime Records Bureau, *Inmate population and overcrowding in prisons - 2009*, available at: <http://ncrb.nic.in/PSI2009/CHAPTER-2.pdf>.

¹⁵ Commonwealth Human Rights Initiative, *Monitoring Prisons: A Visitor's Guide*, available at http://www.humanrightsinitiative.org/publications/prisons/monitoring_prisons_a_visitor's_guide.pdf.

¹⁶ Commonwealth Human Rights Initiative, *Undertrials Waiting for Justice: An Analysis of the Working of Rajasthan's Periodic Review Committees* (unpublished).

¹⁷ National Human Rights Commission, *Minutes and Recommendations of the National Seminar on 'Prison Reform'*, New Delhi, 15 April 2011, available at: <http://nhrc.nic.in/Documents/Minutes%20&%20Reco%20Prison%20Reform.pdf>.

officers, 135 are lying vacant and in the absence of ambulances, inmates are taken to hospitals on motorcycles along with escorts.¹⁸

23. A large number of **foreign nationals** find themselves stranded in Indian prisons. These are Bangladeshi or Pakistani immigrants who have overstayed their visas or illegally entered the country. Due to the ambiguity in repatriation procedures these persons continue to be detained in prison despite having completed their prison sentence. Illustratively, in West Bengal, about 480 Bangladeshi prisoners, accompanied by 112 children, were awaiting repatriation at the time of writing. In the absence of established procedure on deportation or repatriation, such prisoners are occasionally pushed back across the Bangladeshi border.

24. Recommendations to the GOI

- “Bail not jail” is a rule laid down and frequently reiterated by the Supreme Court of India. The judiciary must be more liberal in the implementation of this legal principle and ensure release on bail and parole.
- Strengthen established statutory oversight mechanisms to check overstays and examine prison conditions.

Regarding the recommendations accepted by India during its last UPR

25. Despite the inaccessibility of domestic remedies, the **GOI has been averse to allowing access to international remedies for domestic human rights violations**. This is exemplified in its response to UPR **recommendation 6**, which urged India to consider signing and ratifying OP-CEDAW.¹⁹ The GOI responded by saying that there are effective domestic legal and constitutional frameworks to address individual cases of human rights violations within India. The existence of domestic remedies is not disputed, but these remedies are few and far between and increasingly difficult to access. Despite this inaccessibility, no action has been taken by the government to sign and ratify the Optional Protocol.

26. In response to **recommendation 4**, India noted that it was committed to “continue its *constructive* engagement with international human rights bodies and relevant stakeholders”. **While India has engaged with international human rights mechanisms, its engagement has not been constructive**. India failed to live up to its 2007 election pledge to the Human Rights Council, in which it promised to work to make the Human Rights Council a “strong, effective and efficient body capable of promoting and protecting human rights and fundamental freedoms for all”. Since its first UPR in 2008, India has played a negative role at the Council, regularly voting to shield rights-abusing regimes (such as Sri Lanka and Myanmar) from international scrutiny. In another example of non-constructive engagement, India recently foiled efforts to strengthen the Commonwealth of Nations’ fundamental values of human rights and democracy. India opposed certain urgent reforms proposed by an Eminent Persons Group, one of which would have established a Commonwealth Commissioner on Democracy, the Rule of Law and Human Rights to monitor the compliance of Member States with Commonwealth values.

¹⁸ *Ibid.*

¹⁹ The Optional Protocol includes an individual complaint mechanism for CEDAW, to which India is a party.

27. CHRI commends India for extending a standing invitation to the Special Procedures of the UN Human Rights Council, as it was urged to in **recommendation 14** during its 2008 UPR.²⁰ Despite this positive move, **India has a poor history of inviting the Council's Special Procedures to visit.** While the Government should be commended for inviting the Special Rapporteur on HRDs in January 2010 and allowing her to access to all regions of the country, there are 11 pending requests from Special Procedures mandate holders, including a request from the Special Rapporteur on Torture, which dates back to 1993.²¹ Indeed, **recommendation 15**, that India should receive the Special Rapporteur on Torture as soon as possible, has not been complied with. Other **visits requests have gone unanswered for many years**, such as, for example, the requests from the Special Rapporteur on extrajudicial killings (pending since 2000 despite a number of reminders and follow-ups), the Working Group on enforced disappearances (pending since 2005), and the Working Group on arbitrary detention (pending since 2004).

28. Recommendations to the GOI

- Take immediate action to sign and ratify OP-CEDAW.
- Work towards making countries accountable for human rights violations at international human rights fora.
- Taking advantage of its standing invitation to the Human Rights Council's Special Procedures, clear the backlog and invite all waiting Special Procedures to India before the country's next UPR.

²⁰ Office of the United Nations High Commissioner for Human Rights, *Standing Invitations*, available at: <http://www2.ohchr.org/english/bodies/chr/special/invitations.htm>.

²¹ Office of the United Nations High Commissioner for Human Rights, *Country and other visits by Special Procedures Mandate Holders since 1998*, available at: <http://www2.ohchr.org/english/bodies/chr/special/countryvisitsf-m.htm>.