



# Commonwealth Human Rights Initiative

New Delhi, India. London, UK. Accra, Ghana  
NGO in Special Consultative Status with the Economic & Social Council of the United Nations

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## MHA's 24<sup>th</sup> JULY 2015 GUIDELINES FOR 'ALLOWING' VISITS IN JAILS: UNREASONABLE & UNFORTUNATE

### Commonwealth Human Rights Initiative Press Statement, 5 August 2015

CHRI considers the recent advisory issued by the Ministry of Home Affairs (MHA) on 24th July 2015 on the regulation of jail visits of individuals/NGOs/Company/Press, to be highly 'unreasonable' and out of line with prison laws and jurisprudence. If implemented, it would result in an overreach of powers on the part of prison authorities, and a regress on efforts made to direct public gaze to those unfortunates who are segregated from society. **With its insistence on hefty monetary security deposit, overbearing surveillance during interviews and stringent censorship of written and filmed material that serve to 'keep out' rather than 'allow' visits, the advisory violates constitutional rights of prisoners, freedoms of an independent press and participation rights of public at large.**

The prisoners' right to communication with the outside world has been read as right to life under Article 21 by several Supreme Court judgments. The Supreme Court in *Sunil Batra v Delhi Administration on 1980 SCR* maintained, "We see no reason why the right to be visited under reasonable restrictions, should not claim constitutional status. We hold, subject to discipline, that liberal visits by family members, close friends and legitimate callers, are part of the prisoners' kit of rights and shall be respected. In the case of *Francis Coralie Mullin v. Administrator, Union Territory for Delhi, 1981*, the Supreme Court found, "no prison regulation or procedure laid down by any prison regulation, regulating the prisoners' right to have interviews with members of his family and friends as constitutionally valid under Articles 14 and 21 unless its reasonable, fair and just". In the case of *P. Nedumaran v. The State of Tamil Nadu, Rep, 2001*, the Supreme Court ruled that "the deprivation of the right of a friend to visit a prisoner is unreasonable and arbitrary...It is no longer a facility or a privilege; it is now elevated to the status of a fundamental right to a prisoner to have an access to his relatives or friends, and similarly, or the right of a relative or friend of a prisoner to interview him".

Moreover, under Article 19(1)(a), the Constitution guarantees to all citizens the right to freedom of speech and expression. The circumstances in which these rights may be restricted are categorically laid down under Article 19(2) which empowers the state to make 'reasonable' restrictions on this right only in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. **The provenance of this advisory does not justify the kind of ruling expressed in it and cannot be justified under Article 19(2) of the Constitution.**

If the advisory is a knee jerk reaction to the film made by a British filmmaker on the jail interview with Nirbhaya's accused, it should be understood that neither the content of the film nor the permission of jail authorities granting it warrants these additional restrictions on documentary filmmakers and researchers. On the other hand, such an advisory runs the danger of closing off prisons more than they currently are. The little transparency gained through the efforts of media, oversight bodies and Information Commissions will be unfortunately lost.

The advisory actually contradicts itself by both affirming and denying the merits of two Supreme Court judgments which concern the rights of prisoners to meet visitors and principles for their code of conduct -*Sheela Barse Vs State of Maharashtra, 1988(1) BOM.CR.58,etc.*, and *Smt. Prabha Dutt Vs UOI and others AIR 1982 SC 6*.

The judgment in *Smt. Prabha Dutt* acknowledges the press' entitlement to exercise its freedom of speech and expression and the right to means of information through the medium of an interview of prisoners but with reasonable restrictions and provided the prisoners are willing to be interviewed. Of course this raises a question how the willingness is to be ascertained without reasonably free access.

**The Supreme Court in *Sheela Barse* has referred to members of the press as *friends of the society* and *public spirited citizens*. It sees them as furthering the fundamental rights of undertrial and convicted prisoners who are segregated from society and permits them as citizens to have access to information and interview prisoners.** It provides a balance between the prisoners' right and need for disclosure and the requirement of the prison administration to prevent damage through malicious information. *"Interviews become necessary as otherwise the correct information may not be collected but such access has got to be controlled and regulated. While disclosure of correct information is necessary, it is equally important that there should be no dissemination of wrong information. We assume that those who receive permission to have interviews will agree to abide by reasonable restrictions. Most of the manuals provide restrictions which are reasonable. As and when reasonableness of restrictions is disputed it would be a matter for examination and we hope and trust that such occasions would be indeed rare."*

While placing restrictions on 'uncontrolled interviews', the judgement draws attention to the need for 'appropriate attitude' within prisons to raise the standards for communication and necessary safeguards provided in the jail manuals to those found in judicial decisions. The judgment states, *"Prison administrators have the human tendency of attempting to cover up their lapses and so shun disclosure thereof. It is, therefore, necessary that public gaze should be directed to the matter and the pressmen as friends of the society and public spirited citizens should have access not only to information but also interviews. In such a situation we are of the view that public access should be permitted"*.

**According to CHRI, the advisory clouds the emphasis on 'reasonable' restrictions on interviews and information provided in both *Smt. Prabha Dutt* and *Sheela Barse*.** It also slights **Section 40 of the Prison Act 1894** which acknowledges the desire of prisoners for communication and categorically allows admission, in the interests of justice, to those whom the prisoner wants to meet, at proper times with proper restrictions, and allows for undertrials to meet with their duly qualified legal advisers

without the presence of any other person. **Nor does it make any room for the practical realisation of the rights of prisoners to communicate with the outside world as per National Human Rights Commission's guidelines such as the availability of facilities like waiting room for visitors and coin-drop telephone facilities for prisoners. Rather, it raises more anxieties than it dispels.**

No provision under existing prison laws or judgments have so far found necessary to seek a monetary deposit for an interview in jail but the 24<sup>th</sup> July advisory asks for an unreasonable deposit of rupees 1 lakh that could also get forfeited. In effect such a condition, if imposed, would create a privilege for a few and dis-privilege many by creating an unfair hierarchy between those who can pay and those who cannot.

No provision permits jail authorities such excessive powers as are demonstrated in points (d), (e), (f), (g) and (h) of the 'Undertaking' that the advisory expects filmmakers and researchers to submit to the jail superintendent before conducting an interview. The researcher must agree to obtain a 'no objection certificate' from the state government, home department or prison authorities and agree to get the final version cleared by the jail superintendent. The researcher must submit their research equipment to the jail superintendent for 3 days after the assignment, and agree not to release any findings in the form of documentary/articles/papers/books or any content thereof other than what has been vetted. **Such entry procedures would be considered 'degrading' under Rule 60 of the Mandela Rules to which the UN Minimum Standards for Treatment of Prisoners are being upgraded**

Such a requirement, if brought into practice, would far exceed the censorship powers of the prison authorities, and violate Article 19 of the Constitution and the spirit of *Smt. Pratibha Dutt* and *Sheela Barse* judgments as well as those of *Sunil Batra* and *Francis Coralie Mullin*. **It would infringe on fair and independent reporting and would virtually mean that public will receive 'only good news' from prisons. That would be quite comforting were it not for the number of deaths in custody being on the rise, numerous instances of unnecessary and undignified punishments and ill-treatment in prison, recent Supreme Court orders directing jail *adalats* to be held and review bodies to be set up in prisons for detecting unnecessary detentions, and CCTV cameras installed inside.**

For a democratic and transparent system that wants to detect mal-administration, this advisory is on the wrong track. CHRI believes that that it is an ill-advised advisory and it needs to look towards the letter and spirit of constitutional provisions and new information laws in the country. Section 4(1)c of the Right to Information Act, 2005 mandates all public authorities to "*publish all relevant facts while formulating important policies or announcing the decisions which affect public*" and under Section 4(1)d of the Act an institution is expected to "*provide reasons for its administrative or quasi-judicial decisions to affected persons*". **Unfortunately, all public engagement on the formulation of such guidelines has been bypassed just as no reasons have been articulated for them.**

In order to truly ensure the implementation of Article 19 and 21 as they apply to life in prison, the advisory should be either withdrawn or brought in consonance with the spirit of judgments not only in the cases of *Sheela Barse* and *Smt. Pratibha Dutt* but also with *Sunil Batra*, *Francis Coralie Mullin* and *P. Nedumaran*.

CHRI Director, Maja Daruwala states *“Security and transparency are both important and CHRI resists the idea of one being traded off for the other. The government must strike a better balance towards achieving the democratic functioning of prisons that the constitutional rights promise and the Supreme Court has affirmed. “*

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