

Roundtable Discussion on Repatriation of Indian Nationals in Foreign Prisons

Minutes and Actionable Points



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ORGANIZED BY
COMMONWEALTH HUMAN RIGHTS INITIATIVE (CHRI) &
INSTITUTE OF CORRECTIONAL ADMINISTRATION (ICA), CHANDIGARH

Participation: The members who participated in the Roundtable are Mr. Satyanarayan Mohanty, Former Secretary General NHRC now teaching in various places; Dr. Ranjit Singh, Joint Secretary (P & A), National Human Rights Commission; Dr. (Mrs) Parveen Kumari Singh, CPO/Admn., Northern Railway, Former Director, MHA; Dr. Upneet Lalli, Deputy Director, Institute of Correctional Administration Chandigarh; Mr. Sudhir Yadav, Director General Prisons, Tihar Prisons; Smt. R. Sreelekha, Director General, Kerala Prisons & Correctional Services Department; Mr. Gaurav Yadav, Additional Director General of Prisons, Punjab; Mr. T. S. Bisht, Additional Director General of Prisons, Gujarat; Mr. Prakash Chand, Director (Consular), Ministry of External Affairs; Mr. Arun Sobti, Under Secretary (PR/ATC), Ministry of Home Affairs; Mr. Fahad Ahmed, Legal Officer, Protection Unit, International Committee of the Red Cross (ICRC); Mr. Anmol Preet, International Bridges to Justice (IBJ); Maja Daruwala, Senior Advisor of CHRI; Sanjoy Hazarika, Director, CHRI; Mrinal Sharma, Programme Officer, Prison Reforms Programme, CHRI; Sugandha Shankar, Senior Programme Officer, Prison Reforms Programme, CHRI; Sana Das, Consultant, CHRI; and other representatives from CHRI.

The Introductory Session was chaired by Sanjoy Hazarika, Director, CHRI with Dr. Upneet Lalli and Dr. Parveen Kumari speaking to set the context for the discussions. Mr. Arun Sobti, Under Secretary (PR/ATC), Ministry of Home Affairs opted to speak and interact later in the session.

Sanjoy Hazarika, Director, CHRI opened the discussion by emphasizing that people are more important than the state and the purpose of the law is to serve the people. He pointed out that like government officials, civil society actors, too, have served the state and therefore they should be considered as partners and not as adversaries. He flagged out certain issues of concern for the discussion: How well do agencies work together? Is there an SOP with MEA to guide Indian Missions or the entire Nationality Verification process? Is due process being followed? Is 44 days enough time to complete the whole process of verification and approval? He welcomed the participants and sought their views to validate the findings and suggest the way forward.

Dr. Upneet Lalli, Deputy Director, ICA introduced the Repatriation of Prisoners Act, 2003 and gave the big picture of detention of Indian nationals in foreign prisons. She also pointed to some of the flaws in the Act and Guidelines. She described the Repatriation of Prisoners Act as a short Act with 16 articles but one which occupies importance at a time when we are seeing an increase in transnational crime and we have many foreign national prisoners lodged in different countries. She informed the group that there are 7059 Indian nationals lodged as foreign prisoners across the prisons of more than 70 countries. India has 6185 foreign national prisoners. Countries like Saudi Arabia and Greece have more foreign national prisoners (FNPs) in their jails than those offended at home.

Some of the problems she pointed to vis-à-vis the Act and Guidelines pertained to restrictions on habitual offenders under the MHA Guidelines and lack of specific definition on who they are, unclarity in the Act and Guidelines whether remand period is to be counted into the sentence calculation or not and compatibility issues in sentence adaptation not being addressed as for instance in drug cases. She added that problems are aggravated by the lack of SOP for early release and NCRB not maintaining data on repatriated prisoners. With regard to factors influencing transfers, she mentioned that prison conditions in India, per se, may not influence so much the choice of the prisoner who wants to be closer to his family but the finer points of bi-lateral treaty such as tickets and obligations for costs, are the elements that delay transfer. She also flagged out the role of the NHRC with regard to human rights violations in the repatriation process.

Dr. Parveen Kumari, Former Director, MHA applauded the legislation of 2003 and stated that treaty arrangements having been done for 43 countries in 12 years was by itself a big achievement. She pointed to the social intent of the Act which is about 'care'. Many young Indians go abroad. They may

not know how to conduct themselves on foreign soil and often come into conflict with law. In that context, the Act is a good measure to bring them back to India.

She mentioned that India has a Model Agreement with 21 Articles which forms the basis of all prisoner transfer treaties signed with foreign countries and not just the Repatriation of Prisoners Act. Treaties are signed under section 3 of the Act. She added that the nature of political regime as well as the intent of both countries determine the nature of the treaty. Between the time of negotiation and signing of treaty, the treaty is not implementable but only becomes so after ratification. Negotiations reflect the criminal justice system of that country.

Two important points of consideration in her address focused on sensitivity of treaty signing and costs. Here, she put forward that the political timing of signing treaties has to be considered as it is a sensitive issue. Illustratively, the transfer agreement was avoided with Italy at the time the case of Italian marines was being dealt with and they were in Indian prisons. The second issue concerned the cost of translation of judgment foregrounding language as an important factor underlying consent and communication. Certain countries, as seen for instance, while signing of the treaty with Russia, are keen that this cost be spelt out and obligations defined.

She also pointed to alternative arrangements for transfer with countries where treaties may not have been signed. A German lost his mind in Tihar and we transferred through letter of reciprocity. Letters were exchanged in the absence of treaty. Indian Missions appear to be a weak link though they are apprised when treaties are signed.

Dr. Kumari brought the participants' attention on to the fact that currently there are 40-50 applications with the GOI. She ended optimistically by showcasing the Repatriation Act as an adolescent Act that could evolve further with some important changes.

Second Session was on the findings of the study. It was interactive with interjections, comments and insights from the participants.

Sana Das, Consultant, CHRI: Key Barriers to Transfers into India

Eligibility Criteria: Habitual offenders and repeat offenders are restricted from repatriation though Act specifies that all Indian nationals are eligible. Also, there is silence on the eligibility of those whose sentence is not adaptable

Applications: Applications reach GOI in incomplete manner and a long time taken for them to reach valid application status as our specification documents are not uniform and correspondence time between GOI and Indian Missions or foreign country gets protracted. MHA will look at an application only when it is complete. Therefore, it is important to shorten the pre-application time.

Early release and remission: GOI's commitment on parole-remission and life-sentence laws are not articulated. This leads to an environment of queries and prolonged correspondence as seen in case details. This information can incentivise quick decision/consent from the prisoner and reduce lengthy paper chain.

Verification: We take more time (almost a month) than specified in the Guidelines (10 days) for cases where nationality cannot be verified through the Passport Portal and has to be conducted through the Nationality Verification Portal, Regional Passport Office and the physical verification by state/district police. It is clear that nationality verification would have to be completed and national identity confirmed before MHA considers it. Guidelines are misleading in pointing out that after application is received by MHA nationality verification begins.

Sentence adaptation: No scope for appeal against adapted sentence as a result of which prisoners have gone to court in cases of aggravation of sentence; and no procedures or SOP to guide stakeholders in sentence adaptation.

Constraints of Indian High Commissions: The responses reveal that Indian High Commission in Sri Lanka was most aware of the funds and facilities they could make available to prisoners and made weekly visits, had awareness literature to reach out to prisoners, followed by Mauritius. Indian High Commission in UK was least aware. IHCs of UK and Canada were obstructed by the privacy laws of the respective countries where they functioned. The problem of privacy laws has been cited in court and in Parliament since 2010 as a barrier before the Indian Missions but no strategies have been evolved by GOI to ensure the ease of access and information to prisoners.

Monitoring Committee: The committee under the Guidelines has not been meeting. This affects overall supervision. It has recently been revived by the Joint Secretary with the assurance that minutes of meetings will be maintained so that in future it is available for public.

Real Pendency: It is a false divide to think that people do not want to come from prisons of advanced countries and those who are interested in transfer to India are in worse prisons. The reality of case details from these countries reveals that applications supported by numerous affidavits get delayed by our own process here. In some cases, it has taken more than 4 years to get to the stage of the NOC from the state. Though we may not be able to discern where exactly the delay was caused, it is clear that there has been delay.

Unavailability of Data: Since repatriation data is not a priority data set that is being gathered by the NCRB, this is not available or easily accessible from the states and can take months to gather as compared to state level data on custodial deaths where jail wise and type of death wise disaggregated data can be made available in a matter of hours.

Transfer Costs: The MHA has some earmarked funds for transfer so this may not be a barrier to transfers. This is going under-utilised. More importantly, there is funds at the disposal of Indian Missions through the ICWF and this too is going under-utilised. With more targeted approach of the Indian Missions to reach Indian prisoners and inform them, funds could be better utilized.

Issues and Problems Highlighted by Other Participants:

Arun Sobti, Under Secretary (PR/ATC), MHA

- ⇔ There are many mistakes in the MHA Guidelines. So, the MHA has decided to revamp the Guidelines as they are obstructive and replace with new provisions.
- ⇔ On eligibility issues, how would Indian Missions even know who a habitual offender is – so those provisions/restrictions are problematic in the Guidelines
- ⇔ Regarding sentence adaptation, MHA does not get any advice from Ministry of Law. NCB just mentions the sentence vis-à-vis the two amounts of contraband mentioned in the NDPS Act. There is no Adaptation Table to help the MHA in taking decisions when prisoners appeal.
- ⇔ Without this guidance, MHA has been doing things under the radar. It first tries to get the person and then looks to how sentence can be adjusted or appeal attended to.
- ⇔ MHA does not have access to the Nationality Verification Portal of the MEA

Mr. Prakash Chand, Director (Consular), MEA

- ⇔ Identity documents may be destroyed by Indian nationals once they go abroad if they do not want to return
- ⇔ GOI might delay consular access in cases where foreign embassies may have delayed consular access for foreign nationals in India.
- ⇔ MEA's 2014 Madad Portal facilitates overseas calls that is toll free. It has a prisoner's module other than a student's module to take care of grievances
- ⇔ When a consular officer visits the prison he informs about all these facilities

- ⇔ Nationality Verification Portal: State's portal based verification supported by an email process is faster than it used to be in checking personal details for nationality verification

S.N. Mohanty, Former Secretary General, NHRC:

- ⇔ Sentence Adaptation: A sentence of 40 years may become 20 years in India. Would it be acceptable to the sentencing country? We need to take care of trust and co-operation between the countries. We can only interpret the treaty, we cannot exceed it. Statement of the Act should guide us in sentence adaptation even if courts may have given orders to the contrary
- ⇔ Phone calls are not allowed in all prisons to foreign national prisoners – eg, Nasik prison, which he inspected. This needs to be addressed by MEA and MHA

Fahad Ahmed, Legal Officer, Protection Unit, International Committee of the Red Cross (ICRC):

- ⇔ We need to look at how the International Criminal Court handled sentence enforcement in other jurisdictions after the breakup of former Yugoslavia. For instance, parole was determined by receiving state. Commutation was determined by sentencing state/by aggrieved state. Also, bi-lateral reciprocity is important and cannot be ignored for the handling of future cases.
- ⇔ Consent verification: Some agency needs to be identified to take the responsibility to verify the voluntariness of the consent of the prisoner before the transfer. There are cases where the prisoner may not want to move anywhere because of his health.

Mrinal Sharma, Programme Officer, CHRI:

- ⇔ Foreign national prisoners are often not allowed to make phone calls. In the case of certain foreign national prisoner cases CHRI has dealt with, and it has dealt with a hundred, we have seen that phone cards are often not provided to them.
- ⇔ CHRI has created an FAQ for embassies so they may provide appropriate assistance to foreign national prisoners.

Key Recommendations from Roundtable Participants

Recommendations have been drawn out from the last session of the Roundtable as well as from the discussion points put forward by participants at different points during the roundtable and follow-up discussions.

Maja Daruwala, Senior Advisor, CHRI:

- ⇔ If we want solutions, we cannot begin with the premise that there are no problems.

Sana Das, Consultant, CHRI:

- ⇔ Improving Prioritization: Prioritization needed by all departments by seeking of more data on the Indian nationals in foreign prisons and those repatriated to Indian states; appointment of Nodal Officers at different levels of the chain; SOPs for key stakeholders; making this a required data field with the NCRB; and improving monitoring at all levels will automatically improve prioritization
- ⇔ Expansion of the Nationality Verification Portal: Expand/diversify the MEA's Nationality Verification Portal to include state wise and offence wise differentiated data/information of Indian nationals in foreign prison to facilitate various actors like the Indian Missions, the state security agencies and other actors to act simultaneously to reduce time taken
- ⇔ Record Keeping: Improve record keeping with all institutions which is currently poor because there is little monitoring and information about repatriated prisoners is not a required data field for prison departments or for the NCRB and no periodic gathering of data happens as it does around custodial deaths

- ⇔ Applications: One comprehensive specification list to be prepared to make uniform all GOI's requirements so that the time taken to prepare a valid application by prisoner/ Indian Mission/foreign country is shortened from years to weeks. Technological solutions to be sought to prevent incomplete applications from getting through and creating false pendency with GOI
- ⇔ Audits/Assessment: Need to assess the use of MEA's madad portal by Indian prisoners seeking repatriation to have a better understanding of their needs
- ⇔ Overcoming constraints of Privacy Laws: Strategies for working through the privacy and data laws need to be invented to reach and inform Indian prisoners.

Dr. Ranjit Singh, Joint Secretary, NHRC:

NHRC has received 14 complaints from foreign national prisoners in India and 42 complaints from Indian prisoners in foreign countries.

- ⇔ There has to be a SOP on the repatriation of Indian nationals in foreign prisons with all checks and balances promulgated for/by the states and Indian Missions.
- ⇔ There is a need for the data of all Indian nationals in foreign jails.
- ⇔ There is a need for lessons learnt and case studies as research on prisons has dropped due to restricted access to prisons following the MHA Guidelines on research and access to prisons.
- ⇔ Appointment of Nodal Officers required with the Indian Missions and with the Indian states who will be responsible for the data gathering, information to prisoners and maintenance and monitoring of repatriation.
- ⇔ Raise awareness of the Indian Missions, police officials and other actors. Sensitize and publicise more.
- ⇔ Infrastructure and technology of sending fingerprints and retina scan required for better verification procedures.

S.N. Mohanty, Former Secretary General, NHRC:

- ⇔ The consolidated and differentiated data of Indian nationals in foreign prisons is essential for improving prioritization and interventions.
- ⇔ Broadband recommendations to government can then follow.
- ⇔ Even if there is no scope for appeal following sentence adaptation, the prisoners can send their appeals to NHRC.
- ⇔ Recommendations need to go to External Affairs Minister with copy to Joint Secretary (CPV), MEA
- ⇔ The Statement of the Repatriation of Prisoners Act needs to be referred for sentence adaptation as well a sentence adaptation table.

Fahad Ahmed, Legal Officer, Protection Unit, International Committee of the Red Cross (ICRC):

- ⇔ Data must be segregated by the background of offence and offenders – how many are non-criminal illegal immigrants and how many are criminal offenders.
- ⇔ There is need to hold some agency accountable to check that the consent given by the prisoner was indeed voluntary. In some cases where prisoners may have health problems, they may not want to be moved at all.

Sudhir Yadav, Director General, Tihar Prisons, Delhi:

- ⇔ The issue of release or repatriation of foreign prisoners anywhere is no priority most of the time. Interest and prioritization of the Indian government and the embassies has to go up.
- ⇔ If interest is there then things will fall into place. Unless the political will of the country is there, as seen in the case of the Indonesian embassy which took its national out of Tihar in less than a week, getting consular access can be very difficult for foreigners in Indian prisoners. In contrast, Nigerian consulate is not aware that there may be 20-30 Nigerians in Tihar in need of their help. The Nigerian prisoners are not aware of their right to consular services. One Taiwanese in Tihar who knows neither Hindi nor English has no access to consular services. Even legal assistance is not

available for those who can be released upon paying a fine. Their consular authorities must be pursued through the MEA.

Gaurav Yadav, Additional Director General of Police, Punjab Prisons:

- ⇔ Verification portal can be modelled on the passport portal which is working well.
- ⇔ SPs can be brought on board to prioritize the task.
- ⇔ NIC can be brought on board for the technological upgradation.
- ⇔ Videoconferencing technology could be used more to facilitate inter-agency coordination.
- ⇔ Sentence match table needs to be prepared soon to deal with sentence adaptability and to help us transit from doing things under radar to over the radar.

T.S. Bisht, Additional Director General of Police, Gujarat Prisons:

- ⇔ Information needs to be made available on how many prisoners from Gujarat are there in foreign prisons.

R. Sreelekha, Director General, Kerala Prisons:

- ⇔ NGOs should be identified who can ensure facilitative support in the entire repatriation process.
- ⇔ There is a need to have a policy framework for terminally ill foreign national prisoners who are currently undertrials but later may be eligible for repatriation. Currently, there are several HIV positive foreign national prisoners in Kerala jails.

Sanjoy Hazarika, Director, CHRI:

- ⇔ SOPs and inter-agency coordination must improve on this matter.
- ⇔ Madad Portal of the MEA needs to be publicized as well as the prisoner module developed by MEA.

Arun Sobti, Under Secretary (PR/ATC), MHA:

- ⇔ It is advisable to replace the existing Guidelines with more practical and comprehensive guidelines. So, these Guidelines will be taken off. The MHA has decided to revamp the Guidelines as they are obstructive.
- ⇔ More coordination needed between MHA and MEA – for instance, the MHA needs to have access to the Nationality Verification Portal of the MEA
- ⇔ MOL must be in a better position to give its guidance to the MHA on issues of sentence adaptability. Currently this guidance is not always available
- ⇔ Special instructions need to go to Indian Missions on their duties on repatriation

Recommendations based on further discussion with Mr. Arun Sobti, Under Secretary (PR/ATC), Ministry of Home Affairs (13.07. 2017)

GOI has several difficulties in expediting the repatriation process that have to do with departmental hierarchies at Central and state level, inter-agency coordination and obstacles placed in the MHA Guidelines as well.

Key Barriers:

- ⇔ Cover note of the Guidelines and details of countries with whom we have treaties are misleading. Timelines and eligibility provisions of the MHA Guidelines are currently not practical or in keeping with the Repatriation Act.
- ⇔ Shortage of skilled person power in the department to conduct research and case management and maintain records
- ⇔ Post-repatriation process brings up appeals from repatriated prisoners/their families and since MHA does not receive sufficient guidance from MoL or NCB it is not equipped to process prisoner requests efficiently
- ⇔ Right amount of awareness of process, procedures and laws not available with all stakeholders
- ⇔ Airlines may refuse to carry a prisoner and absence of guidelines or SOP to deal with that eventuality
- ⇔ Regarding cost of transfer for Indian prisoners, there is no big fund with the government. Only 10 lakhs fund is earmarked mainly for escorts and reimbursements. Political will is required to spend it on the return of prisoners
- ⇔ No special provisions for selecting escorts according to the background of the prisoner, whether he/she is a youth, lgbt, ill.

What MHA will do:

- ⇔ MHA will revise the Guidelines in consonance with the Act, on ground procedures and practical timelines. Illustratively, it will remove restrictions on the eligibility of habitual and repeat offender from the Guidelines.
- ⇔ Application specifications given in the Rules 2004 will be made more comprehensive so that verification is better.
- ⇔ It will facilitate research and preparation of a sentence match table covering different criminal jurisdictions.
- ⇔ It will facilitate compiling of state-wise provisions on early release (parole, remission, furlough)
- ⇔ It recommends SOPs for MHA and MEA with complete clarity regarding their obligations for repatriation of Indian nationals from foreign prisons

What CHRI can do:

- ⇔ It can aid the revision of the Guidelines by providing its suggestions
- ⇔ CHRI can assist MHA in research and development of SOP and Sentence Match Table on Sentence Adaptability for its guidance.
- ⇔ It can compile state prison rules on parole, remission and furlough as a reference document for the MHA to inform prisoners seeking repatriation

What MEA can do:

- ⇔ Make citizens abroad aware through Indian Missions
- ⇔ MEA could gather offence specific and sentence specific data and provide the break-up of the 7059 prisoners by their home states on the Nationality Verification Portal
- ⇔ MEA to facilitate **viewing access** of the Nationality Verification Portal to MHA and other significant stakeholders

- ⇔ Capacities: MEA could undertake an assessment of the composition and capacities in each Mission to see that consular and repatriation needs of Indian prisoners are addressed
- ⇔ Sensitization & Monitoring of Missions: Monitoring of Missions is vital to improve the prioritization of repatriation. For instance, the time taken by them over applications they receive and their rules of impartiality in vetting these can be monitored.
- ⇔ Sensitization of Prisoners: MEA could write to Indian Missions to sensitise prisoners and provide application forms to prisoners.

