

REPORT

CONSULTATION ON DRAFT MODEL SOP ON REPATRIATION OF INDIAN NATIONALS FROM FOREIGN PRISONS



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CHRI

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REPORT OF THE ONE DAY CONSULTATION ON MODEL STANDARD OPERATING PROCEDURES ON REPATRIATION OF INDIAN NATIONALS FROM FOREIGN PRISONS

A one-day Consultation was held in Delhi on 19 July 2018 by the Commonwealth Human Rights Initiative (CHRI) to seek the feedback from Central and state agencies on the contours of a Draft Model Standard Operating Procedures (SOP) prepared for the effective implementation of the Repatriation of Prisoners Act, 2003. Representatives from the Rajya Sabha, the Ministry of Home Affairs, Ministry of External Affairs, Ministry of Law & Justice, the National Human Rights Commission, state home departments, the police and prison departments, state legal services authorities, training institutions, academic and other civil society bodies and individuals were part of the discussions. The report presents the recommendations and deliberations from the one-day Consultation. Part A deals with Recommendations and Part B with [Deliberations](#). The proceedings of the [Panel Discussion](#) on Sentence Adaptation are appended in the Report on page 13.

A. RECOMMENDATIONS

General Recommendations

- **From SOP to Guidelines:** The participants felt that the Draft SOP should be converted to Guidelines. This was a major shift as an SOP is more in the form of outlining ‘procedure’ whereas Guidelines are suggestive. ‘Procedure’ in statute means that for something to be done it shall be done in that way only and in no other way – this was the format used in the Draft SOP. However, it was suggested that the language of the revised Guidelines should not be procedural. That is not the official language used between Centre and states, and some states may not find it acceptable. Therefore, the Draft SOP should be converted to Guidelines.
- **The Place of Old MHA Guidelines & Revisions:** The participants discussed whether the 2015 MHA Guidelines on Transfer of Sentenced Persons (TSP) could be made viable with timelines and nodal officers. Others pointed to the need for changes in the categories and mechanisms mentioned in it. It was stated that the MHA has not been happy with the drafting of the 2015 Guidelines and has recommended it be changed. As the MHA Guidelines on TSP were an internal order of the MHA (CS) division, the changes would not involve any Cabinet decisions.
- **Shortening the Revised Guidelines:** Revised Guidelines need not be so detailed in procedure. It has to be shorter than its short version. It should be generic and not get into the specific details of states as they have different rules, manuals, policies. In this regard, CHRI would assess how both Guidelines and SOP could be merged.

Specific Recommendations

The Revised Guidelines to mention/to correct the following:

Consular Access & Application Process

- A technical error to be rectified - We cannot state that the custodial authorities in the foreign country will inform the Indian Mission ‘forthwith’. We can seek the information but it is not our jurisdiction as it is up to the other country to respond.
- The 5-day limit proposed for the Indian Missions to screen all documents is inadequate and needs to be increased as translation of the judgment given by the foreign court itself would take more than that time.
- The MEA would pass on communication to MHA about sentenced prisoners willing to transfer.
- Revised Guidelines should state that MEA will write to the Indian Missions and Embassies at least once in the year to ensure complete applications related to TSP.
- It should be mentioned that consular and transfer facilities shall be extended to juveniles or women who may not be in prison but in other custodial set-ups.

- Revised Guidelines to mention that the 'Others' section in the MEA's MADAD portal and the Emergency Contact numbers of Ambassadors are to be used for Citizen Tip/first information regarding Indian nationals detected in custody in foreign countries.

Nationality Verification

- It is not important to say that passport will be verified. What is important is to mention that if the prisoner is Indian national, confirmed either by passport verifying agencies or by state and district administration, they can be transferred.

Criminality Verification

- This is to be separated from nationality verification section.
- Criminality verification would be undertaken by the Intelligence Bureau and only for background checking and not determination of eligibility for transfer.
- If criminality verification will be required later for prison selection or sentence administration, that may be undertaken by the state agencies.

Escorts Selection

- When the request comes from the MHA for escorts, states should nominate the officials within two weeks. For issuing passport and visa, four weeks may be given. The language in the Revised Guidelines should be that time taken for passport and visa of escorts should be done within a reasonable period of time, preferably within one month.
- The MEA will assist in providing official passports for the assigned escorts to save time.
- States may have a ready panel of escorts comprising senior and junior security officials from where nominations may be done when a request comes in.

Sentence Adaptation

- Sentence adaptation should be left completely to the MHA who are to inform the prisoner that this is the adapted sentence, and there is so much left to serve. Once the prisoner consents and is to be transferred to a prison in the state, only then should the role of state administration begin.
- The repatriated prisoner shall be entitled to furlough, parole and remission as per the state laws as these are within the administrative jurisdiction of the state.
- State remission rules will apply unless they come into conflict with treaty provisions. If there is any conflict between state rules and treaty provisions, then treaty provisions would stay.
- Three things are to go to the State Home Departments when the prisoner is transferred to the state: The final judgment, the adapted order and the treaty. Subsequently, any further communications from the foreign government with regard to pardons, amnesty or change in sentence by either government must be informed to the state.
- With regard to the following three incompatible scenarios where sentence adaptation may be required, the revised Guidelines to mention that in such cases the adaptation will be negotiated with the foreign country: (i) cases of release on license as in the UK where person serves remaining sentence in the community under supervision, (ii) cases involving life sentence without parole as seen in the US, (iii) cases where the foreign country court places a restriction on remission as part of the sentence.
- Timeline for NCB to complete adaptation of sentence in narcotics cases should not be more than 3 weeks to a month.

Appeals

- There should be no provision for appeal in the revised Guidelines.

Approvals

- The revised Guidelines should replace the designations ‘Home Minister’ and ‘Home Secretary’ with the term ‘Competent Authority’. For approval processes from Chief Minister or Home Minister, the revised Guidelines can also mention that CM approves/state approves or HM approves.
- Timeline for approval by Home Minister should be 2-3 days as it does not take more time than that.

Nodal Officers

- Nodal officers to be factored into the different stages of action.

Monitoring Mechanism

- The revised Guidelines need not mention a Monitoring Committee to monitor the transfer process.
- It should mention timelines for all activities, weekly reviews by the Office of the Joint Secretary and a system of reminders.

Grievance Registration

- The revised Guidelines to mention that MADAD portal can be used for registering grievances related to TSP.

B. DELIBERATIONS

I. Introductory Session

The introductory session began with a welcome address by Sanjoy Hazarika, International Director of CHRI and positioning of CHRI’s work and mandate. Sana Das, Consultant with CHRI, laid out the specific objectives of the Consultation. Mr. Dilip Kumar, Joint Secretary, National Human Rights Commission and former Joint Secretary, (CS), MHA gave his remarks on the evolving practices of repatriation. A short video was screened in this session to draw attention to more than 7500 persons held behind bars in more than 70 countries of which 2095 were sentenced prisoners. The Deputy Secretary, MHA (WS), Mr. S.K. Gupta could not be present in the Introductory Session but had communicated that recommendations from the day’s process on the SOP would be welcome and any legal changes could also be considered. Mr. Arun Sobti, Under Secretary (PR&ATC), MHA was present.

Sanjoy Hazarika pointed to the problem of those who have offended outside the country as a lesser known one. Even Indian consulates abroad, he said, are not well informed on the issues concerned. He welcomed the day’s discussion as a conversation or dialogue to firm up the Standard Operating Procedures (SOP) prepared in discussion with the participants and others. The objective was to make the transfer process simpler, practical, less complicated, more implementable and shorter considering the challenges of connecting the international with the national and to state and district. Mr. Hazarika laid out the reasons why CHRI was working on the issue of repatriation of Indian nationals in foreign prisons:

- CHRI is mandated to work in the Commonwealth and in this country on Access to Justice and Access to Information issues. It has ECOSOC status and special status in the United Nations. Under Access to Justice it works on police reforms and prison reforms, and under Access to Information it works on the implementation of right to information laws. Apart from these, it also works on other issues affecting civil society. Two developing areas of work are media rights and advocacy and anti-discrimination on the basis of skin colour and appearance. With regard to police reforms, other than implementing the Prakash Singh judgment, CHRI also works on training, sensitisation and capacity building.

- CHRI's larger mandate is to work as a CSO to engage with the issues that cannot be left to government alone. It works not to just oppose or resist but to uphold the law. It has the duty to engage with stakeholders and seek their responses for policy changes.
- CHRI works largely at policy level with strong research and advocacy. It also goes to court on issues which can result in egregious harm to citizenry.
- CHRI holds governments to account, opposes arbitrariness and supports good governance and transparency.

Sana Das flagged two objectives of the discussion. One, improving prioritisation to the issue and bringing up the prisoner's file on the officer's table. Two, seeking concurrence to the areas mentioned in the Draft SOP. She mentioned that a draft explaining procedures and timelines with suggestions of good practice had been prepared based on the MHA's suggestions in 2017 for a comprehensive SOP, as well as to make transparent the whole process to all the agencies and functionaries involved. Significantly, between 2003 and 2018 March, GoI had received 171 applications and ensured 63 transfers under the Repatriation of Prisoners Act. The overall time period of transfer took anything from 1-4 years or more.

Other than two checkpoints where barriers to transfer were not witnessed - one, the criminality verification process undertaken by the Intelligence Bureau (IB) and two, prison selection undertaken by the state governments, the many barriers in the process were pointed out as the following:

- thirty checkpoints on the ground though the MHA's 2015 Guidelines for the Transfer of Sentenced Persons under the Repatriation of Prisoners Act, 2003 (TSP) talked of ten.
- the eligibility criteria in the MHA Guidelines which debarred habitual offenders and those with a certain criminal background.¹
- the constraints of the 44-day timeline provided in the MHA Guidelines for processing application into stage of approval for transfer.
- incomplete applications received by the MHA.
- nationality verification processes undertaken by the MEA and the state security agencies; sentence adaptation processes undertaken by the MHA; approvals for transfer and arrangement of escorts as time-taking processes.
- overall monitoring and inadequate inter-agency co-ordination and overall prioritization to the issue of transfer of sentenced persons by all agencies.

The specific aims of the Consultation were outlined as:

- either reducing the number of checkpoints or the time taken up at the checkpoints and between them.
- reducing the time between application and the actual transfer.
- affirming the timelines in the draft SOP which were a balance between ideal and practical.²
- affirming a time-bound model of completing a transfer.³
- affirming the agencies, designations and procedures discussed so accountability chain is fixed.

¹ This goes against the basic eligibility criteria for transfer as provided in the Repatriation of Prisoners Act, 2003. Under the Act, the prisoner must be willing for transfer and an Indian national whose sentence is final, has not been given the death sentence or sentenced under military law, and should, preferably, have six months left to serve.

² Some timelines were stringent as certain stakeholders had emphasized on hour-based calculation for the prisoner - like the ones on reaching the prisoner and communication to/with the prisoner. Other timelines had been made more flexible than in the MHA Guidelines - eg, nationality verification and sentence adaptation which are increased from 20 days and 10 days, respectively, to a month in the Draft SOP.

³ One was a 60 days model where verifications and adaptation could be done simultaneously. Here, a provisional adaptation could be done in the same time of one month within which verification is taking place. Other possibilities were a 90-day model or a 120-day model where things would be done serially and not simultaneously.

- affirming the use of technologies mentioned in the SOP.⁴
- affirming co-monitoring, review and advisory processes mentioned so inter-agency work is improved.

Mr. Dilip Kumar drew upon his insights from his two-year tenure at MHA where he had dealt with repatriation cases as Joint Secretary (Centre-State) to explain how the transfer process under the RPA had evolved. With regard to prioritization, he pointed out that the situation was not so grim that there were 7500 applications pending and the file is down. He stated that MHA has received about 150 applications and processed about 70-80 of them. The key points put forward by him were:

- **Process:** Every case is unique when you are dealing with a different country. Each country has different laws and rules. So, as a process, it would take time. Working by models of 60 days or 90 days may not be possible. It is a process. But most of the internal processes do take place simultaneously.
- **Consent of the Prisoner:** It is not that 7500 prisoners are all wanting to come to the country. Unless the prisoner gives their consent to serve their sentence in India, there is no cause for action.
- **Eligibility:** With regard to eligibility, the main criteria is that the person should have applied and he should be an Indian national. His criminal background is irrelevant.⁵ Most of the cases MHA gets are narcotics offences. If the person is not a first-time offender, then his adapted sentence would vary. So, criminality verification is a requirement for sentence adaptation in drug offence cases. However, offence background cannot be a reason to refuse transfer to a person. Similarly, jail overcrowding too cannot be a reason to refuse the person.
- **Barriers:** (i) Biggest problem for MHA is to get a full/complete application. Some countries take longer to hand over all the documents to the Indian consul – sometimes 2-3 months. Eg., getting the final judgment in English language may take time. (ii) With certain countries India has agreements but no prisoners, with others we have applications but no agreements. GoI may write to them but it is a bi-lateral issue and difficult without agreement.⁶
- **Non-Barrier Areas:** (i) Money for transfers is not an issue. If the prisoner cannot afford, the government affords. (ii) Also, there has been no case where the person has been willing to come but IB has rejected. Nor will they be rejected if they are Indian national, they have got their identity verified, they have got the final judgment, given their fingerprints, got their antecedents checked. (iii) Similarly, the matter of the file going up to Home Secretary is a routine thing and not much time is spent on it.
- **Nationality Verification:** Earlier, the MHA used to write to the MEA and then later to the states for verification of identity. But now it is being done simultaneously.
- **Sentence Adaptation:** Only drug cases go to Narcotics Control Bureau (NCB). Other cases are straight away adapted by MHA. Tricky issues in adaptability are with regard to some cases that are not offences in India but offences abroad.
- **Background of Prisoners seeking Transfer:** With regard to the sentence background of people who want to come to India, he stated that no one with one-three years sentence has applied to come as the process alone will take one or two years, so why would they be interested? Only those imprisoned for 10 years or 20 years or those given life imprisonment. He pointed to two main categories of applicants:
 - (a) The first category is mainly those who have been given life until death. Such persons gain because they can generally get remission here after 14 years unless the foreign country places a restriction of more years of imprisonment before remission.

⁴ Eg., portal based 'citizen tip' facility to inform Indian Missions about detentions abroad and maximum use of MEA's Nationality Status Verification portal for repatriation request cases suggested in the SOP.

⁵ If he is Indian national – he has a right to be here. MHA goes for criminality verification only because his past should be known as he is coming back.

⁶ For instance, there have been no repatriations from America. A few applications were pursued at senior officers' level but were informed 'it is turned out' and they can be considered only after two years.

- (b) The other type of cases where they gain is drug cases. In India there is a 20 years sentence for commercial quantity and 10 years for non-commercial quantity. So, if the person has got a sentence of 30 years for non-commercial quantity in a country whose laws are harsher, it is straightaway adapted to 10 years.

II. Session on Consular Access & Application Stage:

With the outlining of the main issues and repatriation process, the second session of the Consultation went into consular access to Indian nationals imprisoned abroad and the transfer application process which are overseen by both MHA and MEA. The session was moderated by Prof. Narinder Singh, Professor of Law from Maharishi Law University, Noida, and Former Head of the Treaties Division, MEA, and Madhurima Dhanuka, Coordinator of CHRI's Prison Reform Programme.

The key discussants were Mr. Prakash Chand, Director, Consular, MEA, Mr. Dilip Kumar, Joint Secretary, NHRC, Mr. Arun Sobti, Under Secretary, MHA, Mrs. R. Sreelekha, DG Prisons, Kerala, Dr. Upneet Lalli, Deputy Director, Institute of Correctional Administration, Mrs. Harpreet Kaur Jeewan, Member Secretary, State Legal Services Authority, Punjab, Mr. K. Sathyan, Member Secretary, State Legal Services Authority, Kerala, Mr. Mahavir Singh, Member Secretary, Chandigarh Legal Services Authority, Mr. NS Megharik, DG Prisons, Karnataka, Mr. Mukesh Jain, ADD DG, Madhya Pradesh, Mr. Anup Kuruvilla John, DIG Training, Kerala, Mr. Hari Krishnan Namboothiri K, CEO, NORKA Roots, Kerala, Dr. Vijaya Kumar, SP, Bureau of Police Research & Development (BPR&D), Sana Das, Consultant, CHRI.

The moderators discussed the topic in two parts – (a) first, the consular access through which prisoner avails the primary contact with the Indian Mission as first port of call; (b) the application process which was identified as a key bottleneck in the transfer process. They flagged the following issues regarding the purpose and practice of consular access as practiced in India:

- Every state/country under international laws has the right to protect its citizens when they are abroad, that is the right of diplomatic protection. So international law, specifically, Vienna Conventions or Diplomatic Relations Convention have a provision that a person who is arrested abroad has the right to be informed of consular access. The purpose of providing access is that the individual can get in touch with their government through the diplomatic mission or consulate, which in turn can visit the prisoner to see whether they are being properly treated in the prison, what conditions are there, whether they have access to a lawyer to defend their case. Consular access starts when the individual seeks help.⁷
- In many cases the individual may not even be aware that he has the right of consular access or its benefits. As the prisoner abroad may not know about consular access or its benefits such as availing legal representation, the concerns of privacy and consent of the prisoner have to be approached differently. Consent has to be informed consent. There needs to be something for all Indians abroad.

Issues Discussed:

- **With regard to the role of MEA & Indian Missions:** The MEA representative, Mr. Prakash Chand, Director, Consular, stated that with regard to prioritisation by Indian Missions, Transfer of Sentenced Persons (TSP) was being handled at a senior level in the Indian Missions, mostly by Ambassadors. So, due importance was being given to the issue by the MEA. Mr. Chand mentioned that the MEA would like to set good example/good practice and not create difficulties for people, not even in countries where there may not be equal reciprocity. The MEA has also shared the TSP Guidelines on its website. MEA is already spending Indian Community Welfare Fund (ICWF) money when required to bring some prisoners back once their sentence is over.

⁷ The ongoing debate whether consular access is the right of the individual to be protected by the state or a right of the state which is up to the state to exercise was mentioned.

He observed that all the things mentioned in the SOP are under ideal conditions. But on the ground, there are several practical difficulties like number of staff, distance, privacy laws.⁸ However, if this SOP is getting made, things would move. It would be a positive thing if Indian Missions ask for more staff. Though timelines like 48 hours may not be possible, they can be kept in mind so the point is not missed. Once the guidelines are there, the line of action would also be there. The MEA representative also said that once the SOP was ready, they would send it to their Missions for comments.

- **With regard to outreach in foreign prisons and information to prisoners:** Since sharing the MHA Guidelines on the MEA website was not seen as entirely adequate, Mr. Chand clarified that Indian Missions cannot be expected to send circulars to foreign jails directly to find out regarding prisoners interested in TSP. They would have to do so via the agencies in the host governments as per protocol. In this regard, the good practice of UK's HMS Prison Service was mentioned as it has an excellent brochure in Punjabi for prisoners from the state who may be informed about the transfer facility. Such information materials have not been developed by the Indian Missions or Indian prisons.
- **With regard to cases where Indian prisoners want to back out of the transfer:** There was discussion that prisoners in certain countries and from certain states do not want to come back or have backed out of transfer and such cases were not reflected in the SOP.⁹ Member Secretary, Kerala SLISA however, responded that the discussion should not be about people who are not interested in coming back but about those who are willing. If there is any benefit for them, normally a person will accept this particular process under the RPA. Further, the Member Secretary of Punjab SLISA pointed out that prisoners' needs for information on two points must be met first – (1) that they have the right of repatriation, and (2) its consequences – what will be the sentence they will undergo here if they choose repatriation – whether same or as in India. Then the prisoners can decide better whether to ask for transfer or not.
- **With regard to transfer requests from non-treaty countries:** There are requests from prisoners imprisoned in countries with whom treaties are not in place. Though India had indeed implemented some transfers with countries where bi-lateral treaties do not exist, such as from Germany, to which Mr. Arun Sobti from the MHA pointed, it was considered better to first get into a treaty. Mr. Dilip Kumar stated that with treaty the terms of sentence adaptation etc. would stand clarified, rather than doing reciprocal transfers without treaty as is sometimes done in extradition cases.

Actionables for Agencies

➤ What MEA Can Do

- **Obtain the Missing Data on Number of Imprisoned Indians:** It was unanimously felt that the MEA should obtain through the Indian Missions more complete, accurate and relevant data - the total number of Indian nationals who are sentenced abroad, how many have got their final judgment, and how many of the prisoners are serving life sentence or sentences longer than three years, how many have at least six months of their sentence left to serve and are interested in consular access and are willing to be transferred. He assured to speak with the Joint Secretary, Consular, to ensure this information is captured at the same time that the MEA requests for such information before Parliament Sessions.
- **Information to Prisoners:** It was vital that MEA put out the information on transfer of sentenced persons through a published information pamphlet or videos - one on consular access and the other on Repatriation of Prisoners Act. Prisoners would not be able to exercise their choice to opt for transfer in the absence of information.

⁸ The reality is the consular officer in the Indian Mission may not be able to make a jail visit if there are many people assembled at the consular hall to meet the Consular Officer, and if the Assistant is also busy with classified work that cannot be delegated such as the IVFRT work of issuing visas. The prison may be 80-1000 kms away from the Indian Mission. It may also so happen that the person who has given consent may not meet the consular officer when he visits.

⁹ A few cases were discussed where neither the family nor the prisoner were interested in the transfer, where identity documents are self-destroyed, or where despite counselling about repatriation, they were not keen to come to India or were more interested in amnesty and remissions and to continue abroad, or had backed out of transfer after a lot of time spent on process.

- **Help obtain complete application:** Indian Missions are the agencies between the prisoner and the GoI. They must check if the application documents are complete as that would save time for MHA and would help speed up the processing of applications. For instance, the final judgment of the prisoner is part of the application documents and must be received in English. This translation must be done by the foreign country providing all the documents. The Indian Missions can ensure this.
 - **Set Timelines & Reminders for Indian Missions:** It was felt that sharing the TSP Guidelines on the MEA website may not be adequate for the problem at hand. If Indian Missions can be given a timeline for ensuring a complete application, and the appropriate division of MEA can give reminders to Indian Missions about dealing timely with the applications of sentenced prisoners timely and ensuring their completeness, it would be most beneficial to save time.
 - **Provide Training:** Officers of the Indian Missions, particularly those who would visit prisons, must be provided training on the Repatriation of Prisoners Act when they are sent abroad. They can be familiarised with the Application Checklist.
 - **Portal Facilities for First Information:** It was agreed that a Citizen Tip facility to inform the Indian Mission that an Indian national is in custody could be done using the 'Others' Category in the MADAD portal of the MEA. Also, the Emergency Contact numbers of the Ambassadors could be used.
- **What Legal Services Authorities Can Do:** The representatives from State Legal Services Authorities stated that their paralegal volunteers do meet people in camps whose family members are imprisoned abroad and they do get calls from abroad. They would like to know about the application process so they may advise in an informed manner and connect the needy person to various authorities who could help them. They would be interested to provide on their websites a toll-free number for this service.
 - **What MHA Can Do:** The representative from the MHA committed to provide this information to the Legal Services Authorities of Punjab, Kerala, Haryana and Chandigarh which they could translate into the regional language and provide on website so prisoners abroad or their families are informed.
 - **What Indian Associations Abroad Can Do:** There was discussion on how they can help. It was pointed out that it is difficult for ordinary prisoners to interact fearlessly with consular officials. They would find it easier/less intimidating to interact with informed non-officials. So, some role/responsibility can be assigned to Indian Associations abroad. They can assist by collaborating with consular officials who themselves are bound by the consent of the prisoner and that of the foreign country in reaching the prisoner.
 - **What CHRI Can Do**
 - **Information material for Indian Missions:** It was suggested by participants that the Act, Application format and the Checklist of Documents required could be put together in a booklet or FAQ for the Indian Missions. CHRI could help prepare these.
 - **Charter for MEA:** In order to get complete applications on time, it would be helpful if CHRI could make an SOP/Charter for MEA to ease this bottleneck.

III. Session on Nationality Verification and Verification of Antecedents

This session addressed the verification of nationality and criminality process. It was moderated by Mr. Gaurav Yadav, ADGP, Punjab and Dr. P. Vijaya Kumar, SP, Bureau of Police Research & Development (BPR&D). The main discussants were Mr. Prakash Chand, Director, Consular, MEA, Mr. Dilip Kumar, Joint Secretary, NHRC, Mr. Arun Sobti, Under Secretary, MHA, Prof. Narinder Singh, Former Head of Treaties Division, MEA, Mrs. R. Sreelekha, DG Prisons, Kerala, Mr. NS Megharik, DG Prisons, Karnataka, Mr. Mukesh Jain, ADD DG, Madhya Pradesh, Mr. Anup Kuruvilla John, DIG Training, Kerala, Ms. Madhurima Dhanuka, Coordinator, Prison Reforms Programme, CHRI and Sana Das, Consultant, CHRI.

Mr. Gaurav Yadav started the discussion by pointing to the process of nationality verification as the next step after a complete application is received. The MHA on receiving a complete application requests MEA electronically for nationality verification on their passport portal/data. If the result is negative, then MEA informs MHA and it goes to the State Home Department for field verification. He also pointed to the Immigration, Visa, Foreigners Registration Tracking (IVFRT) portal of the GoI that has a window for Nationality Status Verification where the MEA and the states are connected. He pointed out that Punjab is one of the states which is processing nationality verification checks in this manner. The requests are uploaded by the MEA on the National Status Verification (NSV) window and then replies are also sent by the state.

Issues Discussed:

(a) Nationality Verification

- **How MHA Conducts:** Mr. Dilip Kumar pointed out that there is no impediment regarding nationality verification. What the GoI is interested to know is whether the person is Indian national. If the person's identity does not show up on Indian passport data, or has destroyed their passport, it does not mean he is not an Indian national.¹⁰ The state government is approached and also the district administration which can get it done in a few days. As a result, MHA has received reports in ten days. If district administration gives a negative reply, it is sent back again to them to crosscheck. The MHA need not get into how the states would do it, whether by portal or field verification, or both.
- **How MEA Conducts:** Mr. Prakash Chand pointed out that the role of Indian Missions abroad can certainly be added in the Revised Guidelines with regard to nationality verification. Nationality verification is being done by Indian Missions directly or by CPV Division of MEA as both have access to PRIDE which is the passport data base. However, if there are spelling errors or there is no surname or any other detail is missing, Indian Missions abroad will certainly upload the case information on the NSV portal for field verification by the state.
- **What States Do/Can Do:** How the states would do it can be part of their own SOPs. It was pointed out that a portal facility was available through the NSV that crunched the time in reaching verification requests to the states and in uploading their verification reports. The good practice of Punjab was cited which has its own SOP and has used the NSV portal to have field verification reports uploaded within 3-11 days in most cases.
- **Access to NSV Portal:** Whether MEA can give the access to MHA to view the NSV data was brought up for discussion. In this regard, it was mentioned that the Draft SOP has mentioned that, if the verification in repatriation cases goes through the NSV portal, then the verification requests and reports uploaded on NSV portal should also be informed by emails to the MHA.

(b) Antecedents Verification

- **Necessity of criminality/antecedents' verification:** There was debate on the necessity of criminality verification and the stage at which it should happen. Mr. Dilip Kumar mentioned that no matter the offence, the question of the prisoner's antecedents would not be relevant for their being accepted back in India or for MHA to take application forward. Some participants felt that the offender background does need to be taken into account at an early stage to decide if such a person should be brought at all into India, and if so, what would be the risks and preparedness. Others felt that such verification would be required not to restrict entry but for the purpose of prison selection, for determining parole, remission and rehabilitation. So, it can come in at a later point in the Revised Guidelines.

¹⁰ It was clarified that even if a person has destroyed their passport or it is damaged/lost, the nationality could be proven still as the person would remember their name, their date of birth, parents' names which would be sufficient for verification.

- **Authority to conduct the antecedents' verification:** It was debated whether only the Intelligence Bureau (IB), MHA's premium intelligence agency, should do the antecedents' verification or the state security agencies would have a role. Mr. Dilip Kumar mentioned that IB had not rejected a single case. Mr. Sobti pointed out that if the IB had any reservations about a prisoner's antecedents it could be noted on the file. Participants pointed out that IB can look into specific offences alone, and would have no way of verifying IPC offences without engaging the state security agencies as it has neither the data nor the mandate. They also pointed out that the 2015 MHA Guidelines made a mention of the requirement for criminality verification and so also Section 5 of the RPA which requires that sovereignty, security, 'or any other interest' of India be taken into account, a task in which states could be involved. It was also mentioned that it should not so happen that the role of state security agencies in criminality verification was kept out of the SOP and yet states were being requested to undertake the same.
- **Separation of nationality verification and criminality verification:** It was pointed out that Revised Guidelines should separate antecedents' verification from nationality verification stage even if at the state level it happens simultaneously and by the same security agencies.

IV. Session on Escorts Selection & Physical Transfer of the Prisoner

This session was moderated by Mr. Gaurav Yadav, ADGP (Administration), Punjab and Mr. Dilip Kumar, Joint Secretary, NHRC. The key discussants were Mr. Prakash Chand, Director, Consular, MEA, Mr. Arun Sobti, Under Secretary, MHA, Prof. Narinder Singh, Former Head of Treaties Division, MEA, Mrs. R. Sreelekha, DG Prisons, Kerala, Mr. NS Megharik, DG Prisons, Karnataka, Mr. Mukesh Jain, ADD DG, Madhya Pradesh, Mr. Anup Kuruvilla John, DIG Training, Kerala, Dr. P. Vijaya Kumar, SP, BPR&D, Madhurima Dhanuka, Coordinator, Prison Reforms, CHRI and Sana Das, Consultant, CHRI.

Issues Discussed:

- **Reasons for delays in nominating escorts:** (i) Mr. Arun Sobti from the MHA pointed out that not all DGs give time to this issue. MHA does send letters and reminders but things can be faster if DGs would give priority. Mr. Dilip Kumar pointed to a set of other problems – (ii) Escorting involves foreign travel. However, states do not have the set procedures to send escorts for foreign travel. (iii) That states would have to spend first for the travel of the escorts is an impediment for states though MHA would reimburse later. (iv) States may select somebody who does not have a passport. So, obtaining passport and visa for the escort might take time. (v) Ms. Madhurima Dhanuka pointed to other time taking things like panchayat elections or law and order priorities which prevent allotments by police.
- **Cases of speedy escort arrangement:** It was pointed out that in cases where the concerned state wants the person, there is swiftness in the arrangements.¹¹ To sustain similar response in all cases including repatriation, Mr. Gaurav Yadav suggested a ready panel of escorts comprising senior and junior police officials from where selection could be quickly done when required.
- **Selection criteria and designation of escort:** Though MHA had initially stated the norm that there be one senior officer and one junior as escorts, it is up to the states to really decide who and how many shall go.¹² The Revised Guidelines can just fix the timeline.
- **Timelines:** It was agreed that not more than 6 weeks be spent on the entire process of nominating the escorts and preparing them with travel papers.

¹¹ Instances where escorts were ready and waiting were also cited as in the case of fetching the accused in the famous Jassi murder case of Punjab. There was no delay once the Canadian court ordered their handing over to Punjab Police in 2014.

¹² MHA cannot prescribe a scale. Some states say SP rank officer, others say IG. In some states, it is the Principal Secretary or DG Police who decides. In others, it is the Chief Minister, and so decision has to be awaited. It was suggested that lowering the rank of the escort could ensure that decision is taken at a lower level. Under Police Escort Rules, escort means 'constable'. However, it would be disadvantageous to send such a junior person abroad alone. So, an officer would be needed.

- **Physical Transit of the Prisoner:** It was mentioned that MHA has developed the information lines to the Bureau of Civil Aviation (BCA) and to the Airlines. Not just Air India but all private airlines can be instructed by the Bureau of Civil Aviation to carry prisoners when required. Protocol is that the pilot has to be informed that there is a prisoner on board the craft. Despite these guidelines, lapses happen and airlines refuse.

V. Session on Sentence Adaptation

This session was moderated by Prof. Mrinal Satish from the National Law School, Delhi and conducted through a panel discussion and interactions. The panel comprised of Mr. KTS Tulsi, Senior Advocate, Supreme Court & Member, Rajya Sabha, Prof. Narinder Singh, Professor Emeritus, Maharishi Law University, Noida, Dr. Anju Rathi Rana, Joint Secretary, Department of Legal Affairs, Ministry of Law & Justice, Mrs. R. Sreelekha, DG Prisons, Kerala, Mr. Ajay Kashyap, DG Prisons, Tihar, Delhi.

The discussants were Mr. Dilip Kumar, Joint Secretary, NHRC, Dr. Upneet Lalli, Deputy Director, Institute of Correctional Administration, Mrs. Harpreet Kaur Jeewan, Member Secretary, State Legal Services Authority, Punjab, Mr. NS Megharik, DG Prisons, Karnataka, Mr. Gaurav Yadav, ADGP (Admin), Punjab, Mr. Mukesh Jain, ADD DG Prisons, Madhya Pradesh, Mr. Anup Kuruvilla John, DIG Training, Kerala, Mr. Kapil, Law Officer, Narcotics Control Bureau, Dr. P. Vijaya Kumar, SP, BPR&D, Advocate Ajay Verma, IBJ & NFPR, Advocate Aarthi Rajan, Ms. Madhurima Dhanuka, Coordinator, Prison Reforms Programme, CHRI, Sana Das, Consultant, CHRI.

The aim of the session was to clarify both policy and procedure of sentence enforcement of Indian prisoners seeking repatriation from foreign prisons, define the scope of incompatibility scenarios where sentence adaptation would be required, and discuss the challenges for adapting authorities and administering agencies. The details of the discussion are presented in Part C of the report on page 11.

Issues Discussed:

- the process of sentence adaptation.
- the scenarios of incompatibility when GoI may adapt sentences as required under the Repatriation of Prisoners Act, the treaties and the new Conventions signed.
- the application of state remission policies.
- the line of action in case of dissonance between treaty and state laws.
- the approaches to deal with prisoners' appeals, and the consultations necessary between Centre and state, between GoI and the prisoner.
- the areas of change in the Revised Guidelines with regard to role of Centre and state.

VI. Session on Reporting & Monitoring & Grievance Redressal

This session was moderated by Mr. Dilip Kumar, Joint Secretary, NHRC and Professor Narinder Singh, Professor of Law, Maharishi Law University. The discussants were Mrs. Sreelekha, DG Prisons, Kerala, Mr. Ajay Kashyap, DG Prisons, Tihar, Mr. NS Megharik, DG Prisons, Mr. Mukesh Jain, ADD DG, Madhya Pradesh, Ms. Madhurima Dhanuka, Coordinator, Prison Reforms, CHRI, Sana Das, Consultant, CHRI.

Professor Narinder Singh highlighted the areas which involve communication between the two countries and between the agencies within the state for different purposes. The issue was raised whether monitoring was to be discussed at all these levels or more generally.

Issues discussed:

- **Whether there shall be a Monitoring Committee headed by the Joint Secretary as mentioned in the MHA Guidelines:** Here the need to have a multi-agency mechanism as mentioned under provision (o) of the Guidelines to supervise the finalisation of cases was discussed. Queries were posed as to its

functioning, periodicity of meetings and expansion. Mr. Kumar stated that the Office of the JS should not be required to monitor itself. The status of cases can be taken up on a particular day every week by the JS. A Monitoring Committee (MC) would make people wait for the next MC meeting to do things.

- **Monitoring by timelines and reminders:** It was pointed out that for bureaucratic monitoring, timelines were necessary. Timelines sensitise the bureaucracy. For instance, NHRC's timelines of 4 weeks/6 weeks. That would be enough. Bureaucracy will instinctively keep monitoring. Further to that, the MHA and MEA have the system of reminders. Once timeline is there, there will be instinctive monitoring. If it does not happen then there will be reminders.
- **Mechanism for lodging grievances:** Prisoners/prisoners' families have registered their grievances with NHRC, with MEA and other bodies. The SOP can mention that grievances can be registered on the existing MADAD portal. People sometimes register grievances with multiple bodies and even after their problems are solved they do not remove them. As a result, pendency keeps showing and there is waste of effort on the part of grievance redressal or monitoring agencies like NHRC who might issue summons as it is not aware that the problem has been solved.
- **Communication & Consultations:** Some participants pointed out that many consultative processes vis-à-vis the states and the prisoner could be pared down in the SOP. It was explained that the standard draft agreement, treaties and new co-operative arrangements for prisoner transfer under the new Conventions signed by GoI require communication processes between the government and the prisoner who has to be kept informed about the processing of their application.

The Consultation ended with a vote of thanks from Sanjoy Hazarika, the International Director of CHRI, and an assurance that the suggestions given for the Revised Guidelines by the participants of the Consultation would be taken on board before submission to the MHA. Mrs. R. Sreelekha, DG Prisons, Kerala, also thanked CHRI and the MHA on behalf of all the participants for making the Consultation possible.

APPENDIX

Panel Discussion on Sentence Adaptation, Life Sentence and Remission Policies in India

Panelists: *Mr. KTS Tulsi, Senior Advocate of the Supreme Court and Parliamentarian, Professor Narinder Singh, Professor Emeritus and Professor of Law, Maharishi Law University, Dr. Anju Rathi Rana, Joint Secretary, Ministry of Law & Justice, Mrs. R. Sreelekha, DG Prisons, Kerala, Mr. Ajay Kashyap, DG Prisons, Tihar, Delhi and Professor Mrinal Satish, Associate Professor, National Law School, Delhi.*

Discussants: *Mr. Dilip Kumar, Joint Secretary, National Human Rights Commission, Dr. Upneet Lalli, Deputy Director, Institute of Correctional Administration, Mrs. Harpreet Singh Jeewan, Member Secretary, Punjab Legal Services Authority, Mr. NS Megharik, DG Prisons, Karnataka, Mr. Gaurav Yadav, ADGP (Administration), Punjab, Mr. Mukesh Jain, ADGP Prisons, Madhya Pradesh, Advocate Ajay Verma, Convenor, National Forum for Prison Reforms, Advocate Aarthi Rajan, Mr. Kapil, Intelligence Officer, Narcotics Control Bureau (NCB), Dr. P. Vijaya Kumar, SP, BPR&D, Madhurima Dhanuka, Coordinator, Prison Reforms Programme, CHRI and Sana Das, Consultant, CHRI.*

The One Day Consultation on Model Standard Operating Procedures for the Repatriation of Indian Nationals from Foreign Prisons organized by the Commonwealth Human Rights Initiative on 19th July 2018 conducted a spotlight session on sentence adaptation policies and practices in India. The main aim was to address obstacles in sentence adaptation in life sentence cases and in the administration of the adapted sentence vis-à-vis the provisions in the Repatriation of Prisoners Act (RPA), state remission policies, treaty provisions and new Conventions signed by GoI, i.e., the Inter-American Convention on Serving Criminal Sentences Abroad and the Council of Europe Convention on the Transfer of Sentenced Persons that have scope for non-custodial sentences. Thereby, having a clearer field of action outlined in the Revised Guidelines on Transfer of Sentenced Persons.

Professor Mrinal Satish, Associate Professor, National Law School, Delhi introduced the topic and the speakers and moderated the discussion.

Professor Narinder Singh introduced the significance of the stage where a decision has been taken that the prisoner sentenced abroad has been accepted for transfer and his judgment has become final. He presented the following policy scenario for sentence adaptation:

- The judgment / sentence of the foreign country cannot be questioned/reviewed in India.
- On the pardons, remissions, amnesty - that depends on treaty to treaty – we have both models. In some agreements, only the sentencing country shall grant these. But in other agreements we have that either of the contracting parties, that is the sentencing country and the receiving country, can both grant.
- The offence must be offence in both the countries so a comparative sentence may be given.
- Some countries may have shorter sentences and others may have longer sentences and the manner of punishment may also differ. He raised the question of treatment of a person sentenced with amputation in an Islamic country or with multiple life sentences that have to run consecutively as in the US, if they were to be transferred to India.¹³ How would India adapt in such cases and would the foreign government have a say?

¹³ Some Islamic countries have amputation as a form of punishment which is unacceptable in a civic state and so the sentence would have to be adapted. Again, there is a problem with regard to sentences in countries like USA where a person may be given several life sentences and all are added up which the prisoner has to serve consecutively whereas in India multiple life sentences run concurrently, so they all start at the same time. They will expire much earlier as compared to the US where you can have a person sentenced for hundred or two hundred years so they can never hope to be released. So far India has not had to adapt an American sentence of this type but it remains an ordeal for the future.

- The adapted sentence can be one which is closest to the sentence given, and the maximum of the Indian law for that offence can be substituted for the sentence given by the foreign country. But this would only work in cases where the difference in sentences is not very large. In cases of amputation, since this cannot be carried out under Indian law, a longer period of imprisonment may be given.
- Sentence adaptation must also take into account the particulars of the sentence, how much of the sentence has been served and how much further remains to be served – these must be provided.
- Adaptation of the sentence may take place through an administrative order through the court. In India, we have chosen to adapt administratively and there is also a committee which looks into this and persons more directly involved should share how this is functioning and what are the factors which influence the modification of the sentences.

Dr. Anju Rathi Rana stated that the Ministry of Law & Justice (MoL&J) was dealing with this issue based on what MHA requested it to. These were aspects pertaining to the quantum of the sentence and the adaptability part. She pointed to the legal framework and process for adaptation and when GoI may adapt the sentence:

- GoI has to adapt the sentence in case of incompatibility either in terms of nature or duration of sentence, as section 13(6) of the Act lays down.
- The sentence has to be adapted according to Indian law because municipal law will prevail over any other law and that has to be agreed between India and the contracting state.
- Sentence would have to be adapted according to the sentence that the Indian court would have passed had the offence been committed in India. Article 9(2) of the Standard Draft Agreement and most Prisoner Transfer Agreements also points out that in case there is incompatibility between the law of the receiving state and contracting state we have to adapt the sentence by administrative order to that punishment or measure prescribed by its own law. But in any case, the sentence cannot be aggravated.

Mr. Ajay Kashyap provided a prison manager's perspective to the discussion by pointing to some of the challenges as practical considerations that must condition the policies of repatriation.

- Challenges of a prison manager – (1) dealing with depressed individuals. The moment you lock someone up the mental trauma begins plus there is the stigma that they and their family go through – every person is depressed; (2) legal aid may be required for assistance; (3) grassroot links/agencies are very sketchy; (4) gainful employment avenues are very few – only 15-20 percent of the prisoners are gainfully employed.
- If one knows these four challenges, then one would be aware of the risks of having to ready a prison for a person to be repatriated.¹⁴ When policies like the RPA have to be implemented these challenges/practical problems should be kept in mind.
- Furlough should be available to both prisoners who have offended here and the repatriated prisoner. There should be no confusion about this. It is intended to provide family contact and also that the prisoner can remain a productive person. That is the judicial philosophy of furlough as a reform measure.
- Many countries have alternatives to imprisonment and community sentencing. Repatriation of such prisoners to India has to be resisted as we do not have such sentences.

Mrs. R. Sreelekha discussed the remission policy of Kerala, and validated the needs of prisoners abroad seeking repatriation.

- In Kerala, unlike several states which give remission after 20 years the state can grant remission after 14 years, even if a Supreme Court judgment states that life sentence is till the end of life. The

¹⁴ He gave two instances. One, if Mallya was brought back and he were to commit suicide, which would attract a lot of adverse publicity amongst everybody including the prison institution of his stay. Two, the case of 15 Pakistani prisoners who have been transferred from J&K prisons to Tihar. They were supposed to be repatriated to Pakistan, but some of them have fallen ill because of the extreme weather in Delhi and one of them is 82 years old and a cause of anxiety till they are sent back to Pakistan.

repatriated prisoner should be seen as equal to other prisoners once they are handed over to the state to serve their adapted sentence.

- Sentence Advisory Board meets periodically to review the cases of all prisoners who have completed 14 years, whether the person is fit for release perpetually or not. If they are, then their names are recommended to the Governor. The Cabinet meets, takes a decision. Then Governor orders the release.
- Different states have different rules. Other than that, there is jail remission which prison authorities can give. 60 days can be given by the IG/DG Prisons. The Superintendent can give 15 days in a year. So, a prisoner can get remission of one and a half to two years without going to any other agency. Then there are special remissions given by the State Government on a jubilee year, Gandhi Jayanti, Ambedkar Jayanti – drastic cuts in sentences are given and premature release also takes place on these days. In Kerala there are many facilities for remission.
- She shared her concerns for Indian prisoners in some of the Gulf countries like the UAE where the prison conditions were very poor and prisoners would be in great difficulties. The needs of such persons who might be wanting to come to India because India might offer better prisons to them and they would be closer to their homes must be taken into account. Jail conditions in Kerala are not a problem – there is no overcrowding except in a few prisons. The depression rate is quite low. Even for undertrials the lock up hours are not more than 8-9 hours. They are also allowed to work in different units like handicrafts, carpentry, cloth making, tailoring.

Mr. KTS Tulsi provided a framework to understand the international, political and legal role of the GoI with regard to prisoner transfers conducted under various reciprocal arrangements like the International Law of the Sea and extradition treaty arrangements. He brought up three examples to discuss the rights of transferred prisoners and the obligations of GoI as a contracting country in the agreements and home country of thousands of Indian nationals imprisoned abroad.

- Prisoners serving death sentence abroad: He pointed to people under harsh sentences like the death sentence wanting to come back to India here to save their lives and avoid execution. Since those under death sentence are not strictly eligible for transfer under the Repatriation of Prisoners Act, he said it would depend on diplomatic relations between the two countries to consider transferring people whose offences would earn life sentence here instead of death for the same offence. It would have to be a political decision. If we are proactive and if India wants to get the Indians back, the person could be brought into our legal system and treated by our laws.
- Italian Marines: He gave the example of the Italian Marines who were sent back to Italy under the condition that they would be tried under the terms of their own laws for firing from a boat in Kerala waters and killing two people. While GoI, i.e., the present government, did not do enough to prevent their transfer, the Italian government, on the other hand, was very proactive in taking them out of India, and for all that is known, they would probably be leading normal lives now under the Italian law.
- Abu Salem's Case: In this extradition case from Portugal, though GoI had filed affidavit saying it would not try the person for cases other than mentioned, once the person was extradited he was tried for conspiracy though those charges had been disclaimed by Portugal. The Supreme Court allowed that to go ahead though it had been agreed that if he were to be tried for any other offence, he would first be given the opportunity to be repatriated to Portugal. But nothing of the sort happened. The person is still in jail. As a result, India might find it very difficult to transfer prisoners from European jurisdictions.

Issues discussed: This session clarified the objectives of the policy, the motivational aspects of the prisoners, the practical operations of sentence adaptation, and the instances of incompatibility when MHA may adapt the sentence, how orders are written, the communication between Centre and state and between GoI and the prisoner.

Objectives of the Policy:

The objectives of the policy were reiterated vis-à-vis concerns from participants whether the aim was to bring the prisoners closer to their families or into a less strict legal regime and make them comfortable with a lighter sentence. Mr. Dilip Kumar clarified that the prisoner is coming with their consent and under their own request. That people want to be near their families is true. So also that they stand to benefit as the narcotics or certain other laws of several countries are really harsh. But dealing with the sentence is part of the legal procedure and the session was to sort out the procedure for how that would happen as there is some disharmony between the laws/policies.

A. Practical Operations: The practices of MHA were discussed with regard to adaptation as the Act does not say that sentence has to be adapted in all cases but only where there is incompatibility.

i. Whether MHA adapts in all cases or only where there is incompatibility

- Mr. Dilip Kumar explained that when a person has to come into a prison in India, he has to be told how many years he is going to serve here, and the prison, too, has to be informed of the specific offence for which he has been convicted, that he has completed so many years and so many years remain to be served. So invariably it means checking in each case what the sentence in India would be.
- The MHA has dealt with three types of cases so far – narcotics, fixed term, and life sentence. For fixed term of 3-4 years it just accepts the sentence and does not adapt it as the other country may not agree. So, where there is discretion for our judiciary to give either 3 or 4 years, the MHA has generally accepted the sentence of the foreign country.
- Biggest problem arises when there is a life sentence. Different countries have different norms. India has different norms. For most kinds of life imprisonment MHA leaves it to the states because they have their remission rules and their interpretation of life imprisonment. How a person would be treated would depend on the state laws. Generally, he would be either released after 14 years or else would have to continue according to the state laws.

ii. How sentences in narcotics cases are adapted:

- The judgments already mention the quantity and they mention the sentence, Mr. Dilip Kumar mentioned. This has to be adapted to our laws.
- The NCB representative, Mr. Kapil, mentioned that NCB does the adaptation according to the NDPS Act which is a very specific and clear law. It has a policy of quantity-based punishments. To adapt the sentence, NCB requires the amount of contraband the person was confiscated with and they just pass on the interpretation of the law to the MHA. NCB looks at the whole quantity in its assessment and not just the pure quantity. This is based on a notification as the person's intention was to traffic the entire quantity. However, Mr. KTS Tulsi clarified that there is a formula by recent amendments to the NDPS Act whereby quantity includes quality. Therefore, quantity to be taken into account should be the pure quantity.

iii. Whether the sentence adaptation order is a reasoned order

- Ms. Madhurima Dhanuka pointed out that CHRI has suggested a format in the SOP – that it should have certain points so the prisoner understands why he has been given the sentence he has been given.
- Mr. Dilip Kumar confirmed that it is a reasoned order, a speaking order that is issued by MHA. No one has said so far that the sentence is wrongly adapted though they do go to court to try their luck for pre-mature release. Courts have taken up their appeals.

iv. Consultation between MHA and Ministry of Law & Justice on sentence adaptation/interpretation:

- Dr. Anju Rathi Rana, pointed out that consultations have not been sought in the last one and a half years.
- Mr. Dilip Kumar mentioned that earlier to that MHA used to go to the Ministry of Law & Justice but they refused quite some time back on the ground that there was no law point involved. Since the MoL&J refused to interpret and sent back the cases, MHA has been trying to do it mostly by itself or sent them to NCB in narcotics cases.

v. Communication and Consultation between Centre and States

- Mr. Dilip Kumar pointed out that MHA writes in the adapted order that state remission rules will apply. Some states have sought clarification on this. What is informed to the prisoner, whether they are from Kerala or Gujarat, is that the state's remission and parole laws of the state would apply – which means they may or may not get. MHA does not get into the actual administration of remission. If some states do not follow the adapted order, then consultation will not help. It becomes a legal matter.
- Mr. NS Mehgharik and Mr. Mukesh Jain pointed out that consultation element should only be where the rule is silent and you need to build up some regulations for that. Otherwise, if there is broad consensus and things are in place, it would not be required.
- Mr. Ajay Kashyap stated that the Draft SOP has too many consultative processes and the language used must be official and not procedural. Mrs. R. Sreelekha suggested that the Revised Guidelines need not include consultation with the states at the time of adapting the order. There are many laws under which people may get convicted in foreign countries which are not recognized as offences here. MHA would be the appropriate authority to decide how they should be adapted. Once the order is adapted, the person is transferred to the state then the role of the states begin and Revised Guidelines should reflect that.
- CHRI representatives clarified that the points in the Draft SOP relating to consultation with the states before the transfer was only on the issue whether and when the person would be **eligible** for remission for a particular offence. The remission rules vary from offence to offence of which the state home departments would have knowledge. The prisoner would need to be informed about this as they have to give their consent to the adapted order and cannot be expected or assumed to have access to the state rules.
- Dr. Upneet Lalli and Professor Narinder Singh pointed to an important communication requirement that if states are going to apply the remission laws, then they must have a copy of the final judgment, a copy of the adapted order and they must know what the treaties say with regard to who can grant remission.

C. Incompatibility Issues:

There was discussion on what would constitute 'incompatibility' and when GoI may adapt sentences. The discrepancies in the laws and policies to be reconciled while adapting in 'incompatibility' scenarios were also discussed. For instance, the RPA states that the adapted sentence shall 'correspond' with the original sentence, and at the same time approaches the offence as one committed in India. Further, treaties may place power of pardon and remission with the sentencing country alone and that might conflict with state powers of granting remission. Other incompatibilities were also discussed, particularly in the context of new types of sentences having to be contended with. Five kinds of incompatibilities were discussed with regard to when GoI may adapt the sentences.

- i. Incompatibility in the duration of sentence:** With regard to queries raised by Mrs. Harpreet Singh Jeewan and Advocate Ajay Verma on what the adapted sentence would be in narcotics cases of non-commercial quantity where the person has been sentenced with 20 years in the foreign country but in India the equivalent sentence is between 7-10 years. It was clarified that the treaties mention that the maximum of Indian law should apply and it cannot be aggravated beyond that. So, the person would get 10 years.

- ii. **Incompatibility between life sentence given and state powers of remission:** In such cases where the court of the foreign country may have given a sentence restricting the grant of remission for an excessively longer period than warranted under Indian remission policies,¹⁵ Mr. KTS Tulsi emphasized that states would still have the power to remit or pardon, unless GoI has given an undertaking that it will not alter the sentence. He pointed out that normally such an undertaking would not be given by GoI as the framework here is one of sentence adaptation.

Mr. Dilip Kumar reminded that if, at the time of negotiation, GoI has assured the foreign country of administering the sentence in a certain way, eg., without remission, then it cannot act contrary to its assurances. That might jeopardize the chances of others. Mr. Dilip Kumar and Prof. Narinder Singh pointed out that in each transfer case, the other country is made aware of what the adapted sentence is going to be and there is periodic communication on how it is being enforced, on any release from imprisonment and even prison conditions.

- iii. **Incompatibility between state powers of remission and treaty provisions:** It was also discussed by participants whether states can grant remission to a repatriated prisoner as per their remission policies even if treaties might say otherwise. Prof. Narinder Singh, Mr. Dilip Kumar, Mr. NS Megharik, Mr. Gaurav Yadav and Dr. Vijaya Kumar were categorical that while states can grant remission under jail policies as well as by their state policies, they cannot exceed the treaty restrictions.
- iv. **Life sentence without parole:** Ms. Madhurima Dhanuka pointed to this as a clear case of incompatibility as India does not have life sentence without parole. Countries like the US have them. Though MHA has not yet done a repatriation in such cases, Mr. Dilip Kumar explained that in an ordinary life sentence case of an Indian national lodged in an American prison, the foreign government enquired whether the person would get parole and furlough upon transfer, and they were agreeable that India could adapt according to the laws of the concerned state. Further, with regard to the role of states Mr. Gaurav Yadav pointed out that what states can grant is administrative parole. They cannot tamper with the sentence after it has been negotiated by the MHA and foreign government at the time of transfer.
- v. **Community sentences:** Another kind of incompatibility was identified by Dr. Upneet Lalli with regard to license on parole cases as seen in the case of UK. These are pre-mature release sentences where the person is released into community with certain conditions and remains under supervision for the remaining period of sentence. It was discussed that India did not follow such a form of premature release and in the case of applications from such prisoners, the adaptation was to be negotiated between the two countries.

D. Appeals: Whether the prisoner can appeal their adapted sentence: Mrs. R. Sreelekha pointed out that care should be taken that the prisoner does not get the impression that the sentence or process is as binding as it is in the treaties or in the Draft SOP. The prisoner can appeal as per the laws of our country. However, it was argued by Mr. Dilip Kumar that the person has accepted the adapted sentence and should not appeal. He is being transferred to be close to his near and dear ones. Moreover, the adapted sentence will be to his advantage. So, if an appeal system is brought in, it will create difficulties. Prisoners are trying their luck in court for remission and early release. In this regard, CHRI representatives mentioned that in several states the repatriated prisoners were not even being considered eligible for pre-mature release. Therefore, there was recourse to legal action on their part to effectively implement the adapted sentence.

¹⁵ Eg., cases where sentence restricts remission before 20-25 years of actual imprisonment instead of the general 14 years in India.

E. Consultation with the Prisoner: With regard to the emphasis on consultative processes in the Draft SOP, it was pointed out that the treaties and the signing of the two new Conventions place obligations on the receiving country to consult and inform the prisoner from time to time with regard to their consent and processing of application and that cannot be dispensed with. It was pointed out at different points in the session by Mr. KTS Tulsi, Professor Narinder Singh, Mr. Dilip Kumar, Mr. NS Megharik and Ms. Madhurima Dhanuka that the consent of the prisoner matters, be it a case of extradition or repatriation. Particularly with regard to sentence adaptation, the prisoner must be informed of all aspects of the adapted sentence and their consequences.



List of Participants

One Day Consultation on Draft Model SOP on Repatriation of Indian Nationals from Foreign Prisons 19th July 2018, India International Centre, New Delhi

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| Delhi/NCR | Assam |
| Mr. K.T.S.Tulsi Senior Advocate, Supreme Court & Member, Rajya Sabha | Mr. Prateek Thube Superintendent of Police Special Branch, Assam Police |
| Mr. Dilip Kumar Joint Secretary (T & R) Establishment, Accounts, Training, Research and Computerisation National Human Rights Commission | Chandigarh Dr. Upneet Lalli Deputy Director Institute of Correctional Administration, Chandigarh |
| Mr. Arun Sobti Under Secretary (PR/ACT) Ministry of Home Affairs | Mr. O.P.Mishra DIG, Prisons Chandigarh |
| Ms. Anju Rathi Rana Joint Secretary & Legal Advisor Dept. of Legal Affairs Ministry of Law And Justice | Mr. Mahavir Singh Member Secretary Chandigarh State Legal Services Authority |
| Mr. Prakash Chand Director (CONSULAR) Ministry of External Affairs | Haryana Mr. Jagjit Singh, IG Prison, Haryana |
| Prof. Narinder Singh Professor Emeritus & Professor of Law Maharishi Law School Maharishi University of Information and Technology, Noida | Mr. Hanif Qureshi, Inspector General Police Haryana |
| Prof. Mrinal Satish Associate Professor of Law National Law University, Delhi | Mr. Puneesh Jindia Member Secretary Haryana State Legal Service Authority |
| Mr. Ajay Kashyap, Director General, Tihar | Dr. Rajshri Singh IGP/SCB, Haryana Police |
| Dr. Paresh Saxena, (IG ADM), BPRD | Kerala |
| Dr. P. Vijaya Kumar, Superintendent of Police Bureau of Police Research and Development (BPRD) | Ms. R. Sreelekha Director General of Prisons and Correctional Services, Kerala |

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| Mr. Kapil Intelligence Officer, Narcotics Control Bureau (NCB) | Mr. Anup Kuruvilla John Deputy Inspector General of Police O/o DIG(Training), Kerala Police Academy |
| Mr. Ajay Verma, Advocate Senior Fellow and India Country Manager International Bridges to Justice | Mr. K. Sathyan Member Secretary Kerala State Legal Service Authority |
| Ms. Aarthi Rajan Advocate on Record Supreme Court of India | Mr. Harikrishnan Namboothiri K Chief Executive Officer Norka- Roots, Norka Centre Kerala |
| Mr. A.K.Singh Advocate, Delhi | Mr. Ajit Kolassery Deputy Director Norka- Roots, Norka Centre Kerala |
| | Karnataka |
| | Mr. N.S. Megharikh ADGP & I.G. Prisons Karnataka |
| | Madhya Pradesh |
| | Mr. Mukesh Jain Special Duty Officer/ ADG, Prisons Madhya Pradesh |
| | Punjab |
| | Mr. Gaurav Yadav ADGP, Administration Punjab Police |
| | Ms. Harpreet Kaur Jeewan Member Secretary Punjab State Legal Services Authority |
| | Rajasthan |
| | Mr. Randhir Singh, IPS DCP, Metro, Jaipur Rajasthan |
| | Mr. R. Suhas, IPS Deputy Inspector General of Police Security Rajasthan |
| | Uttarakhand |
| | Ms. Sweety Agarwal, IPS Superintendent of Police (Intelligence) Uttarakhand |
| | Uttar Pradesh |
| | Mr. Ajeet Kumar Singh (A.D.P) Additional Director of Prosecution, Uttar Pradesh |