

**REPORT ON SOCIO-LEGAL ISSUES OF  
FOREIGN NATIONAL PRISONERS  
(WOMEN) IN BYCULLA DISTRICT  
PRISON- MUMBAI**



**Field Work at Byculla District Prison from 15 March 2019  
to 12 April 2019**

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# CHAPTER 1

## INTRODUCTION

The term ‘foreigner’ is defined in the Foreigners Act 1946<sup>1</sup> under Section 2(a) as “*person who is not a citizen of India*”. In India, at the end of 2015, there were 6,185 Foreign National Prisoners (FNPs) confined in prisons across India. Out of which 2,353 are convict, 3795 are undertrials and 37 are detenues. A total of 3,795 undertrial foreigners (3,276 males and 519 females) were lodged in various jails of the country as undertrial prisoners. The highest number of such undertrials was reported from West Bengal (2,149) followed by Maharashtra (490), Uttar Pradesh (274), Delhi (261), Tripura (59), Karnataka (58) and Tamil Nadu (53).<sup>2</sup>

There are several types of FNPs: Firstly, those who have travelled between countries for committing a criminal offence or engaged in criminal activities; Secondly, those who entered the country on valid documents but have overstayed their visa period and therefore violated the laws of the country; or committed an offence; Thirdly, long-term residents in a country, who have not yet been granted citizenship for various reasons; Fourthly, illegal immigrants, i.e. those who enter the country primarily for economic or social reasons and are apprehended.<sup>3</sup>

It may be noted that the foreigners are also equally entitled to two major basic constitutional rights namely right to life, personal liberty under Article 21 and right to equality and equal treatment without any discrimination under article 14 as these are the only two fundamental rights which accrue / apply to all individuals on the capacity of “persons” unlike other fundamental rights which are applicable only to citizens of India. In *The Chairman, Railway Board & Ors vs. Mrs. Chandrima Das & Ors*<sup>4</sup> the Apex Court held that certain Fundamental Rights are also available to the foreigners and are fully entitled for the same. Also in *Anwar v. State of J&K*<sup>5</sup> it was held that the rights under Articles 20, 21 and 22 are available not only to “citizens” but also to “persons” who would include “non-citizens”.

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<sup>1</sup> Act no. 31 of 1946

<sup>2</sup> Prison Statistics India, 2015, available at <http://ncrb.gov.in/statpublications/psi/Prison2015/Full/PSI-2015-%2018-11-2016.pdf>

<sup>3</sup> ‘*Strangers to Justice*’ CHRI Report on Foreign National Prisoners 2019, available at <http://www.humanrightsinitiative.org/download/1547551168Strangers%20to%20Justice%20FNP.pdf>

<sup>4</sup> (2000 2 SCC 465)

<sup>5</sup> (AIR 1971 SC 337)

## 1.1 Legal Context / Description of Foreign NP

India is among the very few countries where illegal immigration is a criminal offence and illegal immigrants can be convicted and imprisoned alongside prisoners convicted of internationally recognized criminal offences.

The “Foreign prisoners” are also recognized as a “category with special needs” in the UN Handbook on Prisoners with Special Needs. This handbook states that ‘despite the high proportion of foreigners in prisons worldwide, in the vast majority of countries there are no policies or strategies in place to deal with foreign national prisoners’. Though the United Nations Standard Minimum Rules for Treatment of Prisoners (UNSMR) doesn’t specifically lay down provisions for foreign national prisoner.<sup>6</sup>

In a recent judgment, in response to the FIR registered by the Maharashtra Government, against three Ugandan citizens, including advisor to the President of Uganda, which was quashed by the Supreme court. It has reaffirmed that Article 21 of the Constitution is available even to the foreign nationals. A vacation bench of justice A.K.Patnaik and Ranjan Gogoi said, “*Article 21 of the constitution [right to life and liberty] applies to all citizens, whether Indian or foreign nationals. Police due to a business dispute cannot restrain their right to liberty. Our country gets a bad name because of the acts of few police officers and it is unfortunate that the Mumbai Police, instead of protecting the rights of these foreign nationals, filed an FIR against them and the charges are baseless.*”<sup>7</sup>

In view of the issues mentioned above, the major issues facing the FNPs are these the non-compliance with SC directions in *DK Basu Guidelines*<sup>8</sup> by the Police at the very formative stage of arrest at the police station and further at the time of their admission in prison, the absence of or delayed Consular, Embassy access, lack of strict nationality verification and establishment of specific nationality or identity in term of citizenship, denial and restrictions on family correspondences in terms of accessing or availing phone calls, video conferencing through Skype, denial or restraint on permitting local visitors as family or friends, inefficient government-funded legal aid

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<sup>6</sup> 2015.

<sup>7</sup> Available at

<https://www.thehindu.com/news/national/right-to-life-liberty-available-even-to-foreign-nationals-says-supreme-court/article4831250.ece>.

<sup>8</sup> *DK Basu vs. State of West Bengal* (1997) 1 SCC 416.

lawyers and expensive private legal assistance, Language barriers and inadequate understanding of Indian legal system in terms of prosecution, charge framing, applicability of law and bail provisions, non production before courts, these inter connected issues underline the susceptibility of such prison inmates to series of legal violations contesting their right to speedy effective criminal justice , bearing upon their right to life, equality as enshrined under article 21 of Indian Constitution.

### PROCEDURAL FLOWCHART IN THEORY

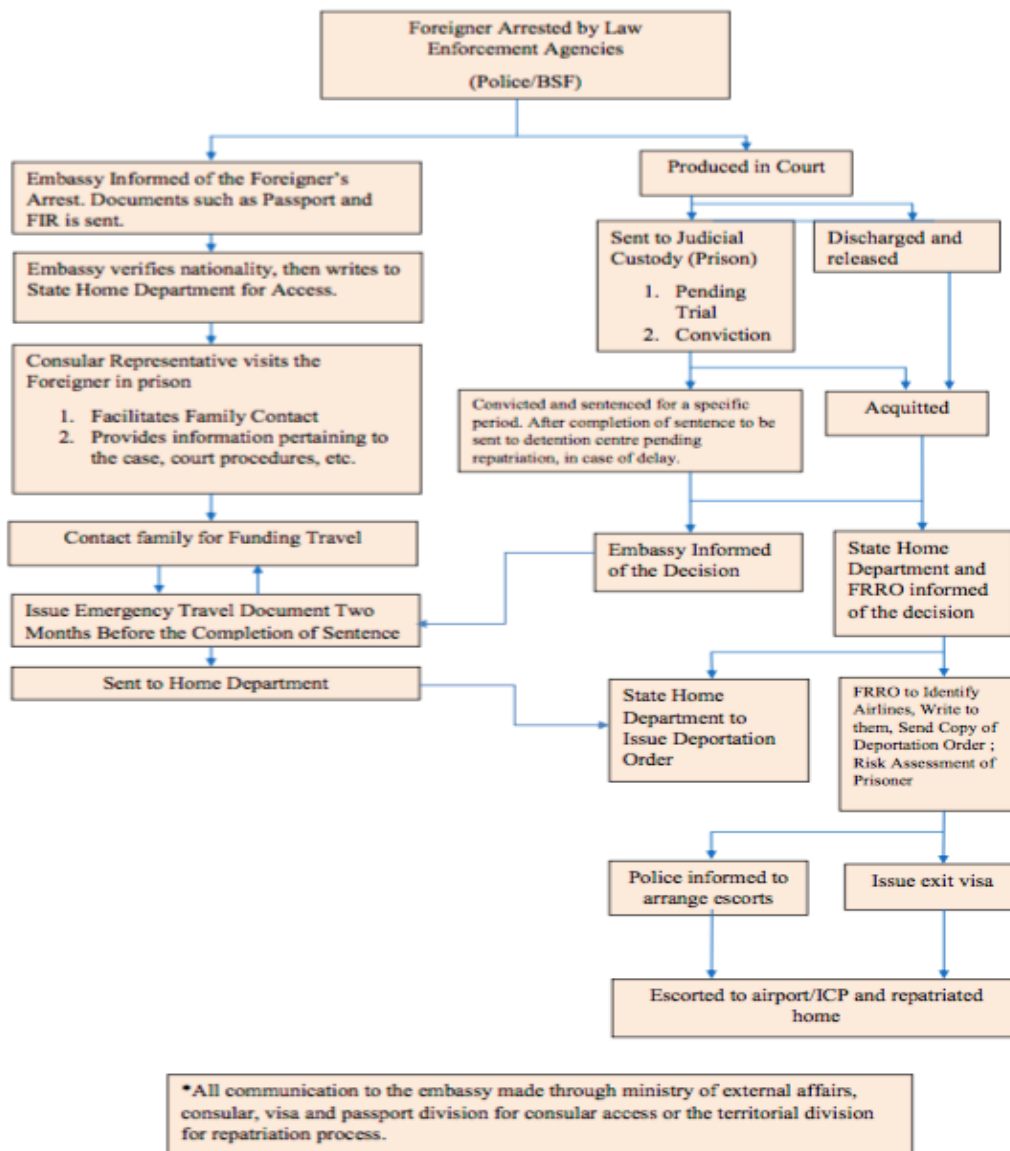


Figure: Flowchart showing the procedure when FNP is arrested.<sup>9</sup>

<sup>9</sup> *Strangers to Justice*’ CHRI Report on Foreign National Prisoners 2019, available at <http://www.humanrightsinitiative.org/download/1547551168Strangers%20to%20Justice%20FNP.pdf>

## **1.2 Research Methodology**

The research design involved a mixed methodology with both qualitative and quantitative research approach. The doctrinal legal analysis with respect to an exhaustive literature review of Statutes, Cases, Government and Civil Society reports, Committee recommendations.

The empirical study involved collecting data following interaction with the research stakeholders through qualitative and quantitative research tools as Questionnaires and Semi structured Interview Guides.

In addition to these Research tools, observation and researcher inferences are also an important research tools for developing a better understanding of the issues and including in data collection.

The sampling technique is purposive sampling as there are pre-defined parameters for identification of women inmates for data collection and administering research tools in compliance of the above mentioned objectives.

(See annexure for Interview Guides and tables)

**1.2.1 Research Stakeholders Participants** – The Prison Authorities, Staff largely the Prison Superintendent, Circle officer, Judicial Department among other officials and the main stakeholders i.e. the Foreign National Prisoners in the Byculla District Jail.

**1.2.2 Universe & Time period of study** – This proposed study was commenced at the Byculla District Prison from the 15<sup>th</sup> of March till 12<sup>th</sup> of April as a part of the fieldwork schedule of the LLM Students of School of Law TISS Mumbai.

**1.2.3 Ethics Compliance** -Privacy and Confidentiality of the interview with either of the inmates or officials was ensured. Informed consent documentation may be administered to all the research participants before starting with the questionnaire or schedule. The information collection process would be voluntary information, which would be read over to them and taken down by the researchers for transparency. The information so collected would not be used for any vested interest.

There would be beneficence and no harm in any case during the process of administration of the same. The research would be undertaken in utmost good faith.

The proposed study was conducted following due consent obtained and necessary consultation with the IG Prison and the concerned Superintendent Official Staff of the correctional institutions.

### **1.3 Literature Review**

The Literature Review will comprise of a detail study of relevant provisions pertaining to Legal Regulatory Framework including these following:

#### **A. National Legislations and Reports:**

1. The Prison Act, 1894.
2. Maharashtra Prison Manual, 1979.
3. Model Prison Manual, 2016.
4. Foreigners Act, 1946
5. The Passport (Entry into India) Act, 1920
6. The Foreigners Order, 1948
7. The Foreigner (Tribunals) Order, 1964
8. Foreigner's Tribunal and Illegal Migrants (Determination Tribunals) 1979
9. The Repatriation of Prisoners Act, 2003.
10. Model Police Manual, 2016
11. Criminal Procedure Code, 1973
12. Indian Penal Code, 1860
13. Narcotics Drugs and Psychotropic Substance Act, 1985.
14. Radhakrishnan Committee on Prison Reforms 2017-2018)
15. "*Women in prison – India*", Report by Ministry of Women and Child Development Government of India 2018.
16. "*Women in detention and access to justice*", Parliamentary Standing Committee on Empowerment of Women, Aug 2017.
17. "*Strangers to Justice*", CHRI Report, January 2019.

#### **B. Supreme Court and High Court Judgments:**

In connection with directions pertaining to health living condition, education, medical need of women and their children living in prison.

1. Bhim Singh vs. Union of India and ors. (W.P. (Criminal.) No. 310/2005 )

2. Sarbananda Sonowal v. Union of India ((2005) 5 SCC 665).
3. 3. Sheikh Abdul Aziz v. State of NCT of Delhi, Delhi HC (WP (Crl) 1426/2013. )
4. 4. Francis Coraille Mullin vs. The Administrator, Union Territory of Delhi *AIR 1981 SC 746a*)

**C. International Conventions:**

1. Standard minimum rules for treatment of prisoners (Mandela rules), 2015
2. United nations rules for the treatment of women prisoners and non-custodial measures for women offenders (the Bangkok rules), 2010.
3. Body of Principles of All Persons under Any Form of Detention or Imprisonment, 1988
4. Vienna Convention on Consular Relations, 1963
5. UN Model Agreement on the Transfer of Foreign Prisoners and Recommendations on the Treatment of Foreign Prisoners
6. UNODC Handbook on Prisoners with Special Needs, 2009

## Chapter 2

### MAJOR FINDINGS AND ISSUES

#### THEMATIC HEADING

##### A. Lack of Embassy/Consular help

**Factual issues:** Contact with embassy is one of the main issues in the Prison.

- Out of 19 FNP in the Jail only 2 are getting assistance from the Embassy one of these inmates is getting money in every 3 months from the embassy.
- 8 out of 19 do not have embassy help of any kind.
- One of the inmates was getting assistance till January 2017 and rest all do not have any kind of aid from the embassy.
- One of the inmates is from Venezuela and has written many letters to the embassy but still no reply has come till date.
- Two inmates do not want any Embassy help as indicated by them in their interview.
- Prison Authorities have maintained a register of the Embassy personnel visit. The country name and the date and time of arrival is recorded in the register.
- The Prison authorities said that the letters written by the inmates are sent to Ministry of Home Affairs and with their approval it is forwarded to respected Embassy.
- Different treatment of different embassies can be observed as England embassy is providing periodical and regular help in terms of cash and other assistance by connecting with the NGO of their country. But as in the case of others some are not receiving any help. One inmate from Venezuela is writing letters to her Embassy but is not receiving any help.

##### Legal Framework:

##### National Legislations

##### 1. Model Prison Manual, 2016

**Rule 8.23** “if any foreign national is committed to prison, or to custody pending trial, or is detained in any other manner, **the Superintendent of Prison shall,**



*immediately inform the Inspector General of Prisons. Any communication addressed to a Consulate, by a prisoner or detainee, shall be forwarded to the Ministry of External Affairs through proper channel without undue delay. Such communication shall be subject to scrutiny/ censorship as per rules. The particulars of incoming and outgoing letters of a foreign national, if found objectionable shall be censored and also furnished to the government.”*

*Rule 8.24 states that ‘whenever Consulate Officials of a foreign country seek permission to visit or interview a prisoner for arranging legal representation for them, or for any other purpose, the Superintendent of Prison shall inform the Government of such request from the Consulate. Only on receipt of orders from the government the Superintendent of Prison shall permit Consulate officials to visit the prisoner.’*

*Rule 26.121 Women prisoners, who are foreign nationals, shall be allowed reasonable facilities to communicate with their diplomatic and consular representatives. Those who are nationals of other countries, or refugees, shall be allowed similar facilities to communicate with any agency whose task is to protect such persons.*

## **2. Model Police Manual, 2016**

*Rule 565 ‘when foreign nationals are arrested on major criminal or civil charges, it is possible that the Foreign Diplomatic/Consular Missions in India may wish to assist the nationals of their countries in regard to their defense before a court of law and/or take such other action, as they may deem appropriate in accordance with diplomatic practice. **Therefore, as soon as a foreign national (including Pakistan national) is arrested in a major crime, the fact, with a brief description of the offence should be brought to the notice of the Ministry of External Affairs through the State Government by the DGP/CP concerned.** Government of India, who decides about the necessary action, should bring these cases to the notice of the Foreign Diplomatic/Consular missions concerned. The report of the arrest of a foreign national in major crime, together with a brief description of the offence, should be communicated to the DGP, Addl. DGP, CID and Addl. DGP Intelligence and Security.’*

## **3. Maharashtra Prison Manual 1979**

*It contains special provisions for foreign nationals. They provide that during urgent times, consular officials may visit foreign nationals after obtaining permission in writing from the Chief Secretary to the state government. The intimation of such permission shall be made to the Ministry of External Affairs.*

### **International Conventions**

1. Vienna Convention on Consular Relations 1963 (The Convention)

*Article 36(b) states that the competent authorities should inform the consular post of the concerned state, 'if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner'.*

*Article 36(c) provides that consular officers shall have the right to visit their national who is in prison, custody or detention within their jurisdiction, to converse and correspond with him and to arrange for his legal representation. These authorities are also required to inform the person concerned without delay of his rights*

2. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

**Principle 16** states, *'If a detained or imprisoned person is a foreigner, he shall also be promptly informed of his right to communicate by appropriate means with a consular post or the diplomatic mission of the State of which he is a national or which is otherwise entitled to receive such communication in accordance with international law or with the representative of the competent international organization, if he is a refugee or is otherwise under the protection of an intergovernmental organization.'*

It is not mandatory to have consular access, the FNP can refuse to get help from the Consular service, *'and nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.'*

3. The United Nations Convention Against Torture.

**Article 6.3.** *Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless*

person, with the representative of the State where he usually resides.  
**Article 6.4.** *When a State, pursuant to this article, has taken a person into custody, it shall immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances, which warrant his detention. The State, which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.*

#### 4. Nelson Mandela Rules 2015

**Rule 62** states that ‘*prisoners who are foreign nationals shall be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they belong.*’

#### **Case Law:**

- **Jan Adalat Through Shaikh Ibrahim vs The State Of Maharashtra And Anr**

“38. (1) ***Prisoners who are foreign nationals shall be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they belong.***

(2) *Prisoners who are nationals of States without diplomatic or consular representation in the country and refugees or stateless persons shall be allowed similar facilities to communicate with the diplomatic representative of the State which takes charge of their interests or any national or international authority whose task it is to protect such persons.*”

#### **Inferences & observation –**

Based on the interaction with the inmates and the verification, corroboration from the official of judicial department, Superintendent, Circle officer, as well as verification of documents from the judicial department, it is found that the prison authorities are sending the letters written by the Foreign National Prison inmates to the Ministry of Home Affairs and then with their approval the letter is forwarded to the respected embassies. The embassy then visits the prison and helps the Foreign National Inmate by counseling them.

Also there are some unclear or vague issues in terms of identification of “major crime” in Model Police Manual and “urgent times” as stated in Maharashtra Prison Manual, 1979, which are not defined anywhere. These are left undefined or not described as per the legal regulatory instrument and therefore there is wide amplitude of discretion with the Prison staff superintendent which may not be fairly exercised in all cases.

**I. Assessment of legal compliance –**

The Model Prison Manual, 2016 has provisions regarding consular help, which needs to be provided to the FNPs. The prison authorities forward letter that are written by the FNPs and allow the Embassy for the consular help.

**II. Contentions by the inmates –**

One inmate from Venezuela has written many letters to her Embassy, but there is no reply from the Embassy help. The police or the prison does not provide any facilities with regards to the contact with Embassy help. The inmate themselves have to contact the embassy and the only medium by which they can contact is through letters which are sent from the prison.

**III. Justification by prison authorities -**

The Prison authorities said that the letters, which are written by the FNPs are sent to the Ministry of Home Affairs and when they clear the letter after scrutiny they forward the letter to the Respective Embassies. The Embassy sends their representative in the Prison and the Prison authorities fix meeting of the Foreign National inmate and the Embassy Personnel. The prison authorities for keeping the record of the same maintain a register.

**THEMATIC HEADING**

**B. Lack of contact with family and friends/ Mulaqaat issues.**

**Factual issues:**

- The FNPs are not allowed to contact with their families in the prison.
- They are allowed to call their family when they are sent to Court that is only permissible with the prior permission of the Judge. The time duration given is also very less i.e. 5 to mins only.

- One of the issues is related to Mulakats as Mulakats are only allowed with the person having blood relations, which is generally not the case of FNPs. They rarely have family members in India. Friends are not allowed to do Mulakat in Prison.
- One of the inmates stated that the time period for Mulakat is very less as one comes from different country to meet the FNP and 15 mins according to them is less time for Mulakat.

## **National Legislations**

### **1. Model Prison Manual, 2016**

The contents of all letters shall be limited to private matters. Postage stamps may be allowed to be purchased for letters addressed by prisoners to their relatives in foreign countries at their cost. If the prisoners have no cash or credit, it shall be supplied at government cost in deserving cases, and at reasonable intervals, at the discretion of the Superintendent of Prison

8.01 Reasonable facilities to be allowed for interviews and letter.

## **Reports**

- **Women in Prison, Report by Ministry of Women and Child Development, 2018**

*5.13.4 For effective post-release transition and psychological wellbeing, it is essential for them to be able to communicate with their families/friends regularly. Video-conferencing facilities through new technological tools may be provided to facilitate such communication.*

## **Case Law:**

- **In Francis Corraile Mullin vs The Administrator, Union Territory of Delhi (AIR 1981 SC 746a )**

*The SC held that “As part of the right to live with human dignity and therefore, as a necessary component of the right to life, he would be entitled to have interviews with the members of his family and friends and no prison regulation or procedure laid down by prison regulation regulating the right to have interviews with the members of the family and friends can be upheld as*

*constitutionally valid under Article 14 and 21, unless it is reasonable, fair and just.”*

- **Jan Adalat Through Shaikh Ibrahim vs The State Of Maharashtra And Anr, 1 March, 2017**

*“92. An untried prisoner shall be allowed to inform immediately his family of his detention and shall be given all reasonable facilities for communicating with his family and friends, and for receiving visits from them, subject only to restrictions and supervision as are necessary in the interests of the administration of justice and of the security and good order of the institution.”*

- **Sunil Batra v Delhi Administration (1980 SCR), stated:**

*“We see no reason why the right to be visited under reasonable restrictions, should not claim Constitutional status. We hold, subject to discipline, that liberal visits by family members, close friends and legitimate callers, are part of the prisoners’ kit of rights and shall be respected.”*

*“...visits to prisoners by family and friends are a solace in insulation, and only a dehumanized system can derive vicarious delight in depriving prison inmates of this humane amenity...”*

- **P. Nedumaran vs The State of Tamil Nadu, Rep, 2001,**

*The Supreme Court ruled that “the deprivation of the right of a friend to visit a prisoner is unreasonable and arbitrary. It is no longer a facility or a privilege; it is now elevated to the status of a fundamental right to a prisoner to have an access to his relatives or friends, and similarly, or the right of a relative or friend of a prisoner to interview him”.*

- **Jan Adalat vs State of Maharashtra:**

*4. Interviews and communications of prisoners:-*

*(i) An unconvicted criminal prisoner (undertrial prisoners) shall be entitled to reasonable facilities, for interviewing or otherwise communicating either*

*orally or in writing with his relatives, sng 36 crpilst-46.15 friends and legal adviser during the hours prescribed by the Superintendent in each case.*

*(ii) Subject to the provisions of sub-rule (3), and the following rules, every newly convicted prisoner (including a prisoner committed under Chapter VIII of the Code of Criminal Procedure, 1973 shall, during the period of appeal, be entitled to see his relatives or friends and communicate with them once a week for the purpose of enabling the prisoner to prepare of file an appeal or to arrange for procuring bail or security, or to arrange for payment of fine or to manage his property or other family affairs.*

- **RE- INHUMAN CONDITIONS IN 1382 PRISONS (I.A. No. 68248 of 2017)**

*Direction made by the SC: “...While visits to prison by the family of a prisoner should be encouraged, it would be worthwhile to consider extending the time or frequency of meetings and also explore the possibility of using phones and video conferencing for communications not only between a prisoner and family members of that prisoner, but also between a prisoner and the lawyer, whether appointed through the State Legal Services Authority or otherwise”.*

## **International Conventions**

### **1. Nelson Mandela Rules, 2015**

**Rule 37** *‘Prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits.’ This applies equally for foreigners as well.*

*Rules 58 to 63, which deal with prisoner contact with the outside world. It was submitted that merely because a person is in prison, it does not mean that he or she should be cut off from the outside world. In fact, the prisoner should be allowed to communicate with his family and friends at regular intervals and should also be permitted to communicate and consult with a legal adviser of his or her choice.*

**I. Assessment of legal compliance –**

The Supreme Court and the High Court from time to time have given many judgments that allows friends also to meet in Mulakat Kaksh which are situated in the Prison Premises.

**II. Contentions by the inmates –**

The notice board in Mulakaat Kaksh states that only Blood relatives are allowed to meet the prisoners and no one else can be allowed for the same. The problem arises in case of FNPs who generally does not have any blood relatives and may have a friend who can help her in any way. But this is not possible, as friends are not allowed to meet in Mulakaat Kaksh.

**III. Justification by prison authorities –**

The main contention of the Prison Authorities was that Maharashtra Prison rules allowed only blood relatives only. Also the problem with the friend visiting the foreigner prisoner is that of the language and as it cannot be determined that whether the person is friend or the associate of the prisoner. What kind of conversation the inmate and friend are having is the main issue.

**THEMATIC HEADING**

**C. Lack of Translator**

**Factual issues:** Language barrier is also an important issue in the present study.

An inmate belonging to Venezuela did not know even English. As per her interview she was not provided translator during her arrest and not even in prison. She was admitted in the Prison in the month of February and till date no translator is provided to her.

- Translator is not provided at the courts proceeding also.
- Lack of knowledge of information. The FNPs who have language barrier are not able to communicate properly as translator is not being provided to them.



## Reports

- ‘Women in prison’ Ministry of Women and Child Development, 2018

*5.13.3 Foreign inmates must be provided with translators to help them communicate with prison officials and other inmates for easy understanding of rules and procedures and to communicate their grievances and complaints easily.*

## International Convention

- **Mandela Rules 2015.**

Article 30 (3) *Where necessary and practicable the prisoner shall be allowed to make his defense through an interpreter.*

### **I. Assessment of legal compliance –**

In the Govt. Report the importance of translator is provided also in many international convention the translator is to be provided in each step of the criminal proceedings.

### **II. Contentions by the inmates –**

Translators are not provided to the FNPs during arrest, in prison and also in the court when the proceeding is going on.

### **III. Justification by prison authorities –**

According to the authorities the translator is a third party and they are not allowed inside the premises of the Prison.

## THEMATIC HEADING

### **B. Delay in Production before the Court**

**Factual issues:** This is also the common main issue, which was reported by all the FNPs of Byculla.

- Almost all the FNPs, which the researchers interviewed, had said that there is delay in production before the court.
- The main reason for the same as told to the FNPs is lack of guards.
- Each and every FNP has stated the there is problem in delay in production before the court.

- One of the inmates is languishing in the jail from 2013 under NDPS charges and has her final hearing in April 2019.
- Sup....

### **Case Law**

- **Hussainara Khatoon v. State of Bihar, (1980) 1 SCC 81**

Right to speedy trial, it was held that where under trial prisoners have been in jail for duration longer than prescribed, if convicted, their detention in jail is totally unjustified and in violation to fundamental rights under article 21.

- **Anwar v. State of Jammu & Kashmir (AIR 1971 SC 337)**

The Supreme Court in this case, has clearly ruled that the Foreign Nationals have the protection of Arts. 20 to 22 of the Constitution of India.

- **In The Matter Of Reference Made By ... vs Unknown (1993 CriLJ 1573)**

Article 21 of the Constitution of India would be equally applicable to the Foreign Nationals and consistent therewith right of speedy trial cannot be denied.

### **THEMATIC HEADING**

#### **E. Bail related issues**

##### **Factual issues:**

- Granting of bail is also an important issue is faced by almost all the FNPs in Byculla District Jail.
- Firstly the bail is not granted easily as it is very difficult to get a local surety for bail in India especially for foreigner.
- Secondly the bond amount is very high and generally FNPs are not able to pay the bail bond amount. The amount is Rs. 30,000 or more, which is not paid by the FNPs as the fees of the lawyer is also high.
- Out of 19, 3 FNPs Bail application were pending as on 18 March 2019
- 3 FNPs have got bail but do not have money for the bail bond.
- 3 inmate's bail application has been rejected.
- 2 FNPs have no information about their bail status.

##### **Case Law:**

- **Undertrial Prisoners v. UOI [(1994) 6 SCC 731 : 1995 SCC (Cri) 39] ,**

The Bench was concerned with the detention of a large number of persons in jail in connection with various offences under Narcotic Drugs and Psychotropic Substances Act, 1985. The Court, after noting the stringent provisions relating to bail as incorporated in that Act, directed for release of those undertrial prisoners who were languishing in jail for a period exceeding half of the punishment provided in the Act.

- **Ajay Verma vs. Govt. of NCT Delhi**

The Court took note of a detailed order passed by it in December last year, wherein it had directed District and Sessions Judges to conduct a "risk assessment" of cases where undertrials have been unable to secure release from jail despite grant of bail. *"...It shall be the responsibility of prison authorities to promptly bring any instance of a prisoner being unable to secure release from prison despite an order of bail having been passed in his favour to the notice of the trial courts as well as the concerned Secretary of the District Legal Services Authority..."*

**I. Assessment of legal compliance –**

Courts have given judgment stating that if half of the term of punishment is served by the prisoner during trial then the prisoner can be released on bail.

**II. Contentions by the inmates –**

The Inmates main contention in regards to bail issue is that the Lawyer's fees drains all the money and there is no money left for payment of bail bond. Few inmates said that the only reason their bail application is rejected is on the basis of their nationality.

**III. Justification by prison authorities –**

Prison authorities said that the bail issues are addressed and resolved by the Courts only. They only follow the order made by the courts. Detention centre point

## Chapter 3

### RECOMMENDATIONS

In view of these issues interaction with stakeholders proposed to be held and necessary recommendations are proposed on the same. The recommendation that can be provided to resolve the issue faced by FNPs can be categorized as follows:

#### **1. Securing translator facility.**

A translator needs to be provided to the FNPs at each step of the legal process starting from Arrest and in the Prison. The inmates can make request for translator to their private lawyer and can obtain court's permission for the same. Request can also be made to the consulate directly by the inmate.

##### **a. Practice in Prison.**

No translator is provided in the prison.

##### **b. Contentions by the prisoners.**

2 out of 17 FNPs were not able to English or Hindi, they belonged to Venezuela and Brazil respectively. They told the researcher that no translator is provided to them in the prison and not even when the proceeding is going on in the court. It becomes difficult to understand the procedure without knowing the language.

##### **c. Observations.**

The FNP who was from Venezuela explained the condition to the researcher by acting and she needs translator at least while the court is hearing the case. Language barrier is a major issue and can be a restriction in case of access to justice.

State Human Rights Commission and Women's Commission can be approached to provide translator services from court and jail authority.

##### **d. Superintendent.**

The superintendent explained that in case of prison. The inmates sometimes get the help of other inmates for translating the things in prison.

##### **e. IG**

As per IG it is a third party and hence they cannot be allowed inside the prison without court order.

## **2. Mulakaat to friends.**

### **a. Practice in Prison.**

In prison only blood relatives are allowed in the Mulakaat Kaksh from meeting the inmates of the prison. No other person is allowed to be a visitor in the prison.

### **b. Contentions by the prisoners.**

Out of 17 FNPs 5 said that they need mulakaat of friends. They said only blood relatives are allowed but their blood relatives are generally in another country and they cannot come to meet in person. The FNPs requested that their friends can be allowed, as their blood relatives cannot come.

### **c. Observations.**

The Supreme Court in its various judgments has described the importance of visits in prison and in its judgments held that friends can be allowed as a visitor in jail.

### **d. Superintendent.**

The Superintendent told the researcher that there is problem of understanding the communication of FNPs as they may not understand the native language of the FNP. Hence they have problem not allowing friends.

As per the prison Superintendent every visitor for FNP may be allowed on the basis of Passport verification and Driving license, subject to the approval of prison authority.

### **e. IG**

As per IG there are problems of credibility and identity verification of non-blood relatives to be allowed as a visitor. There are cases of fake relatives who in disguise intimidate the FNP or the gang members or indulge with conspiracy.

IG proposed that if a prior verification of FNPs to be done by Ministry of Home Affairs under a set protocol, wherein their individual details

as nationality, name, address, other particulars, passport etc. can be collected and recorded, by MHA officials before they can be allowed to visit the inmates.

The second proposition is for the FNP to request through their legal aid/private lawyer to request for a visitor to obtain court permission following submission of passport other identity documents to be allowed for the visitors.

### **3. Video Conferencing facility & Allowance of international call through Embassy**

The facility of Video Conferencing with the family members should be allowed to FNPs. Example in West Bengal Prisons FNPs can have videoconference sessions once a week with their family members in other countries. International call can be allowed through a proper channel of Embassy. The foreign prisoners are allowed to talk to their family members/relative twice a month in Tihar jail, Delhi.

Videoconferencing through embassy should be allowed and not only for court proceedings and secondly the time limit for phone calls has to be increased.

The prison inmates said that it is only 15 mins.

Appointments can be booked using *e-prison suite* – the prison management software developed by National Informatics Centre, India.

#### **a. Practice in Prison.**

Video conferencing facility is provided to the FNPs but only to appear in the court.

#### **b. Contentions by the prisoners.**

As their family lives in other country so they said that videoconferencing may help to see their family.

#### **c. Observations.**

The facility of videoconferencing can be provided but beforehand full verification of the same needs to be done, which can be done by the respective Embassies.

#### **d. Superintendent.**

The Superintendent told the researcher that there is problem of credibility of the person who the FNPS is talking he/ she may be a family member thus it is difficult to determine the same.

**e. IG**

As per IG there are proper mechanism should be there based on prior check and scrutiny of the IP address and the identity verification of the person who the FNP will talk to.

IG said there complexities or limitation in either allowing for videoconferencing or Mulakaat unless prior verification is done by MHA because the IG said as per law prison is a State subject and Embassies are dealt by Central Government. Hence these matter pertaining to foreigners have to come to prison officials only after verification monitoring or processing by the various authorities.

**4. Bail**

All the 17 FNPs are undertrials and 11 of them are charged under NDPS, 2 are the cases of fraud and lastly 2 of them are charged under Customs Act.

Possessors, peddlers and users- judicial department.

Bail bond amount.

Lack of Local surety is one of the reason for not granting of bail to the FNP.

IG also said that since there is no surety IG mentioned that as there are no detention centers in the country as per the Foreigners Ac, which is a legal handicap. Therefore these FNP even though they are users they cannot be granted bail for the fear of absconding or evasion.

Setting up of detention center under the Foreigners Act, clear segregation of users, peddlers and possessors under NDPS Act.

**5. Cases for identity verification, for securing legal aid lawyer to be referred to State Legal Services Authority.** The relevant cases in which Lawyer is not being provided or the cases in which the FNP wants to engage a Government lawyer can be referred to the DLSA.

**6. The various Commission can be requested to conduct visits so as to help the FNPs:** The State Human Rights Commissions, the Women Commission

and the Child Rights Commission can conduct official visits to the Jail as per the mandate of the respective Act as per their statutory mandate, these commissions are duty bound to visit the government correctional , custodial institutions suo moto and undertake study, research on the same and issue necessary guideline so recommendation for the improvement of the inmates and can look into the conditions of FNPs.

### **ACTIONABLE RECOMMENDATION**

**These are to be taken up by the prior approval of IG and prison authorities.**

- A.** Phone calls should be allowed after proper scrutiny to the FNPs.
- B.** Video Conferencing facility can be allowed once a month to the Foreign Nationals to contact with their family members.
- C.** Address verification by the inmates should be done while taking admission in the prison.
- D.** Translator should be provided to the Foreign Nationals whenever they need to communicate.
- E.** Extending the time limit for the FNPs in Mulakaat Kaksh timing.
- F.** Mentioning list of identity documents to be displayed at Mulakaat Kaksh for visiting FNPs.
- G.** Sharing of e-prison performa for visitor based on NIC.