



2019

Broken Path to Freedom: Deciphering Lives of Foreign Nationals In Indian Prisons

Madhurima Dhanuka

Palak Chaudhari

Follow this and additional works at: <https://repository.nls.ac.in/nlsir>

Recommended Citation

Dhanuka, Madhurima and Chaudhari, Palak (2019) "Broken Path to Freedom: Deciphering Lives of Foreign Nationals In Indian Prisons," *National Law School of India Review*: Vol. 31: Iss. 2, Article 4.

Available at: <https://repository.nls.ac.in/nlsir/vol31/iss2/4>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in National Law School of India Review by an authorized editor of Scholarship Repository. For more information, please contact library@nls.ac.in.



BROKEN PATH TO FREEDOM: DECIPHERING LIVES OF FOREIGN NATIONALS IN INDIAN PRISONS

—Madhurima Dhanuka* & Palak Chaudhari**

Abstract This paper seeks to document existing problems with the problems Foreign National Prisoners (FNPs) face in prison. Even though there is dispute about how many FNPs are actually serving their sentence, the common thread is that all of them face the brunt of the criminal justice system. They are cut off from their families and home countries, have delays in repatriation, and suffer extreme hardships due to the indifference of embassy officials. Many of such officials are unaware of existing transfer agreements between the imprisoning and home countries. To ease the existing legislative framework, the paper suggests solutions to distinct issues that prevent FNPs from being repatriated to their home countries. The paper concludes by calling for a review of the Foreigners Act, 1948 which draws no distinction between the different types of migrants and permits extended periods of incarceration for such persons.

I. INTRODUCTION

Imprisonment can be a harrowing experience for most. It can be even worse for prisoners who are not a resident of the country where imprisoned, and are thus cut off from any family contact or support. The sense of isolation coupled with language or cultural barriers can be overwhelming, thus placing foreign national prisoners at a particularly vulnerable position. Their miseries however do not end here, and ‘the absence of, or delayed consular access, lack of strict nationality verification tools, restrictions on making international

* The author is the Programme Head for the Prison Reforms Programme at the Commonwealth Human Rights Institute.

** The author is a Project Officer with Prison Reforms Programme of the Commonwealth Human Rights Institute, India.

phone calls, inefficient government-funded legal aid and expensive private legal assistance further underline the susceptibility of such prisoners to violations. Language barriers and inadequate understanding of legal system add to their vulnerability'.¹

This paper documents our experience of engaging with foreign national prisoners ('FNPs') in India and recounts our interactions with FNPs and stakeholders to highlight the difficulties faced by FNPs in India. The paper also puts across the current legal framework within which foreign nationals are detained, prosecuted and imprisoned in India and makes an attempt to enumerate the barriers and possible solutions that can be considered to ensure that rights of FNPs are duly protected.

II. FOREIGN NATIONAL PRISONERS IN INDIA

The Prison Statistics India 2016 report pegs the number of FNPs in India at 6370.² The actual figures could however be higher, as in all probability the number does not account for FNPs confined in detention centres.³

While the official data does not provide detailed information on FNPs, some details can be found in Commonwealth Human Rights Initiative's (CHRI) recently published report - *Strangers to Justice: A Report on Foreigners in Indian Prisons*.⁴ According to this, as of January 2018, the number of FNPs in prisons across twenty-six states and union territories in India was 3908. This data was collated from responses received from twenty-two states and four Union Territories through Right to Information (RTI) requests filed by CHRI to heads of all 36 states and Union Territory's prison departments.

¹ Madhurima Dhanuka, Mrinal Sharma and Tahmina Laskar, *Strangers to Justice*, 16 JOURNAL OF THE NATIONAL HUMAN RIGHTS COMMISSION, INDIA 107-129 (2017).

² PRISON STATISTICS INDIA 2016, NATIONAL CRIME RECORDS BUREAU, GOVERNMENT OF INDIA, <http://www.ncrb.gov.in/StatPublications/PSI/Prison2016/Full/PSI-2016.pdf>.

³ There is a discrepancy between data on prisoners in some states where numbers would have been considerably higher, had persons in detention centres been accounted for. For example, Assam.

⁴ Palak Chaudhari and Madhurima Dhanuka, *Strangers to Justice: A Report on Foreign Nationals in Indian Prisons* COMMONWEALTH HUMAN RIGHTS INITIATIVE 2019, <http://www.humanrightsinitiative.org/download/1547551168Strangers%20to%20Justice%20FNP.pdf>.

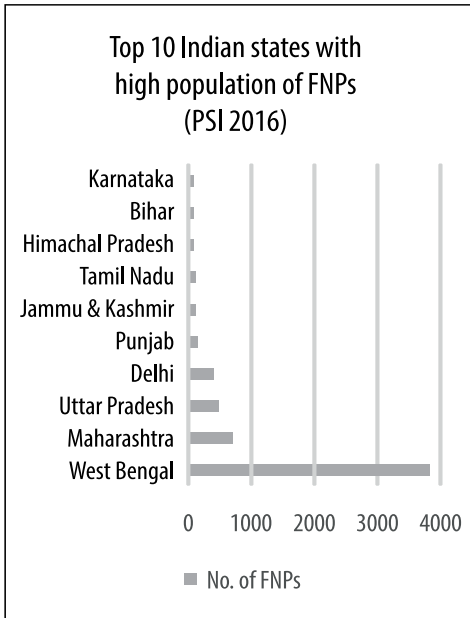


Table 2. Distribution of Foreign National Prisoners by Type (CHRI Data)

States	Under Trials	Convicts	Awaiting Repatriation	Total
Andaman and Nicobar Islands	1	30	2	33
Andhra Pradesh	9	1	0	10
Assam	135	16	341	492
Chandigarh	11	7	0	18
Delhi	67	26	0	93
Goa	2	0	0	2
Gujarat	67	8	1	76
Haryana	29	16	0	45
Himachal Pradesh	25	2	0	27
Jammu and Kashmir	48	19	43	110
Jharkhand	1	3	0	4
Karnataka	87	1	0	88
Kerala	29	33	37	99
Madhya Pradesh	5	15	0	20
Maharashtra	260	174	0	434
Meghalaya	19	3	0	22
Mizoram	7	10	0	17

Nagaland	0	0	1	1
Odisha	2	0	0	2
Puducherry	1	0	0	1
Rajasthan	47	20	1	68
Sikkim	0	0	0	0
Tamil Nadu	0	0	0	0
Telangana	27	10	0	37
Tripura	36	10	10	56
West Bengal	742	978	433	2153
Total	1657	1382	869	3908

Table 3. Distribution of Foreign National Prisoners by Nationality (CHRI Data)

<i>Nationality</i>	<i>UT</i>	<i>Convict</i>	<i>Awaiting Repatriation</i>
Afghanistan	12	4	
Austria	1		
Bahrain	2		
Bangladesh	929	1045	568
Belgium	1		
Benin		1	
Bolivia	2		
Brazil	3		
Bulgaria	1		
Cameroon	4	1	
China	3		
Colombia	3		
Congo	4		
Ethiopia	1	4	
France	2		
Germany	1		
Ghana	4		
Guinea	1		
Indonesia	1	1	
Italy	1		
Ivory Coast	1	3	1
Jordan	2		
Kenya	3	1	

Lesotho	1		
Malaysia	2		
Mali	1		
Myanmar	36	43	30
Namibia	1		
Nepal	85	25	
Nicaragua		1	
Nigeria	194	45	4
Pakistan	79	29	8
Palestine		1	
Paraguay	1		
Peru	1		
Poland	1	1	
Romania	1		
Russia	2		
Rwanda	1		
Sierra Leone			1
Singapore		1	
Somalia		112	
South Africa.	8	4	
Spain	1		
Sri Lanka	8	1	
Sudan	1		
Taiwan	2		
Tanzania	8	1	
Thailand		1	
Turkmenistan	3		
Uganda	1		
UK, England, Britain	8	1	
Ukraine			1
USA	3	1	
Uzbekistan	1		
Venezuela	2		
Zambia	3		
Zimbabwe	2		
Myanmar/Bangladesh			5

Venezuela/America	1		
Not Provided	216	55	251
Total	1657	1382	869

Some of the key findings highlighted in *Strangers to Justice* include,

- In the twenty-six states and UTs that responded to the RTI applications, there are 3,908 FNPs; these include 1,657 undertrials, and 1,382 convicts, while another 869 await repatriation.
- The FNPs belong to fifty-eight countries, and 65% of them are from Bangladesh.
- 522 prisoners have been categorised as ‘persons whose nationality is not provided’, essentially meaning that they do not belong to any country.
- Of the 3,908 FNPs in India, only 5.7% (222) have ever received consular access.
- Of the 1,657 undertrial prisoners, 38.5% (638) were charged under the Foreigners Act/Foreigners Registration or Passport Act alone. 444 were charged under other penal laws such as Indian Penal Code, the Narcotics Drugs and Psychotropic Substances Act, 1985 etc. were and 361 were charged with both offences.
- West Bengal alone confines 55% of all FNPs in India.

These figures shed light upon the stark realities of FNPs in India. In particular, the data on consular access is highly disappointing. It is also ironical that while FNPs in India are not provided consular access, India is emphasising on the Vienna Convention of consular access to get access to Kulbhushan Jadhav who is detained in Pakistan.⁵ Other figures are also startling, in particular the 522 with no known nationalities. These FNPs are at risk of being imprisoned indefinitely, as there are no policies to deal with stateless persons.

In addition to data, our own experiences of interacting with FNPs, consulate representatives, prison officers further highlight the key issues faced by FNPs. These are narrated in the next section.

⁵ *Kulbhushan Jadhav case at ICJ: Pakistan violated Vienna convention, denied consular access - India's counters*, TIMES NOW NEWS (February 18, 2019), <https://www.timesnownews.com/india/article/kulbhushan-jadhav-case-at-icj-pakistan-violated-vienna-convention-denied-consular-access-harish-salve/367925>.

III. INTERACTION WITH PRISONERS, PRISON OFFICERS, AND EMBASSIES – SNAPSHOT OF EXPERIENCES

A. Prisoners

Life inside prison is not easy. ‘Foreign prisoners are often discriminated against and considered ‘strangers’ by other prisoners as well as prison staff. Language barriers and/or inadequate understanding of the legal system are primary causes for this disconnect. A number of factors place foreign national prisoners in the condition of unwarranted hardships and rights violations.’⁶

Family contact: There are no official modes of maintaining communication with one’s family apart from writing letters on your costs or the embassies assisting you. One particular case of a South African national was heart aching. In prison since 2013, his mother only knew of his detention in 2016 when we contacted her. For two years till her death we were the only source of contact between him and his mother. It was only months after her death that the state permitted video conferencing calls between him and his family, and we still continue to be the information bearers for the family.

This is not a lone case. A Palestinian national spoke with his family after 28 years; an Iranian national’s family was informed after five years; and a Bolivian’s family was informed by us almost four months after her confinement in India. Following are the excerpts of our first conversation with her:

“It’s been 4 months since we have not heard from her. We have been very concerned about her for a long time, we did not know where she was. We thought she was in Brazil with her friends.”

We have also come across prisoners using illegal means to remain in contact, while some others try and persuade their lawyers to contact their families, and some like Sohan, a mentally ill Nepalese prisoner, continues to be detained for 39 years and counting, with all efforts to locate his family having failed.

Language barriers, discrimination and mental health: Communication is key, but when languages are different, it may cause a misunderstanding- in turn attracting prejudices based on the colour of one’s skin or religion, etc.⁷ For instance, the Bolivian national’s troubles are amplified due to language barriers, with her only known language being Spanish. It took applications like google translator and a computer to initiate communications with her by the

⁶ Madhurima Dhanuka, Broken Ties: In Custody Commonwealth Human Rights Initiative 2018, <http://www.humanrightsinitiative.org/blog/broken-ties-in-custody>.

⁷ Chaudhari and Dhanuka, supra note 4.

prison department to understand her situation and procure contact information for her family. Luckily, her lawyer understands Spanish and has been representing her case in the court.

‘Other rights also get inhibited due to language barriers. An accused’s ability to understand court proceedings is an indispensable fair trial right. Absence of good interpreters during the course of trial can render the prosecution and trial of a foreign prisoner futile.’⁸ Linguistic differences can also lead to exclusion from different vocational and educational program. All this can ultimately culminate into serious mental illnesses.⁹ For example, a prisoner in Alwar Detention Centre – which is on the compound of Alwar District Jail, detained there since 2009, could hardly communicate. He remained sitting on a large rock and stared at the boundary wall, in the piercing heat of Rajasthan, he had skin burns on his cheeks but that did not stop him. One of the other detainees told us that he just sits there all day everyday rocking back and forth.

Instances of discrimination have also been narrated to us by African nationals. In Haryana, *Frank* shared with us the discrimination he faced in prison. He alleged that other prisoners kept on screaming racial slurs at him and refer to him as ‘*kaalia*’. He further shared how prisoners would gang up to harass him, either hide his stuff, or wake him up while he slept or purposefully slap his arm when walking past him. He felt annoyed by this behaviour. He said “I have been a patient man so far, because these people will not get punished for what they are doing to me, but if I respond in any manner, there will be a complaint against me and it will just add to my sentence to be served”.

Delays in repatriation: Prisoners often count days till the completion of their sentence, with hope that they will soon be free and with their families. For Indian prisoners, it is simple, you complete your sentence and submit your fine (if any) and you are released on the day of your release. For foreign nationals, it is not as easy. On completion of sentence and in absence of a valid passport and visa, one cannot be simply set free, but has to be deported to the country of origin.¹⁰ Thus, release comes only after nationality verification, issuance of travel documents or an emergency travel certificate, purchase of travel tickets, arrangement for escorts to the airport/border, etc.

For instance, an Iranian national finished serving his prison sentence in June 2013. Subsequently he was transferred to a detention centre in Rajasthan. But until we met him in May 2018, no efforts seemed to have been made for his nationality verification or eventual repatriation. The Iranian embassy

⁸ Chaudhari and Dhanuka, *supra* note 4.

⁹ See more Magali Barnoux and Jane Wood, *The specific needs of foreign national prisoners and the threat to their mental health from being imprisoned in a foreign country* 18(2) *Aggression and Violent Behaviour* 240 (2013).

¹⁰ As per procedures established by the Ministry of Home Affairs (Foreigners Division), Government of India and circulated to state governments from time to time.

when contacted had no idea of his confinement, which also led to an initial scepticism with regard to Mr. Hassan not being Iranian. When his sister was traced and informed, she couldn't have been happier as the entire family had lost all hope of his being alive. His documents have finally been processed in March 2019, but his wait still remains as his family tries to secure funds for his travel. Similar are the tales of many Nigerians who often remain detained for lack of funds to support their travel, often seeking funds from the state governments.

Another peculiar situation arises when the nationalities are not verified. For instance, in a detention centre in Punjab, an alleged Pakistani national awaits repatriation for 22 years. Zoheb crossed over the India border in 1997 to meet with a Bollywood celebrity, only to have been caught and sentenced to 3 months imprisonment. While he claims to have lived in a small village in Pakistan, he doesn't have any documents to prove his nationality nor remembers his family details. Unfortunately, there are no government policies that place limits upon confinement of such persons, leaving them to rot and eventually die in prison.

B. Prison officers

Interactions with prison officers on the issue of FNPs can be quite interesting. Recently, during a prison visit in Haryana, a warden shared his understanding of Bangladeshis; being those who are from West Bengal. While sharing details of FNPs confined in his prison, he only named those from Canada and Nigeria, while keeping mum on those from Nepal and Bangladesh, for "Bangladeshis are the people who are from West Bengal and speak Bengali, and travelling to Nepal doesn't require a passport or visa, so is it really a foreign country?" When we responded, "Sir they are separate countries", he actually questioned "Really? When did that happen?"

While it resonates the existing ignorance among the prison administration on the issues concerning FNPs, it is not representative of the entire prison system of India. Our interactions with prison officers in West Bengal have been on a different footing, with their knowledge and experiences being vital in building our own understanding of the issues of FNPs in prison. For all the FNP cases we assisted with, the documentation maintained by the prison officers is appreciable. Letters after letters have been written to authorities seeking nationality verification or consular access or travel documents. Some received positive response, while others got no replies. Yet the authorities kept on writing and once we initiated our interventions in prisons, they shared the files and were willing to seek our assistance.

C. Embassy representatives

Over the course of our work, we have contacted and interacted with consular representatives of various embassies/high commissions. Building trust was initially difficult, but persistent conversations and a realization of common goals, i.e., welfare of their national eased them up eventually. When our data on their nationals was shared with them, surprisingly, our lists didn't match. They had a considerably smaller list of nationals whom they knew were imprisoned in India. Further, we realised that while some High Commissions were persistently seeking permission to visit prisons to provide consular access they hadn't received a single permission in over 15 months. Few others had never applied for consular access nor knew of the provisions. Some claimed that the procedures are not clear, neither to the Embassy/High Commission nor to the Ministry, while some said that they were immediately being granted access when requested.

A similar ignorance was also observed with regard to transfer of sentenced prisoners' agreement. These agreements permit nationals to seek transfer to their native countries to serve the remainder of their sentences in their home countries. As of today, India has agreements with over 40 countries for Transfer of Sentenced Prisoners by virtue of bilateral agreements and multilateral conventions.¹¹ Strangely though, we realised that often high commissions are not aware of the same. For instance, in a meeting when we raised our concern of non-use of the sentence transfer agreement, which the countries signed years ago, the Counsellor said "Is that true? (with reference to the existence of such an agreement) I'm unaware of the same, let me look into it." Some others however, blame the complex procedure under the agreements, and state "Well, the procedure is so complicated and nobody really cares to communicate the intricacies of the agreement properly, so it is not preferred."

While the different stakeholders involved in processes affecting FNPs are riddled with their own chaos, nobody is really looking into the impact it has on the lives of foreign nationals confined in prisons. Behind the high opaque walls of prisons and detention centres, are people whose families do not know where they are, who continue to serve sentences even after its completion, who have lost their mental stability due to the harsh conditions of their current reality. Having interacted with foreign nationals in prisons in different parts of the country, the realities that surfaced warrant attention and need to be addressed.

¹¹ Transfer of Sentenced Persons Agreement List, Ministry of External Affairs, http://mea.gov.in/Images/pdf1/TSP_Final_List.pdf (last visited on July 23, 2019).

IV. REPAIRING THE PATH TO FREEDOM

There is an emergent need to examine policies and practices in order to ensure that rights of FNPs are respected and protected. Our experiences highlight the existence of numerous barriers that lead to rights violations for FNPs in India. However, in order to understand them it is first important to understand the legislative framework within which processes relating to FNPs function.

A. Legislative Framework

The entry, stay, and removal of foreigners in India is governed by the Foreigners Act 1946, the Passport (Entry into India) Act 1920, the Foreigners Order 1948, the Foreigner (Tribunals) Order 1964,¹² the Citizenship Act 1955, the Citizenship (Registration of Citizens & Issue of National Identity Cards) Rules, 2003, the Citizenship Rules, 2009, Foreigner's Tribunal and Illegal Migrants (Determination by Tribunals) Rules, 1979 and the Repatriation of Prisoners Act 2003.¹³

The Foreigners Act, 1946 confers upon the central government certain powers in respect of the entry of foreigners into India, their presence therein and their departure therefrom. It also contains provisions that prescribe penalties for contravention of provisions. The term 'foreigner' is defined in Section 2(a) of the Foreigners Act 1946, to mean a person who is not a citizen of India.

The regulations regarding recognition of citizenship are contained in the Citizenship Act, 1955, that was enacted in accordance with powers vested in the parliament by Article 11 of the Constitution of India 1950. The Citizenship Act contains provisions for acquisition and termination of citizenship. As per the Act there are five modes of acquiring the citizenship of India: by birth, descent, registration, naturalisation, and incorporation of territory. The Act also defines an illegal migrant as a foreigner who entered India, (a) without a valid passport or other prescribed travel documents; or (b) with a valid passport or

¹² Including the Foreigners (Tribunals) Amendment Order 2012.

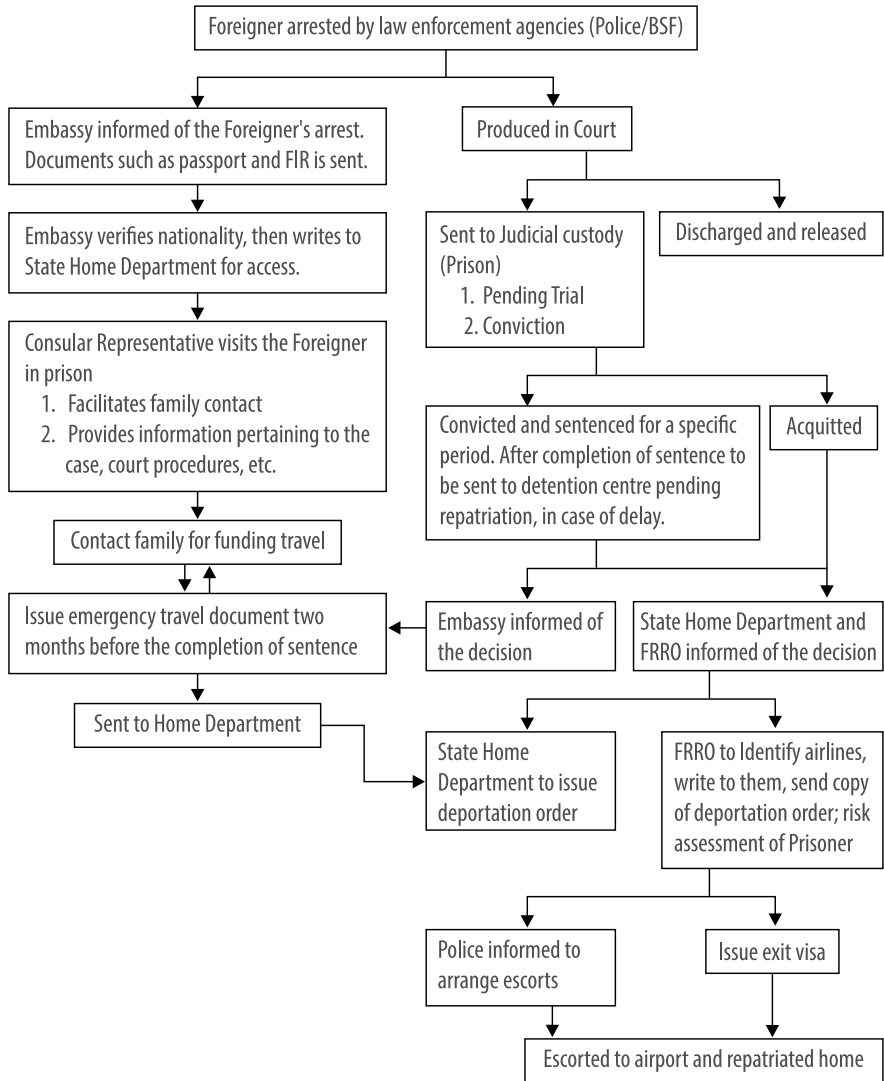
¹³ Additionally, there are orders and rules relating to protected and restricted areas restricting movements of specific categories of people and foreigners such as Registration of Foreigners Act, 1939; B. Registration of Foreigners Rules 1939 including the Executive Instructions issued by the Government to supplement and facilitate the administration of these rules; Registration of Foreigners (Exemption) Order 1957; Foreigners (Exemption) Order 1957; Exemption Orders under the Passport (Entry into India) Rules 1950; The Foreigners (Internment) Order 1962; The Foreigners (Restriction on Chinese Nationals) Order 1962; The Foreigners (Restriction on Pakistani Nationals) Order 1965; The Foreigners from Uganda Order 1972; The Registration of Foreigners (Bangladesh) Rules 1973; The Foreigners (Report to Police) Order, 1971; The Foreigners (Restriction on Pakistani Nationals) Order 1971; Foreigners (Protected Areas) Order 1958; Foreigners (Restricted Areas) Order 1963; Foreigners (Amendment) Order 2015, Foreigners (Amendment) Order 2016.

other prescribed travel documents but remains in India beyond the permitted period of time.¹⁴

The Foreigners Order 1948 further provides for detailed provisions on grant or refusal of permission to enter India and the various restrictions that can be imposed on foreigners. Further the Passport (Entry into India) Act 1920 empowers the central government to make rules requiring all persons entering India to be in possession of passports, and for all matters ancillary or incidental to that. It also provides for powers to arrest and detain, as well as the power of removal.

¹⁴ Citizenship Act 1955, §2(1)(b).

PROCEDURAL FLOWCHART IN THEORY



*All communication to the embassy made through ministry of external affairs, consular, visa and passport division for consular access or the territorial division for repatriation process.

The implementation of the provisions laid down under the various acts have been enshrined upon the Bureau of Immigration ('BoI'), set up by the Government of India in the Ministry of Home Affairs, New Delhi. BoI is headed by the Commissioner of Immigration and assisted by Foreigner

Regional Registration Offices ('FRRO') for immigration facilitation services at airports and work relating to registration of foreigners under various Acts and Rules.¹⁵

In addition to the Indian legislative framework that regulate the stay or removal of foreign nationals, there are a number of International instruments which protect the rights of FNPs. The Standard Minimum Rules,¹⁶ Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment,¹⁷ Vienna Convention on Consular Relations,¹⁸ United Nations Convention Against Torture,¹⁹ Model Agreement on the Transfer of Foreign Prisoners and Recommendations for the Treatment of Foreign Prisoners,²⁰ etc. guide the confinement and treatment of foreign nationals while in prison. Broadly speaking, in addition to all other guarantees and protections provided to all prisoners, foreign nationals are also entitled to the -- right of information regarding arrest or apprehension to consular post (Article 36(b) of the Vienna Convention on Consular Relations 1963);²¹ right to communicate with their diplomatic mission and consular access (Article 36(b) of the Vienna Convention on Consular Relations 1963 and Rule 62 of the Nelson Mandela Rules 2015); right to be visited by consular officers in place of detention (Article 36(c) of the Vienna Convention on Consular Relations 1963); right of prisoners to refuse visit or communication with consular officers (Article

¹⁵ Altogether, there are 86 Immigration Check Posts (ICPs) all over India, catering to international traffic. Out of these, 37 ICPs are functioning under the BoI, while the remaining are being managed by the concerned State Governments. At present, there are 12 FRROs in major cities i.e. Delhi, Mumbai Kolkata, Chennai, Amritsar, Bengaluru, Hyderabad, Calicut, Kochi, Trivandrum, Lucknow and Ahmedabad. Apart from this, there are 12 Chief Immigration Officers in the cities i.e. Goa, Jaipur, Gaya, Varanasi, Nagpur, Pune, Mangalore, Trichy, Coimbatore, Bagdogra, Chandigarh and Guwahati. At remaining places District Superintendent of Police (SP) or the prescribed authority functions as FRO to facilitate foreigners. For more information, see <https://boi.gov.in/>.

¹⁶ Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime Treatment of Offenders, held at Geneva in 1955, <https://www.un.org/ruleoflaw/files/STANDA~1.PDF>.

¹⁷ Body of Principles of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173 of December 9, 1988, <https://www.ohchr.org/en/professionalinterest/pages/detentionorimprisonment.aspx>.

¹⁸ Vienna Convention on Consular Relations, 1963, http://legal.un.org/ilc/texts/instruments/english/conventions/9_2_1963.pdf.

¹⁹ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>.

²⁰ UN Model Agreement on the Transfer of Foreign Prisoners and Recommendations on the Treatment of Foreign Prisoners, adopted by the Seventh Crime Congress, Milan, August 26 – September 6, 1985, <http://www.prisonwatch.org/assets/un-model-agreement-on-the-transfer-of-foreign-prisoners-and-recommendations-on-the-treatment-of-foreign-prisoners.pdf>.

²¹ This right can also be found in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and The United Nations Convention Against Torture, adopted by General Assembly resolution 43/173 of December 9, 1988, <https://www.ohchr.org/en/professionalinterest/pages/detentionorimprisonment.aspx>.

36(c) of the Vienna Convention on Consular Relations 1963); right to communicate with their families and friends (Rule 37 of the Nelson Mandela Rules 2015); right to communicate in language understood by him/her (Article 14 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment); right to seek transfer to home country for serving remaining part of sentence (UN Model Agreement on the Transfer of Foreign Prisoners and Recommendations on the treatment of foreign prisoners 1985).

B. Understanding the barriers and possible solutions

Our experiences of interacting with prisoners, prison officers, families and lawyers indicate the following barriers²² that effect rights of foreign nationals in Indian prisons: -

1. Lack of intimation to consulate/diplomatic missions upon arrest.
2. Lack of a nationality verification process at the time of trial.
3. Lack of consular access while in prison.
4. Lack of contact with family and friends.
5. Lack of provisions to meet special needs.
6. Delay in nationality verification.
7. Delay in obtaining Emergency Travel Certificate ('ETC').

Insufficient funds to support travel.

Delays in logistical arrangements, approvals, etc.

These barriers obstruct the realization of rights for FNPs. However, there are solutions, which can be considered and implemented at different stages of the entire process involving the arrest, trial and imprisonment of FNPs. They can be summarised as follows: -

Barrier I: Lack of intimation to Consulate/Diplomatic Mission upon arrest

- The police should be instructed to ensure that the arrest and imprisonment of FNPs has to be immediately communicated to the relevant embassies via proper channels;
- Guidelines that prohibit direct communication between police officers and embassies should be revised;

²² Dhanuka, *supra* note 6.

- A web portal where information can be centrally uploaded by the police and automatically sent to the concerned embassy (with a copy to the Ministry of External Affairs ('MEA')) should be developed;
- A brochure with details of departments and the process for seeking consular access must be prepared for embassies.

Barrier II: Lack of nationality verification process at the time of trial

- Effective representation for FNPs in court proceedings must be ensured;
- All communication made to and received from embassies over nationality verification should be made part of court orders and the court record;
- Guidelines must be prepared on how to deal with FNPs whose nationalities cannot be verified.

Barrier III: Lack of consular access while in prison

- Officers-in-charge of prisons must be instructed to ensure that relevant embassies are immediately informed - via proper channels - of the imprisonment of FNPs;
- The MEA can streamline process for visits by consular representatives to prisons, and also include the use of video-conferencing or calls to provide consular access.

Barrier IV: Lack of contact with family and friends

- FNPs should be allowed to use video conferencing to communicating with their family overseas;
- They should be allowed to make or receive international calls or use emails to contact their families.

Barrier V: Lack of provisions to meet special needs

- Prison officers should use innovative tools like visual dictionaries to overcome language barriers;
- Pamphlets with information on prison rules and regulations pertaining to FNPs should be prepared and made available on the prison, MEA and embassy websites;

- Prison authorities should consider the dietary preferences of FNPs.

Barrier VI: Delay in nationality verification

- The process of nationality verification should be initiated immediately upon admission;
- Standard operating procedures (SOPs) should be drafted to ensure the timely repatriation of prisoners;
- Use of the Repatriation of Prisoners Act 2003 should be encouraged to facilitate the transfer of prisoners who wish to spend their imprisonment terms in their home countries;
- Prison authorities should ensure that all documents pertaining to prisoner's nationality are transferred to the prison from the police station;
- All prisoners awaiting repatriation may be transferred to one prison in the state, which has appropriately trained staff members.

Barrier VII: Delay in obtaining Emergency Travel Certificate (ETC)

- An integrated web-portal created for this purpose can reduce delays in obtaining ETCs considerably.

Barrier VIII: Insufficient funds to support travel

- Prison authorities may permit FNPs to work during their imprisonment terms;
- Government and embassies can consider setting up welfare funds to support travel when they deem appropriate.

Barrier IX: Logistical arrangements, approvals, etc.

- An integrated web portal created for this purpose can streamline the entire process.

V. CONCLUSION

It is an unfortunate reality that foreign national prisoners often find themselves bearing the brunt of the criminal justice system. "Lack of diligent consular assistance; restrictions on making international calls to family; lack of implementation of agreements on transferring of prisoners between India and many countries; sketchy application of deportation/repatriation procedures and

absence of alternative facilities to house the released prisoners have contributed to an enormous humanitarian and administrative problem.”²³ But all is not lost, and with concerted efforts and persistent engagements we have met with some success in our attempts.

Our most peculiar and difficult case till date, was of Yezid- a Palestinian national.²⁴ Yezid a Palestinian man underwent multiple convictions, which accounted for the 20 years he spent as a prisoner. Another three years were spent awaiting repatriation. In these 23 years, he never once got the occasion to speak to his family. From being known as a Jordanian, then Egyptian and finally being verified as a Palestinian; to the difficulties of locating his passport which was in Nagpur while he was imprisoned in Kolkata; to his family believing him to be dead; to the denial of an airlines to board him after he reached the airport; to the short time frame within which he had to travel from Kolkata to Gaza via Mumbai and Egypt; his case highlights all that can go awry for FNPs. Eventually it took a mammoth effort on part of every agency concerned viz. CHRI, MEA, FRRO, Prison department, the Palestine Embassy and the Egyptian Embassy to finally see him aboard the flight home.”²⁵

We end with the hope that the governments will soon undertake review of their laws and policies which violate rights of FNPs. One also hopes that a review of the Foreigners Act 1948 is also undertaken which currently bears no distinction between economic migrants, asylum seekers, refugees, stateless persons and permits for the prolonged and indefinite detention of foreign nationals in India.

²³ Mrinal Sharma and Madhurima Dhanuka, *A Long Night's Journey into Day*, The People's Beacon - Odisha Human Rights Commission (2017).

²⁴ All names of prisoners have been changed for privacy concerns.

²⁵ Read more on the case in Mrinal Sharma and Madhurima Dhanuka, *A Long Night's Journey into Day*, The People's Beacon - Odisha Human Rights Commission (2017).