

Date: 03.05.2021

To

Hon'ble Mr. Justice Vipin Sanghi
Chairperson, High Powered Committee (HPC)
Executive Chairperson, Delhi State Legal Services Authority
High Court of Delhi at New Delhi

Hon'ble Mr. Justice Sanghi and Members of the High Powered Committee,

1. The undersigned are concerned citizens having diverse experience in the field of law, human rights, women's rights and public health, and are writing the present representation to bring certain factors to the attention of High Powered Committee (hereinafter referred to as 'HPC') and seeking immediate directions for decongestion of prisons in Delhi, to protect the right to life of prison inmates, during the present Covid surge.
2. The present surge in Covid-19 cases across India and particularly in Delhi calls for urgent and decisive intervention of the HPC to ensure that prison inmates in Tihar, Mandoli and Rohini jails are not left helpless and reeling against the deadly strains of the virus. Medical and expert opinions and instances suggest that the present wave of Covid-19 in India is even more virulent and fatal. Further, unlike the first wave in 2020, younger people are also being seriously impacted and succumbing to the virus in 2021. This necessitates that a reevaluation be carried out in the approach towards combating the pandemic in prisons by revisiting the criteria outlined by the HPC for prisoners to be released on Interim Bail and Emergency parole from jails in Delhi. The present wave of Covid-19 is no longer a threat merely to persons above the age of sixty. (News report of The Bangalore Mirror, published on April 29, 2021 is available at: <https://bangaloremirror.indiatimes.com/bangalore/others/not-so-gentle-reminder-for-covid-age-is-no-bar/articleshow/82299175.cms>)
3. There are also reports of multiple deaths from Covid-19 in Tihar, and more than 250 inmates are reportedly Covid positive, leading to prison authorities seeking release of prisoners on emergency parole. (A news report published by the Hindustan Times dated April 30, 2021 is available at: <https://www.hindustantimes.com/cities/delhi-news/after-4-die-of-covid-19-tihar-asks-govt-to-allow-release-of-inmates-on-parole-101619734794079.html>)
4. In view of the above, the undersigned wish to place the following issues for consideration of the HPC so that necessary directions may be passed:

Congestion and overcrowding in prisons

- A. The National Crime Records Bureau Prison Statistics for India (2019) places Delhi's prisons as the most overcrowded prisons in the country, with an occupancy rate of 174.9 percent. The orders for decongestion of prisons passed in 2020 by the HPC stand revoked as directions were passed by the HPC, the Hon'ble High Court of Delhi and the Hon'ble Supreme Court in March and April 2021 asking all persons released on bail / parole to surrender. As per information available on the prison department's website, updated on 20.02.2021, there are a total of 17,285 prisoners in Delhi against a sanctioned capacity of 10,026 inmates. Hindustan Times reports that there are presently above 20000 prisoners in the jails (Refer to Annexure A-2). Further, another 3000+ prisoners are expected to return to the prisons pursuant to directions for their surrender, which would result in more than 23,000 prisoners, which is significantly more than double its sanctioned strength. Jail officials stated that this is the highest population of inmates in the jail till date. (Refer to news report in para 3).
- B. The need for adequate social distancing in prisons would necessitate **at least** a reduction in the occupancy to 50% of the sanctioned capacity – which would place the number of inmates that can be held by following distancing norms at around 5000, as opposed to the present strength of 20,000+ prisoners. This would require decongestion of the prisons to be undertaken at a large scale, without which there remains a live, real and grave threat of the virus spreading throughout the jails and afflicting many inmates. There are already reports of 4 deaths in Tihar in the last week due to Covid-19, and 261 inmates are reported to be Covid positive, along with 115 infected jail officials (Refer to news report in para 3). Further, a fifth Covid death - of Md. Shahabuddin has been reported on 01.05.2021. (News report is available at <https://www.thehindu.com/news/national/other-states/jailed-ex-rjd-mp-mohammad-shahabuddin-dies-of-covid-19/article34456482.ece>)

United Nations statement on detention during the pandemic

- C. In a joint statement dated 13.05.2020, issued by various global leaders in the field of public health, human rights and prisoners' rights including the UN High Commissioner for Human Rights (UNOHCHR), Director General World Health Organization (WHO), Executive Director UN Office on Drugs and Crime (UNODC) and Executive Director of The Joint UN Programme on HIV/AIDS (UNAIDS), it has been stated,
- "In the light of overcrowding in many places of detention, which undermines hygiene, health, safety and human dignity, a health response to COVID-19 in closed settings alone is insufficient. Overcrowding constitutes an insurmountable obstacle for preventing, preparing for or responding to COVID-19.*
- We urge political leaders to consider limiting the deprivation of liberty, including pretrial detention, to a measure of last resort, particularly in the case of overcrowding, and to enhance efforts to resort to non-custodial measures."*

Copy of the statement is available at:

<https://www.who.int/news/item/13-05-2020-unodc-who-unaid-and-ohchr-joint-statement-on-covid-19-in-prisons-and-other-closed-settings>

Under Trial Review Committee and release under Sec. 436A Cr.P.C.

D. The Under-Trial Review Committee constituted in each district in India pursuant to the Supreme Court's directions in the case titled *In Re Inhuman Conditions in 1382 prisons* [W.P. (Civil) 406 of 2013, Order dated 31.10.2017] must also play a significant role in ensuring that persons eligible for the benefit of Section 436A Cr.P.C. are not languishing in the jails in New Delhi. The concerned Committees be directed to send the latest information in this regard to the HPC to ensure that all those entitled for release in terms of Sec. 436A CrPC are enlarged on bail.

Women prisoners are a vulnerable class and are at greater risk

E. While Jail no. 6, Tihar Jail, which has a capacity of 400 inmates, has 440 lodged currently; Jail no. 16, Mandoli, with a capacity of 280, has 210 female inmates lodged at present. As per reports, there are 42 Covid positive cases in Jail No. 6, Tihar Jail, signifying that 10 percent of the inmates have contracted the virus, which is the highest rate of infection in any jail in Delhi. (Copy of news report published by The Print dated 29 April 2021 is available at:<https://theprint.in/india/least-crowded-tihars-women-jail-has-highest-number-of-covid-cases-of-all-delhi-prisons/647723/>)

F. The spread of Covid-19 is largely aggravated by structural and systemic issues in the prison including hygiene, cleanliness, social distancing and exposure to common surfaces. While there are dedicated women's jails, that does not however mean that the said jails is designed to meet the differential needs of women. It is not specially equipped to address issues of female health and hygiene, including reproductive and menstrual needs of women. In an article titled, 'Gendering the Pandemic in the Prison', co-authored by one of the undersigned persons, Dr. PratikshaBaxi has argued:

"Women inmates in male-defined prisons governed by male rules of incarceration experience specific forms of discrimination, deprivation and violence. Their dignity is stripped as women—menstruating bodies are made to leak and vaginal infections allowed to fester. Their souls broken as women, with strip searches and cavity probes. All women in prisons without distinction of charge, crime or sentence, whether pregnant, lactating, menstruating or menopausal, differently abled or ailing may be thought of as "custodial" minorities."

Copy of the article is available at:

<https://www.theindiaforum.in/article/gendering-pandemic-prison>

G. The shared sanitation and hygienic facilities in women's prisons,

especially washrooms with inadequate facilities to manage menstrual needs poses a greater risk of exposure to the Covid-19 virus in female only prisons. There is an immediate need to drastically decongest all women's jails in that regard, almost to an extent that washrooms need not be shared by many inmates, and there can be regular sanitization of washroom surfaces after usage by an inmate. Leaving women prisoners at the mercy of regular bail jurisprudence while the pandemic rummages through the jail would tantamount to a failure of the State's obligation towards protecting the health of women prisoners. In another article, published by The Indian Express on April 21, 2021, Dr. PratikshaBaxi states:

"For women and children, life in Indian prisons means being subjected to the patriarchy of custodial institutions in unusually cruel ways that have not found much judicial reflection in bail jurisprudence. For bail jurisprudence is foundationally adult, able-bodied and male. It does not empathise with women and children, or the elderly and the afflicted. It does not consider the vicarious liability of the state for the systemic and everyday forms of violence, humiliation and deprivation on women or transgender undertrials. Custodial rape, pregnancy or childbirth is not seen as cruel, inhumane and degrading treatment of women prisoners as women. Nor are the rights of children of incarcerated parents put at the centre of bail jurisprudence. The abject state of women's prisons, which is much worse than male prisons, is often not seen as a justified ground for the release of women undertrials, even in a pandemic."

Copy of the article is available at:

<https://indianexpress.com/article/opinion/columns/bail-jurisprudence-womens-prisons-judiciary-7282034/>

NHRC Advisories 2020

H. It is pertinent to draw the attention of the HPC to the recommendations made by the National Human Rights Commission (NHRC). In furtherance of its mandate under The Protection of Human Rights Act, the NHRC in order to assess the impact of the pandemic on realisation of rights of different marginalised groups including, migrant workers, prisoners, women, disabled, etc. constituted a "Committee of Experts on Impact of Covid 19 pandemic on Human Rights and Future Response" which included representatives from civil society organizations, independent domain experts and the representatives from concerned Ministries / Departments. On the basis of the impact assessment done by the said Committee of Experts and the Recommendations issued by it, the NHRC released the Human Rights Advisory on Rights of Women in the context of Covid-19 dt. 07.10.2020. One of the undersigned, Sarojini N. a women's and public health expert, was a member of the said Committee of Experts.

a) **Human Rights Advisory on Rights of Women in the context of Covid-19** dt. 07.10.2020 acknowledges the specific challenges unique to women prisoners and states,

"The Covid-19 pandemic has also amplified the crisis of the prison system and poses specific challenges to women in prisons. Women do not have equal access to gender sensitive health systems, nor do they have access to adequate nutrition and protection from abuse within the prison leading to heightened possibilities of sexual violence."

b) The said Advisory of NHRC makes the following significant recommendations pertaining to women prisoners during Covid-19:

"i. Ensure release of all pregnant women and women with children from prison in keeping with the Supreme Court order dt. 23, May, 2020 and the guidelines of states' High Powered Committee to decongest prisons.

ii. Equal access to gender sensitive health services may be provided, including availability of a gynaecologist and regular check-ups. The conditions of prison facilities such as washroom should also be improved.

iii. Ensure access to adequate nutrition and protection of women from abuse within the prison.

iv. Women prisoners with existing health conditions including mental illness and disabilities may be given priority in releasing on bail.

v. Ensure legal services, court camps in every prison for early release. No woman should be unable to secure release due to their inability to pay surety/arrange personal bonds."

Copy of the Human Rights Advisory on Rights of Women in the context of Covid-19 dt. 07.10.2020 is available at:

<https://nhrc.nic.in/sites/default/files/Advisory%20on%20Rights%20of%20Women.pdf>

I. The HPC for the state of Odisha on 04.12.2020 passed a direction to all stakeholders including the prison superintendents to ensure full and proper compliance of the NHRC's Human Rights Advisory on Rights of Women in the context of Covid-19. Copy of the minutes of the meeting is available at:<https://oslsa.nic.in/wp-content/uploads/2020/12/minutes-of-the-meeting-dated-04.12.2020.pdf>

J. The NHRC's 'Human Rights Advisory on the Rights of Persons with Disabilities in context of Covid-19' dated 28 September, 2020, further emphasizes the need to recognize the specific needs of persons with disabilities in institutions and calls upon the State to take necessary steps to combat Covid-19. The guidelines in the Advisory state:

"1. Prioritise testing and promote preventive measures within

institutions to reduce infection risks by addressing overcrowding, implementing physical distancing measures for residents, modifying visiting hours, mandating use of protective equipment, and improving hygiene conditions.

2. Increase the resources of institutions including human resources and financial resources to implement preventive measures.

3. Promote and coordinate the development of community support networks, and ensure the availability of protective materials, equipment and products.

4. Move prisoners with disabilities out of congested jails/detention centers and provide them adequate medical treatment on an urgent and immediate basis."

Copy of the NHRC 'Human Rights Advisory on the Rights of Persons with Disabilities in context of Covid-19' dated 28 September, 2020, is available

at:<https://nhrc.nic.in/sites/default/files/NHRC%20Advisory%20on%20Disability.pdf>

UNAIDS Advisory, 2020

K. The UNAIDS in 2020 published an Advisory on responding to Covid-19, titled, 'Six Concrete Measures to Support Women and Girls in all their diversity in the context of the Covid-19 pandemic', where it emphasized the greater risk to women prisoners. The documents states,

"Women in prison are more susceptible to acquiring the virus because prisons keep people in confined spaces, with limited options for physical distancing. Prison populations already have a weaker health profile than the broader community, and many prisons do not provide adequate health care. Where prison health-care services are available, women, being a minority, often have poorer access, and their sex-specific needs remain largely neglected."

Copy of the UNAIDS advisory titled 'Six Concrete Measures to Support Women and Girls in all their diversity in the context of the Covid-19 pandemic' is available at:

https://www.unaids.org/sites/default/files/media_asset/women-girls-covid19_en.pdf

Public health centric approach to guide decongestion and release of prisoners

L. To protect the right to life of the prison inmates there is an imminent need to adopt a health centred approach that addresses the present Covid crisis. The criteria set out for purposes of awarding Interim Bail and Emergency Parole, must be premised on and take into consideration the overall holding capacity of prisons, health related vulnerabilities, comorbidities, disabilities including physical disability and mental illness or mental health concerns, belonging to marginalised social groups, special physiological needs of women, and age related ailments. The existing approach of categorising under-trial prisoners and convicts solely on the basis of the nature and

gravity of offence / punishment, for purposes of release on interim bail, will not address the emergent situation to combat the pandemic. At this moment of a health emergency the State will have to bear responsibility for the protection of all prisoners, UTPs and convicts from the pandemic, and incarceration as the regular norm with prisoners and under-trials requires review. Given the lethal nature of the pandemic, and the unrelenting and pervasive toll that it is taking on human life and health, it may not be out of place to suggest that interim bail or emergency parole should be the norm and ought not to be denied, especially if the person belongs to a custodial minority, or a marginalized or vulnerable group, community or class in society, unless there are strong reasons for a person's continuing incarceration during the pandemic. It is urged that the adoption of such criteria to decongest the prisons would be in conformity with the letter and spirit of the guarantee to right life under Article 21 of the Indian Constitution, and should guide the HPC.

M. The strain on the State run as well as private hospitals in Delhi suggests that the prison authorities would not be able to ensure hospitalization of inmates if there is a large-scale spread of the infection, thereby placing a serious doubt over access to and availability of effective and timely medical attention. In such circumstances prisoners ought to be allowed to at least seek the comfort and solace of being with family.

N. The response of the State to the pandemic, in dealing with prisoners, cannot disregard the duty cast upon the State to ensure the best medical care for prisoners, and rapid decongestion of prisons is a prerequisite to the same. Every prisoner has a fundamental and human right to prompt and comprehensive medical care under Article 21 of the Constitution, which conversely casts a duty upon the State to take all necessary steps to provide effective medical care. This constitutional duty of the State is further reiterated in international covenants, including the **United Nations Rule for the Treatment of Women Prisoners and Non Custodial Measures for Women Offenders ("The Bangkok Rules")** of 2011 and the **United Nations Standard Minimum Rules for the Treatment of Prisoners ("the Nelson Mandela Rules")** of 2015. These Rules have been cited with affirmation by judicial pronouncements in India (*Dr. P V Varavara Rao vs NIA*, Bombay High Court Order dt. 22.02.2021), and also included by the Ministry of Women and Child Development in its advisories, and may be used as a guiding light in the present circumstances. The International Covenant on Economic, Social and Cultural Rights (ICESR) further states that prisoners have a right to the highest attainable standard of physical and mental health.

The Bangkok Rules are available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/BangkokRules.aspx>;

The Nelson Mandela Rules are available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/443/41/PDF/N1544341.pdf?OpenEle>

[ment](#);

The ICESR is available at:

<https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>

Non-discrimination is a mandate of the Disaster Management Act, 2005

O. Prisons as hotspots of mass contagion with overcrowded and vulnerable populations, attract the application of the Disaster Management Act (hereinafter DMA), 2005, especially the provisions for mitigation as well as relief and rescue. Section 61 of DMA prohibits discrimination by holding that '*while providing compensation and relief to the victims of disaster, there shall be no discrimination on the ground of sex, caste, community, descent or religion*'. The 2007 National Disaster Management Guidelines, which provide the principles for state disaster management plan, insist that such plans must recognise: '*the differential needs of all sections of the society, including marginalised groups such as the elderly, pregnant and lactating mothers, children, physically and mentally challenged persons etc. It should specifically address the concerns of women*' (at page 10).

Copy of the 2007 National Disaster Management Guidelines is available at: <https://nidm.gov.in/PDF/guidelines/sdmp.pdf>

National Disaster Management Plan, 2019

P. The National Disaster Management Plan of 2019 outlines critical guidelines on inclusiveness, including the directions that prohibits discrimination against women, gender and sexual minorities, Dalits, tribals, women living with disabilities and religious minorities. Therefore, the state plan must recognise the differential needs of women and other custodial minorities in prisons. The disaster law must be read with prison rules so that **all** women prisoners are considered as a class of most vulnerable populations, along with persons with physical and mental disabilities, who deserve rescue and relief, mitigation and compensation. One compelling interpretation of the non-discrimination principle crystallized in the disaster law is to read it as a law that prohibits discrimination (such as on the grounds of nationality) and recognizes the differential needs of marginalised groups for mitigation, relief and rescue during a disaster.

Copy of the National Disaster Management Plan of 2019 is available at: <https://ndma.gov.in/images/policyplan/dmplan/ndmp-2019.pdf>

State responsibility - right to life of prisoners u/Article 21

Q. There are numerous judicial pronouncements which recognize the right to health and right to medical treatment of prisoners as a facet of the right to life under Article 21. In *Sunil Batra vs Delhi Administration* (1980) 3 SCC 488, the Supreme Court of India explained the import of 'right to life' for prisoners by stating:

"Prisoners are peculiarly and doubly handicapped. For one thing, most prisoners belong to the weaker segment, in poverty, literacy,

social station and the like. Secondly, the prison house is a walled-off world which is incommunicado for the human world, with the result that the bonded inmates are invisible, their voices inaudible, their injustices unheeded. So it is imperative, as implicit in Art. 21 that life or liberty shall not be kept in suspended animation or congealed into animal existence without the freshening flow of air, procedure. 'The meaning of 'life' given by Field J., approved in Kharak Singh' and Maneka Gandhi bears exception:

Something more than mere animal existence. The inhibition against its deprivation extended to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm, or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world Therefore, inside prisons are persons and their personhood, if crippled by law-keepers turning law-breakers, shall be forbidden by the Writ of this Court from such wrong doing. Fair procedure, in dealing with prisoners, therefor, calls for another dimensions of access to law-provision, within easy reach, of the law which limits liberty to persons who are prevented from moving out of prison gates."

R. The onus on the State to protect and provide for the life of jail inmates, in the context of under-trial prisoners, was recently underscored by the Supreme Court in its judgment and order dated 28.04.2021 in the case of ***Kerala Union of Working Journalists vs Union of India & Ors.***, where the Apex Court reiterated that:

"The most precious fundamental right to life unconditionally embraces even an undertrial."

5. The undersigned urge the High Powered Committee to take the above factors into consideration and pass appropriate orders for:

i) Identification of Under Trial Prisoners(UTPs) and convicts to be released on Interim Bail / Emergency Parole to ensure immediate decongestion of prisons to at least 50% percent capacity and protection of the Right to Life under Article 21 of the constitution of India; and

ii) The release of women UTPs and Convicts on Interim Bail / Emergency Parole.

Yours Sincerely,



Adv. Vrinda Grover

Dr. Pratiksha Baxi, Associate Professor, Centre for the Study of Law and Governance, Jawaharlal Nehru University, New Delhi

Sarojini Nadimpally, Former Member, Expert Committee by NHRC on
"Impact of COVID 19 Pandemic on human rights and future response", &
Founder, Sama Resource Group for Women and Health
Advocates Soutik Banerjee, Devika Tulsiani, MannatTipnis

Copy to:

1. Hon'ble Mr. Justice S. Mridul
Chairman
Delhi High Court Legal Services Committee

2. Hon'ble Ms. Anu Grover Baliga
Secretary
Delhi High Court Legal Services Committee

3. Mr. B.S. Bhalla,
Principal Secretary (Home)
GNCTD

4. Mr. Sandeep Goel
Director General (Prisons)

5. Hon'ble Shri Kanwal Jeet Arora
Member Secretary
Delhi State Legal Services Authority