

Date: 6th May, 2021

To,

Hon'ble Mr. Justice Mohammad Rafiq,
Chief Justice
The High Court of Madhya Pradesh

Sub: Requesting the immediate decongestion of Madhya Pradesh prisons

Madhya Pradesh's prisons have a capacity of housing between 28,000-29,000 individuals. As of 31st March, 2021 they hold 49,763 individuals in total and 32,263 undertrials, with overcrowding at an all time high of 174%. 115 of MP's 131 jails are overcrowded; seven jails have an occupancy of over 300%. The undertrial population is nearly two-thirds of the overall prison population.

In March 2020, following the Hon'ble Supreme Court's *suo motu* petition to decongest prisons, the Madhya Pradesh High Powered Committee released around 7,500 individuals. However, it is important to note that MP prisons were overcrowded by 140% even after decongestion efforts. Over the next 12 months the prison population steadily increased, primarily due to the influx of undertrial prisoners. In December 2020, there were over 8,000 undertrials in MP prisons before the prisoners released on emergency parole and interim bail by the High Powered Committee were sent back.

The increase in prison population is predominantly due to indiscriminate arrests by the police, even for minor offences, and limited access to bail due to the limited functioning of the courts during the pandemic.

The second wave of the COVID-19 pandemic has proved to be more fatal across the country, exacerbated by the pressure on medical facilities. MP prisons are also highly vulnerable to COVID-19 outbreaks, even more than in 2020 when the decongestion exercise was implemented. News reports from 2020 highlight over 500 COVID positive prisoners and several deaths. A news report published in Amar Ujala on 30.03.2021 documents information suppression with respect to the number of COVID positive cases in prisons as well as the denial of COVID tests to prisoners in Indore Central Jail following the COVID related death of an inmate. The alarming nature of MP's increasing prison population and government inaction has also been documented in national news reports. These reports are annexed for your perusal.

Decongestion is critical, given these circumstances and the high overcrowding in MP prisons.

Various High Courts have taken cognizance of COVID-risks in prisons and initiated mitigation plans. For instance, the Kerala High Court passed an order in 2020 granting bail to all individuals arrested for offences punishable by 7 years and less besides extending emergency parole to prisoners at risk of COVID. Recently, the Bombay High Court took cognizance of COVID risks in prisons from news reports and initiated a *suo motu* public interest litigation (PIL). In 2020, a PIL (WP No. 8391/2020) had also been filed before the Hon'ble Madhya Pradesh High Court pleading decongestion; unfortunately it remains pending.

We recognise the timeliness of the Hon'ble High Court's orders dated 23.04.2021 In Re: (Suo Motu) v. Union of India, particularly with reference to the grant of parole (direction 7, pg. 5) and arrest (direction 8, pg. 5).

We request that the Hon'ble High Court similarly prioritise measures to immediately decongest Madhya Pradesh prisons, mitigate prison overcrowding and curb the influx of undertrials to avert any COVID-related crisis. These measures must be taken up on priority in order to proactively protect the right to life and health of all incarcerated individuals.

These measures could include:

1. Passing a judicial order granting bail to:
 - a. all accused persons in judicial custody for offences punishable by 7 years or less
 - b. all undertrials over 45 years of age
 - c. undertrial women including pregnant women and women with children, as well as gender minorities.
 - d. undertrials with comorbidities who are at risk of contracting COVID as well as other critically ill inmates.
 - e. undertrials with disabilities, including long-term physical, mental, intellectual, or sensory disabilities, as defined by the Rights of Persons with Disabilities (RPwD) Act, 2016.
2. Passing a judicial order extending emergency parole to:
 - a. all convicts over 45 years of age at risk of contracting COVID, consenting to such.
 - b. all convicts who are women including pregnant women and women with children, as well as gender minorities, consenting as such.
 - c. all convicts with comorbidities who are at risk of contracting COVID as well as other critically ill inmates, consenting as such.
 - d. all convicts with disabilities, including long-term physical, mental, intellectual, or sensory disabilities, as defined by the Rights of Persons with Disabilities (RPwD) Act, 2016, consenting as such.
3. Directing any other measure to bring down the prison population to at least 100% occupancy.
4. Directing authorities to provide safe passage and travel facilities for all released individuals, within or outside the particular district.
5. Issuing guidelines for continuous monitoring and testing in prisons, and issuing vaccination guidelines which are consistent with WHO guidelines for detention centers and extending them to all prisoners regardless of nationality, residence and possession of Aadhaar, and monitoring this process.
6. Directing authorities to publicly disclose information about positive infections, testing and vaccination in prisons in order to ensure accountability.
7. Directing and monitoring the increase of budgetary allocation to prisons to significantly improve health infrastructure in all detention centres and ensuring adequate medical support, treatments, oxygen supply etc and timely communication with families in case of infection and vaccination.
8. Ensuring the functioning of the Undertrial Review Committees as per the Standard Operating Procedure drafted by NALSA.
9. In addition to directions made to the police to avoid arresting persons for minor offences in the order dated 23.04.2021 (direction 8), directing the police and the Magistrates to take a

liberal view of the matter, and abstain from arresting and grant regular bail, respectively, in all cases punishable by 7 years or less for any accused produced before them, and in all cases involving women, gender minorities, elderly, persons with long term illnesses, comorbidities, and the socially and economically vulnerable.

10. Auditing the increase of undertrial prisoners by 8,000 individuals during the pandemic and the conditions leading to this including over arrest by the Madhya Pradesh police and the lack of access to bail during the pandemic.
11. Implementing long term reforms in the criminal justice system so that the prison population remains manageable even in normal circumstances.
12. Ensuring that prisoners' due process rights - such as the right to be produced before Magistrates through appropriate means, right to apply for bail and other legal remedies, prompt access to case diaries and case listings, right to e-mulaqats with families, caregivers, lawyers etc.- are not suspended.
13. In particular, directing the increase of phone lines and internet access at all prisons to facilitate two or more weekly phone calls and e-mulaqats to all undertrials and convicts, and resuming access to canteen facilities for all prisoners which has been suspended since 2016.
14. Directing the prison officials to provide for all essential amenities to the prisoners in lieu of families being able to provide basic items of amenities such as clothes, slippers, etc. since the physical mulaqat system of support is presently terminated.
15. Monitoring the said directions by way of timely prison wise reports submitted by the Director General of Prisons.

CC:

- Chief Secretary, Government of Madhya Pradesh
- Addl. Chief Secretary, Home Department, Madhya Pradesh Government
- Member Secretary, Madhya Pradesh State legal Services Authority, Madhya Pradesh
- Under Secretary, Jail Department, MP Government.
- Director General of Prisons, MP

Regards,

Signatories (in alphabetical order):

Organisations and Networks:

1. Alternative Law Forum (ALF)
2. Article 21 Trust
3. Commonwealth Human Rights Initiative (CHRI)
4. Criminal Justice and Police Accountability Project (CPAProject)
5. Detention Solidarity Network
6. Madhya Pradesh Democratic Rights Front
7. Madhya Pradesh Mahila Manch
8. Madhya Pradesh Prison Rights Committee
9. National Confederation of Human Rights Organisations (Madhya Pradesh Chapter)
10. Prison Rights Forum- Karnataka

Individuals:

1. Advocate Afreen Bano Khan, Lawyer, Mumbai
2. Ms. Amba Kak, Director of Global Policy & Programs, AI Now Institute
3. Mr. Apar Gupta, Executive Director, Internet Freedom Foundation
4. Advocate Arvind Narrain, Researcher, Bangalore
5. Advocate Gautam Bhatia, Lawyer, New Delhi
6. Ms. Jahnvi Sen, Journalist and Deputy Editor and Executive News Producer at The Wire
7. Ms. Kalpana Kannabiran, Sociologist & Advocate, Hyderabad
8. Professor Mrinal Satish, Professor of Law, National Law School of India University
9. Advocate Nitika Khaitan, Lawyer, New Delhi
10. Professor Noam Chomsky, Institute Professor (Emeritus), Massachusetts Institute of Technology
11. Professor Pratiksha Baxi, Associate Professor, Centre for the Study of Law and Governance, Jawaharlal Nehru University
12. Ms. Rinchin, Ektara Collective, Madhya Pradesh
13. Advocate Ritu Kumar, Human Rights Law Network
14. Professor Shreya Shree, Assistant Professor of Law, National Law School of India University
15. Mr. Srinivas Kodali, Independent Researcher, Hyderabad
16. Ms. Sukanya Shantha, Journalist and Senior Assistant Editor at The Wire
17. Advocate Vasid Khan, Lawyer, Bhopal

मध्यप्रदेश: इंदौर की जेलों पर फिर कोरोना का कहर, अधिकारियों समेत कई कर्मचारी संक्रमित

न्यूज डेस्क, अमर उजाला, इंदौर Published by: देव कश्यप Updated Tue, 30 Mar 2021 11:58 PM IST

सार

- केंद्रीय जेल इंदौर के कल्याण अधिकारी अभिषेक कुमार दांगी समेत कई कर्मचारी कोरोना संक्रमित।
- एक कैदी की कोरोना से संदिग्ध मौत के बाद जेल अधीक्षक भांगरे ने बंदियों की कोरोना जांच करानी बंद करा दी।



जिला जेल इंदौर - फोटो : सोशल मीडिया

पढ़ें अमर उजाला ई-पेपर
कहीं भी, कभी भी।

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विस्तार

मध्यप्रदेश में कोरोना संक्रमण बेकाबू होता जा रहा है। इंदौर की जेलों में पिछले साल की तरह इस बार भी कोरोना बम फूट पड़ा है। केंद्रीय जेल इंदौर के कल्याण अधिकारी अभिषेक कुमार दांगी, कंपाउंडर अजीत हेजु, कंपाउंडर संदीप कुमार, मुख्य प्रहरी राजेन्द्र बाथलिया, प्रहरी महेंद्र कुमार, गोविंद भंवर और धर्मेन्द्र कटारे को कोरोना हो गया है। सहायक जेलर कुशवाह भी क्वारंटीन में है।

एक कैदी की कोरोना से संदिग्ध मौत के बाद जेल अधीक्षक भांगरे ने बंदियों की कोरोना की जांच करानी बंद करा दी है और गुपचुप तरीके से बीमार बंदियों का उपचार करा रहे है। पैरोल से 500 बंदियों के आने से जेल में सोशल दूरी का पालन नहीं हो पा रहा है। बैरक ठसा ठस भरे हैं। अगर बंदियों को पैरोल पर नहीं छोड़ा गया तो डर है कि कहीं कोरोना बम केंद्रीय जेल में ना फूट जाए ।

वही मूसाखेड़ी की सीआई जेल में जेलर आलोक वाजपेयी और दो बंदियों की कोरोना रिपोर्ट पॉजिटिव आई है ।

बता दें कि मध्यप्रदेश के तीन जिले भोपाल, इंदौर और जबलपुर में कोरोना के मामले बढ़ते ही जा रहे हैं। प्रदेशभर में रोज सामने आ रहे कुल मामलों में से करीब 55 फीसदी मामले इन्हीं जिलों में से हैं। सिर्फ वहीं सबसे ज्यादा संक्रमित इंदौर में मिल रहे तो सक्रिय मामले भोपाल में बढ़ रहे हैं। यही नहीं लोग कोरोना संबंधी दिशा-निर्देशों का उल्लंघन भी कर रहे हैं। यही वजह है कि इंदौर में एक फार्म हाउस से कोविड-19 नियमों के उल्लंघन मामले में सोमवार को नौ लोगों के गिरफ्तार होने की खबर सामने आई।

रोज एक हजार सक्रिय मामले

प्रदेश में रविवार को 14,185 सक्रिय मामले थे और रोज लगभग एक हजार मामले सामने आ रहे हैं। शनिवार को यह संख्या 12,995 थी। स्वस्थ होने वालों की संख्या करीब 47 फीसदी ही रह गई है। रविवार को 2,276 की तुलना में 1075 मरीज ही स्वस्थ हुए। रविवार तक 2,70,000 लोग स्वस्थ हो चुके हैं।

इंदौर के फार्म हाउस से नौ लोग गिरफ्तार

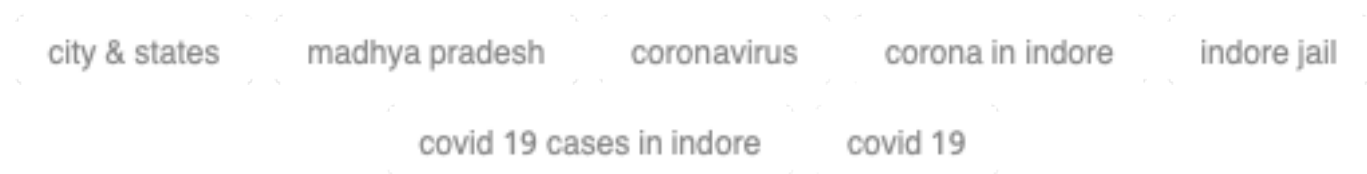
मध्यप्रदेश के इंदौर शहर में पुलिस ने एक फार्म हाउस पर छापेमारी कर कथित रूप से कोविड-19 नियमों के उल्लंघन के लिए नौ लोगों को गिरफ्तार किया है। एक अधिकारी ने सोमवार को यह जानकारी दी। उप जिलाधिकारी प्रतूल सिन्हा ने बताया कि यहां सनराइज कॉलोनी इलाके स्थित फार्म हाउस में रविवार शाम छापेमारी की गई।

इस दौरान पुलिस की टीम ने रविवार को शहर में लगे लॉकडाउन और अन्य दिशा-निर्देशों का उल्लंघन होता पाया।

उन्होंने कहा कि कोविड-19 के लिए लगे लॉकडाउन और अन्य पाबंदियों के बावजूद इन आरोपियों ने फार्म हाउस में पार्टी की और वहां शराब भी परोसी गई। सिन्हा ने बताया कि इस संबंध में फार्म हाउस मालिक एवं आठ अन्य लोगों को गिरफ्तार किया गया है और उनके खिलाफ भादंवि की धारा 188 के तहत मामला दर्ज किया गया है।

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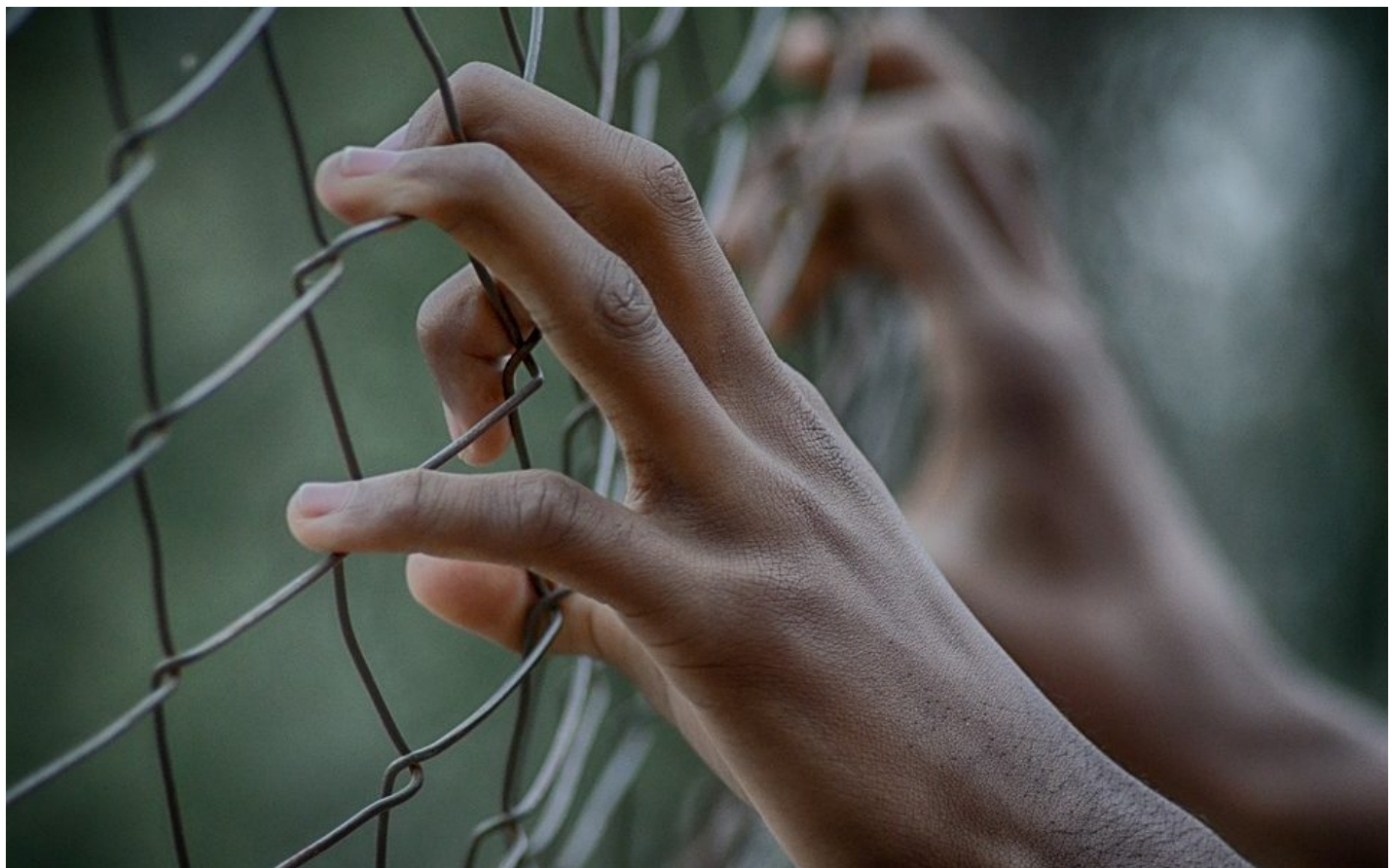
होम

वीडियो

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Madhya Pradesh: Lack of Judicial Intervention is Making Prisons COVID-19 Hotspots

The judiciary's reticence is apparent when in a petition filed by Madhuri Krishnaswami to decongest prisons, the high court diverted the attention towards the activist's 'credibility'.



Representative image. Photo: Pixabay



Sukanya Shantha



GOVERNMENT HEALTH RIGHTS 21/SEP/2020

Mumbai: In early June, Madhuri Krishnaswami, a tribal

rights activist from Madhya Pradesh moved the high court (HC) seeking urgent intervention into the condition of prisoners in the state in the wake of the COVID- 19 pandemic.

Her concerns were that if the state did not follow the Supreme Court's order from March 23 to decongest prisons on an urgent basis, there would soon be a major outbreak in them. Several **news reports** had already indicated a mass spread of the virus in some jails of MP.

Since June, the petition has come up for hearing six times before the Jabalpur HC; the case, however, has been adjourned each time without any relief.

On August 18, however, the division bench of the MP HC comprising of Chief Justice Ajay Kumar Mittal and Justice Vijay Kumar Shukla asked the petitioner to file an affidavit establishing her credibility to file a petition in the court. The court wanted to know what Krishnaswami has done to “tackle” the menace of the coronavirus in the state.

The direction by the HC was unusual but Krishnaswami had to file a detailed 10-page affidavit listing her qualifications and the work her NGO Jagrit Adivasi Dalit Sangathan had carried out.

“Since the onset of the COVID-19 crisis, the petitioner has been continuously working for mitigation of distress among rural poor by helping them access the additional ration sanctioned by the government...” she mentioned in her affidavit filed on September 3.

Krishnaswami said the court's response to her petition so far has dismayed her. Her petition sought court's intervention to ensure proper implementation of the Supreme Court order

but instead the HC, she said, diverted attention towards her. “The concerns raised in the petition were about the prisoners in the state, instead my work and credibility became a focus of the petition,” she rued.



Madhya Pradesh high court in Jabalpur. Photo: Wikimedia Commons/Gyanendra_Singh_Chau CC BY 3.0

Occupancy ratio

Prison statistics show that jails in India are overrepresented by those belonging to the Scheduled Castes (SCs), Scheduled Tribes (STs), Other Backward Classes (OBCs) and Muslims. “And the delay in looking into such petitions amounts to a direct injustice to the marginalised communities,” Krishnaswami said.

Krishnaswami’s concerns stem from Madhya Pradesh’s prison data. **Data** released for August indicates that in 131 prisons – 11 Central, 41 district, six open, and 73 sub-jails – there are 43,388 prisoners lodged. Of them, the data suggests, close to 60% are undertrial prisoners.

The total capacity of the prisons, however, is to accommodate 28,659 prisoners, which means that the occupancy is at 151%. At the end of August, 185 children, between the ages of 0-6 were lodged along with their mothers in jails.

While the cumulative figure shows over 150% occupancy, the conditions of some prisons are even more alarming. For

example, the Maihar sub-jail which has a capacity to accommodate only 30 prisoners, was housing a whopping 170 prisoners in that space, i.e. 566% occupancy. Similarly, in Dindori district prison, in the space available to house 50 prisoners, 148 persons were being held.

Different **news reports** and officials' statements indicate that COVID-19 has infected more than 60 persons in jail. But there is no clarity on how many tests are really being conducted in MP prisons, and if there are separate facilities set up in jails to treat patients.

It is not that the prison department did not release any incarcerated persons. They did, but it was just not adequate. According to a report submitted by the director general of prisons to the high power committee constituted following the apex court's order, by April 13, 6,124 prisoners were released. Of them, 2,557 were undertrial prisoners and 3,567 were convicts.

This was a mere 13.92% of the total number of incarcerated persons.

Also Read: In the Time of Coronavirus, the Right to Bail is Part of an Undertrial's Right to Life

A month later, on May 17, the deputy inspector general (prisons) Sanjay Pandey **informed the press** that 6,500 prisoners had been released, which means, only approximately 400 more prisoners were released in that span of one month. The petitioner stated that in comparison with other states, MP has failed in its efforts to decongest the prisons.

Other states with serious overcrowding of prisons have released at least over 20% prisoners, the petitioner pointed

out. Among them, Tamil Nadu has adopted the most effective measures, and the prison population has come down to an impressive 60% occupancy (after the release of over 4,500 prisoners, around 13,500 prisoners are still lodged in several state prisons).

The National Legal Services Authority (NALSA) in May **claimed** that 42,529 pre-trial detainees and 16,391 convicts were released across India.



Representative image. Photo: Reuters

Rising number of arrests

The number of arrests have, in fact, only gone up since the national lockdown was imposed on March 24, advocate Nikita Sonavane pointed out. Sonavane, who is representing Krishnaswami in the case, said that arrests have increased in the past six months.

“The MP police’s website indicates over 32,000 arrests. A large number of these cases are related to the violation of lockdown rules in the state. While on the one hand, the state’s prison department was sluggish in its efforts to

decongest prisons, the police department has gone ahead pushing more people behind bars,” she shared.

Just between March 22 and May 31, **data** shows that as many as 7,490 new arrests were made in the state under sections like 188, 269, 270 of the Indian Penal Code, and Disaster Management Act. Unlike most other states, in MP, section 188 of the IPC (disobedience to order duly promulgated by public servant) is a non-bailable offence. Another 5,000 persons were arrested under the MP Excise Act and more 4,000 under the Public Gambling Act. Under both the MP Excise Act and the Public Gambling Act, offences are punishable with more than seven years of imprisonment.

“The state focused on arresting more people at the time when it should have invested its resources to decongest the prison space,” Sonavane argued.

Also Read: In Maharashtra Jails, Prisoners Are Being Tested for COVID-19 Only After Their Death

Krishnaswami and Sonavane began tracking the cases of COVID-19 in March. MP was perhaps the first state to have recorded an outbreak in prison. In April, 32 persons had tested positive in the Indore Central Prison. The prison is overcrowded, with over 177% occupancy, the petition pointed out.

“Even when two persons detained under the National Security Act had tested positive for COVID-19, the authorities sent them to Satna Central Prison. This increased the number of cases there. It is alarming how the prison authorities decided to take in prisoners despite their medical condition,” Sonavane said.

On March 23, the apex court had directed every state to set up a high power committee (HPC) and formulate their own unique plans to bring down the prison population. Every state came up with its own, MP too did. Prisoners were either supposed to be released under parole or emergency bail.

For parole, the state prison authorities decided that of the convicted prisoners, male prisoners over 65 years of age, women over 50, pregnant women prisoners, prisoners suffering from cancer, and with a severe heart condition would be considered. For undertrial prisoners, only those booked under sections attracting five or lesser years of punishment would be considered for parole.

Also read: [Did Dr Kafeel Pay a Heavy Price Because His Name Is Khan?](#)

Sonavane called this criterion bizarre. “The HPC has given no reasons for deciding to release only those booked under punishment of five years or lesser. These decisions can’t be arbitrary when it is amply established that thousands of prisoners suffer prolonged pre-trial detention in India.”

Every year, around 1,800 prisoners die in jail custody. Most of these deaths are due to the lack of adequate and timely medical care. With five prison deaths per day, **India’s prison mortality rate** (at 3.96 per 1000 prisoners) is one of the highest in the world. The health system in the country is excessively strained and prisons, like always, are last on the state’s priority.

The case is next listed for hearing on September 23.

Krishnaswami said that as custodians of those jailed (those incarcerated in prisons are held under judicial custody by

law), she is hoping that the court directs the state prison authorities to take adequate measures at the earliest. “The delay of every single day has a bearing on the lives in jail. For every infection and lives lost in prison, it is the judiciary and the state that is responsible,” she added.

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हैं चार हजार कैदी, कोरोना फैला तो मच जाएगा कोहराम

न्यूज डेस्क, अमर उजाला, भोपाल Published by: प्रियंका तिवारी Updated Tue, 06 Apr 2021 02:40 PM IST

सार

देश में कोरोना ने फिर से कोहराम मचा दिया है। मध्यप्रदेश समेत कई राज्यों में वायरस का संक्रमण बेकाबू हो चुका है। मध्यप्रदेश में सोमवार को सभी जिलों में मिलाकर 3 हजार 722 मरीज मिले हैं। 18 मरीजों की मौत भी हुई है। 1 महीने पहले जहां रोजाना की संक्रमण दर 3 फीसद थी वह अब बढ़कर 11 फीसद पर पहुंच गई है यानी 100 सैंपल की जांच की जा रही है तो उनमें 11 लोग कोविड-19 से संक्रमित मिल रहे हैं।



प्रतीकात्मक तस्वीर - फोटो : अमर उजाला

कहीं भी, कभी भी।

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मध्यप्रदेश की राजधानी भोपाल में कोरोना का संक्रमण तेजी से फैल रहा है। यहां के सेंट्रल जेल में भी कोरोना फैलने का खतरा बना हुआ है। जानकारी के अनुसार, यहां क्षमता से डेढ़ गुना ज्यादा कैदी रख गए हैं। ऐसे में अगर जेल में कोरोना संक्रमण फैल गया तो हालात बेकाबू हो जाने का खतरा है। एक अधिकारी के मुताबिक सेंट्रल जेल की क्षमता लगभग दो हजार सात सौ कैदियों को रखने की है, लेकिन यहां चार हजार बंदी हैं। इनमें से दो हजार कैदी विचाराधीन हैं, जिनके कारण जेल प्रबंधन की चिंता बढ़ गई है।

दरअसल, जेल प्रबंधन का मानना है कि इन विचाराधीन कैदियों का केस के सिलसिले में बाहर से आना जाना लगा रहता है। साथ ही इन बंदियों से मिलने के लिए लोगों का जेल परिसर में आना जाना लगा रहता है। ऐसे में जेल में भी कोरोना संक्रमण फैलने की संभावना काफी हद तक बढ़ जाती है।

जेल प्रबंधन का कहना है कि आठ बैरक में नए कैदियों को सात दिनों के लिए क्वारंटाइन करने की व्यवस्था की गई है। उनकी मुलाकात पर भी एक हफ्ते तक रोक है। जेल में कोरोना से बचने वाले सभी नियमों का भी पूरी तरह से पालन किया जा रहा है।

जेल प्रबंधन ने मीडिया से विचाराधीन कैदियों को दिन में एक बार काढ़ा और दो बार गर्म पानी दिया जाता है। इसके साथ ही इन सबकी लगातार स्क्रीनिंग होती है। सभी को मास्क दिए गए हैं। कोई भी मास्क पहने बिना जेल में प्रवेश नहीं कर सकता। इसके अलावा जेल में शारीरिक दूरी का भी पूरा ख्याल रखा जा रहा है। जेल में लोग आपस में एक दूसरे से कम मिलें, इसके लिए उनके मूवमेंट को कम किया गया है।

जेल प्रबंधन ने बताया कि कैदियों और स्टाफ को पैरामेडिकल का कोर्स भी कराया गया है। फिलहाल पैरामेडिकल कोर्स के 40 कैदी जेल में हैं, जिनके ऊपर अन्य कैदियों की स्क्रीनिंग की जिम्मेदारी है।

ये भी पढ़ें...

[गुजरात में बुधवार से 20 शहरों में लगेगा नाइट कर्फ्यू, पुणे में 10,226 नए मामले आए सामने](#)

11 THE IDEAS PAGE

Dilemmas of development

Post-Covid, lack of social security has made many migrants consider employment opportunities closer home. The question for government is how to provide such avenues in ecologically-fragile areas



OVER THE BARREL
BY VIKRAM SINGH MEHTA

OVER THE PAST decade and more that I have been writing a column for this page, I have, on occasion, written about the forest sanctuary of Binsar in Uttarakhand. I have a small cottage in the sanctuary. These articles have not been about the pristine beauty of the sanctuary, the verdant forests that roll from one range of hills to another merging eventually into the snow-capped peaks of the Himalayas. They have not been about the restorative and calming influence of silence, they have been about the tension between economic development and ecological sustainability. Binsar offered me a narrow window of insight into the difficulty of striking a balance between the aspirations of the villagers who lived in the sanctuary and were denied, as a consequence, the economic benefits of development and the imperative of preserving the magnificence of nature.

I bought one of the six British-built establishments in Binsar in 1987. I have been visiting the place regularly ever since. In the early years, I noted the near-total absence of development. There was no running water, there were no electricity lines and the road was narrow and irregularly tarred. I had to walk the last half mile to my house, the nearest hospital was 30 km away and there were no schools. Itinerant travellers may have been happy to get away from the clutter of development but the resident villagers were not. They wanted a share of the benefits accruing to those living outside the sanctuary. They wanted electricity, water, health, schools and above all else, jobs. They verbalised their protest and at times, out of sheer frustration, they even ignited their surroundings to attract attention. One year, the forest fires almost engulfed my home.

The authorities have, to an extent, heard these protests. The drive to Binsar is no longer as tiresome as it used to be. The roads have been broadened and tarred. The electricity lines have been stretched. The valleys which at night were blanketed in darkness are now studded with pinpricks of light. My home still does not have grid electricity as does no one who lives within the forest. But we are not complaining. For, except on days when the sun plays hide and seek with the clouds, solar has become a reliable substitute.

These tangible markers of progress mask, however, the deeper dilemmas of development. The reason I decided to pen another article on Binsar was that in a microcosmic way, the nature and pace of development in this area mirror the faultlines that have to be resolved for our country to get onto the trajectory of sustainable growth. The specifics will be different but the essential issues facing Binsar are the same as those that confront the country.

For anyone visiting the Kumaon region



C.R. Sasikumar

on a regular basis, a striking manifestation of global warming is the receding snow line of the Himalayan range. Even the highest peaks of the Nanda Devi, Trishul and Panchachuli massif reveal large rock faces. The Pindari Glacier is brown to the naked eye. Of course, this will all change when, in a few weeks, the winter snow swaddles the range in white and maybe I am drawing an exaggerated picture but I have never seen so much contrast on the mountain faces before. Sitting inside a sanctuary where on account of regulatory restrictions, the surroundings are lush and green, one cannot but reflect on the forewarning of the scientific community that if the world and to be more specific India, does not tackle the issue of GHG emissions, it will, for certain, bequeath an irremediably damaged planet to the next generation. India cannot afford to develop first and clean up later.

COVID has intruded. Of course, it is not the numbers of infected that have roiled the villagers. These appear to be few. It is the economic ramifications. Most of the young that had left for the plains in search of jobs are back and if one goes by the comments that I have picked up from the locals, only a handful want to return to their earlier jobs. The lack of a social security net in the cities has made them ask whether it might not be better to seek income-generating opportunities closer to home. What those might be is, of course, their biggest concern. Agriculture and manufacturing offer no scope.

Construction, hospitality and eco-tourism are options. But then the MSMEs engaged in these sectors are struggling to sus-

tain their business. These enterprises are not unviable. They simply have no liquidity. The debate in the corridors of our economic ministries as to whether to enlarge the fiscal stimulus or not or whether the central government or the states should turn to the market to make up for the shortfall in GST revenues acquires a different hue when contemplated through the non-academic lens of livelihood.

tain their business. These enterprises are not unviable. They simply have no liquidity. The debate in the corridors of our economic ministries as to whether to enlarge the fiscal stimulus or not or whether the central government or the states should turn to the market to make up for the shortfall in GST revenues acquires a different hue when contemplated through the non-academic lens of livelihood. There is no doubt, in my mind, that the Centre must open up further the fiscal spigot and help the state/local governments create the social security nets that assure everyone a basic minimum income. The argument of those that pore over macro ratios (GDP) that there is no fiscal space for such largesse should be set against the Keynesian comment that “in the long run, we are all dead”.

A stark manifestation of the two-track development of our socio-economic polity is the ubiquitous spread of digital technology. In a place with limited physical infrastructure and few social amenities, everyone carries a cell phone and most can find internet connectivity. I have attended several Zoom meetings from my Himalayan redoubt. To my mind, this reveals the sharpest faultline of all. The potentially deepening tension between society and the State. Technology has deepened aspirations. Government is perceived to hold it in check. Whether it is in Binsar or the country at large, this tension will have to be bridged if India is to develop on an even social keel.

The writer is Chairman, Centre for Social and Economic Progress (CSEP)

WHAT THE OTHERS SAY

“The fact is that efforts are needed on both sides — within the Islamic world and in the West — to prevent an increase in divisive rhetoric and extremism.” — DAWN

The nature of the republic

French tradition of secularism is based on the strict separation between church and state



PRAFULL GORADIA

FRANCE IS ONCE again in the news after the gruesome murder of Samuel Paty, a French middle-school teacher, on October 16 in Conflans-Sainte-Honorine, a suburb of Paris. Paty was beheaded in what is apparently an act of Islamist terrorism. French President Emmanuel Macron has paid tribute to Paty, calling him a “quiet hero” and said he was targeted because he “embodied the Republic”, taught pupils “to become citizens” and “fought for freedom and reason”.

This brings us to the nature of the French Republic. Former French President Jacques Chirac (now deceased) during his tenure commissioned an expert enquiry into what precisely secularism in practice should be. Bernard Stasi presented his report in December 2003, based on which a fresh secular law was passed by the French National Assembly in March 2004. It brought up to date the law of 1905.

The new Act defined three essential principles: Freedom of conscience, equality in law for spiritual and religious belief, and neutrality of political power. In other words, there are in any modern state, three sets of relations: (a) religion and the individual; (b) the state and the individual, and; (c) the state and religion. In (b) the state views the individual as a citizen and not as a member of a religious group. The implication of (c) is that religion and state function in two separate areas of human activity. Donald Smith, a scholar from the University of Calgary, has compared the above relations as three sides of a triangle. And the integrity of (a) and (b) is largely determined by the third relationship, which separates them. Therefore, for any state to function as a secular state, there must be a wall of separation between state and church.

The French law attempted to implement these principles. It had not abolished the wearing of either Jewish skull caps or Muslim headscarves. All it ordained was that the students attending government schools or employees working in government offices must not display religious symbols of a conspicuous nature, which would include even a large cross. There is no restriction on wearing any form of dress or display of any religious symbols in the country at large. The state, however, has to maintain absolute neutrality between one religion and another. The French insistence on the absolute separation of church and state goes back to 1905 — in December that year, a Republican law was passed by the country’s National Assembly. Article 1 assures the liberty of conscience. It guaranteed the free exercise of religious beliefs. The only restrictions were decreed in the interest of public order. Article 2 states that the Republic does not recognise either salaries paid or subsidies granted to any religious group.

The Stasi Report stated that Islam is be-

lieved to be incompatible with secularism. This was a provocation in the report and the subsequent passing of the legislation. As far as private employers of schools are concerned, the law is that the will of the institution would prevail and not any idiosyncrasy of the employee. The intention behind the stipulation is to ensure that there is no discrimination against members of any religion, so that an employer does not avoid the appointment of a scarf-wearing woman or a skull-cap wearing man. These provisions ensure not only the neutrality of political authority but also the freedom of conscience and belief as well as equality before the law. The Stasi Report also emphasised secularism as a cornerstone of democracy.

The rise of Christianity led to the problem of church and state. The Bible recognised a basic duality — the temporal and the spiritual. This is best expressed in the well-known phrase: “Render therefore unto Caesar the things that are Caesar’s; and unto God the things that are God’s.” In the US, an attempt was made at the complete separation between church and state. The American constitution contains no reference to God. Article VI says that no religious test shall ever be required as a qualification to any office. The first amendment to the Constitution adopted in 1791 explicitly said: “Congress shall make no law respecting an establishment of religion”.

India never had a centralised institution to regulate religion nor did it ever interfere in the running of the state. Islam, on the other hand, does not separate the temporal from the spiritual. The ultimate evidence of this was that the Caliph, or the representative of Prophet Mohammed, was the spiritual head and the temporal chief rolled into one.

France did not fully separate church and state until the passage of its 1905 law. Today, secularism is a core concept in the French constitution, Article 1 of which formally states that France is a secular republic. This, however, does not prevent the state from playing an active role in the appointment of Catholic diocesan bishops. Thus, the French president is the only head of state who still appoints some Catholic bishops.

Former President Nicolas Sarkozy differed from this French constitutional tradition and saw France’s main religions as making positive contributions to society. He visited the Pope in December 2007 and publicly acknowledged France’s Christian roots. Pope Benedict XVI commented that it is important to become more aware of the irreplaceable role of religion for the formation of conscience and the contribution it can bring to the creation of a basic ethical consensus within society.

A law was passed on April 11, 2011, with strong support from political parties as well as from Sarkozy, which made it illegal to conceal one’s face in public spaces, affecting a few thousand women in France wearing the niqab and the burqa. Scholar Olivier Roy has argued that the burkini bans and secularist policies of France provoked religious violence, to which Gilles Kepel responded that Britain has no such policies and suffered a greater number of attacks in 2017 than France.

The writer was a Rajya Sabha MP from the BJP



An epidemic of over-arrest

Push for repopulation of prisons during a pandemic is reckless

AMEYA BOKIL, NIKITA SONAVANE AND SRJANA BEJ

LAST MONTH, THE Chief Justice of the Delhi High Court, DN Patel, refused to extend the court’s blanket orders granting interim bail to inmates, reportedly saying, “Let us bring to an end the COVID chapter. Let these people surrender or go back to jail.” Following this order, Delhi’s high-powered committee (HPC) for the decongestion of prisons directed that a final 30-day extension on release will be given to 3,337 undertrials and 1,182 convicts, after which they must return to prisons from early December.

Global health experts have not yet signalled an end to the COVID-19 pandemic, and hence, the belief that inmates can safely return to prisons is entirely misplaced and must make prison authorities nervous. According to the latest HPC report, the Director-General (Prisons) for Delhi pointed out that after the re-entry, “total population of Delhi Prisons is likely to reach 22,000, which would be unprecedented and may become unmanageable...” Prison departments in other states have also made similar appeals to the respective governments.

In March 2020, India’s prisons released convicts on emergency parole, and undertrials on interim bail following a Supreme Court order. The court ordered state governments to form HPCs to determine the criteria for release. Given the contagious nature of COVID-19 and overcrowding in prisons, states would have done well to bring prison populations down. However, many failed to do so and cases of COVID-19 quickly began to break out across jails.

In the last seven months, somehow un-

knownst to the judiciary, prisons have seen an extraordinary influx of new inmates: almost all of them undertrials. According to data submitted by the Director General (Prisons) for Delhi to the Delhi HC, 5,581 undertrials were granted interim bail by the courts and between 1,200-1,500 convicts were granted emergency parole under the HPC’s guidelines. Delhi’s prisons can hold 10,033 persons. Before the HPC’s guidelines, Delhi’s prisons held 17,300 persons. The HPC released 7,000 prison inmates by April. However, as of October 20, Delhi’s prison population stands at 15,900 individuals, 90 per cent of whom are undertrials. The criminal justice system added over 5,500 individuals to Delhi’s prisons, raising crowding to 155 per cent while the pandemic raged unrelentingly. If the Delhi High Court’s orders of surrender are implemented, the re-entry of undertrials will likely increase overcrowding to 200 per cent in a few weeks’ time.

Throughout the pandemic, the criminal justice system has been at odds with itself, and Delhi is no anomaly. Uttar Pradesh, housing 21.1 per cent of the country’s prison population, released 9,000 inmates due to the pandemic. Concomitantly, it added 17,000 undertrials, raising overcrowding from 66 per cent in February to 79 per cent in September according to official data. Similarly, Madhya Pradesh released 7,500 inmates following the HPC’s order, but added the same number of inmates by 30 September. While undertrials in MP accounted for 53.4 per cent of the prison population in February, they accounted for

67.5 per cent of the prison population in September. Maharashtra released 10,000 persons in March but added 5,000 inmates in September and October alone. If the respective high courts of these states similarly order surrender/re-entry of inmates released due to COVID, the prison populations will be 200 per cent, 180 per cent and 160 per cent of their capacities in UP, MP and Maharashtra respectively. A second wave of the pandemic in prisons is almost guaranteed.

Why have prison populations increased during a pandemic which necessitated decongestion and, therefore, prioritised decriminalisation? First, policing priorities were entirely misplaced. We studied arrests made in MP during the first three phases of the lockdown, when the overall number of cases registered and arrests increased. Besides a high number of lockdown-related arrests (14.8 per cent), MP saw higher than usual number of arrests under its Excise Act (15.8 per cent) and the Public Gambling Act (12.2 per cent). Two issues about state action are revealed — a public health crisis was misdiagnosed, and treated as a law and order issue; and the state had a tendency to “re-store order” by pursuing low-level, low-harm, victimless offences such as alcohol possession and public gambling against low-income, marginalised communities (our analysis also revealed the disproportionate targeting of Muslims for lockdown-related offences).

Second, access to bail was significantly impaired for arrested persons due to reduced court capacities. Regular bail hearings were

delayed by weeks. The adoption of a virtual court system also aggravated judicial delays.

The pandemic and the consequent plight of inmates have revealed the convoluted logic and structure of our criminal justice system. Police, courts and prisons view themselves in silos, failing to work together as a cohesive whole towards the wisest precaution (decongestion) even during this pandemic. The police’s priorities lie in exercising their powers of arrest to full extent, irrespective of social context, while some courts are unconcerned with overcrowding in jails. This leads to two pertinent inquiries — why is the epidemic of over-arrest not being addressed; and why are agents of the criminal justice system not taking responsibility for prison populations and their burgeoning rise?

An earnest attempt by the Supreme Court to reduce decongestion has ultimately come to naught. The problem of over-arrests and inherent problems of policing have never been addressed. Reforms to reduce the undertrial prison population have not been carried out. Even if we were not grappling with a pandemic, a 55-90 per cent representation of undertrials in the total prison population is a major cause of concern. Yet, this does not seem obvious to those in positions of power, who continue to plunge thousands of individuals back into a historically burdened prison system.

The writers are associated with the Bhopal-based Criminal Justice and Police Accountability Project

LETTERS TO THE EDITOR

DATA WORRIES

THIS REFERS TO the editorial, ‘Trust in data’, (IE, October 30). The integrity of COVID-19 data has been an issue since the early days of the pandemic outbreak, with notable discrepancies in the data publicised by different public bodies. The state’s committees to refine mortality figures have been an outlier from the global best practices. At a time when the economy is still opening up, ramping up of testing infrastructure, making it accessible and affordable to the masses should be given priority. The report of alleged interference with the testing process to control the test-positive rate at the district level is a serious issue.

Sudip Kumar Dey, Kolkata

ONLY CLASSROOMS

THIS REFERS TO the editorial, ‘Last child matters’ (IE, October 30). Only face-to-face physical classrooms can provide quality education, which a child can learn and imbibe forever during his lifetime. Online classes have a short-term retention value in a child’s mind and, moreover, a child needs physical handling to grow-up. How can the computer take the place of a teacher or a parent? Moreover, online education is the domain of the middle class and the rich. Where do the vulnerable, poor children go, if everything is online?

Rajiv Boolchand Jain, Zirakpur

FREEDOMS MATTER

THIS REFERS TO the article, ‘Lost in Paris’ (IE, October 30). Freedom of expression

IDEAS ONLINE

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● CAPTAIN MOHANSINGH BAYAS, MY GRANDFATHER: PRAVEEN SINGH PARDESHI

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is universal and non-negotiable, whether for teachers or students, a Western nation or an Eastern one. Any kind of intellectual, or social hierarchy endangers freedom of expression. The right to free speech makes sense only when coupled with the unwritten law of tolerance and the unspoken right to get offended, without committing or inciting violence. More often than not, the experiences, memories, and anticipations of the body prevent it from speaking or writing without fear, overruling the mind’s convictions, thus robbing it of its right to freedom of expression. As long as bodies fear other bodies we cannot talk about the freedom of expression. Interestingly, bodies alone cannot change a thing and this transformation involves ideas of peace, brotherhood, equality, freedom and justice.

Fatima Ghazali, via email



COMMENTARY / LAW

Condemned Without Trial

India's undertrials problem is spurring the COVID-19 outbreak in prisons

NIKITA SONAVANE AND AMEYA BOKIL

01 October 2020



Prisons across India have shown high rates of infection, with those in Maharashtra being worst hit—with 1,772 inmates and 383 jail staff infected as of 7 September, and an increase of about thirty positive cases daily. ASHISH VAISHNAV / SOPA IMAGES / GETTY IMAGES

As India has climbed to the second spot in overall numbers of persons infected by COVID-19 across the world, the healthcare situation is deteriorating rapidly, especially in prisons. On 23 March, the Supreme Court ordered that state governments constitute “high-powered committees” to devise a criteria for granting interim bail or parole to undertrials and convicted inmates, respectively, to decongest prisons. Despite these measures, the governments and courts appear to be unable to control the crisis.

Prisons across India have shown high rates of infection, with those in Maharashtra being worst hit—with 2,061 inmates and 421 jail staff infected as of 23 September, and an increase of about thirty positive cases daily. In Andhra Pradesh, 928 prison inmates and 167 staff have tested positive across jails. Most states have not made this data

available, but reports of outbreaks have been coming out from across the country.

Several public-interest litigations have been filed across various high courts to find a better approach to the problem. Meanwhile, the Supreme Court has refrained from monitoring the implementation of its March orders. To tackle the COVID-19 situation in prisons, four important measures are needed: reducing the quantum of arrests; increasing access to early bail; improving health infrastructure; and decriminalisation of poverty and marginalisation. The case of Madhya Pradesh, where we work as criminal lawyers and researchers, shows the urgent need for these interventions.

In early May, Indore Central Jail in Madhya Pradesh reported 32 COVID-19 positive inmates. In July, three guards and 64 of 82 inmates of Bareilly sub-jail in Raigarh district tested positive. In another few weeks, over a hundred more positive cases were detected in prisons across the state, including about fifty in Jabalpur Central Jail. Yet, there has been no effort to put out official data by the Madhya Pradesh prisons department, and relatives remain in the dark about the well-being of inmates.

As per official data, Madhya Pradesh has 131 prisons across 50 districts. This includes central jails, district jails, open jails and sub-jails. At the end of March, the prison population in the state was 40,955, despite an estimated capacity of 28,718. As per recent statistics made public by the National Crime Records Bureau, the occupancy rate across prisons in the state stands at 155 percent, which is higher than the national average of 118.5 percent. The state's prison system ranks as the sixth-most overcrowded in India.

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Despite the release of almost seven thousand inmates by the state following the Supreme Court's order, the over-occupancy dropped by a meagre twenty percent at the time. Even after the prisoners were released, the police continued to over-arrest, bringing the prison population numbers back up.

The primary reason for the administration's inability to bring down the prison population are the highly restrictive parameters for release in terms of both age and comorbidities for convicts, as well as the nature of offences for undertrials. Many questions of bail have been left to magistrates' discretion. A restrictive parameter used by many high-powered committees is to release on parole or interim bail only those inmates whose offences are punishable with five years or less. In Madhya Pradesh, for health conditions, only those who have undergone bypass or valve-replacement surgeries, or are suffering from cancer, are eligible to be released. In 2019, the NCRB reported 1,544 natural deaths in prisons. Of these, 406 were caused by heart-related ailments, 190 by lung-related problems, 81 by tuberculosis, 78 by cancer, 61 of liver-related ailments, 56 by brain haemorrhage, 51 by kidney-related ailments and 43 by HIV. None of these common comorbidities have been considered by the high-powered committees as a parameter for release of undertrials and convicts.

The high-powered committee in Madhya Pradesh has adopted a particularly conservative view. Despite its high occupancy rate, it has only released 14.7 percent of its prisoners. In contrast, with an occupancy rate of 95.7 percent, Punjab has released 31.9 percent of its prisoners. Tamil Nadu, which has an occupancy rate of 60 percent, has released 33.4 percent of its prisoners.

Some people have been deprived of relief despite meeting all criteria. Among those who were denied interim bail in Madhya Pradesh is Rakesh Pardhi, a 20-year-old who was arrested by the police in May for illegal possession of raw country liquor under Section 34 (2) of the Madhya Pradesh Excise Act, 1915. This offence is punishable by a maximum of three years of imprisonment for a first-time offender. Pardhi had no prior criminal record, and has been suffering from tuberculosis since before the time of the alleged offence. He was arrested and sent to judicial custody and has been incarcerated for nearly three months. Despite meeting the parameters and suffering from tuberculosis, he was not considered for interim bail. His regular

bail application was rejected by both the magistrate and the sessions court for one of the lowest-level offences.

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The state of the prisons is linked to the larger problem with how undertrials are treated in India. Undertrials comprise 69.4 percent of India's prison population. This number is egregious given the very idea of pretrial detentions has been widely questioned. Pretrial detention requires some extent of presumption of guilt, and comes with a heavy cost in cases of wrongful arrest. Observers, including those writing in *The Caravan*, have correctly argued that the court and the government have not done enough to protect the most vulnerable—persons over 60 years of age, and those with comorbidities. While these people should be protected, we must not ignore the structural problem concerning undertrials.

A reduction of the undertrial population by half would significantly decongest prisons. The sentencing function of the courts has been staggered, which is contributing to overcrowding. Bareilly sub-jail, where 64 inmates tested positive for COVID-19 in July, had a total of 78 inmates in April, of whom 73 were undertrials.

It is clear that the prison system was unprepared for a crisis such as this, and we need more than just ad hoc steps to address these challenges. The policing culture and laws that criminalise communities contribute to excessive arrests. According to the 2016 NCRB data, India arrests 14.6 people for eventually incarcerating one, as compared to 4.7 in the United States.

The case of Rakesh Pardhi is not an exception. The Madhya Pradesh police arrests disproportionately under excise laws, and even before the pandemic, trial courts almost always deny bail in these cases.

The number of undertrials in the state's prisons increased from 23,448 on 29 February this year to 28,608 by the end of August. Between 31 March and 30 April, Madhya Pradesh prisons released around 2,500

inmates, but since then they have added 6,497 new undertrial inmates to its prison population between April and July.

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By August end, according to official numbers, the overall prison population was almost back to the pre-pandemic February figures, despite attempts at decongestion and a consistent decline in the population of convicts in prison. In the case of district- and sub-jails of Madhya Pradesh, the prison population has exceeded the numbers of February.

The data on district- and sub-jails from June is shocking. The Maihar sub-jail had an occupancy rate of 647 percent, while the Anuppur District Jail was at 356 percent and the Baidhan District Jail at 355 percent. At the same time, 99 out of 131 prisons in the state had over-occupancy, and 26 of these had occupancy rates higher than 200 percent.

Many of these arrests and judicial custody have been ordered in cases under Section 188 of the Indian Penal Code, which deals with disobedience of orders promulgated by public servants, including violating lockdown rules. This is compounded by the fact that Section 188 is a non-bailable offence in Madhya Pradesh, following a state amendment to the IPC in 1976.

There were also multiple arrests in the garb of action against members of the Sunni Islamic organisation Tablighi Jamaat who had attended an event on 23 March at the organisation's headquarters in Delhi, known as Nizamuddin Markaz. The Bhopal district court ordered arrests of 69 attendees, a majority of whom were foreign citizens and many were COVID-19 positive. In Ujjain, a first-information report was registered against a person for putting up a display picture on WhatsApp that said "*Hum Markaz Nizamuddin ke saath hain*"—we are with Markaz Nizamuddin.

Dozens of cases across the state were registered against people who had already tested positive, who were being punished for falling ill.

Notably, three accused persons were detained under the National Security Act, 1980 in Indore for allegedly attacking doctors. Two were found to be COVID-19 positive when they were sent to the Satna Central Jail from Indore, and one was found to be COVID-19 positive when he was brought to the Jabalpur Central Jail. Over the years, the NSA has been also invoked in the state for offences such as transportation of cows and possession of beef.

The record of arrests between 22 March and 3 May made available by the Madhya Pradesh police contains over twenty-one thousand arrests. While this is an incomplete data set, it tells us that around a fifth of the contained cases are lockdown-violations related, a sixth of them were under excise laws and an eighth of them under gambling laws. The proportion of lockdown-related offences goes higher in busier urban centres, in some places accounting for over eighty percent of all cases. As we argued in a piece in *The Wire*, criminal law is an inappropriate response to a pandemic.

In 2009, there was an attempt to plug the number of arrests by way of an amendment to the Criminal Procedure Code, under which mere notices were supposed to replace arrests in minor cases. While the provision is used commonly by the police, it has not made a dent in the prison population of undertrials.

According to the latest NCRB data, Madhya Pradesh boasts of one of the highest annual rates of offences under excise and public-gambling laws. The rate of offences under excise laws stands at 110.2 per 100,000 population in the state, as opposed to 20.2 nationally; for public gambling laws, it stands at 34.4 per 100,000, as opposed to 11.9 nationally. Just as in the case of lockdown-related offences, these offences are somewhat manufactured. There is no victim, no harm, and it is mostly the poor, especially those from marginalised communities, who are targeted.

Trial courts also treat minor offences under excise laws with undue harshness. While high courts often grant bail, approaching them makes the process costlier for the accused. In *Arnesh Kumar vs State of*

Bihar, the Supreme Court held that the magistrate shall not authorise detention casually and mechanically and, in particular, in relation to offences punishable by an imprisonment of seven years or less.

However, compliance with this order has not sufficiently percolated down to the lower judiciary. Judges have also treated some lockdown-related cases with undue harshness. In one case, a vegetable vendor in Indore was sent to judicial custody, even though the judge recognised that vegetables were essential goods.

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To tackle the COVID-19 situation in prisons, four important measures are needed: reducing the quantum of arrests; increasing access to early bail; improving health infrastructure; and decriminalisation of poverty and marginalisation.

A disproportionate growth in the number of women prisoners is also worrying. As per the NCRB's prison statistics, until 31 December 2018, the prison population in India was 466,084. From 2000 to 2018, the rate of increase in India's women inmate population, at 117.7 percent, is more than double the global rate, which stood at 53 percent.

The abysmal healthcare facilities in prisons makes the arrest itself a form of punishment. In 2018, healthcare expenditure on prison inmates in India was merely 4.3 percent of its total expenditure on prison inmates. According to a study conducted by the Commonwealth Human Rights Initiative, with five prison deaths per day, India's prison mortality rate of 3.96 per 1,000 inmates is higher than that of the United States, Australia, and England and Wales.

Finally, it is important to ask why certain offences exist at all in the criminal law books. Crimes of possession such as those under excise, gambling, anti-beggary and cattle-slaughter prohibition laws serve to

criminalise the poor, in particular those from certain social groups—the denotified tribal and nomadic communities, Dalits, Adivasis and Muslims. Unsurprisingly, prison records show that two-thirds of inmates are from Scheduled Castes, Scheduled Tribes and Other Backward Classes.

In the context of the criminal-justice system in the United States, the racialised targeting of African-American communities has been cited in arguments for abolishing the police. In India, the criminal-justice system is designed to carry out casteist social control. Any conversation on policing must be cognisant of this structural reality. Focussing on the problem of prison-overcrowding without locating it within this context would be missing the woods for the trees.

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Gendering the Pandemic in the Prison

Pratiksha Baxi, Navsharan Singh


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Part of a long poem written on the outer wall of New Delhi's Tihar jail (2015) | kyoorius.com/Government of Delhi

'For women, prisons are built with stones of "patriarchal" law. It is time to campaign against incarcerated pregnancies and custodial childbirths as making for cruel, inhuman and degrading treatment of women.' 



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3,23,337 (10%) are undertrials. Yet, no moratorium on fresh arrests that would stop new admissions of undertrials into prisons has been announced during the pandemic.

The legal system has the responsibility to devise ways to avoid mass contagion in custodial institutions.

In [Contagion of Covid 19 Virus in Prisons](#), the Supreme Court of India directed the constitution of High Power Committees (HPCs) headed by each high court to oversee the de-congestion of prisons during the pandemic. The court noted that ‘prisons can be fertile breeding grounds for incubation of COVID-19’. Despite a national de-congestion drive, even on 22 June 2020, as per the e-prison dashboard, the total prison population stood at an extraordinarily high 4,64,127. This would include UTPs, convicted prisoners, and detenués or civil prisoners. The legal system has the responsibility to devise ways to avoid mass contagion in custodial institutions. Failing which the system would be hit by a catastrophization of a disaster for, as [Upendra Baxi argues](#), ‘if the spread of a global pandemic was an act of misfortune, its catastrophization has to be located in the injustices of social structure and policy’.

[The threat of mass contagion in prisons poses specific challenges to women, children and gender and sexual minorities in prisons and other custodial minorities.](#) Older women prisoners, detenués and undertrials in overcrowded pandemic-struck prisons have been denied bail, while pregnant women, lactating mothers, and mothers and their children, women with disabilities, and women with co-morbidities continue to be incarcerated in overcrowded prisons. [Why should courts be mindful of women inmates as women?](#) We argue that all women inmates should be released, whether or not they are pregnant, and outline why we think that a disaster could become a catastrophe if the legal classification of women prisoners and undertrials deserving of release or bail is not altered.

Are women “custodial” minorities?

Curious about what percentage of the overall prison population comprises women, we collated the [figures available on the e-prisons dashboard](#) on 20 June 2020 and found that this platform showed that there are 22,927 women inmates in all prisons in India. This forms 4.1% of the total inmates, an increase from 3.3% in 2000 as per the [NCRB statistics](#) available until the end of December.



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44741	1079	4722	9717	4709	9110	1977	1027
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Source: These figures, which change every day, have been collated from [the e-prisons dashboard](#). as of 20 June 20 collected on 21 June 2020 at 13:00 hours.

We argue that all women inmates may be defined “custodial” minorities. As per the 2020 statistics we collated, there are 68 persons incarcerated under the category “others”. No grave threat is posed to society by UTPs belonging to sexual and gender minorities that non-custodial alternatives cannot be found for them, while they wait for investigations and trials to be over. And alternatives to prison system need to be innovated for all convicted women, and gender and sexual minorities. There does not seem to be an attempt to recognise that their right to health and life is made far more precarious in a transphobic prison-medical complex. They must be counted and accounted for.

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.

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. ¹ 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. Muslim women face terrible targeting and blame, as do Dalit women who face intolerable discrimination and bear the brunt of misuse of law against them. Similarly, Muslim and Dalit male undertrials are also subjected to sexualised forms of torture in police and judicial custody. And policies that exclude foreigners from interim bail position them as custodial minorities, who face institutionalised racism. However, the law has difficulty in “seeing” these prison inmates, especially undertrials, as custodial minorities.

The penal policy during the pandemic found critique as [a number of students, activists, human rights dissenters, bloggers, journalists and ordinary people found themselves being detained, and arrested during the lockdown, without easy recourse to the legal system](#). Most of these women and men are now confined in prisons and denied bail by different courts. In such



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[the citizenship law](#). [These shifts in the penal policy are accompanied by the consolidation of legal autocrats](#), the emergence of newer forms of legal 'reasoning' which Gautam Bhatia characterises as '[imprisonment by metaphor](#)' and are marked by the rise of particular forms of autocratic legalities, while creating an institutional crisis for the prison system. These custodial minorities are seen as undeserving of release during the pandemic.

Classification by the High Power Committee: Case of Delhi

Following the Supreme Court, in Delhi the HPC chaired by Justice Hima Kohli met to devise a method for de-congesting prisons in Delhi. [This resulted in a number of decisions starting from 26 March 2020](#). Delhi has 16 jails located at Tihar, Mandoli and Rohini, with 17,440 inmates (consisting of 2,997 convicts, 14,355 UTPs and 88 civil prisoners (as on 27 March 2020) against a holding capacity of 10,026 prisoners. 'Deserving' undertrials such as first-time offenders, those arrested for an offence punishable up to seven years or in custody for over three months could be released on interim bail. For instance, interim bail was permitted for women undertrials in custody for 15 days or more. However, this rule did not apply to all women. Those women who were foreigners, or undergoing trial under the drug law, child sexual offence law, rape law, or corruption were denied interim bail. Further, those women who were accused with 'cases investigated by CBI/ED/NIA/Special Cell Police and Terror related Cases, cases under Anti-National Activities and Unlawful Activities (Prevention) Act etc' stood excluded from interim bail.

The HPC did not look at women prisoners as a class nor did it order the release of all pregnant women or mothers with babies as being a high risk category. There was no moratorium on fresh arrests of pregnant women or mothers with babies during the pandemic. The classification of women prison inmates was according to nationality, nature of offence, investigation agencies and *etc*. This "*etc*" classification rests on a penal policy that sorts women inmates into *deserving* and *undeserving*. The classificatory practice is not based on protecting high risk populations, irrespective of offence or sentence.

'It is a very, very sorry state of affairs'

By June 2020, in Maharashtra at least 10 prisons reported that 292 inmates and 72 prison staff had tested positive. [At least four inmates have died due to Covid-19 in Maharashtra](#): two in Taloja central prison, one in Yerawada and another in Dhule prison. [The women's prison in Byculla also reported one positive case](#). Yet undertrials locked up in these jails [continue to be denied bail](#).



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were afflicted by Covid-19. [Yet, care to all vulnerable populations is not being given](#) in spite of the risk of the contagion.




Women prisoners in Tihar jail having lunch | Wilderness Films India Ltd.
(wildfilmsindia.com)

[In the PUCL case](#) filed in the Bombay High Court against over-crowding in jails in Maharashtra, it was put on record in mid-June that even after four Covid-19 deaths, prisons did not have space to quarantine, and no testing was being done. . And [temporary prisons](#) are in a [deplorable state](#). As the Bombay High Court remarked it is '[a very sorry state of affairs](#)'.

In May, [merely 1,700 women had been released from prisons in eight states](#), a meagre 8.3% of all women inmates.

Reading Section 61 of the Disaster Management Act, 2005

Reading the Disaster Management Act, 2005 (DMA) into prisons as hotspots of mass contagion with overcrowded and vulnerable populations, one might argue that the DMA's provisions for mitigation as well as relief and rescue come into operation. The [2008 National Disaster guidelines](#) define an epidemic as a biological disaster. Therefore, the question of de-congesting prisons is not only a question for the judiciary, but it is equally a question for the disaster authority to contain mass contagion, prevent fatality and treat affliction in an affected area. 



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GROUND OF SEX, CASTE, COMMUNITY, DESCENT OR RELIGION.

The [2007 National Disaster Management Guidelines](#), which state 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.

The National Disaster Management Plan of 2019 outlines critical guidelines for inclusiveness, including the directions that prohibits discrimination against women, gender and sexual minorities, Dalits, tribals, and religious minorities. Therefore, the state disaster management 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 most vulnerable populations, 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 discriminating between the rights of an undertrial accused of murder as compared to the rights of an undertrial accused of terror or sedition, for mitigation, relief and rescue during a disaster.

Coercing incarcerated pregnancies and custodial childbirths

The utter lack of concern for pregnant inmates has not shocked judicial conscience. No *suo moto* proceedings followed [the reports](#) from the Thane jail in Maharashtra, outlining the plight of a pregnant prisoner who was infected by Covid-19.

The most recent debate on incarcerated pregnancy and the misuse of terror law has been about Safoora Zargar who was first arrested on 10 April 2020. The state has filed 26 criminal charges against her, including various sections of the [Unlawful Activities \(Prevention\) Act, 1967, \(UAPA\)](#) a law that has been critiqued for serious violations of fundamental rights. The state opposed her bail applications in lower courts thrice. [None of the bail courts contemplated the law on the question of forced childbirth in prison, especially at the time of the risk of mass contagion in a prison.](#) Rather, the [Patiala court had merely 'requested'](#) the jail administration to provide Safoora Zargar 'adequate medical (sic) aid and assistance' given her 'precarious medical condition' (*State v. Safoora Zargar* at page 9, order dated 4 June 2020). The court did not address the question: should pregnant prisoners or undertrials be coerced into giving birth in prisons?



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On 23 June 2020, Zargar was granted bail after the Solicitor General of India decided not to oppose the bail on humanitarian grounds. [The Solicitor General of India argued that this act of humanity was not to be treated as a legal precedent.](#) Bail was granted with conditions. Was this a concession? [There have been different views on the prosecutorial acknowledgement of humanitarian grounds.](#) Some argue that if the case had been argued, the question of the applicability of the terror law and the very question of the legality of incarcerated pregnancies would have had to be addressed. Whether the bail order is read as an example of autocratic legalism (Scheppelle 2018) that allows humanitarian acts to interrupt the grammar of politics or it is read as a welcome sociological precedent that allows the law to fulfil its quest for humanity, the fact remains that the courts have yet to rule that all incarcerated pregnancies and custodial childbirths are inhuman, cruel and degrading to women in every custodial institution.

We suggest that the law's quest for humanity should be especially attentive to the cruelty inflicted by the exception. Exceptional law such as the terror law by virtue of its application already imbues the accused with hyper criminality, and justifies cruel, inhuman and degrading treatment of terror suspects. We know this from Ujjwal Kumar Singh's (2007) magisterial book on terror law; or the lacerating account of routinisation of torture in police remand and judicial custody by Nitya Ramakrishnan (2013). Jinee Lokaneeta offers chilling account of policing, forensics and torture in her recent book, *Truth Machines*. Vrinda Grover has held [a powerful brief against encounter killings of women and custodial torture](#), while insisting that the aggravated impact of state impunity on women and sexual minorities must remain central to any constitutional understanding of custodial violence. Taking our cue from these germinal works, we argue that incarcerated pregnancies and custodial childbirths must be thought of as cruel, inhuman and degrading treatment of women in all contexts without exception.

The NCW has not only failed to ensure that all women inmates, including pregnant and lactating mothers are rescued from prisons as an urgent measure, but it has also not stopped new arrests and remand during the pandemic.

In 2018, the Ministry of Women and Child Development [held](#) that 'pregnant women should be given bail to facilitate child birth outside the prison', and that 'information about a woman's pregnant status should also be made known to the court that has ordered the detention, to enable the court to grant bail (where appropriate) or modify the detention order as deemed



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[offences leading to a penalty of death or life imprisonment, if found guilty, needs to be processed for bail under proviso to the Section 437 \(1\) \(ii\) of CrPC., which provides for special dispensation to women and children below the age of 16 years in the matter of grant of bail](#).

Hence, even women UTPs who are charged with life or death can be given bail. The NCW has not only failed to ensure that all women inmates, including pregnant and lactating mothers are rescued from prisons as an urgent measure, but it has also not stopped new arrests and remand during the pandemic.

Bail should be given to women on the grounds of reproductive justice and law must not inflict reproductive harm to women in custody.

Not only has section 61 of the disaster law, which defines non-discrimination, not been applied, no reasons have been given for why non-custodial alternatives cannot not be found for women undertrials as provided in [international law](#). Surely, Article 51 of the Constitution obliges courts to follow international law. The UN General Assembly's adoption of the *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* (also known as the Bangkok Rules) *vide* Rule 24 states that 'non-custodial means should be preferred for pregnant women during the pre-trial phase wherever that is possible or appropriate'. Incarcerated pregnancies and coercing custodial childbirth violate Rule 24. Furthermore, [the principle of non-discrimination obliges states to find alternatives to imprisoning women](#).

Moreover, does a pregnant woman who has decided to carry the pregnancy to full term not have the right to bail on the ground of her right to protect the needs of her unborn child? Why is an incarcerated pregnancy and a custodial childbirth per se not a denial of reproductive justice? Bail should be given to women on the grounds of [reproductive justice](#) and law must not inflict reproductive harm to women in custody. Recognizing this implicitly, [in its judgment of 2016](#), the Gujarat High Court after finding a pregnant woman guilty of murdering her sister-in-law in a dowry related case, allowed the woman to surrender after she had delivered her baby.

Custodial childbirth and incarcerated pregnancy then is a specific form of cruel, inhuman and degrading punishment that is inflicted on women in prisons. Any incarcerated pregnancy and custodial childbirth is a fundamental violation of reproductive justice. To rescue some pregnant women and not others during a disaster amounts to condemning some pregnant inmates to a death sentence. In our law, no death sentence can be given to a pregnant woman; nor can the technique of execution be cruel, degrading or inhuman. Section 416 of the Criminal Proced



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Why are reproductive rights of some women prisoners more important than of others? There is a lengthy and sad litany of the literal miscarriage of justice in our legal history that has inflicted more sexual and reproductive harm on some women. We know that women who are “othered” such as Phoolan Devi were forced to undergo a hysterectomy. Her consent to remove her uterus was deemed irrelevant, for the prison officials decided that she should not give birth to more Phoolan Devis. This targeted reproductive violence that aimed to extinguish a woman’s reproductive capacity is an act of gross custodial violence against all women prisoners. Who is liable for irreversible reproductive harms like non-consensual sterilization, coerced miscarriage or maternal or infant mortality, especially against women who are imprisoned to be ‘taught a lesson’? This precedent of injustice is reason enough for courts to re-think jurisprudence of bail and custody of all women undertrials and prisoners.

A media that repeats the police-prosecution framing of accused women normalises and justifies state excess.

The question of reproductive justice is not an issue when reproductive politics *others* women—Muslim, Dalit, Kashmiri—to deny an entire community a reproductive future. These discourses index differential treatment of differently situated pregnant bodies. The [sexual and reproductive violence on Soni Sori in prison](#) highlights how torture itself is sexualised and directs reproductive violence on the bodies of Adivasi women. The public vilification campaigns against all these women aim to portray them as exceptionally criminal and dangerous, who deserve to be taught a lesson through cruel, inhuman and degrading punishment. A media that repeats the police-prosecution framing of accused women normalises and justifies state excess.

Our courts tend to forget that prisons are male spaces where women are fitted in and many women prisons have reported stories of indignity, decay and torture.

Another routine and heartbreaking illustration of custodial reproductive violence is the shackling of pregnant prisoners. From women’s perspective this is a form of custodial reproductive violence that is a grave violation of women’s right to life, as of the right of their unborn or newborn child. In keeping with international law, as recently as 2018 the Ministry Women and Child Development has recommended that ‘instruments of restraint, punishment



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The techniques that discipline and punish menstruating bodies, lactating bodies, pregnant bodies, menopausal bodies, ailing bodies, and young bodies of women inscribe a terrifying gender code. This is not to argue that women prisoners do not have agency or politics nor to suggest that they be reduced to their biological beings. Rather this is to underline that [prisons are foundationally male spaces, designed to reduce all women to biological degradation.](#)

Concluding Remarks

Justice Krishna Iyer famously said that '[prisons are built with the stones of law](#)'. However, for women, prisons are built with stones of 'patriarchal' law. It is time to campaign against incarcerated pregnancies and custodial childbirths as making for cruel, inhuman and degrading treatment of women. We must fully trace the impact of the sexual and reproductive politics of the state on detention practices that are normalised under the sign of the nation. To do otherwise, is to direct violence at women. It is time to campaign for an urgent moratorium on all fresh arrests of women, and of gender and sexual minorities, wherein no coercive action should be taken against women and gender and sexual minorities, and no custodial sentences should be handed out to such persons. All women and gender and sexual minorities should be released during the pandemic.

It is time to re-think the prison system as it exists from the point of view of gender and sexual minorities, a question that should concern all kinds of publics and movements, jurists and academics, people and their courts.

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