

To,
The Chairperson,
The High Powered Committee,
High Court of Delhi,
New Delhi.

17 August 2020

Dear Hon'ble Justice Hima Kohli,

We appreciate the work of the High Powered Committee (HPC) in ensuring the release of prison inmates during the difficult conditions of the lockdown. However, we wish to highlight the gendered aspects of de-congestion, and highlight especially that bail, parole and arrest also need to be reviewed from the perspective of gendered vulnerabilities of prison inmates. This petition is to appeal to the HPC to place under consideration our submissions and suggestions for a reconsideration of the classification adopted for the release of prisoners and the issuance of further guidelines with a specific focus on women, children and transpersons who are in COVID-19 struck prisons.

In *Contagion of Covid 19 Virus in Prisons*, the Supreme Court of India left it “open for the High Powered Committee to determine the category of prisoners who should be released as aforesaid, depending upon the nature of offence, the number of years to which he or she has been sentenced or the severity of the offence with which he/she is charged with and is facing trial or any other relevant factor, which the Committee may consider appropriate.” It is our view that the HPC has the power to determine what may be “any other relevant factor” to determine its classification.

As researchers committed to efforts to ensure access to justice, gender equality and prison reform, we submit most respectfully that the threat of mass contagion in prisons poses specific challenges to women, children and transpersons in prisons. We appeal for a reconsideration of the HPC's classification to enable the release of all women, children and transpersons during the pandemic. It is our plea that the HPC classification of who deserves release from congested prisons must begin with an assessment of vulnerabilities, physical and psychological; and social. And the question of decongestion be seen as a gendered problem.

I. Treating Women & Transpersons in Prison as a Class: A Question of Release of 2.7% of Total Prison Population during the Pandemic

Women and transpersons are in minority as compared to the total prison population. As the Ministry of Women and Child development has noted ‘Owing to the fact that women still remain a minority in comparison to total prison populations, they do not receive adequate specialized services or infrastructure.’ (MoWCD Report 2018 at 4.2.7). In Delhi, women & transpersons comprise 2.7% of the total prison population as per the data uploaded on the National Prisons Information Portal. The information that is available on the portal as per jail

tell us that 402 women and 7 transpersons are detained in Delhi prisons as per the statistics uploaded on the National Prisons Information Portal (represented in Table 1 and 2).

Table 1: Total Women Inmates

S. No.	Jail	Women	Age	Age	Age	Age	Age	Age	Nationality
		Total Women Inmates	Below 20	20 to 30	30 to 40	40 to 50	50 to 60	60 to 70	Indian
1.	Mandoli Jail No 16	147	6	61	53	33	14	3	Total 145 132 Indian
2.	Central Jail No 6, Tihar	252	3	87	91	70	32	11	Total 257 218 Indian
	Total	402	9	148	144	103	46	14	350

Source: National Prisons Information Portal (<https://eprisons.nic.in/Public/DashBoard.aspx>), collated on 11 August 2020.

*On 11 August 3 women inmates were admitted, 1 released.

**2 inmates between 20 to 30 years and 1 inmate between 40 to 50 years were admitted to Central Jail Tihar Jail No 6.

Table 2: Total Trans Inmates

S. No.	Jail	Others	Age	Age	Age	Age	Age	Age
		Total Trans Inmates	Below 20	20 to 30	30 to 40	40 to 50	50 to 60	60 to 70
1.	Mandoli Jail No 16	1	0	0	0	1	0	0
2.	Mandoli Jail No 15	4	1	3	0	0	0	0
3.	Central Jail No 6, Tihar	2	0	2	0	0	0	0
	Total	7	1	5	0	1	0	0

Source: National Prisons Information Portal (<https://eprisons.nic.in/Public/DashBoard.aspx>), collated on 11 August 2020.

Women and transpersons in prisons are numerically small, comprising 2.7 of the total prison population. The release of small numbers of women and/or transpersons and/or use of non-custodial alternatives does not threaten law and order.

II. Women and transpersons as a class have social restrictions on mobility, resources and access.

- During a pandemic especially, women and transpersons satisfy the conditions required for bail since as a class they are less likely to flee, influence witnesses, tamper with evidence.
- As a class, women and transpersons do not have the means, positions and standing nor the social, physical (through use of violence) or economic capacity to influence witnesses or the capacity to flee.
- Due to restrictions on accessing courts, the burden should not fall on individual women and transpersons to apply for and secure bail and they should be released as a group.

III. Prisons as Male and Transphobic Spaces

Prisons are male spaces where women are fitted in and many women prisons have reported stories of indignity, violence, affliction, decay and torture. Women face the indignity of strip searches, cavity searches, and routine abuse that is directed at their being as women. The techniques that discipline and punish menstruating bodies, lactating bodies, pregnant bodies, menopausal bodies, ailing bodies, and young bodies of women inscribe a horrific gender code. Prisons are foundationally male spaces, designed to reduce all women to biological degradation.

- Since special women prisons are sparse, most women prisoners are locked up in a small congested spaces in male prisons.
- The prison systems are structured and run with male prisoners at the centre and most arrangements, however deficient, are made to suit them, while women prisoners' needs are invariably overlooked.
- Women and transpersons are vulnerable within the prisons as several reports show including the 2018 Report on women in prisons published by the Ministry of Women and Child Development. 'Female inmates are often faced with prison infrastructure and administrative systems, which are largely oblivious to their gender-specific needs' (MoWCD Report 2018 at para1.2).

IV. In a prison under lockdown, women, differently abled persons, elderly and afflicted, foreigners and transpersons are the worst affected.

The prison medical complex is by definition male and transphobic. The specific needs of women and transpersons bodies is not a priority in any medical system that the prison system may adopt. There are inadequate women doctors and nurses in prisons, if any.

- It is imperative to think of women's lives in prisons as a series of afflictions, psychological and physical, which now stand in peril due to COVID-19.
- The congestion in prisons is a structural problem that under trials pay for, sometimes with their lives, as we saw with the tragic death of two elderly inmates due to COVID-19 and the death of a woman FNP following a lathi charge in the Tihar jail.
- As the MoWCD Report points out 'in a number of judgments on various aspects of prison administrations, the Hon'ble Supreme Court has laid down three broad principles: A person in prison does not become a non-person. A person in prison is entitled to all human rights within the limitations of imprisonment. There is no justification in aggravating the suffering already inherent in the process of incarceration'.

V. Application of the Non Discrimination Clause of the Disaster Management Act, 2005 to Prisons

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. Further, prison inmates' fundamental rights, right to health and right to life is protected by a plethora of laws.

- If the application of disaster law is legally valid, then the classification of the prison population, and the grounds of mitigation, rescue or relief (remission, bail or parole), must be read with Section 61 of the DMA. **Section 61 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 National Disaster Management Plan of 2019 outlines critical guidelines for inclusiveness, including the directions that prohibits discrimination against women, gender and sexual minorities, elderly, differently abled, minors, Dalits, tribals, and religious minorities.
- Therefore, the state disaster management plan must recognise the differential needs of women and other vulnerable populations 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.
- Humanitarian classification that flows from social and physical vulnerabilities rather than a classification based on offence and sentence alone may be adopted as policy so that the disabled and co-morbid inmates ailing from asthma, diabetes, TB, cancer or HIV, among other afflictions, are treated as vulnerable persons irrespective of offence or sentence during the pandemic.

VI. Pregnant Women and Mothers

In keeping with international and constitutional law, read with the disaster law, we appeal to you to release all pregnant women and women with children from prisons on the following grounds.

- Custodial childbirth and incarcerated pregnancy 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.
- 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.
- 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 Procedure Code (CrPC) holds that an execution may be postponed or commuted if the woman on death row is found to be pregnant.
- Yet scores of pregnant women are yet to be released from our prisons and remain deprived of law’s humanity.
- Further, the decision to de-congest prisons from a gender perspective must take into consideration new admissions in police or judicial custody. Pregnant women, mothers and children should not be taken into custody during the pandemic, considering their vulnerability to contracting COVID-19 in the custodial institutions.

VII. Discrimination on the basis of caste, community and religion

In keeping with constitutional law read with disaster law, we appeal to you to ensure that all Scheduled Caste and Scheduled Tribes, and religious minorities be treated as a class that deserve protection from discrimination given their social and economic vulnerability in law and society.

- The plight of dalits and tribals in prisons deserves urgent attention, who are a significant vulnerable population in prisons. The pandemic has brought with it newer practices of untouchability for the protocol of social distancing is interpreted through casteist ideas of pollution and purity in many institutional contexts.
- Religious minorities have been made vulnerable to variety of discrimination, abuse and prejudice within the prison, especially heightened during the pandemic. Discrimination of religious minorities, their social vulnerabilities and their inability to access justice has been documented in various reports. Protection from discrimination, prejudice, abuse, torture, and neglect must be ensured.
- Women from other states such as Kashmir, Jharkhand and other states who are migrants or transferred from state prisons into central jails in Delhi have specific problems relating to health and access to the justice system. They have been unable to meet their families or access legal service or secure their release, even when allowed in law.
- The sociological fact is that when such prison inmates are the object of public prejudice and stigma, the possibility of neglect, harassment and violence is higher in custodial situations.
- The review of how they cope with the inhuman conditions in prisons is absolutely critical as policy to ensure that they are not subject to inhuman, cruel and degrading treatment under the cover of the pandemic.

VIII. Racial Discrimination

In keeping with constitutional law read with disaster law, we appeal to the HPC to re-consider the representation of foreign national prisoners (FNPs) and to re-consider the exclusion of foreign nationals as a class. We are deeply distressed at the death of the Ugandan prisoner, Jesca Sarah Kafeco, who recently died during surgery after incurring injuries following the so-called use of minimum force by jail authorities. We urge the HPC to reconsider the violence on 16 June 2020 in the woman jail in Tihar, the injuries on 15 women FNPs and the subsequent death of the injured Jesca Sarah Kafeco as cause for a review of the classification to exclude FNPs as a class. We appeal to the HPC to please re-consider the representation made by the FNPs.

- It is a sociological fact that most foreigners are Blacks and South Asians who experience racial discrimination in prisons. The CHRI Report, *Strangers to Justice*, details the specific forms of discrimination that FNPs face in prisons.¹ African news portals have also reported the everyday racism that Blacks face in Indian prisons which is a matter of grave concern.
- The FNPs also have problems in relation to language and culture, and access to the legal system. Black women in prisons face specific problems of gender and race. Rather than see all foreigners as a class that do not deserve preferential treatment on the grounds of their nationality, they should be seen as vulnerable populations,

¹ <https://www.humanrightsinitiative.org/download/1547551168Strangers%20to%20Justice%20FNP.pdf>

and as custodial minorities in a foreign prison who deserve the protection of law flowing from principles of substantive equality. For Black women's lives matter, especially in Indian prisons.

IX. Custodial Deaths and Negligence during lockdown

The pandemic has also accentuated the problems within prisons. We are deeply concerned about reports of 'suicides' and unnatural deaths in Delhi prisons during the lockdown.

- A 30 year old woman inmate by the name of Praveen alias Kavita of Central Jail number six who was arrested on the charge of having connived with her husband to kill her parents in law committed suicide by hanging herself from the fan on the intervening night of 26 and 27 April 2020. She was brought dead to the hospital.
- On 18 July it was reported that Sonu Punjaban charged with human trafficking attempted suicide in jail no 6, Tihar .
- In July, it was reported that a 38 year old man who was in judicial custody after being charged with killing his mother in law, killed himself with a bedsheet in Tihar jail no 4.
- On 8 June, a man accused of sexual assault was allegedly murdered in Jail No. 8 in Tihar Central Jail.

Not only have other prison inmates have expressed concerns about their security during the lockdown, the lack of intervention to ensure that ill treatment, violence, torture and/or depression caused due to the lockdown is prevented may lead to further custodial tragedies.

1. Greater scrutiny and review of jail conditions are imperative during the lockdown, especially when families, legal services, Magistrates and NGOs are not able to access the prisons.²
2. All reported instances of unnatural deaths must find judicial scrutiny, especially during the time when lockdown suspended any contact, accountability and redress.
3. District courts should be apprised of the increased abuse of power in prisons during the lockdown, and guidelines must be issued that make the fundamental rights of prison inmates central to all aspects of judicial review of prisons including detention, interrogation, remand, bail, release and legal services.
4. The COVID-19 deaths combined with the above mentioned custodial deaths in the last four months are grounds enough for a humanitarian classification falling within the meaning of 'any other relevant factor' that the HPC may determine.

X. The Suspension of Criminal Trials during the Pandemic and Impact on Under Trials

A majority of UTPs, languish in jails because they are not produced in court and the position is aggravated by the slow rate of disposal of cases in the courts of law. Further, the pandemic adds to judicial delay for those UTPs booked under extraordinary law. Judicial delay results in torturous punishment to under trials for charges that may be dropped, quashed or meet with acquittals in the future.

² <http://www.millenniumpost.in/delhi/man-who-pointed-gun-at-cop-claims-threat-to-life-in-tihar-413747>

1.1 Judicial Delay and Online Courts

- Due to the pandemic, criminal trials have been suspended and hearings have been adjourned in most criminal matters other than in bail courts and those deemed to be urgent.
- The large majority of women and transpersons in Delhi prisons are under trials or are suspects in on-going investigations by various state agencies.
- While extensions are granted to filing of charge sheets and courts are under lock down, under trials face the prospect of spending longer duration in prison which are at present under the threat of mass contagion.
- Due to the lockdown of courts, we hazard that the rate of pendency for each under trial has increased at least two times over – if an average trial takes 3 to 4 years to finish, it may now take 5 to 8 years.

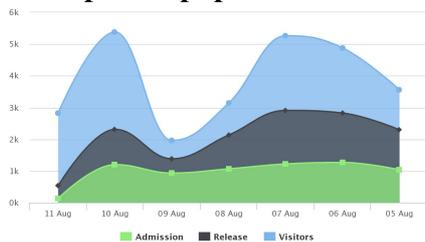
1.2 Lockdown Orders

- The lockdown orders in April and May uploaded on the website of the district courts in Delhi indicate that approximately 4% bail hearings concerned women inmates.
- These orders reveal that women are more likely to get to bail courts if they are co-accused with men.
- Despite the best efforts of bail courts, many bail hearings during this period were adjourned due to lack of verification of papers, lack of filings, broken links during e-hearings³, non-appearance of lawyers and cases withdrawn.
- The protocols of verification and authentication despite courts going online remained unchanged, creating problems for courts in disposing bail hearings. In one case that stands out, the wife of the accused did not have money to pay the counsel and hence, the case was not argued on merits by the counsel and withdrawn. This case filed after the accused's mother had died, and the wife had no familial support during the lockdown.⁴
- The lockdown created extraordinary circumstances for the families of prisoners, and often women related to the prison inmate faced extraordinary hardships and impoverishment during this period.
- The impact of the lockdown on the families of prison inmates has had a devastating impact on their capacity to access prisons, lawyers and courts.
- The overall impact of lockdown on under trials, especially women and transpersons deserves urgent scrutiny and redress. Bereavements, illnesses, and penury in the family during the lockdown for under trials is an extraordinary humanitarian ground, and a burden often carried by elderly parents, women and children in the families of under trials.

³ State v Salman, <https://delhicourts.nic.in/Bailorder/2020/May2020/11d.pdf>

⁴State v. Shanker Dass (Sunil) <https://delhicourts.nic.in/Bailorder/2020/May2020/11d.pdf>

1.3 Fresh admissions: Non-custodial measures must be conceived of and adopted for these vulnerable prison populations.



Nation-wide prison population trend (last 7 days),

<https://eprisons.nic.in/public/DashBoard.aspx>, accessed on 11 August 2020

Despite efforts to de-congest prisons, more women are admitted in prisons during the pandemic. There is no effort to think of imprisonment as a last mile measure as recommended by the Ministry of Women and Child Development, where in it was said that ‘Steps need to be taken to ensure that imprisonment is only considered a last mile measure in the case of women, and non-custodial measures are encouraged’ (MoWCD Report 2018 at 4.2.8). The United Nations Standard Minimum Rules for Non-custodial Measures, also called the Bangkok Rules likewise emphasize the importance of such measures and urge the member States to develop non-custodial measures to rationalize criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender. These international standards read with the WHO guidelines and the disaster law read with constitutional law provide a framework to treat women and transpersons as a class to recommend non-custodial measures during the pandemic.

1.4 Inability to afford bail

- Reports have also indicated that women are in prisons because they are unable to pay fines, sureties, court expenses or pay the lawyers. In 2018, the MoWCD noted, ‘The number of undertrial prisoners in India is huge. Steps should be taken to facilitate their early release under Section 436A of Cr.P.C.as well in cases where are unable to pay sureties on release.’Most under trials come from a highly disadvantaged section of society comprising working class persons, Dalits, religious minorities, women and transpersons.
- The Tihar statistics tell us that majority of the prison population (around 66%) has education below class tenth; and that 78.9% prison population is working class, where the monthly income does not exceed Rs. 8000/- per month.⁵
- During the pandemic, it is imperative to compensate those prison inmates who have not been released also by supporting the families of the inmate who may have faced disease, bereavement or penury during the pandemic.
- Women and elderly parents must be provided welfare benefits by the state as compensation for the loss of wages and support by prison inmates of their families.
- Many families cannot afford legal fees and do not have sufficient wherewithal to connect to legal services, and hence legal services could take a more pro-active role to determine the needs of prison inmates, especially since all prison inmates are at risk of a mass pandemic, and hence, attract the definition of those deserving legal services.

⁵ http://tte.delhigovt.nic.in/wps/wcm/connect/lib_centraljail/Central+Jail/Home/Prisoner+Profile

Prayer to the HPC

1. It is our plea that all women, children and transpersons be treated as a class deserving release during the pandemic; and that the existing classification be revised flowing from the Supreme Court's direction that the High Court committee may find appropriate "any other relevant factor".
2. It is our plea that all pregnant women and mothers in prisons be treated as a class deserving release during the pandemic; and that the existing classification be revised flowing from the Supreme Court's direction that the High Court committee may find appropriate "any other relevant factor".
3. It is our plea that all inmates, who are vulnerable by virtue of gender, class, caste, religion, and race; and disability, co-morbidities, illnesses and age be released, irrespective of nationality, sentence or offence during the pandemic. We request the HPC to review its decision to exclude foreigners and think of them as deserving release during the pandemic.
4. Fresh admissions of women and transpersons in prisons not be allowed during the pandemic. Rather, non-custodial measures in line with the health guidelines be evolved. Specific advisories prohibiting detention of pregnant, menstruating and lactating women be issued.
5. We request you to please ensure that no woman who is a survivor of rape or other forms of violence should be sent to prison on contempt or any provision of criminal law.
6. We would request the HPC to please seek information and bring on public record the total number of women, children and transpersons who are undertrials, convicted prisoners and detenues who have been released from prisons in Delhi till date.
7. We would further request the HPC to please seek information and bring on public record on how many pregnant women and child bearing women undertrials, convicted prisoners and detenues are lodged in prisons in Delhi.
8. We would request the HPC to please seek information and bring on public record on how many working class, illiterate, dalit, religious minorities, disabled, ill and foreign inmates are lodged in prisons in Delhi with a break up in each category for under trials, convicted prisoners and detenues.
9. In the interim, we would request the HPC to please direct legal services to review each case of women and transpersons which may have fallen under existing HPC guidelines and not resulted in a release. And to ensure that special provisions for vulnerable populations who have been denied mulakats, emergency parole, furlough or bail for legal aid, mental health counselling, counselling about Covid-19, medical care which attends to their needs as women, beds, masks, preventive medicines, better diet, counselling, reading and viewing material, medicines, medical check-ups, and other forms of relief and compensation. Such provisions must review jail administration rather than rely on their word.
10. Special initiatives by the HPC in collaboration with legal services, and NGOS, academics and trans rights and women's rights activists to meet prison inmates through video conferencing to hear from them would ensure that prison lockdown is interrupted by some legal and public check and balance.
11. A virtual inspection of the barracks and wards comprising women and transpersons and common spaces should be routinely undertaken especially when the prison is under lockdown and during the pandemic. We would like to appeal to the HPC to ensure that the protocols of isolation, distancing and the use of ICMR guidelines do

- not amount to cruel, inhuman and degrading treatment of prison inmates, nor become the pretext for justifying increasing number of custodial deaths and torture in prisons.
12. The fellowship scheme for children of prison inmates to enable them to finish school education should be sustained and efforts must be made to provide smart devices to school going children of prison inmates since education is now online and these children won't be able to afford going online. And those in schools, or universities in prison should also be enabled to access online classes and materials.

We would be deeply appreciative of your consideration of our submission.

Sincerely,

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