

**COVID-19 :**  
**Prisons in India**  
**and**  
**A Perspective on the Criminal Justice System**

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# Table of Contents

I.	Introduction .....	3
II.	Factual scenario .....	3
III.	Issues: As it stands and further down the line .....	6
	i. Prevention guidelines .....	6
	ii. Sanitation and other key issues .....	6
	iii. A perspective on domestic law .....	7
	iv. A perspective on international conventions .....	7
IV.	Analysis	
	i. Prevention and physical distancing measures .....	7
	ii. Sanitation and personal hygiene measures .....	8
	iii. Obligations under the domestic law of India .....	9
	iv. Obligations under the international conventions .....	11
V.	A brief perspective on legal aid .....	12
VI.	Conclusion .....	13
	References .....	14

# I. Introduction

The catastrophe the world is dealing with in the form the COVID-19 pandemic has put the entire world at a crossroads. Most of the existing institutions around the world, or what may be insinuated as our current ‘world order’, face a challenge of an unprecedented nature. Inevitably, India has not found itself immune to this global disaster. Currently, the major institutions of India, fundamental to the state, are facing a potential shakeup of unforeseen magnitude, since the nation attained its sovereignty a little over 70 years ago. In light of this, it has become vital for us to examine the diabolical state of the Indian prisons. Although it is not discernible to the naked eye, the current state of prisons in India finds itself lying precariously at a tipping point. It is only a matter of time, before this pandemic, unleashes its wrath over prisons which form the cornerstone of our criminal justice system. Thus, we ought to take the necessary steps based on the evidence before us to mitigate, as far as we can, the consequences of the current reality. In this paper, firstly, I will be providing a detailed factual account of the problem faced by India and the manner in which it is being tackled by the government. This will be followed by listing the multitude of issues that are already before us, and issues that may potentially arise as we implement the necessary steps. And lastly, I will be critically analysing the steps taken to reduce the impact and also provide suggestive measures in line with international guidelines. The third component, will also take into consideration the implications of government actions on the criminal justice system of India.

## II. Factual scenario

The primary issue and an unfortunate reality for India is the fact that the prisons in the country are massively overburdened. The last report on the prison population, published by the National Crimes Record Bureau in 2018, stated that the occupancy rate in Indian prisons is at 117.6%<sup>i</sup>. This would only result in the direct contravention of social distancing which has become an obligation in current times. However, notably, this fact has not gone unnoticed and a series of events have unfolded between March 2020-April 2020. Action is being taken on the

national as well as the state level to prevent the outbreak from getting out of control in prisons, which are one of the most vulnerable places to infectious diseases<sup>ii</sup>.

“Looking into the possible threat of transmission and fatal consequences, it is necessary that prisons must ensure maximum possible distancing among the prisoners including undertrials.”

– Supreme Court of India<sup>iii</sup>

The first major decision was taken by the Supreme Court (hereinafter referred as SC), when a bench including the Chief Justice S.A Bobde, took Suo moto cognisance of the matter of the spread of COVID-19 in the prisons of India<sup>iv</sup>. The bench took into account the steps taken by the various states to prevent the spread of the virus in their prisons. Subsequently, a list of directives was issued to states and union territories (hereinafter referred as U.T). The first was the setting up of a high-powered committee<sup>v</sup> by each State and U.T. The committee would constitute of (1) Chairman of the state legal services committee, (2) Principal Secretary (Home/Prison) by whatever designation is known as, (3) Director General of Prison(s). The objective of the committee was to formulate a classification of prisoners who would be eligible for parole or interim bail for any period of time considered by the relevant authority to be apposite. Also, relevant authoritative texts were cited serving as a guiding light for the constituted committee.<sup>vi</sup>

Interestingly, the court did not pause here. Certain other recommendations were made keeping in mind the state of things in prisons with respect to capacity, sanitation, available health care etc. The court has directed the devising of response plans in consultation with medical experts. This would imply relying on published, prison-specific guidelines by international organisations. This is the “Interim guidance on Scaling-up COVID-19 Outbreak in Readiness and Response Operations in camps and camp like settings” made as a joint effort by the International Federation of Red Cross and Red Crescent (IFRC), International Organisation for Migration (IOM), United Nations High Commissioner for Refugees (UNHCR) and World Health Organisation (WHO). Subsequently, it was published on 17 March 2020 by the inter-agency standing committee of the United Nations. This was followed by other directives such as the prohibition of presenting undertrial prisoners in courts, the prohibition of standard transfer of prisoners amongst multiple reasons unless done with the intent of decongestion and the immediate transfer of a suspected COVID-19 case to a Nodal Medical Institution. Further, a monitoring team was to be instituted at prisons to ensure that the aforementioned directives are duly complied with.<sup>vii</sup>

On April 7 2020, the Apex Court also directed the states and U. Ts to ensure that the released prisoners get a secure transit to their homes amid the national lockdown. However, an alternative in form of a temporary state shelter is also to be provided to them until the situation alleviates.<sup>viii</sup>

In an immediate response to the SC order on 23 March 2020, several states and U. Ts across the country have ordered the release of convicted prisoners/under-trial detainees based on the classification made by their respective committees. In Delhi, it was announced on the same day of the SC order, that the Tihar Jail would release a combined total of 3000 convicted prisoners and under-trial detainees on parole and interim-bail respectively. Similarly, the state of Maharashtra informed the Bombay High court in April 2020 that it had released 4060 under-trials on temporary bail and that it potentially planned to release 11000 prisoners on parole/furlough. The numbers are similar across other states with U.P planning to release 11000, West Bengal matching Delhi at 3000 and Punjab declaring a release of 6000.<sup>ix</sup>

Understandably, such a mass release of prisoners spells trouble as the liability now shifts on the community at large. To assuage concerns, the states have issued a protocol to track the movements of the released prisoners. In Delhi the local police are bestowed with the onerous job, whereas in U.P a state level monitoring committee has been instituted. West Bengal has charted out a detailed profile including contacts of the prisoners and this information will be sent to all the police stations across the state.<sup>x</sup>

In India, there is another facet to the whole issue which has arguably, gone unnoticed. Although it is beyond the primary scope of this paper, we cannot simply ignore an appeal that was made by the executive director at Amnesty International India<sup>xi</sup>. While the SC has issued a host of directives on prisoners, it has surprisingly kept quiet on the issue of an outbreak of COVID-19 in the detention centres of Assam. In fact, the six detention centres house more than 800 “irregular foreigners”<sup>xii</sup> and the conditions these detainees find themselves in are strikingly similar to those of prisons. In a briefing titled “Between Fear and Hatred: Surviving Migration Detention in Assam”,<sup>xiii</sup> the organisation threw light on plight of those who were detained. It was noted that the rooms provided for accommodation were severely crowded and even the availability of basic humane facilities was questionable. Evidently, this predicament holds considerable relevance to India. In the backdrop of the pandemic, The Office of the United Nations High Commissioner for Human Rights, the United Nations High Commissioner for Refugees, the World Health Organisation and the International Organisation for Migration,

have collectively, requested governments to release migrant detainees and avoiding any delay in doing the same due to the lethal consequences of a spread of COVID-19<sup>xiv</sup>. A failure in acting, with respect to detention centres, could not only aggravate the issue of the outbreak domestically but also portend unwelcome implications for India on the international stage where it is a signatory to multiple conventions on human rights.

### III. Issues: As it stands and further down the line

As this paper moves beyond the mere regurgitation of information and data, it is instructive to critically analyse the actions that have been taken by those in authority both at the state and the national level. However, prior to venturing into the analysis and the suggestive measures, this paper will enumerate the issues that India faces in dealing with the conundrum of prisoners in light of the pandemic. These issues will be concerned with the safety of the prisoners and also the community at large. Furthermore, questions will be placed on India's obligations under its domestic law and relevant international conventions to which it is a signatory.

- i. On 15 March 2020, the World Health Organisation (WHO), released an interim guideline on the management of COVID-19 in prisons and detention centres. One of the prevention measures<sup>xv</sup>, mentions physical distancing as a crucial element of combating the outbreak. However, as mentioned earlier, the number of inmates in India exceed the capacity by approximately 117.6%. For example, the Arthur Road Jail in Mumbai, houses more than 3000 inmates although its reported capacity is under 1000.<sup>xvi</sup> Although, authorities have adopted measures, as seen above, the effectiveness of the same remains to be seen. To examine this, the paper will import suggestive measures from the guidelines published by international organisations.
- ii. Sanitation and maintenance of basic hygiene is another mandatory requirement. Till now, we have been way off the mark in addressing such concerns.<sup>xvii</sup> Again, this paper will turn towards published guidelines to attend to this issue.

Also, I will highlight the potential issues that could arise as a result of the measures taken by the authorities and briefly elucidate on how to address them.

- iii. This component will elaborate on the obligations of the state towards the prisoners under the domestic law of the country. Thus, the constitutional rights of the prisoners will be read along with other laws and precedents which need to be upheld for the protection of human rights of the prisoners.
- iv. The last component will be dealing with India's obligations on upholding human rights under the international law, notably, ICESCR and the Universal Declaration on Human rights.

## IV. Analysis

- i. As has been discussed previously, most of the states have abided in an appropriate manner to the directives issued by the SC.<sup>xviii</sup> The states have formed the 'high-powered committee' and appointed the necessary personnel to implement strategies. The main strategy was formulating a classification of prisoners who were to be released on parole/ interim-bail with immediate effect. However, significant problems have arisen as a consequence of the classification. Unfortunately, it appears rather arbitrary. In its order the SC suggested a release of prisoners convicted or the undertrial inmates who are to face a prescribed punishment of seven years or less and prisoners serving a sentence shorter than the maximum term. But the classification was left to the discretion of the concerned state/U.T. In April, the high-powered committee of Delhi declared the release of under-trial prisoners on bail where the maximum punishment is up to 10 years, but added that the inmates ought to have been in custody for at least 6 months.<sup>xix</sup> How such a classification will facilitate in achieving the objective of protecting vulnerable prisoners remains inexplicable. Arguendo, assume that a prisoner falling in the age group of 25-30 is convicted for an offence for which the punishment is less than 10 years. On the contrary, there is an inmate in the age group of 65-70, but convicted for an offence with a term exceeding 10 years. The classification states

clearly that the latter prisoner, who is as a matter of fact, likely to be more vulnerable<sup>xx</sup>, will fail to make the cut. It begs the question whether such a classification is morally acceptable. Instead we need to follow the ‘vulnerable classification’ that has been applied in other countries.<sup>xxi</sup> Obviously, this would result in release of some prisoners who had been convicted of the more serious offences, and “...is shifting responsibility from prison system to society”.<sup>xxii</sup> Yet, human rights of the vulnerable must be the priority even in the times of an unprecedented crisis.

- ii. Moving beyond the topic of the release of prisoners, we also have to protect those who remain inside. The sanitation facilities inside the Indian prisons have been termed “horrible”.<sup>xxiii</sup> In 2016, a Model Prison Manual<sup>xxiv</sup> was published which called for the maintenance of 1 toilet for every 6 inmates in the day and for every 10 inmates during the night. But implementation has fallen short. Women too, need to be provided with the adequate resources for their personal sanitation, yet, our prisons have lacked on this front too. Also, the PSI 2018 report revealed that 1559 inmates succumbed to various illnesses ranging from heart and kidney ailments to tuberculosis and cancer.<sup>xxv</sup> The situation is certainly one of abject vulnerability for those inside the cells. On this note, the WHO guidelines cover a host of prevention measures.<sup>xxvi</sup> These include personal protection measures for inmates who must abide by norms of physical distancing and maintaining personal hygiene through regular washing of hands using alcohol hand sanitizers. They must wear masks but also avoid touching their masks regularly. Moreover, the staff must also abide by the strict protocol. They should be provided with individual PPE on prison premises and they must maintain the regular safety measures when off premises. For the purposes of brevity, I would only give a glimpse of these guidelines, as they can be accessed for further details.

The other measure includes provision of regular telephone services to the inmates to reach out to their families. This is crucial for their mental well-being. Prohibiting them from making contact with the outside world could lead to unrest and possibly riots.<sup>xxvii</sup> Moreover, the immediate testing of symptomatic prisoners and staff will go a long way in prevention of a COVID-19 hotspot in prisons.

iii. “Prisons are built with stones of Law....”

- William Blake

Now that the measures adopted in India towards preventing a COVID-19 spread in prisons have been discussed elaborately, I will move towards the fundamental question of the state’s legal obligations towards the vulnerable behind bars. The obligation of the state is derived from Article 21 of the constitution.<sup>xxviii</sup> The fundamental right is stated as follows; **Protection of life and personal liberty**- *No person shall be deprived of his life or personal liberty except according to procedure established by law.* In *Pt. Parmanand Katara v. Union of India*<sup>xxix</sup>, the SC, laid down that it is the obligation of those in charge to preserve the life of an individual regardless of whether he is an innocent person or a criminal convicted under the laws of the society. This obligation was also noted in *State of Punjab & Ors. v. Mohinder Singh Chawla*,<sup>xxx</sup> in which, the court affirmed that right to health is integral to right to life under the law.

Hence, it is under this obligation that we have seen the state functionaries take action. Yet this has not gone down without justified criticism. The high-powered committee in Maharashtra held that there will not be a release of convicts or under-trials booked under special offences (not IPC) like UAPA, PMLA, NDPS etc. A petition against the classification stated that “...the discretion given by the Hon’ble Apex Court was to ensure that the Committee shall take into consideration the relevant parameters so as to ensure that the right category or class of prisoners are released rather than making blanket exceptions based on irrelevant criteria.” Instead the seemingly arbitrary classification appears to defeat the objective of protecting the more vulnerable.<sup>xxxi</sup> The petitioners, in their argument, have referred to the Arnesh Kumar case<sup>xxxii</sup>, wherein, the guidelines by the Apex Court refrained from making a distinction between offences under IPC and under special acts. The concerns highlighted by the petitioners have been observed in the recent case of the Dalit scholar and academic Anand Teltumbde, who was denied temporary bail on the reason of COVID-19, by the National Investigation Agency (NIA) court.<sup>xxxiii</sup>

The landmark SC judgement in *Maneka Gandhi*<sup>xxxiv</sup>, marked the beginning of a golden era of human rights jurisprudence in India<sup>xxxv</sup> and the SC was termed as an ‘institutional ombudsman of human rights’.<sup>xxxvi</sup> Since then, right to bail has been considered to exist within the ambit of human rights. V.Krishnaiyer, in *Gudikanti Narasimhulu & Ors.*<sup>xxxvii</sup>, applied Article 21 to

criticize unjust denial of bail as a gross violation of personal liberty. He also cited Coleridge J. stating that the detention of an accused party is not due to his guilt but only because sufficient probable grounds exist to warrant a trial. Thus, the grant of bail should be conditional on the charge, nature of evidence and potential punishment for the accused if found guilty. It is understood that authorities are unable to release those inmates convicted of serious offences. But they must read into the spirit of personal liberty and right to health to at least extend their classification in a reasonable territory, thus, substantially enhancing the chances of preventing a dire situation, wherein, those vulnerable are rendered completely helpless.

However, the overall picture is not entirely grim. An unprecedented crisis, can also catapult our institutions into making necessary penal reforms for the future. The light at the end of the tunnel, can still be bright for the criminal justice system. To add to this argument, I will introduce an avenue that has already been a part of the debate in the judicial sphere. It revolves around Section 436 A of the Criminal Procedure Code 1973. This section was inserted by the CrPC Amendment Act 2005.

*Section 436 A- Where a person has, during the period of investigation, inquiry or trial under this code of offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for up to a period of one-half of the maximum sentence of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties:*

*Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period of release him on bail instead of the personal bond with or without sureties:*

*Provided further that no such person shall in any case be detained during the period of investigation, inquiry or trial for more than the maximum period of imprisonment provided for the said offence under the law.*

***Explanation*** – *In computing the period of detention under this section for granting bail the period of detention passed due to delay in proceeding caused by the accused shall be excluded.*

This section enjoyed the privilege of being in the spotlight, in *Bhim Singh v. Union of India and Ors.*<sup>xxxviii</sup> A petition was filed in the court by a human rights organisation asking the court to look into the problem of under-trial prisoners in Naxal affected areas. In the factual matrix

of the case the then Attorney General, Mukul Rohatgi, reported that under-trial prisoners contributed to more than 50% of the inmate population. The case sought to bring in a progressive change to the criminal justice system, which had been ravaged by slow trials. As a solution to the problem of congestion of under-trial prisoners, an ‘Undertrial review mechanism’ was to be implemented to take cognisance of the predicament. This would involve the release on bail of undertrial prisoners who had already served more than half of the maximum sentence they could be subject to. However, the bail would be conditional on a personal bond with or without surety. The proposed change indicated that a much-needed reform could finally come to fruition. Yet, a report titled ‘Justice Under Trial- A study of pre-trial detention in India’, published by Amnesty International,<sup>xxxix</sup> found that prison officials had failed in their duties to correctly calculate those prisoners, eligible for bail under the aforementioned section. It appears to be a classic case of strong foundations plagued by shaky implementations. Another element that might have gone unnoticed is that of the requirement of the personal bond. In *Hussainara Khatoon & Ors vs Home Secretary, State Of Bihar*,<sup>xl</sup> Justice P.N Bhagwati, notably remarked that the poor in India are priced out of justice. The “law of the poor” was perceived as the “law for the poor” as they only stood a meagre chance for recourse. Borrowing from his words, it is pertinent to note that the reforms in the criminal justice system can never be complete without the poor standing an equal chance. Attaining their faith is of paramount importance for the judiciary and the democracy in the bigger picture. Hence, Section 436-A needs to be applied in a manner that would also be inclusive of those who simply cannot afford the monetary demands of justice in this country. It is certainly a gargantuan task for the state. But achieving this in the current crisis and for the future could take us a step closer towards upholding the spirit of equality and justice imbibed in the Constitution of India.

- iv. India is a party to a number of international conventions and declarations on human rights. These conventions serve the objective of recognising prisoners’ rights on an international platform and also with the hope that member states would import the rights into their domestic legislation. One of the recent internationally recognised documents is the ‘Nelson Mandela Rules’. The rules state that prisoners must be provided with the necessary resources for their personal hygiene.<sup>xli</sup> This is vital in combating the spread of an infectious disease. More importantly, it is explicitly stated that the provision of health-care of prisoners is a state responsibility.<sup>xlii</sup> Prisoners are entitled to the same

standard of health care as an individual in the outside community would enjoy. But the provisions are not just limited to physical health care. Mental health-care also becomes a crucial aspect in the current scenario.<sup>xliii</sup> Recently, there was a riot in the Dum Dum prison, West Bengal. It was because the inmates' family members were prohibited to meet the prisoners to avoid an infectious spread of COVID-19.<sup>xliiv</sup> Although the state's decision appears justified, they should also ensure the prisoners' mental health care is taken care off, since, a meeting with their family and close ones is necessary for their psychological well-being, during their time behind bars.

The Universal Declaration of Human Rights<sup>xliv</sup>, states that everyone has the right to adequate health care. India is also a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>xlvi</sup>, wherein, prisoners have a “right to highest attainable standard of physical and mental health”. These are just a few rights and rules that aim to secure basic human rights for prisoners. Being a party to the conventions and declarations, India has an obligation under international law to ensure the prisoners secure these rights. A failure to do so could bring the nation under scrutiny on the international platform.

## V. A brief perspective on legal aid

The criminal justice system in India has multiple foundational pillars. The actors are not solely limited to people inside the government and the courts. But rather it encompasses entities representing the accused and convicts who find themselves against the state. These entities take the form of legal aid providers, who have stood up for the communities behind bars. In a critical period, such as the one the criminal justice system finds itself in, legal aid providers appear strongly positioned towards ensuring that the decongestion of prisons is done rapidly in accordance with the due process of law.<sup>xlvii</sup>

“Defense lawyers hold the criminal justice system accountable to delivering justice for all.....they ensure that laws in place to protect human rights are being used to protect our most vulnerable population. We need legal aid providers now more than ever to

ensure millions of people in overcrowded detention centres, jails and prisons around the world are not left alone and in danger.”<sup>xlvi</sup>

## VI. Conclusion

The paper comprehensively provides a detailed account of the problem faced by Indian prisons with regards to the plight of the vulnerable prisoners during the Covid-19 pandemic. It also encompasses the larger issues faced by the criminal justice system of India. The following questions have been answered in the paper: (1) What action has the government and the SC taken? (2) What are the current and potential problems faced by the prisons? This was followed by an evaluation of the strategies implemented and furthermore, certain preventive measures were introduced for reference. The predicament is certainly complex. It portends serious implications for the nation’s criminal justice system. However, on the contrary, the tables can be turned, to pave way for an opportunity to examine and bring about the long overdue penal reforms.

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