


# Bail, prisons and COVID-19: An Indian perspective

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## Abstract

This article explores the implementation of the right to bail for prisoners during COVID-19. Using data from a sample of 50 advocates collected through a face-to-face questionnaire, the article probes lawyers' perceptions of the functioning of the mechanism of bail in the pandemic. The article also evaluates the efficacy of measures taken to decongest prisons by critically reviewing the criteria identified by the High-Powered Committees of States for releasing prisoners. Finally, it concludes by indicating the urgent need to remedy the deficiencies and provides recommendations for reforming the criminal justice system to safeguard prisoners' right to life and health.

## Keywords

Bail, prisoners, right to health, decongestion, High-Powered Committees

In a country such as India, spending on public health is less than 2 per cent of the GDP.<sup>1</sup> COVID-19 poses a significant challenge not only to the public health system but also to the justice dispensation system. With more than 24 million COVID-19 confirmed cases reported in India to date, the impact of the pandemic has been disruptive in terms of economic activity and loss of human life.<sup>2</sup> The proliferation of the virus has also posed considerable challenges for congested Indian prisons, which already lacked hygiene, sanitation and medical facilities. According to the online tracker on *State/UT Wise Prisons Response to COVID-19 Pandemic in India* managed by the Commonwealth Human Rights Initiative (CHRI), a total of 19,724 prisoners (ie, at least 4 per cent of prisoners and prison staff) have tested positive since May 2020 with 22 deaths.

Since March 2020, the Indian Supreme Court, High Courts and subordinate courts sought to constrain the spread of the virus by reducing its caseload and only hearing extremely urgent cases. The functioning of the courts was

restricted to hear only matters involving extreme urgency.<sup>3</sup> Courts also altered their working style and started digitalising their procedures by enabling e-filing in all courts and hearing urgent cases through videoconferencing.<sup>4</sup>

Our stance is that the pandemic has had an unprecedented effect on the functioning of the criminal justice system in India. We will substantiate this by highlighting the courts' challenges in hearing and disposing of bail applications during the pandemic. This article is divided into three parts. The first discusses how the pandemic provided an opportunity to consider the right to bail as a part of an undertrial's<sup>5</sup> right to life, using the right to health under Article 21 of the *Constitution of India*. Next, we consider steps taken to decongest Indian prisons and critically examine prisoners' categorisation for release on interim bail. Thirdly, we discuss the struggles undertrials experience in seeking bail and having their applications listed in the courts. We further explain how, due to the non-availability of proper infrastructure in Indian courts, especially at the

<sup>1</sup>Sadhika Tiwari, 'India Spent 1 per cent Of GDP on Public Health for 15 Years. Result is Vulnerability to Crises', *India Spend* (online, 26 June 2020) <https://www.indiaspend.com/india-spent-1-of-gdp-on-public-health-for-15-years-result-is-vulnerability-to-crises/>.

<sup>2</sup>Susmita Pakrasi, 'India's Covid-19 tally crosses 24 million-mark with 343,144 fresh cases, daily death toll stands at 4,000', *Hindustan Times* (online, 14 May 2021) <https://www.hindustantimes.com/india-news/indias-covid-19-tally-crosses-24-million-mark-with-343-144-fresh-cases-daily-death-toll-stands-at-4000-101620959959348.html>.

<sup>3</sup>Seema Chishti, 'Courts today: virtual hearings, written submissions, arguments over phone', *The Indian Express* (online, 16 May 2020) <https://indianexpress.com/article/explained/virtual-courts-robos-lawyers-covid-lockdown-6412041/>.

<sup>4</sup>Dhananjay Mahapatra, 'Virtual courts to hear urgent cases during lockdown', *The Times of India* (online, 5 April 2020) <https://timesofindia.indiatimes.com/india/virtual-courts-to-hear-urgentcases/articleshow/74988557.cms>.

<sup>5</sup>The term 'undertrial' denotes an unconvicted prisoner, that is, one who has been detained in prison during the period of investigation, inquiry or trial for the offence they are accused of having committed. See *Hussainara Khatoon (1) v State of Bihar* (1980) 1 SCC 81.

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subordinate level, access to justice has been denied and the personal liberty of the undertrials was curtailed.

## Methodology

Our research methodology is both doctrinal and non-doctrinal. The article reviews news articles, statistics, legislation and case laws. The article also investigates the problems at the grassroots by interviewing advocates. We contacted lawyers with seven or more years' experience to learn the issues concerning bail during the pandemic and what they thought of the states' measures. We confined our research to lawyers because, along with knowing the law, they are well aware of the changes introduced in the system regarding the online functioning of courts and the measures taken to decongest prisons. The respondents were a diverse group from all over India, but mainly from the States of Uttar Pradesh, Punjab, Chandigarh, Delhi and Uttarakhand.

## Right to bail vs prisoners' right to health

A bail is a form of security provided by an accused person in a criminal trial to secure a release from custody pending investigation or trial.<sup>6</sup> In several cases, the Supreme Court of India has reiterated the importance of bail because the detention of an individual impinges upon their right to personal liberty. Therefore, while interpreting the provisions of the *Code of Criminal Procedure 1973* pertaining to arrest, courts should respect the constitutionally protected liberty unless detention becomes a necessity.<sup>7</sup>

According to India's Prison Statistics, 1350 prisons accommodate 478,600 prisoners, and the all-India average occupancy rate is 118.5 per cent.<sup>8</sup> But the average tells only half the story. A closer look shows that prisons in some States are more overcrowded than others; for example, Delhi has reported the highest occupancy rate of 174.9 per cent, followed by Uttar Pradesh with 167.9 per cent and Uttarakhand with 159.0 per cent.<sup>9</sup>

In India's extremely overcrowded prisons, where it was impossible to provide for hygiene requirements, maintaining social distancing norms was a challenging task. If States' attention was not drawn towards India's poorly

sequestered prison complexes, the pandemic would have rapidly exploded in Indian prisons with thousands of infected inmates.<sup>10</sup> Hence, certain steps were taken by the States to protect prisoners since the right to health is a human right available to all.

Article 21 of the *Constitution of India* guarantees the right to healthcare to everyone irrespective of the status of the person, whether an innocent person, an undertrial or a convicted prisoner liable to punishment under the law.<sup>11</sup> The Supreme Court of India has on several occasions held that the State is under an obligation, under national as well as international laws such as the *Universal Declaration of Human Rights*, Articles 6,<sup>12</sup> 9<sup>13</sup> and 10<sup>14</sup> of the *International Covenant on Civil and Political Rights (ICCPR)*, the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* and the *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, to safeguard the right to health of all prisoners without discrimination.<sup>15</sup> In addition to constitutional rights, the *Prisoners Act 1894*<sup>16</sup> and the *Model Prison Manual 2016* also mandate that steps should be taken for the shelter and safe custody of prisoners when there is an outbreak of epidemic diseases, particularly where the number of prisoners held is greater than the normal occupancy capacity. Therefore, in the time of coronavirus, the right to bail may be construed as part of an undertrial's right to life and health under Article 21 of the *Constitution of India*. This article argues that, in light of COVID-19, the Indian judiciary missed the opportunity to transform and strengthen bail jurisprudence and the way the courts failed to enforce the principle that 'bail is the rule, jail is the exception'<sup>17</sup> in its true form and spirit. The following paragraphs evaluate the Indian States' actions taken to protect the right to health of prisoners.

## Decongestion of prisons

Overcrowding contributes to a greater risk of disease and adversely affects hygiene and sanitation in prisons. Many countries worldwide started releasing thousands of prisoners to curb the infection spread and save prisoners' lives. Nearly 10,000 prisoners have been released from

<sup>6</sup>R V Kelkar, *Criminal Procedure* (EBC Publishing, 2014).

<sup>7</sup>*Dataram Singh v State of Uttar Pradesh* (2018) 3 SCC 22; *Jeetendra v State of Madhya Pradesh* (2020) 12 SCC 536; *Sanjay Chandra v Central Bureau of Investigation* (2012) 1 SCC 40.

<sup>8</sup>National Crime Records Bureau, *Prison Statistics India 2019* (Report, 1 September 2020) <https://ncrb.gov.in/sites/default/files/PSI-2019-27-08-2020.pdf>

<sup>9</sup>*Ibid.*

<sup>10</sup>Jai Dehadrai, 'In the Time of Coronavirus, the Right to Bail is Part of an Undertrial's Right to Life', *The Wire* (online, 26 March 2020) <https://thewire.in/law/in-the-time-of-coronavirus-the-right-to-bail-is-part-of-an-undertrials-right-to-life>.

<sup>11</sup>*Parmanand Katara v Union of India* AIR 1989 SC 2039.

<sup>12</sup>Article 6(1) of the ICCPR states that every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

<sup>13</sup>Article 9 of the ICCPR states that everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

<sup>14</sup>Article 10 of the ICCPR states that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

<sup>15</sup>*Re: Inhuman Conditions in 1382 Prisons* (2017) 10 SCC 658; *Parmanand Katara* (n 11).

<sup>16</sup>*The Prisoners Act, 1894* s 7.

<sup>17</sup>*See State of Rajasthan v Balchand* 1977 SCC (4) 308.

Afghanistan;<sup>18</sup> Iran<sup>19</sup> released more than 85,000 prisoners, while Indonesia<sup>20</sup> has released over 30,000 prisoners.

On 23 March 2020, the Supreme Court of India, noting the severe risk to the life and health of prisoners due to overcrowding in prisons, directed each State and Union Territory to form a High-Powered Committee (HPC).<sup>21</sup> Subsequently, all 28 States across the country constituted a three-member HPC, which comprised the Chairperson of the State Legal Services Authority, the Home Secretary and the Director-General of Prisons in that State. The HPCs were to determine the category of prisoners who should be released on interim bail, depending upon the nature of the offence, the number of years to which the prisoner had been sentenced or the severity of the offence with which they were charged and facing trial. In conformity with the HPCs' guidelines, the courts released a total of 68,264 prisoners on interim bail across the country until 14 December 2020.<sup>22</sup>

An analysis of the criteria adopted by the HPCs for releasing prisoners on interim bail provides interesting insights. We critically examine the categorisation of prisoners by the HPCs in two parts. In the first part, we highlight the categories of prisoners identified for release. In the second part, we analyse the categories of prisoners excluded by the HPCs. The efficacy of the recommendations made by the HPCs is analysed (i) based on parameters of an HPC and (ii) comparing its parameters with the other State HPC parameters. Thereupon, an understanding has been sought to be achieved on the scope and efficacy of the categorisation of prisoners.

### Categories identified by HPCs for release of prisoners

Following the Supreme Court's recommendation, the HPCs in 26 States recommended the release of undertrials in prison for offences where the maximum sentence was less than seven years. The HPCs of States like Delhi, Punjab and Mizoram, instead of restricting themselves to the criteria recommended by the Supreme Court, expanded the criteria to release more and more prisoners. First-time

offenders,<sup>23</sup> residents of the State,<sup>24</sup> all undertrials in jail for 3 months or more,<sup>25</sup> those who have been granted bail but could not furnish bail bonds or execute surety,<sup>26</sup> old age<sup>27</sup> and pregnant women<sup>28</sup> are some of the additional categories permitted by the HPCs to be released.

On a detailed analysis of the criteria identified for release, we found that the seriousness of the offence was the main criterion adopted by the HPCs. However, this criterion ignores inmates who were most vulnerable to COVID-19 due to their old age or any prior medical condition.<sup>29</sup> It is disheartening to see that HPCs in only three States – Mizoram, Punjab and Delhi – considered undertrials suffering from comorbidities, chronic diseases and pre-existing medical conditions such as kidney disease, severe asthma, a heart condition, cancer, Hepatitis B or C, or tuberculosis. Only Punjab's HPC specifically mentions pregnant women as a category for release.<sup>30</sup> The HPCs also fail to acknowledge that elderly prisoners are at a higher risk of COVID-19 infection due to their weakened immunity. HPCs in only four States (Mizoram, Punjab, West Bengal and Delhi) considered cases of senior citizens for release. The definition of senior citizen varied, with Punjab's '65 years and above', while Delhi considered male undertrial prisoners over 65 years of age and female undertrials over 60 years of age.

In our research, we found that the criteria for the release of prisoners, adopted by the HPCs, are not prisoner-centric. The HPCs did not adequately distinguish between the different types of prisoner characteristics like old age, gender, disability, illness and comorbidities, particularly in terms of the risks COVID-19 posed to them as individuals. Despite the elevated risk to their health, these prisoners were not released because they did not satisfy the requirements of the HPC guidelines. We recommend that the criteria outlined by the HPCs for the release of prisoners on interim bail must be revisited, and the HPCs need to adopt a health-centred approach to protect the right to life and health of prisoners. The criteria set out for awarding interim bail must be premised on, and consider, the overall holding capacity of prisons, as well as prisoner health-related

<sup>18</sup>Arpita Mitra, 'Prisoner Releases Across Asia: A Right Move Gone Wrong?', *The Wire* (online, 26 April 2020) <https://thewire.in/world/prisoner-releases-across-asia-a-right-move-gone-wrong>.

<sup>19</sup>'Hard-hit Iran frees more prisoners amid coronavirus outbreak', *Aljazeera* (online, 17 May 2020) <https://www.aljazeera.com/news/2020/3/17/hard-hit-iran-frees-more-prisoners-amid-coronavirus-outbreak>.

<sup>20</sup>Nur Yasmin, 'Indonesia Releases 30,000 Prisoners as Covid-19 Cases Double in a Week', *Jakarta Globe* (online, 2 April 2020) <https://jakartaglobe.id/news/indonesia-releases-30000-prisoners-as-covid-19-cases-double-in-a-week>.

<sup>21</sup>*In Re: Contagion of Covid 19 Virus in Prisons 2020* SCC OnLine SC 320.

<sup>22</sup>See *State/Ut Wise Prisons' Response to The Coronavirus Pandemic in India* (28 June 2021) <https://www.humanrightsinitiative.org/content/stateut-wise-prisons-response-to-covid-19-pandemic-in-india#Table%20G>.

<sup>23</sup>First-time offender was a primary criterion for release of prisoners in Delhi, Himachal Pradesh and Chandigarh. See Commonwealth Human Rights Initiative, *Responding to the Pandemic: Prisons and Overcrowding* (2020) <https://humanrightsinitiative.org/download/Responding%20to%20the%20Pandemic%20Prisons%20%20Overcrowding%20Vol%201.pdf>.

<sup>24</sup>Resident of the State was a primary criterion for release of prisoners in Himachal Pradesh. See *ibid* (n 23).

<sup>25</sup>All undertrials in jail for a period of three months or more was a primary criterion for the release of prisoners in Himachal Pradesh, Sikkim, Delhi. See Commonwealth Human Rights Initiative (n 23).

<sup>26</sup>Granted bail but could not furnish bail bonds or execute surety was a primary criterion for release of prisoners in Manipur, Karnataka, Meghalaya. See Commonwealth Human Rights Initiative (n 23).

<sup>27</sup>Old age was a primary criterion for release of prisoners in Mizoram, Punjab, Delhi, West Bengal. See Commonwealth Human Rights Initiative (n 23).

<sup>28</sup>Pregnancy in women was a primary criterion for release of prisoners in Punjab. See Commonwealth Human Rights Initiative (n 23).

<sup>29</sup>Vijay Raghavan, 'Prisons and the Pandemic: The Panopticon Plays Out' (2020) 22(2) *Journal of Social and Economic Development* <https://link.springer.com/article/10.1007/s40847-020-00127-9>.

<sup>30</sup>See Minutes of the meeting of the Punjab's High-Powered Committee held on 2 May 2020 <https://dgrpg.punjab.gov.in/wp-content/uploads/2020/05/Review-meeting-of-the-High-Powered-Committee-Held-on-2-5-2020-Under-the-Chairmanship-Letter-no-12-16-2020-2H7-796-800-dt.-02-05-2020.pdf>

vulnerabilities, comorbidities, disabilities, age-related ailments and other pressing concerns such as pregnancy.

Apart from the HPCs, even the courts failed to consider the bail applications on medical grounds while deciding bail applications and ignored the daily risk of exposure to the deadly virus for persons in fragile health. One such case is 81-year-old poet-activist P Varavara Rao, charged under the *Unlawful Activities (Prevention) Act, 1967*, who was in judicial custody for more than two years. Despite both his serious medical condition and old age, his interim bail plea was rejected several times by the Supreme Court and the Bombay High Court.<sup>31</sup>

### Categories of prisoners excluded from consideration by HPCs

Some undertrial prisoners are excluded from consideration by the HPCs due to the seriousness of the offence with which they were charged. The benefit of interim bail was denied to certain prisoners because of their potential to cause a severe threat to society's law and order. In our research, we found that prisoners arrested or convicted for offences under *Narcotic Drugs and Psychotropic Substances Act, 1985*; *Protection of Children from Sexual Offences Act, 2012*; *Prevention of Corruption Act, 1988*; *Prevention of Money Laundering Act, 2002*; *Unlawful Activities (Prevention) Act, 1967* and offences against women were excluded from eligibility.<sup>32</sup> Furthermore, prisoners accused of rioting, waging war against the government and counterfeiting currency were denied the benefit of interim bail. Also, the HPCs of 13 States excluded foreign prisoners from consideration for release on interim bail, irrespective of their offence background.

So, what happens to the undertrial prisoners excluded by the criteria adopted by the HPCs? Does denying these prisoners interim bail violate Articles 14 and 21 of the *Constitution of India*? It is crucial to ask these questions as prisoners excluded by the HPCs' criteria are equally entitled to the fundamental right to health. The recent Supreme Court decision indicates that not every prisoner can claim to be released on interim bail on account of the COVID-19 situation.<sup>33</sup> In this decision, the determination of the HPC of Maharashtra to classify the categories of prisoners was challenged on the ground of being arbitrary and violating the fundamental rights of prisoners. While upholding the classification, the Court observed that the provision for interim bail during COVID-19 is not a statutory right but a human right to safeguard a prisoners' health. With respect, we argue that this case is prejudicial to the interest of prisoners. In this case, the court ignored the prisoners' right to health which was already neglected by the HPCs. In addition to this, the scope of interim bail has been narrowed from a measure to protect and

safeguard prisoners' right to health to a mere tool of decongestion.

Concerning the rights of the excluded categories of prisoners, the court observed that undertrial prisoners who are not identified by the HPCs for interim release are entitled to approach competent courts for the grant of regular or interim bail, and their bail applications are to be decided on merits and in accordance with the law. But in practice, and contrary to the Supreme Court's decision,<sup>34</sup> the HPCs' classification of prisoners did influence the trial courts while deciding the interim bail applications of the prisoners. In many bail orders, and while dismissing the bail application, courts have noted that the applicant's case is not covered under the guidelines laid down by HPCs.<sup>35</sup> In the case of *National Alliance for People's Movements v State of Maharashtra*,<sup>36</sup> the Supreme Court has failed to acknowledge that the trial courts are likely to be influenced by the decisions of HPCs. By relying upon the criteria of HPCs, courts denied the chance of a fair hearing to the excluded categories of prisoners. Instead, the courts should have decided their bail applications on merit, keeping in mind the responsibility of the State to safeguard the health of all prisoners. Hence, the HPCs seem to have identified the legal boundaries of the scope of the right to health for prisoners seeking interim bail.

### Research findings concerning inclusion and exclusion of categories under HPCs

The following two questions were posed to advocates:

1. Are you satisfied with the categories identified and excluded by the HPCs to protect prisoners' right to health in these uncertain times?
2. Do you think that the HPC classifications negatively influenced the courts' functioning in relation to bail?

Regarding the first question, 53 per cent of respondent advocates were partly or fully dissatisfied with the HPCs' categorisation of prisoners and approximately 39 per cent were fully or partly satisfied. Only eight per cent chose the response 'cannot say'. In addition, 27 advocates – that is, 54 per cent of lawyer respondents – also provided reasons and insightful comments. Advocates' comments indicate that the HPCs should not have overlooked the needs of the elderly and prisoners with prior medical conditions, as adequate healthcare facilities are not available in prisons.

To the second question, 73 per cent of respondents partly or fully agreed and approximately 20 per cent fully or partly disagreed. Only seven per cent chose the response 'cannot say'. In addition, 23 lawyer respondents (ie, 46 per cent) provided their reasons and insightful comments.

<sup>31</sup>Kay Dodhiya, 'No bail, but doctors to examine Varavara Rao', *Hindustan Times* (online, 13 November 2020) <https://www.hindustantimes.com/india-news/no-bail-but-doctors-to-examine-varavara-rao/story-khlXqHbl38jrgUE3lpFhK.html>.

<sup>32</sup>Commonwealth Human Rights Initiative, *Responding to the Pandemic: Prisons and Overcrowding* (2020) Vol II State Information Reports <https://justicehub.in/dataset/89ff14fa-6718-4551-8eba-59767317fe47/resource/2c62d845-57c2-4267-b2db-d7223d2badc7/download/part-2.pdf>.

<sup>33</sup>*National Alliance for People's Movements v State of Maharashtra* (2020) 9 SCC 698.

<sup>34</sup>*Ibid.*

<sup>35</sup>*State v Vandana* (Patiala House Court, Bail Application No. 1163/2020, 17 June 2020); *State v Om Parkash* (Rohini Court, Bail Application No. 1160/2020, 26 May 2020); *State v Vikas* (Rohini Court, Bail Application No. 1171/2020, 26 May 2020).

<sup>36</sup>*National Alliance for People's Movements* (n 33).

Most advocates seemed to agree that the HPCs' classification of prisoners influenced the courts. Thus, bail applications of the excluded categories of prisoners were not decided on merit by the trial courts, and courts somehow failed to safeguard inmates' right to health and treat all inmates equally. Many advocates informed us that only a few courts were hearing bail applications of prisoners excluded by the criteria of HPCs. Such bail applications were either kept pending or rejected immediately. However, in contrast to this, the process was much smoother for prisoners falling within the criteria of HPCs.

Therefore, while easing congestion of prisons by temporarily releasing some inmates on bail was laudable in response to the unexpected COVID-19 crisis, it has highlighted deficiencies in the system that indicate an urgent need for improvement. We believe that the HPCs' primary focus was on the decongestion of prisons, and the right to health of prisoners was neglected. The HPCs and the prison authorities should have ensured that proper medical facilities were provided to those left imprisoned. Regular testing of prisoners and jail staff should have been undertaken, and records of testing should have been maintained and updated regularly. Further, prisons should have been regularly inspected by officials for improving hygiene and sanitation. The vulnerability of Indian prisons stands exposed in the second wave of the pandemic. Between 1 March 2021 and 15 May 2021, the CHRI online tracker indicates that a total of 1567 prisoners and prison staff have tested positive for the virus. During this period, in Delhi alone, 267 inmates in three prisons have been infected.<sup>37</sup>

### The challenge of accessibility during the pandemic

Despite the best efforts of courts, many bail hearings during the lockdown period were adjourned due to lack of verification of papers,<sup>38</sup> broken video links during e-hearings,<sup>39</sup> non-appearance of lawyers and withdrawal of cases. While 'extremely urgent matters' were heard via video link, there were no defined parameters as to what constituted an 'urgent matter' and no clarity about the courts' functioning, especially district courts. It is disheartening to see that the courts have not given bail matters the attention they deserve in uncertain times like these. The High Courts have observed in several cases that bail applications could not be treated as an 'urgent judicial matter' at the time of a pandemic.<sup>40</sup> We believe that unjust denial of bail, especially in this extraordinary time, is one of the grossest violations of the individual's right to personal liberty.

### Research findings concerning the difficulties in accessing bail during COVID-19

Higher courts were dealing with bail applications through e-filing and video conferencing to a limited extent, but we wondered about bail applications filed in the lower judiciary. To understand the ground-level reality, we asked advocates the following two questions:

1. Do you think lawyers and clients faced difficulties in these times due to (i) lack of clear parameters regarding urgent matters and (ii) lack of robust infrastructure?
2. Do you think that trial courts are hesitant in granting bail to undertrials during these times?

In response to the first question, 59 per cent of lawyer respondents partly or fully agreed and approximately 32 per cent fully or partly disagreed. Only 9 per cent chose to respond 'cannot say'. In addition, 60 per cent of respondents gave reasons and insightful comments as well. Most answered that they faced difficulties due to a lack of clear parameters regarding urgent matters. In our research, we found the situation in Delhi was different from other States. On interviewing the lawyers practising in Delhi, we found that despite the chaotic situation, the judges, court staff and administrative wing of Delhi district courts and the High Court worked to the best of their ability and utilised the available resources in the best possible manner. Procedure for online filing, listing and hearing of cases was notified by the Delhi High Court at the earliest to ensure that the litigants and the advocates did not suffer due to the unplanned lockdown. Compared to other States, virtual court proceedings were a success in Delhi because of the trained judicial staff and availability of better infrastructure.

In India, district courts are dependent on higher courts' instructions and do not have infrastructures like those available to the Supreme Court and High Courts. This point was a matter of great concern to all advocates working in district courts, who commented on the abovementioned question. Advocates' comments indicated that litigants struggled for days enquiring about the procedure for filing and listing matters before the district court. Most advocates were advising their clients to approach the High Courts for relief directly. Due to district courts' infrastructure inadequacies and the non-availability of court staff, no new bail application was filed in these courts for months.

Further, the undertrials had to face a few issues that arose in the virtual hearings such as confusion about the date and time of hearing of bail applications, non-availability of case files and other relevant documents due to a lack of

<sup>37</sup>Bismee Taskin, 'Least crowded Tihar's women jail has highest number of Covid cases of all Delhi prisons', *The Print* (online, 29 April 2021) <https://theprint.in/india/least-crowded-tihars-womenjail-has-highest-number-of-covid-cases-of-all-delhi-prisons/647723/>.

<sup>38</sup>*State v Suresh* (Tis Hazari Court, Bail Application No. 422/2020, 10 June 2020).

<sup>39</sup>*State v Salman* (Tis Hazari Court, Bail Application No. 392/2020, 29 May 2020).

<sup>40</sup>*Sopan Ramesh Lanjekar v State of Maharashtra* 2020 SCC Online Bom 468; *Shahrukh v State of Rajasthan* (Rajasthan High Court, Bail Application No. 17767/2019, 31 March 2020); *Ganesh Ashok Pathare v State of Maharashtra* 2020 SCC Online Bom 531.

proper communication among the prisons' authorities, judicial officers and advocates. The situation was worse in the district courts of the rest of the sampled States as they were only disposing of bail applications filed before lockdown. If any regular or interim bail on urgent grounds was required, then the only likely option available to the litigant was to approach the High Court. Despite courts going online, the protocols of verification and authentication remained unchanged, creating problems for courts in disposing of bail hearings.

To the second question in this category, as to whether trial courts are hesitant in granting bail at this time, 58 per cent of respondents partly or fully agreed, approximately 29 per cent fully or partly disagreed, and 13 per cent chose to respond 'cannot say'. In addition, 21 of the lawyer respondents (42 per cent) provided comments on the question.

Based on the advocates' comments, we found that undertrials eligible to be released (as per the HPCs' guidelines) faced technical difficulties in securing bail. Many bail applications that prison departments forwarded to the trial courts were either kept pending or rejected due to unavailability of court staff, difficulty in locating case files and relevant papers, and the absence of public prosecutors on the date of hearing of the bail applications.

## Conclusion

The extremely grim situation created by the coronavirus has once again triggered an indispensable need for discussion of legal reforms. The pandemic has not only accentuated the need to relieve congestion in prisons but has also provided many lessons about enhancing the right to bail and the right to life of prisoners, which could be adopted in the long run, even when the crisis is over. Sincere endeavours should be made to bring about prison reforms such as regular decongestion and adequate healthcare facilities in prisons. We also suggest that the HPCs constituted to decongest prisons must not be abolished after the pandemic is over. On a case-by-case basis, these committees may consider recommending regular or interim bail for different prisoners based on fairer criteria determined in light of the fundamental right to health, as suggested in the article. Regardless of the State, uniformity should be ensured in the guidelines of all the HPCs and these guidelines should conform to the core constitutional values.

We recommend that virtual courts, which were an emergency response to the first wave of COVID-19, must continue in light of concerns regarding subsequent COVID-19 waves and the associated uncertainty looming over lockdowns. Under the supervision of the respective High Courts, district courts must upgrade by adopting efficient procedures regarding online filing, online case listing, online publication of their cause list and hearing of cases through video conferencing and teleconferencing. Along with the courts, prisons and police stations should be equipped with infrastructure to enable detainees, accused persons and advocates to participate in online bail hearings. The success of this approach is contingent on upgraded infrastructure in the district courts and prisons, clear guidelines for the online functioning of lower courts by the High Courts, trained judicial staff and constant supervision by the High Courts.

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