

CHALLENGES IN BAIL PROVISIONS DURING COVID 19: AN INDIAN PERSPECTIVE

Dharmender Kumar (Research Scholar)

Dr Reema Agarwal (Associate Professor MMH College, Ghaziabad)

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

Introduction

In a country such as India, spending on public health is less than 2 per cent of the GDP.¹ 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

¹ 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/](https://www.indiaspend.com/india-spent-1-of-gdp-on-public-health-for-15-years-result-is-vulnerability-to-crises/).

date, the impact of the pandemic has been disruptive in terms of economic activity and loss of human life.² 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.³ Courts also altered their working style and started digitalizing their procedures by enabling e-filing in all courts and hearing urgent cases through videoconferencing.⁴

The first discusses how the pandemic provided an opportunity to consider the right to bail as a part of an under trial's⁵ right to life, using the right to health under Article 21 of the Constitution of India. Next, we consider

² 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>.

³ 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-robey-lawyers-covid-lockdown-6412041/>.

⁴ 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>.

⁵ 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.

steps taken to decongest Indian prisons and critically examine prisoners' categorization for release on interim bail.

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.⁶ 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.⁷

⁶ R V Kelkar, Criminal Procedure (EBC Publishing, 2014).

⁷ 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.

According to India's Prison Statistics, 1350 prisons accommodate 478,600 prisoners, and the all-India average occupancy rate is 118.5 per cent.⁸ 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.⁹

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 under trial or a convicted prisoner liable to punishment under the law.¹⁰ 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 6,¹¹ 9¹² and 10¹³ 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.¹⁴ In addition to constitutional rights, the Prisoners Act 1894¹⁵ 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 dis-

⁸ 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>

⁹ Ibid.

¹⁰ Parmanand Katara v Union of India AIR 1989 SC 2039.

¹¹ 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.

¹² 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.

¹³ 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.

¹⁴ Re: Inhuman Conditions in 1382 Prisons (2017) 10 SCC 658; Parmanand Katara (n 11).

¹⁵ The Prisoners Act, 1894 s 7.

eases, 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'¹⁶ in its true form and spirit. The following paragraphs evaluate the Indian States' actions taken to protect the right to health of prisoners.

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.

Therefore, while easing congestion of prisons by temporarily releasing some inmates on bail was laudable in response to the unexpected

¹⁶ See *State of Rajasthan v Balchand* 1977 SCC (4) 308.

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 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, broken video links during e-hearings, 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.

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.

Further, the under trials 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 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.

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.