

To,

29 March 2020

1. The Hon'ble Chief Justice B P Dharmadhikari,  
105-Bombay High Court  
(P.W.D) Building, Fort, Mumbai -32
2. The Hon'ble Justice A.A.Sayed,  
105-Bombay High Court  
(P.W.D) Building, Fort, Mumbai -32
3. Shri Uddhav Thackeray,  
Chief Minister,  
Mantralay, Nariman Point, Mumbai, Maharashtra
4. Shri Anil Deshmukh  
The Hon'ble Home Minister, Maharashtra  
Mantralay, Nariman Point, Mumbai, Maharashtra
5. Shri Shree Kant Singh,  
Additional Chief Secretary (A&S) Home,  
Govt. Of Maharashtra
6. Shri Shrikant D Kulkarni,  
Member Secretary, MSLSA,  
105-Bombay High Court  
(P.W.D) Building, Fort, Mumbai -32
7. Shri S.N. Pandey,  
Director General of Police (Prisons), Maharashtra
8. Shri Sunil Ramanand,  
Additional Director General of Police (Prisons), Maharashtra

**Subject: Recommendations with regards to the release of prisoners and/or detainees in other settings.**

Sir,

We, the undersigned advocates from Maharashtra, write out of a shared and urgent concern regarding thousands of individuals incarcerated in prisons and other settings of detention such as observation homes, special homes, children homes, detention centres, borstal homes, etc. during the escalating COVID-19 pandemic. We seek your immediate action to reduce the risk of transmission of COVID-19 among the incarcerated.

In the view of Novel Corona Virus (COVID-19) posing a threat to the whole world, World Health Organization has declared it a global pandemic. Until now India has reported more than 724 cases with 17 deaths (as of March 27, 2020 time; 13:20). Nearly 400,000 people have tested positive and around 17,000 have died across the world. Maharashtra is worst hit by the pandemic with 135 positive cases reported so far, highest in the country.

Addressing the nation to deal with this crisis, the Hon'ble Prime Minister Narendra Modi said that 'Social distancing is the only way to break the cycle of infection.' A country-wide lockdown is ongoing from 24<sup>th</sup> March, 2020 to ensure self-isolation and social distancing.

Even the Hon'ble High Court of Bombay has issued regular orders limiting the functioning of not only High Courts but also of subordinate courts. At subordinate level, only remand and extremely urgent matters that cannot wait beyond a week are being taken up. Thus, bringing a halt to the ongoing cases of thousands of undertrials. Accused are no more being brought to court and have been put under further restrictions with regards to any communication with the outside world, including their lawyers and family members.

The International body on health, the WHO has also noted how prisons and other similar enclosed places are some of the places most susceptible to this disease. It published interim guidance titled "**Preparedness, prevention and control of COVID-19 in prisons and other places of detention," and specially pointed the reason**" as follows:

*People deprived of their liberty, such as people in prisons, are likely to be more vulnerable to various diseases and conditions. The very fact of being deprived of liberty generally implies that people in prisons and other places of detention live in close proximity with one another, which is likely to result in a heightened risk of person-to-person and droplet transmission of pathogens like COVID-19. In addition to demographic characteristics, people in prisons typically have a greater underlying burden of disease and worse health conditions than the general population, and frequently face greater exposure to risks such as smoking, poor hygiene and weak immune defence due to stress, poor nutrition, or prevalence of coexisting diseases, such as bloodborne viruses, tuberculosis and drug use disorders.*

## PRISONS AND OTHER SETTINGS OF DETENTION IN MAHARASHTRA

Maharashtra prisons, detention centres, juvenile homes are some of the most overcrowded prisons/detention centres in the country. This doesn't even take into account the large number of prison department staff. We know that COVID-19 spreads quickly in closed spaces and given the existing overcrowding and resultant poor conditions in Indian prisons, the fear of the spread of COVID-19 among the prisoners and the staff in Maharashtra Prison is imminent and needs to be addressed with absolute immediacy.

Today, in such pressing times, while the whole country has been put under lockdown to ensure social distancing, the prisoners do not have the option to make choices or implement measures which would protect them or those around them, as well as prevent further spread to and within communities outside the institutional environment. Prisons will serve as sources of re-infection if they are not immediately de-congested. The entire exercise of the Maharashtra state lockdown and India-wide lockdown will be useless if there remains large number of individuals who are at risk. In a press release, dated March 23, 2020, the Commonwealth Human Rights Initiative stated that some prisoners in the United Kingdom, the United States of America, Iran, China, Italy and France have already been tested positive for COVID-19. Given the trajectory of the diagnosed cases, our prison systems are also at the brink of being infected.

## SUPREME COURT DIRECTIONS

The Hon'ble Supreme Court also took *suo moto* cognizance of the critical risk of COVID19 infection spreading in overcrowded prisons across the Country and on 23<sup>rd</sup> March 2010 gave the following directions: :

1. *“Taking into consideration the possibility of outside transmission, we direct that the physical presence of all the undertrial prisoners before the Courts must be stopped forthwith and recourse to video conferencing must be taken for all purposes. Also, the transfer of prisoners from one prison to another for routine reasons must not be resorted except for decongestion to ensure social distancing and medical assistance to an ill prisoner. Also, there should not be any delay in shifting sick person to a Nodal Medical Institution incase of any possibility of infection is seen.”*
2. *“We direct that each State/Union Territory shall constitute a High Powered Committee comprising of (i) Chairman of the State Legal Services Committee, (ii) the Principal Secretary (Home/Prison) by whatever designation is known as, (ii) Director General of Prison(s), to determine which class of prisoners can be released on parole or an interim bail for such period as may be thought appropriate. For instance, the State/Union Territory could consider the release of prisoners who have been convicted or are undertrial for offences for which prescribed punishment is up to 7 years or less, with or without fine and the prisoner has been convicted for a lesser number of years than the maximum.”*
3. *“It is made clear that we leave 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.”*
4. *“The Undertrial Review Committee contemplated by this Court In Re Inhuman Conditions in 1382 Prisons, (2016) 3 SCC 700, shall meet every week and take such decision in consultation with the concerned authority as per the said judgment. The High Powered Committee shall take into account the directions contained in para no.11 in Arvind Kumar v. State of Bihar, (2014) 8 SCC 273.”*

Thus, the state government is required to form a High Powered Committee. The committee has to determine the following:

- 1) Class of convicts who can be released on parole.
- 2) Class of undertrial prisoners who can be released on interim bail.

While the Supreme Court suggested that the Committee should look at the nature of the offence charged or convicted for, number of years the convict has been sentenced for and severity of the offence the undertrial has been charged with and facing the trial for, it also gave powers to the committee to decide any other relevant factors as the committee may consider appropriate.

## SUGGESTED CATEGORIES FOR RELEASE

Given the various vulnerabilities, in deciding the categories of the prisoners and/or detained in other settings for release, priority should be given to the following, irrespective of the offences they are charged with:

1. Prisoners and/or detained in other settings above 50 years of age,
2. Children in conflict with law detained at different settings,
3. Prisoners and/or detained in other settings with pre-existing health conditions,
4. Prisoners and/or detained in other settings with disability and mental illness,
5. Pregnant women and/or with children in prisons and/or detained in other settings,
6. Women Prisoners and/or detained in other settings,
7. Category of undertrial prisoners to be released in accordance to the standing order passed by the Apex Court in *In Re Inhuman Conditions in 1382 Prisons*, (2016) 3 SCC 700.
8. Category of convicts scheduled for early release.

It is a welcoming decision of Home Minister for State of Maharashtra, Anil Deshmukh promising the release of 11,000 inmates in view of spread of COVID 19. As a first step, On 27<sup>th</sup> March 2020, an order was passed by the High Powered Committee to decided that undertrials who have been booked/charged for such offences for which maximum punishment is 7 years or less be favorably considered for interim release, but excluding people charged under MCOC, PMLA, MPID, NDPS, UAPA etc, foreign nationals and people from other states. This categorization is shocking and unfair.

The Indian Criminal Justice System envisages the innocence of a person until proven guilty. By such exclusion, the Right to Life envisaged under Article 21 of the Indian Constitution of undertrials charged under the various Special Acts and/or undertrials who are from other States is under threat. To have such a criteria also violates the principles laid under Article 14. Such an exclusion would mean that the rights are not equally guaranteed by the Constitution to all and those in the excluded categories are “unequal citizens” in the eye of law.

Further, inmates of foreign nationality and of different states should not be confined to the prison under the unusual pressing circumstances. Instead of putting a blanket restriction on releasing undertrials of foreign nationality and those having a place of residence out of Maharashtra, provisions should be made to send them safely back to their place of residence so that they remain safe and the burden on the prison system is also relieved. If the foreign nationals have no place to stay in India and there is a blanket ban on international flights, care should be taken to keep them healthy and safe.

Even if categories excluded by the High Powered Committee are considered, it is imperative that vulnerable people (suggested categories) amongst those are considered for release. These are acknowledged to be high-risk categories and excluding them only on account of the nature of crime charged with, is like giving the death sentence to them. The need of the hour is not only to decrease the overcrowding but also to ensure that people get proper access to health care.

The process of law will continue after this devastating crisis is over but the immediate need right now is to ensure that most minimal number of prisoners are kept in prisons and the others are able to access healthcare outside. The prison system and the government will bear

immense responsibility for the safety and proper health of all those it continues to detain and the only way to ensure the safety is to release on interim bail to undertrials without discriminating what charges are against them. The state and the judiciary have the resources to put reasonable restrictions on the movements of the released persons, and thus in case of the above mentioned categories, if any of the individuals is detained/charged/convicted with serious offences, release can be considered on strict bail conditions. Given that the entire country is under lockdown, the fear of an accused jumping bail or tampering of any evidence is minimum.

## **SUGGESTED GUIDELINES FOR RELEASED PRISONER/DETAINEES**

Given that the entire country is under lockdown, it is important that, certain guidelines be followed for the release:

1. **Consent of prisoner:** No prisoner should be released without their consent.
2. **Provision for safe-transit:** Other than ensuring safe transit of those in other cities, towns within the state, it is important that prisoners and/or detained in other settings in Maharashtra are also released. Maharashtra has a huge number of inmates who are from other states. Since there are restrictions on travels etc., it is important that the State government ensures safe travel to each inmate that is released. Financial and logistical arrangements should be made by the authorities.
3. **Post-release subsistence:** Prior to the release, the Committee must provide subsistence allowance for all released prisoners, so as to ensure they can sustain themselves post their release.
4. **Medical Assistance:** Strict screening of prisoners should be carried out for symptoms of COVID-19, i.e. fever (high temperature), cough and problem in breathing before release. In case of any symptoms, adequate medical assistance should be provided.

## **SUGGESTED GUIDELINES FOR PRISONERS WHO CANNOT BE RELEASED**

In its document, WHO further states:

*It is of paramount importance to work in partnership across public health agencies, health-care services and places of detention, bringing together community services and prison/detention services. The human rights framework provides guiding principles in determining the response to the outbreak of COVID-19. The rights of all affected people must be upheld, and all public health measures must be carried out without discrimination of any kind. People in prisons and other places of detention are not only likely to be more vulnerable to infection with COVID-19, they are also especially vulnerable to human rights violations. For this reason, WHO reiterates important principles that must be respected in the response to COVID-19 in prisons and other places of detention, which are firmly grounded in human rights law as well as the international standards and norms in crime prevention and criminal justice.*

On the lines of the principles mentioned in the document, we suggest the following:

1. Ensure that the prisoners are informed on the status of the COVID-19 and their rights.
2. Inmates should have access to hand sanitizer, soap and cleaning supplies at no cost. Common areas should be sanitized.

3. Minimize the impact of restrictions on prisoners. In absence of face-to-face visits, arrangements should be made to provide frequent opportunities to communicate with their family members, friends and lawyers via phone calls or video conferencing. Communication services should be made available for free.
4. Impose strict protocols for staff entering the prisons.
5. Given the seriousness of the situation, health care mechanism should be improved. Regular doctors, health care workers should be assigned to the jails. People in prisons and other places of detention should enjoy the same standards of health care that are available in the outside community, without discrimination on the grounds of their legal status.
6. Prisoners should be provided a minimum monthly sustenance of Rs. 3000 for the purchase of food, daily needs etc.
7. Adequate measures should be in place to ensure a gender-responsive approach in addressing the COVID-19 emergency in prisons and other places of detention.
8. Adequate measures should be in place to prevent stigmatization or marginalization of individuals or groups who are considered to be potential carriers of the virus.
9. Adequate measures should be in place to protect persons in isolation from any form of ill treatment and to facilitate human contact as appropriate and possible in the given circumstances (e.g. by audiovisual means of communication).
10. Direct that adherence to all fundamental safeguards incorporated in the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) be maintained. There should not be any inhuman or degrading treatment or punishment; the prohibition of prolonged solitary confinement. The non-medical prison staff should not at any point of time take any medical or clinical decisions and such decisions should only be taken by health-care professionals. Their decisions should not be ignored or overruled by non-medical prison staff.
11. As a result of the lockdown, the prisoners have minimum communication with the outside world and will have no recourse in case of any dispute, thus it must be ensured that even in these times, external inspection of prisons and other places of detention by independent bodies such as designated prison visitors, doctors, civil society organisations and/or the district judge continues.

## SUGGESTED GUIDELINES FOR FUTURE ARRESTS

Other than policy for release of prisoners, it is also very important that further imprisonment be prevented.

1. Enhanced consideration should be given to resorting to non-custodial measures at all stages of the administration of criminal justice, including at the pre-trial, trial and sentencing as well as post-sentencing stages. (WHO principle)
2. The Hon'ble Supreme Court in its order directed that "*The High Powered Committee shall take into account the directions contained in para no.11 in Arnesh Kumar v. State of Bihar, (2014) 8 SCC 27.*" This para refers to direction to ensure that the police officers do not arrest an accused unnecessarily and magistrate do not authorise detention casually and mechanically.
3. Even though the above observations were restricted to a certain category of cases, the same can be applied in the present unusual circumstances to other cases as well. The principle of, "**bail is a rule**" should be followed and no person should be arrested/detained or sent for judicial custody, unless such arrest/custody is inevitable.

Prisoners are one of the most vulnerable populations in our country. Given the make and condition of our prisons and/or other settings of detention, if action is not taken immediately, they are the most at risk during this growing pandemic. These circumstances require extraordinary measures. It is the time for the State to dramatically reduce the prison population immediately for the health of this vulnerable population and our collective health. Any restriction on the basis of the crime they are alleged to have committed is unfair and violates their fundamental rights. When this pandemic infects the prisons and/or other settings for detention, there will be unmanageable consequences, both for inmates and for the wider community. We cannot wait for this to occur and should act now.

We urge you to take the extraordinary measures and necessary actions to drastically reduce the overcrowding in prisons and other settings of detention before the situation is out of control.

### **Signatories/-**

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