

BEING TETHERED TO BARS DURING A PANDEMIC

Relevant for: Developmental Issues | Topic: Rights Issues - Human Rights and NHRC

A distance of two yards — *do ghazh ki duri* — we are enjoined to maintain between oneself and anyone else. The ‘pandemic’ message is relayed on recorded caller messages in all our official languages.

But there is a category of persons by which the injunction cannot be observed — prisoners. By the very nature of their situation, the physical limits of their confinement, they are obliged to stay in poorly ventilated and over-crowded cells. Being holed up in that condition almost seems to form part of the punishment. A jail and a dungeon are almost interchangeable terms.

Criminal justice has ‘activists’ in the United States observing with a sharp eye, prison conditions. We do not. At least not in the same numbers or with the same capacity to influence policy. Writing in *Diplomatic Courier* on December 29, 2020 (<https://bit.ly/2M4IHIT>), Carolyn Nash reported that in March 27, last year, a letter signed by over 40 public health experts called federal prisons and immigration detention centers “breeding grounds for uncontrolled transmission” of the virus. By September, 44 of 50 COVID-19 clusters were found to be located in prisons. In Texas, the virus had, by then, killed more than 230 people in jails and prisons, 80% of whom had not been convicted of a crime. By November, the number of cases in Michigan prisons more than doubled in two weeks. A Minnesota organiser called his state’s soaring rate of prison infections “a human rights disaster”, she says.

England and Wales have 121 prisons housing about 79,000 prisoners. As the novel coronavirus grew alarmingly in Britain, a mass testing programme commenced for all prisoners in 28 of these prisons in July, starting with symptomatic prisoners. The United Kingdom Ministry of Justice figures (*The Guardian*, November, 2020; <https://bit.ly/39ltmg5>) showed that prisoners testing positive in September stood at 883 (By October the number rose to 1,529, with five deaths. This rise was doubtless computed on account of increased testing.

Do we have such statistics for India?

They do exist, surely but not in handy, ready form in the public domain.

But the tragedy in human terms is that such statistics are not being demanded of our criminal justice system. In the United States and in the U.K., pandemic control in prisons is being driven by enlightened public opinion. Not so in India. When we hail an ‘unlocking’, we are not thinking of our lock-ups. This is not surprising in a society such as ours which seems to have concluded, prematurely, that the novel coronavirus is behind us, which is not the case. But more pertinently, this is not surprising in a society that has a poor tradition of human rights activism.

It takes a prominent prisoner such as the writer, Varavara Rao, or the Khudai Khidmatgar Faisal Khan going down with the virus for the enormity of the disease combining with imprisonment to dawn on us. That our 1,400 or so prisons, ‘housing’ over 4.5 lakh prisoners are breeding grounds for the virus does not occupy our thoughts, even our virus-related thoughts.

But how about the Indian state ?

The Prisons Act of 1894 (<https://bit.ly/39G9473>) makes prisons the exclusive responsibility of State governments. Over the years the condition of prison life has moved up on the human civility and dignity scale, with the venues now being called correctional homes and over 60

'minimum security' open prisons having been set up. Of the 4.5 lakh prisoners that our correctional homes hold, according to the National Crime Records Bureau's report for 2019 (<https://bit.ly/3q1bl8T>), about 3.3 lakh are 'under-trial prisoners', against whom investigation or trial is supposed to be 'in progress'. These 3.3 lakh 'under-trial prisoners' have been detained under Section 167 of the Code of Criminal Procedure (CrPC) which provides for "Procedure when investigation cannot be completed in 24 hours". The original CrPC of 1898 specified the period of detention as 15 days. This has, by amendments, been extended to periods that can go up to 90 days and, in some exceptional situations, even indefinitely.

Surendra Nath, a former Additional Secretary in the Ministry of Justice, Government of India and member of the Constitutional Conduct Group, has pointed out : "... (O)ut of 3.3 lakh, about 2.2 lakh are either not likely to be even charge-sheeted, or they are likely to be acquitted."

B.D. Sharma, a former Head of Correctional Services in West Bengal, who has done amazing work in giving that nomenclature true meaning, describes their condition thus: "This huge violation of the basic human rights of UTPs in such large numbers is made further unbearable by overcrowding, poor living conditions, inadequate healthcare facilities and torture by other rowdy prisoners (which often occurs with the connivance of jail staff) in our prisons." And he highlights the huge injustice caused to the families of the 'under-trial prisoners' "languishing in prisons for long years particularly their children who are denied a normal childhood, proper education, and are exploited by cruel sections of the society in various way especially the girl children and many of whom are forced to take to the path of crime".

So, while the plight — to use a cliché — of all prisoners is by definition bad, in terms of exposure to disease, it is 10 times worse for 'under-trial prisoners', for the majority of them are and are likely to be found to be innocent. Theirs is a case of innocence in jail and in jeopardy — the jeopardy of a potentially fatal infection contracted while in detention.

Is this acceptable in a country which boasts of a Constitution, in the Preamble to which we give unto ourselves, before anything else — Justice?

The virus gives cause for an immediate review of all prisoners' vulnerability to the epidemic, starting with that of 'under-trial prisoners' who are suffering two privations — one, being immobilised, most probably unjustly, and two, being tethered to the risk of infection.

This review has to comprise 100% and repeated testing procedures in all prisons, especially sub-jails, which form the biggest category among them and the least 'equipped' and an arrangement for the isolating and hospitalisation of those testing positive. No prisoner who has tested positive can be allowed to remain within the crowded confines of that venue without transmitting the disease to a progressively rising concentric circle of inmates.

But above all, the population of prisons has to be vigorously brought down.

Through a salutary amendment, the Code Of Criminal Procedure (Amendment) Act, 2005, a much-needed Section 436-A has been introduced in the CrPC. Excluding offences for which capital punishment is envisaged, it provides for an under-trial to be released on a personal bond, with or without sureties if the period spent in detention by the under-trial has been for more than half the maximum period of imprisonment prescribed for that offence. (The public prosecutor can move the court to deviate from this.)

The 2005 amendment had two aims : one, de-congestion and two, fairness. Today, in our COVID-19 times, if congestion is *per se* held to be dangerous, de-congestion in prisons through a prescribed legal procedure becomes not just a desirability but a duty. And I urge the

immediate and massive activation of Section 436-A without sureties so as to benefit all under-trials eligible for it.

It is not just desirable but axiomatic that the 2005 amendment to the CrPC be activated on a nation-wide and urgent basis as a penological imperative, a state duty and a human right. And while their release is being actuated, it also follows that even as anyone in a state hospital may rightly expect to be vaccinated on a priority against the virus, so should inmates of the 'Hospitals of Correction'.

While 'Prisons' is in the 'State List', as is 'Public Health', the Constitutional responsibility of handling infectious and contagious diseases figures in the Concurrent List. It is the Centre that must show the States its concern in this and lead from the front.

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