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## Gendering the Pandemic in the Prison

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*For women, prisons are built with stones of "patriarchal" law. It is time to campaign against incarcerated pregnancies and custodial childbirths as making for cruel, inhuman and degrading treatment of women.'*

That the prison system needs reform and that its conditions are inhuman is a matter of state record and acknowledgment. The legal principle ‘bail not jail’ frames every legal commentary on bail. The law therefore intends for undertrial prisoners (UTPs) to be a numerical custodial minority in the prison. However, the 2018 National Crime Records Bureau (NCRB) data shows that of 4,66,084 prison inmates in our prisons, 1,39,488 (30 percent) are convicted and 3,23,537 (70%) are undertrials. Yet, no moratorium on fresh arrests that would stop new admissions of undertrials into prisons has been announced during the pandemic.

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In *Contagion of Covid 19 Virus in Prisons*, the Supreme Court of India directed the constitution of High Power Committees (HPCs) headed by each high court to oversee the de-congestion of prisons during the pandemic. The court noted that ‘prisons can be fertile breeding grounds for incubation of COVID-19’. Despite a national de-congestion drive, even on 22 June 2020, as per the e-prison dashboard, the total prison population stood at an extraordinarily high 4,64,127. This would include UTPs, convicted prisoners, and detainees or civil prisoners. The legal system has the responsibility to devise ways to avoid mass contagion in custodial institutions. Failing which the system would be hit by a catastrophization of a disaster for, as [Upendra Baxi](#) argues, ‘if the spread of a global pandemic was an act of misfortune, its catastrophization has to be located in the injustices of social structure and policy’.

The threat of mass contagion in prisons poses specific challenges to women, children and gender and sexual minorities in prisons and other custodial minorities. Older women prisoners, detainees and undertrials in overcrowded pandemic-struck prisons have been denied bail, while pregnant women, lactating mothers, and mothers and their children, women with disabilities, and women with co-morbidities continue to be incarcerated in overcrowded prisons. [Why should courts be mindful of women inmates as women?](#) We argue that all women inmates should be released, whether or not they are pregnant, and outline why we think that a disaster could become a catastrophe if the legal classification of women prisoners and undertrials deserving of release or bail is not altered.

### Are women “custodial” minorities?

Curious about what percentage of the overall prison population comprises women, we collated the [figures available on the e-prisons dashboard](#) on 20 June 2020 and found that this platform showed that there are 22,927 women inmates in all prisons in India. This forms 4.1% of the total inmates, an increase from 3.3% in 2000 as per the [NCRB statistics](#) available until the end of December.

Women Inmates Total	Below 20	20-30	30-40	40-50	50-60	60-70	70 Above
22927	1093	4922	5917	4963	3116	1379	1627

Source: These figures, which change every day, have been collated from [the e-prisons dashboard](#). as of 20 June 20 collected on 21 June 2020 at 13:00 hours.

We argue that all women inmates may be defined “custodial” minorities. As per the 2020 statistics we collated, there are 68 persons incarcerated under the category “others”. No grave threat is posed to society by UTPs belonging to sexual and gender minorities that non-custodial alternatives cannot be found for them, while they wait for investigations and trials to be over. And alternatives to prison system need to be innovated for all convicted women, and gender and sexual minorities. There does not seem to be an attempt to recognise that their right to health and life is made far more precarious in a transphobic prison-medical complex. They must be counted and accounted for.

All women in prisons without distinction of charge, crime or sentence, whether pregnant, lactating, menstruating or menopausal, differently abled or ailing may be thought of as “custodial” minorities.

Women inmates in male-defined prisons governed by male rules of incarceration experience specific forms of discrimination, deprivation and violence. Their dignity is stripped as women—menstruating bodies are made to leak and vaginal infections allowed to fester. Their souls broken as women, with strip searches and cavity probes.<sup>1</sup> All women in prisons without distinction of charge, crime or sentence, whether pregnant, lactating, menstruating or menopausal, differently abled or ailing may be thought of as “custodial” minorities. Muslim women face terrible targeting and blame, as do Dalit women who face intolerable discrimination and bear the brunt of misuse of law against them. Similarly, Muslim and Dalit male undertrials are also subjected to sexualised forms of torture in police and judicial custody. And policies that exclude foreigners from interim bail position them as custodial minorities, who face institutionalised racism. However, the law has difficulty in “seeing” these prison inmates, especially undertrials, as custodial minorities.

The penal policy during the pandemic found critique as [a number of students, activists, human rights dissenters, bloggers, journalists and ordinary people found themselves being detained, and arrested during the lockdown, without easy recourse to the legal system](#). Most of these women and men are now confined in prisons and denied bail by different courts. In such instances, the pandemic is not considered as a ground for bail even for those UTPs who are ill, and likely to die if infected by Covid-19. These arrests were especially critiqued since the lockdown had ensured that no one could flee or escape police investigation and the need for incarcerating a suspect in overcrowded pandemic infested prisons seemed punitive. The application of the draconian terror law against young Muslim women and their detention in prisons has been condemned as [persecution of Muslim women for leading the protests against the citizenship law](#). These shifts in the penal policy are accompanied by the consolidation of legal autocrats, the emergence of newer forms of legal ‘reasoning’ which Gautam Bhatia characterises as ‘[imprisonment by metaphor](#)’ and are marked by the rise of particular forms of autocratic legalities, while creating an institutional crisis for the prison system. These custodial minorities are seen as undeserving of release during the pandemic.

### Classification by the High Power Committee: Case of Delhi

Following the Supreme Court, in Delhi the HPC chaired by Justice Hima Kohli met to devise a method for de-congesting prisons in Delhi. [This resulted in a number of decisions starting from 26 March 2020](#). Delhi has 16 jails located at Tihar, Mandoli and Rohini, with 17,440 inmates (consisting of 2,997 convicts, 14,355 UTPs and 88 civil prisoners (as on 27 March 2020) against a holding capacity of 10,026 prisoners. ‘Deserving’ undertrials such as first-time offenders, those arrested for an offence punishable up to seven years or in custody for over three months could be released on interim bail. For instance, interim bail was permitted for women undertrials in custody for 15 days or more. However, this rule did not apply to all women. Those women who were foreigners, or undergoing trial under the drug law, child sexual offence law, rape law, or corruption were denied interim bail. Further, those women who were accused with ‘cases investigated by CBI/ED/NIA/Special Cell Police and Terror related Cases, cases under Anti-National Activities and Unlawful Activities (Prevention) Act etc’ stood excluded from interim bail.

The HPC did not look at women prisoners as a class nor did it order the release of all pregnant women or mothers with babies as being a high risk category. There was no moratorium on fresh arrests of pregnant women or mothers with babies during the pandemic. The classification of women prison inmates was according to nationality, nature of offence, investigation agencies and *etc*. This “*etc*” classification rests on a penal policy that sorts women inmates into *deserving* and *undeserving*. The classificatory practice is not based on protecting high risk populations, irrespective of offence or sentence.

### ‘It is a very, very sorry state of affairs’

By June 2020, in Maharashtra at least 10 prisons reported that 292 inmates and 72 prison staff had tested positive. [At least four inmates have died due to Covid-19 in Maharashtra](#): two in Talaja central prison, one in Yerawada and another in Dhule prison. [The women’s prison in Byculla also reported one positive case](#). Yet undertrials locked up in these jails [continue to be denied bail](#).

The Maharashtra Department of Prisons and Correctional Services put in place the process of decarceration and decongestion aiming to release 17,000 inmates. If this target is achieved, then [prisons in Maharashtra will be filled to only 60% to 70% of their capacity](#), assuming new arrests are not made and prison transfers do not take place. This process was accelerated when the contagion hit the Arthur Road jail where (in mid-June) a shocking 181 inmates and 39 staff were afflicted by Covid-19. Yet [bail to all vulnerable populations is not being given](#) in spite of the risk of the contagion.



Women prisoners in Tihar jail having lunch | Wilderness Films India Ltd. ([wildfilmsindia.com](http://wildfilmsindia.com))

In the [PUCL case](#) filed in the Bombay High Court against over-crowding in jails in Maharashtra, it was put on record in mid-June that even after four Covid-19 deaths, prisons did not have space to quarantine, and no testing was being done. . And [temporary prisons](#) are in a [deplorable state](#). As the Bombay High Court remarked it is ‘a very sorry state of affairs’.

In May, [merely 1,700 women had been released from prisons in eight states](#), a meagre 8.3% of all women inmates.

### Reading Section 61 of the Disaster Management Act, 2005

Reading the Disaster Management Act, 2005 (DMA) into prisons as hotspots of mass contagion with overcrowded and vulnerable populations, one might argue that the DMA’s provisions for mitigation as well as relief and rescue come into operation. The [2008 National Disaster guidelines](#) define a epidemic as a biological disaster. Therefore, the question of de-congesting prisons is not only a question for the judiciary, but it is equally a question for the disaster authority to contain mass contagion, prevent fatality and treat affliction in an affected area. Further, prison inmates’ right to health and right to life is protected by a plethora of laws. If the application of disaster law is legally valid, then the classification of the prison population, and the grounds of mitigation, rescue or relief (remission, bail or parole), must be read with Section 61 of the DMA. Section 61 prohibits discrimination by holding that ‘while providing compensation and relief to the victims of disaster, there shall be no discrimination on the ground of sex, caste, community, descent or religion’.

The [2007 National Disaster Management Guidelines](#), which state the principles for state disaster management plan, insist that such plans must recognise:

...the differential needs of all sections of the society, including marginalised groups such as the elderly, pregnant and lactating mothers, children, physically and mentally challenged persons etc. It should specifically address the concerns of women.

The National Disaster Management Plan of 2019 outlines critical guidelines for inclusiveness, including the directions that prohibits discrimination against women, gender and sexual minorities, Dalits, tribals, and religious minorities. Therefore, the state disaster management plan must recognise the differential needs of women and other custodial minorities in prisons. The disaster law must be read with prison rules so that *all* women prisoners are considered most vulnerable populations, who deserve rescue and relief, mitigation and compensation.

One compelling interpretation of the non-discrimination principle crystallized in the disaster law is to read it as a law that prohibits discriminating between the rights of an undertrial accused of murder as compared to the rights of an undertrial accused of terror or sedition, for mitigation, relief and rescue during a disaster.

## Coercing incarcerated pregnancies and custodial childbirths

The utter lack of concern for pregnant inmates has not shocked judicial conscience. No *suo moto* proceedings followed the reports from the Thane jail in Maharashtra, outlining the plight of a pregnant prisoner who was infected by Covid-19.

The most recent debate on incarcerated pregnancy and the misuse of terror law has been about Safoora Zargar who was first arrested on 10 April 2020. The state has filed 26 criminal charges against her, including various sections of the *Unlawful Activities (Prevention) Act, 1967, (UAPA)* a law that has been critiqued for serious violations of fundamental rights. The state opposed her bail applications in lower courts thrice. None of the bail courts contemplated the law on the question of forced childbirth in prison, especially at the time of the risk of mass contagion in a prison. Rather, the Patiala court had merely ‘requested’ the jail administration to provide Safoora Zargar ‘adequate medical (sic) aid and assistance’ given her ‘precarious medical condition’ (*State v. Safoora Zargar* at page 9, order dated 4 June 2020). The court did not address the question: should pregnant prisoners or undertrials be coerced into giving birth in prisons?

[T]he courts have yet to rule that all incarcerated pregnancies and custodial childbirths are inhuman, cruel and degrading to women in every custodial institution.

On 23 June 2020, Zargar was granted bail after the Solicitor General of India decided not to oppose the bail on humanitarian grounds. The Solicitor General of India argued that this act of humanity was not to be treated as a legal precedent. Bail was granted with conditions. Was this a concession? There have been different views on the prosecutorial acknowledgement of humanitarian grounds. Some argue that if the case had been argued, the question of the applicability of the terror law and the very question of the legality of incarcerated pregnancies would have had to be addressed. Whether the bail order is read as an example of autocratic legalism (Scheppelle 2018) that allows humanitarian acts to interrupt the grammar of politics or it is read as a welcome sociological precedent that allows the law to fulfil its quest for humanity, the fact remains that the courts have yet to rule that all incarcerated pregnancies and custodial childbirths are inhuman, cruel and degrading to women in every custodial institution.

We suggest that the law’s quest for humanity should be especially attentive to the cruelty inflicted by the exception. Exceptional law such as the terror law by virtue of its application already imbues the accused with hyper criminality, and justifies cruel, inhuman and degrading treatment of terror suspects. We know this from Ujjwal Kumar Singh’s (2007) magisterial book on terror law; or the lacerating account of routinisation of torture in police remand and judicial custody by Nitya Ramakrishnan (2013). Jinee Lokaneeta offers chilling account of policing, forensics and torture in her recent book, *Truth Machines*. Vrinda Grover has held a powerful brief against encounter killings of women and custodial torture, while insisting that the aggravated impact of state impunity on women and sexual minorities must remain central to any constitutional understanding of custodial violence. Taking our cue from these germinal works, we argue that incarcerated pregnancies and custodial childbirths must be thought of as cruel, inhuman and degrading treatment of women in all contexts without exception.

The NCW has not only failed to ensure that all women inmates, including pregnant and lactating mothers are rescued from prisons as an urgent measure, but it has also not stopped new arrests and remand during the pandemic.

In 2018, the Ministry of Women and Child Development held that ‘pregnant women should be given bail to facilitate child birth outside the prison’, and that ‘information about a woman’s pregnant status should also be made known to the court that has ordered the detention, to enable the court to grant bail (where appropriate) or modify the detention order as deemed necessary’. The state therefore is also of the view that incarcerated pregnancies and custodial childbirths are not desirable. Yet the ministry’s recommendations of 2018 have not yet been adopted.

Nor has the National Commission of Women’s (NCW) advisory of 22 April 2020 been heeded. It states that ‘even the cases of those women under trials who are charged for non-bailable offences leading to a penalty of death or life imprisonment, if found guilty, needs to be processed for bail under proviso to the Section 437 (1) (ii) of CrPC., which provides for special dispensation to women and children below the age of 16 years in the matter of grant of bail’. Hence, even women UTPs who are charged with life or death can be given bail. The NCW has not only failed to ensure that all women inmates, including pregnant and lactating mothers are rescued from prisons as an urgent measure, but it has also not stopped new arrests and remand during the pandemic.

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Not only has section 61 of the disaster law, which defines non-discrimination, not been applied, no reasons have been given for why non-custodial alternatives cannot not be found for women undertrials as provided in [international law](#). Surely, Article 51 of the Constitution obliges courts to follow international law. The UN General Assembly’s adoption of the *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* (also known as the Bangkok Rules) *vide* Rule 24 states that ‘non-custodial means should be preferred for pregnant women during the pre-trial phase wherever that is possible or appropriate’. Incarcerated pregnancies and coercing custodial childbirth violate Rule 24. Furthermore, [the principle of non-discrimination obliges states to find alternatives to imprisoning women](#).

Moreover, does a pregnant woman who has decided to carry the pregnancy to full term not have the right to bail on the ground of her right to protect the needs of her unborn child? Why is an incarcerated pregnancy and a custodial childbirth per se not a denial of reproductive justice? Bail should be given to women on the grounds of [reproductive justice](#) and law must not inflict reproductive harm to women in custody. Recognizing this implicitly, [in its judgment of 2016](#), the Gujarat High Court after finding a pregnant woman guilty of murdering her sister-in-law in a dowry related case, allowed the woman to surrender after she had delivered her baby.

Custodial childbirth and incarcerated pregnancy then is a specific form of cruel, inhuman and degrading punishment that is inflicted on women in prisons. Any incarcerated pregnancy and custodial childbirth is a fundamental violation of reproductive justice. To rescue some pregnant women and not others during a disaster amounts to condemning some pregnant inmates to a death sentence. In our law, no death sentence can be given to a pregnant woman; nor can the technique of execution be cruel, degrading or inhuman. Section 416 of the Criminal Procedure Code (CrPC) holds that an execution may be postponed or commuted if the woman on death row is found to be pregnant. Yet scores of pregnant women are yet to be released from our prisons and remain deprived of law’s humanity. The law’s quest for humanity lies in the face of what it finds intolerable, yet humanity stands defeated by law’s cruel attachment to reasonable classification based on offence and sentence.

### **Custodial Reproductive Violence**

Why are reproductive rights of some women prisoners more important than of others? There is a lengthy and sad litany of the literal miscarriage of justice in our legal history that has inflicted more sexual and reproductive harm on some women. We know that women who are “othered” such as Phoolan Devi were forced to undergo a hysterectomy. Her consent to remove her uterus was deemed irrelevant, for the prison officials decided that she should not give birth to more Phoolan Devis. This targeted reproductive violence that aimed to extinguish a woman’s reproductive capacity is an act of gross custodial violence against all women prisoners. Who is liable for irreversible reproductive harms like non-consensual sterilization, coerced miscarriage or maternal or infant mortality, especially against women who are imprisoned to be ‘taught a lesson’? This precedent of injustice is reason enough for courts to re-think jurisprudence of bail and custody of all women undertrials and prisoners.

|| A media that repeats the police-prosecution framing of accused women normalises and justifies state excess.

The question of reproductive justice is not an issue when reproductive politics *others* women—Muslim, Dalit, Kashmiri—to deny an entire community a reproductive future. These discourses index differential treatment of differently situated pregnant bodies. The [sexual and reproductive violence on Soni Sori in prison](#) highlights how torture itself is sexualised and directs reproductive violence on the bodies of Adivasi women. The public vilification campaigns against all these women aim to portray them as exceptionally criminal and dangerous, who deserve to be taught a lesson through cruel, inhuman and degrading punishment. A media that repeats the police-prosecution framing of accused women normalises and justifies state excess.

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Another routine and heartbreaking illustration of custodial reproductive violence is the shackling of pregnant prisoners. From women’s perspective this is a form of custodial reproductive violence that is a grave violation of women’s right to life, as of the right of their unborn or newborn child. In keeping with international law, as recently as 2018 the Ministry of Women and Child Development has

recommended that ‘instruments of restraint, punishment by close confinement or disciplinary segregation should never be used on pregnant or lactating women’.

Our courts tend to forget that prisons are male spaces where women are fitted in and many women prisons have reported stories of indignity, decay and torture. Women face the indignity of strip searches, cavity searches, and routine abuse that is directed at their being as women. The techniques that discipline and punish menstruating bodies, lactating bodies, pregnant bodies, menopausal bodies, ailing bodies, and young bodies of women inscribe a terrifying gender code. This is not to argue that women prisoners do not have agency or politics nor to suggest that they be reduced to their biological beings. Rather this is to underline that [prisons are foundationally male spaces, designed to reduce all women to biological degradation.](#)

### **Concluding Remarks**

Justice Krishna Iyer famously said that [‘prisons are built with the stones of law’](#). However, for women, prisons are built with stones of ‘patriarchal’ law. It is time to campaign against incarcerated pregnancies and custodial childbirths as making for cruel, inhuman and degrading treatment of women. We must fully trace the impact of the sexual and reproductive politics of the state on detention practices that are normalised under the sign of the nation. To do otherwise, is to direct violence at women. It is time to campaign for an urgent moratorium on all fresh arrests of women, and of gender and sexual minorities, wherein no coercive action should be taken against women and gender and sexual minorities, and no custodial sentences should be handed out to such persons. All women and gender and sexual minorities should be released during the pandemic.

It is time to re-think the prison system as it exists from the point of view of gender and sexual minorities, a question that should concern all kinds of publics and movements, jurists and academics, people and their courts.

### **Footnotes:**

**1** See Uma Chakravarti’s compelling film on Snehalata Reddy’s account as the only woman political prisoner who spent eight months in solitary confinement, *Prison Diaries*, <https://psbt.org/films/prison-diaries/>

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