

APPLYING FOR FURLOUGH IN MAHARASHTRA

The Maharashtra government has recently [amended](#) the [Prisons \(Bombay Furlough and Parole\) Rules 1959](#) to narrow down the circumstances under which prisoners can apply for furlough. This development is [reported](#) to have been introduced after Sajjad Moghal, convicted of the murder of Mumbai-based journalist, Pallavi Purkayastha, jumped parole in March this year. He has been absconding ever since (Nandgaonkar 2016). As would be expected of such a knee-jerk response, the amendment is riddled with rules of doubtful constitutional validity. This article focuses on the provisions relating to furlough and outlines three aspects of the amendment that are particularly problematic.

State governments in India can formulate rules relating to furlough in accordance with Sections 59 and 28 of the [Prisons Act 1894](#). ‘Furlough’ is defined under Clause 3(5A) of the Prisons Act, as is applicable in Maharashtra. It is distinct from ‘parole’ ([Haryana v Mohinder Singh](#) AIR 2000 SC 890 [15]). ‘Parole’ refers to the release of prisoners in response to a particular (usually emergent) situation, like the death or marriage of a loved one, or a natural calamity such as an earthquake or a flood ([Gajanan Babulal v Maharashtra](#) 2014 (2) BomCR (Cri) 544 [16]). In contrast, ‘furlough’ refers to the release of prisoners for limited periods of time, so that they may maintain their links with society outside the prison. The availability of furlough is recognised as an important way to

humanise [the] penal system and to enable the prisoner to maintain continuity with his family life and to deal with the family matters and to save him from evil effects of continuous jail life and to enable him to gain self-confidence and to maintain constructive hopes and active interest in life ([Bhikhabhai Devshi v Gujrat](#) AIR 1987 Guj 136 [28]).

For these reasons, furlough is understood to be a ‘substantial legal right’ ([Sharad Keshav Mehta v Maharashtra](#) 1989 CriLJ 681 [2]; cf Rule 17), albeit not an absolute one ([Bhikhabhai](#), [18]). While some restrictions on furlough have been upheld by courts in the past, three aspects of the amendment need to be reconsidered.

First, the amendment deprives those convicted of the following offences of their right to apply for furlough: dacoity, terrorism, mutiny against the state, kidnapping, drug smuggling, rape, rape with murder, child sexual abuse and human trafficking (Rules 4(13) and 4(18)). There is no consistency among the High Courts on whether the right to apply for furlough can be restricted based on the nature of the offence. For instance, The Bombay High Court has upheld the ineligibility of those convicted of certain drug offences under the special regime instituted by the Narcotic Drugs

and Psychotropic Substances Act 1985 on account of the seriousness of those offences [*Sheikh Salim v Maharashtra* Cri WP No. 267 of 1994 [10]]. Similarly, the Gujarat High Court has upheld a categorisation where the denial of furlough was in case of offences which 'by their very nature' indicate a criminal tendency, rather than just a criminal act ([Juvansingh Lakhubhai Jadeja v Gujarat](#) (1973) 14 GLR 104 [9]; see also *Jina Mohan v Gujarat* 1987 GLH (1) 445). The judgment distinguishes offences that are directed against 'society at large' (such as robbery) and those that are directed against 'individuals' (such as murder) ([9]). However, such a line of reasoning draws a false dichotomy and ignores that a large part of what makes any wrongdoing criminal is its *public* nature. The Delhi High Court has thus rejected the Gujarat High Court's judgment, positing that recidivism is related to the personality traits and environmental factors pertinent to the offender, rather than the offence for which she is convicted ([Dinesh Kumar v Delhi](#) 2012 CriLJ 2959 [36]).

In *Dinesh Kumar*, there were two petitioners. The first, Neeraj, had been convicted for murder and robbery. For the six years that he had spent incarcerated, no adverse finding had been made against him by the prison authorities. He had been granted parole on four occasions, and each time, he had fulfilled all the conditions of his parole. Despite his exemplary record, his application for furlough was denied. The second petitioner, Dinesh Kumar, was serving a life sentence for kidnapping. At the time of his application, he had spent over 13 years in prison (including the period of remission earned by him for good conduct) during which time, his behaviour in prison was reported to be 'unblemished and without any complaint whatsoever' ([6]). Even so, his application for furlough was denied. The reason for denial on furlough in both cases was Clause 26.4 of the Parole/Furlough Guidelines 2010. Under this provision, any person convicted of robbery, dacoity, arson, kidnapping, abduction, rape and extortion was rendered ineligible for grant of furlough. The Delhi High Court held that while the serious nature of offences might be a reason for proceeding with caution, it cannot be a ground for disqualifying people from applying for furlough altogether ([43]-[48]). It thus struck down the impugned rules in the *Dinesh Kumar* case as violating the prisoners' rights to [equality](#) and [personal liberty](#) ([49]). The reasoning of the Delhi High Court is persuasive. If anything, criminal jurisprudence would dictate that the 'graver the offence, larger the punishment and larger the punishment, more the...grant of furlough' ([Prahlaad Gajbhiye v Maharashtra](#) 1996 (1) BomCR 522 [16]). For similar reasons, the fact that those sentenced to life imprisonment until death are no longer permitted to apply for furlough under the amendment is a further basis for challenging the constitutionality of the amended rules (Rule 4(14)).

Secondly, the amendment provides that those who have been denied bail while their appeals against conviction are pending are not eligible for furlough (Rule 4(11)).

However, the Bombay High Court has already indicated that the pendency of an appeal is not a sufficient ground to deny a prisoner the right to apply for furlough ([Sharad Bhiku v Maharashtra](#) 1990 (3) BomCR 633). In this case, Sharad Bhiku was convicted for murder and sentenced to rigorous imprisonment for life. His appeal before the Bombay High Court was dismissed, and the matter was pending before the Supreme Court. In the meantime, having spent over nine years in prison, the petitioner applied for furlough under the Prisons (Bombay Furlough and Parole) Rules, 1959 (as they stood then). His application was rejected. In court, the respondent defended this decision, among other grounds, because the petitioner's appeal against the conviction was pending before the Supreme Court. This argument was rejected by the High Court. It is true that in *Sharad Bhiku* the denial of furlough was struck down because there was no rule indicating that furlough could be refused based on the pendency of an appeal. Even so, there is no policy reason to suggest that the grant of furlough, which is meant to facilitate reintegration of the offender, should be linked to the filing of an appeal. To appeal a conviction is the [right](#) of a convicted person.

Given that bail and furlough also serve independent policy objectives ([Haryana v Mohinder Singh](#) AIR 2000 SC 890 [9]), it is unacceptable that denial of one should automatically lead to ineligibility for the other. Rule 4(11) hence carves out a category of cases based on a differentia that does nothing to facilitate the objectives of having a furlough system. It is therefore *ultra vires* [Article 14](#) of the Indian Constitution, which guarantees the right to equality.

Finally, the amendment disqualifies those who 'don't have sound mental health,' unless a psychiatrist recommends their release (Rule 4(12)). Again, if the idea of furlough is to humanise incarceration, it is unclear why those with mental health issues should be excluded from this system. In addition, the amendment does not clarify what 'sound mental health' is, and how it related to mental disability. While the increasing 'medicalisation' of disability jurisprudence has often mediated the relationship between disabled people and the State, under Rule 4(12), the role of the judge is altogether displaced and usurped by the doctor. This not only ignores the frequent disagreements among experts on the boundaries of biomedical categories, but may also result in the promotion of 'reductionist views about the abilities, capacities and potential of the disabled' ([Addlakha and Mandal 2009](#), 64).

In conclusion, the latest amendment to the Prisons (Bombay Furlough and Parole) Rules 1959 makes serious inroads into the prisoners' right to furlough. In light of decided case law and current social science research, the problematic aspects of this amendment need to be urgently reviewed and remedied.

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