

Rights of prisoners and role of higher judiciary in humanizing Indian prisons: a critique

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Abstract

The prison has remained an ignored area for long time. The rights of the prisoners have also remained neglected for a very long time. Though there were various cases dealt by the India's higher judiciary relating to rights of prisoners yet the same has remained obscured as the mainstream media does not cover the news related to prisoners' rights until some celebrity is involved. In this paper, it is attempted to analyze the rights of the prisoners as recognized by the international law. The paper also analyses the role played by Indian higher judiciary in humanizing the prisons through various case laws in the context of the rights available to prisoners. This paper makes an analysis of the role of India's Higher Judiciary in making the prisons a place where a prisoner can be treated and made fit to re-enter the society after release to lead an honest life. There have been many areas of challenges wherein the Courts have contributed to its improvement through its decisions and guidelines.

Keywords: prisoners; human rights; higher Judiciary; Supreme Court of India.


Os direitos dos prisioneiros e o papel dos tribunais superiores na humanização das prisões indianas: uma crítica

Resumo

Por muito tempo, as prisões permaneceram um universo ignorado. Os direitos dos prisioneiros têm igualmente sido de longa data negligenciados. Ainda que vários casos relativos aos direitos dos prisioneiros tenham sido tratados pelos tribunais superiores da Índia, eles foram ignorados pela grande mídia, cuja cobertura das notícias relacionadas a tais direitos somente ocorre quando há celebridades envolvidas. Este artigo analisará os direitos de prisioneiros reconhecidos pelo direito internacional, bem como o papel desempenhado pelos tribunais superiores indianos na humanização das prisões, em diversas jurisprudências referentes aos direitos cabíveis. Será igualmente analisado o papel destes órgãos judiciais na transformação das prisões em um local no qual os reclusos possam ser cuidados e tornados aptos a se reintegrarem à sociedade, para terem vida honesta após a soltura. Graças às suas decisões e diretrizes, os tribunais têm contribuído em muitos aspectos para a melhoria das condições de detenção.

Palavras-chave: prisão; direitos humanos; tribunais superiores; Suprema Corte da Índia.

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Los derechos de los reclusos y el papel del poder judicial superior en la humanización de las prisiones indias: una crítica del tema

Resumen

Las prisiones han sido, durante mucho tiempo, un área ignorada y, en esa misma línea, también los derechos de los presos se han descuidado durante mucho tiempo. A pesar de que el poder judicial superior de la India ha tratado varios casos relativos a los derechos de los reclusos, la información sobre esta cuestión no ha salido a la luz, ya que los principales medios de comunicación no cubren las noticias relacionadas con los derechos de los presos sino hay alguna celebridad involucrada. En este trabajo se busca analizar los derechos de los presidiarios reconocidos por el derecho internacional. Así mismo, el documento analiza el papel desempeñado por el poder judicial superior de la India en la humanización de las prisiones a través de diversas jurisprudencias en el contexto de los derechos disponibles para los reclusos. Este artículo lleva a cabo un análisis del papel del poder judicial superior de la India a la hora de hacer de las prisiones un lugar en el que los presos reciban el debido tratamiento y preparación para su reinserción en la sociedad después de su liberación, con vistas a que puedan llevar una vida honesta. Son muchas las situaciones complejas que los Tribunales han contribuido a mejorar a través de sus decisiones y directrices.

Palabras clave: prisión; derechos humanos; poder judicial superior; Tribunal Supremo de la India.

Droits des prisonniers et rôle des instances judiciaires supérieures dans l'humanisation des prisons indiennes : une critique

Résumé

La prison est restée longtemps un domaine ignoré. Les droits des prisonniers ont également été négligés pendant très longtemps. En dépit des diverses affaires concernant les droits des prisonniers traitées par les instances judiciaires supérieures de l'Inde, elles ont été ignorées par les médias grand public, qui ne couvrent les nouvelles liées aux droits des prisonniers que lorsqu'une célébrité est impliquée. Il s'agira dans cet article d'analyser les droits des prisonniers tels que reconnus par le droit international, ainsi que le rôle joué par le pouvoir judiciaire supérieur indien dans l'humanisation des prisons à travers diverses jurisprudences liées aux droits dont doivent disposer les prisonniers. Sera également menée une analyse du rôle de ces instances judiciaires dans la transformation des prisons en un lieu où les prisonniers peuvent être soignés et rendus aptes à réintégrer la société et à mener une vie honnête après leur libération. On a vu dans de nombreux domaines les tribunaux contribuer à l'amélioration des conditions de détention par le biais de leurs décisions et directives.

Mots-clés : prison ; droits humains ; instances judiciaires supérieures ; Cour suprême de l'Inde.

囚犯权利和印度高级司法机构在监狱人性化方面的作用

摘要

长期以来,在印度,监狱是一个被人忽视的地方,囚犯的权利也一直被忽视。尽管印度高级司法机构处理过各种与囚犯权利有关的案件,但主流媒体并不报道有关囚犯权利的新闻。除非有名人卷入其中,媒体一般来说不会关注囚犯的权益。本文试图分析国际法所承认的囚犯权益,研究了印度高等司法机构在保障囚犯享有的权利的背景下通过各种判例法使监狱人性化方面发挥的作用。作者认为,印度高等司法机构在努力改善监狱环境,为囚犯提供治疗,并且促使囚犯在释放后重新进入社会,过上诚实生活等方面起了重要作用。在许多具有挑战性的领域,印度法院通过其裁定和指导方针为保护囚犯权益做出了贡献。

关键词: 监狱; 人权; 高级司法机构; 印度最高法院。

Introduction

Prison or Jail can be considered as one of the most conventional and usual penal institution for correcting prisoners awaiting trial or serving sentences (STERN, 2004). Incarceration of a person is done through a judicial order only.¹ The prison administration is considered as an integral part of criminal justice system. However, the very same institution is also considered a place for inflicting torture on its inmates.²

In a democratic country like India, the rule of law implies the public powers given to the State machinery must be exercised in a manner which is justifiable as per the legal norms of reasonableness and human dignity. Such exercise of power has to be legally valid and socially just. The same is also applicable to the prison administration. Various prison reform committee reports published have made slew of recommendations from time to time. While the first committee under Lord Macaulay advocated rigorous treatment and rejected all reforming tendencies, the subsequent committees led way for many changes. The most important of all was the report of the Indian Jail Committee, 1919-20 which, for the first time, identified and incorporated the idea of 'reformation and rehabilitation' of offenders as one of the major objectives of the prison administration. In the later phases of 1980-83, the Mulla Committee and the Krishna Iyer Committee undertook revision of laws, rules and regulations with regard to rehabilitation and a study on status of women prisoners respectively. The latter half of the twentieth century saw the concept of institutional correction which made attempts towards reformation of the prisoner and reducing criminal activity by the offenders in the future (INDIA, 2017). The conceptualization of the rights of a prisoner to be treated humanely, to create conditions which enables a dignified life to a prisoner has been an important area in the field of prison justice.

In this paper, it is attempted to analyse the rights of the prisoners as recognised by the international law. Further, the paper also analyses the role played by Indian higher

¹ The incarceration can be during the investigation (pre-trial), during the trial as well as post-conviction. The former two carry their presumption of innocence till found guilty while the latter is devoid of any such presumption as his guilt has been proved beyond reasonable doubt through a judicial process in the criminal justice system. The presumption of innocence requires that the incarceration must be minimal and therefore, the settled law says that bail is the rule and jail is exception. However, it has been highlighted in various Public Interest Litigations that the jails in India are filled with languishing under-trials who either are not granted bail and even if they have been granted bail, they cannot afford it. Even in cases of conviction, there are provisions relating to probation, parole, furlough which can be invoked to prevent the incarceration of the convict. However, even these provisions are seldom utilised due to the mistrust on the reformation theory of punishment.

² We find various instances where the custodial torture and prison atrocities are reported on regular basis. These atrocities may range from hurt, grievous hurt and killing of the inmates. The issue of custodial violence has been highlighted in one of the most infamous case of Bahgalpur blinding case.

judiciary in humanizing the prisons through various case laws in the context of the rights available to prisoners. This paper makes an analysis of the role of India's Higher Judiciary in making the prisons a place where a prisoner can be treated and made fit to re-enter the society after release to lead an honest life. There have been many areas of challenges wherein the Courts have contributed in its improvement through its decisions and guidelines. However, this paper is restricted to the analysis of three core concerns i.e. (a) women prisoners and juveniles, (b) the living conditions, prison facilities and prison wages, and (c) the conjugal rights of prisoners.

The paper is divided in various parts and sub-parts. The second part of the paper analyses the international legal mandate with respect to prison standards which are expected to be followed by the prison authorities. Third part deals with the efforts of the higher judiciary in dealing the issues of women prisoners and juveniles. This part deals with the endeavours of higher judiciary in the areas of the living conditions, prison facilities and prison wages. Lastly, attempt is made to analyse judicial attitude with respect to conjugal rights of prisoners.

Human dignity and international mandate for prison standards

Various international documents relating to human rights have set the standards for treatment of offenders and convicts. The documents dealing with civil and political rights remains the core documents relating to measures for upholding the rights of prisoners (UNITED NATIONS, 1966a) remains the core documents relating to protection of the rights of prisoners (UNITED NATIONS, 1966a, articles 9, 10 of International Covenant on Civil and Political Rights [ICCPR]). India ratified the ICCPR in 1979 which makes it mandatory to respect the provisions contained in it. Also, various covenants (UNITED NATIONS, 1966b) states that prisoners have a right to the highest attainable standard of physical and mental health (UNITED NATIONS, 2016 [the Nelson Mandela Rules]). The rules relating to treatment of prisoners (UNITED NATIONS, 2016), apart from advocating for non-discrimination on grounds of race, religion, color, sex, etc, also considered separation of the different categories of prisoners (UNITED NATIONS, 2016, rule 8). The standard minimum rules prescribe giving of punishment only when the prisoner is informed and given opportunity to defend himself (UNITED NATIONS, 2016, rule 30). It also recommends prohibition of corporal punishment and of all cruel inhuman or degrading punishments (UNITED NATIONS, 2016, rule 31).

The international law dealing with the issue of human rights provide that inherent dignity of human being is at the core of world peace and justice. This dignity cannot be compromised at any cost and should be respected by the State and other institutions without any discrimination based on race, gender, colour, religious belief etc (UNITED NATIONS, 1948 [Universal Declaration of Human Rights – UDHR], 1966a). Inherent dignity is not lost merely by the incarceration and therefore the prison system must respect the human dignity. The State is mandated to ensure that the rights which are meant to protect and respect the human dignity (UNITED NATIONS, 1966a, article 10 (1)). It is the bounden duty of the State to adopt legislative and executive measures to implement the human rights (UNITED NATIONS, 1966a, article 2).

One of the basic rights is the right to life and personal liberty. This right is inherent and the deprivation of such right can be only with procedure established by law (UNITED NATIONS, 1966a, article 6). The personal liberty cannot be curtailed by arbitrary arrests and if any arrest is made it must be brought to the notice of the judicial wing of the State for the purposes of authorization, and such authorization must be based on the procedure established by law (UNITED NATIONS, 2016, rule 7). Attempt should be made that the imprisonment is authorized as the last resort and it should be authorized only in those exceptional cases where the safety and security of the society at large cannot be ensured without incarceration, especially in cases of persons belonging to the vulnerable age group (UNITED NATIONS, 1985 [The Beijing Rules]). If the person has been detained under the judicially authorized order before the trial of the case, then every effort should be made that the trial is conducted at the earliest without undue delay (UNITED NATIONS, 1966a, article 9 (3)).

The international law mandates that the arrest and detention have to be based on the laws and proper procedure (UNITED NATIONS, 1966a, article 9 (4)) for the same is to be followed so as to exclude the scope of arbitrariness in the deprivation of life and individual liberties (UNITED NATIONS, 1948, article 9). Further, if a person is arrested by the police or any other person on any charges it must be ensured that he be brought promptly before a judicial authority to ensure the judicial scrutiny of the arrest made as necessary (UNITED NATIONS, 1966a, article 9(4)). If it is found that the arrest was not necessary under the circumstances, then the person arrested should be released after ensuring that he shall be available for the trial and receive the punishment in case of conviction. The general rule should be such which is against the incarceration pending the trial (UNITED NATIONS, 1948, article 9(3)). It is also important that the laws must ensure that if anyone is arrested in

unlawful manner then remedies against such arrests must be available in the form of compensation and disciplinary action (UNITED NATIONS, 1948, article 9(5)).

The human dignity of the prisoners is not lost merely by the fact that they have been convicted and/or incarcerated. They are still very much human beings and all the rights, except the rights which are lost directly or incidentally lost due to incarceration, remain with the inmates. So is the case with the human dignity. Therefore, the prison administration has the bounden duty not to subject the prisoners to such treatments which are considered as violative of human dignity. Thus, the cruel practices such as torture, isolation, solitary confinement etc. should not find any place in the administration of prison (UNITED NATIONS, 2016, rule 1).

The prison systems should recognize the classifications between the convicted and pre-trial prisoners (UNITED NATIONS, 1966a, article 10(2)(a)), similarly it should also ensure that the juveniles and women should be segregated from the adult male prisoners (UNITED NATIONS, 1966a, article 10(2)(b), 2016, rule 11). The prisons are meant to be a corrective institution and therefore the institutions are required to deal with the inmates in individualized manner and same treatment cannot be afforded to all types of inmates (UNITED NATIONS, 2016, rule 2(2)). If possible, every effort should be made that each individual is given a separate cell and only under the unusual and exceptional circumstances the dormitory mode of bedding and lodging should be utilized after proper arrangements of the safety and security of the inmates (UNITED NATIONS, 2016, rule, 12).

The treatment should be focused on the rehabilitation of the inmates in the society, wherever possible (UNITED NATIONS, 2016, rule 61). Further, the imprisonment being one of the harshest measures and therefore it should not be implemented in cases where the civil liabilities are involved (UNITED NATIONS, 2016, rule 11). Further, the safety and security of the prisoner is the responsibility of the prison administration and any threat to such safety and security should be dealt in the most stringent manner (UNITED NATIONS, 2016, rule 11). It is to be always kept in mind that the prison administration is not supposed to aggravate the sufferings of the inmates by inflicting unnecessarily harsh disciplinarian approach (UNITED NATIONS, 2016, rule 3). Further, the arrangements for the accommodation should be such which does not affect the health and wellbeing of the prisoners (UNITED NATIONS, 2016, rule, 13).

The prison administration cannot act in arbitrary manner and each individual in prison should be given proper rest and leisure time as well as holidays from the prison routine (UNITED NATIONS, 1948, article 24). Further, the medical attention, whenever needed.

The act of cruel and inhuman treatment is direct contravention of the right to life and human dignity and the prisoner, even when he is serving the sentence, cannot be treated as such. Even the punishments to be meted out to the prisoners must be such which respect the human dignity (UNITED NATIONS, 1948, article 5). Even the maintenance of discipline in the prison and supervision of the inmates must be in consonance with the human dignity. Excessive searches of the cell, improper timing of searches should be minimal and avoided as far as possible.

For the purposes of maintaining the discipline in the prison, the use of force should be the last resort and if an inmate is subjected to the prison disciplinary action the same should be recorded in the prisoner's profile maintained with the prison authorities. The prison personnel should be given proper training with respect to the handling of various situations without using force and it should be ensured that the police personnel should not be given the responsibility to administer the prison and a separate cadre should be established for the same (UNITED NATIONS, 2016, rule 74).

Further, the imprisonment is not equivalent to becoming of slave (UNITED NATIONS, 1948, article 4) and therefore a prisoner cannot be subjected to servitude. The punishment in the form of imprisonment cannot be of such nature which leads to forced or compulsory labour (UNITED NATIONS, 1966a, article 8, para 3(a)). Even when the law provides for the imprisonment with the hard labour it must be judicially sanctioned (UNITED NATIONS, 1966a, article 8, para 3(c)(i)) and not excessive (UNITED NATIONS, 1966a, article 8, para 3(b)).

As pointed earlier, mere imprisonment does not lead to the deprivation of inherent human dignity and the prison system is meant to ensure the reformation of the individuals and every endeavour should be made to ensure that the person incarcerated is reclaimed in the society. Family and social connections should be not snapped due to incarceration and the prison system must recognize tools which ensure that the social and familial connections remain alive (UNITED NATIONS, 1948, article 25(1)). Further, the outer world should not become an alien place to the inmate and therefore it is to be ensured that the communication with the outside world should remain intact in a reasonable manner. Therefore, access to press, freedom to obtain information through various channels such as

post, telephone etc. should be allowed without compromising the prison discipline (UNITED NATIONS, 1948, article 25(2)).

Higher judiciary in India and prison

Human rights find its place in the Indian Constitution in the form of Fundamental Rights as provided in part III. Though the Constitution does not contain specific provisions with respect to prison administration, however, the basic tenets within which the criminal justice system will operate is provided by declaring various rights under part III. Right to equality and equal protection of laws, the fundamental freedoms and the right to life and personal liberty, forms the *triveni* of the human rights. Most of the human rights derive their substance and merge in this *triveni*. In addition to these rights, Articles 20 and 22 are the specific provisions dealing with the rights which has direct nexus with the criminal justice administration.

The Courts have played a crucial role to establish a rule-of-law in India. The insistence on “fairness” in every aspect of the exercise of power by the State has been the hallmark of the judicial activism. Prisoners’ rights have also not remained untouched by the Indian higher judiciary. The higher judiciary has made an attempt to rationalize the rights of the prisoners’ while incarceration. As observed by justice Krishna Iyer, in the *Sobraj* case, a prisoner does not forfeit his Part III rights and the worth of the human person and dignity and divinity of every individual inform Articles 19 and 21 even in a prison setting (AIR 1978 SC 1514). While elaborately dealing with prisoner rights in *Sunil Batra (I)* (MANU/SC/0184/1978), the Apex Court also explained that the courts have a continuous responsibility to ensure that the prison administration does not lose sight of the constitutional purpose.

Women Prisoners and Children

Women are the most vulnerable category of prisoners as they tend to feel the impact of prison more than any other. The stigma of being imprisoned for an offence, the lack of social support and the psychological stress of being separated from their families and children affects them the most. Many of them come from a background of violence and abuse against them and then the highly aggressive and oppressive prison environment is difficult to understand and tolerate (STERN, 2004).

In *Sheela Barse* (MANU/SC/0382/1983) the plight of women prisoners subjected to custodial violence in the police lock up was brought to the notice of the Apex Court by a

letter written by a journalist, Sheela Barse. Concerns were raised with regard to the safety and security of women prisoners in police lock up and their protection against torture and ill-treatment. The Apex Court highlighted the urgent need of proper mechanism to provide legal assistance to prisoners. It also prescribed the duty of the lawyers and went on to frame certain guidelines with respect to women prisoners. These guidelines provided for exclusive lock ups for women in each area with the women constabulary. The court also asked the States to ensure that the interrogation of the women suspect must be carried out by or in the presence of female police officers.

In *State of Maharashtra v. C.K. Jain* (AIR 1990 SC 658), the Supreme Court was faced with a case concerning rape in police custody and the evidentiary value of the testimony of the victim under such circumstances. The Court made it clear that when the rape is alleged under such circumstances then the evidentiary value of the victim cannot be equated with that of an accomplice. Rather, the victim's testimony should be equated with that of an injured witness. It was observed by the court that under such circumstances where the women is in under custody and there are no cogent evidence of she falsely implicating the police personnel, then the sole testimony of the victim is sufficient to hold the accused guilty. In such situation, insisting on corroborating evidence may lead to injustice as there will be very few circumstances to corroborate.

In *Sheela Barse v. Secretary, Children's Aid Society* (1986 SCALE (2)230), the issues involved were with respect to the rights of physically and mentally disabled children and abandoned or destitute children who were lodged in prison. The court remarked that proper upbringing of the children is directly connected with the good future of the country. Each child is a national asset. It was observed by the Court that jail is not the place to keep children and it can leave a scar on the conscious of the child which may adversely affect the overall development of the child. The prison environment may lead to exposure of the children to adverse influences which may create a future of darkness for the children. The Court held that it is the duty of the State to ensure that the children do not get influenced by such exposure and the best approach of prevention is to ensure that they are kept in the safe remand homes or observation homes meant exclusively for the children. The Court also observed that the incarceration of the children should be the last resort and under such circumstances also, not with the adult prisoners. The magistrates and judges should be given special training with respect to dealing with the matters relating to children.

In addition, the adolescents who live with their mothers inside the prison walls are treated as prisoners and suffer the prison upbringing. Their health, education and childhood suffer as they stand imprisoned for no fault of their own. The juveniles or the young offenders are a target of abuse at the hands of prison administrators and the adult criminals. They become a victim of sexual crimes and brutality inside prisons which narrows the scope of their rehabilitation. The higher Judiciary, through various judgments, has provided guidelines to be followed in order to reduce the challenges faced by such prisoners.

Another landmark case on the issue of development of children is that of *R D Upadhyay v. State of A.P. & others.* (AIR 2006 SC 1946) This case dealt with the issues relating to the rights of the children who are in jails not because they have committed any offence but due to the fact that their mothers are lodged in the prison as under-trials or as convict prisoners. The Court remarked that there are a number of constitutional provisions under part III and part IV which provide for care, welfare and development of children. Apart from that, there are also a number of existing laws on the issues concerning children. India being a party to the Child Right Convention, must comply with its objective which provides that the decision making at all the levels and at all the stakeholders must be informed by the principle of best interest of the child as the primary consideration in every action (INDIA, 1950 [Constitution of India], articles 15(3),21A,23,39(e),39(f),42, 45, 46, and 47). Apart from that, there are also a number of existing laws on the issues concerning children. India being a party to the Convention on the Rights of the Child complies with its objective of best interest of the child as the primary consideration in every action concerning children. The court referred to the report made by the National Institute of Criminology and Forensic Sciences in 2002 which brought out the fact of the diverse deprivations being faced by the children in jails. The study showed the deprivations faced related to food, healthcare, accommodation, education, recreation, etc. There was no special consideration for childbearing women inmates nor were there special medical facilities. The court also referred to the reports prepared by the various State Governments and Union territories.

The Court, after referring to *Sheela Barse* (1986 SCALE (2)230) case laid down 15 guidelines which may be summarised as follows:

That provisions must be made for facilities relating to child delivery as pre- natal and postnatal care of mother and the child has to be ensured before sending a pregnant woman to jail. Proper gynaecological examination of the female prisoner found to be pregnant is to

be conducted in the Government hospital and the report with all particulars has to be sent to the Inspector General of Police.

That the child birth is to take place in prison only in exceptional cases which pose high security risk. In other cases, delivery outside prison is to be enabled for the expectant prisoner. The birth registration office must ensure that only the address of the locality is to be recorded and not that the child was born in prison. Also, the naming ritual of the children born in the prison may be carried out and the facilities for the same should be provided by the prison authority.

That such children must not be treated as under-trial or convict and they are entitled to basic facilities in the nature of food, shelter, medical care, education and recreational facilities as a matter of right. The crèche facility should be available in the prison where the children of the working prisoner can be kept under the supervision of a matron if the child is below the age of three years. Similarly, the children between the ages of three to six years must be kept in the nursery for proper upbringing. A women prisoner whose child is also with her should not be kept in any jail where the facility for the proper upbringing is not there or cannot be ensured.

That the women prisoner should be allowed to keep their child with her till the child attains the age of six years. After that the child may be given in the custody of the surrogate/foster parent or to a welfare institution as per the wishes of the mother. It has to be ensured that the child is within the same town as the mother to prevent the undue hardship. The child should be allowed to meet the mother once a week. The child has to be kept in such protective home till the mother is released or he attains the age to earn his own livelihood. In case of death of the female prisoner who has left behind a child, the District Magistrate would ensure that the child is placed in a proper institution or a responsible person for his care and maintenance.

That it is the duty of the State/UT government to ensure adequate food, clothing and medical care to the children. The clothing must suit the climatic requirements and the food must fulfil the nutritional needs of the child. It is to be ensured that the food quality is such which can provide all the required macronutrients and micronutrients.

Clean and separate utensils, drinking water and sleeping facilities are to be provided to the children and those living with their mothers. Regular medical examination and timely vaccination is also to be ensured. Further, the State has to ensure that the children are

separated from the prison environment on priority basis to prevent the adverse influence of the prison environment on the personality of the children.

The Court went on to direct the States to amend the rules of prison and other relevant laws to ensure that the directions of the Court. Further, the court also directed various stakeholders to ensure that they contribute in the conditions of the children and women prisoner.

The subject matter of *Sanjay Suri's* (AIR 1988 SC 414) petition was related to rights of the under-trial children. The case highlighted the fact that many despite the prohibition many children were being sent to jail. Not only that, but these children were also kept along with the hardened criminals and habitual offenders. This contact of the children with hardened criminals exposed them to various brutality including sodomy and other tortures.

Apart from the order relating to segregation of the children in the prison the Court passed the order directing all the magistrates to ensure that the age of the person is mentioned in the warrants of detention. Further, it was also directed by the Court that the prison officials must refuse to honour the warrant if it does not mention the age of the person to be detained. The Court also recognised the role of the society in ensuring proper facilities in the prison and observed that the Visitor's Board should consist of a cross-section of society, social activists, journalists, jurists and government officials. This will allow the stricter scrutiny of the affairs of the jail.

In *Sanat Kumar Sinha v. State of Bihar*, (1989 Patna LJR 1024) High Court of Bihar was appalled at the fact that the many children were languishing in jails for more than five years without the trial. The Court observed that the trial should have completed within one year and the failure to do so gives ample grounds to the court to quash the prosecution in deserving cases. The Court further directed that the State should ensure that the children released should be given proper education at the Government expense to ensure their upbringing in a normal environment.

In *Jay Mala v. Home Secretary, Govt. of J &K and others*, (AIR 1982 SC 1297) Justice Bhagwati observed that the power relating to preventive detention should be used sparingly, especially in cases of children. He observed that to curb the enthusiasm of the youth the State should not use the sledgehammer.

Living Conditions, Prison Facilities And Prison Wages

The approach of the higher judiciary in treating the prisoners is based on the fact that the prisoners are humans as much as any other and have all the rights to live with dignity

and not be tortured at the hands of prison administrators. Our Courts have in a number of cases upheld the constitutional rights of a prisoner which are not taken away from him just because he has been convicted. Jail is not a place to inflict ill-treatment and brutalities on a person but it is a place where a person ought to realize the fate of his ill-doings and be ready to change himself so that he can restart his life with his self-respect intact.

Before we get to know how our Judiciary has contributed in enabling prisoners to live a dignified life, we need to understand as to whether the courts can rightfully interfere in the day to day administration of Jails. Krishna Iyer J. clarified the stand in the landmark *Charles Sobraj v. Supdt. Central Jail, Tihar, New Delhi* (AIR 1978 SC 1514) case wherein it observed that although the courts are reluctant in interfering into the penal system and administration of jails, it cannot tolerate and allow the inhuman and barbaric treatment towards prisoners. The prison staff cannot inflict undue harsh treatment in the guise of discipline and security. The court observed that both “hands-off” and “take-over” theory were extreme in nature and the middle way was to intervene when the constitutional or statutory rights of a prisoner are transgressed. The court observed that the courts need to maintain a constant vigil that the content of the warrant of imprisonment are respected and the contents of the same cannot substituted, exceeded or nullified.

In *Sobraj* case the petitioner contended that intentional discrimination, barbaric and inhuman treatment was inflicted at him. The Court held that imprisonment does not spell farewell to fundamental rights. It held that “compassion wherever possible and cruelty only where inevitable is the art of correctional confinement” and that if this be the valid goal of prison justice, the Courts will not need to intervene in formal administration of prisons. The court held that the prisoner retains all his rights excepting the ones which are incidental to his confinement. The court ordered that prisoners should be treated in a humane and dignified manner. It should always be borne in mind that the confinement itself has various adverse effect on the mental and physical conditions of a prisoner.

The Court, however, did not agree with all the prayers of the petitioner with regard to the averments made by his fellow inmates and his case history. The court concluded that “the court must not rush in where the jailor fears to tread”. Justice Iyer observed that while the jailors should not be made the ‘sole sadistic arbiter of incarcerated humans’, the courts must also not be given the power to control the running of Central prisons.

Also central to the discussion in this segment is the case of *Sunil Batra-I* (MANU/SC/0184/1978) where the court held that the “...courts which sign citizens into

prisons have an onerous duty to ensure that, during detention and subject to the Constitution, freedom from torture belongs to the detenu". In this case the prisoner was kept in a quasi-solitary confinement. The Court contrasted the status of the prisoner being charged with a sentence to death and was not "under a sentence of death". Similarly, the Court reminded the prison authorities that the inmate is not been awarded a solitary confinement but that he is under statutory confinement as per the provisions of the Prison Act and Cr.P.C. The Court reiterated that rehabilitation efforts are necessary components of incarceration in the context of criminal justice system. This has been incorporated as a standard by the National Advisory Commission on Criminal Justice Standards and Goals.

The court held that the rationale of punishment is correctional and it should not be such as to undermine human dignity or wound the body and spirit of the prisoner. The prison treatment ought to be reformatory; to practise dehumanising practices is wasteful, counter-productive and irrational. It held that inhumanity cannot be masked with security; that what is banned is brutality and it will not be tolerated in any manner, be it punitive or preventive. The court held that it is permissible and legal under Section 30 (INDIA, 1894 [Prisons Act], section 30) of the Prisons Act to separate convicts liable for death sentence from the rest of the prison community during the hours when prisoners are generally locked in. The Court also justified special vigil, during day as well as night hours in case of such convicts but still the minimum privacy should be respected under such circumstances as well.

The court gave number of directions for the purpose of making the punishment more rehabilitative and the procedure more humanizing. Prisoners who are liable to sentence of death (INDIA, 1894, section 30 (1)) shall not be discriminated with respect to community amenities which are available to other prisoners, subject to reasonable regulation of prison management. However, a clear demarcation exists between the under-trials and convicts. They cannot be equated. The under-trials should be given relaxed conditions of imprisonment than convicts.

Fetters are violative of human dignity, within and without prisons. Similarly, handcuffing the accused person in transit to and from courts and the practise of forcing irons on prison inmates is illegal. It needs to be sopped barring a few cases, where it becomes a necessity. In cases where a prisoner has a tendency for violence and escape, a humanely graduated degree of iron restraint may be used after exhausting all other disciplinary alternatives. Even in such cases the grounds for imposing such harsh punishment of fetters shall be given to the victim. Further, the reasons and decision of imposing such punishment

must be mentioned in the journal and in the history ticket of the prisoner every time such punishment is inflicted. Further, the iron regimen shall not be used harshly and intervals should be allowed. Further, the fetters cannot be imposed beyond the prescribed punitive maximum time as per the rules of the prison.

The Court also provided that any punishment in violation of the prison rules should be imposed only after ensuring the previous hearing, though minimal. Further, legal aid shall be given to prisoners to seek justice from prison authorities or to challenge the decision of the court as it would be unfair if a prisoner does not have a lawyer's service because he

Also, the court prescribed that there must be very grave reasons to indulge in the practice of solitary confinement. It held that such unrelieved and constant isolation is the most abnormal environment and it is so degrading, dehumanizing and natural that it could result in insanity of the prisoner. It, being disastrous to the physical and mental health of the prisoner, is violative of Articles 20, 14 and 19 of the Constitution. It would also offend Article 21 if the prisoner is kept in total isolation as to deprive him from co-mingling and talking to a fellow prisoner. Thus, this case did the groundwork for the principles of human rights which were hoping to see the light of the day inside the stone walls of prison.

The judgment was immediately followed by another judgment by Justice Iyer in *Sunil Batra-II* (MANU/SC/0265/1979). In this judgment the Court went ahead and clarified that the punishment served by the prisoner are very specific and nothing more can be added to what is prescribed by the courts and the rules. Thus, all the rights which are not expressly taken away by expression deprivation or necessary implication, it still remains in the domain of the prisoner. Thus, all other freedoms such as to communicate with the outside world including the family members, fellow inmates, expression in any form including recreational opportunity should be made available to the prisoner in addition to the basic needs fulfilment in terms of food, clothing, medical assistance and security. Any act which can be considered against the human dignity, such as forced nudity, excessive torture and other humiliating tasks cannot be allowed to be permitted in the name of prison discipline.

The above cases inspired the line of judgments (PANDEY, 2004) in later years where the issues and questions raised were related to the dehumanizing practices being followed in the prisons. To cite a few, in *Vikram Deo Singh* (1988 Supp SCC 734) which dealt with the inhuman living conditions, ill treatment, insufficiency and bad quality of food, lack of medical attention were considered in derogation of the rights of a detained person by the Apex Court. Similarly, in *Gurudev Singh* (AIR 1992 HP 70) the court reminded the duty of

the State with respect to above matters. In *Rama Murthy* (AIR 1997 SC 1739) the court raised the concern with respect to the routine orders of prisonisation becoming a standard keeping in mind the overcrowding, delay in trial, torture, ill treatment etc. It also considered the issues relating to food, clothing, health and hygiene, jail visits and open air prisons.

Overcrowding is one of the major reasons for the dehumanization of prisoners. It is a result of the delay caused in trials. So, it can be said that delay is one of the causes which is the root cause of problem of degrading life in prisons. The issue of speedy trial as a right of prisoner was very emphatically propounded in the case of *Hussainara Khatoon* (MANU/SC/01119/1979) wherein the court addressed the case of under-trials who were charged with minor offences. These under-trial prisoners were languishing in jails for long periods even without the commencement of trial of the case registered against them. The Court directed the State Government to immediately look into the matter and dispose the cases by setting up additional courts.

Prison Wages

In *Mohammad Giasuddin* (1977 (3) SCC 287) Justice Krishna Iyer addressed the issue of prison wages and the kind of work under the umbrella subject of humane sentencing. The case in hand about a 28 years old young man. He used to work as junior assistant in the state secretariat of Andhra Pradesh. He was charged with the offence of cheating and lost his job post-conviction. The court took note of the socio-economic conditions of the man—his parents and younger siblings were financially dependent upon him and his long imprisonment would pose a burden on them. The court thus ordered a limited 18 months imprisonment though making note that this period also ought to be a healing process. The Court made the observation that healing process can be ensured only in the circumstances where the work given to the inmate provides job satisfaction—and there is no jail frustration and no further criminalisation. The Court thus directed the State Government to assign the appellant with a job which involves mental, intellectual work or a like type mixed with manual labour. It was in order to ensure that the appellant does the kind of work he is used to. The Court also directed that the appellant must be paid a 'reasonable fraction of remuneration by way of wages' for his work since unpaid work amounts to bonded labour which is violative of the fundamental right of a person.

From 1980 onwards various High Courts were faced with different issues related to payment of wages to prisoners. All the courts either had different opinion or different grounds

for similar opinion. The issue still being debatable, we can take note of various decisions and their viewpoints to address the topic. In the *Kerala Reforms* (AIR 1983 Ker 261) case, the court was of the view that compulsory labour was in contravention of the mandate of Article 23(1) if reasonable wages are not paid to the prisoner in return of the job performed. The court also referred to the provisions under Articles 41, 42, and 43 of the Constitution and observed that living wage is the essence if these Articles. The court beautifully highlighted the distinction as exist between the hard labour and free labour and held that the Penal Code only talks of the hard labour. Thus, non-payment remuneration would also amount to 'forced labour' within the meaning Article 23 (1) of the Constitution of India. The court was persuaded by the *People's Union* (AIR 1982 SC 1473) case to take the view that the prisoners are entitled to payment of fair or living wages. The court referred to the following paragraph of the above case:

[...] where a person provides labour or service to another for remuneration which is less than the minimum wage, the labour or service provided by him clearly falls within the meaning of the words 'forced labour' and attracts the condemnation of Article 23. Every person who provides labour or service to another is entitled at the least to the minimum wage and if anything less than the minimum wage is paid to him, he can complain of violation of his fundamental right under Article 23 and ask the court to direct payment of the minimum wage to him so that the breach of Article 23 may be abated.

According to the Court, the "reasonable wages" would always mean to exceed minimum wages. It also enumerated various benefits of "fair wages" such as it would make the punishment appear just and fair and result in rehabilitation of the prisoner. It would make him recognise his human-hood and preserve his self-respect. It would also help the prison authorities in maintaining discipline and the prisoners would also be induced to work.

The decisions of similar cases in the States of Gujarat, Rajasthan, Himachal Pradesh (MANU/HP/0018/1992) and Andhra Pradesh (MANU/AP/0227/1988) were all put taken note in the appeal filed in the case of *State of Gujarat v. High Court of Gujarat* (MANU/SC/0632/1998). The Court in this case overruled the judicial pronouncements of the high court. Thomas and Wadhwa JJ. recommended that "equitable wages" (and not minimum wages) be paid to the prisoners. According to them, it was neither uncivilised nor unsociable for a State to deduct the average per capita cost of food and clothing on a prisoner from the minimum wages. It directed the States to bring about legislation for that purpose.

Conjugal Rights of Prisoners

The issue of conjugal rights of prisoners was raised in the case of *Jasvir Singh & Anr v. State of Punjab & Ors.* (MANU/PH/2930/2014) decided on 29th of May, 2014 by the High Court of Punjab and Haryana. Though the Court declined to accept the prayer of the petitioner, it laid down certain directions and guidelines to be followed if such a right is to be granted. The Court observed that it is not an absolute right and is subject to caveats.

The petitioners in this case were a couple charged with kidnapping and murdering a minor. They approached the court for seeking permission to allow conjugal life temporarily for the sake of progeny. They clarified that their purpose was not personal sexual gratification and they were also open to artificial insemination. The State vehemently opposed the prayer on the plea that the Prisons Act, 1894 contained no provision to permit conjugal visitation. Further, the State was also not willing to accept the option of artificial insemination.

The court framed various issues to analyse the situation. The first question before the Court was relating to the issue that whether the right to procreate survives after the incarceration?

The Court observed that the old relieving practises of parole and furlough are backbone of penal jurisprudence and can be used to achieve the purpose of conjugal visits or procreation. The court also commented that the criminologists have delineated the aim of punishment and the growing trend is for rehabilitation and reformation. The new concept of punishment based on rehabilitation has found universal acceptability in all the civic societies which are governed by the principles of rule of law.

The court then went on to refer to the landmark cases which expanded the horizon of Article 21 like *Sunil Batra-I* wherein re-humanisation of prisoners was emphasised and visits by and to families were considered as one of the strategies. The court reiterated the scope of legislative intervention to revisit the obsolete prison laws. The HC observed that in *Sunil Batra-II*, the court had taken note of the effect of the loneliness of the prisoners and prevalence of homosexuality and sexual abuse of under-age inmates by the adult offenders. However, the issues of conjugal rights or right to procreation were not raised in these cases.

The Court in this case accepted that the right relating to conjugal visits and procreation can be understood as a component of right to live with dignity and the same can be ingrained into the Article 21 of the Constitution. Also, such right has to be subject to all the reasonable restrictions. The court made note of several relevant factors to determine in granting of such a right. The Court pointed out that good behaviour, unlikelihood of

endangering the security, peace and harmony or the social and ethical order, financial and societal security of the convict and of his/her family etc are some of the considerations which shall be taken into account while granting such right.

On the issue of whether the State ought to permit creation of facilities for the exercise of right to procreation during incarceration or not? And if so, whether all categories of convicts are entitled to such rights?

The Court held that it is sentinel for the rights of the prisoner and financial constraints cannot be a reason to turn a blind eye towards the rights of the prisoners. The State needs to frame the policy and arrange the finances for implementation of the rights. The excuse of the lack of finances cannot be justified when it comes to the implementation of the fundamental rights which tends to promote the rehabilitation measures.

The court was of the view that the spaces for conjugal visits may not be feasible within the prison itself as the prisons of India are already overcrowded. Further, the social norms and societal expectations are also not in tune with such facilities being provided within the four-walls of prison. Still, it may be introduced on trial basis in Model Jails or Open Air-Free Jails.

Ultimately the Court concluded that right to procreation survives incarceration if read along with the UDHR. Further, the court harmoniously balanced the right to procreate and incarceration and declared that there is no inherent conflict if proper context is given to the apparently conflicting views. However, such right is subject to reasonable restrictions. Ordinarily this right would be available to all convicts, unless a reasonable classification is made by the State.

The issue relating to conjugal visit came before the Madras High Court once again in *Meharaj* (H.C.P. (MD) No.365 of 2018) case. The full bench of the High Court made certain interesting remark in this judgment. Firstly, the court tried to explain the ordinary meaning of 'conjugal right' and observed that it means the privilege to the husband and wife arising from the marriage, including mutual rights of companionship. However, equating the same with the sexual relationship may not correct in all circumstances. In the present case the convict husband was already given the leave for the infertility treatment and thereafter the wife was pleading for the leave of the husband for procreation. The Court clarified that the earlier leave was already given on the grounds of the couple being issueless. The clarified that the legal system creates a difference between a law abiding person and convict and the rights of the same cannot be at same footing under all the circumstances.

Conclusion

The walls of prisons do not shut doors to the concept of rule of law which is a basic feature of our Constitution. The fact of imprisonment does not render a prisoner as a non-person deprived of his basic and fundamental rights.

The judiciary has contributed a great deal in shaping the jurisprudence of rights of prisoners. It has adopted a value oriented interpretation of constitutional provisions, statutory provisions and the international law relating to human and prisoner's rights. The Judiciary has created a passage for human dignity to enter the walls of prison to ensure prison justice. The courts came up with the interventionist approach wherein it ruled not only what the prisons ought not to do but also what they ought to do and how they ought to do things (PANDEY, 2004). The Courts have been generous in adopting the international law standards in the domestic laws.

In this paper, it was attempted to bring forth the role played by our Judiciary in humanizing the prisons through various case laws. It is pertinent to note that though the judiciary can pass guidelines and directions required to be followed, it is only through the concerted efforts of the legislature and the executive that reforms and progress could be made. There have been many improvements over the years and guidelines of Supreme Court have also been implemented in prisons. As in the case of Tihar Jail, through a new legislation, effort has been made to implement the guidelines laid down in the case of *Sunil Batra*. We can also find news on almost a daily basis like installation of CCTV and medical facilities and to improve correctional facilities. Hence, the role of Judiciary in influencing and guiding the other organs in devising new and better rules and for better implementation of those in hand has been paramount. Judiciary has done and is doing its job; it is now our turn to be more vigilant and start demanding answers which is our right in a democratic society.

References

- INDIA. *The Prisons Act*. 1894. Available at: <https://legislative.gov.in/sites/default/files/A1894-9.pdf>. Access on: Apr. 22, 2022.
- INDIA. *Constitution of India*. 1950. Available at: <https://legislative.gov.in/constitution-of-india>. Access on: Apr. 22, 2022.
- INDIA. Lok Sabha Secretariat. *Prison reforms in India*. Delhi, July 2017. Available at: http://parliamentlibraryindia.nic.in/writereaddata/Library/Reference%20Notes/Prison_reforms_in_India.pdf. Accessed on: Apr. 22, 2022.

PANDEY, Bhupendra B. Human rights of prisoners. In: VIBHUTE, K. I. (Ed.). *Criminal justice: a human rights perspective of the criminal justice process in India*. Lucknow: Eastern Book Company, 2004. p.327–335.

STERN, Vivien. Prison as punishment - time for a new approach. In: VIBHUTE, K. I. (Ed.). *Criminal justice: a human rights perspective of the criminal justice process in India*. Lucknow: Eastern Book Company, 2004. p. 286-301.

UNITED NATIONS. General Assembly. *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*: resolution / adopted by the General Assembly. A/RES/40/33, Nov. 29, 1985. Available at: <https://www.refworld.org/docid/3b00f2203c.html>. Accessed on: Apr. 22, 2022.

UNITED NATIONS. General Assembly. *Universal Declaration of Human Rights*. 217 A (III), Dec. 10, 1948. Available at: <https://www.refworld.org/docid/3ae6b3712c.html>. Accessed on: Apr. 22, 2022.

UNITED NATIONS. General Assembly. *International Covenant on Civil and Political Rights*. United Nations, Treaty Series, v. 999, p. 171, Dec. 16, 1966a. Available at: <https://www.refworld.org/docid/3ae6b3aa0.html>. Accessed on: Apr. 22, 2022.

UNITED NATIONS. General Assembly. *International Covenant on Economic, Social and Cultural Rights*. United Nations, Treaty Series, v. 993, p. 3, Dec. 16, 1966b. Available at: <https://www.refworld.org/docid/3ae6b36c0.html>. Accessed on: Apr. 22, 2022.

UNITED NATIONS. General Assembly. *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*: resolution / adopted by the General Assembly. A/RES/70/175, Jan. 8, 2016. Available at: <https://www.refworld.org/docid/5698a3a44.html>. Accessed on: Apr. 22, 2022.