



PRISONERS' DILEMMA: IS INDIA A REAL FOLLOWER OF REFORMATIVE THEORY?

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“In our world prisons are still laboratories of torture, warehouses in which human commodities are sadistically kept and where spectrums of inmates range from drift-wood juveniles to heroic dissenters”.

- V.R. Krishna Iyer (J.)

INTRODUCTION:

India, a country also known as the Golden Bird, the world's fifth largest economy,¹ and one of the emerging superpowers in the world. A country having the lengthiest written constitution ever, thereby securing every rights of its citizens, but unfortunately remains silent on the simple rights of its prisoners. On one hand, the so called law makers are striking back and again to break the conventional image and securing the rights (transgenders² being the recent one) in the parliament and contrary to it, there is no legislator who has ever talked about the rights of a prisoner.

Unlike India, England is the country with a proper legislation specifically enacted for prisoners administration, which defines and recognizes the rights of prisoners. The section 1 of that enactment³ defines the term prisoner as, any person who is kept under incarceration inside the jail because they have perform such act which is forbidden in law, thereby curtailing them to enjoy at least basic rights necessary to survive. The enactment also concerns the rights of the fellow inmates behind the bars with few basic legal rights that are inseparable, either by law. Similarly, South Africa (being one of the former colonies of Great Britain), under section 35(2)(e) of its Constitution has also recognised certain rights such as the livable conditions of detention which are in consonance with the human dignity.⁴

¹ World Economic Outlook Database, October 2019, International Monetary Fund.

² Transgender Persons (Protection of Rights) Act, 2019.

³ Prison Security Act, 1992, s 1. (United Kingdom of Great Britain).

⁴ The Constitution of the Republic of South Africa Act 106 of 1996, s 35(2)(e).

The fundamental problem in India relating to prisoners' administration is resulting into numerous kinds of human rights issues and challenges, for example; basic health issues, sanitation problems, food, custodial torture, sudden and unexplained deaths, and likewise. In order to counter these issues and challenges, it's the need of time for reformation of Indian criminal justice delivery system. Hence, the provisions related to arrest, bail, adjournment of the cases, needs to be revised with the human rights perspective of the prisoners.

In the recent past, the role of Indian Judiciary has been that of a backstop in order to deal with the situation. Time and again through various judgements and directions, the Indian Judiciary has evolved and recognised certain basic rights and responsibilities towards prisoners. But it is pertinent to note that in absence of legislation for the matter concerned, not much of those directions are compiled by the authorities concerned. The present article highlights the basic issues relating to rights and life of a prisoner in India. It further projects the prominent shortcomings of Indian Legislative Framework as far as the rights of prisoners are concerned. It provides numerous judgments of the Supreme Court affecting the rights of the prisoners. Lastly, it covers the evolution of various rights which are elementary to every prisoner are discussed with their contemporary relevance.

HISTORICAL PERSPECTIVE:

Sentence for felony does not lessen the status of a person into a human being whose rudimentary rights are subjected to the whims and fancies of prison administration system and it is high time to make laws in such a way so that the prisoners also live their life with dignity.

The Indian legislature was concerned about prisoners' basic human rights even before Independence. In the year 1894 the first enactment was passed to regulate the conditions of prisoners during their punishment period. The Prisons Act, 1894 is considered as the first step in the direction to regulate the prison system in India. Along with procedural aspects, it also talked about certain fundamental rights which are available for every human being living on this planet such as accommodation and sanitary conditions (section 4), right to have shelter and safe custody in case the prison gets over crowded (section 7), provision related to medical aid (section 24(2)), separation of prison on the basis of gender to reduce crime against women prisoner (section 27), provisions related to treatment of under-trial, civil prisoners, prisoner on parole and temporary release of prisoner (section 31 & section 35). The British India was concerned about the basic rights of prisoners and to protect the interest of the prison atmosphere. Such legislation was passed at that time and today the situation is worse in prison. During the jail visit by the author it was experienced that the condition of prison is so poor that even the prisoners are suffering for basic necessities like clean water, fresh air and hygienic food. The Indian Judiciary from time to time by taking cognizance of such serious issues has directed the legislature to form rule and regulation to minimize the impact on prisoners' health and their fundamental rights could be secured.

HUMAN RIGHTS OF PRISONERS:

Human rights are those natural rights that are inseparable even in the worst of the circumstances and are duly protected under both Municipal as well as the International law. India as a nation is signatory of various international conventions and treaties linked with human rights such as Human Declaration of Human Rights which states that, “No one shall be subject to torture or cruel, inhuman or degrading treatment of punishment”⁵.

A complete preservation of Human Rights of citizens is an illusion in today’s era, unless the same is sustained under a systematic and codified umbrella by the law makers. Various International Organizations are worried about the rights of Migrants and Prisoners of War but, none of them are concerned about the Prisoners who are living the life of animals inside the four walls.

Being an age-long principle that public order and morality are considered as the essence of any nation and those who try to create chaos of any nature, must be punished under the appropriate statute and as per the procedure established by law. However, despite being subjected to any kind of punishment the personal liberty expressly provided for in the Constitution cannot be negated.⁶ Thus, the personal liberty perspective works as a limitation on the power of a state,⁷ to ensure that the state does not make any such laws which are arbitrary in nature, thereby creating a threat to personal liberty of a person, including their dignity and privacy and depriving them of certain rudimentary rights that are inherent to human beings.⁸

Considering Art. 21 of Indian Constitution which guarantees the right of personal liberty and thereby prohibits any inhuman, cruel or degrading treatment to any person whether (s)he is a national or foreigner.⁹ Emphasizing on the extended connotation of ‘Life’ given by Field J., “life means more than mere animal existence” thereby making them applicable to the prisoners as well. The Supreme Court of India, by elucidating Art. 21 of Indian Constitution, has developed human rights jurisprudence for the protection and preservation of prisoners. In the case of *State of A.P. v. Challa Ramkrishna Reddy*,¹⁰ the apex court of India has held that, “even though a law restricts freedom of a prisoner or a person under-trial, they are still human beings and (s)he enjoys all the rights conferred under Part III of Indian Constitution.” Also remembering the words of J. Marshall that “a prisoner does not shed his basic Constitutional rights at the prison gate and the imposition of any serious punishment within the prison system requires procedural safeguard,”¹¹ it seems pertinent to out shadow the responsibility of legislators and policy makers to take care of this serious issue.

The various freedoms as provided under Art. 19 of the Indian Constitution may also be curtailed down as per the procedure established by law and the same cannot be enjoyed further owing to the very nature they

⁵ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 1.

⁶ Mirjan Damaska, Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study, (1972) 121 University of Pennsylvania Law Review 506, 575–77.

⁷ *Miranda v. Arizona*, 384 US 436, 439 (1966) (Supreme Court).

⁸ Vol. 1 Jain M.P., Indian Constitutional Law, 5th Edition, Wadhwa and Company, Nagpur, 2003, p.1295.

⁹ The Constitution of India, art 21.

¹⁰ *State of A.P. v. Challa Ramkrishna Reddy* AIR 2000 SC 3083.

¹¹ *Charles Wolff v. McDonnell*, 418 U.S. 539 (1974) (Supreme Court).

hold. However certain freedoms like the freedom of speech and expression,¹² freedom to become a member of an association¹³ and likewise, are considered as inseparable.

THE ROLE OF JUDICIARY:

The Indian judicial system has time and again through various matters presented before it, has interpreted and secured certain rights that are enshrined under the Constitution of India which has direct implication to the problem of prisoners' administration in India. The Apex Court of India has had the opportunity to recognise and protect certain rights as rudimentary in nature and are embodied in the criminal administration system through various cases presented before it. Some of the rights are:

1. Right to have Free Legal Aid,¹⁴ it is recognised as a beneficial legislation from the perspective of those who cannot afford the fees of Counsel to defend their case;
2. Right to Fair Hearing and Speedy Trial,¹⁵ it is the duty of the State to provide fair hearing and speedy trial, as there are thousands of cases pending before various courts in India, which being the primary reason for higher occupancy rate in prison;
3. Right against cruel and unusual punishment,¹⁶ is very prevalent in almost every prison in India and shows the poor quality of administrative functioning;
4. Equality before law and equal protection of law,¹⁷ is a secured right under part III of Indian Constitution. The right also covers right to fair trial,¹⁸ to trammel various incidents that thrive in the shadow of justice by the prison authorities and by the police. (The recent case of Hyderabad encounter is still an unsolved mystery that the encounter is real or there are chances of mis-happening on the part of Police which violated the right against custodial violence and death in police lock-ups or encounters);¹⁹
5. Right to live with human dignity.²⁰ Mere animal existence in prison violates the right conferred under Art. 21 of Indian Constitution, including the contours of the right to live with human dignity;²¹
6. Right to reasonable wages in prison,²² is also governed by the provisions of Minimum Wages Act, 1947²³ and various reports published after the surveys conducted by various NGOs and government bodies shows that the prison is the place where the prisoners are not even getting the minimum wages after the hard labour.

¹² The Constitution of India, art 19(1)(a).

¹³ The Constitution of India, art 19(1)(c).

¹⁴ M.H. Hoskot v. State of Maharashtra, (1978) 3 SCC 544.

¹⁵ Hussainara Khatoon v. Home Secretary, State of Bihar, (1980) 1 SCC 81.

¹⁶ Jagmohan Singh v. State of U.P. (1973) AIR 947 (SC).

¹⁷ The Constitution of India, art 21.

¹⁸ Rattiram v. State of M.P., (2012) 4 SCC 516.

¹⁹ D.K. Basu v. State of W.B., (1997) 1 SCC 416.

²⁰ Jeeja Ghosh v. Union of India, (2016) 7 SCC 761.

²¹ Jeeja Ghosh v. Union of India, (2016) 7 SCC 761.

²² People's Union for Democratic Rights v. Union of India, AIR 1982 SC 1473.

²³ The Minimum Wages Act, 1947(Act No. 11 of 1947).

RIGHT TO HAVE SPEEDY TRIAL:

The Indian judicial system is primarily known for its justice oriented approach and its impartiality. The biggest problem in Indian Judicial System is the justice delivery system. As said by the eminent jurist of India late Nani A. Palkhivala, “If I were asked to mention the greatest drawback of the administration of Justice in India today I would say it is delay in the disposal of cases.”²⁴ As far as the interest of justice is concerned (either to the accused or to the victim), the early disposal of criminal litigations is of utmost importance.²⁵

The right to have speedy disposal of cases is considered as the fundamental right guaranteed under Art. 21 of Indian Constitution. However, in reality the situation is farfetched to be achieved. Being a civilized nation and having recognised various procedural laws related to disposal of cases, it is indigenous that every person including both a victim and an accused, enjoys at least some basic dignified liberty. The Constitution of India imposes a great responsibility upon the judicial system to impart justice. Though the Indian Constitution, in no express provision provides for a right to speedy trial as such, but has very well recognised it through an extensive interpretation of Art. 21 and has held in various judgements, that the right to speedy trial is to be considered as part and parcel of Art. 21. The right is made available at all the stages of the criminal adjudication process, starting from investigation, to inquiry, trial, appeal and finally revision.²⁶ Emphasising on the term “procedure established by law”²⁷ it is interpreted as a procedure, which is prescribed by law for a person whose liberty is taken from him, and that procedure under the article cannot be considered as ‘reasonable, fair and just’ unless it ensures a speedy justice delivery trial for ascertain the of guilt of the accused.²⁸ In the judgment of *Hussainara Khatoon (IV) v. Home Secretary, State of Bihar*,²⁹ the apex court has observed that, “no procedure which doesn't ensure a reasonable quick trial be regarded as ‘reasonable, fair and just’ and will be contravention of Article 21 if the Constitution and hence is not valid by law.”

Considering the statistical perspective also, the total number of prisons in India is around 1,412 having the total average capacity of 3,80,876. On the other hand, the number of prisoners is more than 4,33,003, thereby creating the occupancy rate of around 113.7%.³⁰ Also, the number of convicted prisoners is only close to 1,35,683 are convicted, and around 2,93,058 are the under-trial prisoners, the rest are detainees. This shows the status of overcrowded prisons in India. If the concerned court disposes of the case on time, it will do justice to the victims. In this way, the correct occupancy rate can also be decreased and the money of the state which is invested on the under-trial prisoner can be used more beneficially.

Speedy justice delivery mechanism is considered as one of the paramount principle of a fair judicial system. The said principle cannot be neglected as delayed trial of the under-trial prisoners means denial

²⁴ Abhay Valmi, The Hindu Daily News Paper, December 15, 2018.

²⁵ B.K. Arora, Law of Speedy Trial in India, (II edition) 2005, p.71.

²⁶ Raj Deo Sharma v. state of Bihar, (1998) 7 SCC 507.

²⁷ The Constitution of India, art 21.

²⁸ Maneka Gandhi v. Union of India, (1978) 2 SCR 621.

²⁹ Hussainara Khatoon (n 14).

³⁰ National Crime Records Bureau (Ministry of Home Affairs) Government of India, Prison Statistics India 2016

of justice to them.³¹ The concept of speedy justice was first ever discussed in the age old Magna Carta. Justice Krishna Iyer, in the matter of *Babu Singh v. State of Uttar Pradesh*,³² stated “*the Indian legal system even in grave matters suffers from slow motion syndrome which is toxic to the right to have fair and speedy trial. Speedy justice is a component of social justice since from a criminal case all the whole society is afflicted in a sense as the criminal should be punished in a reasonable time and the innocent should be exonerated from the clutches of criminal procedure*”. The supreme court of India in the case *Hussainara Khatoon(II) v. Home Secretary. State of Bihar*³³ has observed that “the plight of under-trial prisoners who were languishing in jail for a long period without a trial and hence the court directed the state Government to release forthwith the under-trial prisoners on their personal bonds as an exceptional measure.”

In another case *Kadra Pahadiya v. State of Bihar*,³⁴ the apex court highlighted that the speedy trial is a fundamental right and commented against the cases of the several under-trial prisoners who were languishing in jail for eight and more years without a proper trial. Right to have speedy trials in the modern era is getting recognised every day. However, the justice delivery system is surrounded with many lacunas which are causing such delays. The biggest problem with the Indian Judicial is the huge number of pending cases and because of that the judiciary is over burdened and almost every judge has more than 30 cases to hear every day. The Judge case ratio is also another big reason for delay in delivering the judgment. Though judicial independence is considered as a boon for the judiciary and due to which the judges need not work under any influence, but the very same independence is becoming the reason for delay in cases. The judges, being not answerable to anyone, so they consider the court as their personal office and thereby delay occurs. In addition to it the investigation agencies also take time to present the case before the court, filing of charge sheet, investigation and other technical formalities which ultimately leads to a big hurdle in the justice delivery system.

The Bhopal Gas leak Tragedy is the best example to show how the police machinery works. More than 30 years have passed and it took around 25 years for the victim to get justice. More than 15000 people lost their lives. Prof. (Dr.) Madhava Menon the father of modern legal education in India, also stated that, “*If police tends to become lawless, the very foundation of democracy will be in jeopardy, development will be subverted and countries integrity compromised*”.³⁵

³¹ Dr. K.I. Vibhute, *Criminal Justice: A Human Rights Perspective of the Criminal Justice Process in India*, (I edition) 2004, p.131.

³² *Babu Singh v. State of Uttar Pradesh* (1978) 1 SCC 579.

³³ *Hussainara Khatoon* (n 14).

³⁴ *Kadra Pahadiya v. State of Bihar* (1981) AIR 939 (SC).

³⁵ N. R. Madhava Menon, *A Training Manual for Police on Human Rights*, Human Rights Centre 1997, NLSIU Publication Centre, Bangalore, P .172.

FREE LEGAL-AID AS FUNDAMENTAL RIGHT:

The Right to Free Legal Aid is not explicitly available as a fundamental right to an accused person. An accused who is charged with a bailable offence, generally does not apply for bail owing to their financial status. Being not able to bear the financial expenses that are implied in a court case. Such expenses include but are not limited to court fees, fees of an advocate and other paper works. Both central as well as state government are provided with a constitutional mandate under Art. 39-A to facilitate the poor, needy, under-trial and the accused, with free legal aid to protect their interest against injustice and to protect them under constitutional and statutory regulations. Similar is the case with the South African Government, which has also enacted legislations which secure the rights of the inmates and under trial Prisoner by providing them the right to confer with a legal advisor.³⁶

Art. 22(1) of Indian Constitution mandates that no person shall be deprived of legal assistance and also post Maneka Gandhi judgment,³⁷ the Indian Judiciary has unambiguously held that in Criminal proceedings and trial the legal assistance can be understood as a core concomitant of Art. 21.³⁸ The Principle of 'reasonable, fair and just' is the very foundation of the justice delivery system. The same principles are implied in the right to life and personal liberty under Art. 21 of the Constitution. Thus any denial of free legal services to the poor accused person or under-trial prisoners would definitely vitiate the principle.

The apex court of India in the case *Hussainara Khatoon v. Home Secretary, State of Bihar*,³⁹ while interpreting Art. 39-A stated that, "the right to free legal services is clearly an essential ingress of reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Art. 21." Also, in the case *Suk Das v. Union Territory of Arunachal Pradesh*,⁴⁰ the apex court of India held that "failure to provide free legal aid to an accused at the State's cost would vitiate the trial," the court further added that "no application is needed on behalf of accused relating to appointment of counsel but it is the court who has responsibility to arrange a competent counsel for the accused." The court set aside the conviction of the accused on the ground that he was not provided with proper legal aid at the time of his trial and thus there was violation of Art. 21 of Constitution of India.

The Indian Judiciary has always followed a liberal approach while interpreting Free Legal Aid within the ambit of Art. 21. The outcome of this liberal attitude is revolutionary in nature. Earlier, the right of free legal aid which was available to an accused person/under-trial only at the instance of judicial trial, is now being enjoyed even at the time when the case is first presented before the magistrate in order to apply for bail.

³⁶ Correctional Services Act No. 111 OF 1998, s 17, (South Africa).

³⁷ Maneka Gandhi (n 27).

³⁸ Maneka Gandhi (n 27).

³⁹ Hussainara Khatoon (n 14).

⁴⁰ Suk Das v. Union Territory of Arunachal Pradesh, (1986) 2 SCC 401.

The National Legal Services Authority (NALSA) is a governmental entity, duly constituted under the Legal Services Authorities Act, 1987 having a vested power to protect the right to have Free Legal-Aid available to the economically weaker section of the society including women & children, person belonging to ST and SC caste, victim(s) of illegal trafficking, person of unsound mind, victim(s) of mass disaster, any person with annual income less than Nine Thousand Rupees or as decided by State Government.⁴¹

However, the list is exhaustive in nature, unfortunately there is no express provision for the person(s) who does not belong to the aforementioned list, in order to claim their right to Free Legal-Aid. Although it is necessary to have a special provision for the marginalised section of the society, the law should also protect others who are facing Criminal charges. Thereby implicating a urgent need for special provision/legislation to treat every person on equal parameters.

The State Government on the other hand, is under the statutory obligation to provide a legal counsel to an accused if he/she is financially incapable of bearing the necessary legal expenses related to hiring an advocate to present him/her before the court,⁴² and it is also the responsibility of the concerned State Government to pay off all the expenses including those incurred during the trial of the accused. Also, if the right to appeal is available in any matter, the State Government has an added obligation to arrange a counsel who represents the accused before the court of law so that he/she has a fair and equitable stand in the case.

PROTECTION AGAINST CUSTODIAL TORTURE:

The relationship between a prisoner and human rights is always unpredictable. The definition of the term “Torture” is yet to arrive India in much more legal sense. However, the Judiciary being the all-time savior, has made an initiative to define not all but major aspects of the term torture as such. The Amnesty International (an Internationally recognized NGO) in its report has cited that more than 100 countries have already sanctioned torture in Prison by the concerned prison authority.⁴³ In addition to it, another report states that around 894 judicial custody deaths and approximately 74 deaths under police custody were reported in 2017-2018.⁴⁴ International institutions are very pertinent against torture inside the prison and right against torture is protected by customary International law as “Jus cogens” which supplant every treaty and convention.⁴⁵

⁴¹ Legal Services Authorities Act 1987, s 12.

⁴² Code of Criminal Procedure, 1973, s 304.

⁴³ 'Stop Torture' (Amnesty.org, 2019), < <https://www.amnesty.org/en/get-involved/stop-torture/> >

⁴⁴ Amnesty International Report 2017/18, 'The State of the Worlds Human Rights.

< <https://www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF> >

⁴⁵ Human Rights Watch, 'The Legal Prohibition Against Torture' (Human rights watch, 1 June 2004).

The term 'Torture', though not exhaustively defined anywhere, includes inflicting immense physical and psychological/mental suffering on a human to get some information by giving physical or mental pain.⁴⁶ The Judiciary has interpreted the word torture as synonymous with the darker side of the human civilization.⁴⁷ Indian judicial system is against the third degree Torture in police custody and also the Torture against the prisoner by the jail authority. The Indian Judicial system has now turned into reformatory theory and the jail authorities are instructed not to use unnecessary force against the prisoners including the under-trial also.

In various Judgments the Hon'ble Supreme Court of India held that, in addition to that torture by forced iron immobilization-that is the complaint here-stands the peril of being shot down as unreasonable, arbitrary and is perilously near unconstitutionality. In this sense, the courts which passes an order of imprisonment are under an obligation to ensure that subject to the Constitution, freedom from torture belongs to the detenus during the detention.⁴⁸ The prison authority sometimes goes beyond the punishment awarded by the Court of Law which constitutes human degradation.

Torture in any form is inhuman, degrading and offensive to human dignity and it constitutes an inroad into the right to life and thus it is prohibited under Art. 21 of the Constitution, for no law authorizes and no procedure permits torture or cruelty, inhuman or degrading treatment,⁴⁹ and torture is used by the authorities over under trial or accused to collect various information. Even though the outcome could be right but the inhumane treatment to reach that conclusion is never a way. In *T.V. Vatheeswaran v. state of Tamil Nadu*,⁵⁰ the Apex Court of India rightly pointed out that the prisoner has every right secured under article 14, Art. 16 and Art. 21 of Indian Constitution and protection against torture is secured by interpretation of Art. 21. It is pertinent to note that the right to life and the right to liberty are of foremost importance in a democratic form of government as stated under Art. 21 of Indian constitution and, therefore, any form of torture would violate the right to life, is prohibited by Art. 21 of the Constitution.⁵¹

Custodial violence nowadays is like a routine in India, every day the situation is getting worse.⁵² Back in the year 1997, India signed the Convention against Torture or Other Cruel, Inhuman, or Degrading Treatment or punishment (U.N.C.A.T.),⁵³ but till date no such law has been passed by Indian Parliament. In the year 2008, the 273rd report submitted by Law Commission Report of India⁵⁴ recommends the Government to ratify U.N.C.A.T. which makes the government obligated to make such laws to protect the accused. Thereafter "Prevention of Torture Bill, 2017" was proposed before the lower house of Parliament

⁴⁶ R S Saini, 'Custodial Torture in law and practice with reference to India' (1994) 36 Journal of the Indian Law Institute.

⁴⁷ M.H. Hoskot (n 13).

⁴⁸ Jagmohan Singh (n 15).

⁴⁹ Francis Coralie Mullin v. Administrator, Union Territory of Delhi and Ors, (1981) 2 SCR 516.

⁵⁰ AIR 1983 SC 361.

⁵¹ Ashwani Kumar v. Union of India (UOI) and Ors, (2019) 2,SCC 636.

⁵² National Human Rights Commission, India 'Annual Report 2016-17'.

⁵³ Convention against Torture or Other Cruel, Inhuman, or Degrading Treatment or punishment, December 10, 1984 United Nations Treaty series vol. 1465 at. 85.

< <https://treaties.un.org/doc/Publication/UNTS/Volume%201465/volume-1465-I-24841-English.pdf> >

⁵⁴ "Implementation of 'United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment' Through Legislation" (Government of India) at 273.

< <http://www.bareactslive.com/LCR/lc273.htm> >

but till date no such law is made and implemented which shows the delay on the part of legislature and if there is delay on the part of legislature to pass the foresaid legislation under reformatory theory, few amendments are also needed in Police Act, 1861 to stop police and restrict them to violate such Fundamental Rights as secured under part III of Indian Constitution.

RIGHT TO REASONABLE WAGES IN PRISON:

World leaders are also of the view that, “*it is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones*”⁵⁵. The prisons are considered as reformatory centres for those who are causing any risk to the harmony of the society and hence are secluded. The main aim of a prison labourer is to engage in some activity and generate some earnings so that after completion of their reformatory journey which is in the form of a punishment, the prisoner could manage to earn for his/her livelihood. It is a Fundamental Right of every individual to have at least minimum wages if not fair wages,⁵⁶ and it is pertinent to note that every human being also includes those who are inside the prison.

Initially, prisoners’ are considered as a liability on the State. Thereby, the concept of payment of wages suffered huge opposition. However, in the present day India no such situation exists. The payment of wage is even considered as motivation to prisoners, as monetary reward would develop interest and if the jail authorities are not giving at least minimum wages to the work they perform then it would amount to forced labour, which is prohibited under Art. 23 of Indian Constitution.⁵⁷

The Labourers are classified under three categories for distribution of labour on the basis of works i.e. (1) Skilled workers, those prisoner who are skilled either physically or mentally. (2) Semi-skilled workers, those workers engaged on a task which cannot be performed by untrained hands but which can be executed with some training and practice but does not require any strict standard of precision. (3) Unskilled Worker, those workers engaged on a kind of work which does not require any special skill or training to complete the task.⁵⁸

The Apex Court is also of the opinion that all the prisoners of different categories in all the jails are entitled to be paid reasonable wages for the work they are called upon to do either in the jails or outside.⁵⁹ The power to decide the wages is given in the hands of the State Government and it is the duty of the State

⁵⁵ Nelson Mandela, Nelson Mandela Rules: United Nation Standard Minimum Rules for the Treatment of Prisoners, 2015, <https://www.unodc.org/documents/justice-and-prison-reform/16-05081_E_rollup_Ebook.pdf >

⁵⁶ The Constitution of India, art 21.

⁵⁷ People's Union for Democratic rights and ors. v. Union of India & Ors., (1982)AIR 1473 (SC).

⁵⁸ Model Prison Manual for the Superintendence and Management of Prisons in India, Bureau of Police Research and Development Ministry of Home Affairs Government of India, New Delhi, 2003.

< <https://bprd.nic.in/WriteReadData/userfiles/file/5230647148-Model%20Prison%20Manual.pdf> >

⁵⁹ Gurdev Singh and Ors. etc. vs. State of Himachal Pradesh and Ors., (1992) HP AIR 70 .

Government to insure that the prisoners will get the reasonable wages as per the provisions of the Minimum Wages Act, 1984.⁶⁰

Moreover, no prisoner who is sentenced to rigorous imprisonment can conceivably complain, that the jail authorities have committed an offence under the provisions of IPC,⁶¹ by forcing him to work during his term of imprisonment. Accordingly, the work assigned to a prisoner can only be imposed if (s)he is sentenced to rigorous imprisonment. Meaning thereby that neither the under-trials/detainees with simple imprisonment nor the person held under preventive detention can be asked to do manual work during their detention period.⁶²

There have been instances where even the jail staff were unaware of the fact that an under-trial person cannot be subjected to hard labour. Compulsory labour is considered to be the contemporary form of slavery and unfortunately it was found in full practice inside the prisons.⁶³ As per the Code of Criminal Procedure, 1973 the person who is negligent in such matters should be punished according to procedure established by law for taking work from them which is unlawful and amounts to compulsory labour.⁶⁴

The Indian Penal Code, 1860 has specifically categorized imprisonment in two categories i.e. rigorous imprisonment and simple imprisonment. The former can be explained as imprisonment within the time period of which a person can be subjected to hard compulsory labour. The provision under IPC dealing with the concept hard labour,⁶⁵ are in violation of Fundamental Rights protected under part III of Indian Constitution. The then Chief Justice of Kerala H.C. P. Subramonian Poti highlighted the question whether the force labour inside the prison operates as a valid exception to Art. 23(1)?. The court by highlighting the main issue before the court held that the hard labour falls under the exceptional circumstances until reasonable wages are given by the authorities.⁶⁶ Similarly, the Himachal Pradesh High Court relied on the Kerala Prison Reform case and held that, section 53 of Indian Penal Code, 1860 is intra vires to the Constitution only when the prisoners receive payment of wages and hard work which should be reasonable as decided by the state otherwise violates the mandate of Art. 23 of Indian Constitution.⁶⁷

PRISONER AND ITS FUNDAMENTAL RIGHTS:

The Indian judiciary time and again has stressed that mere conviction cannot denude the convict of all fundamental rights. (S)he, as an impact of incarceration, can be deprived of few fundamental freedoms like move freely in the territory of state or to practice profession.⁶⁸ The protection of prisoners' fundamental right is not just a national but also an internationally recognized issue. Even the United

⁶⁰ Minimum Wages Act, 1984, s 4.

⁶¹ Indian Penal Code, 1960, s 374.

⁶² State of Gujarat and Ors. v. Hon'ble High Court of Gujarat, (1998) AIR 3164 (SC).

⁶³ State of Gujarat and Ors. v. Hon'ble High Court of Gujarat, (1998) AIR 3164 (SC).

⁶⁴ Code of Criminal Procedure, 1973, s 376.

⁶⁵ Indian Penal Code, 1860, s 53.

⁶⁶ In Re Prison Reform Enhancement of Wages of Prisoners, (1983) AIR 26 (Kerala).

⁶⁷ Gurudev Singh v. Himachal Pradesh, (1992) AIR 76 (H.P.), at 86-87.

⁶⁸ Bhuvan Mohan Patnaik v. State of Andhra Pradesh, (1974) AIR 2092 (SC).

Nations General Assembly has also adopted basic principles for treatment of Prisoners through resolution 45/111 of December 14, 1990,⁶⁹ thereby showing the concern towards the prisoners.

Law against restraint like handcuffs, chains is also considered as basic human right by the Apex Court of India,⁷⁰ and this shows the active participation of Judiciary in securing the dignity of human life. In *Kadra Pahadiya v. State of Bihar*,⁷¹ The Supreme Court of India criticized the concept of leg irons in case of under-trial prisoners as it was against the fundamental rights and other prison regulations. The court conceded this as an inhuman act. Human dignity is covered under Art. 21 of Indian Constitution, and it is pertinent to note that the right to have a healthy environment and medical checkup are very fundamental for survival. In a suo moto writ the Hon'ble HC of Gujarat issues direction to the Government that all district as well as central jail should have pathology lab, expert doctor including nurses and equipped with ICCU.⁷² The last stage of any prisoner's journey inside a prison is walking out from the prison's main gate freely after completing his/her punishment. The right to release on a due date is neglected many times due to one another reasons by the prison authority.

COVID-19 AND INDIAN PRISON SYSTEM:

The Novel CoronaVirus emerged as the Global Pandemic, having the greatest impact on the 21st century. Prisons are among those places in the world where social distancing is a myth. The only reason for this is the overcrowded prisons. The Apex Court of India took the Suo motu cognisance upon the spread of Covid-19 in prisons, and after considering the seriousness of the matter has proposed certain guidelines during this Pandemic time.⁷³ The Apex Court has directed all the states and union territories to take considerable measures to protect the interest of prisoners.⁷⁴

The situations in the prisons are getting worse day by day and some strict steps are needed to stop the spread of virus within the four walls of prison. In order to deal with the issue the Ministry of Home Affairs of Government of India issued some mandatory notices dated 12th March 2020 and on 02nd May 2020 to implement various precautionary measures in Prison during COVID-19 Pandemic.⁷⁵ The Precautionary measures includes:-

- a. Social distancing should be followed strictly;
- b. Segregation cells should be maintained;
- c. Security of inmates should be considered strictly;
- d. Proper Health monitoring;

⁶⁹ Basic Principles for the Treatment of Prisoners, resolution 45/111 of 14 Dec. 1990.

⁷⁰ Prem Shankar Shukla v. Delhi Administration, (1980) AIR 1535 (SC).

⁷¹ (1981) AIR 939(SC).

⁷² Gujarat Smachar, Ahmadabad, 20th May, 2005.

⁷³ In Re: Contagion of Covid-19 Virus in Prisons, Suo Motu Writ Petition (C) No. 1/2020.

⁷⁴ Suo motu writ petition civil no.1/2020. In the order dated 23.03.2020, the court has directed the State/UT Governments to constitute a High-Powered Committee (HPC) to determine the category of prisoners to be released on parole or interim bail to address the risk of transmission of COVID-19 especially due to overcrowding in prisons.

⁷⁵ Advisory 'Precautionary measures in Prisons in view of COVID-19 Corona virus scenario' March 12, 2020. Ministry of Home affairs, Government of India, No. 17013/17/2020-PR.

- e. Minimum movement of prisoners in prisons should be followed;
- f. Careful screening of all inmates shall be conducted and suspected one should be tested for Covid-19;
- g. The inmates returning from parole or furlough should be lodged in separate cell and shall be regularly screened;
- h. If there is large outbreak of covid-19 in a prison, a temporary prison should be created;
- i. The staffs should be properly masked, face-shielded, use gloves, thermals scanning equipment and sanitizers and whole building shall be sanitized daily;
- j. Group activities should be completely stopped; and
- k. Gloves, eye protection and face masks should be used while physically handling the prisoners.

The conditions of Indian Prisons are far beyond the international standards. The factors like health and hygiene are only in black and white but no practical application of regulations due one and other reason.

CONCLUSION AND RECOMMENDATIONS:

The Indian legal system is now changing and adopting the reformatory theory of Punishment. The framework of Indian Constitution has been broadened with the interpretation of Part III by Indian legal arena. Jail Authorities in India are suffering to manage overcrowded prisons due to pending cases of under trials in lower courts, different High Courts of state and even the Apex court of the Nation. The situation inside the prisons is also a concern as the inhuman treatment by prison authorities on various occasions inside is very awful. The related authority should have to consider the seriousness of matters such as inhuman treatment, exploitation and forced labour imposed on an under-trial and also the unpleasant environment to survive by any living of a civilized state.

The Supreme Court of India being the Apex Court describes Prison as rehabilitation⁷⁶ and reformatory centers, but in reality the conditions are as worst as hell and a reasonable prudent man will never term it as a reformatory center. The sole behind the bars are also like other humans with feelings and should get more than mere animal existence.⁷⁷ The atmosphere inside the prison is polluted with evil vibes and if someone is willing to reform him/herself the evil sprite will not allow them. The society is very dynamic and if ill-will gets any chance to grow there, it should be considered as a great failure of Indian Justice delivery system and of those who are responsible to maintain the status quo of the society should be held responsible for not fulfilling their duty and at present time the prisons are the place where maximum reform is needed. The law is to protect society from crime. The criminals are also human beings with natural rights given to them by the Grundnorm and these rights are inseparable in any situation. Therefore, it is the responsibility of the legislature to make laws in order to protect the interest of prisoners inside and outside the prison. Also, it is the duty of executive to implement those laws and an obligation upon the

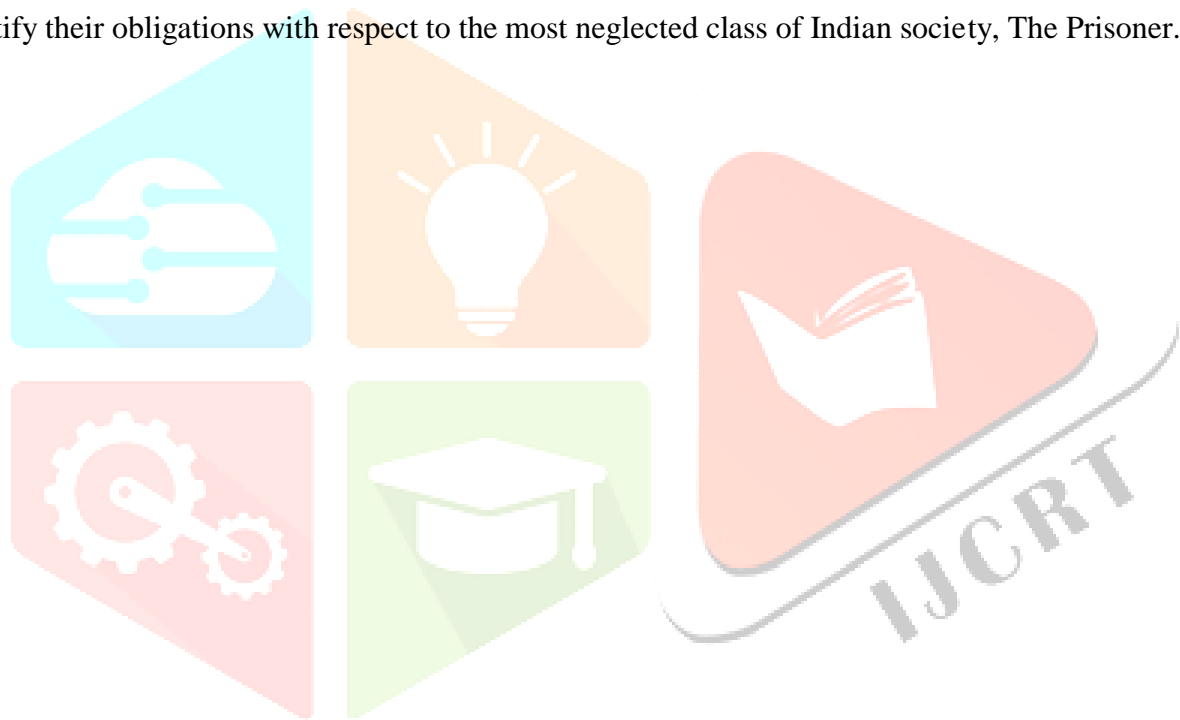
⁷⁶ Hiralal Mallick v. State of Bihar, AIR 1977 SC 2237.

⁷⁷ The People of the state of Illinois v. Frank A. Manna, 421 N.E.2d 542 (Ill. App. Ct. 1981) (Illinois Appellate Court- Second District).

judiciary to apply them to the cases arising out of breach of laws so that India achieve the status of a country which follows the rule of Equality before the law and Equal protection of Law, and every prisoner get his Right to Life along with Personal Liberty.

During the time of Pandemic state is taking care of every citizen but not much thought has been given by the state for hundreds and thousands of prisoners and staff that were tested positive of coronavirus only in Arthur Road Central Jail Mumbai. One inmate from Rohini Jail through Video said that, “Please release us on Parole otherwise ensure safety in the prison and if any of us die, the compensatory money should be handed over to our family.”⁷⁸

The Indian system is at the urge where codified legislation is of high importance and no such legislation even discussed to protect the interest of Indian Prisoners. Enactment with respect to prison and inmates is of great necessity in this dynamic world so that the scheme of Indian Constitution and intention of drafters cannot get defeated and the three pillars of India democracy i.e. Judiciary, Legislative and Executive can justify their obligations with respect to the most neglected class of Indian society, The Prisoner.



⁷⁸ The Hindu Daily News Paper, COVID-19 impact: inmates of two city prisons complain of ‘poor’ conditions, March 30, 2020. < <https://www.thehindu.com/news/cities/Delhi/covid-19-impact-inmates-of-two-city-prisons-complain-of-poor-conditions/article31212498.ece> >