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EFFECTIVE AND HUMANE RESTORATION OF WOMEN PRISONERS IN INDIA THROUGH THE PRISM OF JUDICIAL PRONOUNCEMENTS: AN ANALYSIS

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Abstract

The Indian Penal System is considered to be a mechanism which follows retributive justice and focusses on providing the punishment to the accused for the violation of the laws. It has often been condemned for not taking into account the impact of the offence on a victim and providing complete justice. Over the recent years, the Indian Criminal Justice system has evolved and included certain provisions which are based on the principles of restorative and corrective justice. The provisions for compounding of offences under the Code of Criminal Procedure, 1973 at the discretion of the victim and those providing for alternative forms of justice for children under the Juvenile Justice Act, 2015 are welcome steps towards the incorporation of restorative and reformatory justice in the Indian Penal system. The process of reformation in India is often hindered by the poor conditions, mistrials, custodial torture, overcrowding and other issues faced by the Indian prisons. Women are the disadvantaged class and bear additional brunt of the unfavourable conditions which hampers the process of their reintegration into the society. The paper studies the concept of restorative justice, its application and utility in India. The paper further scrutinizes the celebrated judicial pronouncements related to restorative justice and rights of women in prison. It traces the development of the journey of reformation and rehabilitation of women prisoners in India through the lens of landmark judgments delivered by the Supreme Court of India. It further discusses the existing voids in the judicial process which act as a stumbling block in achieving the goal of effective and humane restoration of women prisoners in India. The author will also propose relevant suggestions for upgrading the Indian Penal System on the path of restorative justice in prisons.

Keywords: Restorative Justice, Women Prisoners, Humane Treatment, Indian Penal System, Criminal Justice, Judiciary, Indian Prison System.

1. Introduction

Restorative Justice has been defined as, “a process to involve, to the extent possible, those who have a stake in a specific offence and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”¹ The Preamble to the Indian Constitution promotes the concepts of Justice and Fraternity in India. In order to maintain the same, it is essential that the relationships between individuals in society remain harmonious. When the occurrence of crime takes place, the harmonious nature of these relationships is disturbed and it creates conflict in the society. This is where the restorative justice can be useful.

The aim of restorative justice is to reinstate the scenario to its original position before the offence or act which caused damage to the victim had taken place. It may not be possible to completely restore the previous conditions. However, efforts must be made to provide restitution to the maximum extent possible. The concept is based upon “*Creative Restitution*” which has been developed by **Dr. Albert Eglash**, a Psychologist. The main characteristics of this system are “*humanity*” and “*accountability*”. The offenders perform the dual task of providing compensation to the victims for their wrongdoings and also spending time with other offenders, encouraging them to change.² This method seeks to restore the damage caused to the victim, while also allowing for the offender to have a new lease of life by reforming themselves and reintegrating into the society.

The interpretation of the term restorative justice has varied meanings across different countries and legal systems. It has been described as “*communication justice*”, “*making amends*”, “*positive justice*” and “*community justice*.” The “**United Nations Economic and Social Council**” has adopted the “*Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*.” The main role of these principles is to prescribe the legal standards for restorative justice. Restorative Justice has been adopted by countries in different formats. One of the methods include “*Victim-Offender Mediation (VMO)*.” In this method, the needs of the victim are addressed and the offender is held accountable for their offences. There has also been introduction of some projects related to victim, awareness, empathy where they seek to understand the impact of crimes of victims by the means of role-plays and experimental experiences.

Restitution has been prevalent in the civil law systems since times immemorial. However, when it came to the criminal law system, the offenders were punished for their crimes.³ “*Creative Restitution*” promoted the application of restitution to criminal cases as well. The concept of restorative justice is inclusive and involves all the stakeholders, namely –victim, state, judiciary,

¹ NV PARANJPE, CRIMINOLOGY AND PENOLOGY WITH VICTIMOLOGY 3 (Central Law Publications, 16th edn., 2014).

² Luara Mirsky, *Albert Eglash and Creative Restitution: A Precursor to Restorative Practices*, IIRP NEWS (Dec. 3, 2003). available at: <https://www.iirp.edu/news/albert-eglash-and-creative-restitution-a-precursor-to-restorative-practices> (Last visited on April 12, 2020).

³ Karan Shubh, *Restorative Justice & Weaker Section: Role of Judiciary in the Perspective of Delinquency Prevention*, LEGAL SERVICES INDIA (April 12, 2020).

and offender. The opinions of all the stakeholders are taken into account when discussing the consequences of the actions of the offender. They work together to decide a plan of action that benefits all the parties involved and provides justice to the victim.⁴It is based on the view that the crime is not committed against the society in general but against people, relationships and emotions. It seeks to provide a way for the victim and the offender to sit together and discuss the mutual feelings and find the best way to settle the matter amicably.

Retributive Justice seeks to establish blame and punish the offender for their wrongdoing. It considers the crime as one against the whole society and the process can often lead to ignorance of the plight of the victim. On the other hand, restorative justice is a problem-solving approach which recognizes the needs of the victims as well. The need to consider the impact of an offence on the victim had been observed by Justice Wadhwa in the case of *State of Gujarat v. Hon'ble High Court of Gujarat*⁵ where he iterated that, “*criminal justice would look hollow if justice is not done to the victim of the crime. A victim of crime cannot be a ‘forgotten man’ in the criminal justice system. It is he who has suffered the most. His family is ruined particularly in case of death and other bodily injuries. An honor which is lost or life which is snuffed out cannot be recompensed but then compensation will at least provide some solace.*” This shows that the role of a criminal justice system is merely limited to punishing the offender but also to provide compensation and restitution to the victim in every possible way.

2. The Concept of Effective Restoration and Reformation in the Indian Penal System

The Indian Criminal Justice System does not have provisions for life imprisonment and looks at prisons as alternatives where the criminals can reform and reintegrate themselves into the society. There are only a few offences which are classified as the “*rarest of the rare cases*” where no mercy is shown to the offender and they are sentenced to life imprisonment or capital punishment.

However, the Indian Prison systems suffers from a number of issues like overcrowding, poor sanitary and hygiene conditions, lack of food, ineffective reformation programs and more. The situation was also noted by former Supreme Court *Justice Krishnaswamy Iyer*, in the case of *Rakesh Kaushik v. Superintendent Central Jail*⁶ where he raised the question, “*Is a prison term in Tihar Jail a post graduate course in crime?*” It was further held in this case that, “*A court sentence does not deprive the prisoner of his fundamental rights. To reform and deter the criminal and to work out that process geared to social defence, the convict is cast into prison-not to make him more hardened, more brutal, more cunning and dangerous to society. No sentencing judge, high and low should hang his helpless head in frustration and humiliation because institutional alternations and personnel perversions have sullied and stultified the justice of his*

⁴ John Braithwaite, *The Fundamentals of Restorative justice* (Anita Jowitt, Tess Newton eds.); A KIND OF MENDING 35 (ANU Press, 2010).

⁵ *State of Gujarat v. Hon'ble High Court of Gujarat*, (1998) 7 SCC 392.

⁶ *Rakesh Kaushik v. Superintendent Central Jail*, (1980) Supp. SCC 183.

sentence.” In the case of *Sunil Batra v. Delhi Administration*,⁷ the Supreme Court held that, “the penological purpose of sentence was importantly, reformatory even though deterrent too.”

The Indian Courts have attempted to maintain a balance between the social impact of the crime and the rights of the victim and the accused. In the case of *Gian Singh v. State of Punjab*,⁸ the Constitution bench of the Supreme Court observed that the exercise of the compounding powers should be done by the courts after analysing the social impact of the crime in question, vis-à-vis its individual impact, when determining if its power to quash or compound such offences is to be exercised. It was further held in this case that, “The High Court must refrain from quashing criminal proceedings if the offence involved is a heinous and serious offence or when public interest is involved.”

In addition to this, compromise was observed to be a *sine qua non* in modern societies in order to maintain peace and harmony by the Punjab and Haryana High Court in the case of *State of Gujarat v. Raghavbhai Vashrambhai*⁹. Restorative Justice was observed to be a reflection of the process of meditation in the Criminal Justice system by the Delhi High Court. The process leads to the involvement of the victim in the justice delivery mechanism which is a welcome step.¹⁰ The retributive system of justice primarily focussing on the law and its violation by the accused which diverts the attention from the victim to the accused.

However, the conditions of the prisons make the reformatory process all the more difficult with umpteen problems. This leads to the creation of a negative environment inside the prisons which hinders the process of reformation.¹¹

3. The Approach of Restorative Justice in the Indian Penal System

The Indian Criminal Justice system is primarily adversarial in nature. However, even it has the existence of some of the characteristics of the restorative justice system. An accused is presumed to be innocent until proven guilty for most offences except in few cases where the burden of proof for innocence is placed upon the accused. The onus is upon the prosecution to prove that the accused is guilty. This shows that the law is made to protect the accused from societal agony before he is even proven guilty for the offence committed. The prevalence of this practice has been summed up perfectly by *Blackstone* who wrote, “Better that ten guilty person’s escape than that one innocent should suffer.”

The Supreme Court of India in the landmark judgment of *State of Rajasthan vs. Balchand alias Baliya*¹² laid down that, “Bail is a rule, jail is an exception.” In the case of *Superintendent and*

⁷ Sunil Batra v. Delhi Administration, (1979) 1 S.C.R. 393.

⁸ Gian Singh v. State of Punjab, (2012) 10 SCC 303.

⁹ State of Gujarat v. Raghavbhai Vashrambhai, (2003) 1 GLR 205.

¹⁰ Anupam Sharma v. NCT of Delhi, (2008) 146 DLT 497.

¹¹ Akanksha Marwah, *Shifting of Penological Trends towards Rehabilitation of Offender*, 2(2) HNLU JLSS 13 (2017).

¹² State of Rajasthan vs. Balchand alias Baliya, AIR 1977 2447.

*Remembrance of Legal Affairs v. Amiya Kumar Roy Chowdary*¹³ it was held that, “the law of bails, has to dovetail two conflicting demands, namely, on one hand, the requirements of society for being shielded from the hazards of being exposed to the misadventures of a person alleged to have committed a crime; and on the other, the fundamental canon of criminal jurisprudence viz., the presumption of innocence of an accused till he is found guilty.”

Therefore, the Indian Courts have sought to maintain a balance between the rights of the accused and the right of the society to be protected from the ill actions of the accused. The principle that has been followed by the Indian Courts is to grant bail in most instances. It is only in cases where there is a compelling reason for the court not to grant bail to the accused. This is generally done in cases where there is a possibility of the accused interfering with the investigation, causing harm to the victim or being a threat to the society in general. The Criminal Procedure Code of India, 1973 has also been drafted to facilitate the same principles. **Section 436** of the Code provides that a person who is arrested for a bailable offence under the Indian Penal Code, 1860, is to be granted bail as a right unless the facts and circumstances of the case indicate otherwise. **Section 437** of the Code provides that in case of a non-bailable offence, no right to bail resides with the accused. It is up to the courts to decide whether bail should be granted or not. The Judicial decisions have indicated that the general principle of allowing bail in most of the cases and the denial of bail is based on the facts and circumstances of the case where the court is compelled to do so.

The Courts have allowed the convicts to be released on Bail even in cases like the Gujarat Communal Riots. The bail was provided at the time when an appeal against their conviction was pending. They were asked to do mandatory community service in the state of Madhya Pradesh.¹⁴ This shows that even the accused in some of the most gruesome cases are given the chance to reform and be reintegrated into the society.

The proviso to **Section 437(1)** of the CrPC provides that, “the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.” The Court has been granted with a discretionary power under this section which empowers the court to release a woman on bail irrespective of the offence committed by her. It is in compliance with the provisions under Article 15 of the Indian Constitution which allows the Indian State to make special provisions related to women and children. However, the Courts have ensured that they do not use this provision too liberally. For example, in the case of *Jollyamma Joseph v. State of Kerala*,¹⁵ the petitioner was the prime accused for serial murders. The Kerala High Court refused the bail to the accused simply on the grounds that she is a woman. The Court stated that the petitioner was involved in six murder cases where she had used a similar modus operandi. On careful consideration of the facts and circumstances of the case, the Court held that the accused is not entitled to such a benefit.

¹³ Superintendent and Remembrance of Legal Affairs v. Amiya Kumar Roy Chowdary, (1974) ILR 1 CAL 304.

¹⁴ *Godhra riot convicts arrive in Indore for community service*, TIMES OF INDIA (Feb. 11, 2020).

¹⁵ *Jollyamma Joseph v. State of Kerala*, (2020) SCC OnLine Ker 3265.

4. The State of Women in Indian Prisons

Women in prison face multiple challenges of being a convict and of being a woman. The prison facilities do not always cater to the needs of women and the rehabilitation opportunities available to them are very limited. In India, the Courts took cognizance of the situation of women in prisons and issued directives to ensure that women are provided with humane treatment inside the prisons. However, despite these efforts, women struggle in prison with lack of access to education, denial of clean sanitation facilities, lack of necessary skill to earn money and incidences of custodial violence. In addition to this, they do not have the faculty to develop the necessary social skills to assimilate themselves into the society. This hinders their ability to reintegrate themselves into the society. The social stigma associated with the women prisoners stops their growth as the members of the society. In addition to this, women prisoners often belong to the lower strata of the society and have already dealt with abuse and trauma throughout their life. The ill treatment inside the prisons can further trigger the damage and negatively impact their psychological well-being.

In the year of 2016, the number of women who were arrested in India for crimes under the Indian Penal Code (IPC) and Special and Local Laws (SLL) were 3,34,865.¹⁶ This figure has stayed nearly the same since 2000 hovering between the 3-3.5 Lakhs mark. The data until 2015 shows that women constitute 4.3% of the total number of persons in jail in India.¹⁷ There has been a growth in the percentage of women prisoners over the years in India with a rise from 3.9% in 2005 to 4.3% in 2015. At a global level too, the rate of increase of female prison population is faster than that of male population. There only 31 jails for women prisoners. Therefore, a large number of women prisoners are imprisoned in the women's enclosures of the general prisons. The data from the NCRB shows that out of 19,913 women inmates, only 3,652 are lodged in women's jails, making up for just 18 per cent of women inmates.¹⁸ The majority of women in prison are between the age group of 30-50 years (50.5%).¹⁹

Women also suffer from overcrowding in prisons, especially due to lack of women prisons in the country. The highest overcrowding exists in the State of Uttarakhand at over 170% which is followed by Chhattisgarh at 136% and UP at 127%.²⁰ The 2018 report by the Ministry of Women and Child Development also mentions that, "*overcrowding is one of the key problems plaguing Indian prisons.*" This also translates into lack of sanitary and hygiene facilities, lack of privacy and mental trauma faced by the prisoners. The children of the prisoners also have to live in the same unhygienic conditions which increases their health risk as well and also affects their overall development. There is also the lack of specialized services for women which also leads to

¹⁶ National Crime Records Bureau, *Crime in India* (2016).

¹⁷ National Crime Records Bureau, *Prison Statistics India* (2015).

¹⁸ National Crime Records Bureau, *Prison Statistics India* (2019).

¹⁹ Ministry of Women and Child Development Government of India, *Women In Prisons India* (June 5, 2018). available at: <https://wcd.nic.in/sites/default/files/Prison%20Report%20Compiled.pdf>.

²⁰ Deeptiman Tiwary, *20,000 women in jails, only 18% in women-only jails*, INDIAN EXPRESS (May 5, 2021). available at <https://indianexpress.com/article/india/20000-women-in-jails-only-18-in-women-only-jails-6575583/>.

no proper classification amongst prisoners in women prisons. As a consequence of this, women who are imprisoned for petty offences are grouped together with women offenders who have been incarcerated for serious offences. They have to face the same level of security and scrutiny which is extremely unfair.

The lack of prisons for women means that they are often incarcerated far away from their homes. This makes it difficult for them to have visitors even from their own family. In addition to this, unlike males, women are also regarded as morally deviant in addition to legally deviant.²¹ This perception often leads to their abandonment by their own families. In her book, *“Women ‘Inside’: Prison Voices From India”*, Rani Dhavan Shankardas wrote:

“Prisons may classify prisoners according to their legal offences but a prison’s social grouping, especially in a women’s prison, is not all about legal offences: it’s about them having crossed the barriers of social and moral taboos set out over the ages by custom, tradition and often religion, and are expected to be a stronger sanction than the law.”

The women are also vulnerable to sexual abuse, torture and violence by the officials, fellow prisoners and the prison staff when in police custody, judicial custody or lodged inside prisons. They are often stripped off their dignity and made to live in deplorable living conditions. One of the worst forms of custodial violence is the rape of women prisoners by the staff in the prison. Asian Centre for Human Rights (ACHR) stated that *“custodial rape remains one of the worst forms of torture perpetrated on women by law enforcement personnel and a number of custodial rapes of women take place at regular intervals.”*

The consequences which arise out of the mistreatment towards women prisoners are significant. They affect the women physically and emotionally. The common symptoms which are experienced by the women prisoners include fear, shame, anger, anxiety attacks, nightmares and flashbacks. Moreover, the conditions inside prisons are such that they lack any form of privacy. They are also vulnerable to physical injuries like abrasions, cuts, broken bones etc. Moreover, the incidents of sexual assault or rape can result in impregnation which will force them to bear the child of the abuser or can force them into using unsafe abortion methods. This can result in the development of chronic health issues, a tendency for substance abuse and mental health problems. Therefore, a woman faces much more than merely the punishment she has been sentenced to. Such events inhibits the ability of a woman to reintegrate herself into the society. Moreover, it can lead to the creation of criminal tendencies once released from prison as they are likely to seek revenge on the perpetrators.²²

5. Judicial Trends Associated with the Effective Restoration of Women Prisoners

²¹Jahnavi Sen, *Buzz of a Mosquito... But With the Sound of Grief: The Lives of India’s Women Prisoners*, THE WIRE (FEB. 20, 2021).

²² Just Detention International, *Sexual Abuse in Prison: A Global Human Rights Crisis* (May 6, 2020).
https://justdetention.org/wp-content/uploads/2015/11/International_Summary_English.pdf.

There has been a lot of criticism for the formal system of justice at the national as well as the international level. This has necessitated countries across the world to look for alternative responses to crimes. These methods are often based on the resolution of conflicts between the parties that are involved. The Indian Supreme Court has also issued directions to establish “*open prisons*”. A number of orders have been passed by the Indian Courts which provide for the reformation of inmates, prevention of over-crowding, the appointment of counsellors, facilities for telephone facilities and video conferencing so that they can remain in contact with their lawyers and family members. Therefore, the Indian Courts have been highly proactive with respect to women prisoners rights.

India being one of the world’s largest democracies, has been expected to have a codified law for the rights of the prisoners. However, till date no such law exists which deals with the rights of the prisoners and regulates their well-being and conduct while they are imprisoned. Therefore, the Courts have come to the forefront and provided the due recognition to the rights of the women convicts keeping in mind the principles envisioned in the Indian Constitution and the Principles of Natural Justice. The lack of legislations on the subject has not deterred the courts from setting precedents to uphold the rights of the women prisoners. In addition to this, they have also provided guidelines time and again to provide directions to the authorities for the effective and humane restoration of women prisoners in India.

5.1.Right To Humane Treatment

In the case of *Sunil Batra (II) v. Delhi Administration*,²³ the Supreme Court stated that the Fundamental Rights are available to prisoners even in custody, even though there may be a shrinkage in the Fundamental Rights. The Court rejected the hands-off doctrine and ruled that, “*Fundamental rights do not flee the person as he enters the prison although they may suffer shrinkage necessitated by incarceration.*” It also dealt strictly with the concept of solitary confinement and stated that a prisoner should only be sentenced to solitary confinement in exceptional cases where the actions of the prisoners necessitate such action. It further acknowledged the impact of solitary confinement on the mental health of the prisoners and termed the practice as dehumanizing and against the spirit of the Indian Constitution.

It further pointed out that, “*Prisoners are peculiarly and doubly handicapped. For one thing, most prisoners belong to the weaker segment, in poverty, literacy, social station and the like. Secondly, the prison house is a walled-off world which is incommunicado for the human world, with the result that the bonded inmates are invisible, their voices inaudible, their injustices unheeded. So it is imperative, as implicit in Article 21, that life or liberty, shall not be kept in suspended animation or congealed into animal existence without the freshening flow of fair procedure.*”

This decision was significant for women prisoners as they are the most disadvantaged group inside the prison system since they bear the brunt of being the discriminated gender and a convict

²³ Sunil Batra (II) v. Delhi Administration, (1980) 3 SCC 488.

at the same time. The women belonging to lower castes or belonging from impoverished backgrounds face additional difficulties in prisons. The plight of the disadvantaged groups had been recognized by the Court in this judgment. It further understood the impact of isolation and strongly voiced its opinion against the practice of solitary confinement.

5.2.Right To Legal Aid And Documents For Appeal

In the case of *M.H. Hoskot v. State of Maharashtra*,²⁴. In the instant case, the prisoner was unable to receive the copy of the judgment for a lengthy period of three years. The Supreme Court laid down important principles in order to ensure that a prisoner has adequate access to justice.

“(1) Courts shall forthwith furnish a free transcript of the judgement when sentencing a person to a prison term.

(2) In the event of any such copy being sent to the jail authorities for delivery to the prisoner by the appellate, revisional or other court, the official concerned shall with quick dispatch get it delivered to the sentenced person and obtained an acknowledgement thereof from him. (3) Where the prisoner seeks to file an appeal or revision, every facility for the exercise of that right shall be made available by the jail administration.

(4) Where the prisoner is disabled from engaging a lawyer, on reasonable grounds such as indigence or incommunicado situation, the court shall, if the circumstances of the case, the gravity of the sentence, and the ends of justice so require, assign a competent counsel for the prisoner’s defence, provided the party does not object to that lawyer.

(5) The State which prosecuted the person and set in motion the process which deprived him of his liberty shall pay to assigned counsel such sum as the court may equitably fix”.

Women prisoners are often unaware about their rights and are denied free legal aid. This judgment is significant as it ensures that they are provided with proper assistance and the relevant documentation for unfettered access to justice.

5.3.Right To Privacy

The Supreme Court stated that a prisoner should not be subjected to methods and techniques for investigation against their consent if they lead to an unwarranted intrusion into the personal liberty of the individual in the case of *Rohit Shekha v. N.D. Tiwari*.²⁵ This right is not absolute and there are certain cases which involve narcotic substances, manslaughter, murder or sexual offences where compulsory testing needs to be permitted. The Court has sought to attain a balance between public policy and privacy of an individual. A prisoner can be allowed to have a

²⁴ M.H. Hoskot v. State of Maharashtra, (1978) 3 SCC 544.

²⁵ Rohit Shekha v. N.D. Tiwari, FAO (OS) No. 547/2011.

private unmonitored meeting with their spouse in case a grave situation arises as had been held in the case of *Rahmath Nisha v. Additional Director General of Prisoner and Others*.²⁶

5.4.Right To A Speedy Trial

An accused is entitled to a speedy trial as a Fundamental Right as held by the Apex Court in the case of *A.R. Antulay v.R.S. Nayak &Anr.*²⁷The right cannot be denied merely on the ground that the same was not demanded. It further observed that the time for the trial cannot be fixed as it can vary due to a number of factors which include the nature of the offence, number of accused, number of witnesses, the amount of workload on the court, It further stated that if the circumstances indicate that the convict's Right to a Speedy Trial has been violated, the conviction charges against the convict should be quashed.

5.5.Right Against Inhumane Treatment

In the case of *Christian Community Welfare Council of India v. Government of Maharashtra*²⁸, the Bombay High Court held that, "A woman should not be arrested after sunset and before sunrise and only in the presence of lady constables." The State Government was directed to set up a committee with the role to make special provisions for female detainees. This right is significant as it plays a major role in protecting female prisoners from sexual abuse and custodial violence.

In the case of *Nandani Satpathy v. P.L. Dani*,²⁹the Court held, "the right not to make self-incriminatory statements should be widely interpreted to cover the pre-trial stage of police investigation

5.6.Right Against Torture

The case of *Sheela Barse v. State of Maharashtra*³⁰ arose out of a letter written by the petitioner to the Supreme Court by a journalist in which she highlighted the pitiable condition of the women prisoners that had been interviewed by her. The letter was treated as a Writ Petition by the Apex Court and it took cognizance of the issue. The Court directed social workers to make reports which dealt with the ill treatment of female prisoners and issued guidelines to protect the women prisoners. The guidelines provided that:

- The lockups for male and female prisoners must be different.
- Female prisoners should only be interrogated in the presence of a female police officer.
- They should be educated about their right to hire a lawyer and be provided with free legal aid if they do not have the means to do so.

²⁶ *Rahmath Nisha v. Additional Director General of Prisoner and Others*, WP(MD) No.12488 of 2019.

²⁷ *A.R. Antulay v. R.S. Nayak &Anr*, (1988) AIR 1531.

²⁸ *Christian Community Welfare Council of India v. Government of Maharashtra*, 1996(1) BOM CR 70.

²⁹ *Nandani Satpathy v. P.L.Dani*, AIR 1978 SC 1025.

³⁰ *Sheela Barse v. State of Maharashtra*, AIR 1983 S.C. 378.

- A female suspect is only to be checked by a female police officer as provided under Section 160(1) of the CrPC.
- A women cannot be arrested after sunset and before sunrise with the exception of compelling circumstances which necessitate the same.

The court concluded by stating that every person has the right to live their life with dignity, even if they are in prison. Their Fundamental Rights under Article 20 and Article 21 of the Constitution are not suspended even in prison and they are entitled to just treatment and humane living conditions.

A letter was written to the court by the executive chairman of the legal aid services expressing concern over the increasing number of custodial deaths in India. It was treated as a writ petition by the Supreme Court of Indian and it delivered the landmark judgment in the case of ***D.K. Basu v. State of West Bengal***.³¹ The Court observed the lack of an effective mechanism in dealing with cases related to Custodial Torture. The Court directed that every procedure for arrest needs to be followed until specific legal provisions were made to prevent any form of torture, cruel, inhuman or degrading treatment which is in violation of Article 21 of the Constitution. It further provided that the victim of torture can seek compensation for the harm suffered and the quantum for the same is dependent upon the specific facts and circumstances of each case. It also pointed out the inadequacy of the punishment for the offence. It further stated that the Parliament should amend the statutory provisions or formulate a new legislation in light of the growing incidences of custodial violence and torture. There were some general guidelines that had been issued by the Supreme Court in the case.

- When conducting interrogation of the accused, the police officers must not use third-degree methods of torture.
- The police officers should be trained to respect the basic human values and the working environment and training should be such that the basic rights of the prisoners are not violated.
- In order to extract information even from hardened criminals, a balanced approach should be followed.
- The arrestee should be informed of their basic rights immediately after the arrest takes place.

5.7.Right To Knowledge

In a significant judgment related to the rights of the prisoners to access books in prison, the Bombay High Court took cognizance of a case where the number of books allowed to the inmates had been limited to twelve. The High Court in the case of ***Prabhakar Pandurang***

³¹ D.K. Basuv. State of West Bengal, AIR 1997 SC 610.

*Sanzgiri v.State Of Maharashtra*³² ruled that the decision could not be taken by the Superintendent and disallowed the same. It further added, “*all the restraints on liberty, that no knowledge, learning and pursuit of happiness is the most irksome and least justifiable. Improvement of mind cannot be thwarted but for exceptional and just circumstances. It is well known that books of education and universal praise have been written in prison cells.*”

In the case of *R. Rajagopal v. State Of T.N*³³ the Supreme Court held that permission to publish the autobiography of a prisoner cannot be denied on the ground that it could cause defamation to prominent IAS and IPS officers.

These cases are significant since they are pivotal efforts for the rehabilitation and reintegration of prisoners into the society. If women prisoners are also provided with the means to educate themselves and express their thoughts through words, it would ensure their assimilation back into the mainstream society, post the completion of the sentence.

5.8.Rights Related To Children

The decision of the Supreme Court in the case of *R.D Upadhyay v. State of Andhra Pradesh & Others*³⁴ was a landmark decision related to the rights of women prisoners in jails. It acknowledged the positive steps that had been taken in this regard. It noted that “*a lot more is required to be done in the States and Union Territories for looking after the interest of the children.*” It took a report from all the states and Union Territories with regards to the special facilities provided to women and children in prison. It also took note of the study conducted by “**The National Institute of Criminology and Forensic Sciences**” of women prisoners in the Indian prisons. After analysing the reports and the studies, the court issued the following guidelines:

- “*A child shall not be treated as an undertrial/convict while in jail with his/her mother. Such a child is entitled to food, shelter, medical care, clothing, education and recreational facilities as a matter of right.*”
- “*Pregnancy:*
 - *Before sending a woman who is pregnant to a jail, the concerned authorities must ensure that jail in question has the basic minimum facilities for child delivery as well as for providing pre- natal and post-natal care for both, the mother and the child.*
 - *When a woman prisoner is found or suspected to be pregnant at the time of her admission or at any time thereafter, the lady Medical Officer shall report the fact to the superintendent. As soon as possible, arrangement shall be made to get such prisoner*

³² Prabhakar Pandurang Sanzgiri v. State Of Maharashtra, 1986 (1) BomCR 272.

³³ R. Rajagopal v. State Of T.N., (1995) AIR 264.

³⁴ R.D Upadhyay v State of Andhra Pradesh & Others, AIR 2006 SC 1946.

medically examined at the female wing of the District Government Hospital for ascertaining the state of her health, pregnancy, duration of pregnancy, probable date of delivery and so on.

- *Gynaecological examination of female prisoners shall be performed in the District Government Hospital. Proper pre-natal and post-natal care shall be provided to the prisoner as per medical advice.”*
- *A female prisoner is allowed to keep her children in prison with her until they turn the age of six years. Once the child has crossed that age, the child shall be handed over to a suitable surrogate with the consent of their mother or be sent to an institution run by the Social Welfare Department. The child shall be kept as close to the prison as possible in order to reduce hardships due to distance on both the mother and the child. The children will be allowed to meet their mother at least once a week.*

The states were directed to implement these measures and make appropriate changes in order to incorporate them. The guidelines laid down by the Court acknowledge the right of a mother with her child irrespective of the circumstances. Motherly love and affection can be a crucial motivating factor for a woman prisoner to gear up her efforts to re-integrate into the society and provide a better living to her child. Moreover, children should not be deprived of motherly love, care and affection at an early age. The decision is extremely progressive and a watershed moment in the Indian Criminal Justice System.

Therefore, it can be seen that the decisions by the Indian Courts have played a significant role in protecting the rights of women prisoners. The approach and perspective of the Indian Judiciary is based on reformation, restoration and rehabilitation of women prisoners into the mainstream society. They have shown sensitivity towards, the specific needs of the women prisoners and also to the social stigma they face by the virtue of their gender. In the absence of any specific legislation on the subject, the Courts have played the vital role of the law.

6. National Instruments for the Effective Restoration of Women Prisoners in India

6.1. Prevention Of Torture Bill, 2016

The **Law Commission of India** submitted a draft law titled *The Prevention of Torture Bill, 2017*. The aim of the draft law was to curb the menace of custodial torture and have a deterrent effect on public officials who indulge in such acts. It suggested the insertion of a new **Section 114 B** into the Evidence Act, 1872 which as per the Law commission, “*will ensure that in case a person in police custody sustains injuries, it is presumed that those injuries have been inflicted by the police, and the burden of proof shall lie on the authority concerned to explain such injury.*” The panel further stated that, “*While dealing with the plea of sovereign immunity, the*

courts will have to bear in mind that it is the citizens who are entitled to fundamental rights, and not the agents of the state.” These recommendations have not been implemented till date but can be of significant use to counter the menace of Custodial Torture.

6.2. Model Prison Manual, 2016

The Manual has been adopted by the **Ministry of Home Affairs (MHA)**. The primary aim of the manual is to bring about uniformity in laws, rules and regulation regarding the functioning of the Indian Prisons. There are a total of 32 Chapters in the Manual. Chapter 26 specifically provides for the rights to women prisoners. Some of the provisions under the chapter are as follows:

- Every state is to have one prison specifically dedicated to women prisoners.
- The jails must have adequate facilities to meet with the special needs of women prisoners which include healthcare, pregnancy, menstruation and more.
- The women must be provided with equal rights to work, obtain vocational training and education in prison.
- The male members should not be allowed into the wards of women prisoners barring cases of strict emergency.
- The women should be provided with a proper medical examination before they are admitted into prison.
- In case, a woman is found to be pregnant anytime during the sentence, it is to be reported to the Superintendent of the Jail who must arrange for a gynaecological examination at the earliest.
- The staff in woman prisons must be properly trained to deal with the specific needs of the women prisoners.

The adoption of the Manual reflects a conscious effort on the part of the MHA and the Indian states to improve the condition of women prisoners. Unlike, several previous documents, it has specifically paid attention to the needs of women prisoners and has specifically provided for separate rules for them.

7. Conclusion

The aim of restorative justice is to provide for an alternative to custodial sentencing. It seeks to devise a system which runs parallel to the penal system. It is aimed to develop a mechanism which also provides accountability to the victims. The system has not been fully developed in India. However, over the years, the Indian Criminal Justice system has incorporated elements of restorative justice. However, their implementation and utility are often limited by the inefficiency of the Indian Judiciary and the inadequacies of the Indian prisons. There are several

instances where the trials are delayed which sometimes even leads to an innocent person spending an ample amount of time in custody as an undertrial.

Women prisoners are the worst sufferers in this case, since they form a minority of the prison population. The prisons are not made to suit their specific needs which hinders the reformative process. Moreover, they are often the victims of custodial violence and sexual abuse which further puts them under physical and mental agony. These factors negatively affect their ability to reintegrate into the society. Moreover, they also face social stigma and discrimination post their release. The moral sanction they suffer upon release is far worse than the punishment they deserve for the crime committed by them.

The Indian Government, Judiciary and Legislature have made attempts over the years to ensure that prisons are a place of reform and not a place for development of enhanced criminal tendencies. The judiciary has time and again issued guidelines for Prison Reforms in various decisions. It has also shown support for the development of restorative justice. Moreover, the courts have been proactive in the cases of custodial violence and has granted compensation to the victims. The Government too, has worked to develop a system so that adequate care of prisoners is taken. Moreover, the adoption of the Model Prison Manual, 2016 is a welcome development as it seeks to provide further rights to the prisoners and encourages healthy measures for their effective reintegration into the society. The process of effective and humane restoration of women prisoners into the society is still ongoing and the incidents of mistrial, custodial torture and violence are still rife. The Indian Criminal Justice system has a long way to go before it can call itself a system truly meant for the reformation of women prisoners.

8. Suggestions

- Women prisoners are often isolated from the society in prison and face boycott and condemnation even from their own families. Therefore, they should be allowed to maintain contact with people in the outside world. In order to allow this, the conditions related to interviews, letters and visitation should be relaxed. They should also be allowed an increased number of phone calls.
- The National Prison Manual provides for a comprehensive after-care program. This program should be implemented effectively. Some benefits to which the prisoners are entitled under this program are the subsistence money, provision of food, continuity of healthcare being received in prison, housing, getting employment or starting a cottage industry, marriage, prevention of harassment by local police. Moreover, support should be provided to female prisoners in case of child custody. Identification papers must be given to them so that they can find a place of residence and a job.

- The Central and State Governments should encourage the NGOs and other organisations to work for the amelioration of women prisoners. They can collaborate with such organisations in order to provide better support to woman prisoners after their release.
- Local teams can be setup to keep check on the conditions of women prisoners post their release. They can include women police officials in order to ensure that the released prisoners are not harassed.
- The trials for undertrial prisoners must be expedited so that they do not spend additional time in Judicial Custody. There should be proper constitution of Undertrial Review Committees.
- The compounding of offences under CrPC should be encouraged and alternative methods for punishment similar to the Juvenile Justice Act, 2015 can be introduced for women prisoners.
- The Indian Government has already started to envision care programs which are dedicated to women prisoners. The implementation of these programs should be expedited. In addition to this, awareness needs to be created amongst prison inmates about the programs.
- The creation of awareness amongst women prisoners would be really helpful as it provides them hope of reintegration into the society as a reformed person with the ability to lead a normal life.
- It is essential that there is proper coordination between the Judiciary and the Government in order to take stringent measures against people who force women to commit crimes.