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## PROTECTION OF RIGHTS OF UNDER TRIAL PRISONERS WITH REFERENCE TO WOMEN PRISONERS

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### ABSTRACT

In the words of William Penn, “To delay justice is injustice”.<sup>1</sup> This forms the part of our legal system. In order to safeguard the dignity of women, timely Justice is equally important. The Constitution of India provides for a Right to live with dignity. This right is available even to those women who have been convicted or languishing in jails. However, these rights have been violated and are shrouded in a culture of silence. Due to the burdening and pendency of cases, the under trial prisoners face inequality and custodial abuse. Protection of dignity of women is interrelated with the concept of “timely justice”. Punctuality in the courts is the essence of Justice. As for the women, many domestic duties and responsibilities are imposed on them in our country, therefore timely disposal of cases is a necessity. Timely Justice not only refers to the timely disposal of cases, but also timely sitting of the Judges. All elements of delaying justice must be removed.<sup>2</sup> One must judicially and ethically sensitize themselves, and prioritize the case in order to uphold the rights of the women in Prison.

**Keywords:** Children rights, Incarcerated parents, Under trials, Women Prisons, Constitutional Status, Custodial Pregnancies

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<sup>1</sup> Penn, William (1693), *Some Fruits of Solitude*, Headley, 1905, p. 86.

<sup>2</sup> Clause 40 of Magna Carta

## I. INTRODUCTION

India has always been a male dominated society. There has been a fight from time immemorial for the women to get equal rights and opportunities as that of men. However, during the period of Vedas and Upanishads, women were treated as equivalent to Goddess. But this view gradually deteriorated, leaving the women being exploited. Manusmriti stated that women were being treated as objects and properties, on which it was the absolute right of the men. Likewise, in present day women are being objectified. This is well evident in the Personal laws as well. For instance, in Muslim Personal Law, a Muslim male is allowed to solemnize 4 marriages, however, a Muslim Female cannot. The same can be seen in the Hindu customary laws, wherein polygamy was allowed but polyandry has always been prohibited.

The condition of women in prison is not very different from that of the women outside the prisons. The Government has implemented several welfare and developments programmes for the women such as, Ujjawala Scheme, Mahila Shakti Kendra, Swadhar Greh Scheme, etc., but very less has been done for protecting the rights and dignity of women in Prisons.

In India, there is an unlimited number of cases pending for trial. In various cases, the decision of the Court comes even after the lifetime of the convicted. There are various women who are unaware of the court proceedings and have limited access to the outside world. In such cases, these under trial women tend to remain in prison till their case is decided, which often takes years. In the words of William Penn, "To delay justice is injustice".<sup>3</sup> This forms the part of our legal system. In order to safeguard the dignity of women appearing in Courts, timely Justice is equally important. Gender inequality is often seen in Courts which can be regarded as the most "unseen" incident and is shrouded in a culture of silence. In order to perceive these incidents, one must be sensitized enough towards these incidents.

## II. CONSTITUTIONAL ESSENCE OF INCARCERATION OF WOMEN IN INDIA

A woman, whether convicted or acquitted, inside prison or outside is entitled to the preservation of her dignity at all times. The status of the woman must not be the criteria of deciding the level of dignity provided to her. Article 14 of the Constitution provides for the

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<sup>3</sup> Penn, William (1693), *Some Fruits of Solitude*, Headley, 1905, p. 86.

equal protection of rights of all the individuals, which implies that the rights of a woman must be ensured and protected. The Constitution prohibits discrimination, however a protective discrimination for safeguarding the rights of a woman is allowed under Article 15(3). In addition, Article 21 ensures every individual a right to life with dignity. Just because a woman is in prison does not take away her right to life with dignity.

In spite of abovementioned Fundamental Rights, women in prison are still facing hardships, and their fundamental rights are being violated in the most gruesome ways.

### **III. ISSUES AND CHALLENGES FACED BY UNDERTRIAL WOMEN PRISONERS**

#### **1) Alarming situation of Pregnancies of women in prison across the country**

Women are considered as the most vulnerable and prone to sexual abuse. Therefore, it must be of the utmost importance to maintain the safety and security of the women inside prison. However, the custodians of the jail are becoming the violators. Prisons, which are under a surveillance at all times are also becoming like the deserted streets where women are helpless, without anyone at their rescue. This is an issue of concern as it not only violates the rights of the women, but also puts a question on the efficiency of the justice system, and the System of imprisonment, as well as the prison authorities.

It has been observed that the Hon'ble Supreme Court has taken suo moto cognizance of the pregnancies of undertrial women prisoners. The Calcutta High Court has also directed the bar of male employees' entry in the women prisons. *"It is interesting to note that women prisoners, while in custody, are getting pregnant. Subsequently, babies are born in prisons. At present, 196 babies are staying in different prisons of West Bengal."*<sup>4</sup>

An amicus curiae was appointed to look into the matter of overcrowding prisons across India. The following Prison Statistics India (PSI) Report was observed: <sup>5</sup>

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<sup>4</sup> Hindustan Times Report

<sup>5</sup> National Crime Records Bureau (NCRB)

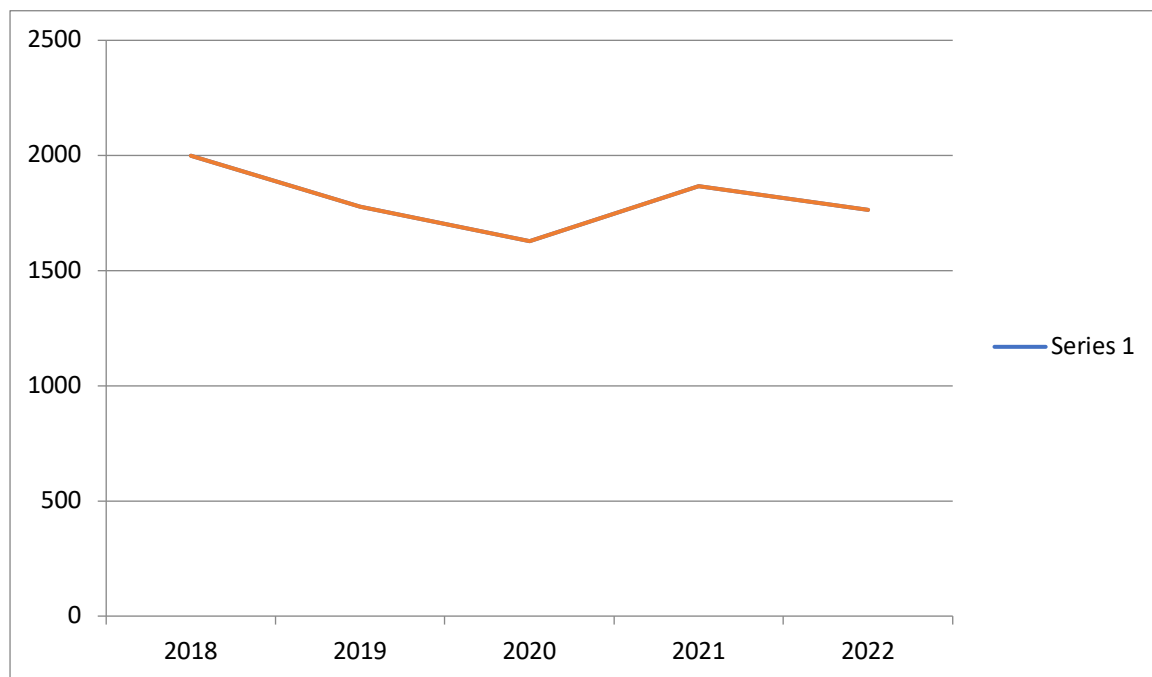
**Statistics of Child birth across India:**

In 2018, total 1999 children were born to the incarcerated women.

In 2022, the numbers decreased by 235, with a total of 1764 children born in prison.

This data shows that there has not been a drastic decrease in the number of births in the prisons from the Year 2018 to Year 2022. However, it can also be seen that there has not been any alarming situation. Nevertheless, it signals towards the lack of proper management in the Prison authorities.

**Child Birth in Prisons (2018-2022)**



**2) Rights of children of incarcerated parents**

The rights Children with a parent in prison have a distinct set of needs. These children are likely to experience trauma, feelings of loss, anxiety as a result of the absence of, and separation from, a parent. They are likely to experience disruption to their care arrangements and face stigma from their peers, schools, communities and wider society. Imprisonment also has an impact on family dynamics and may result in family breakdown or prove an additional burden to the family. A parent held in custody has a serious impact on a child’s well-being. It violates the right of the child to direct contact with their parents according to Article 9 UN Convention

on the Rights of the Children (CRC)<sup>6</sup>. The situation of children with an incarcerated parent is a particularly a difficult one. Children with a parent in prison face a significantly greater risk of developing mental health problems than children in the general population, and the social consequences of their situation cause them a great deal of distress. However, not everyone agrees that parental involvement in the justice system is bad for children. In fact, some observers believe that removing a parent engaged in criminal behaviour can have positive effects on a child. In some cases, a child's situation may improve, for example in cases of domestic violence or severe child abuse or neglect. Even in those cases, however, the justice system can be traumatic or can lead to other traumatic experiences. The justice delivery system of India often negates the rights of prisoner that in turn leads to needs and rights of children or infants overlooked and much of the time it is the lacuna in legislative and executive framework of a country.

Children of imprisoned parents are often considered as forgotten children and ignored victims of justice. They face unique set of problems and with rise in numbers of female inmate all around the world there is urgent need to address the problems and rights violation of this often-forgotten group. Children of incarcerated parents are broadly divided into two broad categories those who can live along with their mother in the prison (up to the age of 6 years) and those that are left behind when their parents are incarcerated. Prisons do not offer the physical and social environment that is conducive for a child's development There is need of emphasis that the child should not be treated as an under trial or convict while in jail with his/her mother, is entitled to age-appropriate food, shelter, medical facilities and opportunities for education and recreation, but the penitentiary system of India which already lacks in giving basic amenities to its prisoner has failed in making sure enforcement of special provisions for women inmates, women taking care of a child less than 6 years of age or a pregnant women.

It has been long debated whether children should be allowed to stay with their incarcerated parents or not on one hand there is need of children to be kept under parental authority for their development and thereby giving them their rights on the other hand prison which is meant for punishing people and is an environment meant for deprivation of rights. This conundrum in this situation can also be attributed to deep rooted problem of our penitentiary system where there is no identification or differentiation between rights of prisoners. There is general

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<sup>6</sup> Art. 9 UN Convention on the Rights of the Child (adopted 20 November 1989, entered in force 2 September 1990)

agreement that, in attempting to determine the troublesome inquiry of whether to isolate a mother from her kid during detainment, and at what age, the interests of the kid ought to be the essential thought. Issues to consider ought to remember the conditions for jail and the nature of care kids can hope to get outside jail, on the off chance that they don't remain with their moms. This rule would suggest that jail specialists ought to exhibit adaptability and take choices on an individual premise, contingent upon the conditions of the youngster and the family. Applying inflexible standards in all cases, where conditions shift massively, is very frequently not a fitting strategy.

During the time which they spend in jail, youngsters ought to be furnished with progressing great quality essential medicinal services administrations and their advancement checked by a jail analyst and masters in kid improvement (for example on normal visits from network social insurance administrations). Nature accommodated the kid's childhood ought to be as close as conceivable to that of a kid outside jail, with a nursery staffed by authorities who can deal with the kid while isolated from their mothers. They ought to have sufficient play and exercise offices. Mothers ought to be given the most extreme potential chances to invest energy with their youngsters. The accessibility of nurseries in penitentiaries is additionally critical to guarantee that ladies with kids can partake in jail exercises and projects on an equivalent premise with different detainees. The jail organization ought to work together with wellbeing centres for inoculations and intermittent assessments of youngsters for controlling their immunizations and checking their physical turn of events.

The removal of the child from prison should be undertaken with sensitivity, only following an individual assessment as to the suitability of removal and when alternative care arrangements for the child have been identified. After children are separated from their mothers and placed in an institution, with family or relatives, women prisoners should be given the maximum possible opportunity to meet with their children, to reduce the mental distress of the mothers and the emotional trauma of the child, as well as to protect the children from developmental problems. The responsibility of the State to care for the child does not end with the placement of the child in an orphanage or with the relatives of the prisoner. In line with article 9 (3) of the Convention on the Rights of the Child, the responsibility of the State extends to enabling the child to have regular contact with his or her mother, to ensure that the adverse effects of

separation on the emotional development of the child are minimized<sup>7</sup>.

### **Current status**

As per the latest data available around 1, 817 children live with their undertrial or convicted mothers in prisons across India<sup>8</sup>. A study by amnesty international shows various instances where the guidelines from RD Updhayay case<sup>9</sup> were not met.

As per the Supreme Court guidelines, once a child turns six, he or she is supposed to be handed over to a suitable surrogate, or transferred into protective custody in a home and brought to prison to meet the mother at least once a week. But the lack of co-ordination between protective homes and the chronically understaffed prisons department makes this difficult. Officials in six prisons that Amnesty visited over the past few months admitted that children are seldom brought to meet their mothers in prison.

A woman delivered her son in Belgaum Central Jail and she did not know she was entitled to temporary release, and jail authorities had not taken any steps to allow her to give birth outside prison. She and her child have been in prison since and no action has been taken against any jail officials. Amnesty also came across instances where the education and recreational arrangements prescribed in the guidelines were not met. Often, literate prisoners double up as teachers for children and women inmates. The Supreme Court guidelines had also said that courts should prioritise cases of women prisoners with children. But as happens with other under trials, the lack of police escorts, poverty and inadequate legal representation means that these cases drag on<sup>10</sup>.

### **3) Lack of Women Prisons:**

Prisons exclusively for women in India lack in number. In most of the prisons, males and females co-exist, which results in serious repercussions, such as increasing the sexual abuse and harassment towards women, compromise in health and nutrition of women. The number

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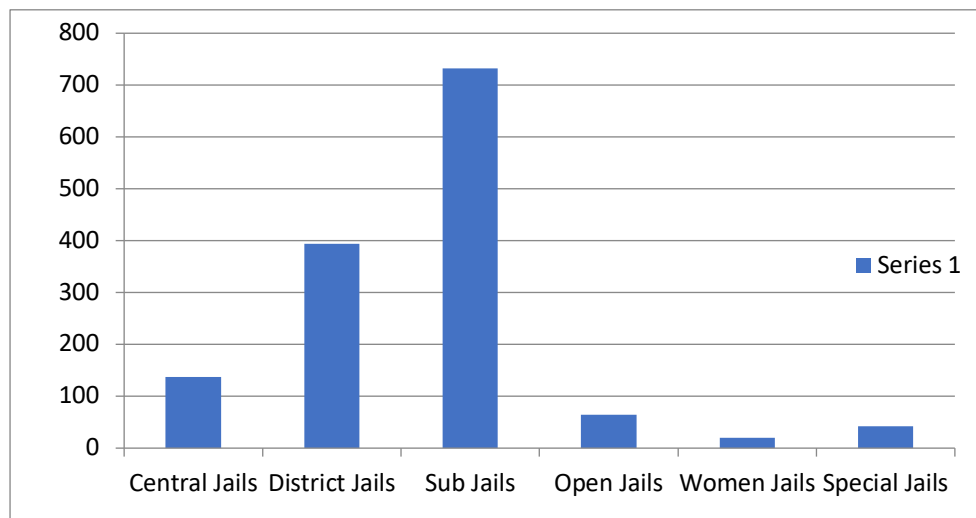
<sup>7</sup>Handbook on Women and Imprisonment 2nd edition, with reference to the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (The Bangkok Rules) UNITED NATIONS New York, 2014

<sup>8</sup> State National Crime Records Bureau's 2014 Prison Statistics

<sup>9</sup>Supra note – 7

<sup>10</sup>Manjunath, "Growing up in Indian Prisons: Children of undertrials and a case of widespread neglect" Amnesty international report 27<sup>th</sup> May 2016b 5:26 am

of total prisons throughout India is 1412, as per the 2018 Report of Prison Statistics India, wherein only 20 prisons have been established exclusively for women.



The abovementioned data shows that the number of women prisons is drastically low. Due to the limited capacity of women's jails, most of the female prisoners are housed at other types of jails.

#### IV. MAXIMUM DETENTION OF AN UNDER TRIAL PRISONER

An under trial prisoner languishing in jail cannot be detained in the prison for eternity. Every person has a "right to life and personal liberty"<sup>11</sup> as granted to them by the Constitution of India. This right can be curtailed only to a reasonable extent and in a reasonable, accountable and transparent manner. The interest of the individual has to be protected but at the same time the societal interest has to be seen. The Code of Criminal Procedure does this balancing of interest between the rights of the accused and the interest of the society. There has to be a maximum limit till which an under trial prisoner can be detained, even if the trial has not concluded in his favor.

On the basis of Section 436A<sup>12</sup> of the Code of Criminal Procedure, the Court held that it is mandatory to release the accused who has completed half the period unless the Court deems proper to extend the custody beyond the period for recorded reasons. Once half the period is completed or entire period is completed, the Magistrate or Court has to release the accused per

<sup>11</sup> Article 21 of the Constitution of India

<sup>12</sup> The Code of Criminal Procedure, 1973



se even if the bail application has not been filed. The Court also held that section 436A is a dimension of Article 21. It was also held that the Court shall make weekly sittings in the jail to examine whether the said period of under trial prisoners has expired or not. And the release of the accused can be done then and there. Report of the same has to be sent to the Registrar General of the High Court who in turn will send a report to the Secretary General of the High Court.

## **V. CONCLUSION**

Pending cases in the Indian Courts have considerably seen a hike, due to which there has been a shortage of prisons. This not only affects the under trial prisoners but also raises a question of the credibility of the Judicial System. As it is said that “to delay justice is injustice”, hence there is a need for the speedy justice system. There is a need for the deadline within which a case must compulsorily be decided. There have been such efforts made in the newly enacted Bharatiya Nagrik Suraksha Sanhita, 2024 in place of the Code of Criminal Procedure, 1973 which has taken an initiative in fixing a time limit. The Bharatiya Nagrik Suraksha Sanhita, 2024 has various provisions which direct toward a shift approach to be taken by Judiciary as well as the Executive.

## **REFERENCES**

1. Law Commission of India, Women in Custody
2. Prison Statistics India 2016 NCBR
3. State National Crime Records Bureau's 2014 Prison Statistics
4. Kelkar, K.V., The Code of Criminal Procedure, Edition 6<sup>th</sup>
5. Bhim Singh V. Union of India, Ibid.