
***An Analysis Of The Legal Services For Women Prisoners
And Their Children In Indian Prisons***

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Abstract

The patriarchal culture in the Indian society has led to normalisation of gender bias, especially against women. They are subjected to social, economic and moral discrimination on regular basis. It is also a major hurdle for women prisoners in India. It denies them a fair and just trial. They do not have adequate facilities in prisons and their children also suffer due to the lack of enforcement of the rights. The laws for protection of women prisoners and their dependents are good on paper but not adequately implemented. Therefore, certain changes need to be made in order to ensure that their rights are protected and the Constitutional Principles are not violated.

The purpose of this policy brief is to analyse the availability and condition of legal framework for women prisoners. It will address the issues faced by women prisoners which include maternity facilities, hygiene issues, health problems and the impact on their children. The remedies available will be analysed. Suggestions for removing the blank spaces in the existing system of prison administration and prisoner's rehabilitation will be provided.

Keywords: *Women Prisoners, Children, Under-trial, Legal Aid, Covid-19, Social Welfare, Health Risks.*

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I. Introduction

The rights of convicts, under trials and offenders in India are protected under Article 21 and 22 of the Indian Constitution. Article 21 provides that, “*no person shall be deprived of his life and liberty except according to procedure established by law.*” These rights have been extended to convicts by the Supreme Court in the case of *D. Bhuvan Mogan Patnaik v. State of AP*.¹ The Supreme Court in the case of *Sunil Batra v. Delhi Administration* issued direction to the States and Prison staff to better the condition of the prisoners. It held that, “*the prisoner’s rights shall be protected by the Court by its writ jurisdiction plus contempt power. To make this jurisdiction viable, free legal services to the prisoner programmers shall be prompted by professional organizations recognized by the Court such as ‘Free Legal Aid society.’ The District Bar, we recommend shall keep a cell for prisoner relief.*”

II. Crime And Women Prisoners

The number of women arrested in India for crimes under the Indian Penal Code (IPC) and other laws were 3,34,865.² This figure has been nearly constant in the past two decades. They constitute 4.3% of the total prisoners in India. As of 2021, there are 31 jails for women prisoners and majority of them are kept in separate enclosures for women in the general prisons. Nearly half the women imprisoned in India fall between the age group of 30-50 years.³ This enhances the possibility that many of them are mothers who have children to raise.

III. Issues Faced By Women In Prisons

There is generally overcrowding of prisons leading to poor hygiene and inadequate food availability. Women who are imprisoned for petty crimes are often kept in the same complex as those imprisoned for heinous crimes. This exposes women to a greater level of scrutiny irrespective of the gravity of their crime. Women often bear the brunt of not only their crimes but also the social and moral taboo that comes attached with it. The prisons are often located in faraway places which make visits from families all the more infrequent and leaves them to lead a life of isolation. Their social integration in the society post imprisonment is also hindered by the social and moral norms of the society.⁴

¹ *D. Bhuvan Mogan Patnaik v. State of AP*, AIR 1974 SC 2092.

² National Crime Records Bureau, [Crime in India 2016](#).

³ Ministry of Women and Child Development, [Women in Prisons](#), 2018

⁴ RANI DHAVAN SHANKARDASS, *WOMEN ‘INSIDE’: PRISON VOICES FROM INDIA* (Routeledge, 2020).

IV. Legal Provisions Regarding Women Prisoners And The Hurdles Faced By Them

The provision of free legal aid to poor and weaker sections of the society is mandated under Article 39A of the Constitution of India. This is based on Article 14 and Article 22(1) of the constitution where it is the duty of the state to ensure equality before law and equitable justice. The Legal Services Act was also enacted in order to maintain a network that can be used to provide free legal aid and services to the needy persons. The provisions of the Act extend to the persons in custody. The National Prison Manual puts an obligation on the State Governments to, “*appoint jail-visiting advocates, set up legal aid clinics in every prison and provide legal literacy classes in all prisons to ensure access to legal aid to prisoners.*”

In the case of *Rama Murthy v. State of Karnataka*⁵, the Supreme Court recommended the setting up of a Modern Prison Manual. This decision was enforced by the government and it constituted the “All India Model Prison Committee” which was headed by Director General BPR&D in order to prepare a Modern Prison Manual. The Manual was circulated to States and Union Territories for adoption. In order to keep pace with changing times, an expert committee was constituted in 2014 in order to update the manual. The work was concluded in 2016 and the Prison Manual was updated. It specially focussed on the after-care services, special provisions for women prisoners and more. All the states were instructed by the Ministry of Home Affairs to maintain uniformity in rules and regulations of prisons. There should be revises based upon the “National Model Prison Manual, 2016.”⁶

V. Judicial Decisions Related To The Rights Of The Women Prisoners And Their Children

In the case of *D.K. Basu v. State of West Bengal*,⁷ the Court laid down guidelines that were to be followed during the time of making arrests. Some of the relevant ones to the rights of women prisoners were:

- The person arrested must be informed of their right to have a person informed of their arrest as soon as they have been arrested or detained.
- “The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the

⁵ Rama Murthy v. State of Karnataka, AIR 1997 SC 1739.

⁶ RANI DHAVAN SHANKARDASS, WOMEN ‘INSIDE’: PRISON VOICES FROM INDIA (Routeledge, 2020).

⁷ D.K. Basu v. State Of West Bengal , AIR 1997 SCC 416.

Legal Aid Organisation in the District and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.”

- The arrestee can be permitted to meet their lawyer during interrogation.

The case also took note of custodial torture that occurs in prisons and held that, “*Custodial violence, including torture and death in the lock ups, strikes a blow at the Rule of Law, which demands that the powers of the executive should not only be derived from law but also that the same should be limited by law.*”

The Supreme Court was notified about prisoners overstaying in jail. It held that, “*the undertrial prisoners who are languishing in jail for a period exceeding half of the punishment provided in the Act and who are unable to furnish surety can be released on bail having regard to the period spent in the jail.*”⁸

The decision of the Supreme Court in the case of *R.D Upadhyay v State of Andhra Pradesh & Others*⁹ 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

⁸ Representing Undertrials v. Union of India, (1994) 6 SCC 731.

⁹ R.D Upadhyay v, State of Andhra Pradesh & Others, AIR 2006 SC 1946.

superintendent. As soon as possible, arrangement shall be made to get such prisoner 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.

- Gynecological 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.”
- It also directed that a temporary release should be allowed to an expectant prisoner so that she can have the delivery outside prison. This right should only be denied in cases where there is a high security risk.
- The birth will be recorded in the local birth registration office and there shall be no mention of the child being born in prison. The naming rites for the child shall be extended to the maximum extent permissible under the circumstances.
- 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.
- In case of the death of the mother of the child in prison, the District Magistrate will take responsibility for the proper care of the child.
- *“Children in jail shall be provided with adequate clothing suiting the local climatic requirement for which the State/U.T. Government shall lay down the scales. The States/ U.T. Governments shall down dietary scales for children keeping in view the calorific requirements of growing children as per medical norms.”*
- *“The child of female prisoners living in the jails shall be given proper education and recreational opportunities and while their mothers are at work in jail, the children shall be kept in crèches under the charge of a matron/female warder. This facility will also be extended to children of warders and other female prison staff.”*

The states were directed to implement these measures and make appropriate changes in order to incorporate them.

In order to mitigate the impact of Covid-19 in overcrowded prisons which posed a grave risk to the health of the inmates, the Supreme Court directed the formation of a High-Powered Committee to determine which prisoners can be released on interim bail in order to prevent the spread of the virus.¹⁰ A total of 68,264 prisoners were released on interim bail across the country until 14 December 2020.¹¹

In 2021, keeping in mind the impact of Covid-19, an advisory was issued to all prisons to address the mental health issues of the prisoners. It acknowledged that incarcerated populations may face many vulnerabilities during the pandemic, including anxiety, stress, deprivation of support from families, concern about the wellbeing of their family members etc., which may impact their mental wellbeing. Two handbooks have been issued by NIMHANS to deal with the impact of Covid-19. The prison authorities are advised to make use of the guidance provided in the handbook.¹²

VI. Plight Of Women And Children In Prisons

As per the judgments of the Supreme Court, they are entitled to free legal aid. Moreover, there is also the obligation upon the states and prison authorities to provide adequate facilities to children in order to facilitate their growth. However, the situation has not improved considerably despite all the recommendations by the Supreme Court, its guidelines and the efforts by the Government. The current Chief Justice of India, NV Ramana has also remarked that, *“As a welfare State, we are obligated to provide women prisoners with programmes and services that enable them to effectively reintegrate into society, on an equal basis with men.”*¹³

However, the reality on the ground level is not so rosy. The Prison Statistics Report 2019 states that most of the women prisoners are illiterate or semi-literate. This means that they are vulnerable to abuse and violation of their rights. They do not have the requisite legal knowledge which denies them access to bail, lawyers and the right to demand humane treatment.

¹⁰ Re: Contagion of Covid 19 Virus in Prisons, 2020 SCC OnLine SC 320.

¹¹ CHRI, *State/Ut Wise Prisons' Response to The Coronavirus Pandemic in India* (28 June 2021) <https://www.humanrightsinitiative.org/content/stateut-wise-prisons-response-to-covid-19-pandemic-in-india#Table%20G>.

¹² Ministry of Home Affairs, *Advisory on Dealing with Mental Health issues of Prisoners and prison inmates*, 2021.

¹³ S Jyotirajan, *The sad fate of women prisoners in India*, THE DAILY PIONEER, (November 17, 2021, 9:29 PM) <https://www.dailypioneer.com/2021/state-editions/the-sad-fate-of-women-prisoners-in-india.html>.

They are often from the lowest strata of the society.¹⁴The plight of their children is no better with the lack of women prisons. Women are often housed in a separate enclosure in male prisons which means that children have limited access to education and other recreational facilities. The complaints about food are rife and mothers often complain that children do not get adequate facilities for growth. This has a negative impact on the development of children and they lack adequate social skills since they spend their formative years in the closed environment of the jail. The decisions of the Apex Court, implementation of the Model Prison Manual, 2016 and the United Nations Bangkok Rules Protocol, 2011 have had a positive impact on the rights of women prisoners and children. However, there exists a gap between policy and implementation.¹⁵ The pandemic of Covid-19 further impacted the rights of women prisoners since there were no trials allowed and they were forced to stay in cramped spaces even during the pandemic. There was an incident where 44 inmates of just one women prison tested positive.¹⁶ Therefore, a need still exists to pay more heed to the rights of women and their children in prison.

VII. Conclusion and Suggestions

The rights of women prisoners have found a voice in the legal discourse in recent times. The courts have taken a progressive view with respect to the rights of women prisoners and have issued directions and guidelines to ensure that the prisoners are not denied their Fundamental Rights. The state has also been proactive in updating the National Prison Manual and issuing directives to the states for its implementation. However, there still exist a number of issues in the implementation of the same. The following suggestions can be implemented to improve the legal services for women prisoners and provide them with better rights:

- Provide sessions to women prisoners to develop legal awareness and ensure that they are provided with free legal aid.

¹⁴ *Id.*

¹⁵ Shreehari Paliath, *Children of women prisoners in India struggle to get proper food and education despite guidelines*, SCROLL (17 November, 2021 9:55 PM) <https://scroll.in/article/975186/in-india-children-of-women-prisoners-struggle-to-get-proper-food-and-education-despite-guidelines>.

¹⁶ ANI, *Punjab: 44 inmates of women prison in Patiala test positive for COVID-19*, ECONOMIC TIMES, (17 November, 2021 9:58 PM) <https://economictimes.indiatimes.com/news/india/punjab-44-inmates-of-women-prison-in-patiala-test-positive-for-covid-19/videoshow/81764032.cms?from=mdr>.

- The states must ensure adequate educational, nutritional and recreational facilities to children of women. They can be enrolled in a local school close to prison so that they are able to experience social life and are able to break away from the confines of prison.
- The courts should ensure that trials take place at a faster pace so that accused and undertrials do not serve a longer sentence than they are supposed to.
- There should be development of alternative measures other than prison for rehabilitation of women prisoners, especially those involved in petty crimes.