

A HUMAN RIGHTS STUDY ON GENDER SPECIFIC NEEDS OF WOMEN PRISONERS

Anu Kumari*

ABSTRACT

The ideal woman is attributed to the role of a wife and a mother at home. When a woman commits a crime she is casted as a “double- deviant”, first for violating the criminal law and second which is more significant, for violating the narrow moral strictures of the female role in society. Social construction of gender is an institutional creation wherein rules are arbitrarily made on the basis of social hierarchies and divisions in social order that are divisive, elicit and repressive. However even after committing the crime or being accused of committing the crime when a woman is put behind bars, her concern is not of losing freedom, which she was not enjoying much even being out of the prison, the society itself has a lot of constrains to her freedom, her only concern is how the family specially the children would manage without her? Women experience incarceration differently than men. However there has not been much research on women’s experiences in prison as they are a miniscule minority in prisons all over the world ranging from 4% to maximum 10% of the total prison population of any country. The paper tries to analyse the various aspects related to incarceration of women and better ways to deal with women prisoners.

Keywords: Human Rights, Women, Children, Prisons

INTRODUCTION:

Criminalization is a complex process not a sudden product. Crime is not only comprised of blameworthy conduct of an individual, society with its own distortions also plays a vital part in turning a law abiding citizen into a criminal. Therefore criminal is more a behavioural projection of a crime prone society.¹ An overview of research conducted on female prisoners

*Research Scholar, Faculty of Law, University of Delhi.

¹ Justice V.R. Krishna Iyer, ‘Justice in Prison: Remedial Jurisprudence and Versatile Criminology’ in R. Shankardass, *Punishment and the Prison* (London: Sage Publications, 2000). While advocating for the rights of prisoners in this paper Justice Krishna Iyer states that “ The contradiction between right to be human and human rights on the one hand and the punitive deprivation of fundamental freedoms and dignity of the individual as an easy method of defending society against its criminal members, on the other is the dilemma of our times”.

clearly illustrates that female prisoners are devastatingly victims first and offenders second.² As justice Krishna Iyer says the Indian woman suffers from disabilities of various kinds be it cultural. Economic, matrimonial or the like, which makes her peculiarly vulnerable in law and in life notwithstanding the concept of constitutional egalite.³ A study by Widom found that abused girls are more likely to become criminals or delinquents than girls without histories of abuse.⁴ A report of U.S. Department of Justice provides that an estimated 62% of female violent offenders had a prior relationship with the victim as an intimate, relative or acquaintance.⁵ As per a study conducted in USA, 77% of women in jail in the United States and 80% of homeless women with children are survivors of intimate partner violence.⁶ Similarly a study conducted on women prisoners in Rajasthan found that a large no. of crimes committed by women are due to their maladjustments in the marital home.⁷ Research has documented the positive correlation between previous victimisation and subsequent incidents of revictimization leading to severe effects on mental health and well- being of women and resulting in criminal acts.⁸

THE CONCEPT OF PRISONERS RIGHTS:

Human rights originates from human dignity. Prisoners are human beings too as held by the Supreme Court of India in a number of cases that imprisoning someone does not take away their fundamental rights although now they can be exercised in restrictive prison environment but nonetheless they exist. Therefore, merely sending a person to prison does not strip him off his human rights. It is the duty of state to protect the human rights of prisoners as they are wards of the state. It is also responsibility of a civilized society to work towards protection of

² Cathy S. Widom and Michael G. Maxfield, 'An Update on the "Cycle of Violence"', U.S. Department of Justice, National Institute of Justice, (Feb. 2021). The report discusses the "cycle of violence" hypothesis which suggests that a childhood history of physical abuse leads the survivor to commit violence in later years. The study found that females who were neglected and abused in childhood are 73% more likely to commit crime than women who lived in a secure environment.

³ National Expert Committee on Women Prisoners, (1987). The committee is popularly known as The Justice Krishna Iyer Committee on women prisoners.

⁴ C. S. Widom, 'Does violence beget violence? A critical examination of the literature,' 106 *Psychological Bulletin* (1989)

⁵ Lawrence A. Greenfeld and Tracy L. Snell 'Women Offenders' U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Special Report (Dec. 1999). The report also provides that the findings relating to women offenders are in contrast to male offenders who majorly commit crime against strangers.

⁶ Alana Van Gundy and Shaunty James, *The History, Evolution, and Current State of Female Offenders: Recommendations for Advancing the Field* (Routledge 2022)

⁷ Ram Ahuja, *Female Offenders in India* (Meenakshi Prakashan, 1969).

⁸ Gail E. Wyatt, Donald Guthrie et.al., "Differential effects of women's child sexual abuse and subsequent sexual revictimization," 60 *Journal of Consulting and Clinical Psychology* 167-173 (1992).

human rights of prisoners as Dostoyevsky pithily remarked, “The degree of civilization in a society is revealed by entering its prisons”. In the matters of social policy women are included in ‘vulnerable groups, hence they are given special care and protection. However in the matter of prison policies women are hardly paid much attention. Since prisons mainly caters to the needs of predominantly male population.⁹ The Human rights afforded to an individual are not a favor done to him but a matter of norm accepted in a civil society.¹⁰ According to Amrendra Mohanty, “In the male-dominated Indian society, women often face discrimination. A number of crimes are also being committed against the women in the society. Women are exploited in the society at different levels because of their unawareness about their legal rights. Condition of the women prisoners is also not good. They are being oppressed and tortured in the prisons. Custodial horror is a daily occurrence for women prisoners in India”.¹¹

There was a period in the history of humankind when sending a person to prison was treated as equivalent to ‘civil death’, as they lost all their rights. They were being denied meager human needs. Although this extreme position has now changed and prisoner’s rights are being recognized in almost every modern civilization but nevertheless emphasis has to be given more while dealing with human rights of prisoners as they still exercise their rights in confinement without much communication with the outer world.

Human rights has been part of human civilization since time immemorial. Rights are basically claims that people have against the authority. And the authority has duty to provide mechanism for the implementation of these rights. The contemporary human rights can be traced back to Renaissance and French revolution followed by universal declaration of human rights. The human rights has been evolving since then and had traversed a long way from 1st generation human rights to now 4th generation of human rights. The United Nations Organization has played a major role in the universalization of rights and has led to their inclusion in various statutes book of many countries.

Hohfeldian concept of rights in the context of prisoners: In a classical essay on legal rights Wesley Hohfeld (1919) provided for a four rights structure- these are the components of rights that may be a part of substantive rights in one form or other. These components comprise

⁹Neera K. Sohani, ‘women in prisons in India’ (October 1975).

¹⁰ J.S.Verma, Penal reform in south Asia, Key Note Address at the Regional Conference on Penal and Prison Reform and Access to justice in South Asia, Kathmandu, Nepal(2000)

¹¹Amarendra Mohanty, *Indian Prison System* (Ashish Publishing House, New Delhi,1990).

privileges, claims, powers and immunities. A person can be said to have a privilege to do something if that person has no compulsion to do it. A person can be said to have a claim to something against another if that other person has a duty to provide that thing. A person can be said to have a power to do something if that person has the ability to constrain the liberty to claim it. And a person has an immunity to something against another if the other person lacks the ability to constrain or change what the other is at a liberty to do.

Although Hohfeldian concept of rights is normally discussed in relation to legal rights but these distinctions can be carried forward and very well applied in moral domain as well. As it is from moral rights only that the legal rights originates. The moral rights has been there since time immemorial and are the basis of contemporary legal and statutory rights. Therefore even if some of the rights which may be part of human rights can be very well be claimed as it is the duty of State to provide humane existence.¹² The implementation of human rights for prisoners becomes all the more important a duty of the State as this category of people can not claim them in the way a free person could and secondly prisoners are more prone to the violation of their human rights. So a state is duty bound to protect the ones who are confined by it in prisons. And the prisoners being at the mercy of state shall be provided with their rights in statutory form so that it would be easier for them to claim them through courts in case of any violations by the state.¹³

THE CONCEPT OF HUMAN RIGHTS OF WOMEN PRISONERS:

The criminality of women and human rights of women prisoners has long been neglected area of criminology, female criminality has often ended up as a footnote to the works of male prisoners that claims to be works on criminality in general.¹⁴ It was the decade of 1980's that witnessed the beginning of some serious research accorded to women's prisons. By the end of 20th century prisons were still seen through a glass darkly and their forms and functions as very specific instances of state punishment.¹⁵ Historically female offenders have constituted a miniscule percentage of the penal system also due to subordinate positioning of women in society and an academic and societal lack of interest in female criminality it was deemed that female offenders are not worth focusing on and there is no requirement to look deeper into the

¹² Kleinig John, *Prisoner's Rights* (Routledge,2014)

¹³ Growing Significance of Dignity Jurisprudence in the World of Ascending human rights , 2019

¹⁴ Dorie Klein, "The etiology of female crime: A review of the literature," 8 *Issues Criminology* 3 (1973).

¹⁵ Pat Carlen, 'Why to study women's imprisonment :or anyone else's?' An Indefinite Article, (1994) *The British Journal of Criminology* 131-140

needs of the population.¹⁶ For most part of the history the treatment of female offenders has been conducted as an afterthought in a male model of corrections. As a result the prison system has failed to consider the regional, cultural, familial and ethnic diversity of women offenders.

The Universal Declaration of Human Rights (UDHR) recognized that recognition of gender equality is essential and everyone is entitled to all rights and freedoms without distinction of sex etc.¹⁷ The emphasis of UDHR on human dignity require that all persons men or women enjoy the rights set out in UDHR including the right to education, right to equal employment opportunities , right to be free from torture and cruel, inhuman or degrading treatment. It is important to pay attention to gender impacts of systems and attitudes that are seemingly “gender- blind”. The UDHR must be enforced in a way that highlights the specific impact upon women of certain abuses, certain attitudes and certain forms of neglect.¹⁸ Convention on Elimination of Discrimination Against Women (CEDAW) seeks to advance protection of women’s human rights by inculcating a gender perspective to the principles enunciated in the UDHR. CEDAW became the first international treaty to define discrimination against women.¹⁹

Women are the primary caretakers of children throughout the world. Even if they get imprisoned the major worry for them is the care of their children and they plan to provide better care to their children on release. For majority of women their children are often the primary factor motivation them to reduce recidivism.²⁰ Women experience criminal justice system differently than how it is experienced by men. There are many studies that in a woman’s life the foundations of her identity are attachment, interdependence and connection. When females are imprisoned they are removed from their relationships with family and friends and children that can have serious toll on their mental health inside prison.²¹ Research conducted on women

¹⁶ Alana Van Gundy and Amy Baumann-Grau, *Women, Incarceration, and Human Rights Violations: Feminist Criminology and Corrections* (Routledge, 2016). Gundy further argues that this lack of attention to female offenders and their gender- specific needs, life stories and social positioning has resulted in ignorance of female prison population.

¹⁷ *Universal Declaration of Human Rights*, Article 1, states that “All human beings are born free and equal in dignity and rights.” Article 2 further provides that “everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind such as race, colour, sex, language.”

¹⁸ Gordon Brown, *The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World* (Open Book Publishers, 2016).

¹⁹ *The Convention on the elimination of All Forms of Discrimination against women (CEDAW)*, 1979.

²⁰ Elizabeth Fleming et al., “Adopting a Gender-Responsive Approach for Women in the Justice System: A Resource Guide” *New York: The Council of State Governments Justice Center* (2021).

²¹ Caroline White, “Strategy needed for mental health of women prisoners,” *British Medical Journal* (2002).

inmates in USA reveals that 12.2% of females in jail have severe psychiatric disorders.²² Intimate and biological relationships plays a vital role and paradoxical effect on women's arrests and incarceration experiences. Familial relationships can be the reason women engage in crime at the first place but at the same time these relationships can be the reason for women to desist from crime.²³

Women prisoners are a minority in the prisons of all countries. Crime was deemed to be a men's world hence prison system was designed only to confine men. Women were nowhere to be seen in the picture.²⁴ But now the number of women prisoners is on the rise, in fact the number of women prisoners are increasing at a rate more than the male prisoners. One of the reasons for imprisoning more and more women is the equality paradox of the system. All the stakeholders be it the police, prison authorities or even the judges have been more eager to send a woman to prison rather than letting her go. Another reason of increasing female population in prison is that there are fewer non-custodial facilities for female than male.²⁵

What differentiates women's imprisonment than men's imprisonment is the aspect of children as well. Women's imprisonment causes more damage to their children as they are more likely to be the primary caregiver of young children.²⁶ In case a father is imprisoned mother is still there to raise the child, but when the mother is imprisoned in most cases there is no one left to look after the child. Hence a woman's imprisonment not only impacts herself but it has a huge toll on the wellbeing of her child as well. Children of incarcerated mothers are shuffled into foster homes. If the mother-child contact is maintained there is a less likelihood of the child acting out, being violent or getting involved in delinquency.²⁷ Women's imprisonment can have profound effects on women's relations with their children, the relations and connections in their communities and it can also have a huge toll on the economic opportunities that needs to be explored.²⁸

Constitutional roots for Safeguards of Human Rights of Women Prisoners in India:

²² National Institute for Corrections, 'Strategies for working with female inmates in jail', U.S. Department of Justice, (2004).

²³ Sandra Bucarius and Sveinung Sandberg, 'Women in Prisons,' 51 *Crime and Justice* (2022).

²⁴ *Ibid*

²⁵ Pat Carlen, *Sledgehammer: Women's Imprisonment at the Millennium* (Springer, 1998).

²⁶ Pat Carlen and Anne Worrall, *Analysing Women's Imprisonment* (Willan Publishing, 2013).

²⁷ Erman Tejeda, 'Mothers in prison with minor children,' 82 *Prudentia juris* 251 (2016).

²⁸ *Ibid*.

The term 'Human Rights' has nowhere been mentioned in the Constitution of India, but as has been stated by Justice A.K. Sikri in a lecture as a tribute to Justice Ansari human rights are based on human dignity. The term dignity exists under the constitution of India in the preamble. Therefore even if no particular provision is given in the constitution with regard to women prisoners we can relate all the rights of women prisoners that relate to human dignity as having their roots under the constitution itself

*M. Nagaraj v. Union of India*²⁹The Supreme Court asserted human dignity in the following manner: "The rights, liberties and freedoms of the individual are not only to be protected against the State, they should be facilitated by it. ... It is the duty of the State not only to protect the human dignity but to facilitate it by taking positive steps in that direction. No exact definition of human dignity exists. It refers to the intrinsic value of every human being, which is to be respected. It cannot be taken away. It cannot be given. It simply is. Every human being has dignity by virtue of his existence".³⁰

Constitution of India is said to be a living document that protects the rights of every aggrieved person. There is one exclusive part three in the constitution of India that provides with fundamental rights of people that they can exercise against the arbitrary power of State and the State is duty bound to protect these rights of people and the aggrieved person can approach the apex court for violation of their fundamental rights. The Indian judiciary has played a robust role in extending the horizons of fundamental rights to inculcate within the umbrella of constitutional rights many more moral or human rights which were hitherto not part of written constitution are now an integral part of fundamental rights due to liberal interpretation of the constitution by the judiciary.

1. *Right to equality and dignity of women prisoners:*

The first fundamental right under the constitution of India provides the right to equality. When we study this right in the context of women prisoners it is the second part of this right that needs to be emphasized upon which is: equal protection of laws.

Women's crimes are committed in different circumstances to men's. Hence the response to both men and women lawbreakers should be in- part gender specific rather than merely crime and sentence specific³¹.

²⁹ [2006] SCC 234

³⁰ [2006] AIR 226

³¹Pat Carlen, *Sledgehammer: Women's Imprisonment at the Millennium* (Springer, 1998).

Article 14 of constitution of India provides the fundamental right to equality. This is one of the most sacrosanct fundamental right. Equality does not mean identical treatment of all but it is actually about equal protection of laws. Now a question that arises is whether equal treatment of women prisoners at par with male prisoners really protects or violates their fundamental right to equality?

Women's imprisonment is different from men's for following reasons:

- a) **Biological aspects-** women's physical needs are essentially different to men's. They need various facilities which are not required in men's prisons. For example facilities for menstrual hygiene, better nutrition to pregnant women prisoners and lactating mothers. Women may also need medical facilities for termination of pregnancy.
- b) **Social aspects** - women's role in the family is different from men's. Women are more attached to their children and hence they may feel more urge to be in contact with their children or other family members. Women prisoners are required to have better and more modes of communication with their family as they are more prone to depression and anxiety due to loneliness.
- c) **Cultural-** women face different experiences than male prisoners. Different meanings are associated with imprisonment of women prisoners. Women are expected to be caring, affectionate and calm. These stereotypes relating to women in the society may cause a lot of hardships to women prisoners. Hence prison authorities are required to be sensitized towards to issues of women prisoners.

The needs of women prisoners are quite different from those of male prisoners hence equality of treatment in this case would actually result in injustice to women prisoners. In order to effectively manage female prisoners as with other offenders a comprehensive study must be done that would analyze the needs of female offenders. A gender neutral prison system can actually imply “ gender- specific indignities” on women prisoners. One of the reason for inadequate provision of healthcare in women's prisons stems from they fact that they are a miniscule minority in almost every country and the male centric criminal justice system is ill-equipped to take on different and unique needs of women prisoners.³²

³²Estalyn Marquis, 'Nothing less than the dignity of man: Women prisoners, reproductive health, and unequal access to justice under the eighth amendment'(2018) California Law Review.

Article 15(3) enables the state to make special provision for women and children³³. Hence any law that treats women prisoners differently would stand constitutionality. Although women prisoners as a matter of right can not claim special provisions under Article 15(3) but they can be granted special treatment owing to Article 14 of the constitution of India by proving that equality of treatment of women prisoners at par with male prisoners actually results in unequal and unjust treatment as the needs of women prisoners are quite different from men's. Hence treating unequals equally would actually amount to violation of their fundamental right to equality. And they can approach the apex court directly through a writ.

There are many international and national conventions and committees that provides supports and demands special safeguards to women prisoners. viz.:

U.N. Standard Minimum Rules for the treatment of Prisoners, 1955 provides following non -discriminatory measures to protect the human rights of women prisoners:

- Rule 53(3) laid down that institution set aside for women should be under the authority of a responsible woman officer who shall have the custody of the keys of the institution. Rule 53(3) provides that women prisoners should be attended and supervised only by women officers, provided male functionaries like doctors and teachers within their professional duties can accrue out their authorizes in such institutions
- Rule 6 provides for non-discrimination among prisoners,
- Rule 8, calls for different provisions for different category of prisoners separated on the basis of age, sex, criminal record and necessities of their treatment.
- Rule 8(a), provides that as far as possible men and women shall be detained in separate institutions. There are rules that deal with medical facilities as well.

The U.N. Standard minimum rules recognizes that women prisoners are better protected under the women guards and women officers.

Rule 1 of **Bangkok Rules**³⁴ also provides that In order to employ the principle of non-discrimination embodied in for the Treatment of Prisoner account shall be taken of the distinctive needs of women prisoners. The rule further says that providing for such needs of

³³ Constitution of India, Article 15(3) states "Nothing in this article shall prevent the State from making any special provision for women and children".

³⁴ *The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, 2010*

women prisoners in order to accomplish substantial gender equality shall not be regarded as discriminatory.

In India a uniform prisons act is applicable to both male and female prisoners while the needs of women prisoners is quite different. In order to ascertain equality among men and women prisoners two different set of prison systems needs to be brought up. While The Prisons Act 1894 do say that male and female prisoners should be kept differently but apart from it no statute in India proves for separate treatment and residence of women prisoners.

Right to live a dignified life:

Sunil Batra vs Delhi Administration³⁵ is a landmark judgment which originated from a letter of a prisoners to the Supreme Court of India wherein the prisoners talked about his torture at the hands of prison authorities. The Supreme Court of India held that the convicts are not deprived of their fundamental rights under the constitution of India merely because of their conviction. The Apex Court has held in the landmark judgment of Menaka Gandhi V. Union of India³⁶ that right to life does not merely imply bare human existence but it extends to all those aspects of human life that provides a human to live a dignified life. When we apply this judgment to the case of women prisoners following aspects can be treated to be part of their fundamental right to life under Article 21 of the Constitution of India:

- *Access to menstrual hygiene:* A large number of female prisoners fall in the menstruating age group of 18-50 years, hence their hygienic needs must be taken care of by providing sufficient resources. They should be provided with sterilized sanitary napkins as most of the prisoners use cloth or other material during periods which can prove to be extremely harmful to the women's health. In some of the prisons it has been noticed that women are charged for the sanitary napkins provided by prison authorities. This compels women prisoners to resort to using unhygienic materials such as cloth, ash, pieces of old mattresses, newspapers etc. women's hygiene needs require more no. of toilets and better cleaning facilities in jails.³⁷

³⁵(1980) AIR SC 1579

³⁶(1978) AIR 597

³⁷Ministry of women and child Development, "Women in Prison" (June 2018).

Reproductive rights of women prisoners:

Reproductive rights are one of the vital subset of human rights. A woman must have complete control over her body in order to enjoy her life and personal liberty. Reproductive rights becomes all the more important in case of pregnant women prisoners as dealing with a pregnancy in prison environment is something no woman would like due to lack of facilities and proper care.

The twenty-year "**Cairo Programme of Action**" was adopted in the year 1994 at the International Conference on Population and Development (ICPD) in Cairo. The Cairo Program is the first international policy document to define reproductive health, stating:

“Reproductive health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so. Implicit in this last condition are the right of men and women to be informed [about] and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods for regulation of fertility which are not against the law, and the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant”.

The WHO defines reproductive rights as follows:

“Reproductive rights rest on the recognition of the basic rights of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have information to do so, and right to attain the highest standard of sexual and reproductive health. They also include the right of all to make decisions concerning reproduction free of discrimination, coercion and violence.”

Pregnancy in prison environment can be extremely challenging for the mother and unborn child as prison environment is quite harsh to deal with needs of pregnant prisoners. Comprehensive prenatal care is vital for a successful pregnancy. A thorough medical

examination and various tests are extremely important for healthy pregnancy. Prisons however provide inadequate prenatal care.

U.N. Standard Minimum Rules for the treatment of Prisoners, 1955 . Rule 23(1) emphasizes on having pre and post natal care and treatment facilities. The rules also states that when a child is born to an inmate the place of birth should not be mentioned as ‘prison’.

Rule 25 (1) requires that are the medical officer shall be appointed to take care of physical and mental health of the prisoners and daily checkups shall be conducted on sick prisoners.

During pregnancy a woman would require regular medical checkups and if there are any complications she needs to be kept under observation. But Indian prisons does not provide with such medical facility to women prisoners that subjects them to painful and risky pregnancy that sometimes can be life threatening.

Right to terminate pregnancy:

The Indian Penal Code criminalizes termination of pregnancy at any stage, but Termination of Pregnancy act 1971 allows termination of pregnancy till 20 weeks of pregnancy .After 20 weeks of pregnancy the abortion can be done only in exceptional circumstances viz. abnormal foetus, t o save the life of pregnant woman that too only after a board of medical practitioner assents.³⁸

Right to abortion is also available to women prisoners also as affirmed by the High Court of Bombay in case of *High Court on its own motion V. State of Maharashtra*³⁹ that a woman prisoner who wants to terminate her pregnancy before 20 weeks has the same rights as any other woman out of prison. No special permission of any committee is required. She merely has to state that she wants to terminate her pregnancy and she would be referred to a government hospital for termination.

Although a woman prisoner has same right to terminate her pregnancy at par with any other woman but it is applicable only within first 20 weeks. What if a woman is imprisoned in 20th week of pregnancy and she does not want to continue her pregnancy in adverse environment of prison, should not she be allowed to abort her pregnancy? The law is silent on this aspect.

³⁸Latika Vashist, “Women and the Law”, Annual Survey of Indian Law, (2016)

³⁹[2016] SCC OnLine Bom 8426

Right to better nutrition and menstrual health:

Women's body is delicate and needs special attention. The nutritional requirements of a pregnant or lactating woman are different. Also in order to maintain menstrual health she needs better hygienic conditions and better food .

Rule 5 of Bangkok rules provides that The women prisoners shall have facilities and materials required to meet women's specific hygiene needs, including sanitary towels provided free of charge and a regular supply of water to be made available for the personal care of children and women, in particular women involved in cooking and those who are pregnant, breastfeeding or menstruating.

Mother- child relationship in prison environment:

Prison environment is very harsh to nurture a child. In India children upto the age of six years are allowed to live with their mothers in prison and thereafter they are handed over to their guardian .In order to ease the life of women and their dependent children in prison **Bangkok rules**⁴⁰ has provided for following safeguards:

Rule 48

1. Pregnant and breastfeeding women prisoners shall be provided regular consultation with a medical practitioner. Nutritious and healthy food shall be provided. Women prisoners shall also be provided regular exercise facilities.
2. But for serious health issues, women prisoners shall not be denied breastfeeding their children.
3. Treatment program shall include medical and nutritional needs of pregnant and lactating women prisoners.

Rule 49 provides that in order to decide whether a child shall be allowed to be kept in prison with its mother or not, the best interest and welfare of the child shall be prime consideration.

⁴⁰The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, 2010

Rule 50 says that women and their children shall be provided maximum opportunity to spend time with each other. As separating the mother and child for long durations can have adverse impact on both.

Rule 51 lays down two sub rules:

1. Dependent children of women prisoners who live in the prison with their mothers shall be provided with health care services and their development shall be regularly monitored by specialists .
2. As far as possible the upbringing of the child in prison shall be as close to the one outside prison.

this rule recognizes the fact that prison environment can have adverse impact on the mind and body of a child. The authorities shall try to provide a free environment to the better growth of the child.

Rule 52 provides following three sub rules:

1. The time of separation of child from its mother and sending the child to free outer world shall be based on individual assessment and the best interest of child.

In India children only up to the age of six years are allowed to be kept with their mothers. After that they are separated from their mother and are handing over either to their legal guardian or an NGO. No child above six years can be kept in prison. This separation can impact both child and mother adversely.

2. Sub rule 2 says that the removal of the child from prison and from its mother shall be accomplished with utmost sensitivity, and shall be done only when alternative arrangement have been made for the care of child outside prison.
3. After children are separated from their mothers and are handed over to the guardian or relatives or any NGO women prisoners shall be given the opportunity and facilities to meet with their children.

For the betterment of both mother and child communication between both shall be maintained even when the child goes out. Abrupt separation can cause lot of mental distress to both mother and child that can have a lifelong impact. It would be inhumane to not provide any communication of mother with her child.

In India there is no particular provision that facilitates women prisoners to have a regular communication with her children outside. The government must evolve a scheme that ensures that women prisoners are able to meet their children at regular intervals. Such meetings would provide some hope and positivity to women prisoners who are otherwise staying in a distressing state of separation from their children.

Privacy rights of women prisoners in India:

*K.S. Puttaswamy v. Union of India*⁴¹, which is a path-breaking judgment recognizing right to dignity as a facet of Article 21 of the Constitution. The Court held that “privacy postulates the reservation of a private space for an individual described as the right to be let alone as a concept founded on autonomy of the individual. In this way, right to privacy has been treated as a postulate of human dignity itself. While defining so, the Court also remarked that privacy of an individual is an integral aspect of human dignity. Dignity and freedom are inseparable and one is a facilitator to achieve other. The family, marriage, procreation and sexual orientation are all integral to the dignity of the individual. Above all, the privacy of the individual recognizes an inviolable right to determine how freedom shall be exercised.”

Punishment justifies some restriction on civil rights but merely imprisoning somebody does not mean forfeiting one’s humanity, and therefore there ought to be sufficient space for basic activities and the prison environment should allow for at least a modicum of privacy and well-being.⁴²

In the year 2017 Minister of State for Home Affairs Hansraj Gangaram Ahir informed the parliament there were only 4,391 female jail staff for a population of 17,834 female prisoners as of 2015. Appointment of male staff in women prison violates their right to privacy as women may feel uncomfortable in the presence of male staff. In *Forts vs Ward* women prisoners incarcerated at New York State’s Bedford Hills Correctional Facility argued that the policy of assigning male guards to prison’s infantry and housing units violates their right to privacy as they would be “involuntarily exposed to view while partially or completely unclothed.” Advocacy for women prisoners and women guards has developed along parallel lines. In the case of women prisoner’s expectation of privacy, the US courts have held that gender and

⁴¹(2017)10 SCC1

⁴² Kleinig John, *Prisoner’s Rights* (Routledge,2014)

gender differences must matter while dealing with privacy rights of women prisoners as the courts treat women with a sense of modesty and a greater need for privacy than men.⁴³

Early prison reform systems did not cater to the issues faced by women's prisons as female prisoners were not rioting, nor did they have any sort of organizational structure within and outside the prison. Instead of cell, female prisoners were housed in "cottages" as they were thought to require constant supervision and were considered less physically violent.⁴⁴ The plight of women prisoners has recently got a lot of concern and limelight as the number of women prisoners has drastically increased. During last two decades movement on behalf of women prisoners has developed. These movements have attracted the attention of both legislature as well as judiciary towards the unique concerns of women prisoners.⁴⁵

Women sharing space with male offenders: In India the number of only women prisons is quite low as compared to the number of women prisoners. In many states women prisoners share the prison space with male prisoners that not only violates their right to privacy but can even subject them to sexual violence at the hands of male prisoners.

In many prisons women prisoners are even bound to share washrooms with male prisoners this clearly makes them vulnerable to sexual abuse and also violates their right to privacy. They are entitled to be treated with dignity. Immediate corrective steps should be taken in that behalf in all prisons in the State.

Even in women only prisons, there are few washrooms wherein as many as 15-20 women are bound to take bath simultaneously without any sort of partition, there is no privacy to the women prisoners even in women only jails. The State Government shall ensure that separate bathrooms are made available to the women prisoners for taking bath in privacy. The State Government shall maintain the dignity of women prisoners by providing privacy to individual women prisoners.

In the case of *Mr. Ganesh Shankar Pawar v The State of Maharashtra*, (Through Secretary, Home Development Department, Mantralaya, Mumbai) the Bombay High Court directed the state

⁴³Rebecca Jurado, "The Essence of her womanhood: Defining the privacy rights of women prisoners and the employment rights of women guards", *the American University Journal of Gender, Social Policy and the Law*, 7(1)

⁴⁴Erik. H. Monkkonen, "Crime and Justice in American History", *Prisons and jails* 612 (1992).

⁴⁵*Women Prisoner's of D.C. Department of corrections vs District of Columbia*, 913-19,(1996).

government to make immediate arrangements for providing more bathrooms in prisons in order to ensure privacy to women prisoners.

The Law Commission in its 135th Report indicated that the High Courts while exercising their administrative jurisdiction should be vested with power to direct sessions judges to satisfy themselves that women prisoners are protected and properly looked after. Further, the High Courts should have power to take such measures as may be required in order to move a state government to take necessary action for ensuring compliance of the orders. The Commission specifically proposed that a female prisoner on admission to jail should be medically examined by a lady medical officer and, wherever deemed necessary for medical reasons, she should be kept separately in a female enclosure for such period as in the opinion of the medical officer may be necessary.

Strip searches and privacy concern of women prisoners:

Strip searches is another concern with regard to protecting the bodily integrity of women prisoners. **Bangkok rules** provides for following rules to be followed while searching the body of women prisoners:

Rule 19 provides that searches of women prisoners shall be done having strict regard to the dignity of woman. And shall be conducted by trained woman staff that has been sensitized in accordance with established procedures.

Rule 20 provides that Alternative screening methods shall be employed in place of invasive body searches and strip searches scanning can be used to ensure that women prisoners do not experience any bad touch.

Rule 21 provides that Prison staff shall behave with competence and professionalism while searching the bodies of women prisoners.

Strip searches can have a toll on the privacy rights of women prisoners. Indian law does not provide any sort of guidelines or safeguards against strip searches. Even though many studies have shown that the strip searches conducted on women prisoners may not be as indignified as they are. Dignity of a woman shall be of at most concern to the authorities while searching women prisoners.

THE WAY FORWARD: NON- CUSTODIAL MEASURES FOR WOMEN PRISONERS

Imprisoning a woman has an adverse impact not only on the women offenders but on their families and most specifically on a large no. of children. Women have different needs with respect to family. A study conducted on Victorian women's correctional facility shows that out of the total male population in prison who have children 89% left their children in the care of their biological mother. While contrastingly in case of female inmates only 22% left their children in the care of their biological father.⁴⁶ The effects of incarceration of women can be particularly catastrophic for their children and can prove to be a costly affair for the state in terms of providing for their care.⁴⁷ Legal assistance shall be provided from the time of arrest itself so that required action can be taken on time. Detaining undertrial women can have severe consequences than in case of male undertrials. We should first ask the question whether there is even a necessity to send these women to prison in the first place. Is it possible as a society for us to go back to the days when prison was used as a measure of last resort for only the most violent and irredeemable among us.

The UN Standard Minimum Rules for Non- custodial Measures, 1990 popularly known as The Tokyo Rules provides a set of basic principles to promote the use of non- custodial measures. The rules intends to promote greater community involvement in the management of criminal justice.⁴⁸ Rule 5 of The Tokyo Rules requires all the functionaries to employ non- custodial measures as far as possible instead of sending the person to prison.⁴⁹ Rule 6 requires that pre trial detention shall be an exception rather than a rule and non custodial measures shall be more frequently employed specially at this stage. Rule 8 provides for following non- custodial measures: Rule 8: "Sentencing authorities may dispose of cases in the following ways:

- (a) Verbal sanctions, such as admonition, reprimand and warning;
- (b) Conditional discharge;

⁴⁶ Marilyn Warren, "Women in the Corrections System" (unpublished presentation, Monash University, 2010).

⁴⁷ Muktikanta Mohanty, "Behavioural Syndrome of Women Prisoners in India" *The Indian Journal of Political Science* (2013).

⁴⁸ *UN Standard Minimum Rules for Non- Custodial Measures* (1990), Rule 5 provides for Pre-trial dispositions and says that "Where appropriate and compatible with the legal system, the police, the prosecution service or other agencies dealing with criminal cases should be empowered to discharge the offender if they consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims. For the purpose of deciding upon the appropriateness of discharge or determination of proceedings, a set of established criteria shall be developed within each legal system. For minor cases the prosecutor may impose suitable non-custodial measures, as appropriate".

⁴⁹ *Id.*, Rule 5(2).

- (c) Status penalties;
- (d) Economic sanctions and monetary penalties, such as fines and day-fines;
- (e) Confiscation or an expropriation order;
- (f) Restitution to the victim or a compensation order;
- (g) Suspended or deferred sentence;
- (h) Probation and judicial supervision;
- (i) A community service order;
- (j) Referral to an attendance centre;
- (k) House arrest;
- (l) Any other mode of non-institutional treatment
- (m) Some combination of the measures listed above.”;

Rule 9 of The Tokyo Rules further provides 9 Post-sentencing dispositions in the following ways in case of convicted person instead of keeping him or her in the prison. Rule 9.1 of the Tokyo rules says that “The competent authority shall have at its disposal a wide range of post-sentencing alternatives in order to avoid institutionalization and to assist offenders in their early reintegration into society. Post-sentencing dispositions may include:

- (a) Furlough and half-way houses;
- (b) Work or education release;
- (c) Various forms of parole;
- (d) Remission;
- (e) Pardon”.

The Rule 9 further requires than any form of release from institution to a non- custodial mechanism shall be considered at the earliest.

The Bangkok Rules Rule 57 and 58 mandates that those female suspects who do not pose a risk to society shall not be detained pretrial unless exceptional circumstances are present.

As per UNODC Handbook on Women and Imprisonment the court is required to take into account the parental status and other caring responsibilities of women presented before them before detaining them during trial proceedings.

Conclusion:

Women's prisons should be a recreational and rehabilitative place. It should recognize the dignity of women. Prison space is not conducive to the needs of pregnant and lactating women hence as far as possible such women prisoners shall be left on parole or bail. Only in extraneous circumstances pregnant woman should be kept in prison. Women prisoners should be educated about their menstrual hygiene and better medical facilities should be provided to them. Women prisoner's needs are quite different from their male counterparts. Treating both with a uniform law actually amounts to indirect discrimination. Women prisoners are required to be dealt with a different rule book. Concerns like reproductive health, privacy issues and mother child relationship are specific to women prisoners only, the women prisoners needs special attention of the concerned authorities in order to live a life of human dignity. Prison shall be used as a measure of last resort in case of women offenders and efforts shall be made to utilize alternatives to imprisonment as imprisoning women even for a short duration can have irreversible adverse impacts on their children as well.