

## “RIGHTS OF FEMALE DETAINEE IN INDIA: A LEGAL ANALYSIS”

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### Abstract

Every year, close to 3 lakhs women are arrested for crimes under the Indian Penal Code and Special and Local laws. As per the Prison Statics of India 2022 of NCRB. Out of 5,73,220 prisoners, 23,772 are female Prisoners. There were 1,537 women prisoners with 1,764 children as on 31<sup>st</sup> December. A majority of female inmates are in the age of 30-50 years (51.5%), followed by 18-30 years (28%).

The women are fragile creature of God. God designed women to have weaker bodies. Weaker refers to bodily weaker. Body includes brain, muscular capacities and hormonal system. As a consequence, women have been a stigma in the patriarchal and misogynistic society. India is deemed to be the most dangerous country in the world to be a woman. The various problem faced by the female prisoners across the country is threefold due to the patriarchal and male centric perspective in the criminal justice system.

The constitution of India confers upon women status of equality and mandate the State to protect their rights. Despite of the prison's rules and various criminal laws, female prisoners have been experiencing hardships of imprisonments like lack of sanitary napkins during menstruation. Even the majority of women are not aware of their legal as well as fundamental rights. Primary object of this research is to spread awareness of female prisoners' legal rights and fundamental rights conferred by Indian constitution.

### Introduction

At the outset, it is important to acknowledge that men and women are not physically or biologically equal in terms of strength. Women face unique challenges due to various phases in their lives, such as menstruation, pregnancy, motherhood, and menopause. When a woman is under trial or convicted, she is often held in a detention centre until her conviction, acquittal, or during the trial process. During this time, women may experience significant hardships due to their biological phases, custodial rape and torture and responsibilities of motherhood. Custodial rape is the most common thing in our country. Custodial rapes and torture are the serious human right violation that have been reported in the country. They can lead to a range of negative health outcomes, including

unwanted pregnancies and sexually transmitted infections. Recognizing these factors, the Indian Constitution and the State have made provisions to protect female prisoners in a patriarchal and often misogynistic society, addressing their needs during these bodily phases and ensuring their rights are safeguarded.

As per the State provided in the Seventh schedule of Indian Constitution; all issues related to the prisons, reformatories, and borstal institutions and person detained therein; come under the domain of the State Governments. However, Indian constitution does not provide specific guarantees to women prisoners. The constitution of India under Art 14 provides equal protection of laws to women in India and Art 15 prohibits discrimination on ground of sex. Art

20(1) & (2) which talks about Ex Post Facto and double jeopardy. Art 21 of the Indian Constitution guarantees right to life and personal liberty. Art 22(4) to (7) grants the right to an arrested person to consult and be defended by a legal practitioner of their choice. Art 39(A) of the constitution provides free legal aid for all citizens, including all women prisoners.

Part IV of the Constitution of India contains the Directive Principles of State Policy. Art 15(3) of Constitution of India allows State to make special provisions for women and children. In the context of women prisoners, these provisions mean that state has a duty to provide for special needs and requirement of female prisoners. The state must ensure that women prisoners are not discriminated against and are provided with adequate with facilities, medical care, and protection from abuse and violence.

### History and Background

National Expert Committee headed by Justice Krishna Iyer examined the situation of women in prisons. The committee recommended the induction of more women in the police force in view of their special role in tackling the women and child offenders. This national committee also framed a draft Model Prison Manual. Chapter XXIII of this manual made special provisions for children of women prisoners. This committee also made significant suggestions regarding the rights of the pregnant female prisoners, child birth in prison, provisions for the nursery and crèches, regular medical examination, nutrition for children and adequate clothes according the climatic condition.

Ten years later, Supreme Court had directed the Central Government to prepare such manual. In 2003, central government circulated it to all the states and union territories and asked them to adopt it. In *Re Inhuman Conditions in 1382 Prisons [(2016) 3SCC 700]*, Supreme Court passed a landmark judgement concerning prison condition. Overcrowding, unnatural deaths of prisoners, inadequacy of trained staff.

Supreme Court observed that step taken by the state were facile and inadequate. Despite the fund allocated under 13<sup>th</sup> financial commission for the improvement the condition of women prisoners, the utilisation was less than 100%. In the result of landmark judgment passed by the Apex court, the most recent and updated Model Prison Manual 2016 was formulated. This Manual provides for certain special provisions for women prisoners and their children.

According to the Manual, incarcerated female inmates must be held in separate, well equipped jail annex area. Only female employee may work at this annex. according to the ministry of Home Affairs, 11 states and Union territories have adopted the manual. Remaining states regulate their prisons according to their own jail state manuals, based on the Prison Act 1948.

### Problem faced by women Prisoners

Due to various challenges women face at different stages of life, they required significant care. As a result, women prisoners often encounter numerous difficulties in prisons. There are several problems a female detainee must endure during their imprisonment.

#### ➤ Lack of Female Prisons

According to the National Crime Record Bureau (NCRB), India had 34 women's jail as of 31 Dec 2022. According to the NCRB reports, Jails in India are overcrowded. The lack of female prisons is the biggest problem faced by female prisoners. In the majority of the cases, undertrial female accused is detained in a jail where both male and female live. A vast majority of female prisoners throughout the country are confined in small detention cells within male prisons. Out of the total arrested female prisoners, only 18% (3650 women) were confined in female prisons. Female prisoners feel uncomfortable.

#### ➤ Poor Living Standards and Overcrowding in Prisons:

This is the most common problem faced by both male and female prisoners in India. Overcrowding is a serious issue. it leads to worse hygiene conditions and health issues and

the infection spreads quickly. Overcrowding also leads to severe mental effects on accused person who are forced to live in crowded jail. Due to overcrowding, the children of prisoners live in undesirable conditions. Convicted and undertrial prisoners, should be housed in separate jails, but it is not possible due to the lack of prisons.

➤ **Lack of Basic Facilities like sanitation and hygiene:**

In India, most of the accused are young, they come in the age group of 18 to 55 years. Most of them fall under the mensuration age group. During mensuration period, female accused should be provided with proper mensuration hygiene products and sanitary pads. Due to the lack of sanitary pads, it leads to the use of unhygienic means like cloths, rugs and newspapers, etc. it is the real concern of their menstrual hygiene.

➤ **Custodial Rape and torture:**

Women's safety in the prison is the utmost priority of the government as well as jail officials. Custodial rape is a serious crime and a grave violation where the aggressor not only takes undue advantage of his authority to control the individual, usually a woman, but also violates the individual's bodily integrity and the duty to care for and protect the citizens and their rights. In 2022, 24 cases of custodial rape were registered.

***The Mathura rape case of 1972: A watershed Moment in India's Rape Laws.***

Mathura, a young tribal woman from Maharashtra, was reportedly raped by two uniformed police officers in 1972. Her trauma shook the country and changed the landscape of rape laws in India. This case led to an amendment to the rape law in India via the criminal law(amendment) Act, 1983.

➤ **Lack of facilities for children of female accused in jail:**

As of December 31, 2022, there were 1,764 children of women prisoners in India, with 1,537 women prisoners. Children can stay in jail with their mothers till they turn six years of age if there are no suitable situations for their children

to live outside. According to some reports, women accused in jail even struggle to get proper food/diet for their children. Children live in jail premises, even in the absence of their parents. Minor children can come into contact with habitual criminals and develop their mentality according to the situation.

**Rules governing women in prison**

- Indian penal code, 1860
- Prison Act, 1894
- Prisoner Act, 1900
- Identification of Prisoner's Act, 1928
- Exchange of Prisoner's Act, 1948
- Prisoner (Attendance in court), 1955
- Probation of Offenders Act, 1958
- Code of Criminal Procedure, 1973
- Repatriation of Prisoners Act, 2003
- Model Prison Manual, 2003
- Model Prison Manual 2016

**Rights of women under Indian Penal Code, 1860**

Indian Penal Code, 1860 contains several sections that are relevant for the protection of the rights of women prisoners in India. Some of the major sections are: sec 354 and 376 are relevant for the protection for the rights of female prisoners in India.

- Sec 354: Sec 354 IPC has been enacted with a view to protect a woman against indecent assault. It states that, Any woman was assaulted or criminal force was used against her, to outrage her modesty. The offence is punishable imprisonment with two years, or with fine, or with both.
- Sec 376: This sec provides for the punishment for rape. It states that anyone who commits rape shall be punished with imprisonment for a term that may extend to life imprisonment.

**Arrest of a woman**

As per the Criminal Procedure Code, a woman is arrested by the female police officer. Arrest of a woman shall be made before the sunset and after the sunrise only. in exceptional circumstances, a woman shall be arrested after sunset and before sunrise only after obtaining the written permission of the Judicial Magistrate

(Sec 46). The police officer arresting the woman should not be dressed in his uniform to maintain to reduce to stigma of incarceration. As per the provision of sec 160(1) of criminal procedure code, women should not be called to police station or to any other place other than their place of resident for questioning. It also says that neither a male under age of 15 nor a woman shall be required to attend any place other than the place where they reside. In the case of “*Sheela Barse vs State of Maharashtra*” The Hon’ble Supreme Court held that it is the duty of police officers making arrests to ensure that arrested females are segregated from man and kept in female lock ups in a separate room.

### Search Procedures

Under the sec 46 to 51, the process of executing the search has been provided along with separate provisions for women. In making arrest of woman, the police officer or other person making the same, unless the circumstances otherwise require, or unless the circumstances otherwise require, or unless the police officer is a female the police officer shall not touch the accused woman for making her arrest (Sec 46). When a police officer, while executing arrest warrant has to enter in a house which is an original residence of a woman who, according to customs, does not appear in public, shall appoint a notice to that woman regarding her right to cancel the search Sec 47(2). Search of a woman shall be made only by another female with strict regard to decency (Sec 51). And medical examination of a woman shall be made under the supervision of a female registered medical practitioner. (sec 54).

### Medical examination of an arrested woman

According to sec 53(2) of CrPC, as per the section, when a woman is being examined, the examine shall be made only by, or under the supervision of a female registered medical practitioner.

Other than these provision, it is given that woman should be guarded by female constables or police officers while being

questioned or arrest. All necessary prenatal and postnatal care should be provided to females who are arrested. Safety of a woman and her foetuses should never be compromised or never be put on risk. A woman should never be restrained during labour.

### Right of an arrested woman

It is an important task to maintain a modesty of a woman, even she is accused of an offense. Therefore, certain rights have been provided to arrest woman along with some specifically allotted rights.

#### 1. Right to free legal aid

Art 39(A) of constitution of India makes provisions to provide free legal aid to a person who is incapable of bearing the expenses of civil and criminal proceeding of the court. This Article states that

It shall be the duty of the state to provide that person with adequate legal assistance at the State’s expenses. This Article extends to women. According to Section 304 of CrPC, the State Legal Service Authorities shall bear the cost of legal proceedings including the cost of legal proceedings including fees of the appointed legal counsel. If a woman is an accused of an offence, she is entitled to exercise the right of free legal aid and hence ensure her proper representation in the Court. This right was considerably exercised in “*Hussain Ara Khatoon v. State of Bihar (1979)*”, where the Apex Court held that if an accused is not able to afford legal services, then he has a right to free legal aid at the cost of the State.

#### 2. Right to be informed regarding the grounds of arrest and bail

Under the provisions of Section 50(1) of CrPC, the arrested person is entitled to gather information regarding the grounds of his arrest, and the police officer or any other person executing the arrest shall communicate the same to him/her. As per the judgement in “*D.K Basu vs. State of West Bengal (1986)*”, this right is exercisable by accused men and woman as well. Moreover, as per Sec 50(2) of CrPC, a woman without a warrant for an offense other

than a non-bailable one, and after arranging sureties on her behalf.

### 3. Right against manhandling and Handcuffing

When an accused woman is arrested, as per Section 46(1) of the CrPC, it is assumed that she has submitted to custody upon oral intimidation of arrest. Furthermore, unless there are extreme circumstances, only a female police officer shall touch an accused woman in order to carry out the arrest procedure. In the 2012 case of *Vibin P.V. vs. State of Kerala*, it was decided that the law has a responsibility to shield people from abuse and torture by law enforcement officials.

### 4. Right to inform relatives or friends

When making an arrest of a woman or man, the arresting police officer is required by law to promptly notify the arrested person's friends or relatives, or whoever they designate, of the arrest and the location where the arrested person is being held.

### 5. Rights during detention

Under normal circumstances, a police officer is not allowed to hold an apprehended person for longer than 24 hours (not including travel time). As was previously said, rigorous decorum should be used when making arrangements for the care of a detained woman. Because of a woman's modesty, it is against moral norms to hold accused males and women in the same jail. The Orissa High Court noted in the 1959 case *Gandharba Rath v. Apariti Samal* that Section 56 requires police officers to make an arrest in writing, stating the person to be arrested, the offence, or any other reason for the arrest. This requirement is particularly relevant in situations where a police officer has deputed a subordinate to arrest without warrant.

### National Model Prisoner's Manual 2016

Here are key elements that typically pertain to women's right in such manual:

#### 1. Healthcare for Woman:

Sterilized sanitary pads should be issued free of cost to woman prisoners as per their requirements. Comprehensive health screening of women must be done, while maintaining their right to privacy, dignity, and confidentially,

including their right to refuse screening. Comprehensive medical check-ups of the women should be done annually or monthly.

Woman prisoners are entitled to receive medical care such as reproductive health services, gynaecological exams and prenatal/postnatal care including regular medical check-ups during pregnancy, appropriate nutrition, assistance during labour and delivery. Women who have undergone abortion or have had a miscarriage should also be included in treatment and nutrition programme. Woman or lactating mother should receive advice on their health and diet under a qualified registered medical practitioner.

Prisons are applied to provide adequate mental health care, including counselling and treatment for issue like PTSD and depression.

#### 2. Pregnancy and Childbirth birth in prison:

Women are entitled to dignity and safe childbirth procedure. In case of pregnant prisoners, a temporary release should be considered for the delivery of children in a hospital outside the prisoners. Court must be apprised as to the pregnancy status of the detainee in order to grant bail or modify the detention order. s

Pregnant and lactating women should be provided with special diet as per the National Prison Manual. Woman prisoners must have access to urine pregnancy test kits within prison. Separate accommodation for at least a year should be allowed to maintain the hygiene during postnatal stage of the female detainee. Women may have access to nursery to spent time with their newborn. The birth certificate of the child born in prison should not mention the prison as the birth place to protect them against social stigma.

#### 3. Protection from Sexual Abuse and Harassment

**Protection under the Prison Rape Elimination Act (PREA):** Women prisoners are entitled to protection from sexual harassment, abuse and assault by staff and other prisoners. There

should be mechanisms to safely report abuse and harassment.

Custodial rape is one of the most common and heinous crime faced by the female detainees during imprisonment. Female constables must be appointed in all police stations so as to make the environment for female victims to be safe and secure. CCTV cameras must be installed in police stations and lock ups for the reason that these places are the major sources where such issues have been witnesses to occur. Installing the cameras in police stations is far more effective than that in prison.

#### **4. Family Rights and Visitation**

Woman prisoners have rights to regular visitation, phone calls, phone calls, and written correspondence to maintain family relationships.

Incarcerated mothers have the right parental decision making and maintaining custody of their children.

#### **5. Substance used and rehabilitation programme**

Women in prison often face addiction issues, and they should have access to substance abuse treatment programs that are designed specifically for women's needs, including trauma-informed care and support for dealing with domestic violence history.

#### **6. Mental Health and Trauma Informed Care**

Woman prisoners often have higher rates of trauma related to past experience of physical or sexual abuse. Prisoners are expected to provide trauma-informed care. Counselling of women prisoners in prison shall be carried out in such a manner that it will:

Give her the right feeling that prison is not the dumping ground. Rather it is a residential centre for occupational therapy from where their return journey to the free world. They shall be kept in mental health hospitals under the supervision of a lady medical officer.

#### **7. Educational and Vocational Training**

Woman prisoners are entitled to equal treatment under the law. This includes equal access to educational, vocational, and

rehabilitation programs that may be offered in person. The National Prison Manual provides diverse educational facilities for female prisoners. The education of young offenders (18 to 21 years) is considered compulsory. If they wish to pursue formal education. Study material and books should be provided as per the rules. Even vocational education facilities are also available in prison but options in vocational education are often not enough.

#### **Conclusion**

With the increasing number of women in prison there arises an urgent need to address the problems being faced by them. They encounter a number of hardships in prison such as: physical and mental health issue, poor standard of living and overcrowding, improper diet and poor nutrition and lack of free legal aid. They endure physical abuse by the prison staff. They are often beaten to death and custodial rape. Majority of female detainee don't know about free legal aid. These factors make their lives worst. They required special care.

The national modal provisions of prison manual must be followed strictly to make arrangements such as: temporary release for delivery in hospital outside the prison, separate accommodation for the mothers at postnatal stage to maintain hygiene, special diet for the pregnant and lactating women. There should be conducted a regular medical check-up on monthly basis and annual basis. Body searches must be conducted as per guidelines under the CCTV camera to maintain the dignity and privacy of the women prisoners. Woman with mental health issue should have access to female psychologist. Reformation and rehabilitation centres must be set up for the purpose of reintegrate the lives of the prison's inmates in the society after their release from the prison. They must aware of their legal rights.

In a nutshell, women should be treated equally as mentioned in the Art 14 and Art 15 of constitution of India so that we can achieve the main object of law of equality and law against discrimination.

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