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# **PRISONER'S DILEMMA: FROM TRIAL TO CONVICTION**

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## **INTRODUCTION**

Prison system owes its genesis with the civilization itself. Imprisonment as a way of punishing offenders has been in vogue since ancient times<sup>1</sup>. Prisons and correctional services are deemed to be the 'tail end' of criminal justice system. The punishment is based upon the principle that it must not degrade human dignity of flesh and spirit in order to keep the society civilized. The verity lies far away from this principle. History bears testimony to the fact that prison is regarded as the most opaque institution of the state as no one can just walk into a prison and ask to be taken around as one would in case of courts, hospitals and schools. The rule of law has always advocated the need for treating prisoners as human beings conforming to the basic standards of humanity and fairness. The words of Justice V.R Krishna Iyer clearly depicts the current situation in our prisons:

“ In our world, prisons are still laboratories of torture, warehouses in which human commodities are sadistically kept and where spectrum of inmates ranging from drift wood juveniles to heroic dissenters.<sup>2</sup>”

The utility of prisons as an institution for rehabilitation of offenders and preparing them for normal life is the motive behind giving punishments as ruled by the Supreme court through its various judgements that it follows reformatory theory<sup>3</sup> of punishment. Thus, this paper suggests

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<sup>1</sup>Prison system which is a method of handling criminals was the result of historic accidents. It was not a carefully thought out plan. The great prison in Rome was built by Pope Innocent X in 1655. There were generalised institutions for the care of criminals. The Seventeenth and Eighteenth centuries saw the rise of "Prisons", "Jails", "Houses of correction", etc. See John Lewis Gillin, *criminology and Penology* (1977), p.372.

<sup>2</sup>V.R.KrishnaIyer, *A National Prison policy-Constitutional Perspective and Pragmatic Parameters* (1981), p.7.

<sup>3</sup> There is deterrence, but without naked terror, there is prevention, but by methods that are generally regarded as just: there is reform, but by ' way" of expiation rather than by cure: there is education, both in knowledge of the laws themselves and in the need to recognise the rights of others: and there is public denunciation too. H.B.Action

a new approach towards the concept of reformation, which is coupled with the views of Mahatma Gandhi that 'criminality is a disease- criminal is a patient- reformation is the needed treatment- prisons are the hospitals- prison staff ought to be the expert doctors for the criminal patient. The idea is to turn prisons into hospitals<sup>4</sup>. This is the need of the hour as the conditions of the majority of prisons in India is horrible and many offenders are languishing in jails without trial for several years. Further, the prisoners are suffering in jails due to non availability of proper health facility, solitary confinement, inhuman torture of prisoners, overcrowding etc. This paper attempts to discuss all essential rights associated with the prisoners along with the desired result in case of it's violation with a comparative study with laws of different nations<sup>5</sup>. Further, the paper evaluates the penal provisions which are harsh in nature and needs to be scrapped or lessened and further a case study is attempted based on the model of Bastoy prison and various alternatives for under trial prisoners is also dealt in.

### 1.1 Objective of the Study.

- To make a comprehensive and critical analysis of the entire subject of prison reforms.
- To understand, the need and necessity of prison reforms.
- To offer appropriate suggestions to make the prison system more effective and efficient.

### 1.2 Scope of the study.

It is limited to the study of law and policy relating to prisons. This paper further intends to know the significant role that the Bastoy model will play in bringing prison reforms in India.

### 1.3 Methodology.

The research is purely based upon doctrinal method. The research is analytical and descriptive in nature. The data for the research has been gathered through various techniques such as

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(Ed.), The Philosophy of Punishment (1969), p.282 J.D.Mc Clean and J.C.Wood, Criminal Justice and Treatment of Offenders (1969), pp.85—

<sup>4</sup>The said thoughts of Mahatma Gandhi was echoed by Justice V.R.KrishnaIyer in his inaugural address at the Sixth Annual Conference of the Indian Society of Criminology at Madras on the 25th March, 1977. He stated: "Progressive criminologists across the world will agree that the Gandhian diagnosis of offenders as patients and his conception of prisons as hospitals mental and moral — is the key to the pathology of delinquency and the therapeutic role of punishment". Ismail Commission Report (1977), p.186.

<sup>5</sup>At present in England many prisoners serving relatively long terms have one short period of home leave near the end of their sentence. It is intended to be used in seeking employment and making other arrangements for release. In many countries regular home leaves are allowed at intervals throughout the sentence. See J.D.Mc Clean and J.C.Wood. op.cit., p.141.

Statutes on prison and prison administration, various judicial decisions, jail manuals etc.

Indian prison system, its core working and drawbacks have been analyzed from the viewpoint of the prisoners, keeping in mind their betterment. The paper intends to offer some valuable suggestion in order to make the system more effective and efficient.

## **PRISONER'S RIGHTS: CONSTITUTIONAL PERSPECTIVE**

The socio-legal framework of India is based on reforming and maintaining human dignity of the individual. Since the rights of the prisoners are not codified in India, the Judiciary has recognized certain prisoners rights mentioned below.

### **1. RIGHT TO BE PRODUCED BEFORE A MAGISTRATE:**

An arrested person has the right to be produced before a magistrate within 24 hours of his arrest.<sup>6</sup> This right safeguards the personal liberty of a person.

### **2. RIGHT TO BAIL:**

Bail is the procurement of release from prison by a prisoner under trial or on appeal. Provisions w.r.t. bail grant are provided in CrPC(ss. 436 to 450).<sup>7</sup>

“Bail is the rule and committal to jail an exception”. This principle has been pronounced by the apex court in umpteen cases, justifying the fact that until proven guilty, an accused cannot be deprived of his personal liberty<sup>8</sup>. It also finds place in s.436a(CrPC) which directs bail grant to under-trials after the completion of half the time of minimum punishment for the accused offence. In the case of Bhim Singh<sup>9</sup>, it was observed that in spite of incorporation of section s.436a (CrPC) under-trials continue to remain in prisons in violation of the mandate of the said section.

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<sup>6</sup> Article 22 of the Constitution of India & s.67 of Criminal Procedure Code, 1973

<sup>7</sup>Crimes have been classified into bailable and non bailable offences in Criminal Procedure Code, 1973. s.436 provides for procedure of bail in bailable offences and s.437 sets out the provision for bail in non-bailable offences. Although bail is a right provided to prisoners, it is not absolutely enforceable. Courts exercise wide discretion in granting bail.

<sup>8</sup>Refusal of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the Constitution of India; see Sanjay Chandra v. CBI (2012) 1 SCC 40; see also State of Rajasthan v. Balchand 1977 4 SCC 308; see also Gudikanti Narsimhulu v. Public Prosecutor 1978 1 SCC 240; see also Gurucharan Singh v. State (Delhi Admin.) 1978 1 SCC 118 (Unless exceptional circumstances are brought to the notice of the Court which may defeat proper investigation and a fair trial, the Court will not decline to grant bail to a person who is not accused of an offence punishable with death or imprisonment for life).

<sup>9</sup>Bhim Singh v. Union of India 2015 13 SCC 605; see also Re: Inhuman Conditions in 1382 Prisons (2016) 3 SCC 700.



### 3. RIGHT TO FAIR AND SPEEDY TRIAL:

Fair trial is the heart of a democratic polity that is governed by rule of law, and denial to it is regarded as crucifixion of human rights.<sup>10</sup> It is the allowance of fair and proper opportunities to the accused to prove his innocence.<sup>11</sup> **Articles 14 & 16 of ICCPR** advances mandate to a fair trial internationally.<sup>12</sup>

The slow motion syndrome<sup>13</sup> has plagued Indian Judiciary so much so that 67.2% of our prisoners are under trial, out of which 1.3% remained in jail for more than 5 years, being rebuffed of justice.<sup>14</sup> Even after the recognition of **Right to speedy trial** as fundamental to **Article 21 of the Constitution** and **Article 9(3) of ICCPR**,<sup>15</sup> its reach cannot be seen even marginally, leading to grave breaches of the fundamental rights of the prisoners. Overcrowded Indian prisons can be attributed to this very syndrome.<sup>16</sup>

### 4. RIGHT TO FREE LEGAL AID:

The promise of equality before law<sup>17</sup> has proven to be an empty promise, and has become the scourge of the poor worldwide. Things which come free are often compromised in quality and the same can be seen in dissemination of improper legal aid. **Article 14 of ICCPR** embodies the principle of access to justice to all. The **Convention on International Access to Justice**<sup>18</sup> came into being to ensure that its State parties provide access to justice to all, including aliens to the state. While in India Legal Services Authority Act, 1987 has been enacted to ensure

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<sup>10</sup>In the case of Sidhartha Vashisht v. State (NCT of Delhi) 2001 CrLJ 2404 Justice P. Sathasivam opined that “The investigation should be judicious, fair, transparent and expeditious to ensure compliance to the basic rule of law. These are fundamental cannons of our criminal jurisprudence and they are quite in conformity with the constitutional mandate contained in Articles 20 & 21 of the Constitution of India.”

<sup>11</sup>Mrs. Kalyani Baskar v. Mrs. M. S. Sampoonam 2007 2 SCC 258

<sup>12</sup>Article 14: (1) All persons shall be equal before the courts and tribunals. (2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law, (3) (c) To be tried without undue delay. Article 16: Everyone shall have the right to recognition everywhere as a person before the law

<sup>13</sup>In the bail plea of Babu Singh v. State of Uttar Pradesh 1978 AIR 527, Justice Krishna Iyer referred to the delayed justice system as a slow motion syndrome and remarked, “Our justice system even in grave cases, suffers from slow motion syndrome which is lethal to “fair trial” whatever the ultimate decision. Speedy justice is a component of social justice since the community as a whole is concerned in the criminal being condignly and finally punished within a reasonable time and the innocent being absolved from the inordinate ordeal of criminal proceedings.”

<sup>14</sup>National Crime Records Bureau (Ministry of Home Affairs), *Prison Statistics 2015*, September 2016.

<sup>15</sup>Hussainara Khatoun & ors v. Home Secretary, State of Bihar; see also Kartar Singh v. State of Punjab 1994 SCC (3) 569.

<sup>16</sup> According to *Prison Statistics 2015*, published by NCRB, Prison occupancy rate in India is 114.4%.

<sup>17</sup>Article 14 of the Constitution of India ensures that every citizen is provided equality before the law and comprises of right to free legal aid to all.

<sup>18</sup> Hague Convention on 25<sup>th</sup> October 1980 on International Access to Justice, India is a member party to the convention since 2008.

access to justice. It is government's duty and not charity to extend free legal aid to its citizens,<sup>19</sup> in which government has fallen on its face.

#### **5. RIGHT TO LIVE WITH HUMAN DIGNITY:**

The apex court has promulgated that Article 14, 19 & 21 are available to both prisoner and freemen.<sup>20</sup> Article 21, the parent to many rights encloses within itself Right to live with human dignity.<sup>21</sup> Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule.<sup>22</sup> Despite such legal pronouncements, prisons continue to be handicapped with overcrowded prisons, poor sanitation, inadequate food, , poor medical services, and improper legal aid, robbing off the prisoners of their basic human rights.

#### **6. RIGHT AGAINST CUSTODIAL VIOLENCE:**

Prisoners have always been a trifle in the hands of policemen, killed and tortured at their behest. Custodial death is a sheer violation of Article 21 of the Constitution.<sup>23</sup> NCRB reports 1496 custodial deaths in the year 2015, with a poor classification of natural and unnatural death. Collecting evidence and fair investigation is grueling by the very nature of such deaths being caused under police custody. Awarding compensation to the next kin has been a practice followed by the apex court, but it has not resulted in lowering of custodial deaths. The apex court suggests that custodial deaths be made in itself a crime.<sup>24</sup>

### **PRISONS, PENOLOGY AND PENAL REFORMS**

The Penal Provisions in India date back to 1860s when IPC was put to effect, since then the ideology of human rights have taken a huge leap, bringing in the need for reform.

**Death Penalty** is the judicial killing of an offender. Over the past 20 years as many as 141

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<sup>19</sup>State of Maharashtra v. ManujiPragajiVashi 1995 SCC 5 730; see also Khatri II v. State of Bihar 1981 SCC (Cri)288; see also Article 39A of the Constitution of India; see also Section 304 of Criminal Procedure Code, 1973

<sup>20</sup>T.V. Vatheeswaran V. State of Tamil Nadu, A.I.R. 1983 SC 361

<sup>21</sup>Jeeja Ghosh V. UOI, (2016) 7 SCC 761

<sup>22</sup> General Comment no. 21: Article 10 (Humane treatment to persons deprived of their liberty) of ICCPR

<sup>23</sup> D.K. Basu v. State of West Bengal (1997) 1 SCC 416; see also Ajab Singh v. State of U.P. 2000 3 SCC 521; see also Murti Devi v. State of Delhi 1998 9 SCC 604; see also Rohtas Kumar v. State of Haryana 2013 14 CC 290.

<sup>24</sup> Re-Inhuman Conditions in 1382 Prisons 2016 SCC SC 121

countries have abolished death penalty either in law or practice,<sup>25</sup> even the UN promotes abolishment of death penalty.<sup>26</sup> Often India was bewildered with the question of its constitutionality but all disputes were set to rest in the case of Bachan Singh<sup>27</sup> when the apex court held death penalty to be constitutionally valid. Death penalty as a measure to deter crime has been in practice since time immemorial but in today's world it has failed drastically. Even as some countries continue its use today, the crime rate has not lowered, instead a negative slope in crime rate has been observed in countries that have abolished death penalty.<sup>28</sup> Also, it is the only punishment that neither leaves any opportunity of reform in the offender nor provides any scope for rectification of error in the judgment if any.

Understanding the need for prison reforms, the apex court has come up with measures to ameliorate the prison system. Supreme Court issued guidelines to the Under Trial Review Committee to safeguard the fundamental rights of under trial prisoners relating to bail, habitation, health etc.<sup>29</sup> Also issued guidelines for High Courts to deal with under trials on a fast track basis.<sup>30</sup> With respect to legal aid it has been reiterated that a prisoner is entitled to legal aid for trial as well as appeal.<sup>31</sup> Measures to check custodial violence and make it a crime have been issued to the government in another recent case.<sup>32</sup>

### **CASE STUDY: A TURNING POINT**

Over the past three decades, penologists repeatedly have described Indian prison as “in crisis”. The nation has transformed itself from the mid 1970's regarding the views towards the prison inmates. It has departed from the culture where prisoners were seen as inhuman beings, who were sent in prison in order to be suffered. The judiciary owes the credit for changing this perception. Despite the verity, that our prison follows the reformatory approach, the reality lies

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<sup>25</sup> Amnesty International, *Amnesty International Global Reports: Death Sentence and Executions 2016*, Amnesty International Ltd., 24 (2017); Out of 141 Abolitionist Countries 104 have abolished death penalty in law and 30 in practice, out of 57 Retentionist countries 7 have abolished death penalty for ordinary crimes. (hereinafter, Amnesty)

<sup>26</sup> Centre for Civil and Political Rights (16<sup>th</sup> session 1982), *General Comment no. 6: Article 6(Right to Life) of International Covenant for Civil and Political Rights*; para 6; Article 6 (2) to (6) does not make abolishment of death penalty the law, but it obliges the states to limit its use and restrict it to most serious crimes, further the committee concludes that all measures of abolition should be considered as progress in the enjoyment of the right to life.

<sup>27</sup> *Bachan Singh V. State of Punjab*, AIR 1980 SC 898

<sup>28</sup> Amnesty, *supra* 24

<sup>29</sup> *Re-Inhuman Conditions in 1382 Prisons 2016 SCC SC 121*

<sup>30</sup> *Hussain & anr. V. Union of India AIR 2017 SC 1362*

<sup>31</sup> *Rajoo @ Ramakant v. State of Madhya Pradesh*

<sup>32</sup> *Re-Inhuman Conditions in 1382 Prisons 2017 SCC SC 121*

far away from the truth as overcrowding, absence of necessary things, custodial violence have led to make prison life far away from the reformatory one and the very basic idea of putting a person behind bars defeats the very purpose of reformation as no one can be reformed sitting in a cage.

Bastoy prison island is the largest low security prison in Norway situated a couple of miles off the coast in the Oslo fjord. The criminal justice system in Scandinavian countries<sup>33</sup> is based on the concept of 'Restorative Justice'<sup>34</sup>, which puts more emphasis on repairing the harm caused by crime than punishing the perpetrators. It also concentrates on the recovery of prisoners and efforts are made to prepare inmates for their return to the normal world. The Bastoy prison is based on the same principles.

#### **4.1 Salient features of Bastoy Prison.**

Bastoy prison is home to murderers, rapists, addicts and thieves, people who would be locked away in maximum security in prisons in India, roam free here on the island and that too with minimal security containing 8-10 guards and that too without fencing and yet there has been only a single attempt of escape, in its 32 years old history. The prison is based on the principle of mutual respect and trust as the guards deployed here don't even carry any weapons. The prisoners here live in communal cottages that includes a kitchen, living room and private bedrooms. The cost to maintain the facility is much less than other prisons because the inmates are mostly self-sustaining; they do the farming and cook their own meals as well as maintain their homes.

It is hailed as the world's first "Human ecological prison"<sup>35</sup>. It changes the common understanding of prison in society as a place of deprivation and penance. It is well known that no one can be reformed sitting behind the bars and can't be expected to develop real life skills of working and cooking. This Bastoy model is based on the theory that if prisoners are treated

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<sup>33</sup> Lahti, R. (2000). Towards a Rational and Humane Criminal Policy – Trends in Scandinavian Penal Thinking. *Journal Of Scandinavian Studies In Criminology & Crime Prevention*, 1(2), 141-155. doi:10.1080/140438500300076135

<sup>34</sup>Benson, E. (2003, July/August). Rehabilitate or punish? Psychologists are not only providing treatment to prisoners; they're also contributing to debate over the nature of prison itself. *American Psychological Association*, 34, 7.

<sup>35</sup>Ryan, R. (2015, February 25). Bastoy Prison in Norway Is the World's First Ecological Prison. Retrieved November 28, 2016 from NewsComAu. News Limited.

like animals than they are likely to behave like animals<sup>36</sup>. This model believes that for the victim, the offender in prison curtailed of his liberty is justice and for the purpose of justice to the society being served, it is important to treat them as human being and give respect; this way they learn to respect others. Thus, when they are released they are less likely to commit crime and become reoffenders.

## 4.2 Implication in India.

The Indian Judiciary has made it very clear that it proposes to follow reformatory approach but the problems that the Indian prison have makes it a utopian concept as overcrowding, custodial violence etc. has already taken their toll on Indian prisons.. 33% of prison population consists of convicted prisoners. Bastoy model can even be used in India and can be of great help in freeing up the space in already overcrowded prisons and reducing the number of reoffenders by actually reforming the prisoners. The Bastoy model can symmetrically be replicated in India as it is blessed to have 572 islands, in the Andaman & Nicobar region, out of which only 38 is habituated. India can very well select islands in the Andaman region to make it on the Bastoy model. It would also be cost efficient as the prisoners will be self sustaining. If successful, it may become a place of reformation for the hardened criminals into law abiding citizens and would ultimately serve the purpose of punishment.

## 4.3 New dimensions for under trials.

67% of the prison population in India is that of undertrials which makes it very important to have a solution for that class of prisoners among whom there would be many innocents and thus their rights are in need of urgent protection.

Solution for the plight of under-trials:

1. Separation of under trials from full fledged and hardcore criminals. The Bastoy model if implemented will result in the fulfillment of this concept.
2. The class of compoundable and bailable offences should be widened.
3. With under trial prisoners, adjournment should not be granted unless absolutely necessary.
4. Provisions of section 167 Cr.Pc with regard to the time limit for police investigation in case of accused under trial prisoners, should be strictly followed by both the police and courts.

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<sup>36</sup>Sutter, J. D. (2012, May 24). Welcome to the world's nicest prison. Retrieved December 3, 2016, from <http://www.cnn.com/2012/05/24/world/europe/norway-prison-bastoy-nicest/>

5. The concept of open prison needs to be implemented more vigorously.
6. The Government should start a policy to pay for the bail bond of the people belonging to poor class as this is a major reason for the overcrowding of prisons.

## **CONCLUSION**

Gone are the days when prisons were dungeons where prisoners were lodged to pass their days in dark and dingy cells. The prisons are no more the institutions designed to achieve only the retributive and deterrent aspects of punishment. They are now the places where the inmates are lodged not as forgotten and forsaking members of the society but as human beings who have to go out in their surroundings as well behaving and reformed persons. The souls behind the bars cannot be precluded of the basic human rights. However, the fact remains that it is the police and the prison authorities whose mindset needs to be changed and it has to be recognized that criminals are one among us and therefore needed to be treated than punished.

