



# IMPRISONMENT AS A PUNISHMENT OUTLOOK FOR THE 21<sup>ST</sup> CENTURY IN INDIA



## Introduction

*Public participation in prevention of crime and treatment of offenders must be made a part of our National Policy on Prisons. An intensive public education drive should be taken up to make the society aware of the role it can play in the prevention of crime and the treatment of offenders [emphasis added]*

*Chapter XXI Report of the All India Committee  
on Jail Reforms (Mulla Committee) Ministry of  
Home Affairs, Government of India, 1983*

The prison is the most opaque institution of the State which means no one can just walk into a prison and ask to be taken around as one would in the State's Courts of Justice, or State schools or hospitals. Practitioners all over the world will give a long list of reasons for this policy of exclusion: some are valid, the rest are either intended to create a mystique about the prison in the mind of the public, or simply excuses to cover up a lot of ignorance and lack of professionalism in running a prison. If qualitative change in prison management forms any part of the objective of good governance the above recommendation of the Mulla Committee is probably the most essential ingredient for that change suggesting as it does that society too has a role in prison and prisoner reform. That the debate about prisons generally is at a nascent stage all over the world, and that in India it is almost non-existent, is both a cause and a result of the general ignorance and indifference that surrounds the theory and practice of imprisonment especially in unequal and differentiated societies. As a large democratic system India can least afford to be sloppy about its institutions

especially those that relate to the delivery of justice. The existing indifference to the ethical management of institutions of custody surely needs to be questioned. This paper would wish to suggest why and how this should be done with some new logic and a drive to think outside the box both by practitioners and the public.

Many of the reasons for the present state of affairs in prisons lie in the intrinsic nature of this institution which is about one set of persons locking up another set of persons – all in the name of the law, and as an integral part of a full time job. Quite aside from the institution itself not being interrogated, a wholesome definition of this 'job' has never been undertaken except through referencing and quoting sections and sub-sections from obsolete rule books (Jail Manuals, Prisons Acts) most of which date back to the nineteenth century.

***Recommendation:*** *The absence of a search for a proper description of the job of a prison functionary in the present climate of greater emphasis on human rights than ever before needs to be addressed and acted upon.*

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In implementation terms it means providing such specific and concrete features that would be able to unite the abstract list of qualifications and requirements with the personal qualities needed for performing requisite tasks inside the prison environ today.

### **Background:**

Having had origins in a criminal justice system that was designed in colonial times for the colonial purposes of instilling fear and keeping control, in its present incarnation Indian prisons still have many features of being essentially products of those British colonial motivations and rationales that underlay the processes for administering India. To meet above all else the (colonial) agenda of law and order through control the entire structure of criminal justice was meticulously prepared to be effective for this end alone.

The main rule book for criminal offences and their corresponding punishments today is the Indian Penal Code (Act 45 of 1860) drafted and passed when the objective of punishment was as suggested above clearly stated by the authors of the Code as 'instilling fear' and exercising control over native populations. And year after year thereafter even when India shook off the colonial yoke the State (both central and provincial) has simply added more and more offences to the list as and when circumstances demanded. The repertoire of punishments that were set out in the 150 year old Penal Code however remains exactly as it was.

Related to this is the reality that this criminal justice system declared equal and impartial through codification was neither equal nor impartial given its ability to incorporate in its functionality several features of the prevailing unequal social injustice in the region. Punishment was declared the same for all but the real question was always which people were more likely to and did get caught in the

punitive net. Then as now most of those locked up were the socio-economic 'undesirables' of society and the rules of managing them were framed accordingly. The incentive to change has got diluted in most differentiated societies.

**Recommendation:** *A detailed knowledge of who is in prison (offences, socio-economic backgrounds, personal details, sentencing experience) needs to be available in the public domain to ensure transparency and public debate.*

Unfortunately the ethos of the present prison administration still remains rooted in the old motivations even when two dramatic changes have occurred that should affect this situation: (a) India is now a sovereign democratic republic with a constitution that spells out fundamental rights and duties for all citizens, and (b) a voluntarily set up world organisation (UN) exists that has provided universal standards and guidelines and monitoring mechanisms for ensuring that institutions of the state like prisons, adhere to humane and ethical standards.

**Recommendation:** *Rules for prison management must move away from old articles of faith and be commensurate with constitutional provisions and UN standards at all levels.*

Access to equal and impartial justice in all its manifestations is high on the agenda for all UN bodies that deal with human rights and justice systems throughout the world. Standards and guidelines have been in place for prison management for sometime now and as aberrations are highlighted by reform groups more formulae and courses of action are prepared collectively by international experts to address shortcomings in the criminal justice systems of many regions so that they are commensurate with the ultimate goal of justice for all. One example of a neglected area that has been overlooked thus far even

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at the international level has been the treatment of vulnerable groups at the hands of the justice machinery and the penal systems around the world. Recently in 2010 the General Assembly of the UN adopted the Rules for the Treatment of Women Prisoners and Non-custodial measures for Women (known now as the Bangkok Rules). Intended as detailed guidelines for addressing the treatment and needs of this one vulnerable group in the criminal justice it also serves as an example of the need for further investigations into other groups with special needs (children, the elderly, mentally ill).

***Realities of incarceration: theoretical and practical***

Without going into all the principles and theories that underlie the aims and purposes of punishment and its most prevalent form, imprisonment (deterrence, retribution, restoration, etc.) it is clear that the prison has failed to deliver what the State's criminal justice system professes as its primary goal, i.e. social equilibrium. What it does achieve is a sense of fear, a feeling of horror and multifarious ways of hoodwinking the state, all of which make no contribution to social equilibrium. In fact most of the findings of research bodies arrive at some simple conclusions:

- (i) that prisons damage people, albeit in different ways and degrees and
- (ii) that prisons serve only a very limited purpose in the quest for keeping society safe as less than 5% of those inside are a threat to society.

So no matter which aspect of the institution called prison is discussed, the 'why' of prison creeps up in the discourse at all times.

Clearly from a time when prison was considered necessary and useful (albeit for vested interests and primarily to warehouse undesirables) society and the state have reached a point when the institution's glaring shortcomings need to be seriously reviewed, reanalysed, revisited and reassessed on several fronts. But who would do this review and reassessment of shortcomings? There are no mechanisms that have a role as independent monitoring bodies that will inspect places of detention to focus on what exists and what does not, or even to prevent violations of human rights or cruelty and torture. The National Human Rights Commission of India does have a mandate that gives it the authority to enter and inspect institutions and highlight violations. But the role for action is still limited. The importance of and openness of closed institutions can never be emphasised enough. How often do we hear quotes suggesting that the degree of civilization on a society can be gleaned from looking inside its prisons? The attempt here is to suggest how this reassessment might take the shape of change-oriented recommendations for policy makers. The underlying suggestion is that while the prison is not going away, it needs the kind of reform-oriented change that is far more fundamental than it has been thus far. And accompanying that is the need to explore some effective alternatives to prison.

***Recommendation:*** *The negative effects of incarceration on different categories of prisoners needs to be professionally ascertained and made available for public and practitioners to embark on the road to alternatives,*

“.....no one who has been inside a prison, if only for a day, can ever forget the feeling. Time stops. A note of attenuated panic, of watchful paranoia, anxiety and boredom and fear mixed into a kind of enveloping fog, covering the guards as well as the guarded.... The scale and brutality of our prisons are the moral scandal of American life...”

**Adam Gopnic - The Caging of America  
Why do we lock up so many people?  
The New Yorker, 30 January 2012**

Independent India as a republic is a federal state system with a Central government and 28 State Governments and 7 Union Territories. States are further subdivided into *districts* (671 in all) which in turn are subdivided into *subdivisions*, or directly into the next unit of administration *taluks* or *tehsils*. The management and administration of prisons is a State subject under the State List (consisting of 61 items) in Part XI of the Constitution. Prisons are governed by the Prisons Act of 1894 and Prison Manuals the most important of which date back to British India. Updated rules and manuals supplement the above regulations. Day to day administration is carried out mainly through these rules and the Prisoners’ Act of 1900 and the Transfer of Prisoners Act 1950.

There are 1,394 prisons in India most of them positioned and structured more or less as they were in colonial India. Prisons are all called ‘jails’ in India unlike the UK where they are called ‘prisons,’ or the USA where they are ‘prisons’, ‘penitentiaries’, ‘jails’, and ‘houses of corrections’ depending on the nomenclature used in different States for the different categories of prisons.

Indian Jails fall into 8 categories or types and are located squarely within the administrative units described above. These are commonly known as Central

Jails (127), District Jails (340) and Sub Jails (806). Other types are dedicated institutions for specific purposes: Women’s jails (20), Special Jails (31), Open Jails (46), Borstal Schools (21) and others.

The capacity of these jails is as follows:

Type	Total Capacity
Central Jails (123)	46,648
District Jails (333)	1,24,768
Sub Jails (806)	8,474
Women’s Jails (19)	4,817
Open Jails (44)	4,028
Borstal Schools (21)	2,438
Special Jails (30)	10,331
Other Jails (3)	32

*Tabulated from Report of the National Crime Statistics Bureau, 2012*

Unfortunately the above source fails to provide the corresponding *occupancy* of the different jail categories thus obfuscating some of the realities relating to numbers that constitute a significant feature in assessing conditions of living within jails. There is however, comparative data on capacity and occupancy for individual Indian States that suggests that occupancy far outdoes capacity resulting in an overcrowding that severely stretches all the facilities in the prison.<sup>2</sup> Independent researches and programmes do indicate that district jails are the most crowded of all the jail categories. There is also no precise definition of each of these categories of Indian jails: Prisoners sentenced for a term exceeding 2 years are sent to Central jails which are larger and have more facilities than other jails but are still not adequately provided for the numbers they house.

The reality is that most Central Jails also house pre-trial prisoners (for long and short terms) whose numbers far exceed convicted prisoners. District jails are more numerous although smaller than Central

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Jails in most Indian States, for instance Maharashtra has 9 Central Jails and 25 District Jails, and Uttar Pradesh has 5 Central Jails and 53 District Jails. The factors that determine which prisoners are sent to these jails vary – from geographical location of the offence and offender, to type of offence (which in turn decides the duration of stay), and the length of the sentence awarded by magistrates and judges. Pending investigation and trial prisoners stay locked up for long periods in all these jails. The resulting problematic is overcrowding and overstretched facilities in most prisons, and the fallout of that is a host of issues that defy simple answers and solutions.

So the answer to ‘what are the Indian prisons’ is a hotchpotch consisting of the types of jails, the structures, the lay out, the categories and numbers they house and how they are classified, the personnel inside, the activities and functions of all inside – the list is long. Most of these structural categories have been around since colonial times when these jails were set up. The design and architecture is not just old but as suggested caters to a philosophy of punishment emanating straight out of the Victorian era. The degree of dilapidation of some of the jails has to be seen to be believed. Many of the facilities are poor and the explanation often given is ‘so are the prisoners poor’.

But this is not the most glaring problem relating to Indian (or South Asian) prisons, for if it were then all that the policy makers would need to do is to build newly designed prisons and things would be alright. In fact under the Central Government’s ‘modernisation’ policy funds have been made available for some quite large new prisons to be built in several States in India. They are the pride and joy of prison administrators in these States who often boast of having built ‘state of the art’ prisons with ‘beautiful’ landscaping and modern facilities. Can a

prison ever be beautiful seems a valid question to ask especially since they still fail to meet the standards of functioning proclaimed as desirable and ideal by national and international policy makers for the functioning of a democratic world order. There are other more fundamental problems relating to the institution that are a blot on the State’s reputation for ethical standards and good governance.

### ***The problem areas:***

Thirty years ago the All India Committee on Jail Reforms delineated the most fundamental problem areas relating to Indian prisons. It set out to address the issue of reform under several different ‘heads’ or subjects usually covered by most ‘Standards’ documents that predate it, but with the requisite contextual features added. Broadly these ‘heads’ were:

- Prison buildings
- Living Conditions
- Diet
- Sanitation and hygiene
- Clothing and bedding equipment
- Letters and contact with the outside world
- Medical and physical facilities
- Security and Discipline
- Diversification and Classification
- Typology of crime
- Treatment of Prisoners
- Work Programmes
- Agriculture
- Under-trials and other un-convicted prisoners
- Women
- Children
- Young Offenders
- Lifers
- Death row prisoners
- Sub Jails
- Open prisons
- System of remission, leave and pre release
- Community Involvement in Corrections

*From Chapter classifications in the Report of the All India Jails Reform Committee, (Mulla Committee) Ministry of Home Affairs, Government of India, 1983.*

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Each Chapter in the Report sets out at length the standards required for decency and dignity in managing and maintaining prisons with a special focus on ensuring human rights. Details such as the square footage of space and the cubic foot requirement of air needed by each prisoner are clearly worked out in the recommendations. Among other things the over use of prisons is questioned and there is a clear suggestion for alternatives to prison.<sup>3</sup>

Unfortunately the Report remains an oft-quoted volume that adorns prestigious shelves without finding a formal place in prison policy and management. It emerged out of political circumstances following the declaration of ‘the Emergency’ in India when prominent leaders sent to jail for various reasons saw the inside of a jail for the first time and believed jail reform could become a seductive item in their political agenda. The Report was welcomed by reformers as the most comprehensive document on the subject so far and even with its limitations it would have served as an effective tool on the road to efficient prison management. Unfortunately too, the Indian State has still not worked out its priorities in the area of criminal justice: while control of crime and maintaining law and order has been, justifiably, a priority in the general scheme of things particularly in today’s fear ridden environment, the methods used to achieve these ends are neither effective nor commensurate with the declared adherence to the human rights guidelines set out in the international standards documents subscribed to by all States. Against a backdrop of a fear neurosis there is an indiscriminate use of the prison and an inability to guarantee that there would be no mismanagement resulting in aberrations in the area of human rights, thus rendering the status of all ‘Standards’ oriented documents meaningless. So how does one address the problematic?

### ***A suitable yardstick to ‘measure’ the performance of a prison:***

Any discussion about prisons anywhere in the world would need to look first at the aims and purposes of prisons and why they are such a universally accepted form of punishing individuals who have offended criminal laws promulgated by the State. Not unrelated to the above, a focus on the ground realities pertaining to prisons would then be needed to suggest their position on the ‘good’, ‘not so good’ and ‘bad’ scale. These can be labelled the qualitative and quantitative features in the discourse about imprisonment. Translated into steps for reform it is the experiences of *those inside* (both staff and prisoners) that should form a yardstick for measuring the quality of a prison, its standards of management and more importantly the pride of place it gets as the most preferred punishment for offending. Statistical information at any level is unable to address the one common and regrettable attitude to prison populations anywhere in the world: ‘Lock them up and throw away the key’. We need to examine the institution with untainted glasses.

What need to be looked into are the adverse *qualitative consequences* of the overuse and mismanagement of prisons on those who are ‘inside’ and those ‘outside’. In any debate on the either the conditions in or management of prisons in India the overload of statistical information has mostly been about overcrowding, the absence of amenities and facilities, lack of adequate budgets, poor ratios of staff to prisoner or motor vehicles to prison, or judges to work load and so on. There was a time when collection of statistics for prisons and prisoners was poor in India and projects designed to gather this information were at a premium. Today the National Prison Statistics Bureau produces fairly exhaustive albeit clinical statistics relating to prisons in India. Statistical information unfortunately is no substitute

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for the need to address the fundamental issue of the public's almost total ignorance about prisons, nor is it of much value in assessing and measuring the health (including mental health) and fitness of a prison from a human rights perspective. Much more than statistical information is required to enable prisons in India today to reach the standards of decency required of all state institutions in a democracy.

This 'more' would relate to the kind of research and recommendations set out for instance for each section of a prison in the Mulla Committee Report, which would indicate the nature and degree of compromise of human dignity in the prison. If there is a shortage of good clean water, poor quality of food, unhealthy surroundings and sanitation facilities, lack of health care for different categories of prisoners, disregard of special needs for the old, infirm, women, children and disadvantaged and disabled, and lack of sensitivity in the handling of prisoners, then the prison is clearly unfit as a place of living for anyone. The problem is that as things stand 'prisoners' are not included in the category 'anyone'.

The Mulla Committee Report is not the only document that has been marginalised in the quest for change and reform in the prison system. The Report of National Expert Committee on Women Prisoners (Krishna Iyer Committee, 1987) that made some vital suggestions relating to women and custody has suffered the same fate. The fate of women 'inside' and the repercussions of their imprisonment on them and on their families have received minimal attention in South Asia. Both of the above documents provide a direction for better information and analysis but neither has found its rightful place in the formal rules pertaining to custodial justice.<sup>4</sup>

Two further realities not unconnected to the problematic associated with

'information' and 'statistics' need to be underscored if some of our objectives relating to penal reform are to strike a chord with policy makers. One relates to the actual use made of prisoner statistics i.e.: that India's incarceration rate is low and the fuss and urgency concerning prison reform is somewhat unwarranted. Statistical information often has a way of being used to make a case from two sometimes contradictory positions. Prison populations are generally rising in almost every country and the pace differs. The US now has a total of 2,193,798 prisoners (this includes those in local and city jails and excludes the 4,814,200 adults on probation and parole which brings the total under correctional supervision to 6,977,000).<sup>5</sup> China has 1,548,498 and Russia has 874,161 prisoners. Countries vary in population and for that reason 'rate of incarceration' (prisoners per hundred thousand of the population) is considered a more reliable method of relative assessment of numbers. The US is still the highest rate at 743, with Russia at 484, China at 118, England and Wales at 148, Italy at 108 and France at 101. India's rate is 30, Pakistan's 39 and Bangladesh 42. The US has therefore frantically embarked on the road to reducing its prison population, albeit with an emphasis on cost.

Unfortunately what is missing in the logic relating to numbers is the real gravity of the problem that results from a misinterpretation of the rate of imprisonment statistics, and the consequent lack of attention to this institution. The prison population of any country is declared to be the total number of prisoners on a particular day of the year which figure tells us little about real numbers relating to prison populations on a larger time scale. A better figure would be how many people went through a prison in a whole year: the figures would be ten times higher than the figure on a day every year to assess prison populations. Such a

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statistical calculation would be a better source of information for just how many go through the doors in a year (or ten years or twenty years) and would better suggest just what numbers suffer the damage caused by imprisonment that are becoming increasingly evident. The State has 'maimed' them in so many ways we would not know where to begin to heal the wounds.

The second reality relating to the rate of incarceration for India (30 per hundred thousand) or even Pakistan (39), being considered low in a long list from almost 200 countries is that to give a proper perspective on punishment it would have to be placed against other vital features and aspects relating to punishment. There are only about 16,000 women prisoners in Indian prisons at any given time. Neither this figure (considered low) nor the one relating to pre-trial prisoners – 75% (which is high) can tell us the real gravity of the problem that the justice system fails to address

India's low *rate* of imprisonment is sometimes a reason for complacency for policy makers when pressured by reformist bodies. Falling as it does within the Ministry of Home Affairs whose preoccupation in the present day is making society safe from the menace of terror and the dread of hot headed rebels, the reform of places of detention and custody is easily set aside as low priority in the scheme of things handled by the Ministry. It would rather and sometimes justifiably, occupy itself with combating fear in society through a strengthened police force. Should the prison be located in the charge of another Ministry less occupied with policing so that basic standards of decency and dignity are not compromised? From the viewpoint of governance prisons cannot be allowed to stay as they are, i.e. places of punishment where military discipline rather than care in custody is the guiding philosophy. It would be a

compromise of democratic values and principles. But there seems no rush.

To conclude there is less punishment from the low incarceration rates in India would be an error from yet another angle. In addition to the state's punitive machinery South Asian societies (and many others outside Asia) still retain odious punishments within the community: village and family elders mete out unacceptable punishments to women, lower castes and the marginalised all the time for offences (against a social code) which may or may not be in the formal 'book'. They are like parallel judicial bodies that carry out their own 'justice' often with little interference from the states' formal system. The 'justice' meted out would itself qualify as crime by the State's rule book.<sup>6</sup>

More often than not the formal state system turns a blind eye to this community justice or condemns it with a rhetorical reproach that achieves little. We do a lot of punishing outside the criminal justice system, within community jurisdictions; prison figures are not an indicator of the whole punitive picture. Appalling community punishments are what gave the prison a more civilised status as a punishment in the first place. Upon reflection however it becomes evident that the evil features of the one are adequately matched by equally unethical features in the other. Both need to be dealt with.

### ***The need: Human solutions to human problems:***

From being considered easy dumping grounds for undesirables, or the dustbins of society, prisons, if we must have them, do need to find their proper place among those of the State's institutions that deliver *human* (not just *legal*) justice. The failings and shortcomings of the prison need to be part of a larger debate for reform conducted at forums where practitioners



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and public participate equally: Some of the attitude changes that both need to be reminded about are listed below:

- prisons are institutions of the State like any other
- prisoners still remain persons and citizens of the country even when incarcerated
- prisoners languishing inside without trial for years on end is unacceptable
- qualitative aspects of the prison officer's job require rigorous definition and debate
- sentencing options by judges need to be fully explored
- alternative to prisons need to be looked into and tried
- prisoners need to be systematically classified and their needs addressed accordingly
- the problem of children accompanying parents to prison requires a solution
- vulnerable prisoners need to be systematically categorised and their specific needs attended to professionally and humanely
- the specificity of the damage that imprisonment does needs scrutiny and analysis
- deteriorating mental health in prisons requires professional investigation

If prisons are stretched beyond their capacity both in the numbers housed and the facilities therein ultimately the prison administration is responsible for the compromises with standards on all the features listed above. The choice is clear: reduce the prison population or increase the facilities. Both are regarded as improbable, although they are not impossible.

That the numbers are high (particularly of pre-trial prisoners) can be attributed to:

- too many unnecessary and indiscriminate arrests
- criminalising some aberrant behaviour that could and should be addressed in the societal domain
- a slow judicial process and a general lack of awareness relating to the process
- prison a first choice rather than a last especially for minor offences
- few if any alternatives to imprisonment receiving attention
- minimal use of other sentencing options than imprisonment
- no research into existing 'good practices' (restorative justice, mediation and alternative dispute resolution, open prisons)

Extending the facilities and exploring newer areas of reform has few takers for several reasons:

- Prisoners are considered undeserving for the most part both because of their criminality and their socio-economic backgrounds
- Escalating crime rate has blurred the difference between petty and heinous offences in the public perception
- Outdated retributive theories guide the penal system
- Prisons are opaque institutions and the State gets away with poorly provided mismanaged institutions, and inadequately trained and ill provided staff
- There is no *independent* inspections of prisons
- The damage that prisons do at various levels to all those inside (individual, family, society) has not been researched, analysed and publicised

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## Conclusion

Returning to the beginning – the statement from the Mulla Committee Report suggesting that the public has a role in the treatment of offenders clearly points to a need for more education about the institution among the public and far greater transparency in the running of prisons than exists. The issue of transparency is emphasised all over the world. One of the leading penal reformers in the UK stated in a seminal work:

*No one benefits from the inwardness, the secrecy, the lack of accountability, the untrammelled discretion of prison governors' - not the prisoners, not the system, and certainly not society. The prison system can only benefit from turning away from its inward looking habits and facing the outside world.*<sup>7</sup>

Rethinking the Indian prison almost in its totality should not be seen as an impractical superfluous task by policy makers. In an age when 'change' is the new mantra in all other spheres of activity, social and economic, state and non-state, it is difficult to understand how this one institution has remains dated and archaic and unworthy of both public concern and public debate. Oddly there is only one new development relating to prisons that has caught the imagination of prison managers in India - this seductive development is the rise of privatization of (to be distinguished from the contracting of services within) prisons. 'Not a way to go' is the considered opinion of those who view prisons with a view to governing with accountability an institution that is the responsibility of the state that retains the power to punish.

The rethinking of retributive punitive processes was recently put to the test in India by a judicial pronouncement of some magnitude relating to the commutation of the death sentence of 15 convicts (after the rejection of their clemency petitions) to life imprisonment on moral and

humanitarian grounds.<sup>8</sup> At a time when the demand for the death penalty has been accelerating with boundless energy at every level, the Supreme Court of India's verdict on death row convicts that had obviously met the 'rarest of rare' prerequisite for the death penalty does expand the scope for judicial intervention or review dramatically. For the purposes of the present thesis it is significant in the manner it seeks to protect the fundamental rights of those convicted even for heinous crimes by ensuring their humane treatment right up to the moment of their execution. It recognises the damage caused to the prisoner if there is undue delay in the process (from the pronouncement of the sentence and the petition for clemency to the rejection of the mercy petition). Reminding prison authorities of the restriction relating to keeping death row convicts in solitary confinement before the rejection of their mercy petitions, it declares mental illness and solitary confinement as legitimate grounds for commutation.

*India has been a signatory to the Universal Declaration of Human Rights, 1948 as well as the United Nations Covenant on Civil and Political Rights 1966. Both these contain provisions outlawing cruel and degrading treatment and/or punishment. Pursuant to the judgment of this Court in Vishaka vs. State of Rajasthan, (1997) 6 SCC 241 international covenants to which India is a party are a part of domestic law unless they are contrary of a specific law in force.*<sup>9</sup>

The focus on the mental health of prisoners is significant for its wider implications on all prisoners:

*We have seen that in some cases death row prisoners lost their mental balance on account of prolonged anxiety and suffering.... There should therefore be regular mental health evaluation of all death row convicts and appropriate medical care should be given to those in need.*<sup>10</sup>

There have been other cases earlier where the Court was not able to address the question of delay in the use of the power for clemency (the exercise of which power

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has been seen as a constitutional duty rather than a matter of grace or privilege). However this particular judgment took full cognisance of those features of incarceration of death row prisoners that had not received consideration earlier.

The Judgment also mandates for legal aid for convicts in drafting mercy petitions and exploring judicial remedies. Perhaps there will be more thought on the damage of the death penalty itself. Perhaps too this concern for one category of prisoner will extend to many other categories that are also vulnerable at different but somewhat comparable levels. It would not be unreasonable to suggest that the long periods of incarceration for other categories of (vulnerable) prisoners (long term, old, children, mentally ill) are equally a cause for concern. This too needs to be subjected to scrutiny so that the odious features of incarceration (mental illness in this case) are questioned and addressed in a befitting manner. As stated earlier the damage that prisons do has not yet been investigated and analysed. It is by no means tantamount to calling into question the concept of punishment itself: nor is there any suggestion that the suffering of the victims at the hands of the perpetrators can be underplayed, compromised or minimised:

*We do comprehend the critical facet involved in the arguments by both sides and we will strive to strike a balance between the rights of the accused as well as of the victim while deciding the given case.*<sup>11</sup>

There is a submission here that two wrongs do not make a right. An eye for an eye will indeed make the whole world blind. It is clear that the debate about what is just as well as human in any policy relating to punishment has only just begun. It is hoped that it will continue going forward rather than backward.

## **End Notes**

1. Report of the Indian Law Commission on the Indian Penal Code, 1837 (Macaulay Committee Report)
2. Prison Statistics India, 2012 Chart 2.3. National Crime Statistics Bureau,
3. Report of the Committee on Jail Reforms, 1983 (Mulla Committee Report) Ministry of Home Affairs, Govt of India 1983
4. Report of National Expert Committee on Women Prisoners (Krishna Iyer Committee) Department of Women and Child Development, Ministry of Human Resource Development, 1987
5. Correctional Population in the United States, 2012. U.S. Bureau of Justice Statistics
6. Various newspaper reports (January 2014) on 'gang rape 'order' by kangaroo courts in Bhirbhum, in West Bengal, and *khap panchayats* in States like Haryana where village councils order crude punishments like naked parading or gang raping of women for aberrations of social norms (such as adultery, out of caste relationships)
7. Stern, V. *Bricks of Shame. Britain's Prisons* Penguin, Harmondsworth, 1987
8. *Shatrughan Chauhan and Anr. Vs. Union of India*, Writ Petition (Criminal) No. 55 of 2013
9. Judgment, P Sathasivam, CJI, op.cit. See also *Ediga Anamma vs State of Andhra Pradesh.*, 1974 (4) SCC 443 wherein Krishna Iyer J. spoke of 'the brooding horror of haunting the prisoner in the condemned cell for years'.
10. P. Sathasivam CJI, Cited in Judgment op.cit.
11. *Ibid.*

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## References

### International Standards

- 1: Universal Declaration of Human Rights, 1948.
- 2: Standard Minimum Rules for the Treatment of Prisoners, 1955.
- 3: International Covenant on Civil and Political rights, 1976.
- 4: Convention against Torture and other Cruel, Inhuman or degrading treatment or punishment, 1984 and its optional protocol, 2002.
- 5: UN Standard Minimum Rules for the administration of Juvenile Justice (Beijing Rules), 1985.
- 6: Convention on the Rights of the Child, 1989.
- 7: Basic Principles for the Treatment of Prisoners, 1990.
- 8: UN Rules for the Protection of Juveniles Deprived of their liberty, 1990.
- 9: UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women offenders (Bangkok Rules), 2010.
- 10: UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, 2012.

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