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Prison Rapes and Violence: A Comparative Analysis between USA and India

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ABSTRACT

Rights are very crucial for every mankind be it an accused or the aggrieved person in a particular offence as prisoners are also humans and they deserve to be treated like humans. Just because a person is criminal, it is not justifiable to punish or harass for his/her wrongdoings as it is upon the judicial system of a particular country to decide what punishment an accused deserves or not. Custodial rape and sexual violence upon the prisoner is one of the most ignored offence to be reported or to be discussed about as people are not sympathetic towards prisoners and think that it is better to subject the criminal to the same heinous act, which he/she has committed against the victim and the society. Rape is considered one of heinous offences but only women come under the term 'victim' when it comes to sexual offences or rape laws. Prison violence is not any gender specific issue and it drastically drags the prisoners into trauma and insecurity, which stays with the prisoner and later carries to the society when released.

The authors would be shedding light upon the laws against custodial rape and sexual violence in India and USA and comparing the rights of prisoners. And discussing the loopholes in laws against prison violence with the help of various case laws and later elaborating about the reforms needed in laws in that particular country. Research methodology would be doctrinal and authors would be referring to various secondary sources like books, magazines, journals, case studies, exiting legislations, etc. of India and USA.

The research question:

- 1. Are there any existing laws to tackle and elimination of the crime of custodial rape and sexual violence in India and USA? If yes, are they enough to protect rights of the prisoners?*
- 2. Are the laws gender specific in India or USA? Is there any need for reforms?*
- 3. What is the impact of prison rape and violence on prisoners?*

Keywords- *Rape, Violence, laws, rights, prison*

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I. INTRODUCTION

Under The term offender or a criminal can overwhelmingly, be perceived by the society as its wrongdoer, and the feeling of revenge in order to make him suffer for his sins, escalates. The fear of prisons is not merely the personal deprivation of liberty but is finely of certain acts that take place in that institution. It is very much acceptable that only the toughest survives the tenure of incarceration. An individual, no matter how unfair his conduct against law and society was, is not to be deprived of his dignity and morality of being a human being. It is essential for each and every person to possess human rights. Even if the person is incarcerated because of his offences, he is entitled to basic human rights and a physically and mentally stable environment. The Criminal Justice System is constructed upon the goals including non-violence, dignity, rehabilitation of offenders, preventing other crimes and moral support for the victims. Indian and American Justice System share this componential similarity; however, they also have the parallel conditions in prisons that perpetuates abuse, custodial rape (non-consensual coercive intercourse under the threat of armed or unarmed brutality) and violence against the people incarcerated.

Sexual abuse and exploitation of prisoners by the prison staff and other inmates has been a key theme in the history of imprisonment for a long time. Its existence is unfortunately, deeply rooted: racial bigotry, violence's lethality, mob-lynching, ethnic differences and slavery are some examples of elements contributing the American notion of custodial rape and violence; whereas cultural, social, and class-based oppressions, sexual inequality, and gender disparity are some examples that aid the Indian notion of custodial rape and violence.

Prison rape not only affects or happens to the female prisoners; it is a gender-neutral offence. Prisoners of all genders get harassed and exploited sexually by prison staff and inmates of all genders. It can be termed as a blunt manifestation of dominance. For instance, prison staff or guards, when do body searches upon the prisoners, they might touch their genital areas and chests (in case of women), with/without the intention of violent sexualization, which ultimately depends upon a number of factors; the nature; words used before, while and after the search; guard's gender and character. The norms in the book and the practical reality are never the same.

As per the International Centre for Prison Studies (at the end of 2019), Prison population rates in the U.S. are the world's highest at 629 people per 100,000; whereas India being a developing country holds a lower rate of 35 per 100,000 however, faces the serious problem of

overcrowding.³

Although this may be a well-kept secret that everybody is aware about, it is not one that we as a community can manage to support. We are jeopardizing the health and safety of the general public by continuing to ignore the misery of inmates in this area, as these prisoners will reintegrate into the communities after being freed, from the exploitation that they didn't deserve, despite being the perpetrators of the society. It is to be determined that even though several of the liberties of the prisoners, are constrained, they are still entitled to certain basic human rights. It is the mandate of every state to adhere to and protect the basic rights available to all the humans to be provided to them non-discriminatively. Human rights are the rights which are inalienable since they begin and end at eternity. The primary goal of incarcerating an offender is to make him recognize his crime and understand its consequences and to reform himself so that he can acquire social values and integrity.

II. RIGHTS OF PRISONERS

“The prisoners are no longer considered as an object or a slave of the nation, who the law would leave at the prison door and who would be convicted to civil death”⁴

Every individual has the right to enjoy his liberty but due to commission of offences these liberties are restrained. Prisoners are the individuals who are deprived of some rights but being a convict or under trial certain basic human rights cannot be denied that are necessary for protection of life and survival. Prisoners do not disqualify to be a person just because they are behind the bars hence their rights need to be protected. Article 10 of the ICCPR, which is the most important article relating to prisoner treatment. It offers that, “all people deprived of their freedom are treated with humanity and with respect for the human person's inherent dignity.”⁵

(A) India

Certain rights that have been mentioned in Part III rd. of the Indian Constitution are offered to the prisoners also because a prisoner remains a “person” inside the prison.⁶

- Article 14⁷ lays down the concept that equals should be treated equally and unequal should be treated unequally and the concept of reasonable classification helped the

³ Anonymous, WORLD PRISON BRIEF, (Oct. 7, 2021), <https://www.prisonstudies.org>.

⁴ Dr. Kurt Neudek, THE UNITED NATIONS IN IMPRISONMENT TODAY AND TOMORROW- INTERNATIONAL PERSPECTIVES ON PRISONERS' RIGHTS AND PRISON CONDITIONS EDS., DIRK VAN ZYL SMIT AND FRIEDER DUNKEL; Kluwer Law and Taxation Publishers, Deventer, Netherlands, (1st ed. 1991).

⁵ The International Covenant on Civil and Political Rights, art. 10, para. 1.

⁶ Sunil Batra v. Delhi Administration, A.I.R 1980 S.C. 1579.

⁷ INDIA CONST. art. 14.

courts to examine the categories of prisoners and their basis of classification in different classes.

- Article 20⁸ protects the person from ex post facto laws and lays down the principle of ‘Double jeopardy’ under which no person shall be put behind the bars twice for the same offence. One of the most important safeguards this Article provides is right against self-incrimination means no authority can compel any prisoner give testimony against himself envisaged under Article 20(3)⁹.
- Article 21¹⁰ protects the right to life and personal liberty and the Apex court has expanded the ambit of this right in the judgement of Maneka Gandhi case by saying that right to life includes right to live with dignity. In A. K. Gopalan’s case, the court observed “the ambit of Personal Liberty under Article 21 of the Constitution is wide and complete. It comprises of both substantive rights to personal liberty and the procedure prescribed for their deprivation.”¹¹ This article also guarantees that the procedure should be just, fair and reasonable. It provides the right of speedy trial to the prisoners envisaged under Right to Life.
- Article 22¹² is a specific provision that provides protection against arrest and detention. Arrested person has the right to know the grounds of his/her arrest and has to be presented before Magistrate within 24 hours of his/her arrest and has right to consult legal practitioner of his choice. Clause (4) of Article 22 provides the maximum period of 2 months for detention for which a detente can be capture without asking the opinion of the Advisory Board.
- Article 39A empowers the prisoners to secure free legal aid and it casts duty upon the State to provide the same. Just because a person has been penalised to imprisonment doesn’t mean his rights can be violated.¹³ The right to legal aid is one of the components of fair procedure i.e., the Supreme Court reading Articles 21 and 39-A, read with Article 142 and section 304 of CrPC together acknowledged that the Government was under duty to provide legal services to the accused persons.”¹⁴

⁸ INDIA CONST. art. 20.

⁹ *Supra* note 7, cl.3.

¹⁰ INDIA CONST. art. 21.

¹¹ A.K. Gopalan vs UOI, AIR 1950 SC 27.

¹² INDIA CONST. art. 22.

¹³ Dr. Mukesh Garg & Narshelata Singla, Rights of Women in Prisoners: An Evaluation, 1 IJARMSS 134, 142(2012).

¹⁴ M.H. Wadanrao Hoskot v. State of Maharashtra, (1979) 1 S.C.R. 192.

Role of some Committees in protection of rights of prisoners

- MULLA Committee was constituted in the year 1980 by the Government of India for the purpose of Jail Reform henceforth Justice A.N. Mulla was appointed as a chairman of the committee. The prime motive of the Committee was to evaluate the laws, rules, and regulations, keeping in mind that the overall objective was to the protection of society and rehabilitation of offenders.¹⁵
- National Expert Committee was set-up in the year 1987 by the Government of India under the chairmanship of Justice V.R. Krishna Iyer and the committee made useful recommendation for women prisoners. It has also recommended recruitment of more women in police force in the view of their special role in managing women and child offenders.

Role of judiciary in protecting rights of prisoners

- In the landmark judgement of *DK Basu v. State of West Bengal*,¹⁶ Supreme Court issued various guidelines against increasing custodial deaths and torture. Some of the important guidelines were: -
 - a) Arrested person has the right to inform about his arrest to his family or friends.
 - b) He/she shall be subjected to medical examination by trained doctor every 48 hours during detention in custody.
 - c) He/she may be permitted to meet the lawyer during interrogation but not throughout.
- In 2015, while reviewing the D.K. Basu case guidelines, the Court directed the State governments to install CCTV cameras in all prisons within a year as court observed installation will help in preventing the violation of human rights of prisoners and recommended the installation of CCTV cameras in all police stations.
- In *Nilabati Behera v State of Orissa*,¹⁷ the apex court has observed that “There is a great responsibility on the police or prison authorities to ensure that the citizen in its custody is not deprived of his right to life. His freedom lies in the very nature of his imprisonment and therefore his interest in his limited freedom is invaluable.”

Other Statutes for protection of rights of prisoners

¹⁵ The Mulla Committee submitted its report in 1983.

¹⁶ *DK Basu v. State of West Bengal*, AIR 1997 SC 610.

¹⁷ *Nilabati Behera v State of Orissa*, 1993 SCR (2) 581.

- a) The Prison Act, 1894¹⁸ was the first legislation in India regarding prison regulation. It consists of provisions relating to mental, physical health of prisoners, medical examination of prisoners, etc.
- b) Transfer of Prisoners Act, 1950¹⁹ was enacted for the purpose of transfer of prisoners from one State to another for rehabilitation and to a less congested jail from over populated ones within State.
- c) The Prisoners (Attendance in Courts) Act, 1955²⁰.

(B) United States Of America

Earlier complaints by the prisoners about the conditions of life in prisons were usually ignored by the courts. The courts have shown that handling of persons being convicted of a crime was hard work that required a lot of expertise. Therefore, the courts postponed all aspects of prison administration to what was thought to be a prison administration technology. 'This immunity from judicial scrutiny led to tradition of lawlessness in the corrective phase of the criminal process. Detailed constitutional protection provided the defendant before and during the trial suspended in sentencing point. What happened to the convicts after the sentencing was not a matter of judgment or, of course, of public concern. In *Munn V. People of Illinois*²¹, U.S. Supreme Court stated that *"life is not a merely existence. The humans behind the prisons cannot be denied the same. The importance of affirmed rights of every human being need no emphasis and, therefore it is a duty of court of justice to protect the fundamental rights of the prisoners."*

Right against assault or excessive force in prison

Prison authorities have a legal obligation under Eighth Amendment of the Constitution to stop the abuse of power and to protect prisoners from the attacks of other prisoners. Officials may not use force for good or for bad, but they can use force in a sincere effort to keep the peace. If a prisoner faces an assault by any officer or fellow prisoner then he/she has the full right to file a grievance within a given time limit and if there is an immediate danger of assault then he/she can inform about it to a staff member of trust.

Right against religious discrimination in prison

Federal law provides special protection for the religious beliefs and practices of prisoners. If a prison policy, law, or practice severely prohibits the ability to practice their religious beliefs, prison authorities must show that applying the law will promote a more important government

¹⁸ Prisons Act, 1894, No. 09, Acts of Parliament, 1894 (India).

¹⁹ Transfer of Prisoners Act, 1950, No. 29, Acts of Parliament, 1950 (India).

²⁰ Prisoners (Attendance in Courts) Act, 1955, No. 32, Acts of Parliament, 1955 (India).

²¹ 94 U.S. 113 (1876)

interests (e.g., prisoners security or health) and that there is no better way to go about protecting that interest. If the prison authorities cannot prove this, they must give prisoner a place to stay religiously so that you can practice your religion. Prison officials may be required to provide you with religious food (e.g., halal or kosher meals), worship services, and they may also need to allow a prisoner to have religious documents, wear certain religious clothing, headdresses, and jewelry, and observe religious rituals (such as wearing a beard or long hair). Prison officials cannot impose any religious belief or discriminate on basis of religion among the prisoners. If any of these rights of the prisoner is violated then he can file a complaint to U.S. Department of Justice's Special Litigation Division.

Rights of a transgender against discrimination and abuse in prison

The federal Prison Rape Elimination Act (PREA) requires prisons to provide housing for all transgender and intersex inmates, including when allocating male or female facilities. Transgender or intersex opinion of prisoners regarding their safety should be carefully considered when making these decisions. Prohibition on certain types of treatment, such as hormone replacement therapy or gender reassignment surgery, is unconstitutional. Staff members should provide with clothing and grooming-appropriate clothing, and allow prisoner to identify themselves in accordance with their identity, or will possibly violate the Eighth Amendment. Strip searches should be done professionally and respectfully. If the prisoner faces any kind of threat, then they can report it to any staff member in writing and can send a copy to inspector general, the PREA coordinator. Prisoners can also file a grievance if they face any kind of assault and can also file a federal lawsuit about the events in jail or prison.²²

Rights of a pregnant in prison

- Pregnant prisoner has the right to abortion
- Right to prenatal and other medical care for pregnancy and postpartum care.
- She cannot be forced to make payment before medical care is provided.
- Has the right not to be shackled.
- Right to refuse sterilization or other unwanted birth control after pregnancy.

If no medical care is provided then the prisoner can file an official complaint or contact prison legal services organization for aid.

²² Anonymous, *Prisoner's Rights*, KNOW YOUR RIGHTS, <https://www.aclu.org/know-your-rights/prisoners-rights/>.

Rights of people in prison with disabilities

Prisoners with disabilities are protected under the provisions of the American Disability Act (ADA) and the Rehabilitation Act of 1973.

- They have the equal opportunity to participate in programs and services for which they are qualified.
- Entitled to be housed at your correct security level, and in a cell with the accessible elements necessary for safe, appropriate housing.
- Entitled to reasonable modifications to policies and procedures.
- Entitled to equally effective communication including any necessary auxiliary aids and services.
- Can file a formal grievance and can also contact ADA coordinator if any rights are violated.

III. LAWS RELATED TO CUSTODIAL RAPE AND SEXUAL VIOLENCE

Prison is a place where whatever happens inside it, stays inside it. For women, especially life is difficult and atrocious. There have been a huge number of women prisoners that have experienced sexual harassments of some kind or the other, in jails. The number of women that have been raped behind bars is no less. The governments across the world have made laws in this regard but they are merely in black and white. A lot of proactive and necessary steps need to be taken before we can put these laws into force.

(A) United States Of America

In the United States of America, the number of women prisoners has drastically increased but the peculiar needs and requirements of women have not taken into consideration yet. According to current estimates, at least half of the female prisoners have experiences some or the other kind of sexual abuse.²³

The constitution of US outlaws harsh and degrading punishment, including sexual misbehaviour by an official and ensures the right to privacy. Furthermore, the federal statute prohibits any sort of sexual contact between convicts and officials of the prison. However, these constitutional safeguards have minimally been applied to help women in prison and the Department of Justice, responsible for protecting inmates and their constitutional rights, has rarely investigated the charges of the same. Also, federal facilities are bound by federal

²³ Dorothy Q. Thomas, *All Too Familiar: Sexual Abuse of Women in U.S. State Prison*, (Human Rights Watch, 1997).

statutory provisions against sexual violence in prison, state facilities are not bound by the same where the majority of the prisoner population is kept. State facilities however, have their own provisions barring custodial sexual violence, but only some of them are followed, unreliably.

There are 2 constitutional amendments that can be applied in barring the custodial sexual violence, i.e., the fourth amendment (restricts unreasonable searches and seizures) and the eighth amendment (restricts cruel and unusual punishments). If a state fails to fulfil this obligation, the primary means of enforcing it is via lawsuits brought by inmates asserting personal harm. The court can be pleaded to grant injunctive relief from the state's unconstitutional behaviour and also may acquire compensation in lieu of the violation experienced. The Supreme Court concluded in *Farmer v. Brennan* that a prison official violates the eighth amendment if he subjects a prisoner to a serious risk of sexual abuse by behaving with purposeful disregard.²⁴ The court determined in this case that sexual violence serves no reasonable criminological purpose.

United Nations Standard Minimum for the Treatment of Prisoners was one such treaty that highlighted the importance of the fact that authoritative males should not hold contact positions. Despite this and various other international laws in this behalf, male correctional employees that hold positions of contact and work in close physical proximity of women are likely to orally, vaginally and anally rape the women prisoners. Many times, these male employees misuse their position of power to beseech women to give them sexual favours in return of basic jail amenities. The Human Rights Watch Women's Rights Project and the Human Rights Watch Staff with the U.S. federal government, state departments of corrections and district attorneys conducted interviews in jails from March 1994 to November 1996.²⁵ It was found that a woman prisoner in USA can be a very scary and traumatizing experience. In cases of rape or any other form of sexual harassment, there is no way of escape.

The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant against torture and other cruel, inhumane, or degrading treatment or punishment (Torture Convention), has been ratified by the USA and these laws require the state parties to adhere and strictly conform to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment and must ensure that any such abuse is investigated and punished. These Conventions like Universal Declaration of Human Rights also guarantee prisoners the basic rights such as privacy which includes avoidance or prohibition of frisk or strip search by

²⁴ *Farmer v. Brennan*, 511 U.S. 825 (1994).

²⁵ *Id.*

officers of the opposite sex.

The PLRA has been put into force after the assent of the President, Bill Clinton in April 1996 which has compromised and curbed the power of any entity whether private or public to combat sexual conduct in custody.²⁶ The abusive prison conditions cannot be challenged through litigation after the passing of this act.²⁷ The PLRA also terminates any court order regarding unlawful conditions or practices in a given prison after two years, regardless any compliance degree. It was highly criticized and is rarely followed.

As a result, human rights encourage rape and sexual assault legislations that recognize that a prison officer when involves in a sexual act with a prisoner is to be held as committing a severe offence and to be treated as a criminal. Despite the fact that international human rights law provides further protection against criminal sexual violence, these rules are not completely and coherently implemented by the United States even though it is bound by them.

(B) India

In India, custodial violence has increased alarmingly. The infliction of sexual assault and violence on prisoners and undertrials under custody seems to have become a common occurrence. As mentioned earlier, use of any kind of unusual violence is absolutely outlawed by international treaties and various countries including India. India is a signatory to numerous treaties prohibiting violence and inhumane behavior against all humans, counting people under trials and prisoners. There are however, no specific legislations when it comes to custodial rape and violence.

The constitutional, substantive and procedural laws have various provisions that manifest the legal rights of the person in custody. In addition to that, India has been a signatory to numerous treaties, conventions and declarations like Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on Elimination of all Forms of Discrimination Against Women (CEDAW), Convention against Torture and other cruel and degrading treatment and punishment (CAT), National Human Rights Commission (NHRC), the UN Declaration on basic principles of justice for victims of crime and, that every human is equal before law in terms of basic human rights and no exclusions whatsoever, are to be made even when he/she has committed a crime²⁸.

²⁶ Prison Litigation Reform Act, 42 U.S.C, 1996 (U.S.).

²⁷ *Id.*

²⁸ Anonymous, *International Bill of Human Rights*, LAW TEACHER, (Oct. 10, 2021), <https://www.lawteacher.net/free-law-essays/human-rights/international-bill-of-human-rights.php>.

The Constitution of India under Article 21 specifically consists of and states that no person shall be deprived of his life or personal liberty except according to procedure established by law²⁹. This includes the basic right of an undertrial prisoner while in custody of police or in a judicial custody in India, is entitled to a life full of dignity and right against unusual or degrading custodial violence of any kind. Personal liberty is a concept that is not merely finite to freedom from physical restraint or incarceration in a prison³⁰.

The Supreme Court under various judicial pronouncements has mentioned that an under-trial or convicted prisoner cannot be put to bodily or any psychobiological restraint or distress that is not authorized by the Court's penalty which ultimately amounts to human depravity.³¹ Article 22 has numerous goals, one of which is to guarantee that there are legal safeguards in place to avoid the abuse of arrest and detention powers³²³³.

Sections 375 and 376 of the Indian Penal Code, 1860 elaboratively, describes various circumstances under which a man or the perpetrator is held liable for committal of rape against a female.³⁴ Under sub-clause 2 of section 376, whoever, being a police officer commits rape on a woman in his custody or in the custody of his subordinate, or being a public servant rapes a woman taking advantage of his official position, or being on the management or on the staff of a jail or any other similar establishment, rapes any inmate, shall be answerably liable for the said offence and shall be punished with rigorous imprisonment for a term not less than 10 years.

Despite of all the regulations and provisions, the implementation of these and the justice demanded is rarely provided because of various other reasons namely, political affirmations, societal prejudices, fiduciary relationships, greed for money, higher official positions, lack of resources, poverty, status of caste or community. In the infamous rape case of Mathura, a teenage girl who was raped by a police constable, who was initially acquitted on the ground that there was not enough to corroborate that there was no "consent of the woman".³⁵ It was however, heavily criticized by the nation. It showcases the lack of equivalent laws and the position of weaker sections of the society. When the institutions or establishments fails to effectively prosecute the matters of custodial violence then, it out-loudly is presumable that there was lack of seriousness in prosecuting the "offenders/custodial officers". Rather, it appears that there was greater apprehension for the protection of the accused than for the rights

²⁹ INDIA CONST. art. 21.

³⁰ Kharak Singh v. State of U.P. & Others, AIR 1963 SC 1295 (India).

³¹ Mohamed Dastagir v. State of Madras, AIR 1960 SC 756 (India).

³² INDIA CONST. art. 22.

³³ Sheela Barse v. State of Maharashtra, AIR 1983 SC 378 (India).

³⁴ The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India).

³⁵ Tukaram and others v. State of Maharashtra, AIR 1979 SC 185 (India).

of the victim. It is strenuous for a victim to prove absence of consent specifically in the case of custodial sexual violence, therefore, section 114A of the Indian Evidence Act was added which states that in the cases of custodial rape, if the victim claims that she did not consent, then the court will subsequently presume that she didn't consent and the onus probandi will fall on the accused³⁶.

(C) Impact Of Prison Rape And Sexual Violence In Custody

Prison sexual violence is partly about sexual gratification rather it is more about stark demonstration of power. Conditions in temporary detention centers are a national disgrace. Jail is full of "harmless" perpetrators - drunkards, prostitutes, and travelers - old offenders mixed with young offenders, as well as convicted criminals associated with those awaiting trial but unable to apply for bail. There's existence of extreme form of victim blaming in prison and even beyond its walls. In an environment without women, some men must adopt the feminine role if these structures are to be perpetuated. This adoption is often coerced and neglected. Prison rape is an acting out of power roles within an all-male, authoritarian environment where strength and dominance are highlighted. That is why men who have sexual intercourse with young and vulnerable men do not want to, firstly, be considered as rapists and secondly, there is no crime where such a crime would be attractive if it was committed outside the prison walls.³⁷

Contrary to the situation of male prisoners, until recently, it was thought that there was very little or no sexual violence between female prisoners - and that female prisoners were at risk of sexual harassment by male guards. In addition to the same sexual harassment by other female prisoners, women prisoners are also occasionally harassed by male prisoners. While such attacks are more common in regional prisons involving both male and female prisoners, it is also possible in prisons where male and female prisoners are to be kept separate from one another. For example, when male and female prisons share the same compounds, male prisoners are sometimes given the opportunity to unknowingly enter female prisoners, such as when a guard negligently leaves his position thus allowing male prisoners to enter female prisoners. What is even more shocking is the seriousness of the situation, where security forces plan to attack and "sell" female prisoners to male prisoners.³⁸

The effects of rape in prison are devastating mentally and physically. The victims are

³⁶ The Indian Evidence Act, 1872, No. 1, Acts of Parliament, 1872 (India).

³⁷ Ian O'Donnell, *Prison rape in context*, 44 THE BRITISH JOURNAL OF CRIMINOLOGY (BJC) 241, 243 (2004).

³⁸ D. M. McGuire, *The Impact of Prison Rape on Public Health*, 3 Californian Journal of Health Promotion (CJHP), 72, 74 (2005).

considered to have abandoned their 'manhood'. This is an irreversible shame: they were 'transformed' from men into 'punks. This is the sex economy of zero sum. In this sense, if the abuser was a homosexual and the victim was a homosexual partner, the act of intercourse could mean a change in sexual orientation.³⁹

The dull environment of the prison has an adverse effect on mental health of prisoners firstly and when they helplessly suffer the torturous, painful crime of rape behind the walls that results in bad mental health, which can later have an impact on the society once these victims are released. Crime experts have long maintained that men who are sexually abused in prison usually leave prison far more violent and anti-social than when they went inside.⁴⁰

Sexual assault in prison can cause serious health risk to incarcerated men and women. It can not only cause transmission of various deadly diseases but can also result into serious physical injury. Prison rape and sexual violence have medical consequences too. By concentrating large numbers of those who are already infected with diseases such as hepatitis, HIV and TB, or engage in practices that make infection likely (such as intravenous drug use or unprotected sex), the prison system cranks up the risk of transmission. This is in direct contravention of a prisoner's right to safe custody: they are sentenced to serve time, not to die by lethal infection. There is the additional risk to communities when prisoners are released, both from communicable diseases and simmering fury. Those who are raped in prison return to society brutalized and vengeful and the costs of allowing prisoner-on-prisoner rape to occur are enormous, not only in needless human suffering but also in fostering violence.⁴¹

IV. LOOPHOLES

Rape is a horrific offence that not only bothers or haunts the victim, but also subsequently affects the community or the society as a whole; prison rape however, is even more dreadful since, it requires strong regulations and laws to address it. And as mentioned earlier, there are no explicit legislations on custodial rape and violence. It is well established that rape victims in prison are repeatedly violated on a day-to-day basis. They are not just victims of assault or aggression, the violation of their rights and dignity simply doesn't restrict to the rape. The real scuffle occurs when they put in efforts in regaining those rights in order to live a peacefully dignified life.

Such atrocities in jails are not unambiguously recognized by law.⁴² The law globally (in major

³⁹ *Supra* note 21.

⁴⁰ *Supra* note 13, 76.

⁴¹ *Supra* note 12, 252.

⁴² Anonymous, *Custodial Rape: a report on the aftermath*, PUDR (Mar. 2013), <http://pldindia.org/wp->

nations), simply protects or, rather recognizes women only, when it comes to “rape” or “sexual violence”, but what about other genders? There is no secret to the fact that sexual offences are gender neutral. Men and inmates belonging to the LGBTQIA+ Community are equally, rather more prone to sexual assault, rape or violence against them, since the identification for the same, in the society itself is zero to negative. The amount of ignorance with respect to, basic human rights regarding custodial violence of rape against men or other genders, is flabbergasting. This is undoubtedly, the biggest loopholes in the concept of custodial rape and violence. The patriarchal background of India and the discriminative history of the U.S. both attacks the acknowledgement of the gender-parity or gender-neutrality, when it comes to crime against the humanity as a whole. Rape as an offence and term, both, is confined to a specific meaning, acknowledging a particular sex. It, of course, cannot be compared to any other offence, but merely for the sake of understanding, it is a heinous crime and so is murder, but murder is never related with/to the “sex” of a human/victim. It is considered as a crime against the humanity. Then why do we restrict the meaning and application of the term/offence rape for a specific section of the society.

Life in prison for any human being is dreadful, and it cannot be compared by drawing a yardstick. But it is the state’s responsibility to recognize and keep prior and continuous checks and balances, as a precautionary step in avoiding custodial offences. When it comes to drafting or legislating rape laws, gender disparity should be eliminated. It is crucial for the humanity as whole and the obligation of the state to dispense equal protection to men, women and especially to the transgender people, since they are the most susceptible to such violations and exploitation. Rather than being obnoxious in the view of perceiving all the prisoners as the villains of the humanity, we should be much more sympathetic towards their reformation and, solidarity must be showcased especially by the state, towards uplifting and non-discriminating with any human, in providing them with their basic human rights as enshrined in both the constitutions of India and United States. Fundamental rights are for all the human beings irrespective of them being prisoners or the general public, subject to procedure established by the laws of their land.

V. NEED FOR PRISON REFORMS

Several Acts have been passes regarding reforms but there is a major difference between laws on paper and their implementation on ground level. Prison life requires certain restrictions on the freedom of prisoners. Prisoners are incarcerated for minor offenses and are deprived of

individual freedom. It is important to note that crime is not the result of evil intent or criminal intent. Restricting people's freedom of choice, as well as denying economic, social, political, and cultural rights, can lead to serious misconduct. Therefore, the prison system requires a number of other reforms. The Supreme Court in *Shri Rama Murthy vs State of Karnataka*⁴³, 1996, sought to bring uniformity to prison rules and amended the exemplary framework of the prison manual, which led to the formation of a committee demanding an international prison manual. Even though the top court has recognised prisoner rights vide a series of judgements, such rights elude inmates. While the establishment of new prisons may temporarily reduce overcrowding, past evidence suggests that this is not a viable long-term solution. A violent situation heightens emotions and creates stress, which can lead to unintentional or premeditated conflicts. Violence in prisons can only be reduced if the environment is humane. Any major prison reforms should be made in keeping with the institution's original purpose, namely the rehabilitation and rehabilitation of prisoners. The focus of disciplinary action requires from punishment to reintegration. When combined with adequate support, it will allow former detainees to live normal lives without resorting to crime.⁴⁴

VI. CONCLUSION

The days are gone when prisoners were incarcerated in dark cells. Prisons are no longer institutions designed to achieve recovery and punitive measures only. Prisons are now places, where inmates live not as forgotten or abandoned members of the community but as people who have to get out in the environment around them and behave like a reformed person. There have been efforts made by the Government to improve the conditions and atmosphere inside the prisons but due to increasing number of criminals inside prison there has been a tremendous increase in violence inside prisons. And due to lack of implementation of the laws inside prisons and violation of their rights has corroborated to the increase in crime inside the four walls of prison. Government should take strict action against these crimes and take adequate steps to improve and protect the rights of prisoners.

⁴³ ILR 1986 KAR 3037.

⁴⁴ Md Tasnimul Hassan And Deeksha Tiwari, *From punishment to rehabilitation: The need for prison reforms*, THE LEAFLET (JULY 30, 2021), <https://www.theleaflet.in/from-punishment-to-rehabilitation-the-need-for-prison-reforms/>.