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Privatisation of Prison: Profit-Making or a Way Forward?

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ABSTRACT

The Prisons are a significant part of Criminal Justice Administration. A private prison is where people are confined or incarcerated by a third party contracted by a government agency. Private prison companies enter into a contractual agreement with governments that commit prisoners into the facility and then pay for each incarcerated individual. Till date, the debate over private prisons has focused largely on the efficiency of private prisons as compared to public prisons, and has assumed that, if private contractors can run the prisons for less money than the state without any degradation in quality, then states should be willing to privatize. The paper aims to highlight the scope and limitations of public-private partnership in prison system. Prison system in India has been replete with various problems for a long time which include overcrowding, mistreatment, lack of services needed for inmates' rehabilitation and reintegration into the society upon their release as well as the mismanagement by the callous jail authorities. The Public-Private Partnership Model entered the Indian Prison System through the most famous Tihar Jail, as early as the 90s. The article examines the significant considerations that policymakers, administrators and private entities will deal with as privatization of corrections becomes a more serious option. Privatization of prisons is one of the mechanisms that is being considered an alternative for coping with the growing corrections crisis in countries like India, USA, UK, Brazil etc. Moreover, the corporations running private prisons inevitably claim that they are saving the government money, but their true focus is on protecting their own bottom lines. In order to lower operating costs, these private facilities cut corners, hiring fewer employees and paying and training them less. These are some of the intricacies of Public-Private Partnership model that this article aims to analyse and present.

Keywords: Prison, Privatisation, Public-Private Partnership, Contract, Correctional.

I. INTRODUCTION

Prisons are an all-important wing of Criminal Justice Administration under the Indian Constitutional setup. Prisons are constituted under the constitution of India to restrain man's

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liberty on having committed a social or civil wrong which is punishable under the provisions of Indian law. The prisoner is a person who has been convicted by the Court of Law for committing an offence against a person or the State, after having availed all his legal remedies to prove his innocence before the Court of Law. Criminal Law of India is a replica of colonial times.² It is hostile to the poor and the weaker sections of society. The law still serves and protects the needs of the haves and ignores the have-nots. Such biasness has resulted in rich people escaping law and the jail is more often full of the unprivileged class of society. The hierarchy of courts and with appeals after appeal have led to a situation where the poor cannot reach the temple of justice due to heavy cost of its access. In other words one can state that granting justice at a higher cost indirectly means the denial of justice. Such circumstances lead to a clear violation of the Supreme Court judgement which held, legal aid to a poor is a constitutional mandate not only by virtue of Article 39A³ but also Articles 14,⁴ 19,⁵ 21⁶ which cannot be denied by the government. The key problem is India's criminal justice system is that over three crore cases are pending in various courts, some several decades old. The biggest victims are poor under trial prisoners who don't have money to pay bail. This is an injustice the Supreme Court must address urgently. India has 1,382 central and district prisons. Their total capacity is 2, 86,751 inmates. The total prison population is 3, 64,081 an average overcrowding rate of 28.60 per cent. Overcrowding is greater in some city jails where it rises to over 200 per cent. This ratio reflects the reality of India's slow and often corrupt justice system where the rich get preferential treatment and speedier trials.⁷

(A) Problems in the Indian Prison System

² Sunil K Bhattacharyya, *Social defence: An Indian perspective*, Regency Publications, New Delhi. 2003.

³ *Equal justice and free legal aid* - The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

⁴ *Equality before law* - The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

⁵ *Protection of certain rights regarding freedom of speech etc.*

(1) All citizens shall have the right

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

(c) to form associations or unions;

(d) to move freely throughout the territory of India;

(e) to reside and settle in any part of the territory of India; and

(f) omitted

(g) to practise any profession, or to carry on any occupation, trade or business.

⁶ *Protection of life and personal liberty* - No person shall be deprived of his life or personal liberty except according to procedure established by law.

⁷ Vidhya Bushan, *Prison Administration in India (with Special Reference to Uttar Pradesh)*, S. Chand and Company, New Delhi, 1970.

The key problem is India's criminal justice system is pendency of cases. Over three crore cases are pending in various courts, some several decades old. The biggest victims are poor under trial prisoners who don't have money to pay bail. Many have spent more time behind bars than if they had served the full sentence they would have received on conviction after a court trial. This is an injustice the Supreme Court must address urgently. India has 1,382 central and district prisons. Their total capacity is 2, 86,751 inmates. The total prison population is 3, 64,081 an average overcrowding rate of 28.60 per cent.⁸ But this statistic is misleading. Overcrowding is greater in some city jails where it rises to over 200 per cent. Shockingly, 2, 38,657 prisoners out of an all-India prisoner population of 3, 64,081 (65 per cent of the total) are under trials.⁹ This ratio reflects the reality of India's slow and often corrupt justice system where the rich get preferential treatment and speedier trials.¹⁰ The poor suffer inordinate delays and deprivation. The Supreme Court has finally woken up to the problem. A bench of Justices Madan B. Lokur and R K Agrawal passed this recent order: "A prisoner is required to be treated as a human being entitled to all the basic human rights, human dignity and human sympathy." The authors of the report on the Prison Conditions in India by Human Rights Watch¹¹ say, "We knew they would be bad, if only because life is hard for most Indians outside the prisons. It stands to reason, therefore, that if incarceration is meant to punish, life inside the prisons should be worse. What took us by surprise, however, is the manner in which it is worse for the great majority of prisoners."

(B) Privatising the Prisons

In the 21st century marketplace that makes much of the backstory of a product, could have featured a prisoner in the workforce. The Indian prison industry manufacturing for the state or making prison-branded goods so far has lately started working for the private sector. From The Himalaya Drug Company and automotive component manufacturer Spark Minda Corporation, to small manufacturers in Meerut in UP and Yamunanagar in Haryana, the private sector has started outsourcing or in prison parlance, 'in-sourcing' jobs to jails. Three months ago, 20 prisoners in Colvale Central Jail, North Goa were trained by the pharma's field staff in farming and harvesting. They're paid the state's daily prison wage of Rs 120 for skilled labour (Rs 80 for semi-skilled work). Indian prison officials speak glowingly of the PPP model also interpreted as the Private Prison Partnership saying its income offsets costs. (In 2014-15, the

⁸ All India Committee, *Report on Jail Reforms*, Ministry of Home Affairs, 1980-83.

⁹ Kumkum Chadha, *The Indian Jail: A Contemporary Document*, Vikas Publishing House, New Delhi, 1983.

¹⁰ *Ibid.*

¹¹ *Prison Conditions in India*, Human Rights Watch, United States of America ISBN 0-929692-92-6, Library of Congress Catalog Number 91-71916, 1991.

88,221 inmates lodged in UP prisons cost the state Rs 74 lakh.) But the model also assists in rehabilitation by skilling prisoners for life beyond bars. And finally, as per prison wisdom, a 'busy convict is an easy convict'. Prison brass say convicts are never pressed into work, although they may be nudged. But even though companies are less wary of their association with prisons today, calling it their corporate social responsibility (CSR), jail authorities know they still have to tread lightly. Kiran Bedi, former IG prisons, Tihar is credited with planting the Public-Private Partnership (PPP) model in Delhi prisons in the '90s. "Today prison reform is a movement and big companies want their association with it to be visible; earlier they kept a low profile because it could have been construed as forced work," she says.¹²

(C) Using Under-Trials

It is important to note that an overwhelming majority around 75% of this human resource comprises under-trials. Because of logjams in the Indian penal system, many of these under-trials will be serving more time than the maximum term of imprisonment for the offenses they have been charged with. Plans for expansion of the Minda Furukawa Electric's (MFE) facility at Tihar are already afoot. The jail authorities have agreed to facilitate a bigger area for production inside their premises once the production will reach full capacity.¹³

(D) Private Trouble

A private prison, which is also known as a private facility or for-profit prison, is where people are confined or incarcerated by a third party contracted by a government agency. Private prison companies enter into a contractual agreement with governments that commit prisoners into the facility then pay a per diem or monthly rate for each incarcerated individual. Private prisons are being used all around the world, with the United Kingdom being the first nation in Europe to use prisons run by the private sector. India is also one of the countries to use private prisons. The United States of America also employees this form of imprisonment.

In March this year, the Minda Furukawa Electric (MFE) plant in Sector-3, Bawal saw a bout of spontaneous labour action. 800 workers of the factory went on strike, occupying the plant to protest the sexual harassment of one of their female co-workers by three managers of the company. Intimidation at the workplace and non-payment of overtime at double rate, they claimed, were common. They also complained that efforts to form an independent union have been consistently thwarted by the management. The workers at MFE went on strike in 2008 to

¹² Kiran Bedi, *I Dare!*, UBS Publishers, New Delhi, 2000.

¹³ *Tihar Jail's increased use of prison-private partnerships is a cause for worry, Inmate Labour, Scroll. IN, 2017.* Available at <https://scroll.in/article/679669/tihar-jails-increased-use-of-prison-private-partnerships-is-a-cause-for-worry>. Last accessed on August 28, 2018.

demand “appointment letters to all employees, introduction of a three-shift system and a hike in their overtime allowance”.¹⁴

(E) Challenges to Public-Private Partnership

This so called Public-Private Partnership raises several questions. How does a company with such a dismal labour relations record run a facility within a jail? What laws will govern the joint venture? Will extant labour laws apply there? Do the inmates have a say in the terms of employment, given they are in the coercive environment of a jail, at which they sell their labour?

Though lauded by a large section of the media, the Public-Private Partnership between Minda Furukawa Electric and Tihar Jail needs to be studied in the correct context. In recent years in India there have been a number of examples of corporations being aided by the police or the legal apparatus – where the process itself becomes the punishment. Nowhere is this clearer than in the case of 147 incarcerated Maruti workers who have been languishing in jail for over two years now. Their long and tenacious struggle revolved around one key demand; that they be allowed to register an independent union.¹⁵

(F) Impact of Privatisation of Prisons

Private prisons served an important role during a difficult period, but time has shown that they compare poorly to our own Bureau facilities. They simply do not provide the same level of correctional services, programs, and resources; they do not save substantially on costs; and as noted in a recent report by the Department’s Office of Inspector General, they do not maintain the same level of safety and security. The rehabilitative services that the Bureau provides, such as educational programs and job training, have proved difficult to replicate and outsource- and these services are essential to reducing recidivism and improving public safety.¹⁶

Of course, should prisons be privatised in India, we may not need to worry about it. Indian jails suffer from over-crowding, inhumane conditions and routine brutality. Like the police, the prison system continues to be a colonial institution designed to intimidate and invoke fear in the populace rather than be places where criminals are reformed. Indian prisons are overcrowded and filled with under-trials from poor and discriminated sections of society. They

¹⁴Hand over schools, colleges, jails to private sector: Amitabh Kant, Times of India, July 17, 2017. Available at http://timesofindia.indiatimes.com/articleshow/59782227.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst. Last accessed on August 18, 2018.

¹⁵ Sanjeeb Panigrahi, *Revitalising Indian prisons*. Deccan Herald, Oct 23 2017, 21:50PM IST. Available at <https://www.deccanherald.com/content/639051/revitalising-indian-prisons.html>. Last accessed on August 16, 2018.

¹⁶ R.N. Datt, *Prisons as a Social System with special reference to Maharashtra State*, Bombay Popular Prakashan Publications, Bombay, 1978.

are where those who can't afford bail or navigate the legal system go to be forgotten by everyone else. They were part of the colonial architecture that India's ruling elite never got around to dismantling on the quest to build a more just and equitable society. It's a shame that far from talking of ways to change our prisons to make them reformatory institutions, the idea seems to be to stop caring and make more money off it.

(G) Statement of Problem

The major impediment which is to be observed is Public-Private Partnership in Prison system in India because it raises several questions. There is no clarity on how a company with a dismal labour relations record runs a facility within a jail. The laws that will govern the joint venture and the privatisation of prisons are still not in existence. The application of the extant labour laws is obscure. The legislature and the administration system have failed to address the issue that whether the inmates have a say in the terms of employment, given they are in the coercive environment of a jail, at which they sell their labour. The challenges that the Indian Prison system is facing and the reforms that are the need of the hour have to be observed. The impact of privatisation on prisons and the prisoners is no less than a dilemma as it lacks comprehensibility.

II. A CRITICAL ANALYSIS OF PROBLEMS IN THE INDIAN PRISON SYSTEM AND RIGHTS OF THE PRISONERS

The authors of the report on the Prison Conditions in India by Human Rights Watch say, "We knew they would be bad, if only because life is hard for most Indians outside the prisons. It stands to reason, therefore, that if incarceration is meant to punish, life inside the prisons should be worse. What took us by surprise, however, is the manner in which it is worse for the great majority of prisoners." The key problem is India's criminal justice system. Over three crore cases are pending in various courts, some several decades old. The biggest victims are poor under trial prisoners who don't have money to pay bail. Many have spent more time behind bars than if they had served the full sentence they would have received on conviction after a court trial. This is an injustice the Supreme Court must address urgently. India has 1,382 central and district prisons. Their total capacity is 2, 86,751 inmates. The total prison population is 3, 64,081 an average overcrowding rate of 28.60 per cent.¹⁷ But this statistic is misleading.

Overcrowding is greater in some city jails where it rises to over 200 per cent. Shockingly, 2, 38,657 prisoners out of an all-India prisoner population of 3, 64,081 (65 per cent of the total)

¹⁷ All India Committee, Report on Jail Reforms, Ministry of Home Affairs, 1980-83.

are under trials. This ratio reflects the reality of India's slow and often corrupt justice system where the rich get preferential treatment and speedier trials.¹⁸ The poor suffer inordinate delays and deprivation. The Supreme Court has finally woken up to the problem. A bench of Justices Madan B. Lokur and R K Agrawal passed this recent order: "A prisoner is required to be treated as a human being entitled to all the basic human rights, human dignity and human sympathy." The justices directed the Under trial Review Committee to release on personal bond under trial prisoners who have undergone half of the maximum sentence they would have received if they were convicted. The Supreme Court justices added: "The committee should see that under trial prisoners are released at the earliest and those who cannot furnish a bail bond due to their poverty are not subjected to incarceration only for that reason." It further directed the State Legal Services Authority to hire "competent lawyers" to provide free legal aid to the poorest prisoners.¹⁹

The Constitution of India, the Universal Declaration of Human Rights and the Standard Minimum Rules for Treatment of Prisoners clearly specify the standards of treatment with prisoners on trial. But realities in jails transmit an entirely different tune. In one of the landmark judgements, the Supreme Court with great frankness in *Shri Rama Murthy v. State of Karnataka*²⁰ went so far to cite that state had 193,240 people incarcerated of which 137,838 undertrials that justice would be served by simply were releasing the latter. The Supreme Court in the case also identified several issues that are prevalent in the Indian prison system and that need reforms.

(A) Some of the more striking problems relevant to the prisons in India are following:²¹

1. Overcrowding

The biggest problem in India as a country is the overpopulation, and it has its fallout in the prisons of India as well. The problem of overcrowding in Indian prisons is not a new feature and is synonymous with all the other problems of imprisonment. It cripples every attempt to humanize living standards behind bars, and its implications are too obvious and too serious to neglect. Yet the phenomenon has remained unresolved for more than a hundred years. The occupancy in almost every prison varies from day to day due to induction or addition of new

¹⁸ *Ibid.*

¹⁹ Minhaz Merchant, "India's Hidden Prison Problem", 23 February, 2016. Available at <http://businessworld.in/article/India-s-Hidden-Prison-Problem/23-02-2016-91348/>. Last accessed on February 12, 2019.

²⁰ AIR 1997 SC 1739.

²¹ Prof. N. V. Paranjape, Criminology, Penology & Victimology, Central Law Publication, Allahabad, 17th edn., 2017.

convicts and new under trials and release old convicts and old under trails. Still an estimate of population of inmates at the end of a year serves as a fairly reliable indicator for determining prison population. Each prison has authorized capacity, of inmates against authorized capacity is called occupancy rate. This rate depicts the extent of overcrowding. The presence of under trials is the principal reason for overcrowding in prisons.

Overcrowding strains prison infrastructure, hampers correctional services, spreads contagious diseases and leads to multiple problems for prison administration including larger incidence of indiscipline and violence, and diversion of prison staff for routine duties such as distribution food, security and guarding.²² Jails in some states are filled with over four hundred percent of their original capacity. According to the report of National Crime Reports Bureau, Ministry of Human Affairs, in the year 2010-11 the occupancy rate of prisons in India is 115% at an average. According to the report of the National Human Rights Commission, in 2001-02, against the capacity of about thirty three thousand, the jails in Uttar Pradesh are housing almost fifty thousand inmates.²³ This overcrowding of prisons lead to many other problems for the prisoners as well as the prison administration, some of which are illustrated below:

2. Unsatisfactory Living Conditions

Overcrowding itself leads to unsatisfactory living conditions. Although several jail reforms outlined earlier have focused on issues like diet, clothing and cleanliness, unsatisfactory living conditions continue in many prisons around the country. To improve prison conditions does not mean that prison life should be made soft; it means that it should be made human and sensible. Overcrowding is a serious problem being faced, greatly contributing in abysmal conditions of the prisoners. Lack of hygiene is one of the most pressing problems created by overcrowding in Karnataka's prisons. Since the existing prisons do not conform to the appropriate standards structurally, they are not able to provide acceptable conditions even where the prisons are not overcrowded. Yet, for years, those prisons have been housing double the number of prisoners they should accommodate. Not a single prison can claim that it has sufficient water for daily use as given in the prison manual.

The inadequacy of facilities and the level of overcrowding mean that in the prisons of Madikeri, Bidar, Gulbarga, Bellary and Bangalore, about 75 inmates are forced to use a single toilet on any given day. Till as recently as September 2007, there was no provision of either toothpowder or bath soap for the inmates.²⁴ Inmates being locked up for 23 hours a day in these conditions

²² Sen Shankar, "*Police in Democratic Societies*," Gyan Publications, New Delhi, 2000, p.174.

²³ Sudipto Roy, Jail Reforms In India: A Review, 11 *Kriminologija I Socijalna Integracija*, 34, 33-40 (2003)

²⁴ Each prisoner is entitled to receive 50 grams of toothpowder at the cost of Rs. 12 and 150 grams of

due to shortage of staff who can monitor them means long lock-up hours, which further suggests that cells and barracks stink of sweat. The situation is made worse with unwashed and half-dried clothes hanging all over the barracks without access to fresh air and sunlight. Algae float in the water tanks because no cleaning or maintenance of such facilities takes place for months. Such is the situation of neglect in these prisons where, ironically, huge reserves of manpower remain idle for months and years together. The drive to get anything done through various departments that are responsible for controlling and managing the inmates, or to undertake any useful activity to improve prison conditions among the prison officials is extremely low. No one wants to go to prison however good the prison might be. To be deprived of liberty and family life and friends and home surroundings is a terrible thing. According to a report by India Today (June 24, 2011), in the Tiruchirapalli women's prison in Tamil Nadu, inmates have to get mud to clean their toilets since there isn't any water. Lodged in the Tamil Nadu prison for five years as an under trial from 2005 to 2010, an under trial named Murugeswari has written that water was so scarce that they had to choose between washing themselves and their clothes.²⁵

3. Prison Violence

Prisons are often dangerous places for those they hold. Group violence is also endemic and riots are common. In a three day riot and standoff in the Chappra District prison in Bihar towards the end of March 2002, 6 prisoners died in the shootout that occurred when commandos of the Bihar Military Police were called in to quell the riots. Meek and first time offenders are tortured and made to do all the menial tasks. Failure to comply sees them sleeping in front of smelly and overflowing toilets in the night. The worst form of Prison violence was witnessed in *Khatri v. State of Bihar*²⁶ where the police had blinded 80 suspected criminals by puncturing their eyes by needles and dousing them by acid. In fact in the case *Sunil Batra v. Delhi Administration*²⁷ that the court had already issued a writ directing the authorities that the prisoners shall not be subjected to physical mishandling by jail officials and they should be given adequate medical and health facilities

4. Criminalizing Effect of a Prison

With hardened criminals being around and in the absence of scientific classification methods to separate them from others, contamination of first time, circumstantial and young offenders

bathing soap at the cost of Rs. 17 per month. The government issued an order on 5 September 2007. The expenditure per year works out to Rs. 43, 05,108 per year.

²⁵ Dr. J. N. Pandey, Constitutional Law of India, Central Law Agency, Allahabad, 47th Edn., 2010.

²⁶ AIR 1981 SC 928.

²⁷ 1978 AIR 1675, 1979 SCR (1) 392.

into full-fledged criminals occurs very frequently. It is an often given quote, 'prisons are Universities of crime where people go in as under-graduates and come out with PhDs. in crime.'

5. Neglect of Health Problems and Hygiene

Most of the prisons face problems of overcrowding and shortage of adequate space to lodge prisoners in safe and healthy conditions. Most of the prisoners found in prisons come from socio-economically disadvantaged sections of the society where disease, malnutrition and absence of medical services are prevalent. When such people are cramped in with each other in unhealthy conditions, infectious and communicable diseases spread easily. A sample study conducted by the National Human Rights Commission of India in early 1998 revealed that 76% of deaths in Indian prisons were due to the scourge of Tuberculosis.²⁸

6. Mentally Ill Prisoners

Though miniscule, mentally ill prisoners constitute another percentage of population, which is largely ignored and forgotten by both the outside world and those inside. But given the nature of the illness and prevailing social attitudes, they form the most hapless victims of human rights violations. Even for a normal person, prolonged incarceration might lead to a mental breakdown, the atmosphere being such. Many, on the verge of such collapse, do attempt suicide.²⁹

7. Drug Abuse

After Murder, Attempt to murder and other serious anti-personal offences, people booked under anti-drug laws constitute a substantial percentage of the prison population. Being in prison and cut off from the free world, sees and increased desperation to get the banned substances to satisfy their addiction to drugs. This also increases the danger of fresh prisoners being inducted into drug abuse since 'prison is an environment where there is a captive, bored, largely depressed population eager for some release from the grim everyday reality.'

8. Effect on the Families of Prisoners

Those imprisoned are unable to look after their families. In the absence of the main bread winner, the family is many a time forced into destitution with children going astray. This combined with the social stigmatization that they face, leads to circumstances propelling children towards delinquency and exploitation by others. It is an inexorable circle. The

²⁸ Maj.Gen.Nilendra Kumar, *Law, Poverty & Development* (1st edn., 2011).

²⁹ *The Problems of Undertrials*, Legal Services India, March 16, 2017. Available at <http://www.legalservicesindia.com/article/article/the-problems-of-undertrials-1280-1.html>. Last accessed on February 12, 2019

problems become acute when they belong to the socio-economically marginalized and exploited sections of the society. The dominant class does not fail and lose time in taking advantage of this situation to exploit the remaining family members to the fullest possible extent. This can take the form of rape or forced prostitution of the prisoner's wife and or his daughters.³⁰

9. Understaffing

The total sanctioned staff in Indian Prisons is around 49,000 at various ranks. But the actual strength as of 2010 is a little over 40,000. The ratio between prison staff and prison population is 1:7, which means that there is only one prison staff available for every 7 prisoners throughout the country. However, in countries like UK, there are 2 prison officers available for every 3 prisoners.

10. Lack of Legal Aid

Access to justice for all is unimaginable without access to free legal aid by the weaker sections of society. The fundamental source of the legal aid concept, Article 39-A was inserted in the Constitution of India through the 42nd Amendment. The article mandates the state to promote justice on the grounds of equal opportunity and provide free legal aid to “ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities”. In *Hussainara Khatoon v. State of Bihar*,³¹ the apex court read the right to legal aid as implicit in Article 21 of the Constitution of India. The Court, shocked by the fact that under trials were languishing in the prisons of Bihar for years without legal representation, declared: “There can be no doubt that speedy trial, and by speedy trial, we mean reasonably expeditious trial is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21”. The court pointed out that Article 39-A, emphasised that free legal service was an inalienable element of “reasonable, fair and just” procedure and that therefore the right to free legal services was implicit in the guarantee of Article 21. It described legal aid as “the delivery system of social justice”. It also expressed the hope that every state government would provide legal aid to avoid derailment of the spirit of Article 21.

The legal rights entitled to needy under-trials have been mandated by the Constitution. In *D.K Basu v. State of West Bengal*³² Supreme Court has ordered free legal aid to every person from the point of arrest. However, in reality, legal aid is only provided at the time of trial, that too in

³⁰ *Ibid.*

³¹ (1980) 1 SCC 81.

³² (SC, 1996).

most cases only for name-sake. Further, under the Legal Aid Services Authorities Act, 1987, the Legal Aid Boards have been set up at Centre as well as State level, to provide free legal aid to poor and needy. Due to the lack of awareness on the part of the accused/victim, and the lack of initiative and coordination between the police and the legal aid authorities, there are huge discrepancies between what the law mandates to the accused and what they actually get.³³

(B) Specific Problems Faced by Under-Trial Prisoners

1. The Right to speedy trial is violated.

As recognised by the Supreme Court in *Hussainara Khatoon vs. Home Secretary, Bihar*³⁴ is violated due to protracted delays. This delay is due to all kinds of reasons such as –

- a. Systemic delays.
- b. Grossly inadequate number of judges and prosecutors.
- c. Absence or belated service of summons on witnesses or, Remands being extended due to lack of time and patience with the presiding judge.
- d. Inadequacy of police personnel and vehicles which prevents the production of all prisoners on their due dates.
- e. Many a times, the escorting police personnel merely produces the remand papers in the courts instead of actually producing the prisoner in front of the magistrate. This practice is widely reported, notwithstanding the strict requirement of the law in section 167(2) (b) of the Criminal Procedure Code, 1973 which says that ‘No Magistrate shall authorize detention in any custody under this section unless the accused is produced before him.’

2. Right to bail is denied even in genuine cases.

Even in cases where the prisoner was charged with bailable offence, they are found to rot in prisons due to exorbitantly high bail amount. The spirit of the Supreme Court in *Moti Ram & others vs. State of Madhya Pradesh*³⁵ is violated constantly. The Law Commission analysed this in detail in its 78th report on congestion on undertrials. It is also important to point out that the system of giving bail which is mentioned in sections 436 to 450 in the Code of Criminal Procedure, 1973 is also unjust. This is because according to the provisions of the code a person released on bail is required to execute a personal bond and bond of security for a certain amount of money. As a result the poor who cannot afford to avail surety have to suffer in jail till the

³³ Prof. N. V. Paranjape, Criminology, Penology & Victimology (Central Law Publication, Allahabad, 17th edn., 2017).

³⁴ 1979 AIR 1369, 1979 SCR (3) 532.

³⁵ 1978 AIR 1594, 1979 SCR (1) 335

case is over.³⁶

3. Not following the guidelines

Some of the judges even at the High Court level are not following the guidelines laid down by the Supreme Court on bail and grant of the same is dependent upon the attitude of each judge. Standards cannot become prisoners of the whims and fancies individuals. Authority is to be exercised with responsibility. Large number of persons including women and children are detained under Section 109 of the Criminal Procedure Code provides for failure to furnish requisite security for keeping good behaviour. The police usually pick them up “because the number of cases had to be brought up to the specified figure”. The authorities refuse to release them without bail whereas the standing law on Section 110 says that you cannot ask for bail from such persons, only the history ticket is required. In the absence of a system, that takes a proactive role in providing legal services to prisoners their right to effective Legal Aid is also violated due to politicisation of legal aid schemes as many lawyers are hired on political consideration who get a fix salary without the pressure of disposing off cases at the earliest.³⁷

(C) Rights of Prisoners

Prisoners are also entitled to rights to some extent as a normal human being when they are behind the prison. These rights are provided under the Constitution of India, the Prisons Act, 1894 etc. Prisoners are persons and have some rights and do not lose their basic constitutional rights. A prisoner is entitled to all his fundamental rights unless his liberty has been constitutionally curtailed. The Supreme Court has emphasized that a prisoner, whether a convict, under-trial or detenu, does not cease to be a human being and, while lodged in jail, he enjoys all his fundamental rights guaranteed by the Constitution of India including the right to life guaranteed by the Constitution. Even a person is convicted and deprived of his liberty in accordance with the procedure established by law; a prisoner still retains the residue of constitutional rights.

(D) Rights of Prisoners and Emerging Judicial Trends

1. Presumption of Innocence

It is requirement of a fair process under the Anglo-American system of criminal justice, which means that-

³⁶ *Supra*. Note 32.

³⁷ Gurbuneet Singh Randhawa, Dr. D.J Singh, Analysis of Challenges faced by Indian Prison System, IOSR Journal Of Humanities And Social Science (IOSR-JHSS) Volume 20, Issue 11, Ver. III (Nov. 2015) PP 39-46 e-ISSN: 2279-0837, p-ISSN: 2279-0845. Available at <http://www.iosrjournals.org/iosr-jhss/papers/Vol20-issue11/Version-3/G0201133946.pdf>. Last accessed on February 13, 2019.

- (a) The onus to prove that the accused is guilty lies upon prosecution and that the Court has to start with the assumption that the accused is innocent until proved to be guilty.
- (b) The prosecution is put to strict proof, so that if there is any reasonable doubt in the mind of the Court upon the evidence adduced by the prosecution, the accused is entitled to the 'benefit of doubt' and to be acquitted.³⁸

This rule, applicable to a criminal trial, is thus different from a civil proceeding where each party has to prove his own case and the Judge has to decide according to the standard of probability. It was held in *K. M. Nanavati v. State of Maharashtra*³⁹ that, "The principle that the accused person is presumed to be innocent till his guilt is proved beyond reasonable doubt, is of great importance in the administration of criminal Justice. Every criminal trial begins with the presumption of innocence in favour of the accused; and the provisions of the Criminal Procedure Code are so framed that a criminal trial should begin with and be governed throughout by this essential presumption."⁴⁰

2. Rights of an Arrested Person

In criminal justice administration the police through their restrictive and coercive authority, effect arrest, interrogate, search, seize and detain people prior to trial. All these actions affect an individual's liberty and when done arbitrarily, the individual's dignity as well. To prevent arbitrariness several safeguards have been provided through landmark cases.

3. Grounds of arrest, to be informed

The Supreme Court was very clear while interpreting Art. 21 of the Indian Constitution in the case law⁴¹ where the court said that, "while arresting an individual the reasons should be stated to him clearly as to why he is being degraded in such a manner. The arrest of a person to probe her or deprive her of personal liberty has a serious implication and it cannot be indulged into lightly." In our country, arrest is sometimes made with or without a warrant. Art. 22(1) of the Constitution lays down that the arrested person shall be informed of the reasons for her arrest. In *Nitabar Parida*⁴² the Supreme Court interpreted Sec.167 of Cr.P.C., 1973 which contains the provisions for the arrested persons whereby the Judicial Magistrate has to inquire whether he has been informed on the grounds of his arrest. .

4. Access to Counsel

³⁸ *Pataki v. Austria*, 5 year book of European convention.

³⁹ AIR 1962 SC 602.

⁴⁰ *Talab Haji Hussain v. Madhukar Purushottam Mondkar*, AIR 1958 SC 376.

⁴¹ *Vikram v. State (F.B.)* 1996 Cri. LJ 1536.

⁴² AIR 1976 Cr LJ 1212.

As a coercive arrest violates the principle of right to life and personal liberty of an individual, Article 22(1) of the Indian Constitution provides that "No person who is arrested shall be denied the right to consult and to be defended by a legal practitioner of own choice." This legal and fundamental right is also found in Section 303 of Code of Criminal Procedure. The courts have held that from the time of arrest this right accrues to the arrested person and he has the right to consult a lawyer of his choice. The accused may refuse to have a lawyer but the court has to provide an *amicus curiae* to defend him/her in serious cases. Courts also have held that the indigent accused has a right to legal aid. This requirement is to ensure that poverty does not come in the way of any one getting a fair trial.

5. Protection against arbitrary arrest

Arrest is such a severe penal action of the state which automatically and immediately deprives prisoner's personal liberties and freedoms. Indian Constitution has provided ample protection against arbitrary arrest or illegal detention under Article 21 as "no person shall be deprived of his life or personal liberty except according to procedure established by law". Article 22 also supplements certain procedural safeguards against such type of arbitrary arrest or detention.

Article 22 was initially taken to be the only safeguard against the legislature in respect of laws relating to deprivation of life and liberty protected by Article 21 as it was held in *A. K. Gopalan v. State of Madras*.⁴³ But the position of Article 21, underwent a sea change since *Maneka Gandhi v. Union of India*⁴⁴ and in *Kartar Singh v. State of Punjab*⁴⁵ also where validity of several sections of the TADA was tested in the light of Article 21.

6. Right to know the grounds of arrest

Every pre-trial prisoner must be informed about the reasons of arrest so that he can justify his action or omission whether he is really guilty of allegations made by the police authority and simultaneously, he can prepare himself for self-defense and necessary action for release i.e. to get the bail. It means that the accused should know the reasons of arrest so that he can evaluate action of authority. Article 22 (1) of the Indian Constitution states that "no person who is arrested shall be detained in custody without being informed as soon as may be, of the grounds for such arrest." An arrest or detention will be illegal if, the arrested person has not been communicated grounds of his arrest. Analogous provisions are contained in Section 50 of the Criminal Procedure Code.

⁴³ AIR 1950 SC 27 128.

⁴⁴ 1978 AIR 597.

⁴⁵ (1994) 3 SCC 569.

The section provides two things, namely:

- (i) The person arrested without warrant should immediately be intimated the full particulars of the offence and grounds for such arrest; and
- (ii) In the case of bailable offence, he should be informed,
 - (a) That he is entitled to be released on bail, and
 - (b) That he may arrange for sureties on his behalf. This requirement is not dispensed with, if he is admitted to bail.

In the case of *D.K.Basu v. State of West Bengal*⁴⁶ as well, guidelines were given to be followed in cases of arrest or detention by the concerned Authority.

7. Right to have Interview with Friends, Relatives and Lawyers

In *Sheela Barse v. State of Maharashtra*,⁴⁷ the court held that interviews of the prisoners become necessary as otherwise the correct information may not be collected but such access has got to be controlled and regulated.

In *Dharambir v. State of U.P.*⁴⁸ the court directed the State Government to allow family members to visit the prisoners and for the prisoners at least once a year, to visit their families but under guarded conditions.

8. Right to engage Lawyer

In *Hussainara Khatoon v. Home Secretary, Bihar*⁴⁹, the Supreme Court held that it is the Constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicable situation, to have free legal services provided to him by the state and, the state is under Constitutional duty to provide a lawyer to such person if the principles of natural justice so require. If free legal services are not provided, the trial itself may be vitiated as contravening Article 21.

9. Right to Legal Assistance

The Indian Constitution does not expressly provide the Right to Legal Aid. But the judiciary has shown its activism towards prisoners who are not in a position to engage the lawyers of their own choice because of their poverty. In *M.H. Hoskot v. State of Maharashtra*⁵⁰ the Supreme Court held that right to free legal aid at the cost of the state to an accused who could not afford

⁴⁶ 50 AIR 1997 SC 610.

⁴⁷ JT 1988 (3) 15.

⁴⁸ 2010)5SCC344.

⁴⁹ 1979 AIR 1369; 1979 SCR (3) 532.

⁵⁰ 1978 AIR 1548.

legal services for reason of poverty or indigency was part of fair, just and reasonable procedures enshrined under Article 21. A three Judges Bench of the Supreme Court citing Articles 21 and 39-A, along with Article 142 and Section 304 of Cr.P.C. together, declared that the Government is under duty to provide legal services to the accused persons.

In addition to that, in well-known case of *Khatri v. State of Bihar*,⁵¹ it was held by the Supreme Court that because of shortage of funds or administrative inabilities the state cannot escape from providing free legal aid to the accused. It is a Constitutional obligation of state to provide free legal aid.

10. Right to be produced before the Magistrate

Initially, the principle was recognized in criminal jurisprudence but to safeguard the Human Rights of accused this has been categorically redefined and enforced for the protection of Human Rights of accused by the law. In other words, it is judicial review of the police action which is an independent authority and to decide whether the arrest by the police officer was just and fair or illegal and arbitrary.

The Constitution has taken care of an arrested person in *Govinda Prasad v. State of West Bengal*,⁵² case, where the Court referred to Art.22 (2) and said that "Wherever a person is arrested by police or anyone, authorized to execute the duty for the Government, he shall be told the grounds of his arrest and shall be produced before the Magistrate within 24 hours of arrest and shall not be denied to consult a legal practitioner of his choice." The same is given in Cr.P.C. Sect.56, 57, 76, 80, 167(1). Section 56 and 57 of the Criminal Procedure Code contain more or less the same provisions as is contained in Article 22(2) of the Constitution. While the time given in Article 22(2) is twenty four hours, Section 56 requires taking or sending of the arrested person without unnecessary delay. There is also a Right to be released, if not produced before the Magistrate.

11. Right to Speedy Trial

Since the primary principle of having the presumption of innocence on the part of accused, the right to speedy trial is a device to prove the innocence of accused in speedy manner if he is actually innocent. So the basic idea behind the concept of speedy trial is, to release the innocent person from the charges of the offence. Again Criminal Procedure Code has no assurance for speedy trial however, u/s. 437 (6), if the accused is in detention and charge-sheet is not completed within 60 days, he is permitted to be released on bail.

⁵¹ 1981 AIR 1068.

⁵² 1975 Cr LJ 1249.

Justice Bhagwati has also stressed the fact, in the following observation :-⁵³

"The State is under a Constitutional mandate to ensure speedy trial and whatever is necessary for this purpose has to be done by the State. It is also the Constitutional obligation of this court, as the guardian of the fundamental right of the accused to speedy trial by issuing necessary directions to the State which may include taking positive action, such as augmenting and strengthening the investigative machinery, setting-up new courts building new court houses, providing more staff and equipment to the courts, appointment of additional judges and other measures calculated to ensure speedy trial."

12. Prohibition of applying ex post facto law

The basic principle of law is that no law will impose any penalty until any violation of law is done. In other words, any act or omission which may be immoral, unwanted or against the society if not falls within the preview of judicial adjudication or under any Act and, is not an offence, it is not punishable. Thus any immoral or illegal or forbidden act which is not covered as a violation of legal provisions is not punishable and thus the prospective of retrospection of law is accepted by the Constitution vide Article 20 (1). It prohibits:

- (i) The making of ex-post-facto criminal law as it was approved in case *Nayyar v. Delhi Admn*⁵⁴ i.e. making an act a crime for the first time and then making that law retrospective which was later followed in *Shiv Bahadur v. State of U.P.*⁵⁵
- (ii) The infliction of a penalty greater than that which might have been inflicted under the law which was in force when the act was committed as was held in *Kedar Nath v. State of Punjab*.⁵⁶

13. Protection against double jeopardy

It can be described as immunity from the double punishment which is popularly known in legal terminology as double jeopardy. This principle was initially accepted in Criminal Procedure Code, 1898 under Section 300 and 403. In Constitution of India, Double Jeopardy is incorporated under Article 20(2) and is one of fundamental rights under the Indian Constitution. It contains the rule against double jeopardy which says that "no person shall be prosecuted or punished for the same offence more than once."

⁵³ *The Hindstan Times*, New Delhi , 5th August, 1996.

⁵⁴ AIR 197 9 S.C. 602.

⁵⁵ AIR 1953 S.C. 394.

⁵⁶ AIR 1953 S.C. 404.

14. Protection against self-incrimination

Article 20 (3) provides “no person accused of any offence shall be compelled to be a witness against himself”. The basic idea of the provision is to protect the Human Rights of an individual that the authority may not compel the accused to be a witness against himself. Because, at time it has been observed that the authority compels to provide evidences or documentary proofs which may be proved against the accused himself either in initial investigation process or in process of preparation of charge sheet or, at the time of trial.

15. Right to life and personal liberty

Article 21 provides that “No person shall be deprived of his life or personal liberty except according to procedure established by law.” This is a pertinent right available to an accused against the arbitrary arrest or unlawful detention which may be done without following the procedure of law by the police. In many cases, the personal liberty is considered an essential Human Right, among all other Human Rights and is also a fundamental right under the Constitution. In case of *C.F. Union of India v. Indo-Afghan Agencies*⁵⁷, it was held that the doctrine of “state necessity” is not applicable in India. In other words, a state is never authorized to do any unlawful detention or arrest like it is done in other countries as a state necessity.

16. Right against police torture

In *Kishore Singh v. State of Rajasthan*,⁵⁸ the Supreme Court held that the use of third degree method by the police is considered as part of violation of Article 21. The court also directed the Government to take necessary steps to educate the police so as to inculcate a respect for the human person. Any kind of inhumane treatment of prisoners is a form of torture.

17. Rights against Solitary Confinement and Bar Fetters

The courts in India have consistently taken the view that imposition of solitary confinement is highly degrading and dehumanizing effect on the prisoners. It can be imposed only in exceptional cases where the convict was of such a dangerous character that he must be segregated from the other prisoners. The Supreme Court in *Sunil Batra vs Delhi Administration*⁵⁹ considered the validity of solitary confinement.

The Supreme Court has also reacted strongly against putting bar fetters to the prisoners. The Court observed that continuously keeping a prisoner in fetters day and night reduced the prisoner from human being to an animal and such treatment was so cruel and unusual that the

⁵⁷ AIR 1868 S.C. 778 : 1968 (2) SCR.

⁵⁸ 1954 CriLJ 1672.

⁵⁹ 1980 AIR 1579.

use of bar fetters was against the spirit of the Constitution of India.

18. Right to fair and open trial

Fair and open trial is a part of just and fair judicial process regarding the procedure adopted by the Court and evidences and witnesses examined by the court. In other words, it is whole process of evaluating the act or omission of an accused in light of statement of witnesses and cross-examination done by the pleaders. The basic idea of fair and open trial is that the judiciary should not behave in arbitrary, discretionary, fanciful or whimsical manner or with pre-determined mind.

19. Right to Speedy Justice

In the case of *S.C. Advocate on Record Association v. Union of India*,⁶⁰ the court interpreted that the preamble of Constitution of India very clearly emphasised on providing justice: Social, Economic and Political, to every citizen of India. Also, delay in justice is considered denied justice. The ingredients of Article 21 very clearly establish speedy justice as an essential ingredient of just and fair justice, but the Supreme Court had advanced the concept of speedy justice. In the case of *Rudul Shah v. State of Bihar*,⁶¹ it was held that, it was a great tragedy of Judicial system, where an innocent person suffered imprisonment for 14 years because of the mistake on part of the police and judiciary. Justice was delivered very late and he was declared innocent after wasting his valuable 14 years. The judicial activism also contributed a lot in protection of Human Rights in very popular case of Hussainara Khatoon.⁶²

III. A CRITICAL ANALYSIS OF NEED FOR PRIVATISATION OF PRISONS AND CHALLENGES TO IT

Throughout history the penal system has been viewed as the paramount means of dealing with criminals, through its function has been transformed through time. It has served as a pit for detaining suspected criminals, a home for the vagrant, an institution for the insane, a dreaded place of repute, quarters for cleansing and renewal, and an establishment of catalogued charges. The trials and transformation of history have developed and shaped the institution that we recognize today.

The phrase “private prison” seems like a contradiction in terms. After all, what could possibly be private about getting stuck in jail for months and years and sharing your living space with hundreds and even thousands of other people? However, private prisons refer to places of

⁶⁰ AIR 1994 S.C. 268.

⁶¹ 1983 AIR 1086.

⁶² Hussainara Khatoon & Ors vs Home Secretary, State Of Bihar, 1979 AIR 1369, 1979 SCR (3) 532.

incarceration that are managed by a third party that's contracted by the government instead of being run by the government itself. A private prison, which is also known as a private facility or for-profit prison, is where people are confined or incarcerated by a third party contracted by a government agency. Private prison companies enter into a contractual agreement with governments that commit prisoners into the facility then pay a per diem or monthly rate for each incarcerated individual. Private prisons are being used all around the world, with the United Kingdom being the first nation in Europe to use prisons run by the private sector. These prisons are established in several parts of the world, including India, the United Kingdom, and the United States.

The privatization of prisons can happen in three major ways. First, the government may build the prison then outsource its operations to third parties. Second, private companies may run the prison from start to finish; they finance, design, and construct the facilities and, once the buildings are erected, they eventually manage the prison. Third, the government may take a prison that's currently managed by the public sector and contract it out to a private company. In all three scenarios, the third-party company is then paid a daily or monthly rate either for the actual number of inmates it houses or the number of beds/places available (whether they're used or not). There can be numerous reasons for the need of privatising the prisons despite the fact that Private prisons have garnered praise over the years, but there are those who believe that these places do more harm than good. Some of the reasons are:

1. For-profit prisons create economic opportunities.

The privatization of prisons creates job opportunities on numerous levels for a community. There are the direct jobs that are available in the prison. Service industry jobs are required to support that population. Transportation professionals must bring in consumable goods. In total, the private prison economy in the United States equates to an economic impact of about \$80 billion each year.

2. It can reduce prison population levels.

In state prisons that are publicly operated, the number of prisoners being housed is quickly outnumbering the beds and population levels the facility was designed to hold. Many prisons are above 100% capacity. In USA, UK and India, some prisons operate at 130% capacity levels. When this is combined with low staffing numbers, it can be difficult to control the environment. By opening for-profit prisons, per-facility population levels can be lowered so prisoners can experience a better quality of life.

3. Prisoners from for-profit prisons may reoffend at lower rates.

In some regions, the rate of inmates reoffending and being sent back to prison can be over 80%. As an industry, a rate of 50% is considered to be excellent. Private prisons, on the other hand, may have re-offense rates that are as low as 20%. Although prisoners in for-profit prisons may serve longer sentences, they may spend less overall time behind bars because they have access to more resources inside and outside of prison.

4. Private prisons can be used for more than housing prisoners.

One of the most common uses for for-profit detention facilities is to accommodate immigration detention needs. These facilities can also be used or altered to accommodate many different community needs. Some have been turned into museums. They have been converted into administrative offices. In Portland, Oregon, a vacant 525-bed prison facility has been used for filming television shows and movies while serving as a foundation for the local anti-prison movement.

5. It helps save money

Studies reveal that states can save money by using for-profit prisons. However, these findings are refuted by academic or state-funded studies which highlight that private prisons are more likely to keep low-cost inmates and send others back to state-run prisons. Proponents of privately run prisons argue that benefits of such a system include cost savings and efficiency of operation. However, research has cast doubt on the validity of those statements as evidence points to private prisons not being cost effective or even more efficient than public prisons.⁶³

6. It is a system that has provided a history of proven results.

Although the privatization of prisons feels like a recent debate, it is a practice that has been followed for several generations. Everything from food preparation to inmate transportation has been contracted to third-parties since the first operational contracts were awarded in 1984 within the United States and same is the condition with India.

7. There is much less administrative red tape.

In the public prison system, decisions that involve the administration of the facility must go through several levels of legislation. Local administrative bodies may be involved in the process. Changes may need to be approved by the governor after a bill is debated. The process of change could last 2-4 years in some instances. With a private facility, everything runs

⁶³ Crystal Ayres, 5 Foremost Pros and Cons of Private Prisons, Green Garage, Oct 28, 2015. Available at <https://greengarageblog.org/5-foremost-pros-and-cons-of-private-prisons>.

through the company instead. That means any policy or procedure changes can be handled immediately and directly.

8. It provides an entry-level law enforcement opportunity.

Even with a criminal justice degree, finding work in law enforcement can be a difficult proposition. Many agencies want experienced personnel that can begin working immediately. For-profit facilities offer an entry-level position for correctional officers where that experience can be obtained. It is an opportunity to learn new skills, apply the knowledge from a criminal justice degree for the first time, and get comfortable. That can create some challenges because of inexperience, but the benefits often outweigh the risks in this category.⁶⁴

(A) Privatization of Prisons: Is It a Good Idea?

In 2016, the U.S. Department of Justice announced that it would begin to phase out the use of private prisons for federally-based inmates. During the announcement, the DOJ noted that the reason for discontinuing the service was that for-profit prisons compared poorly compared to facilities that were operated by the government. They found that for-profit prisons provided fewer services, had higher safety risks, and had higher security risks without producing a substantial level of savings.⁶⁵ There are studies which also suggest that the opposite is also true. In addition, the private sector can always be incentivized to perform better, which is something that can be difficult to do from a public standpoint. It all depends on one question: do we as a society feel that private corporations should run prisons? If so, then we must find ways to improve conditions while encouraging prisoner rehabilitation and reform the model. If not, then perhaps now is the time to pull the plug on this experiment.

IV. A COMPARATIVE STUDY OF PRIVATISATION OF PRISONS IN INDIA, U.S.A AND U.K.

In modern societies, the prison plays certain crucial roles, such as: to protect citizens from individuals that do not observe the formal rules; to punish criminals in order to discourage people from breaking the law and to provide the conditions that make the inmate's future re-entry possible.⁶⁶ Following the New Public Management principles, which in fact shape the policies of several countries throughout the world, in order to control a prison, prison managers

⁶⁴ Crystal Ayres, *20 Privatization of Prisons Pros and Cons*, *Vittana.Org*, 16 September, 2015. Available at <https://vittana.org/20-privatization-of-prisons-pros-and-cons>.

⁶⁵ *Ibid.*

⁶⁶ American Behavioral Scientist, 43(1), 192-208. doi: 10.1177/00027649921955119. M. Shirley, & C. Ménard, "Cities Awash: A synthesis of the country cases", (2002). In M. Shirley (Ed.), "Thirsting for efficiency: The economics and politics of urban water system reform", (pp. 1-42, Oxford: Elsevier Science). R. E. Stake, "The art of case study research", (Thousand Oaks: Sage Publications, 2002).

must manage both the cost and quality aspects toward law-and-order goals.

The cost dimension is important because of the budgetary constraints governments have been experiencing in recent years. In fact, cost reduction is one of the main objectives of the new organizational arrangements in the provision of public services⁶⁷. In theory, the measurement of cost indicators is not complicated. It usually involves the amount spent during the period of an inmate's incarceration, which requires the consideration of certain cost dimensions, such as labour, materials, and electricity among others⁶⁸. As each country may consolidate the financial information regarding the prison's costs differently, public versus private comparisons should be restricted to the country level. In the several cases, focus is only on the operational costs to run the prison and do not take into account the construction costs.⁶⁹

Quality-oriented performance indicators must be aligned with the prison's goals mentioned above. In this way, it is essential that the correctional facility be able to provide the proper services that generate an adequate environment and preserve the physical and moral integrity of the inmates, employees and visitors, as well as facilitate criminals' rehabilitation processes⁷⁰. From this perspective, quality aspects can be grouped into three dimensions: Organizing Prisons through Public-Private Partnerships-

- (a) Recidivism⁷¹ rates;
- (b) Safety and order indicators (deaths, assaults, escapes, riots, etc.);
- (c) Services offered to inmates⁷² (food, medical and legal assistance, clothes, hygiene, rehabilitation services, etc.)

The process of assessing these indicators may present certain problems. Besides the procedural issues for collecting and consolidating the relevant information, some aspects are very

⁶⁷ R. A. Oppel, "Private prisons found to offer little in saving" The New York Times, 2011, May 18. Available at http://www.nytimes.com/2011/05/19/us/19prisons.html?_r=1&nl=todaysheadlines&emc=tha2.

D. Perrone & T. Pratt, (2003).

⁶⁸ *Comparing the quality of confinement and cost effectiveness of public versus private prisons: what we know, why we do not know more, and where to go from here.* (The Prison Journal, 83(3), 301-322) doi: 10.1177/0032885503256329. B. Price & N. Riccucci, "Exploring the determinants of decisions to privatize state prisons" (2005).

⁶⁹ *Designing incentives in organizations.* (Journal of Institutional Economics, 6(1), 125-132. doi: 10.1017/S1744137409990221). W. J. Sabo, H. C. West & M. Cooper, "Prisoners in 2008" (Bulletin NCJ 228417, Washington, DC, Bureau of Justice Statistics, U.S. Department of Justice, 2005). G. Salle, *Rule of Law, Managing State*, (2009).

⁷⁰ G. P. Baker, R. Gibbons & K. J. Murphy, "Strategic alliances: bridges between islands of conscious power". (Journal of the Japanese and International Economies, 22(2), 146-163, 2008) doi: 10.1016/j.jjie.2008.03.001.

⁷¹ A. R. Beck, "Recidivism: A fruit salad concept in the criminal justice world. Kansas City", (MO: Justice Concepts, Inc., 2001). J. Bennett & E. Iossa, "Delegation of contracting in the private provision of public services", (Review of Industrial Organization, 29(1), 75-92, 2006). doi: 10.1007/s11151-006-9110-z.

⁷² P. Bayer, & D. Pozen, "The effectiveness of juvenile correctional facilities: Public versus Private management." (Journal of Law and Economics, 48(2), 549-589, 2006). doi: 10.1086/497526.

subjective. It is difficult to assess the quality of the meals provided to inmates or the level of force applied to contain riots and assaults. For these reasons, we focus on quality indicators that can be accessed through quantitative aspects, i.e., observable and measurable features, such as: escapes, deaths, medical appointments and so on.⁷³

Cross-national comparisons of crime and criminal justice practices have potential for defining limits of change in criminal justice systems. Unfortunately, the requisites for good cross-national comparisons are quite stringent. Too often such comparisons misrepresent differences in practices or account for observed differences in terms that are too general to serve as a guide for policy. A specific case in point is cross-national comparisons of incarceration rates.

(A) Private Participation and Performance in Prisons

There are some studies that focus on the comparative aspects of public and private governance. Despite the claims of cherry-picking and correctional creaming i.e., private prisons, allegedly house relatively health and easy-going inmates, the existing studies are almost unanimous in concluding the superiority of private governance in terms of cost-reduction. Private prisons present better performance in terms of cost reduction when compared to the publicly operated unit. On the other hand, public prisons seemed more efficient in preventing escapes and providing a broader range of treatment, recreation, social services and other services to inmates. For-profit facilities led to cost reduction and a statistically significant increase in recidivism. Thus, the short-run savings offered by for-profit over non-profit management are negated in the long run due to increased recidivism rates. Given the many legal, ethical, and political complications associated with profit-seeking correctional facilities, it can be said that the juvenile justice system should move away from the use of for-profit facilities.

(B) Prison Privatisation in India

The concept of for-profit prison privatization dates back to almost as early as the 16th Century. A trend started by the United Kingdom, it enjoyed a modern comeback in the United States during the 1980s. Following them, numerous countries experimented with prison privatization. India has not yet considered the merits and demerits of complete privatization of the prison sector. However, it has started incorporating elements of privatization in it by accepting and developing on the Public Private Partnership model. While the idea of prison privatization seems to be very attractive, one may ask whether public prisons are functioning well or not and

⁷³ A. Boin, O. James & M. Lodge, *The new public management revolution in the public sector: promises and outcomes in three European prison systems*. (ACSME, Louisiana, USA, Public Policy and Administration, 21(2), 81-100, 2006). doi: 10.1177/095207670602100207.

what is the guarantee that private prisons will be more efficient in the optimum utilization of funds allocated to them. Maintenance of prison discipline and improvement in condition of inmates will be there. The very fact that incarcerated mafias and gangsters continue to involve in extortion and killings outside the prison through their proteges brings to the fore the problems of prison security. Further, the maintenance of peace and tranquility in the society may be an inhibiting factor in the adoption of the prison privatization model, especially, in a highly populous country like India.

Public private partnerships (PPPs) are "contractual arrangements between public sector organizations and private sector investors for joint, symbiotic and collaborative provision and financing of public projects and services".⁷⁴ The public sector often faces challenges in the sphere of finance, technical knowledge, institutional limitations in availing infrastructure projects, which begets the need of Public private partnerships. There is widespread proof of the emerging utilization of PPPs in the public sector services to meet the needs of the modern economy. These reflections have led to criminal justice academics and policymakers discuss the advantages and disadvantages of applying this model in prison management, correctional administration and criminal justice governance as a whole.⁷⁵

It is the various Committees formed by the Government of India, post-independence, which laid down the foundation of the Indian prison system. There are numerous Reports that have discussed the Public-private partnership model in prisons, although, to a limited extent. The Mulla Committee,⁷⁶ included in its recommendations the involvement of the concept of public private interface and participation of the community (civil society as a whole) and by way of Non-Governmental Organisations. The next report was that of the Krishna Iyer Committee,⁷⁷ which also reiterated what the Mulla Committee laid down.

In 2003, a study on Implementation of Recommendations of the *All-India Committee on Jail Reform (1980-83)*, was prepared by the Bureau of Police Research and Development, Ministry of Home Affairs, Government of India. It showed that there was an involvement of the private sector when it came to specialized hospital treatment for inmates of correctional institutes, in some states. Private contractors in few states were supplying food or raw materials. In relation to work programmes, some inmates are made over to private contractors. The study also

⁷⁴ J. Broadbent, J. Gill and R. Laughlin, *Evaluating the Private Finance Initiative in the National Health Service in the UK*, (16 (3) Accounting, Auditing & Accountability Journal 445, 2003).

⁷⁵ Vijay Raghavan, *Guidelines for Public-Private Partnership in Prisons Management*, XLVL (4) Economic & Political Weekly 18 (2011). Available at https://papers.ssrn.com/sol3/Data_Integrity_Notice.cfm?abid=2406796, (Last visited on February 28, 2019).

⁷⁶ Report of the All India Committee on Jail Reforms 1980-83.

⁷⁷ Report on National Expert Committee on Women Prisoners 1987.

emphasised on 'role of private contractors' to be an issue to be taken into consideration. It was seen that in eight states, efforts were made with private agencies and potential employers for giving employment to released offenders.

In Bilaspur, Himachal Pradesh the labour of inmates of the open-air jail was being utilised by private contractors, according to this study.⁷⁸ Fast emerging labour workforces for the private sector are jail inmates. The Indian prison industry has entered the manufacturing sector of private industries. Outsourcing by the private sector, or rather 'in-sourcing' jobs to jails is a fine reflection of a symbiotic relationship between corporate opportunism and prison reform.

The Public-Private Partnership Model entered the Indian Prison industry through the most famous prison in India, the Tihar Jail as early as the 90s. Considered a pioneer in the economic rehabilitation program in India, it has nearly 12,000 inmates. It houses a large chunk of human resources. The Tihar Jail brand, *TJ* is involved in various activities like Carpentry, Weaving, Tailoring & Baking School. Even products like bread and pickles are manufactured and sold in the market through the TJ outlets in and around Delhi. With a whopping approximate earning of Rs 10-15 crore, the Tihar Jail entered into PPP agreements with DEIEM India and Century Pvt Ltd, which train inmates on the products manufactured by them and then absorb them into their respective organizations at the end of the term. Set up by Minda Furukawa Electric Pvt. Ltd (MFE), a joint venture company.⁷⁹

Tihar Jail also has India's first ever-manufacturing unit of automotive components inside a jail. This initiative was started to produce a sustainable collaborative social business model, to have dual benefits, for the convicts of Tihar Jail and their families. Indian prison officials speak glowingly of the PPP model also interpreted as the Private Prison Partnership saying its income offsets costs. But the model also assists in rehabilitation by skilling prisoners for life beyond bars. And finally, as per prison wisdom, a 'busy convict is an easy convict'.

(C) Prison Privatisation in the United States

In the 1980's, some state governments in the United States found in the private sector a way to cope with the increase in the inmate population and the corresponding costs of operation and maintenance. Although the decision to privatize in the U.S.⁸⁰ is frequently related to more

⁷⁸ Ministry of Home Affairs, Government of India, *Implementation of the recommendations of All-India Committee on Jail Reform* (1980-1983), Available at <http://mha1.nic.in/PrisonReforms/pdf/Mulla%20Committee%20implementation%20of%20recommendations%20- Vol%202 .pdf>, (Last visited on March 04, 2019).

⁷⁹ Pratibha Sharma, *State Jail Industry Board and Sustainable Economic Rehabilitation of prison inmates*, (LX (2) Indian Police Journal 81, 2013). © Universal Multidisciplinary Research Institute Pvt Ltd International Journal of Law and Legal Jurisprudence Studies :ISSN:2348-8212:Volume 3 Issue 4.

⁸⁰ J. Bennet & E. Iossa, *Contracting out public service provision to not-for-profit firms*. (Oxford Economic Papers, 62(4), 784-802, 2010).. doi: 10.1093/oenp/gpp040 J. F. Blustein, & M. A. Cohen, *The interrelationship between*

conservative political cultures, there is evidence that even more liberal states adopted private management in response to budgetary constraints and prison overcrowding. The first experience of private participation took place in Tennessee in 1983. Today, more than 30 states have adopted private solutions. There are roughly 270 privately-operated correctional facilities. On December 31, 2008, they housed almost 128,524 inmates, which represent 8.5 % of the inmate population of the state and federal correctional systems. In some states, such as New Mexico, around 46% of inmates are held at private facilities. Considering the local jails run by counties, privately operated prisons house 7.4% of the total inmates in custody in the United States, which total 2,304,115 inmates.⁸¹

A number of studies have concluded that the United States is the most punitive of industrialized nations. Those studies have based their conclusions on the fact that the United States has the highest prison population per thousand.' In fact, although the United States has⁸² the largest per capita prison population, that statistic does not necessarily result from a more punitive policy on the part of its courts. Other factors may more readily explain differences in prison populations. One such factor is the greater extent to which the United States tends to legislate morality, as seen, for example, in its more comprehensive laws on the criminalization of prostitution, drug use, and other victimless crimes.⁸³ Also, the United States has a much higher crime rate than other countries.⁸⁴ Crimes in the United States are violent or otherwise serious in greater proportion than in other nations. The isolation of these and other competing explanations of observed differences in prison populations and the systematic examination of these alternatives present in other countries provide information specific enough to serve as a guide to policy-making.⁸⁵

*Camp and Daggett*⁸⁶ (2005) performed a public versus private comparison in prisons managed

public and private prisons: does the existence of prisoners under private management affect the rate of growth in expenditures on prisoners under public management? (2003).

⁸¹ Sandro Cabral & Stephane Saussier, *Organizing Prisons through Public-Private Partnerships: A Cross-Country Investigation*, BAR-Brazilian Administration Review Vol.10 no.1 Rio de Janeiro Jan./Mar. 2013. Epub Nov 27, 2012. Available at <http://dx.doi.org/10.1590/S1807-76922012005000010> .

⁸² Doleschal, Rate and Length of Imprisonment: How does the U.S. Compare with the Netherlands, Denmark and Sweden?, 23 CRIME & DELINO.. 51 (1977); Doleschal, Fact Sheet on Crime and Criminal Justice in the United States, the Netherlands, Denmark, Sweden, and Great Britain, Nat'l Council on Crime and Delinq. Info. Center; Waller & Chan, Prison Use: A Canadian and International Comparison, 3 CRIM. L. Q. 47 (1975).

⁸³ N. MORRIS & G. HAWKINS, THE HONEST POLICEMAN'S GUIDE TO LAW ENFORCEMENT (1970).

⁸⁴ BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 1982 (1984); U.S. FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES (1983).

⁸⁵ James P. Lynch, Comparison of Prison Use in England, Canada, West Germany, and the United States: A Limited Test of the Punitive Hypothesis, 79 J. Crim. L. & Criminology 180 (1988-1989).

⁸⁶ *Design choices in privatized social security-systems: learning from the Swedish experience*. (American Economic Review, 94(2), 424-428). doi: 10.1257/0002828041301632. (Department of Criminal Execution of the State of Paraná, (n.d.), (internal records), Curitiba, PR, Brazil, National Penitentiary Department, 2008).

by the Federal Bureau of Prisons to evaluate inmates' misconducts using hierarchical and linear modeling. Their results show that private prisons did not perform as well as public prisons.

*Lukemeyer*⁸⁷ and *McCorkle*⁸⁸ (2006), in an extensive study covering 873 correctional facilities in the U.S. (762 state facilities, 93 federal prisons and 18 privately operated facilities) observed that even though, as a group, private prisons were less likely to experience violence, private prisons with violence exhibited the highest rate of violence. Authors suggest that among private prisons in the U.S. there may be two groups: one group that is very effective in controlling violence and one that is much less effective. Nevertheless, this conclusion must be viewed with caution, given the small number of private prisons in the sample.

Although, to the best of knowledge, there is no study in U.S. with a centralized database containing information on both public and private prisons that could contribute to better clarify the debate (*Perrone & Pratt*, 2003)⁸⁹, the elements above shed some light on the public versus private debate in the correctional sector. In general, considering the incentive structure and the types of contractual arrangements between private operators and public authorities, one might observe a trade-off between cost-reduction and quality deterioration in the private provision of prison services in the United States.

(D) Prison Privatization in the United Kingdom

Concerns about a rapidly increasing incarcerated population and associated problems of rising costs, overcrowding and deteriorating conditions led to demands for expanded prison capacity and regime improvement.⁹⁰ In 1984, the Adam Smith Institute championed privatisation as the most cost-effective solution to the crisis based on the contested assumption that the management experience, results driven culture and efficiency of private contractors would enable them to deliver prison services of a higher quality at a lower cost.⁹¹ These arguments found favour among Conservative ministers who had already begun to privatise nationalised

⁸⁷ Penitentiary Information System: INFOPEN (Consolidated data), DF: Ministry of Justice. National Penitentiary Department. (2009). Management Report DEPEN: Fiscal Year 2008. Brasil, DF: Ministry of Justice. Desrieux, C. (2006).

⁸⁸ "The role of the public authority in the delegated management of local public services: An approach by the Theory of Incomplete Contracts." (Economic Review, 57 (3), 529-540).

⁸⁹ K. J. Meier, O'Toole. & R. M. Walker, *Public service performance: Perspectives on measurement and management*. (Cambridge: Cambridge University Press, 2007).

⁹⁰ In the 10-year period from 1979-1988, the overall prison population increased quite modestly by 18% from 42,220 (1979) to 49,949 (1988), yet over the same period the remand population increased by as much as 76% from 6,629 to 11,667. Cited in A James, and K Bottomley, 'Prison Privatisation and the Remand Population: Principle versus Pragmatism?' (The Harvard Journal, 1998, Vol. 37, No. 3, pp. 223-233, p.223).

⁹¹ D Pozen, 'Managing a Correctional Marketplace: Prisons Privatisation in the United States and the United Kingdom', (2003). *Journal of Law and Politics*, 2003, Vol. XIX. No. 253).

industries and outsource local government services.⁹² Further, it would give them the opportunity to challenge the power of the Prison Officers' Association, one of the few trade unions that had not already been marginalised since Thatcher came to power in 1979.

In 1986, a parliamentary Select Committee on Home Affairs examined the state of prisons in England and Wales, and, after a visit to US private prisons, published a report entitled *Contract Provision of Prisons* (1987).⁹³ It recommended that the Home Office should, as an “experiment”, enable private sector companies to tender for the construction and management of prisons. Initially, the Home Office adopted a highly cautious approach and spent over four years commissioning a number of studies and hearings to assess the possible costs and benefits of private prisons.⁹⁴

Privately managed prisons were introduced to the UK in the 1990s. HM Chief Inspectorate of Prisons inspects private prisons in the same way as public sector prisons. All private prisons have a 'Controller' linking them to the National Offender Management Service, and the governors of private prisons are called 'Directors'. At present there are 14 private prisons contractually managed by private companies such as Sodexo Justice Services, Serco and G4S Justice Services.⁹⁵ The government of United Kingdom considers whether to extend competition further or to abandon plans for privatisation. Four big jails are being built to cope with a predicted 2,000-inmate rise in the prison population by 2022. But the government is yet to decide whether to offer them to private operators such as G4S, Serco and Sodexo, which dominate the privatised prison estate, or keep them in state hands.

1. A riot in 1990 at Strangeways prison, Manchester

“It was really a way to get more cells built quickly,” said Julian Le Vay, a former finance director of the Prison Service, who has written a book on prison privatisation. “The public sector was hopeless so they gave private companies a chance.” Today, 15 per cent of Britain’s 86,000 prisoners are in private institutions under contracts with an aggregate value of £4bn. New buildings, properly designed and with better sightlines, have safer conditions and lower staffing levels, offering the chance for efficiency gains and savings. Privatisation led to lower prisoner costs, with private contractors charging about 11-15 per cent less than their public

⁹² T Gash and T Roos. *Choice and Competition in public services: learning from history*. (London: Institute for Government, 2012).

⁹³ Home Affairs Committee, *Contract Provision of Prisons*. London: House of Commons, (1987).

⁹⁴ D Pozen, ‘*Managing a Correctional Marketplace: Prisons Privatisation in the United States and the United Kingdom*’, (2003).

⁹⁵ Ministry of Justice, Government of United Kingdom, HM Prison Service, Contracted out Prison. Available at <https://www.justice.gov.uk/about/hmps/contracted-out>.

sector benchmarks, according to a late 1990s study of four privately contracted jails.⁹⁶ With new jails came a new cadre of officer. This was not a smooth process, and many jails saw high staff turnover. But the new staff were not imprinted with the harsh conditions then endemic in Britain's cramped, largely Victorian prison estate, and this led to a new distinct and perhaps more positive culture. The new prisons had their own atmosphere, and one where officers had a more respectful attitude towards the prisoners. Inmates responded to a regime that gave them longer hours outside their cells and better living conditions.⁹⁷

In 2011, the Ministry of Justice endorsed the benefits of private sector prisons in driving positive change across the public estate, noting that "competition in offender services has been shown to be effective at encouraging the management and workforces of existing and future providers to improve services and deliver more innovative models of service delivery". It announced plans to press ahead with rolling out competition to the rest of the prison system.⁹⁸

But since then, a series of events has dented the momentum.

In 2013, G4S and Serco were caught overbilling the government on electronic tagging contracts, not least for offenders who were already dead. This self-inflicted wound seemed to confirm fears about private corporations abusing their position. It damaged public trust and forced the government in effect to blackball them from new contracts for a period. In turn, that exposed the lack of competition in the market. Meanwhile, austerity has seen budgets cut, construction slow down, and a return to overcrowding and riots. The pressures were exacerbated by a sharp fall in staff numbers. During the past five years, these have fallen by more than a quarter across the whole estate, though less in the private sector than in public jails.⁹⁹

As a result, prisoners are being kept in their cells for up to 23 hours a day, a recipe for boredom, frustration and violent conduct. While the problems affect the whole estate, there has been a focus of attention on the private sector. A large jail managed by the French outsourcing group Sodexo is now determined as a chaotic institution, with failing alarms, prisoners bossing the warders around, and a serious drug problem stalking the wings. Neglect the whole process, and the private sector will simply lose heart and move on. Serious order problems have fallen no

⁹⁶ NAO, *The Operational Performance of PFI Prisons*, London, National Audit Office, (2003).

⁹⁷ Home Office, *Review of Comparative Costs and Performance of Privately and Publicly Operated Prisons, 1998-1999, (2000)*, London, Home Office).

⁹⁸ Public Service, 'G4S to Take Over Birmingham prison', (1 April 2011). Available at: http://www.publicservice.co.uk/news_story.asp?id=15946.

⁹⁹ B. Crewe and A Liebling, (2012), 'Inside Views on Private Sector Competition' in Cardwell, V. (ed) *Delivering Justice: The Role of the Public, Private and Voluntary Sectors in Prisons and Probation*, (London, Criminal Justice Alliance).

less heavily on public sector prisons, and the private side does often measure up favourably. But like Serco, many of the things that once distinguished private prisons from public ones have become harder to detect. Costs of construction and operation have fallen to levels where the private sector offers little perceivable advantage.¹⁰⁰ Qualitative judgments are hard to formulate. But since 2009, regular MoJ ratings have shown that private and public prisons deliver broadly comparable results on a range of measures,¹⁰¹

V. IMPACT OF PRIVATISATION OF PRISON: MONEY-MAKING OR PRISON REFORM?

Fundamentally, private prisons have no incentive to release prisoners. Instead, they have financial incentives to keep prisoners for as long as they can. Furthermore, private for-profit prisons have a perverse financial incentive to encourage recidivism rather than to facilitate successful inmate re-entry into society.

There are millions of incarcerated adults presently housed in Indian, U.S. and U.K. correctional facilities. To the surprise of many, roughly huge number of those inmates live in privately owned prisons; ones that the government pays private contractors to run. These prisons can also provide new opportunities and can be cost-effective. What many have not recognized is that these private prisons could be incredibly beneficial to our criminal justice system. The argument against private prisons is persuasive from a moral perspective. Arguably, no one should profit from the incarceration of another person. But there is truly no way to avoid “profiting” from incarceration. Even in public facilities, private contractors inevitably are used. How else would you have food for the inmates, or electricity and television, or a general contractor to build and maintain the facility? Why is the actual management of the facility being private any different from other profit-motivated enterprises?¹⁰²

The majority of state governments have created a justice system that promotes incarceration to drive profit. Our society has made it very profitable for huge corporations to incarcerate people, and the burden of this unholy dynamic falls most disproportionately on the poor and people of colour. Prisoners are calculated as growth commodities on corporate balance sheets. Shareholders are fiscally rewarded when private prison populations increase. These corporations thrive on recidivism.¹⁰³ This practice, sponsored by government, is inherently-

¹⁰⁰ Jonathan Ford and Gill Plimmer, “Momentum stalls on UK’s private prisons” (Financial Times. London, February 12, 2018). Available at <https://www.ft.com/content/3c356914-0d9c-11e8-839d-41ca06376bf2>

¹⁰¹ *Ibid.*

¹⁰² Jordan Ryan, *The benefits of private prisons*, The Observer, Thursday, October 13, 2016. Available at <https://ndsmcobserver.com/2016/10/benefits-private-prisons/>.

¹⁰³ *THE PROBLEM WITH PRIVATE PRISONS*, Abolish Private Prisons. Available at https://www.abolishprivateprisons.org/the_problem.

flawed and filled with economic conflicts of interest that violate "life and liberty" guarantees in the Constitution of India, United Kingdom and United States. Incarceration-for-profit is the new slavery. It is time to abolish this practice throughout the United States. The following reasons can suffice the fact that Privatisation of Prisons is nothing more than a Profit-Making Business Strategy where the focus is corporatisation and not reforming the Prisons. The reasons that highlight the problem with private prisons are:

1. Private prisons can choose which prisoners they take.

Public prisons are often more expensive because they are forced to take on all prisoners, including those with high security risks. For-profit prisoners have the luxury of choosing prisoners that maximize their profits instead. If a low-risk prisoner becomes a high-risk prisoner under the supervision of a private prison, most companies have it in their contract that they can "replace" the prisoner. That is how they can run at cheaper costs compared to public prison populations.

2. They have no obligation to the community where the prison is located.

For-profit prisons operate on contracts. Most communities are responsible for the actual facilities that are being used, not the private prison. That means the for-profit company may not even be responsible for repairs or upgrades that are need. It also means that the prison can decide to leave if they feel like the prison isn't profitable enough. Should that happen, a community is stuck with a useless facility, no jobs, and plenty of unpaid bills.

3. Employees face higher risks of violent conduct in private prisons.

Compared to public prisons, private prisons experience 50% more violence against employees from inmates. The rates of violence against other inmates is even higher. Many privatized prisons have staffing waivers which allow them to under-staff their facility compared to public prisons. Some facilities operate on a ratio of 1 officer for every 120 prisoners. They often rely on inmates to self-govern and reduce violence levels on their own – as another way to save money.¹⁰⁴

4. It creates a unique lobbying effort.

Since for-profit companies need prisoners to make money off of their prison, they lobby legislative bodies to change how laws are implemented. They ask for longer standard sentencing guidelines. Some may even lobby local law enforcement and prosecutors to charge

¹⁰⁴ C. Hartney C, U.S. rates of incarceration: A global perspective. Oakland, CA: National council on crime and delinquency, (2006).

people with higher-level crimes on the chance that they'll receive a longer sentence that can be served within their prison.

5. Employees make less when working at a private prison.

In the United States, the average correctional officer in a public prison will earn about \$36 per hour. They are still eligible for overtime with that wage in many instances and are treated as a public service worker. That means they are often available for pensions, good leave benefits, decent healthcare, and other public-sector benefits. Private prison employees average \$14 per hour and may not receive any other benefits. It may also be salaried to avoid the need to pay overtime.¹⁰⁵

6. For-profit prisons may not offer any cost-savings advantages.

Although the primary advantage that is touted in the privatization of prisons is lower per-prisoner costs, that is not necessarily always factual. According to *The New York Times*, the inmates in private prisons may cost up to \$1,600 more per person, per year, compared to prisons that are operated by the state. This discrepancy is in place even though there is a law that requires for-profit prisons to focus on cost-saving measures.

7. Private prisons tend to limit training opportunities.

According to *Time*, for-profit prisons tend to achieve their cost-savings by cutting down on staff costs. That often means limiting the training opportunities that are available to correctional officers and administrative staff. Fewer training hours may be provided, which is then combined with higher staffing ratios, leading to higher levels of stress. It creates a much higher risk for everyone while providing a very small fiscal benefit.

8. It could create a system of dependency.

When governments are reliant on private companies to provide needed services, the potential for a destructive dependency becomes possible. For-profit companies could use that dependency as leverage to negotiate higher compensation rates. A common method of negotiation is to offer services at lower costs, create a monopoly around those services, and then jack up prices to maximize profits. This is a very real possibility if the privatization of prisons continues to be explored.

9. It lessens the levels of transparency within the system.

¹⁰⁵ U.S. Department of Justice, Federal Bureau of Prisons, "About the Federal Bureau of Prison" (2012), available at www.bop.gov/news/publications.jsp

There are certain expectations in place that the government and public-sector must follow when it comes to transparency. That means the government becomes accountable for their actions to the people whom they serve. For-profit companies are not held to the same standard. The privatization of prisons could create a system where inmates are not treated ethically, but no one would ever realize what was going on because the company running the facility would not be required to report anything.

10. It creates the potential for bribery and corruption.

In 2008, a “Kids for Cash” corruption scandal was discovered in Wilkes-Barre, Pennsylvania. Judge Mark Ciavarella and Senior Judge Michael Conahan accepted money from Robert Mericle, who had built two for-profit youth centers that served as a juvenile detention facility. In one example, a child was sentenced to a substantial amount of time in Mericle’s facilities simply for mocking a principal on MySpace. More than \$2.6 million changed hands. Several hundred adjudications were overturned upon a review of the various cases.¹⁰⁶

The corporations running private prisons inevitably claim that they are saving the government money, but their true focus is on protecting their own bottom lines. In order to lower operating costs, these facilities cut corners, hiring fewer employees and paying and training them less. Private prison employees earn an average of over \$5,000 less than their government-employed counterparts and receive 58 fewer hours of training.¹⁰⁷ This leads to higher employee turnover and decreased security in the prisons.

A 2016 report from the Justice Department found that private prisons had a 28 percent higher rate of inmate-on-inmate assaults and more than twice as many inmate-on-staff assaults, as well as twice as many illicit weapons than comparable federal facilities. The report also found that the Bureau of Prison’s monitors tasked with making sure private prisons comply with federal policy regularly failed to ensure inmates were receiving medical care. One prison went without a full-time doctor for months, a fact that the prison’s monitor failed to report.¹⁰⁸ The lack of adequate security and healthcare unnecessarily endangers the lives of inmates, who are not in a position to do anything about it because they are in prison.

Despite all these cost-cutting measures, it’s unclear whether private prisons actually save the government any money. The research also showed that private prisons can push down their

¹⁰⁶ IAN URBINA, *Despite Red Flags About Judges, a Kickback Scheme Flourished*, The New York Times, March 27, 2009. Available at https://www.nytimes.com/2009/03/28/us/28judges.html?_r=1.

¹⁰⁷ Cody Mason, *Too Good to be True Private Prisons in America, The Sentencing Project*, January 2012.

¹⁰⁸ *Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons, Office of the Inspector General U. S. Department of Justice*. Available at <https://oig.justice.gov/reports/2016/e1606.pdf>.

costs by refusing to accept prisoners with severe illnesses or a history of violence. This helps the facility spend less on medical care and security, while these high-cost inmates are forced into state prisons and paid for by taxpayers. The existence and expansion of private prisons are by no means the only things wrong with our criminal justice system, a system marked by racism, corruption, and inhumane treatment. Yet there is something particularly alarming about the idea of a company working to put more people in prison for the express purpose of profiting off them.¹⁰⁹

VI. CONCLUSION, RECOMMENDATIONS AND SUGGESTIONS

The organizational structure of the department of prisons is inadequate and ineffective. The administration of prisons in the country is still governed by the antiquated Prisons Act 1894. The provisions of the Act do not meet the needs of contemporary correctional thinking. There is a lack of coordination among police, prosecution, judiciary, prison and probation. Any attempt by voluntary agencies to extend their services for the welfare of prisoners is looked upon with suspicion by prison personnel. To be an efficient unit for protection and correctional treatment, a prison must essentially be a scientifically manageable unit. Training of prison personnel has been neglected in India. This is essential not only for ensuring efficiency, financial discipline and control but also for minimizing corruption in the department.

The excess number of prisoners led to the overcrowding of prisons and if once the number of prisoners exceeded the authorized limit the problems relating to management of prisons arise. The major problems of prisoners are like, lack of hygiene or inhuman conditions in the jails, inadequate medicinal facilities, security in prisons, deaths in jails, lack of professionalism, character of prison staff, atrocities on prison inmates, and politics in premature release. The above-mentioned plights repeatedly approached the judiciary for the remedy by using the writ jurisdiction provided under the Indian Constitution. Now, the Prisoner's rights have become an important item in the agenda for prison reforms.

There are some studies that focus on the comparative aspects of public and private governance. Despite the claims of correctional creaming i.e., private prisons, allegedly house relatively healthy and easy-going inmates, the existing studies are almost unanimous in concluding the superiority of private governance in terms of cost-reduction. Private prisons present better performance in terms of cost reduction when compared to the publicly operated unit. On the other hand, public prisons seemed more efficient in preventing escapes and providing a broader

¹⁰⁹ BANKING ON BONDAGE: Private Prisons and Mass Incarceration, AMERICAN CIVIL LIBERTIES UNION, November 2, 2011.

range of treatment, recreation, social services and other services to inmates. Private Prison facilities led to cost reduction and a statistically significant increase in recidivism. Thus, the short-run savings offered by for-profit over non-profit management are negated in the long run due to increased recidivism rates.

Broadly, there are two solid objections to privatising prisons: that it amounts to divesting the state of its core functions, and the high possibility of regulatory capture. Ensuring humane prison conditions that are in line with international and regional standards for the treatment of prisoners is key to the establishment of fair and effective criminal justice systems. The bugbear of privatisation in India – and pretty much everywhere else in the world – has been regulatory capture. It is the process by which the regulator, which is supposed to regulate entities in public interest, ends up working for the regulated entities and against public interest.

When the prisons are privatised, the main “consumer” (the relevant government) is also the regulator. The socio-economic profile of prisoners and the fact that they’ll be under the total control of the contractor as prisoner means that they will not have any meaningful say in how prisons are run. Indian prisons are overcrowded and filled with under-trials from poor and discriminated sections of society. They are where those who can’t afford bail or navigate the legal system go to be forgotten by everyone else. They were part of the colonial architecture that India’s ruling elite never got around to dismantling on the quest to build a more just and equitable society. It’s a shame that far from talking of ways to change our prisons to make them reformatory institutions, the idea seems to be to stop caring and make more money off it. All of this suggests that the situation is ripe to have prisons purely for the profit of their owners and in active detriment to public interest.

It is recommended that when prisons are privatised and the main “consumer” (the relevant government) is the regulator, in such cases, without any biasness on the basis of the socio-economic profile of prisoners and the fact that they are under the total control of the contractor as prisoners should not hamper their right to have any meaningful say in how prisons are run. Access to effective complaints systems, as well as independent external inspection and monitoring mechanisms, should be the indispensable safeguards to ensure that the rights of prisoners are upheld in practice.

It is suggested that Protective and correctional objective of prisons should be achieved on by creating an atmosphere of wholesome opportunity surcharging with a positive value in these institutions and prisons are exposed to such an atmosphere. In order to bring the reforms the problems and plights of prisoners needs to be addressed in a most comprehensive way. The

structural defects and the operational drawbacks should be eliminated and the system should be thoroughly reformed. The motive should be reformation of Prison and the Prisoners and not merely Profit-making.

It is also suggested that a proper surveillance mechanism should be developed to keep an eye on the issue of any improper treatment of prisoners, violation of their fundamental rights and bribery & corruption in the Public-Private Partnership Model that has been implemented.

VII. SUMMARY OF THE RESEARCH

The prison sentence is the sanction: it holds an individual accountable for their actions and protects society. It deprives someone of their liberty and impacts on certain other rights, such as freedom of movement, which are the inevitable consequences of imprisonment, but people in prison retain their human rights and fundamental freedoms. Prison conditions should not be an additional punishment. However, in reality prisons often do not meet even the most basic of standards, and many prison staff consider harsh treatment to be a legitimate way to deal with inmates. Ensuring humane prison conditions that are in line with international and regional standards for the treatment of prisoners is key to the establishment of fair and effective criminal justice systems. Access to effective complaints systems, as well as independent external inspection and monitoring mechanisms, are indispensable safeguards to ensure that the rights of prisoners are upheld in practice.

There are some studies that focus on the comparative aspects of public and private governance. Despite the claims of correctional creaming i.e., private prisons, allegedly house relatively health and easy-going inmates, the existing studies are almost unanimous in concluding the superiority of private governance in terms of cost-reduction. Private prisons present better performance in terms of cost reduction when compared to the publicly operated unit. On the other hand, public prisons seemed more efficient in preventing escapes and providing a broader range of treatment, recreation, social services and other services to inmates. Private Prison facilities led to cost reduction and a statistically significant increase in recidivism. Thus, the short-run savings offered by for-profit over non-profit management are negated in the long run due to increased recidivism rates.

Public private partnerships (PPPs) are "contractual arrangements between public sector organizations and private sector investors for joint, symbiotic and collaborative provision and financing of public projects and services. The public sector often faces challenges in the sphere of finance, technical knowledge, institutional limitations in availing infrastructure projects, which begets the need of Public private partnerships. There is widespread proof of the emerging

utilization of PPPs in the public sector services to meet the needs of the modern economy. These reflections have led to criminal justice, academics and policymakers discuss the advantages and disadvantages of applying this model in prison management, correctional administration and criminal justice governance as a whole. It is the various Committees formed by the Government of India, post-independence, which laid down the foundation of the Indian prison system. The Public-Private Partnership Model entered the Indian Prison industry through the most famous prison in India, the Tihar Jail as early as the 90s. The maintenance of peace and tranquillity in the society may be an inhibiting factor in the adoption of the prison privatization model, especially, in a highly populous country like India.

Prior to the 1980s, private prisons didn't exist in the United States. But thanks to the Reagan administration's War on Drugs, which led to harsher sentencing policies and higher rates of incarceration, the inmate population skyrocketed beyond the capacity of the nation's existing prisons, a fact that corporations were quick to take advantage of. In United Kingdom, concerns about a rapidly increasing incarcerated population and associated problems of rising costs, overcrowding and deteriorating conditions led to demands for expanded prison capacity and regime improvement. In 1984, the Adam Smith Institute championed privatisation as the most cost-effective solution to the crisis based on the contested assumption that the management experience, results driven culture and efficiency of private contractors would enable them to deliver prison services of a higher quality at a lower cost.

However, it cannot be denied that the corporations running private prisons inevitably claim that they are saving the government money, but their true focus is on protecting their own bottom lines. In order to lower operating costs, these facilities cut corners, hiring fewer employees and paying and training them less. Fundamentally, private prisons have no incentive to release prisoners. Instead, they have financial incentives to keep prisoners for as long as they can. Furthermore, private for-profit prisons have a perverse financial incentive to encourage recidivism rather than to facilitate successful inmate re-entry into society. The existence and expansion of private prisons are by no means the only things wrong with our criminal justice system, a system marked by racism, corruption, and inhumane treatment. Yet there is something particularly alarming about the idea of a company working to put more people in prison for the express purpose of profiting off them.

In view of these problems in the Prison System whether it be Public or Private, and the drawbacks in its operation, it may be summarised that, at present the prison system is not effective and efficient in its functioning in India, U.S.A. & U.K. Therefore, unless the structural defects and the operational drawbacks are eliminated and the system is thoroughly reformed, it is likely

that the system would remain ineffective. The motive should be reformation of Prison and Prisoners and not merely Profit-making.

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