

Women in Detention

Legal Framework, Study of Risks and Situation on Ground¹

I. Introduction

In late 2015, a debate sparked off in the Parliament of the United Kingdom. The Members exclaimed how detention was worse than prison. In prisons the inmate is aware of her time of custody, however under detention she is unaware of the number of days she has been deprived of her liberty. Additionally, the lack of legal representation and access to justice leaves only a few detainees in a position to challenge their detention whilst detained.²

The global community has been vocal about the rights of inmates across the globe. Senior Advocate Pushpa Hingorani moved Supreme Court of India with the first ever Public Interest Litigation. She intended to expose plight of under-trial prisoners cast away and forgotten about in jails in Bihar.³ Prison systems and the treatment of inmates has been a widely pondered agenda. The step forward is to bring gender-sensitivity.

Women have needs and problems arisen by the virtue of their gender. They are subject to sexual abuse, have specific health needs, different psychology. Their ill-treatment needs to be looked from a separate lens. It is twenty first century and yet, women, after numerous women empowerment revolutions, remain a vulnerable group in the society. Women's living conditions inside the prison is one such area which remains under-researched and needs more deliberation in order to spread awareness. This paper endeavors to discuss risks involved with respect to safeguards in detention of women. Women require special measures to be protected

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² Miriam Steiner, "Detention Debate: It's Time for a Time Limit", Huffington Post, (Nov. 11 2016), http://www.huffingtonpost.co.uk/miriam-steiner/detention_b_8121534.html.

³ Hussainara Khatoun v. Home Secretary, (1979 SCR (3) 532).

from ill-treatment ranging from torture to sexual assault. The paper further furnishes the legal framework; international and Indian.

To give a grass-root scenario of the situation, case studies from various countries have been given in the pages that follow. Every agenda has various perspectives and to reach a lasting solution, all the shoes need to be tried on; the paper ends with a dialogue from a variety of perspectives. To effectively punish and rehabilitate female inmates, it is imperative to take into account their society and the subculture within which they are locked.⁴



⁴ Ashlie E. Case, *Conflicting Feminisms and the Rights of Women Prisoners*, 17 Issue 1 Yale J.L.F. 312 (2005).

II. Background

A. The Problem

The study will talk about various international model laws and guidelines adopted to protect, maintain and develop favorable conditions for women detainees. Yet, you would come across cases illustrating the need to spread awareness for women rights in detention.

The problem has multifold causes; the authorities fail in effective execution, the prison staff lacks gender-sensitive training, the judiciary is not independent and powerful to keep a check on the executors. Moreover, absence of a strong and vigilant check by the State Government on the detaining authorities and lack of terror among the executing authorities like police officers encourage the prevalence of the practice.

Women in detention have specific needs and are subject to problems which differ from men detained.

In 2017, Australia was ridiculed with allegations of human rights abuses and sexual assault. Citizens circulated a petition urging Australia to ratify United Nation's⁵ protocol against torture, so UN could inspect immigration detention centers.

B. Arrest and Detention

“Arrest” is inferred as the act of apprehending a person for the alleged commission of a crime.⁶ “Detention” refers to the deprivation of liberty or confinement in a closed place which the person is not permitted to leave at will.⁷

Ex concessis, the terms arrest and detention differ in their meanings. To arrest means to capture or to stop a person accused of commission of a crime. To detain refers to put restrictions on the liberty of a person whether accused or not.

⁵ Hereinafter “UN”.

⁶ Model Code of Criminal Procedure, Art. 1(4); “Use of Terms” [a], Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

⁷ Detention Guidelines, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, United Nations High Commissioner for the Refugees.

III. Specific Risks involved with respect to Women Safeguards

The term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.⁸

A. Torture

Article 5 of the Universal Declaration of Human Rights,⁹ article 7 of the International Covenant on Civil and Political Rights¹⁰ are laws against torture. Torture has been given a universally acceptable definition in the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹¹ The degree and the facts of each case determine whether the act of ill-treatment was torture or cruel, inhuman, or degrading. Reforms towards a comprehensive law suggest the addition of 'powerlessness' within the definition. It is specifically applicable to the case of detention as one is in a position to exercise undue force on the other, rendering the other powerless.¹² Further, this should be studied in the light of human rights, developed especially to combat violence against women. Furthermore, rape law has been reformed by widening its definition and introducing gender-sensitive rules of evidence and procedure.¹³

Human Rights Watch reports speak of Iraqi authorities detaining thousands of Iraqi women illegally and subjecting many to torture and ill-treatment. The women who spoke to the organization disclosed the horrors of being beaten, hung upside-down, given electric shocks and raped during interrogation.¹⁴

The shortcomings being, *firstly*, the release orders of the courts are not executed. *Secondly*, Iraq has a weak judiciary; plagued with corruption, coerced confessions and trials which fail to match the international standards.

⁸ General Assembly (Hereinafter "GA") Resolution 48/104, art. 1 (1993).

⁹ Hereinafter "UDHR"; GA Resolution 217 A (III).

¹⁰ GA Resolution 2200 A (XXI).

¹¹ Art. 1.

¹² Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Novak, UN Doc. A/HRC/7/3, Jan. 15 2008, ¶ 28.

¹³ *Ibid.* ¶ 7.

¹⁴ "Iraq: Security Forces Abusing Women in Detention", Human Rights Watch, (Feb. 6, 2014), <https://www.hrw.org/news/2014/02/06/iraq-security-forces-abusing-women-detention>.

B. Health care

1. Physical

Health care becomes important because many women come from impoverished backgrounds. Factors such as gender discrimination, or lack of funds might have handicapped them to resort to medical assistance. Medical care should be provided by female personnel whenever possible.

Recently, The West County Detention Facility in San Francisco has been criticized as the US female migrant detainees are either asked to hold their urine or to use the Bio-Hazard Bag.¹⁵ The lack of sanitation facilities do not only deny basic living conditions but also create an environment which breeds diseases.

2. Mental

Women may experience psychological and physical difficulties related to menopause. The medical workers and prison staff should be sensitized towards such issues and should be supportive of women prisoners.¹⁶ Research shows women have much higher levels of mental healthcare needs than men on entry to prison, often as a result of domestic violence, physical and sexual abuse. Women are more vulnerable in relation to men to social prejudice or boycott after being labeled as a convict. Their mental health is likely to deteriorate in overcrowded prisons, where appropriate classification and placement systems are not implemented, and where prisoner programs are either non-existent or inadequate to address the specific needs of women.¹⁷ Studies of prisoner suicides have indicated that long-term sentences, single cell use, mental disabilities, and a history of suicidal tendencies are all associated with a higher suicide risk.¹⁸

Another dimension is added by drug and alcohol use. Substance abuse acts as a veil for mental health difficulties. Therefore, there needs to be co-ordination between addiction and mental health services. In order to overcome this obstacle, programs must address a twin objective;

¹⁵ “US Female Migrant Detainees ‘Given Bags to Use as Toilets’”, (Nov. 29 2017), <http://www.bbc.com/news/world-us-canada-42169969>.

¹⁶ Tomris Atabay, Handbook for Prison Managers and Policymakers on Women and Imprisonment, UN Office on Drugs and Crime, ¶53, (2008).

¹⁷ Ibid. ¶ 90.

¹⁸ Ibid. ¶ 55.

addiction needs of women, their mental health and general support needs. This necessitates a multidisciplinary approach with good communication between the professionals involved.¹⁹

The effects of incarceration of mothers can be catastrophic on the children and costly to the state in terms of providing for their care. Children should not be permitted to stay in jails for their healthy development.²⁰ Mothers are often distressed about what their dependent children have to undergo in their absence. Minor and dependent children suffer hardships in families where there is no responsible adult person to take care of children when the father is out in the day for work.²¹ They are likely to experience greater disruption to caregiving arrangements, with grandparents and other family members playing a greater role in their care.²²

3. Reproductive

Women have specific health and hygiene needs related to reproductive health, which further vary according to their age. These include sanitary and washing facilities, safe disposal arrangements for blood-stained articles, and provision of hygiene items, such as sanitary towels.²³

In 2017, The UN had to evacuate refugees in Libya to Italy owing to inhumane living conditions. UNHCR's Special Envoy for the Central Mediterranean reported that five women gave birth in detention while in Libya with limited medical assistance.²⁴

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment states that the failure to provide such basic necessities can amount to degrading treatment.²⁵

¹⁹ Mental Health of Women detained by the Criminal Courts Report, Mental Welfare Commission of Scotland, (2013).

²⁰ Children of Women Prisoners in Jails: A Study in Uttar Pradesh Sponsored by: Planning Commission

²¹ A study under taken by Prof. B.N. Chattoraj of National Institute of Criminology & Forensic science, Delhi, (2000).

²² ANN CUNNINGHAM, "*Forgotten families – the impacts of imprisonment*", Australian Institute of Family Studies Family Matters No.59 Winter 2001, https://aifs.gov.au/sites/default/files/ac_0.pdf.

²³ *Supra* note 15, ¶57.

²⁴ Roberto Mignucci, Steve Scherer, "*U.N. evacuates refugees to Italy from Libya for first time*", (Dec. 23 2017), <https://www.reuters.com/article/us-europe-migrants-italy-libya/u-n-evacuates-refugees-to-italy-from-libya-for-first-time-idUSKBN1EG23T>.

²⁵ European Committee for the Prevention of Torture, 10th General Report on the CPT's activities covering the period Jan. 1 to Dec. 31 1999s, ¶ 31, (2000).

C. Substance abuse

A high proportion of women prisoners are dependent upon drug or alcohol and require treatment for detoxification. Such a treatment may consist inter alia of the establishment of therapeutic communities in prisons, with a comprehensive package of treatment including medication, counseling, and continuation of care following release.²⁶

In 1998, 50% women in state prisons in the United States identified themselves as a daily user of drugs. About 30% admitted to have committed the offence to obtain money to support their addiction.²⁷

This problem needs to be taken care of as a priority because drug abuse increases the likelihood of re-offending. The criminals may resort to more drug use or try to procure finance to support their addiction through theft or illegal sex work.²⁸ However, a balance has to be found between humane treatments and ensuring prisons free from illicit drugs.²⁹

66% female prisoners were reported to be drug dependent or to use alcohol to dangerous excess in United Kingdom.³⁰ Research indicates women prisoners are more likely to be addicted to harder drugs than male prisoners.³¹

D. Sexual Abuse

The degree of abuse ranges from humiliation to sexual assault. The former includes verbal abuse, improper touching during pat-down searches, frequent and unnecessary frisking, and spying on prisoners during showers and in living areas. For women, there are no clear-cut boundaries between physical, psychological, sexual and social violence. Any violence perpetrated on women, by definition vulnerable in detention, always carries the threat of sexual aggression.³²

A complaint filed by Community Initiatives for Visiting Immigrants in Confinement reported that 97% of Sexual Abuse Reports in Detention Centers aren't investigated. In the Williamson

²⁶ Ibid. p. 54.

²⁷ Handbook on Women and Imprisonment 2nd edition, with reference to the UN Office on Drugs and Crime, (2014); Bureau of Justice Statistics, Special Report "Women Offenders", p. 9, (Dec. 1999).

²⁸ *Supra* note 15, p. 13.

²⁹ World Health Organization Regional Office Europe, Women's Health in Prison: Correcting Gender Inequity in Prison Health, Copenhagen, ¶ 44, (2009).

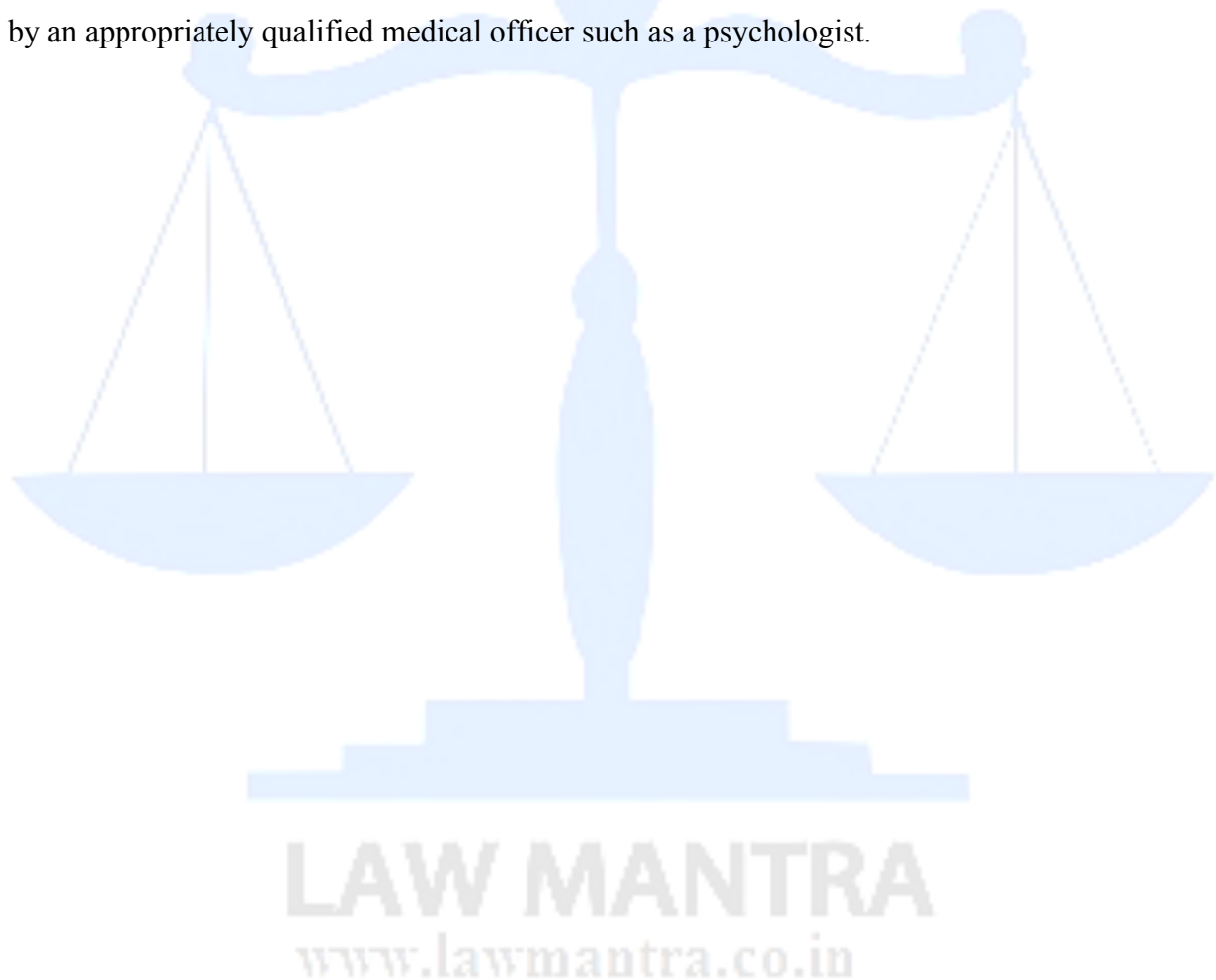
³⁰ The Howard League for Penal Reform, Press Release, (June 20 2006).

³¹ Women in Prison, A Review of the Conditions in Member States of the Council of Europe, op. cit., p. 12, citing "Healthcare Needs of Women in Prison": The Gap between Policy and Implementation".

³² Charlotte Lindsey, Women Facing War, International Committee of the Red Cross, p. 171, (2001).

County federal immigration detention center, in the United States, two women accused guards of sexual harassment. The women alleged the female guards of repeatedly enquiring them of their sexuality and staring at them inappropriately.³³

Lack of transparency in detention arrangements increases the risk of ill-treatment. Sexual assault of women in detention can be the result of indifference and failure to take sufficient preventive measures.³⁴ Sexual assault increases the risk of unwanted pregnancy, HIV, and other sexually transmissible diseases. Abortions are difficult to secure in most areas.³⁵ Women subjected to sexual violence should be offered assessment, professional advice, and counseling by an appropriately qualified medical officer such as a psychologist.



³³ Jenifer Calle, “*Two More Women Come Forward About Sexual Harassment in Detention Center*”, (Dec. 2017), <http://www.latina.com/lifestyle/news/two-more-women-come-forward-about-sexual-harassment-detention-center>.

³⁴ Joan Fitzpatrick, ‘*The use of international human rights norms to combat violence against women*’, in Rebecca J. Cook (ed.), *Human Rights of Women: National and International Perspectives*, University of Pennsylvania Press, Philadelphia, p. 544, (1994).

³⁵ State Standards for Pregnancy-Related health Care and Abortion for Women in Prison, American Civil Liberties Union, <http://www.aclu.org/statestandards-pregnancy-related-health-care-and-abortion-women-prison-map>.

IV. Case Study

A. *Hereditary Dictatorship*

North Korea

Women from the country have been reported to have fell prey to human trafficking. They have been subject to forced labor, marriage and sex trafficking. They are sold to Chinese men who impregnate them. As a result, these women give birth to children with no citizenship. Such victims are caught by the Chinese police and repatriated to their homeland where they face forced abortion. The same is done as Chinese authorities regard the women as economic migrants and not political asylum-seekers.

In the review of the records of Pyongyang, the capital, CEDAW highlighted the issue of rape or mistreatment of women in detention centering those repatriated after fleeing abroad.

Human Rights Watch conducted an interview with eight women who have been victim of sexual abuse while in detention. Their abusers, as confessed, include police interrogators from the People's Security Agency, State Security Department agents, and prison guards in detention facilities.

In 2017, during its 68th plenary session, the UN committee met with North Korean government officials and examined their reports. The committee exclaimed that, *firstly*, Women were subject to torture and abuse in detention. Their children were reported to be forcibly deported from North Korea. *Secondly*, repatriated women were reportedly subjected to harsh treatment and forced abortion, those sentenced to labor were often denied access to a lawyer or a judge.

B. Parliamentary Democratic Republic

Austria

The CEDAW Committee conceded with the view of the State party in Sahide Goekce v. Austria³⁶ and Fatma Yildirim v. Austria³⁷ that it is necessary to determine whether detention would amount to a disproportionate interference in the exercise of the rights of a perpetrator of domestic violence, like the right to freedom of movement and to a fair trial. But the Committee maintained that in cases of violence against women, particularly where the danger is high, the State must act.

³⁶ CEDAW/C/39/D/5/2005, Aug. 6 2007.

³⁷ CEDAW/C/39/D/6/2005*, Oct. 1 2007.

The Government of Austria was held accountable even when the perpetrators were prosecuted to for killing the victims. Conviction may thwart further violations but will not be sufficient to cure violations that occurred. The Committee established the accountability of the State party on its inability to address domestic violence in order to prevent³⁸ the fatal acts committed.

C. Presidential Republic

Belarus

In *Inga Abramova v. Belarus, Communication*,³⁹ a woman Inga Abramova alleged, inter alia, to have been body searched by a male staff member who touched her inappropriately and threatened to strip her naked. She further contended her detention was in an underground cell in a solely men facility. Among such contentions was that other prisoners and male staff could watch her use the toilet.

The Committee found that Belarus had failed to meet its lawful obligations, as Inga had been subject to sexual harassment and discrimination, in violation of articles 2(a), (b), (e), (f), 3 and 5(a) of CEDAW, read in conjunction with article 1 and the Committee's General Recommendation No 19.

Recalling rule 53 of the Standard Minimum Rules,⁴⁰ the Committee reiterated:

1. In an institution common for both genders, the area set aside for women shall be under the authority of a woman officer who shall have the custody of the keys.
2. The entry of any male staff member shall be restricted unless he is accompanied by a woman officer.
3. Women inmates should be attended and supervised only by women officers.

The committee directed to provide reparations to Abramova and take the required gender specific safeguards for women detainees.

³⁸ CEDAW, art. 2(d).

³⁹ No. 23/2009, UN Doc. CEDAW/C/49/D/20/2008 (2011).

⁴⁰ Hereinafter "SMR".

V. Legal Framework

A. International Legal Framework

“No one shall be subjected to arbitrary arrest, detention or exile”⁴¹ finds itself at a platform idealized by all nations.

1. *International Covenant on Civil and Political Rights (ICCPR)*

Article 9 and 10 of ICCPR read together, and complemented with the definition of detention as discussed, infer that when the liberty of a person is curtailed by the state there is a sphere of power a State can work within. Detention is only justified if in accordance with a procedure established by law. A procedure established by law helps retain the rule of law and does not let the authorities act superior to or subvert the law. As a principle of natural justice, everyone shall have the right to be heard. Therefore, it is empirical that the detained is brought before a court of law within the time frame prescribed by the *lex loci*. Further, a fair chance of adjudication of the lawfulness of the detention shall be given. The dignity of a human shall be respected; no atrocities or torture is justified. A criminal centric approach has been put forward rather than a crime centric.

2. *Torture and other cruel, inhuman or degrading treatment or punishment (General Assembly Resolution)*

The resolution commends the work of the non-governmental organizations to combat torture and uplift its victims. The assembly adopted measures in support of the victims of torture. It drew attention of governments to the Principles of Effective Investigation and Documentation and underlined lack of gender perspective in their reports.

The resolution emphasized the obligation of State parties under article 10 of the Convention to ensure education and training for personnel involved in the custody, interrogation or treatment of any individual subjected to any form of detention. It further provided a gender specific approach recognizing the forms of torture specific to women and invited the Special Rapporteur to examine the questions of torture and other cruel, inhuman or degrading treatment directed against women and the environment that enables such torture. Furthermore, make appropriate recommendations accordingly.⁴²

⁴¹ UDHR, art. 9.

⁴² GA Resolution (A/RES/55/89), provision 16.

3. Istanbul Protocol

The Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is a compilation of relevant international legal standards; international humanitarian law, the UN legal obligations to prevent torture, UN bodies and mechanisms. It further reiterates relevant ethical codes; ethics of the legal profession, health-care ethics which subdivide into UN statements relevant to health professionals and statements from international professional bodies, national codes of medical ethics. The principles common to all codes of health-care ethics are the duty to provide compassionate care, informed consent and confidentiality.⁴³

4. Human Rights and Prisons: Pocketbook of International Human Rights Standards for Prison Officials

This Pocketbook is a component of a four-part publication Human Rights and Prisons. They provide directions for the conduct of human rights training programs for prison officials. The training approach has been developed by the Office of the UN High Commissioner for Human Rights. This component contains a comprehensive collection of standards relevant to prison officials' duties and functions.

Further, women are entitled to the equal enjoyment and protection of all human rights in the political, economic, social, cultural and civil fields.⁴⁴ Women shall not suffer discrimination and shall be protected from all forms of violence or exploitation.⁴⁵ They shall be detained separately from male prisoners.⁴⁶

5. Basic Principles for the Treatment of Prisoners

An impartial application of the principles adopted by the GA has been requested. The principles include inter alia provision for education, employment, respect to religious beliefs, retention of the human rights and fundamental freedoms set out in the UDHR and other State ratified UN covenants.⁴⁷ The approach has been made to enable the detainee or the prisoner to reform and rehabilitate in the society post release. It has been tried that the person concerned has the basic skills to earn for himself and his family and is not left as a burden on the society afterwards.

⁴³ Istanbul Protocol, (1999).

⁴⁴ UDHR, art. 2; ICCPR, art. 3; CEDAW, art. 1, 2 and 3; Declaration on the Elimination of Violence against Women, art. 3.

⁴⁵ CEDAW, art. 1, 6 and 7; Declaration on the Elimination of Violence against Women, art. 2 and 4.

⁴⁶ Principles on Detention or Imprisonment, principle 5; SMR for the Treatment of Prisoners, rule 8 (a).

⁴⁷ Basic Principles for the Treatment of Prisoners, GA resolution 45/111, (1990).

6. *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*

The standards and norms hold that all humans detained under any form of detention shall be treated in a humane manner and with respect to their dignity.⁴⁸ The powers of detention of the executing authorities have been limited by international covenants and the role of judicial authority has been laid down.

The standards promote equality and discourage any form of discrimination. However, it has been clarified that measures applied and designed solely to protect the rights and special status of women, including pregnant women and nursing mothers, shall not be deemed to be discriminatory.⁴⁹

7. *Standard Minimum Rules for the Treatment of Prisoners*

The rules of General Application have been written down under this document. The provision reads men and women shall be detained in separate institutions or premises.⁵⁰ Further, a woman officer shall have custody of the keys.⁵¹ Females shall be supervised and searched only by female officers and staff.⁵² Pregnant women and nursing mothers detained shall be provided with the special facilities they need.⁵³ Whenever practicable, be taken to outside hospitals to give birth.⁵⁴

8. *Committee on the Elimination of Discrimination against Women General Recommendation*

In 2015, CEDAW adopted a general recommendation on women's access to justice, observing that the same is essential to the realization of the rights recognized.

With respect to criminal law, the Committee made recommendations including that States protect women against secondary victimization by creating gender units in law enforcement departments, refrain from conditioning support to women on their assistance with human trafficking and organized crime cases, monitor places of detention with respect to female

⁴⁸ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, GA Resolution (43/173), (1988), principle 1.

⁴⁹ Ibid. principle 5(2).

⁵⁰ SMR, rule 8.

⁵¹ Ibid. rule 53(1).

⁵² SMR, rule 53.

⁵³ SMR, rule 23 (1).

⁵⁴ SMR, rule 23 (1).

prisoners, use preventative detention as a last resort and for the shortest time possible and avoid detention for petty offenses.

9. Vienna Declaration on Crime and Justice

It forwarded a cause centric approach; poverty caused by discrimination in education and employment, gender based violence and drug and alcohol addiction as the root causes for women criminals. Provision 12 recognizes the role and acknowledges the requirements of women as criminal justice practitioners, victims, prisoners and offenders. The same is essential as a male dominated arena had policies modeled around the male needs which need to be reformed now.

To overcome the harmful effects of over-crowding the aforesaid provision talks about introducing alternatives to incarceration.⁵⁵

10. United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules)

This document provides that pre-trial detention shall be used as the last resort in criminal proceedings. It promotes its alternate methods and states detention shall be administered humanely and with respect for the inherent dignity of human beings. The basic principles aim at favoring non-custodial measures.

11. United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules)

The measures reemphasize the alternatives to imprisonment in the Tokyo Rules with emphasis on consideration of gender specificities.⁵⁶

These 70 rules address women specific issues and include, inter alia, gender specific healthcare services; medical screening on entry, HIV and AIDS prevention, treatment, care and support, substance abuse treatment programs, suicide and self-harm, preventive healthcare services, responses to allegations of rape and other violence and torture, safety and security, searches.

⁵⁵ Vienna Declaration on Crime and Justice, provision 26.

⁵⁶ Bangkok Rules, ¶ 4.

Further, the specific needs of pregnant women, breastfeeding mothers, women with dependent children, juvenile female offenders have been recognized.⁵⁷



⁵⁷ Briefing on the UN rules for the treatment of women prisoners and non-custodial measures for women offenders, (2011), http://www.quno.org/sites/default/files/resources/ENGLISH_Briefing%20on%20Bangkok%20Rules.pdf.

B. Indian Legal Framework

1. Constitution of India

a. Article 21

This article has been of the supreme importance⁵⁸ to the living constitution. It has been expanded in scope through judicial precedents to incorporate the rights of citizens as the society progresses. It should not be denied to detainees except according to procedure established by law.⁵⁹

In *Joginder Kumar v. State of Uttar Pradesh*,⁶⁰ right against illegal detention was recognized. The Supreme Court laid down the guidelines governing arrest of a person during investigation owing to the illegal detention of a free citizen.

b. Article 22

The said article forwards protection against detention cases. Person arrested shall be informed the reason of arrest and shall have the right to be consulted by a legal practitioner of his choice. The person arrested and detained shall be produced before a magistrate within 24 hours, travel time excluded. Nonetheless, the abovementioned shall not extend to the cases of preventive detention.

*“The object of preventive detention is not to punish a man for having done something but to intercept him, before he does it, and to prevent him from doing it. No offence is proved, nor any charge formulated; and the justification for such detention is suspicion or reasonable probability and not criminal conviction, which can only be warranted by legal evidence.”*⁶¹

Such detention shall be authorized for up to 3 months. Further extension shall require the assent of an advisory board comprising of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court. The Parliament may prescribe the circumstances under which a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining such assent. The detainee shall be communicated the ground of the order and shall be afforded the opportunity of legal representation. The State however may refuse to divulge the grounds of detention for reasons of public interest.

⁵⁸ Justice P.N. Bhagwati.

⁵⁹ PANDEY, J.N., THE CONSTITUTIONAL LAW OF INDIA, p. 269, (47th Ed., Central Law Agency, Allahabad, 2010).

⁶⁰ 1994 SCC (4) 260.

⁶¹ *Union of India v. Paul Nanickan*.

For effective enforcement of fundamental rights under article 21 and 22, the Police Commission issued the following requirements. An arrested person being held in custody is entitled to have a friend or relative informed of her arrest and place of detention. She shall be informed of this right by a police officer. These requirements are not exhaustive.⁶²

Police detained a large number of persons following agitations against reservations in education institutions. Large scale molestation and rape of women at the hands of the forces took place. The act was denounced as “nothing short of terrorism”.⁶³

c. D.K. Basu Guidelines

In *D.K. Basu v. State of West Bengal*,⁶⁴ the Supreme Court laid down guidelines for all types of arrest and detention. The need arose following a writ petition seeking preventive measures against custodial death.

The court held that custodial violence, torture and death are derogatory to rule of law. It reiterated that prisoners and detenues are not denuded of their fundamental rights under article 21 and only such restriction as permitted by law could be imposed.⁶⁵

11 guidelines in addition to the constitutional and statutory safeguards to be followed in all cases of arrest and detention were issued.

2. *Criminal Law*

a. Criminal Procedure Code

The Code lays down specific grounds for detention keeping in mind the age and gender of the accused, to a certain extent. Section 98 lays down the power to compel restoration of unlawful detention of women.

A married woman who was not accused on pretext of her being victim of abduction and rape which never was to her knowledge was detained. She was tortured by threats of violence to her and to her husband and family. A direction was given to State to take immediate steps to launch prosecution against all police officers for illegal detention.⁶⁶

⁶² Third Report of the National Police Commission, ¶ 26- 29; Law Commission of India, Consultation Paper on Law Relating To Arrest, <http://lawcommissionofindia.nic.in/reports/177rpt2.pdf>.

⁶³ *Uttarakhand Sangharsh Samiti v. State of U.P.* (MANU/UP/1607/1996).

⁶⁴ (1997) 1 SCC 416.

⁶⁵ *Neelabati Bahera v. State of Orissa* (1993 SCR (2) 581).

⁶⁶ *Arvinder Singh Bagga v. State of U.P.* (1994 SCC (6) 565).

The extension of detention under section 167 has a caveat specific to females, in case of a woman less than eighteen years of age the detention shall be authorized to be in the custody of a remand home or recognized social institution. Thereby the safety and comfort of the detenu is secured.

b. Indian Penal Code

The Indian Penal code lists wrongful confinement as an offence under the section 340 i.e. complete restriction of the liberty of movement of an individual to a circumscribing limit without lawful justification. This corresponds with the definition of detention read above. The detention of the person wrongfully confined must be involuntary. Detention through the exercise of moral force, without the use of physical force, is adequate to constitute wrongful confinement.

In *Shamlal Jairam v. Emperor*⁶⁷ a head constable detained some persons as suspects for several days. He was held guilty under section 340.

⁶⁷ 4 Bom. LR 79.

VI. Other Aspects

A. Feminist Perspective

Women in detention are the most vulnerable and have the least resources for support to fight against oppression. The roots of gender injustice need to be fought against.

Echoing the words of Audre Lorde, *“There is no such thing as a single-issue struggle, because we do not live single-issue lives.”* Feminism expands further than just “equal rights for women”.

Multiple oppressions cannot be separated akin multiple parts of a single person’s identity cannot be separated. To fight patriarchy from the grassroots, sexism that creates a hierarchy of the value of human life must be fought against.

1. Sexual Violence

Sexual violence has been at the forefront of feminist activism. Reporting rape is the best way to prevent rape. However, victim-blaming, lack of support and hostility from law enforcement act as hindrances. Rather than framing police and detention centers as the end-all solution to sexual violence, support should be extended to the survivors to enable them to make their own choices. The anti-rape campaigns should discuss how injustice to the detained perpetuates rape culture.

Dominance feminism supports the proposition that as men and women are different, men are dominant in the society. Therefore, law must respond to the inequality knowing that the primary source of oppression is sexual violence.

The *Everson v. Michigan Department of Corrections*⁶⁸ secured the needed balance between equal employment and safety of incarcerated women from sexual abuse. It highlighted that a prison may introduce a bona fide occupation qualification defense because the alternative harm is too great to sustain an absolute proscription on sex-based employment policies in the narrow context of women's prisons.⁶⁹

⁶⁸ 391 F.3d 737 (6th Cir. 2004).

⁶⁹ CATHARINE A. MACKINNON, *Feminism Unmodified: Discourses on Life and Law* (1987).

2. Healthcare

The campaigns have been framed around subjects like abortion rights, pregnancy and birth control as women issues. A just healthcare system advocates for schemes that cater the needs of specific individuals; men and women.

Healthcare in detention centers is deplorably inadequate. Recent reports have found substandard reproductive care; delays in accessing gynecological care, denial of access to items like contraception and sanitary supplies.

There is a new wave to a pro-choice framework i.e. shift from abortion rights to advocating for reproductive justice. It includes a broader analysis of the racial, economic, and structural constraints that prevent many from having a safe and healthy environment to raise families in.

B. State's Interest

It is the State's responsibility of prisons for the custody of prisoners for the protection of society against crime. It shall be discharged remembering State's other social objectives and its fundamental responsibilities for promoting the well-being and development of all members of society.

1. National Security

"...in the present circumstances of the country, it may be necessary for the executive to detain a person who is tempering with the defense services of the country. In such case, the exigency of the liberty of an individual shall not be above the interests of the state"; Dr. Ambedkar.

Manfred Nowak remarked in his commentary to the ICCPR, *"The requirement of 'necessity' is subject to objective criteria...Every restriction thus requires a precise balancing between the right to freedom of movement and those interests to be protected by the restriction. Consequently, a restriction is 'necessary' when its severity and intensity are proportional to one of the purposes listed or related."*

Hence, when necessity demands, restriction to liberty is justified to protect the interests of the society.

National Security Act empowers the government to pass a detention order to prevent a person from acting in any manner prejudicial to the defense, foreign relations, or national security of India.⁷⁰

In *A. K. Roy v. Union of India*,⁷¹ Supreme Court reiterated *R. C. Cooper v. Union of India*,⁷² which explained that “...*Detention without trial is an evil to be suffered, but and in no greater measure than is minimally necessary in the interest of the country...*”

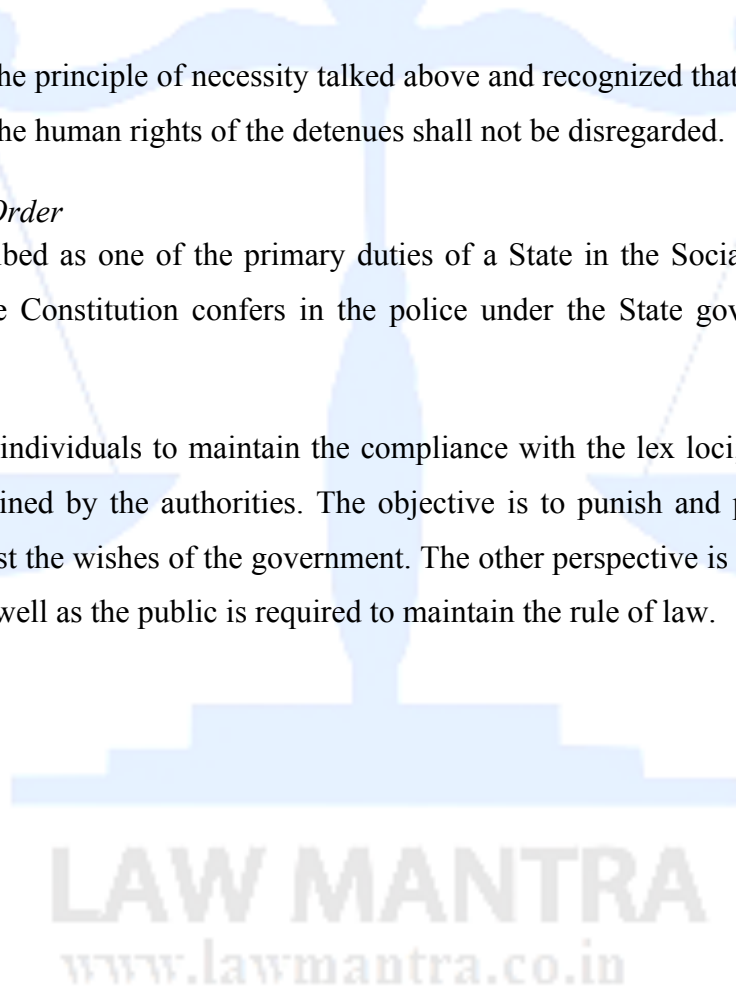
“...*the person who is taken in custody does not forfeit every one of his fundamental rights...treat the detenue consistently with human dignity and civilized norms of behavior...*”

The court traced the principle of necessity talked above and recognized that though detention is a necessary evil, the human rights of the detenues shall not be disregarded.

2. *Law and Order*

It has been described as one of the primary duties of a State in the Social Contract theories. Schedule 7 of the Constitution confers in the police under the State government, the given power.

The state detains individuals to maintain the compliance with the *lex loci*; anyone inferred to infringe it is detained by the authorities. The objective is to punish and prevent the accused from acting against the wishes of the government. The other perspective is that such deterrence to the accused as well as the public is required to maintain the rule of law.



⁷⁰ National Security Act, 1980, sec 3.

⁷¹ (1982) SCR (2) 272.

⁷² (1970) 3 SCR 530, 559.

VII. Conclusion

Women have different requirements, their vulnerabilities differ. After drafting of international model laws and domestic legislations, proper execution of the same is required. It is empirical to develop an environment where women victims feel secure to report a crime. An independent body needs to adjudicate such investigations to uphold the principles of natural justice; *nemo iudex in causa sua*. The government and independent social welfare organization need to take up the cause; create awareness, ignite debates and put pressure on the executing authorities to follow the laws.

