Rights of the Under-trial Prisoners in India: A Critical Analysis of the Post-Colonial Scenario

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Abstract:
With the onward march of civilization, individuals and communities have assumed center stage in the wider political spectrum. The debate on State and rights of the people has attained wider currency. It has happened primarily because of the universal acceptance of the sanctity of the institution of State and the growing recognition of people’s realization of rights, liberty and justice. The reciprocal relationship between the state and the people is reflected in the nature of rights on which both are conflicting with each other. While focusing on rights, of late, the rights of the prisoners come to the forefront.

The notion of rights of the prisoners is a very new concept in the international arena. Since time immemorial, the prisoners were treated as offenders of law and hence they were being deprived of all kinds of rights which they should enjoy as human being themselves. But in contemporary times, the international community comes forward with some new vision for the rights of the prisoners and becomes very vocal about the dignity of the prisoners as a human being even inside the prison.

While discussing India, several initiatives were taken by the government in the post-colonial period to reform the institution of prison to a correctional institution and to promote the rights of the prisoners as well.

In this context, the present research work highlights the rights of the under-trial prisoners in India in the post-independence era.

Keywords: State, Rights, Prison, Under-trial Prisoners, Post-colonial.

1. Introduction
The state has been occupying center-stage in political discourse since the dawn of human civilization. There exists a close link between the role of the state and the legitimate exercise of rights by the people in a given socio-political parameter. The liberal school of political philosophy expanded the ‘rights-oriented’ dimension of people’s social engagements highlighting that ‘people are essentially rights-bearing citizens.’ The concept of rights has come across various stages and in contemporary times it is closely associated with concepts like democracy, social justice, freedom, etc. The concept of rights comes into the forefront only when the authority of the state is sought to be limited or when people demand a positive role of the state.

In contemporary times, prison is no more regarded as a resting ground in the legal process rather, it is influenced by the conventional norms, ideas and assumptions of humanitarianism, enlightenment and welfare state. A prisoner does not cease to be a human being inside the jail and is, as such, entitled to receive a reasonably decent and civilized treatment in the prison. Today, the International Human Rights Communities hold the view that prisoners do not lose their fundamental rights; except those that are incidental to their lawful detention. The main goal of the institution of prison in India today is to develop it as a reformatory center and a sense of discipline and security among the prisoners. But within the walls of a prison, how far the prisoners can enjoy their rights, is of a significant aspect.
Under-trial prisoners are the prisoners, who are in the custody of the state, awaiting their trial. In Indian Prisons, under-trials constitute more than 65 percent of the prison population. As per reports of the National Crime Record Bureau, the percentage of under-trials in the Indian Prisons varies from 65 to 70 percent which is a major indicator of gross violation of human rights.

The present study attempts to explore the inherent link between the State and a category of citizens recognized by the State as prisoners, more specifically the under-trial prisoners. It also attempts to explore how far the rights of under-trial prisoners are being facilitated in India in the post-colonial era.

2. Methodology:

The present study is qualitative in orientation. The analytical method of social research is employed and data collected from archival sources have been presented with scientific and systematic explanations. Secondary sources viz. books, articles, journals along with Government documents and data have been used comprehensively.

The primary data are collected from the debates of Constitutional Assembly, the debates in Parliament on important Constitutional amendments, the judgements of Supreme Courts on the various Constitutional amendments, on various enacted laws and of executive orders.

3. State and the Institution of Prison:

The institution of prison has been evolved as a crucial institution of state’s legitimate control and coercion as well. The genesis of prison lies in the concept of curtailing the liberty and freedom of movement of a person found to have violated the law of the land. Prisons are the example of a total social system in which members are to a greater or lesser degree isolate from the society in which the total system exits. Nevertheless, the very idea of the prison system is completely isolated from the complex social system. It will be noteworthy here that like any other political institution created by the state, the institution of prison is also evolved through the passage of time and eventually the nature and objectives of the prison are also changed. Especially, in the last three centuries, the institution of prison confronted a drastic change in its attitude towards crime and punishment as well. It has undergone some changes from the institutions of the state retribution in the past to institutions for reformation in the present with many human rights organizations promoting the later view.

As prisons are ideally meant to be a correctional institution or institution for reformation, the institution of prison acts more or less as a society where every aspect of the social order actively prevails. The structure of prisons is composed of a ruling group consisting of the prison staff and a subordinate group consisting of prisoners and simultaneously a power relation between the two groups is also growing inside the prison. This power relation is a great influence in the prison system and subsequently it shaped the functioning of the prison as well. Among the subordinate groups of prisoners in a prison, there grows another kind of power relation that is based on hierarchy.

At this crucial point, the question of rights and justice of the prisoners has come up as a new perception in the regime of international politics with great significance. As a citizen of a democratic country, the constitution guarantees certain specific rights to the prisoners. A prisoner does not cease to be a person inside the jail and is, as such, entitled to receive a reasonably decent and civilized treatment in the prison. Right to access to the courts, freedom of expression and religion, prohibition against cruel and unusual punishment and right to due process of law are the basic rights that a prisoner should enjoy like a normal human being, inside the walls of the prison also. Moreover, even in the imprisonment period most of the fundamental rights cannot be denied to the prisoners. Hence, prisoner’s rights deal with the rights of the inmates inside the prison. But within the walls of the prison, how far the prisoners were able to enjoy their rights is of a significant aspect.

During the 1960’s prisoners with the influence of the human rights activists, started to talk about their civil rights. These are marked as an era of prisoner’s rights movement and it basically started in the USA and it is sometimes seen as a socio-political movement by following the objectives and nature of how it operated. This movement brought about some new aspects to the rights of the prisoners such as the right to complain about prison conditions and access to the courts, medical and mental health care, and right to be free from sexual harassment or sex crime like being molested while in custody, certain reasonable accommodations for the people with disabilities which resultanty improved the conditions of prisoners to some extent. In this context, the words of Michel Foucault...
are very significant, who says, “In recent years, prison revolts have occurred throughout the world. There was certainly something paradoxical about their aims, their slogans and the way they took place. They were revolt against an entire state of physical misery that is over a century old: against cold, suffocation and overcrowding, against decrepit walls, hunger, physical maltreatment. But they were also revolt against model prisons, tranquilizers, isolation, the medical or educational services…. In fact all these movements- and the innumerable discourses that the prison has given rise to since the early nineteenth century – have been about the body and material things.”

However, it cannot be assumed and generalized that the prisoners across the globe are entitled to their basic rights, in most of the time the prisoners are deprived of their rights due to their lack of proper acknowledgement about their rights and in such circumstances, how far the prisoners can enjoy their constitutionally guaranteed rights is a question of vital importance now a day.

4. Rights of the Prisoners: an Overview:

The notion of rights of the prisoners is very novel in the international arena. It is only since the last decades, that the international human rights communities are becoming very vocal about the rights of the prisoners. Prison, since the time of monarch from its very beginning, is regarded as the place to punish the criminals and the offended and there was a little place of the reformation in it. It became a place of legitimate control exercised by the state and hence within the period the institution of prison became a center of cruelty irrespective of the nature of state and authority. Consequently, until the 1960’s the concept of prisoner’s right cannot assume a focal position even in the aspects of human rights across the globe. Even in 1866, the US Supreme Court of the United States ruled that prisoners have no constitutional rights. In the contemporary era, it is the US that for the first time begun to talk about the rights of the prisoners and improvement of the prison structure and environment.

In the 1960s, by following the path of US federal court, a drastic change has come up internationally in the attitude of the people towards prison and the rights of the prisoners as well. In 1949, a US federal court for the first time applied the cruel and unusual clause of the Eighth Amendment to a prison environment. During the 1960s, prisoners began to use the ideas and language of the Civil Rights and Black Power movements to demand their constitutional rights. This is marked as the rise of prisoners’ rights movement, and the courts respond by accepting cases and legally mandating institutional norms and minimum standards. The judicial branch abandons its earlier ‘hands-off’ doctrine, limiting the power of administrators for the first time. The Nation of Islam, or Black Muslims, whose attempt to practice religion on the inside, have continually been thwarted, gain full religious freedom, from the right to hold religious meetings, to obtain copies of Koran. This seminal victory paved the way for further federal cases. Prisoners win right concerning health care, sanitation, food and due process of internal disciplinary practices. In 1963, the US Supreme Court decided that state inmate had the right to file a court order of habeas corpus and challenge both the legality of their sentencing and the conditions of their imprisonment. This set the stage for a landmark case for prisoners’ rights in the international arena.

In contemporary times, the international human rights communities hold the view that prisoners do not lose their fundamental rights; except those that are incidental to their lawful detention. Accordingly most of the international human rights instruments make provisions for the rights of the prisoners. There are also specific instruments particularly designed to provide for international human rights norms for prisoners. The most important of these is the United Nations Standard Minimum Rules for the Treatment of Prisoners. In tandem with these international human rights instruments, many countries have incorporated prisoners’ rights in their respective constitutions.

The United Nations Standard Minimum Rules for the Treatment of Prisoners was adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955 and approved by the Economic and Social Council by its resolutions on 30th August 1955. It consists of 5 parts and 95 rules. Part one provides rules for general applications. It declares that there shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or another status. At the same time, there is a strong need of respecting the religious beliefs and moral precepts of the group to which a prisoner belongs. The Standard Rules give due consideration to the separation of different categories of prisoners. It says that men and women shall be detained in separate institutions. The under-trial prisoners shall be kept separate from convicted prisoners. Furthermore, there must be a complete separation between the prisoners detained under civil law and criminal offenses. The UN Standard Minimum Rules also made it mandatory to provide separate
residences for young and child prisoners than from the adult prisoners in the prisons. On the issue of prison offenses and punishment, the Standard Minimum Rule provides clear rules by stating that no prisoner shall be punished unless he or she has been informed of the offenses alleged against him or her and given a proper opportunity of presenting his defence. It has recommended that corporal punishment, by placing in a dark cell and all cruel, inhuman or degrading punishments, shall be completely prohibited as a mode punishment as disciplinary action in the jail. All such punishments including a reduction in diet shall never be inflicted unless the medical officer has examined the prisoners and certified in writing that the prisoner is fit to sustain it. While recognizing the basic principles of punishment, the purpose of punishment is not to torture a person but to reform him and ultimately making him a good citizen. To achieve this objective, Rule 79-81 of the Standard Minimum Rules provides for social relations and after-care provisions. It says that from the beginning of a prisoner's sentence, consideration shall be given to his future after release and he should be encouraged and assisted to maintain or establish relations with persons outside the institution as may promote the belt interacts of his family and his social rehabilitation.  

Apart from these the international community takes various other steps to protect and promote the rights of the prisoners. In this context, reference could be made to the Universal Declaration of Human Rights, 1948 by the United Nations General assembly and the Third Geneva Convention, 1949 related to the treatment of prisoners of war defines the humanitarian protection of prisoners of war. These are two major initiatives taken internationally for the protection of the rights of the people across the globe and which resultantly enriched and enhanced the rights of the prisoners as well.

5. Prisons Rights in India:

The main goal of the institution of prison in India today is to develop it as a reformative center and a sense of discipline and security among the prisoners. But earlier before, imprisonment was not merely a punishment for the offenders who have committed some kind of crime. During the time of monarch, there were cruel and barbarous types of punishment in the Indian penal system like mutilation, throwing to wild animals, etc. But with the advent of the British, the administrative structure in India began to assume a new form. Before the arrival of the British in India, the modern prison system was not in existence in India. The emergence and changes in the modern prison system are the results of different commissions appointed from time to time. At first, very little alteration was made in the existing legal system. In 1773, the Regulating Act was passed which established the Supreme Court at Calcutta to exercise all civil, criminal, admiralty and ecclesiastical jurisdiction and indicated the intention of the British government to introduce English rules of the law and English Superintendence of law and Justice. After independence, a Committee was appointed under the chairmanship of Justice Pakwasa in 1949, known as Pakwasa Committee, which accepted the system of utilizing prisoners as labour for road work without any intensive supervision on them. It was from this time onwards that the system of payment of wages to inmates for their labour was introduced. But the irony is that till the date the Indian Prison is regulated by a colonial act, i.e., the Prison Act of 1894 and hence a colonial attitude is felt in the prison system of India. It is therefore, based on the notion that the best criminal code can be of little use to a community unless there is good machinery for the infliction of punishments.

Observing the Indian prison system, Ujjal Singh illuminates that the permanence and ruptures in the nature of panel sanctions imposed by the state against its antagonists in colonial and independent India. He links the prison with the imposing framework of disciplining strategies of power and points jail rules serving to establish the superiority and inviolability of imperial power. The structure of criminal punishment that the Indian state carries out in the prisons of India within the framework of a legal system is also criticized in contemporary times. In this context reference could be made to Rani Dhavan Shankardas who assumes the Indian prison system as the focal point for determining punishment because it houses those who are the subjects of punishments. To quote the writer, “it is the location from which policymakers have been able to reinforce the widely held liberal-legalistic view that prison is the punishment system per excellence from amongst many punishment forms that those in authority have meted out to offenders.”

The Indian constitution through various attempts tries to protect the rights of the prisoners as human beings. The first and foremost in this regard is the Preamble of the Indian constitution that stated that “we the people of India have solemnly resolved to constitute India into a sovereign socialist, secular, democratic republic and to secure all its citizens”. It aims to make the country safe to live in by the citizens, the way the Universal Declaration of Human Rights is preaching. Moreover, there are certain articles, including the fundamental rights, in the Indian Constitution
that necessarily promote the rights of the prisoners as well. In this context reference could be made to the following articles,

Right to Equality (Article 14) of the Indian constitution which says, “The state shall not deny to any person equality before the law or the equal protection of laws within the territory of India”. Right to Freedom (Article 19) of the Constitution guarantees six freedoms to the citizens of India. Among these certain freedoms like freedom of movement, freedom to reside and to settle and freedom of profession, occupation, trade or business cannot be enjoyed by the prisoners because of the very nature of these freedoms and due to the condition of incarceration. But other freedoms like freedom of speech and expression, freedom to become members of an association, etc. can be enjoyed by prisoners even behind the bars and his imprisonment or sentence has nothing to do with these freedoms. But these will be subjected to the limitations of prison laws.

Protection against Double Jeopardy (Article 20(2)) says that “no one shall be prosecuted and punished for the same offense more than once”. Article 20(3) this article provides that “No person accused of any offense shall be compelled to be a witness against himself.” Right to Life and Personal Liberty (Article 21) reads, “No person shall be deprived of his life or personal liberty except according to the procedure established by law”. Article 21 of the Indian Constitution which embodies the principle of liberty has been a major center of litigation so far as the prisoners’ rights are concerned. This provision has been used by the Supreme Court of India to protect certain important rights of the prisoners. Rights of Person under Arrest and Detention (Article 22(1)) of the Indian Constitution direct that no person who is arrested shall be denied the right to consult and to be defended by the legal practitioner of his choice as well. This legal right is also available in the code of the criminal proceedings under section 304. Produced before Magistrate (Article 22(2)) provides two rights:

1) Every person whether man or woman who has been arrested has the right to be produced before the nearest magistrate within twenty-four hours of arrest excluding time taken for the journey from the place of arrest to court of the magistrate.

2) No such person shall be detained beyond the said period of twenty-four hours without the authority of a magistrate. It is clear here that the provision of this article is applicable only when a person has been arrested and is accused of some offense or any other act and it has no application when such person has been held guilty of the offense and detained in pursuance of conviction held by the court.

Right to Constitutional Remedies (Article 32), says, “The Supreme Court shall have the power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto, and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by part III”. Article 226 says “Notwithstanding anything in Article 32 every High Court shall have powers, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto, and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose”. Writ of Habeas Corpus: Preventive as Well as Remedial: The literal meaning of Habeas Corpus is “to have the body”. This writ is issued to protect the personal liberty of an individual against arbitrary actions of both state and private individuals. Equal Justice and Free Legal Aid (Article 39-A). This article embodies the principle of fair procedure during the trial by courts. The state shall secure that the operation of the legal system promotes justice and ensure that the opportunities for securing justice are not denied to any citizen because of economic or other disabilities. If a prisoner is unable to avail of his constitutional and legal rights or needs legal assistance, he cannot be ignored just because of indigence. If the prisoner is unable to engage a lawyer than under constitutional directions and other statutory provisions court has the power to assign counsel for such a prisoner for doing complete justice.

Thus, it becomes quite apparent that, the prisoners’ rights are to be protected and preserved. The Indian state is legally and constitutionally bound to provide all necessary arrangements for the prisoners to get a timely trial and others in prison facilities.

6. Conditions of the Under-trial Prisoners in India:

Prisoners can be categorized in three manners as under:-
• Under-trial prisoners, and
• Convicted prisoners.
• Detenues.

The 78th Report of the Law Commission of India (1979) defines ‘Under-trial’ as a person who is in judicial custody or remand during the investigation. They are technically under judicial custody but for all practical purposes are kept in the same prison especially in India. In many countries there are separate institutions for under-trials. However, in India also, it has been made compulsory for the prison officers to provide separate accommodation for the under-trials. The Model Prison Manual advocates that no convicted prisoner shall be kept in the same area in which under-trial prisoners are kept, or be allowed to have contact with under-trial prisoners. No convicted prisoner shall be allowed to enter the under-trial yard or block.  

There are following grounds for keeping an under-trial in jail:
• In case of heinous and grave offenses
• If the accused is likely to interfere with the witness or impede the course of justice
• If the accused is likely to commit the same or other offenses
• If the accused may fail to appear for trial.  

In Indian Prisons, under-trials constitute more than 65 percent of the prison population. An alarming 67.6% of prisoners across the state are under-trial prisoners, this proportion is one of the world’s 10 worst. In recent years also, the scenario became worse day by day. According to a survey conducted by National Crime Record Bureau, in its report of Prison Statics 2015, more than 77% at a given time are under-trials in Indian Jail, which amounted to 200,000 in October 2016, when the report was published. According to the Commonwealth Human Rights Initiative’s Comments on Prison Statistics India (PSI) Report, 2015, 67% of the prisoners are under-trial prisoners in India, where there are 32% are convicted and 1% are detenue.

The problem of under-trial prisoners has assumed new proportions in recent years. Thousands of under-trial prisoners are languishing in various jails in different States for periods much longer than the maximum term for which they could have been sentenced if convicted. Many of them are innocent persons who are caught in the web of the law eagerly waiting for their trial date and several of them are even prepared to confess their crime and accept the sentence. The Law Commission in its 268th report remarked that over 60% of the arrests are unnecessary. 

Despite Executive and Judicial Departments of the government launching various programmes and pronouncing some vows to correct the situation in the post-colonial period, little has changed in the contemporary scenario of the under-trials in Indian Prison and lakhs of under-trials still languish in the various prisons. Subsequently, various factors are working together which results in creating the burning problem of the high population of under-trials in Indian Prison, such as,

• Indiscriminate and Unexplainable arrest
• Crisis in the Justice System
• Delayed Investigation
• Deficient Prosecution System
• Problem with the bail System
• Failure to pay the bail bond

A large number of prisoners lying in the jails without sentence have posed a big challenge to prison management. The courts’ inability to take up the cases because of their busy schedule, the prolonged police investigation, unsatisfactory bail system and legal representation being beyond the meager means of poor offenders and creates a major issue of infringement of the rights of the under-trials in India in recent times.

While addressing the problem faced by the under-trials in India, apart from these factors, some other problems caused the plight of the under-trials in contemporary times. Amongst all, prison violence, distress from the other inmates, deteriorating mental health situation, negligence of the family are of major concern. Moreover, the problem of sexual abuse by the other inmate and homosexuality inside the wall is also a burning problem faced by the prisoners.
7. The way Forward:

The forgone study of the rights of the under-trials in India in the Post-colonial era makes it apparently clear that solutions are far from easy and needed full involvement and cooperation from various stakeholders such as courts, police, prison administrators, and the under-trials themselves.

Firstly, the government should take the necessary steps to fasten the justice delivery system. Delay in the trial of cases is the main human rights issue of under-trials. For immediate results, Lok Adalats, mediation, plea bargaining and negotiated settlement can also be pursued.

Secondly, there is a strong need to revolutionize the Police administration system as it is undoubtedly a necessary part of the justice and rights delivery system.

Thirdly, there is also a call of time to reform the Prison Administration system. The rights and dignity of the prisoners as human beings should be ensured at any rate.

Fourthly, emphasis should be given in the use of modern technology, ITCs in harnessing criminal investigations and the justice delivery system as well. It will fasten the system and eventually effects the entire prison and legal system by reducing the over crowded population.

The most crucial role in this concern should be played by the NGOs as they could provide the basic legal knowledge in the civil society. They can ignite the civil society about their rights and dignity as a human being, even as a prisoner also.

8. Conclusion:

The above study apparently reflects that after taking various measures by the Government after independence, the rights of the under-trials in Indian prison are not addressed adequately and hence it is severely violated. Most of the people are not aware of the prisoners’ rights to date and the prison authority is also not willing to give them the basic knowledge about the rights that they shout enjoy inside the prison. In-depth research and measures should be taken to improve the present scenario by the various stakeholders together to address the issue properly and hence only it can be assumed that prisoner’s rights also be achieved by the under-trials themselves.

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