



Victimization of Women in Prisons: A comparative analysis of India and Indonesia

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Abstract: *Prisons have become a world of their own, and women are its new citizens. There have been many studies on incarcerated as a result of the growing numbers of women in prisons, and feminist studies. The on-going reconstruction of literature on this subject has given rise to a new question as to whether we should consider women in prisons, as victims in need of protection, or has this narrative changed? Even with the development of international and municipal legal instruments and agencies for the protection of incarcerated women, there have been various instances where women are victimized in prisons. Both India and Indonesia are part of different international treaties and enacted several laws but lack a systemized prison system to ensure their overall protection. This paper unfolds as follows: The first section delves into the conceptual development of the sexual rights of women in the international sphere, focusing specifically on women in prisons. Subsequently, the second section analyzes in detail various studies, article, and news reports on the subject of sexually abusive treatment of women inmates offering a brief overview of the concerns in India and Indonesia. The methodology adopted for this paper is primarily doctrinal, for the comparative analyses of the rights available to women inmates under various national and international legal instruments.*

Keywords: *sexual rights; sexual victimization; incarcerated women; physical & mental health; constitutional rights.*

I. INTRODUCTION

Initially, prisons came into existence as an alternative to barbaric physical punishments or public punishments, and had an inherent purpose of disciplining and controlling the bodies and impacting their

souls instead of torturing the bodies.¹ but they soon became what can be called 'Necropolitics'. The etymology 'Necropolitics' as described by Mbembe, can be understood as "the generalized instrumentalization of human existence and

¹ M. Foucault, *Discipline And Punish* (New York: Vintage Books, 1995)

the material destruction of human bodies and populations”.² Prisons effectuate the death of one’s social life by depriving the prisoners from political (right to stand in elections, right to vote), cultural (right to perform cultural rites and performances), and personal life (right to have or meet family, freedom to marry, right to have sexual pleasures). They also catalyze deaths, as a result of inadequate medical and health facilities and sanitary conditions- especially for women as their needs vastly vary from those of a man in prison.

Prisons are made by men for men and women are stuck in ‘His’ world. There are comparatively fewer researches on female prisoners as compared to those on male prisoners. Until recently, criminologists mostly usually focused on male prisoners. Pollock (1994) questioned that whether women experience equal treatment in the criminal justice system.³

By taking a brief look at history, we can conclude that the prisons were initially designed to incarcerate men, and the inclusion of women was a poor set up. Their needs as well as experiences in prisons differ entirely from those of men; and the correctional programs and treatments that were usually designed for men failed to serve their purpose as gendered, social, and individual response to women’s needs. Among the other important issues that women face in prisons, the most ignored one by administrators, prison authorities, policy

makers, scholars and the media is the that of sexual violence against prison inmates.

Sexual Violence, as defined by World Health Organization in a World report on Violence and Health,

“any sexual act or attempt to obtain any sexual act or unnecessary sexual comments or advances or acts to traffic or against the person’s sexuality using any kind of coercion done by any person regardless of their relationship with the victim at any place not limiting to home and work”..⁴

Sexual violence is the prime component of Necropolitics in prisons. The first ever study on sexuality of women inmates was conducted in 1900s (Otis1913), where homosexual relationships of incarcerated women were criticized and called as a perversion.⁵ It was observed that such acts were done by inmates for enthrallment, and fun, consequently leading to the same sex relationships. In his study he majorly focused on the issues of race, homosexuality, and dominance of a black girl over a white girl. This was later reversed and stated that race is not an important factor in the dominance of sexual relationships. Subsequent to Otis, there were many studies conducted on prisoners’ sexual relationships and their consequences, but the main subject of focus was violent sexual relationships. Only few of such relationships were consensual and most of it were forced

² A. Mbembe, ‘Necropolitics’ (2003) 15(1) *Public Culture* <https://warwick.ac.uk/fac/arts/english/currentstudents/postgraduate/masters/modules/postcol_theory/mbembe_22necropolitics22.pdf>

³ Stephanie S. Covington and Barbara E. Bloom, ‘Gendered Justice: Women In The Criminal Justice System’ (2003) *Carolina Academic Press* <https://www.stephaniecovington.com/assets/files/4.pdf>.

⁴ *Who.Int* <https://www.who.int/violence_injury_prevention/violence/global_campaign/en/chap6.pdf>.

⁵ Margaret Otis, ‘A Perversion Not Commonly Noted’ (1913) 8(2) *The Journal of Abnormal Psychology* <https://psycnet.apa.org/doiLanding?doi=10.1037%2Fh0073016>.

and was put under the category of prison rape.

Furthermore, in a documentary by Jonathan Schwartz, it was found that the right to penetration - which was symbolically the part of hyper-masculine environment - was considered as the ultimate indication of domination among the male prison populations. Angela Davis brought the issue in front of the world about how dominance of one in a same sex relationship affects the nature of violence by the officials in prisons.⁶ The dominating one in the same sex relationship usually faces verbal or physical abuse, whereas the submissive one experiences sexual abuse.

The over-powering of one another in a sexual relationship sometimes leads to sexual violence or non- consensual sex, which comes under the ambit of prison rape. Prison rape has been defined differently by different states. It has been viewed in terms of - between inmates, or between inmates and prison workers, and sometimes during conjugal visits. In some jurisdictions, the permission for conjugal visits are allowed only to the inmates with good behaviors, or for married couples, and some allow only for domestic partners.⁷ In modern times, countries such as Canada, Germany, Russia, Spain, Belgium, Saudi- Arabia, Denmark have allowed conjugal visits; and countries like US, Brazil and Israel even allow same sex conjugal visits.

Different types of sexual interactions occur in Prisons. Prison rape, usually

committed either by the prison handling authorities or by co-prisoners has two possible contentions – first, to satisfy the over sexual needs and desires which by self-pleasure are not fulfilled; and the second, is to show dominance and manifest power, in order to create fear in the minds of other prisoners. This fear often restrains inmates from reporting the rape; And even if the complaint was lodged by any such victim, most reports are trivialized, thus making prison life traumatic for the victims.

In 2003, for the first time, The United states government had made a major breakthrough for the protection of prisoners from sexual violence. The enormous pressure laid by the human rights groups made the US house of representatives and Senate pass the Prison Rape Elimination Act (PREA) for the protection of prisoners from sexual violence. The report released by Human Rights Watch NO ESCAPE: Male Rape in U.S. Prisons, in 2001 contributed most to the PREA's passage two years later.⁸

This issue of prison rape did not only get the attention at national level through press but also opened the way for new scope of understanding and eliminating the issue. The contribution of media to the U.S. government's initiative proved very constructive and influenced many other nations thus made them follow the same path.

II. LEGAL MATERIALS AND METHODS

⁶ Angela Y. Davis and Cassandra Shaylor Source, 'Race, Gender, and the Prison Industrial Complex: California and Beyond' (2001) Vol. 2, No. 1 pp. 1-25
<https://www.jstor.org/stable/40338793>

⁷ Tomer Einat and Sharon Rabinovitz, 'A Warm Touch In A Cold Cell' (2012) 57(12) *International Journal of Offender Therapy and Comparative Criminology*.

⁸ Brenda V. Smith, 'Side By Side Comparison Of Standard To Address Prison Rape: National Prison Rape Elimination Commission Standards And Proposed Standard Of U.S. Department Of Justice For Adult Prisons And Jails' (2011) *SSRN Electronic Journal*.

This article draws upon two kinds of Doctrinal research as legal methodology:

1. Discursive material on the development of scope of sexual rights especially in relation to prisons
2. Comparative analysis of different Constitutional provisions, Penal provisions, welfare statutes constituting the rights of women prisoners, International conventions as well as academic and semi-activist documents.

To begin with, internet resources such as the websites of Human Rights Watch, United Nations, along with news reports and articles on the subject of sexual violence in prisons in both India and Indonesia, were closely examined in order to collate material on welfare practices. This initial study was used to develop an understanding of the subject, and the early outlines of the arguments and answers presented later in the paper. There upon, the empirical data were re-examined and selected as per their value in substantiating the arguments. In General, reports of international conventions regarding sexual victimization in prisons provided the most comprehensible articulations that are of interest to this paper.

The international and regional documents, treaties declarations, statutory provisions of the Indian and Indonesian legal system such the Constitution, Penal Code, and the studies and reports of the different committees for the protection of women prisoners along with the laws related to the penitentiary system of the Republic of Indonesia have been referred to, examined and studies as the primary sources.

Other secondary sources such as books, journals, media - including print media, have also been examined. Authoritative internet has been studied and analyzed thoroughly. Statistical data on prisons have been

interpreted with the help of graphs and pie charts.

A thorough analysis of India on this subject has been supplemented with reference to extensive principles established by the Judiciary and reports of Commissions which have been incorporated in the administration of the criminal justice system; While on the other hand the analysis of Indonesia on the same subject is, for the most part, based on news reports, commission report, and existing legislations and policies.

III. RESULTS AND DISCUSSIONS

Sexual rights as human rights

Human rights are universal, basic, and inalienable in nature. Every human being is born with such rights and it cannot be taken away by any state practice. They are available to all human beings irrespective of their race, caste, creed, sex, religion, or personal beliefs. Sexual rights are intrinsic to human rights. Sexual rights as a concept has always been a part of human conscious and got a broader platform when terms like sexual and reproductive health, sexual and reproductive rights were started being used by various international organizations in the late 1970's. Prior to 1990's no international instrument had encompassed the sexual rights within it as an integral part of human rights.

Sexual rights can be understood as the series of entitlements related to one's sexuality which flows from the codified and uncodified principles of human rights in terms of sexuality and sexual relationships. While deliberating upon the question of sexual rights of women, it is imperative perceive the issue dynamically, and include the aspects of sexual and reproductive health, in order for better framing of policies on the subject, and also increasing public awareness

as an outcome of crystallization of sexual rights as fundamental or rudimentary for the state.

The National Human Rights Commission (NHRC) investigated nationally on the human rights standards in the context of reproductive and sexual rights and concluded that as reproductive and sexual health are two distinct concepts but are overlapping concerns to study. There must be some clear understanding of these different approaches on which health providers and women health advocates are working, which can possibly result in the practice of medicine as an instrument in context with women empowerment and understanding of women sexual rights. There is an affirmative need of sexual rights for women to exercise their citizenship fully and claim the protection against human rights violation.⁹ Fried and Lewis (2000) found two forms of information: personal stories from various tribunals and got women testified about the violations against them and gathered a detailed study on the sexual rights discussed through documents and debates at (Cairo, 1994) International Conference on Population and Development and The UN Fourth World Conference on women.¹⁰ For example, liberty to decide to carry or terminate the pregnancy.

All such principles of human rights emerge from the 1974 Universal Declaration of Human rights followed by 1979 Convention on the Elimination of All forms of Discrimination against Women. In international law as well as municipal law

there are so many conventions, statutes, precedents, rules, and customs related to the protection of women and children. There are charter-based bodies like Human Rights Council, earlier known as Commission for Human rights which through Universal Periodic review keeps all the member countries well informed about each other's human rights records and directly reports any such violations to the UN General Assembly during the state practices.¹¹

Moreover, right against torture is protected under ICCPR and CAT and all the signatories have implemented their provisions in their domestic laws. U.N. Committee Against Torture monitors CAT. Human Rights Committee monitors ICCPR. Both the committees recognize sexual violence in detention centers.

The ICCPR has provided that all people, including prisoners also, have different civil and political rights and no such person shall be tortured or subjected to cruelty, inhuman or degrading treatment or punishment.¹¹ The CAT enormously focuses on this right and mandates the nations who have ratified it to take strict actions in preventing acts of torture within their jurisdictions.

Regional conventions, national constitutions and criminal laws contain the principles of human rights and imposes state's duty in protecting and promoting it. Moreover, Individuals can also file complaints under UNHR treaties in case if there is any such violation as a result of state practices like in the case of KL vs Peru¹², the

⁹ Diane Richardson, 'Constructing Sexual Citizenship: Theorizing Sexual Rights' (2000) 20(1) *Critical Social Policy*.

¹⁰ Susana T. Fried and Ilana Landsberg-Lewis, 'Sexual Rights: From Concept to Strategy,' in K. Askin and D. Koenig (eds.) *Women's Human Rights Reference Guide* (New York: Transnational Press, 2000), pp. 91-122.

¹¹ *International Covenant on Civil and Political Rights* opened for signature 16 December 1966 (entered into force on 23 March 1976, 999 UNTS 171 (entered into force on 23 March 1976) art 7

¹² 'OHCHR | Peru Compensates Woman In Historic UN Human Rights Abortion Case', *Ohchr.Org* <https://www.ohchr.org/EN/NewsEvents/Pages/PeruAbortionCompensation.aspx> .

most notable decision in the history of sexual rights by an International organization came which made government accountable for non-availability of the legal termination services. At the national level, Constitutions, precedents set by the Constitutional or other decision-making bodies or apex Courts and national as well as state legislations incorporates the principles of sexual rights in the society.

The state is not only bound to end any form of discrimination and promote awareness but is also obliged to scrutinize the efficiency of the legislations in all spheres of life. Thus, creating a three-tier obligation of respect, protect and fulfil rights.¹³ The impact of the Universal Declaration of Human Rights is huge including on the Constitution of India. The preamble of the Constitution enshrines the ideals of human rights such as the dignity of an individual, social justice. It has also been recognized in Part IV of the Indian Constitution as Fundamental Rights. Part IV, i.e., Directive Principles of State policy directs the state to uphold human rights.

On the other hand, in Indonesia human rights are recognized in Part XA of the Constitution, Article 28 A to 28J ha a very important role in protection, promotion and fulfilment of Human Rights. Article 39 of the Constitution of India provides the right to opt for free legal aid. This right protects women from being misquoted and harassed and seek legal assistance without any financial constraints. Also, Article 21 of the Indian Constitution implicitly provides Right to Privacy. This right protects the dignity of sexually by hiding the identity of the victimized women, especially when she

chooses to file a complaint from any prejudice or interference in her daily life by society.

Victimization in Prisons

Prisons have become an invisible component of the society and lives of prisoners are not valued much is a fact which leads to the ignorance of the state protections for them. Custodial misconducts like verbal abuse, rape threats, denial of goods and facilities, over-supervisions, sexual abuse, use of threat or violence are very common (Amnesty International USA, 1999; General Accounting Office, 1999; Human Rights Watch Women's Rights Project, 1996). For example: women prisoners are asked to strip their clothes if they want to get the goods they wished for.

The International Covenant for Civil and Political Rights provides Article 6 emphasizes on the Right to Life which covers various other rights like right to safe and healthy environment, right to proper medical services, right to bodily integrity and autonomy etc. as one of the human rights and it can never be taken away from any human being even if he is in prison, and this right must be protected by law.

Lord Macaulay thought about the reformation of Indian Prison System to provide just and humane conditions for prisoners and later Mulla Committee 1983 recommended the same and suggested rehabilitation for prisoners. States are obliged to guarantee the legal protection to all vulnerable classes of the society and ensure their social, physical, and psychological well-being.

¹³ A. Miller, E. Kismãdi, J. Cottingham, & S. Gruskin, 'Sexual rights as human rights: A guide to authoritative sources and principles for applying human rights to sexuality and sexual

health' (2015) 23 (46) *Reproductive Health Matters*, 16-30.
<<https://www.jstor.org/stable/26495862>>

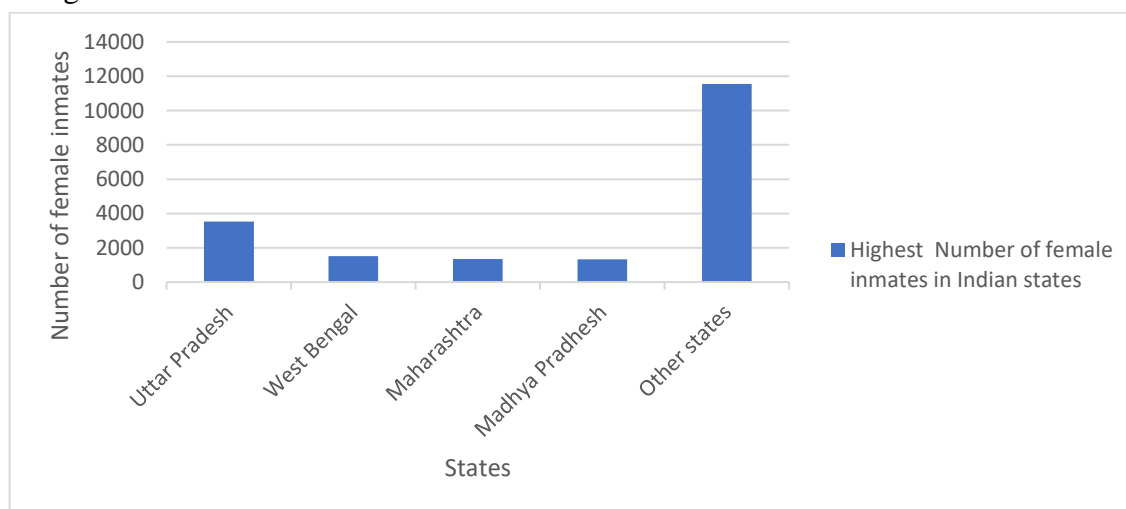
In general, women are disguised as weak and vulnerable, and women in prison are more vulnerable to exploitation at the hands of authorities. We need to critically evaluate the services and facilities in the women prisons as with their growing numbers in the limited capacity of prisons, it will lead to more competition for survival among women, rising the chances of custodial violence by the staff. These services should analyze the special requirements and be altered as per the different backgrounds of the women that include factors such as poverty, race, gender inequality, issues related to marriage and family as well as the personal factors which individually affect the women in the criminal justice system.

Personal and psychological factors actuate more depending on the environment of the prisons thus making structuralizing the prisons, a significant variable. Creating a gender-responsive service will be a

prodigious step in overshadowing the past environments of the prisons and it is indispensable to structuralize the site where women should be kept, selection and training of the staff, and tailor programs, owing to the realities of their lives over and above mitigating the needs of the individual participants.¹⁴

According to data recorded by the National Crime Records Bureau as shown in fig. 1, there were 19,242 women inmates at the end of 2018. Out of which Uttar Pradesh had the highest number, i.e., 3,533 of women in prison, followed by West Bengal with 1,506: Maharashtra having 1,336 and then Madhya Pradesh having 1,322. In India, there are only 24 jails in 15 states and union territories (UTs) established for women with the total capacity of 5593 which currently holds around 3243 whereas the rest of states and UTs do not have separate jails for women.¹⁵

Figure 1: Data of Female inmates from National Crime Research Bureau India 2018



On the Other hand, in Indonesia, total number of prisons and detention centers are 421 and only 9 out of them incarcerate women and children. In the year of 2020, total number of female prisoners are 12,131

which is the 5.2% of total population of the prisons and 4.5% Female prison population rate per 100,000 of national population. The population of women in prisons are less than men but as per the study of Ministry of

¹⁴ Gendered Justice (n 3).

¹⁵ National Crime Records Bureau, *Prison Statistics India Executive Summary* (2018) (3).

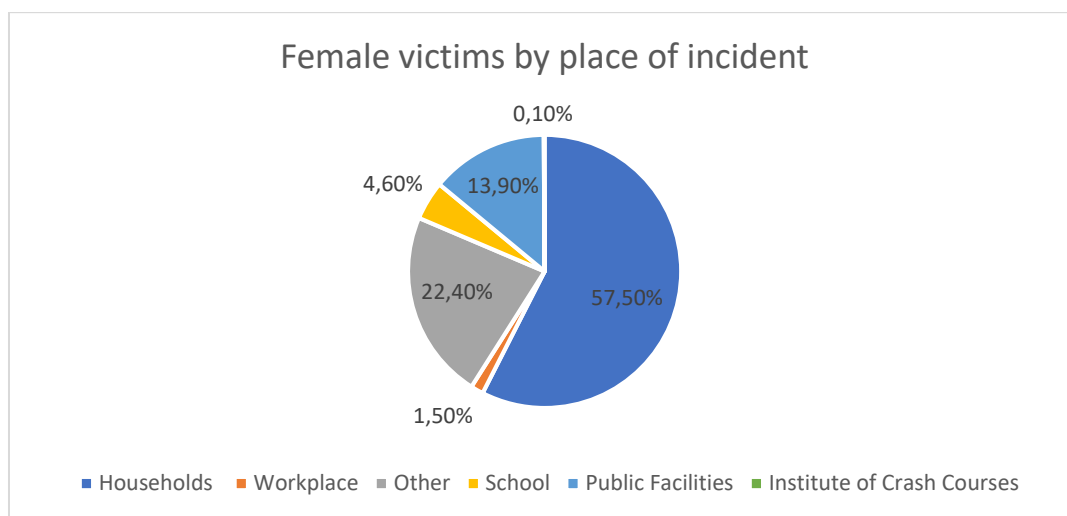
Justice and Human Rights in the year 2009, the release rate is far less than that of men.

In Indonesia, the data released by Ministry of Women's Empowerment and Child Protection of the Republic of Indonesia does not specify the violence in prisons. It has published the data of violence against males and females and not related to third

genders. The total number of cases of violence against women are 7646. It is a big draw back that the ministry did not publish the data as to what all will include in the 'other' places of incident.¹⁶

And number female victims according to place of incident are:

Figure 2: Data from Ministry of Women's Empowerment and Child Protection of the Republic of Indonesia



Sanitation and Hygiene

Many female prisons do not even provide basic facilities like sanitation and hygiene. The National Prison Manual suggested having one toilet and one bathing cubicle for every 10 prisoners which are rarely seen reality.¹⁷

Women bathrooms and toilet should be made with safe entrances and built-in secure areas away from male interaction, but this is not always the case seen. Also, there is a lack of sufficient amount of water in prisons for women which worsen the situations for sanitation and hygiene. Even reports of

prisoners are evidence that they are not able to have a bath for multiple days.

It is highly recommended to periodically cleanse with disinfectants in the prisoner's accommodations by workers, but it is often found that inmates themselves cleanse their toilets and bathrooms. It has also been required by state's prison manuals to provide a minimum number of clothes and undergarments to each woman prisoner according to climate and hygiene standards, but it was found that prisoners have only limited stock of clothes and did not get the opportunity to wash their clothes regularly.

¹⁶ 'SIMFONI-PPA', *Kekerasan.Kemenpppa.Go.Id* <https://kekerasan.kemenpppa.go.id/ringkasan>.

¹⁷ Bureau of Police Research and Development, *Model Prison Manual for the Superintendence And Management Of Prisons In India* (2013).

According to Prison Statistics Report, 2018 (India), many women prisoners belonged to the menstruating age group ranging from 18 to 50 years. They should be facilitated with proper sanitary conditions and menstrual hygiene products.¹⁸ There is an urging need for strict implementation of State and National Prison Manuals along with the regular inspections from municipal and international autonomous bodies without any wrongful interferences.

Medical Treatments

In the Indian Constitution, Directive Principles of State Policy guide the state and provide a fundamental base to Right to Health that includes accessible healthcare to everyone. Separate Hospitals for every ward have been recommended by the National Prison Manual. Comprehensive Health Screening such as tests to detect any sexually transmitted or blood-borne disease, concerns related to mental health, and the presence of any drugs has also been recommended. And all the prisoners must be vaccinated while entering the premises along with diligent care to elderly people and prisoners who are drug addicts.

Imprisonment not only negatively affects physical health but also leaves a strain on psychological health. The initial shock is the severance of ties from their families. Many women have cases of substance abuse and sudden withdrawal impacts their health very crucially and, in that situation, living within four walls with a stranger makes the whole experience more traumatic. They were usually worried about who will be taking care of their families or children, anxious about what conditions will be in the prisons which

can lead to anxiety, epileptic seizures, and self-harm.

Besides spending on health concerns, the prison administration should also focus on the fact that many of the prisoners enter the prison with the preexisting physical and psychological condition which needs intervention. In India, Lady medical officers are appointed for the care of women prisoners. Provisions in the National Prison Manual provides inspection of prisoners and regular counselling and psychotherapy.

Women prisoners dealing with mental illness are not given proper facilities because of which, according to the report by National Crime Records Bureau there have been 360 deaths of women prisoners due to mental illness in India.¹⁹ Women prisoners with treatments of post-traumatic stress disorder or any other kind of mental illness should not be kept with other inmates and be given accommodation separately under an observer or in mental health hospitals.

Prisoners must be provided with adequate care and attention especially those dealing with health-related problems including mental, physical, sexual, and reproductive issues. In case of an emergency, prison authorities must be mandatorily trained to provide first aid. Right to privacy and dignity, right to medical confidentiality and right not to share information should also be extended to incarcerated women. Even though rules are inscribed in State manual, the female prisons are not entitled to proper hospitals with lady medical officers especially gynecologists.

Women prisoners in Indonesia have also been found facing various medical issues as shown in fig.3. The formal facilities

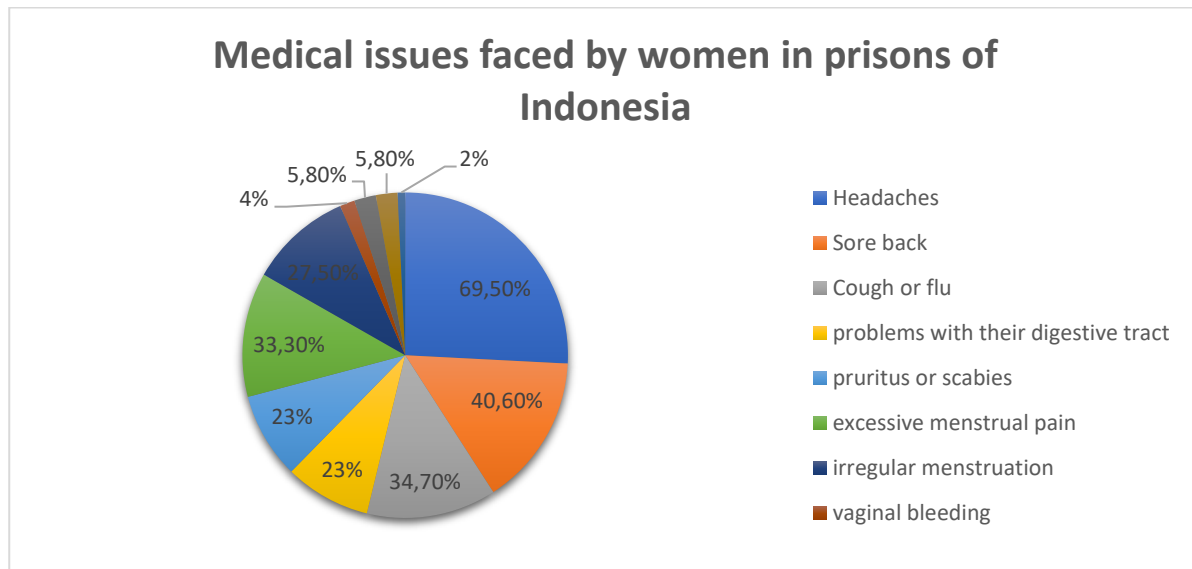
¹⁸ National Crime Records Bureau, *Prison Statistics India Executive Summary* (2018).

¹⁹ National Crime Records Bureau, *Prison Statistics India Executive Summary* (2018).

for such issues were only clinics in prisons which had very few numbers of doctors and nurses, and usually, each prison had only one doctor or one nurse for the visit and some

prisons didn't have any doctors or nurses for the inmates (Ministry of Justice and Human Rights, 2014).

Figure 3 Data from Int J Prison Health ²⁰



Pregnancy and Child Rearing

Women in their post-natal phase should be given separate and proper accommodation for at least one year after delivering a baby to maintain their standard of hygiene and for the protection of baby from infections and other diseases. The Supreme Court of India had issued guidelines in 2006 regarding children in prisons. ²¹ Before sentencing a pregnant woman, the authorities must ensure basic minimum facilities considering pre- natal, natal, and post- natal issues for them. As per the law in Indonesia, women can keep their babies with them in prisons until they are two years of age ²² but there is no formal structure or special facilities to take care of them and usually prisons adopt an informal system

where block/cell leader will provide the goods/facilities as per the needs of that particular block/cell inmates.

Pregnant women should be provided with better diet, proper examinations by gynecologists in the Government Hospitals. Arrangements should also be made for temporary release of women for the delivery of babies in hospitals and not in the prisons as well as suspension of sentence must be considered.

Women in solitary confinements:

Solitary Confinement is used as punishment and for exacerbating the mental illness. Solitary Confinement is psychologically very disturbing especially for the prisoners who have pre- existing

²⁰ Amala Rahmah et al, 'The Health Of Female Prisoners In Indonesia' (2014) 10(4) *International Journal of Prisoner Health*.

²¹ *R.D. Upadhyay vs State Of A.P. & Ors* (1999) SC 2183

²² 'Laws On Children Residing With Parents In Prison', *Loc.Gov* (Webpage, 2014) <https://www.loc.gov/law/help/children-residing-with-parents-in-prison/foreign.php> .

mental illness. The isolation and absence of normal life can further contribute to psychological deterioration.

Pregnant women or postpartum prisoners should be sent to solitary confinement only in very extreme situations or circumstances. It hampers availability of the important health care services which pregnant women has otherwise right to get. Women are usually embarrassed to request medical help or hesitate for such services from correctional officers because these requests require intimate medical information.

Women in solitary confinement experiences the high rate of physical or sexual abuse and traumas as they are forced to be in conditions where they are under surveillance for 24 hours of authorities. Human rights organizations totally condemned the presence of male officers to supervise women prisoners because presence of them can reinforce the feelings of vulnerability in women and can again re-traumatize those who have violent history. Their presence increases the risk of sexual violence at the sites. Instances of force, misusing of restraints, abuse of power, and sexual abuses by male officers increases in solitary confinement as these cells are separated and cannot be detected easily by anyone.

The vulnerable population should never be kept in Solitary confinement- like pregnant, postpartum prisoners, prisoners having mental health issues, or any other health problems because they may be exacerbated in isolation. Prisoners sentences

to solitary confinement should undergo mental and medical health check us by practitioners before and during their stay. Prisons should be regularly and publicly inspected and monitored by special authorities.

According to Supreme Court Right against solitary confinement comes under Article 21 of the Constitution i.e. Right to Life²³ and states that keeping a prisoner in solitary confinement for a long period would lead to physical and mental ill health.²⁴

Excerpts from the news reports of India and Indonesia

Many cases regarding sexual violence happened to women when they face criminal officer both in India and Indonesia. For examples:

1) June 2017, India:

On June 24, 2017, female inmates rioted because a woman inmate died the previous day in the custody. A witness described that she heard the screams of the deceased as her legs were forcefully opened and a stick was shoved into her vagina by female guards in the prison after she complained about the availability of food to them.²⁵

2) April 2019, India:

Superintendent of Jail, a woman police personnel and some prisoners were inquired in the case of sexual harassment as a woman prisoner at Muzaffarpur's Shahees Khudiram Bose Central Jail, India alleged them for not only sexually harassing her but her daughter as well.²⁶

3) October 1989, Indonesia

assaulted-in-an-indian-prison-sparking-a-riot-but-media-coverage-has-turned-her-death-into-a-footnote/ .

²⁶ 'Woman Prisoner Alleges Sexual Harassment By Jail Superintendent', *The Asian Age* (Webpage 4 April 2019) <<https://www.asianage.com/india/all>

²³ *Unni Krishnan & Ors. v. State of Andhra Pradesh & Ors* [1993] SCR (Supreme Court of India)

²⁴ *Sunil Batra v. Delhi Administration* [1979] SCR (1) 392 (Supreme Court of India)

²⁵ Washington Post, <https://www.washingtonpost.com/news/worldviews/wp/2017/06/28/an-inmate-was-brutally->

Mrs Suhani, 28, was arrested on October 11, 1989, was arrested as she was caught during shoplifting. She was taken to the police station in Pasar Minggu where she was raped by three policemen. Her family was asked by the police to pay off Rp. 79,950 (about \$50) to settle the case. When she tried to complain against them, she was forced to say that it was consensual.²⁷

4) May 1989, Indonesia

Rustamat, 29, was arrested for stealing ten kilograms of tangerines from a neighbour. After 52 days in the custody of the police, he died. His wife made a statement that she was offered by a police officer to have a sexual relationship with him in return of a less statement for her husband.²⁸

5) December 2019, Indonesia:

On December 06, 2019, two police officers had been investigated for sexual harassment of a woman prisoner at Papua Police headquarters in Jayapura which was then confirmed by Papua Police chief Insp. Gen. Paulus Waterpauw.²⁹

Legal Instruments on Rights of Incarcerated Women: A comparative Study

1) National Instrument

Constitution of any country is the grundnorm, and all the powers, rights, and liabilities flow from it. It is the base for any state policy or law. In this part, we have critically analyzed the different articles of the

Indonesian and Indian constitutions and their relevance with the rights of women prisoners against sexual harassment.

a) India:

The protection for women in prison under India national regulation regulate in many aspects. Prisoner rights have been protected under the Constitution of India and Prisons Act, 1894. Prisoners are entitled to every fundamental right inscribed in the Constitution which cannot be curtailed because of their status in the society unless explicitly reduced by the legal setup.³⁰

Additionally, Article 14 of the Indian Constitution states that “*the state shall not deny to any person equality before law or the equal protection of the laws within the territory of India*”.³¹ This Article is very important as it can be interpreted to end discrimination and encourage equality among different prisoners.

Moreover, Article 15 empowers the state to prevent discrimination based on religion, race, caste, sex, place of birth or any of them³² and Article 19 grants freedom to all citizens of the country. Some of the freedoms because of their nature are not allowed to the prisoners while they are in prisons however, the right to speech and expression, non-discrimination which is mentioned under those articles persists with them.³³

Then, Article 21 states that “*No person shall be deprived of his life or personal liberty except according to a procedure established by law*”.³⁴ This article specifies

india/140419/woman-prisoner-alleges-sexual-harassment-by-jail-superintendent.html>.

²⁷ Human Rights Watch, *Prison Conditions in Indonesia*, Report, (1990) 77.

²⁸ Ibid 25.

²⁹ Police Officers Accused Of Sexually Harassing Prisoner In Indonesia, *Asiaone* (Web Page) <<https://www.asiaone.com/asia/police-officers-accused-sexually-harassing-prisoner-indonesia>>.

³⁰ *State of Andhra Pradesh v Challa Ramkrishna Reddy* [1989] AP 235.

³¹ *Constitution Of India* Article 14.

³² *Constitution of India* Article 15.

³³ *Constitution of India* Article 19.

³⁴ *Constitution of India* Article 21.

two concepts, right to life and right to liberty. This article is for all the citizens including prisoners. There are various rights within the ambit of article 21 which are available to prisoners:

- i. Right of inmates to have a safe environment.³⁵
- ii. Right to have a free trial.³⁶
- iii. Right to have free legal aid.³⁷
- iv. Protection against custodial violence and death.³⁸
- v. Right to life with human dignity.³⁹

Besides the Constitution, other rights provided to prisoners are:

- i. Right to meet their friends.⁴⁰
- ii. Right against solitary confinement and protection from torture.⁴¹

There are also various provisions in the Prisons Act, 1894 that talk about the reformation of prisoners such as:

- i. Providing accommodation and sanitary conditions to prisoners.⁴²
- ii. Providing shelter and safe custody.⁴³
- iii. Medical examination of prisoners by qualified medical practitioners.⁴⁴
- iv. Separation of prisoners according to their gender or type of crimes.⁴⁵

These rights are for the protection of both men and women. They are equally provided with all facilities according to the Constitution of India and Prison Act, 1894. Moreover, Crimes against the body and

women have been penalized under Indian Penal Code, 1860.

On the other hand, section 294 talks about the conduct of any person making any obscene acts in any public place or singing obscene songs to annoy shall be punished for the imprisonment for the term of up to 3 months or fine or even both.⁴⁶ Section 354 A of the code addresses sexual harassment whether by any physical contact or conduct involving sexual overtures.⁴⁷ Section 354 B: outraging the modesty of a woman: includes the offence of an assault or using any criminal force against the woman or abetting her to disrobe or get naked.⁴⁸ All these provisions are related to the offence committed by man against women. Only a man can be punished under this part.

Moreover, Section 354 D talks about the offence called stalking and it constitutes a woman continuously followed or contacted by someone either online or in-person where she clearly shows no attention in that. This section is an exception to an act of stalking done by the person when he is legally authorized to do so.⁴⁹

The section 375 constitutes rape of a woman, if a man commits any sexual intercourse without her consent, by fraud, force or in fear violating her privacy her sanctity.⁵⁰ It also explains how any act can constitute to rape like inserting of a finger or any object in the mouth, vagina or anus of a woman will also be included in it and it

³⁵ *Upendra Baxi v State of UP* [1983] 2 SCC.

³⁶ *Rattiram v. State of M.P.* (2012) 4 SCC.

³⁷ *M.H. Hoskot v. State of Maharashtra* (1978) 3 SCC.

³⁸ *D.K. Basu v. State of W.B.* (1997) 1 SCC.

³⁹ *Jeeja Ghosh v. Union of India* (2016) 7 SCC.

⁴⁰ *Sunil Batra v. Delhi Administration* [1980] SC 1579.

⁴¹ *Prem Shankar Shukla v. Delhi Administration* (1980) SC 1535.

⁴² *Prisons Act 1894* (India) s 4.

⁴³ *Prisons Act 1894* (India) s 7.

⁴⁴ *Prisons Act 1894* (India) s 24(2).

⁴⁵ *Prisons Act 1894* (India) s 27.

⁴⁶ *Indian Penal Code 1860* (India) s 294.

⁴⁷ *Indian Penal Code 1860* (India) s 354A.

⁴⁸ *Indian Penal Code 1860* (India) s 354B.

⁴⁹ *Indian Penal Code 1860* (India) s 354D.

⁵⁰ *Indian Penal Code 1860* (India) s 375.

doesn't confine itself to the penile-vaginal intercourse only.

Then, Section 376 has the punishment for rape which can be extended to life imprisonment or capital punishment.⁵¹ Section 376 also includes rape by police officer committed within the limits of a police station where he is appointed, or in the premises of any station house, may or may not be situated in the police station where he is appointed, and the woman was in the custody of that police officer or any officer subordinate to him.⁵² Public Servant includes the prison authorities also, putting prisoners in confinement and committing any sexual act.⁵³

An act would be rape if a person supervising the management or the jail, remand home or any place of custody established by law for women takes advantage of his official position.

Section 509 - if someone utters any word or makes any gesture intends to insult the modesty of a woman and intrudes her privacy. The offender is punished with simple imprisonment for the term which may extend to three years and can be combined with fine also.⁵⁴

Critically analyzing the provisions of Indian Penal Code 1860 that though there are provisions for the women protecting them from sexual harassment but the word 'modesty' has not been defined anywhere. As per the Justice Verma Committee Report,

there is a need to include more specific acts which can be covered under section 509 such as acts or gestures creating unwelcoming threat or fear of sexual nature. The word obscene has also not been defined anywhere yet and has been used differently as per the instances of the case.

b) Indonesia:

The Constitution of Indonesia, 1945 and Pancasila recognize and incorporate human rights.⁵⁵ Part X and XA of the Constitution talks about the citizens and their fundamental rights. It could be seen such as:

- i. Right to life has been enshrined under Article 28 A of Indonesian Constitution⁵⁶;
- ii. Article 28 D talks about the right to equality;⁵⁷
- iii. Article 28G states various rights like protection of oneself and protection of one's dignity, honor, property etc;⁵⁸
- iv. Article 28H focuses on the health and well-being of the citizens that assertively pose a duty on the state to provide it to them;⁵⁹
- v. Article 28I incorporates the principle of Convention against torture and imposes the duty on the state to act for the same;⁶⁰ and
- vi. Article 34 obligates the state to take care of weak and vulnerable people and to empower them.⁶¹

⁵¹ *Indian Penal Code 1860* (India) s 376.

⁵² *Tuka Ram And Anr vs State Of Maharashtra* (1979) 1 SCR.

⁵³ *Indian Penal Code 1860* (India) s 24.

⁵⁴ *Indian Penal Code 1860* (India) s 509.

⁵⁵ Lalu Jumaidi, I. Nyoman Nurjaya and Zainal Asikin, 'Legal Protection For Prisoners For A Conditional Exemption In The Perspective Of Human Rights' (2017) 8(1) *Mediterranean Journal of Social Sciences*.

⁵⁶ Pasal 28 A *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945* (Indonesia).

⁵⁷ Pasal 28 D *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945* (Indonesia).

⁵⁸ Pasal 28 G *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945* (Indonesia).

⁵⁹ Pasal 28 H *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945* (Indonesia).

⁶⁰ Pasal 28 I *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945* (Indonesia).

⁶¹ Pasal 34 *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945* (Indonesia).

These human rights under part XA explain that it puts an obligation on the state to make and enforce the laws based on the principles of human rights as enshrined in it.

These rights cannot be curtailed in any circumstances except by the procedure of law and have been incorporated in the Law of the Republic of Indonesia Number 12 of 1995 related to corrections which have various amendments related to penitentiary system and states that inmates should be treated with equal dignity. The guarantee to enjoy human rights is also put forth in Law No. 39 of 1999 on Human Rights.

Article 3 of the Law Number 12 1995 states that the main objective of the correctional institution is to reform the inmate so that he can re-enter the society with good and healthy behaviour and act as a responsible citizen.⁶² Furthermore, Article 5 explains the principles on which correctional system is based that are:

- i. Aegis
- ii. Equality of treatment, care, and service
- iii. Education
- iv. Guardianship
- v. Respect for human dignity
- vi. Loss of liberty is the only suffering
- vii. Guaranteed right to be in touch with the family and certain people.⁶³

Article 12 states that on the following basis:

- i. Age of the inmate.
- ii. Gender of the inmate.
- iii. Length of the sentence imposed.

- iv. Type of crime; and
- v. According to the needs of the inmates

There will be a classification in the correctional system and female prisoners will be kept in the designated setup for them.⁶⁴

Meanwhile, Article 14 talks about the rights of prisoners which include rights like health services, proper food, and the right to file a complaint.⁶⁵ As mentioned in Article 2 these rights are subject to state legislations and human rights which are inscribed in international instruments.⁶⁶ Government Regulation no. 87 of 2014 talks about reproductive rights⁶⁷ and one's autonomy in taking decisions related to one's sexual life.⁶⁸ Articles 285 to 290 of the Code of Penal explicitly talks about the violation of women but it doesn't categorize the sexual harassment in the fiduciary relationship or by police if we compare it with sexual violence eradication bill which hasn't been passed yet, the Code of Penal needs various changes to fit the needs of a dynamic society and to protect women in all spheres.⁶⁹

2) International Instruments

a) India:

National Human Rights Commission of India has played a significant role in the protection of human rights accorded by the Protection of Human Rights Act, 1993. Its function is to recommend and discuss with the concerned ministries and conform the international human rights standards which are accepted by the Government of India.

⁶² Pasal 3 *Undang Undang No. 12 Tahun 1995* (Indonesia).

⁶³ Pasal 5 *Undang Undang No. 12 Tahun 1995* (Indonesia).

⁶⁴ Pasal 12 *Undang Undang No. 12 Tahun 1995* (Indonesia).

⁶⁵ Pasal 14 *Undang Undang No. 12 Tahun 1995* (Indonesia).

⁶⁶ Pasal 2 *Undang Undang No. 12 Tahun 1995* (Indonesia).

⁶⁷ Pasal 73 c *Health Law No.36 Tahun 2009* (Indonesia).

⁶⁸ Pasal 5C *Population Law No.52 Tahun 2009* (Indonesia).

⁶⁹ Ani Purwanti and Rian Adhivira Prabowo, 'Women Rights Fulfillment As The Victim Of Gross Human Rights Violation: Urgency For The Sexual Violence Eradication Bill' (2018) 8(3) *Indonesia Law Review*.

It urged the ministry of human rights for the formal notification of The Convention on the Elimination of all forms of Discrimination (CEDAW). India has signed CEDAW on July 30, 1930, and ratified it on July 9, 1993, with reservations. The reservations were put on Article 29 of the convention. India had made a declaration to abide by all the obligations of the convention related to the 'policy of non-interference' concerning Article 5(a) and 16(1). Though India supports Article 16(2) of the Convention, this Article is not practical in a country like India with a variety of customs and religions. Despite the reservations on the convention, the status of women is getting better legally and in terms of political participation. India has also incorporated the protection of women in Articles 13, 14, and 15 of the Constitution.⁷⁰

India agreed to International Covenant on Civil and Political Rights (ICCPR) on April 10, 1979. India has made declarations related to the article 1,9,12,13,19(3), 21, and 22. The last review of India under ICCPR was conducted in 1997. According to that review, though India has a wide range of constitutional institutions and legislative framework for Human Rights there is a serious need for the implementation of CCPR ability to put it into the practice and made some recommendations to comply with. The NHRC reviewed and conveyed its comments on various National laws and draft bills that cover the rights mentioned under ICCPR including legislations such as Terrorist and

Disruptive Act (Prevention) Act, 1987; Protection from domestic violence bill, 2000; Communal violence (prevention, control, and rehabilitation of victims) bill, 2005; Prevention of torture bill, 2009 and many others.⁷¹

India also signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) in 1997 but didn't ratify it. It has made some reservations against the provisions of CAT such as in Articles 20, 21, and 22. The International Commission of Jurists and many other states have urged the Government of India to ratify the convention during Universal Periodic Review.⁷²

India is also a member of ASEAN Regional Forum since 1996. ASEAN – India partnership has its goals and objectives set from 2016-2020 of Peace, Progress and Shared Prosperity. Both sides have been addressing the common and emerging challenges for overall peace, stability, and prosperity.

b) **Indonesia:**

The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) is the earliest international human rights treaty which was signed and ratified by Indonesia and it became the foundation for the National Commission on Violence against Women of Indonesia in 1999 set up under the Presidential Order No. 181/1998 which majorly recommends changes, do

⁷⁰ National Human Rights Commission India, 'A Handbook on International Human Rights Conventions' (2012) <https://nhrc.nic.in/sites/default/files/A_Handbook_on_International_HR_Conventions.pdf>.

⁷¹ Citizens Against Hate and Quill Foundation, 'India's compliance with ICCPR' (2019) <https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/Ind/INT_CCPR_ICS_Ind_34909_E.pdf> .

⁷² Law commission of India, 'Implementation of 'United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment' through Legislation (Report 273) (2017) <<https://lawcommissionofindia.nic.in/reports/Report273.pdf>>.

campaigns, creates awareness, and investigates the matters.⁷³

Indonesia has also signed International Covenant on Civil and Political Rights and ratified it by legislating it as the Law No. 12/2005. The Indonesian government has enacted its human rights laws through Law No. 39/1999 on Human Rights which also makes it mandatory for the government to create the National Human Rights Commission of Indonesia (NHRCI) and Law No. 26/2000 for the formation of Human Rights Court.⁷⁴

It has also signed Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and ratified through Law No. 29/1999 but with 1 reservation only that it will not be bound to the jurisdiction of International Court of Justice.⁷⁵

As a member of ASEAN, Indonesia has made lots of efforts in the promotion and protection of human rights in the region by being a signatory of ASEAN Declaration of the Advancement of Women (1988), ASEAN Declaration on the Elimination of Violence Against Women (2004), and ASEAN Declaration Against Trafficking in Persons Particularly Women and Children (2004).⁷⁶ It is an exigency to bring a detailed model of prison institutions to disseminate contemporary principles and practices regarding the victimization of offenders in the prisons. It's impossible to bring a one set of rules for all the places or territories in the world. In the same manner, one set of rules can't be made for every age group people, gender, and community. Prison Authorities must be prepared to protect and provide care

to vulnerable classes and no discrimination should be done to prisoners based on the race, colour, sex, language, and religion. Incarcerated women must also be provided with recreational facilities and educating sessions.

The only way to observe a violent death is by post mortem and if there is a case of unnatural death of a prisoner there should be a proper inquiry on the matter. The growing numbers in prisons with 2,10,693 as per June 2020, ranked Indonesia fourth in the world.⁷⁷ So, there must be proper discipline among prisoners and staff authorities facilitated with a safe environment and better lives in prisons. Indonesia has established various institutions and practices to curb human rights violations but the failure of legislation and lag in implementations led to the abuse of the administration of criminal justice.

IV. CONCLUSION

Globally, women are face many issues in prisons, of which the most contemptuous is that of sexual harassment. Despite vast development on the area of the sexual rights worldwide, women still are impuissant to claim it in their routine relationships, forget about incarcerated women asserting such rights. The development of international law on this aspect has created immense awareness but due to unenforceability, it could not be implemented on all the states without any reservations thereto. Indonesia and India both have significantly made welfare changes in criminal justice administration for the protection of incarcerated women, but the system is still flawed and needs prompt improvements.

⁷³ United Nations Human Rights Treaty Bodies, Core Documents, (2010) <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/CoreDocuments.aspx>.

⁷⁴ Tentang Hak Asasi Manusia, *Undang-Undang Nomor 39 Tahun 1999*

⁷⁵ *Core Documents*, (n 74) 'CAT'.

⁷⁶ *Core Documents*, (n 74) 'ASEAN'.

⁷⁷ Statista, Countries With The Most Prisoners 2020, (Webpage) <<https://www.statista.com/statistics/262961/countries-with-the-most-prisoners/>>.

Indonesia has implemented some of the standards from Bangkok Rules which are partially binding in nature affects its efficiency and lack of comprehensive and verifiable data to formulate effective policies empirical data and researches begs the question of safety, security and rights and on-going treatments of the women inmates. The Indonesian prison system needs to legislate and implement an extensive as well as efficacious set of regulations to improve the on-going situation of the prisons like the introduction of a new law in 2014 for juvenile offenders. The government should regulate the prison administration and should anticipate proper funds for regular evaluations of the prison systems and give authority to the National Commission on Violence against Women and the National Commission on Human Rights for collecting data on the victims, their relationships with perpetrators, on prosecutions, convictions and sentences in relation to the violence and sexual abuse with women in prisons. Since the only way to report the sexual abuse or any kind of torture in prisons is to the warden, the grievance redressal mechanism system should be genuine, non-partisan and responsive for the effective justice and reparation and the absence of provisions in the Code of Penal makes lodging complaints about police misconduct more strenuous if compared with that of India, it has specific provisions for different conducts or acts that violates the integrity of women. There has been no statistics of violence against transsexual people in Indonesia in general and as well as in prisons. We could not find any cases on Supreme Court and Constitutional court directory related to sexual harassment of women in prisons. There has be no latest news reported on sexual assault on women in prisons and most of the studies and reports on the government

sites are not in English, so it made a lag in the qualitative research. And there was only one study on the general health of the women in prisons, when compared to India there have been a lot of news reports, prison statistics and reports from various organs of government which gives a better insight as to the conditions of prisons. There have been studies on individual states also by the government as well as non-profit and non-governmental organizations which creates more transparency and judicial activism on such concerns makes justice and reparation available to victims.

Though there are number of legislations laid down for the welfare and protection of women and the treatment of prisoners in the International domain, states have yet to implement it. Prison Statistics provided by NCRB in India do not specifically mention the cases of sexual harassment or assault in the prison by inmates or prison authority which makes it very difficult to know the exact number of victims. There has been no positive outcome of the suggestions provided by National prison manuals in India for the protection of women in the prison because of its ineffective implementation. To strengthen the basic rights of women in prisons, following areas like legal aid in prisons, better systems of conjugal visits, permanent availability of doctors in the cells should be looked upon and governments must let international human rights organizations to independently inspect and interview the inmates. More importantly, the psychological health of the inmates has been overlooked and no recent study has been found on this aspect in India or Indonesia. Moreover, we need to be conversant with the prison system as the sacrosanct part of the society and sensitize our attitude towards the same. A sensitized society, conscious media,

and functional organizations are the strongest metals to the statutory armor.

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