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A Foreword from the Editor

Studio Nilima: Collaborative Network for Research and Capacity Building is an expanding network of legal professionals, academicians and social scientists in North East India. Studio Nilima, was started with the vision to extend the frontiers of law in creating an interdisciplinary practice of legal and policy research while providing a space for bringing together lawmakers, policy makers, thinkers, practitioners and students from different schools to engage with the issues that emanate from the areas of law, culture, governance and society.

In September 2017, *Pratidhwani (The Echo): Free Legal Awareness and Legal Services* campaign of Studio Nilima was introduced as a pilot project by situating itself in the correctional homes of Assam, with the aim of providing effective legal services to the inmates in need of it. Justice Krishna Iyer had very appropriately observed that, "*prisons are still laboratories of torture, warehouses in which human commodities are sadistically kept and where spectrums of inmates range from drift-wood juveniles to heroic dissenters*". The idea of prison reforms has very slowly but gradually been introduced in the prison administration system of India, especially post Independence. However, with respect to the international standards of treatment of prisoners, India still has a very long arduous journey ahead of itself. Our Indian Judiciary has over the decades through various landmark decisions, like *Sunil Batra 'II' v. Delhi Administration,*

D.K. Basu v. State of West Bengal, Prem Shankar Shukla v. Delhi Administration, Dharmbir v. State of Uttar Pradesh, etc., has empowered the cause of reformation in prison administration and ensured that the most basic of human rights are necessarily granted to the prisoners. *Pratidhwani* too stands with the same objective that the inmates of the correctional homes in Assam are entitled to effective legal representation and their right to live with human dignity-and aims to achieve this objective by bridging the gap between the laws that provide such rights to the prisoners which often remain inaccessible due to ground conditions, with the help of para-legal volunteers who assist practising lawyers.

In the past year, the team of *Pratidhwani* has visited the Central Jail, Jorhat, Central Jail, Guwahati and Central Jail, Tezpur; and the District Jail, Morigaon, District Jail, Goalpara, District Jail, Mangaldoi and District Jail, Kokrajhar to provide legal aid to the inmates. *Pratidhwani* has also conducted two legal awareness camps in the district of Baksa. The team has also visited the detention camps that have been set up within the jail premises at Jorhat, Goalpara, Tezpur and Kokrajhar during which several issues that plague the prison administration system is Assam were identified and this issue of *Nilima: A Journal of Law and Policy* is the culminated efforts of studying these issues and trying to provide effective suggestions in the area.

In the visits to these correctional homes, our team of *Pratidhwani* chanced upon- literature in forms of poems, songs and in some cases, even journals being published by the inmates of these prisons, which provoked, stirred and challenged our very linear understanding of the correctional home context. This journal opens with a section named *Voices from Within* where we have extracted the works of three inmates, namely, Anis Ahmed from District Jail, Morigaon; Dulal Nath, District Jail, Morigaon and Abdul Hakim Kadori, District Jail, Goalpara. The voices have been deliberately presented in the language of the inmates to bring to our readers their authentic and very real lived experiences in the correctional homes,

The next section, *Studies from the Field,* brings out the reflections and some academic and legal questions that we grappled with while engaging and interacting with these correctional homes. The first article in this issue titled *Not a Level Playing Field: Onerous Conditions for Bail and its Effects on the Criminal Justice Delivery System*, Krishanu Kar has commented upon the existing

issue of inmates being incarcerated in jails for an indefinite amount of time during their term as an under-trial prisoner who have been granted bail but could not be released because of their inability to fetch surety.

Anubhab Atreya, through his article *Sentencing by Red Tape: Examining Remission in the Correctional Homes of Assam* looks at the issue of remission which is one of the most crucial processes in the penal system, not only for the prisoner but also for the prison administration by examining the current legal framework that governs the process of awarding remission.

Trishna Devi, in her article *Juveniles in Jails: Missing Link Between Practice & Procedure*, looks into the laws that protect the rights of the juveniles in the penal system and also interrogates the existing menace of detaining juveniles in the correctional home of Assam. With data collected from the field, her article provides a important insight into the this persistent problem and tries to highlight the gaps that remain in the codified law and the reality that exists in the our correctional homes.

When one speaks about prison reforms a very vital aspect of the area that is often overlooked is the issues that are faced by the prison administrative staff, and this concern is addressed by Sourabh Roy in his paper, *Perceiving Correctional Administration from the Perspective of Correctional Staff*, where he deals with not only the service and working conditions but also the living conditions of the correctional staff working within our correctional homes and how it effects the prison administration in Assam.

Despite all the problems that our team has observed in the various correctional homes, a very contrasting image has been seen in our visit to the Open Prison in Jorhat-a prison without walls. Pushpanjali Medhi, through her paper *Mukoli Karagar: A Case Study of Mahendra Nagar Open Jail, Jorhat* looks at the very interesting and slowly growing jurisprudence of open jails which has been a revelation in the area of prison reforms.

The third section of the journal termed *Field Notes* documents one of our ongoing efforts related to the issue of Declared Foreign Nationals lodged in the prison context. The first entry *Detention without Conviction: Intervening in the Detention Centres of Assam*, the result of Studio Nilima's intervention in the Supreme Court through Interlocutory Application No. 105821/2018 in the *Re-Inhuman Conditions in 1382 Prisons* matter, looks into the various

issues related to the detention of 'convicted' and 'declared' foreign nationals within the detention camps set up in Assam inside the jail premises at Dibrugarh, Goalpara, Jorhat, Kokrajhar, Silchar and Tezpur.

The second entry documents particular best practices of which relate to the field of education, jail industries and leadership initiatives demonstrated by jail administrative staff in the various correctional homes of Assam.

I would like to extend my heartfelt gratitude to the Inspector General of Prisons, Assam, the District Authorities and the undying efforts of the Prison Authorities who despite the hard work that they put into their daily-lives were gracious and supportive in all our visits to the correctional homes in Assam. It has been my pleasure to work with the dedicated team members of Studio Nilima. I hope these articles provide useful insights into the various aspects of prison administration and also introduce new ideas into the area of prison reforms.

Mr. Justice (Retd.) Brojendra Prasad Katakey

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VOICES FROM WITHIN

হিয়াৰ বেদনা

আনিহ আহমেদ, মৰিগাঁও জিলা কাৰাগাৰ, অসম।

অকলশৰীয়া কৰি, বিৰহৰ বেদনাৰ জুই হৃদয়ত এৰি
আই-বোপাৰপৰা পৃথক কৰি
দিলে মোক চাৰিবেৰৰ নিজান বনত।
৩০২ ধাৰাৰ বলিয়া হই, মৰ্ত্তত জীৱনৰ শাস্তিৰ টোপোলা
মূৰত লৈ, ঘূৰি ফুৰো এই সৰু সংসাৰত।।
নিষ্ঠুৰ বিচিত্ৰ ধুমুহাৰ কালৰ গতি,
নিলে কাঢ়ি সংসাৰৰ সকলো সুখ-শান্তি,
জ্বলন্ত জুইকুৰা হৃদয়ত দি, কৰিলি চিৰকালৰ বাবে বন্ধ্যা
প্ৰভু ! নুবুজিলো তোমাৰ বিধৌৰ বিতোপন,
কালি আমি দেখিছিলো নাচি-বাগি ফুৰা,
আজি আমাৰ এই চাৰিবেৰৰ ভিতৰত শয়ন।।
স্ত্ৰী-ভাৰ্যা-পুত্ৰ, ধন-জন, দিলো মই সকলো বিসৰ্জন,
বন্ধু-বান্ধৱ-মিতিৰ কোনো নাই মোৰ লগৰীয়া।
আনন্দৰ পখি মোৰ উৰি গ'ল দু:বেদনাত হিয়া পৰি ৰ'ল
সংসাৰত আজি কেৱল, আমি অকলশৰীয়া।

সিপিঠিত ...

বন্দীৰ বান্ধনত পৰি, মানসিক স্মৃতি শক্তি নাইকীয়া কৰি
দুখে ভৰা হৃদয় লৈ, আধা মৰা হৈ কটাই আছো জীৱন
মুক্তি পোৱাৰ আশাতে বাট চাই চাই
হঠাৎ হ'বঁগা কিজানি আমাৰ মৰণ।।
অ' দয়াময়? আচল পাতি খুজিছো আমি
তোমাৰ চৰণত এটি ভিক্ষা,
বন্দীৰ বান্ধনৰপৰা মুক্তি কৰি, দিয়া মোক প্ৰাণত আশ্বাস
লক্ষ্মণ ৰেখাৰ দৰে তোমাতে সদায়,
থাকে যেন অটল বিশ্বাস।।
স্বাধীন জীৱন কাঢ়ি পৰাধীনে দিলে আহি ভৰি
হিয়াৰ বেদনাৰ জ্বালখনি চকুৰ আঁতৰ কৰা
প্ৰভু ! তোমাৰ ঐশ্বৰিক ৰূপৰ মোহন মেলা,
আমাৰ বন্ধী আই বোপাসকলৰ আগত দাঙি ধৰা।।

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গীত

ফুটিজ' নিলিমা লৈ মনত পৰে, অ মনত পৰে

দুলাল নাথ, মৰিগাঁও জিলা কাৰাগাৰ, অসম।

ফুটিজ' নিলিমা লৈ মনত পৰে, অ মনত পৰে
আশাবোৰ যেতিয়া ফুল হৈ ফুলে
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তেতিয়া তোমালৈ মনত পৰে।।
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নিয়ৰ কণিকা দুখৰে দুৱৰি
জোনে পাখি মেলে নভৰে কৰণি
তেতিয়া ফুটিজ' নিলিমা লৈ মনত পৰে, অ মনত পৰে।।

সেউজ্ পথাৰৰে ঘাঁহনি ডৰা
তাতে বহি তুমি কিনো চিন্তা কৰা
তেতিয়া ফুটিজ' নিলিমা লৈ মনত পৰে, অ মনত পৰে।।
লা-লা-লা-হু-হু-হু।।

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বন্দিত্ব জীৱনৰ পৰিৱৰ্তনৰ দিনপঞ্জী

আব্দুল হাকিম কাদৰী, গোৱালপাৰা জিলা কাৰাগাৰ, অসম।

গোৱালপাৰা জিলা কাৰাগাৰত এখন সাহিত্য-সংস্কৃতিৰ আলোচনা-সভাত যাৱজ্জীৱন কাৰাবন্দী আব্দুল হাকিম কাদৰীৰ নিজে লিখা বক্তব্য পাঠ কৰাৰ এটা অংশ ঃ

গোৱালপাৰা জিলা কাৰাগাৰ প্রাংগণত যোৱা ইং ৫ ছেপ্টেম্বৰ, ২০১৭, দুপৰীয়া ১ বজাত এখন সাহিত্য-সংস্কৃতিৰ বিষয়ৰ আলোচনা চক্র অনুষ্ঠিত হয়। উক্ত আলোচনা চক্রত কাৰাগাৰ অধীক্ষক মহোদয়ৰ সভাপতিত্বত বাহিৰৰপৰা বিশিষ্ট ব্যক্তি উপস্থিত আছিল। কাৰাবাসী সকলোৱে সভাখনত যোগদান কৰাৰ উপৰি বিভিন্ন বিষয়ৰ ওপৰত গল্প-কবিতা, ৰচনা আৰু প্রবন্ধ আদি চমুকৈ লিখি পাঠ কৰি সকলোৱে আনন্দ উপভোগ কৰিলে।

উক্ত দিনৰ অনুষ্ঠানত কাৰাবন্দী আব্দুল কাদৰীয়ে অংশগ্রহণ কৰি বন্দিত্ব জীৱনৰ ১৩ বছৰৰ অভিজ্ঞতাৰে পাৰ কৰি অহা নিজস্ব কর্মৰ তালিকা আৰু মনৰ ভাব প্রকাশ কৰাৰ সুবর্ণ সুযোগ পোৱাৰ আপোন হাতেৰে লিখা বক্তব্য পাঠ কৰি বর্ণনা কৰাৰ কিছুমান অংশ।

আজি অনুষ্ঠানৰ উপস্থিত সন্মানিতসকল ঃ মাননীয় গোৱালপাৰা জিলা কাৰাগাৰ অধীক্ষক মহোদয় শ্রীযুত ৰঞ্জিত কুমাৰ বৈশ্য (সভাপতি), কাৰাধ্যক্ষ মহোদয় শ্রীযুত ত্রৈলোক্য চন্দ্র কলিতা, সহঃ কাৰাধ্যক্ষ শ্রীযুত কল্যাণ কুমাৰ মহোদয়, প্রধান প্রহৰী, সহ-প্রহৰী আৰু মোৰ মৰমৰ সংশোধনাগাৰৰ হাজোতী, ডি.এফ.এন. আৰু কয়েদী সকলোকে মোৰ অন্তৰৰপৰা শ্রদ্ধা আৰু মৰম জনাওঁ।

প্রথমতে, মই ক'ব বিচাৰো সংশোধনাগাৰ বাক্যশাৰী কিহৰ বাবে প্রয়োগ কৰা হ'ল? অতি পৰিতাপৰ বিষয় যে দেশ (ভাৰত) স্বাধীন হোৱাৰ পিছত আজিলৈকে যেন শব্দ ব্যৱহাৰ চলি আহিছে, কাৰাগাৰ, কাৰাবন্দী এই বাক্যটো শুনাৰ পাছত বহুতৰ মনৰ ভিতৰত সংকোচবোধ, ঘৃণা, ভয়-ভীতিৰ সঞ্চাৰ হয়, কাৰাবাসী সকলোকে তাচ্ছিল্য দৃষ্টিৰে চোৱা হয়।

তাহানি যুগৰপৰা চলি আহিছে যেন ম্যেনুয়েল মতে ইংৰাজ কালৰপৰা বাক্য। এতিয়া বর্তমান যুগত এই বাক্যৰ পৰিৱর্তনৰ প্রয়োজন আছে বুলি মই ভাবো।

উদাহৰণস্বৰূপে, ভাৰতবৰ্ষৰ কে'বাখন প্ৰদেশত জেল শব্দটোৰ পৰিৱৰ্তনৰ যো-জা চলি আছে। বৰ্তমান সময়ত মোৰ জনা মতে ভাৰতবৰ্ষৰ জেলখানাবোৰ পূৰ্বৰ তুলনাত বহু উন্নত আৰু পৰিৱৰ্তন হৈছে, কাৰাবন্দী বন্ধুসকলে এতিয়া জেলৰ ভিতৰত প্ৰস্তুত কৰা সামগ্ৰীসমূহ বাহিৰত বিক্ৰী কৰি হাজাৰ হাজাৰ টকা উপাৰ্জন কৰি আছে। বাঁহ-বেতৰদ্বাৰা প্ৰস্তুত বস্তু, সূতাৰ কাপোৰ (খাদি), কাঠৰ বন্যপ্ৰাণী, চৰাই, টাইটানিক জাহাজ, অসমৰ জাতীয় প্ৰতীক এশিঙীয়া গঁড়, মহাদেৱৰ মূৰ্তি, কাঠৰ খেলনাৰ লগতে মাটিৰদ্বাৰা প্ৰস্তুত কৰা বহুত আকৰ্ষণীয় হস্তনিৰ্মিত কাৰিকৰী বিভিন্ন কামে-কাজে লিপ্ত আছে। বৰ্তমান নেটৰ যুগত কম্পিউটাৰ প্ৰশিক্ষণ লৈ জেলৰ বাহিৰত চাকৰি কৰা আমাৰ চকুত পৰিছে। আনকি অভিযান্ত্ৰিক প্ৰশিক্ষণ লৈ অভিযন্তা হৈ কাৰাগাৰৰপৰা পুৱা ৯ বজাত বাহিৰলৈ গৈ সন্ধিয়া ৮ বজাত পুনৰ কাৰাগাৰত প্ৰস্থান কৰাৰ বহুতো উদাহৰণ আছে। ছফ্‌টৱেৰ, হাৰ্ডৱেৰ অভিযন্তাসকলে দিনটো কাম কৰি আছে। উন্নত ধৰণৰ বৈজ্ঞানিক পদ্ধতিত শস্য উৎপাদন, কৃষি-খেতি, বিভিন্ন ধৰণৰ ফুলৰ পুলি, ফুল উৎপাদন কৰি সমাদৰ পাইছে।

জৈৱিক সাৰৰ প্ৰকল্প স্থাপন হৈছে। শিক্ষাৰ ক্ষেত্ৰত অতীতৰ তুলনাত বহুত উন্নত হৈছে, বিদ্যালয়ৰ লগতে মহাবিদ্যালয়ৰ স্তৰৰ শিক্ষাদান চলি আছে, কৃষ্ণকান্ত সন্দিকৈ মুক্ত বিশ্ববিদ্যালয় স্থাপন হৈছে।

অসমৰ কেইখন কাৰাগাৰৰপৰা মেগাজিন প্ৰকাশিত হোৱা দেখা পোৱা যায়, প্ৰবন্ধ, ৰচনা, গল্প আদি পঢ়ি এনেকুৱা যেন লাগে কিমান প্ৰতিভাৱান ব্যক্তি কাৰাগাৰত আবদ্ধ হৈ থকাৰ পাছতো অকণমান সুযোগ (মেগাজিন) পোৱাৰ বিকাশ প্ৰকাশ কৰিব পাৰিছে।

মহিলা কাৰাবন্দীসকলৰ বাবে বিশেষভাৱে চিলাই মেচিনৰদ্বাৰা প্ৰশিক্ষণ দি মুক্ত হোৱাৰ পাছত স্বাৱলম্বী আৰু ৰোজগাৰৰ পথ প্ৰস্তুত কৰি দিয়া হয়।

আজিৰ উন্নত বিশ্বত আৰু এটা অনুষ্ঠানৰ উল্লেখ নকৰিলে মোৰ বক্তব্য প্ৰবন্ধ আধৰুৱা হৈ থাকিব, যোগগুৰু ৰামদেৱৰ উদ্যোগত বিশ্বজুৰি যোগ-ব্যায়ামৰ প্ৰশিক্ষণ চলি আছে— সেয়াও প্ৰায়বোৰ কাৰাগাৰত কাৰাবাসি বন্ধুসকলৰ লগতে কাৰাগাৰৰ কৰ্মকৰ্তা, কৰ্মচাৰীসকলে আদৰি লৈছে। এই উৎসাহ-উদ্দীপনাৰ বাবে তেওঁলোকক কাৰাবাসীসকলৰপৰা ধন্যবাদ জনাইছো।

কাৰাগাৰত (জেলত) সুদীৰ্ঘ ১৩ টা বছৰ অতিবাহিত কৰাৰ পাছত আৰু বৰ্তমান আজিৰ তাৰিখলৈকে ব্যস্ততাৰ মাজত নিজৰ কৰ্মমতে ব্যস্ত থকাৰ অভ্যাস কৰি লৈছো, আৰু থাকোও। মোৰ জেল-জীৱনত অবিস্মৰণীয় কৰ্মব্যস্ততাৰ উদাহৰণ আজিৰ এই সভাত পাঠ কৰি জনাব বিচাৰো যিসমূহ অসম কাৰাগাৰৰ কাৰাবাসীৰ বাবে গৌৰৱৰ বিষয়।

১। ইংৰাজী ২৩-১১-২০০৪ পৰা ০২-০৯-২০০৬ চনলৈকে গুৱাহাটী কেন্দ্ৰীয় কাৰাগাৰত থকাকালীন ইন্দিৰা গান্ধী নেছনেল অ'পেন বিশ্ববিদ্যালয়ত (IGNOU) ২ বছৰ কাল বন্ধ থকা অৱস্থাত দায়িত্ব পালো, নতুনভাৱে আৰম্ভ কৰাৰ আৰু কয়েদী ছাত্ৰসকলক পাঠদান কৰা, Co-ordinator দায়িত্বত উপ-কাৰাধ্যক্ষ ফাৰুক হক মহোদয়, তেখেতৰ সহযোগী আৰু পৰিচালনাৰ বাবে মোক (আব্দুল হাকিম কাদৰী-কয়েদী) IGNOU চেণ্টাৰত (জেলত) CFN কোৰ্চ পাঠ শিক্ষা ব্যৱস্থা কৰা হ'ল, পৰীক্ষা দিব লগা প্ৰায় ১২ জন শিক্ষাৰ্থীৰ পাছ কৰা চাৰ্টিফিকেট প্ৰদান কৰাৰ ৰেকৰ্ডত লিখিত আছে।

এই উদ্যম আৰু প্ৰচেষ্টাৰ ফলত কয়েদীৰদ্বাৰা (আব্দুল হাকিম কাদৰী) সম্ভৱ হ'ল। ২০০৫ চনত অসম কাৰাগাৰসমূহৰ কাৰাবন্দী কয়েদীসকলৰ খেল-ধেমালি, গান-বাজনা অনুষ্ঠানত

আব্দুল হাকিম কাদৰীৰ নেতৃত্বত ৭ জনীয়া কয়েদীৰ দল অংশগ্রহণ কৰি স্বর্গীয় ড° ভূপেন হাজৰিকাৰ এটি কাৱালী গীত গাই ১ম পুৰস্কাৰ পোৱাৰ যোগ্যতা অর্জন কৰে শংকৰদেৱ কলাক্ষেত্রত। ২। ইংৰাজী ০৩-০৯-২০০৬ ৰপৰা ০৪-১১-২০০৮ চনলৈকে কেন্দ্রীয় কাৰাগাৰ তেজপুৰত থকা সময়ছোৱাত কাৰাগাৰৰ ভিতৰত বিদ্যালয়ত শিক্ষকক সহায়-সহযোগিতা কৰাত শিক্ষক কলিতা মহোদয়ৰ অনুপস্থিত থকাত শিক্ষার্থীৰ লগত শিক্ষাদান কৰাত অৱদান (আব্দুল হাকিম কাদৰীৰ (কয়েদী) আছে।

প্রায় ২ বছৰ কাল তেজপুৰ কাৰাগাৰত থকাৰ পাছত অনুভৱ হ'ল যে, অসমৰ কলা-সংস্কৃতিৰ ঠাই উক্ত কাৰাগাৰত প্রায় সময়ে সময়ে সাংস্কৃতিক অনুষ্ঠানৰ লগতে বিভিন্ন ধৰণৰ প্রতিযোগিতা হয়, তর্ক বিষয়ৰ প্রতিযোগিতাত অংশগ্রহণ কৰি ১ম স্থানৰ অধিকাৰী হয় ডাঃ আব্দুল হাকিম কাদৰী (কয়েদী)।

অতি পৰিতাপৰ বিষয় ইমান ডাঙৰ নাম থকা কাৰাগাৰ এখনত অনুষ্ঠান পতাৰ বাবে নির্দিষ্ট কোনো মঞ্চ বা ষ্টেজ স্থায়ীভাৱে নাছিল। মই আব্দুল হাকিম কাদৰী (কয়েদী) আৰু মোৰ সহ-বন্দী (স্থানীয়) ৰাণা শইকীয়াক লগত লৈ সাহস, উদ্যম আৰু বুদ্ধিৰদ্বাৰা সম্পূর্ণ সহযোগিতাত ২৫ ফুট × ২৯ ফুট ফ্লু'ৰখন চিমেণ্টেৰে পকা, ওপৰত-টিঙৰ ছাউনি দি লাইট, ফেনৰ সুবিধা কৰি তৎকালীন কাৰাধ্যক্ষ পদত থকা শ্রীযুত গোবিন্দ মালাকাৰ মহোদয়ৰদ্বাৰা মঞ্চ উদ্বোধন কৰা হ'ল। সেই স্মৃতি বিজড়িত মুহূর্ত ভিডিঅ' ৰেকর্ডিং কৰি কেছেট সংৰক্ষণ কৰি থোৱা আছে। সেই বছৰতে বিহু আয়োজন কমিটিৰ উপ-সভাপতি আব্দুল হাকিম কাদৰী (কয়েদী) মোক পতা হ'ল। ইমান ডাঙৰ বৃহৎ কাৰাগাৰ থকাৰ পিছতো কয়েদী আৰু হাজোতীৰ বাবে কোনো ধৰণৰ খেল-ধেমালি পতাৰ উপযুক্ত ঠাই নাছিল, খালী থকা এডোখৰ দ ঠাই (পোতাশয়) ১ বিঘা মান বাৰিষাৰ দিনত পানী উপচি থাকে, সেই ঠাইডোখৰ আব্দুল হাকিম কাদৰীৰ প্রচেষ্টাত নিজৰ বুদ্ধিৰ বলত ১২-১৪ জন শ্রম নকৰা কয়েদীৰ কঠোৰ পৰিশ্রমত ২ মাহ পাছত খেল-ধেমালিৰ বাবে উপযোগী কৰি মঞ্চখন প্রস্তুত কৰা হ'ল। সেই মঞ্চখনত আজিৰ তাৰিখলৈ ক্রিকেট টুর্নামেণ্ট, ভলীবল প্রতিযোগিতা আৰু নানা ধৰণৰ খেল-ধেমালি সেই মঞ্চখনত হৈ আছে আৰু থাকিবও। মই আব্দুল হাকিম কাদৰী (কয়েদী) তেজপুৰ জেলৰপৰা অহাৰ পূর্বে প্রতিজন কাৰাবাসী কয়েদী হাজোতী সকলোৰে AIDS বেমাৰৰ অনুসন্ধানৰ বাবে তেজ পৰীক্ষা কৰা হ'ল আৰু প্রতিজনক তেজৰ ৰিপোর্ট প্রদান কৰা হ'ল তেওঁৰেই প্রচেষ্টাত। সকলোকে আমি ধন্যবাদ জ্ঞাপন কৰিলো। ইমান ডাঙৰ মহৎ কাম এটা সহজে সমাধা হৈ গ'ল।

ইংৰাজী ০৬-১২-২০০৮ ৰপৰা ০৭-০৯-২০১০ লৈকে নলবাৰী জিলা কাৰাগাৰত মোৰ নিজা বাসস্থানৰ (স্থায়ী ঠিকনা) ওচৰত থকাৰ বাবে কাৰাগাৰত আহিয়েই প্রথম পদক্ষেপ এইডছ বেমাৰৰ প্রতিৰোধ কৰাৰ বাবে প্রয়োজনীয় উপদেশ প্রদান কৰা হ'ল।

জেলৰ ভিতৰত আৰু গেটৰ সন্মুখত সুন্দৰ ফুলৰ বাগিচা এখন নির্মাণ কৰা হ'ল, বিভিন্ন ধৰণৰ ফুল গছ ৰোপণ কৰা হ'ল, পুখুৰীত চাৰিওকাষে বন্ডাৰ গাঁথনিৰে সৌন্দর্য বৃদ্ধি কৰা হ'ল।

নলবাৰী জেলত আটাইতকৈ ডাঙৰ সমস্যা দেখা পালো দমকলত ইমান বেছি আইৰন, যাৰ বাবে সেই পানী শৌচালয়ত ব্যৱহাৰৰ অনুপযোগী পানী পৰিশোধন কৰি সেই পানী শৌচালয়ত কঢ়িয়াব লাগে।

কাপোৰ ধোৱা আৰু গা ধোৱাৰ বাবে ২ বাৰ ফিল্টাৰ কৰিব লাগে। খোৱাপানী উপযোগী কৰাৰ বাবে ৩ বাৰ ফিল্টাৰ কৰিব লাগে। এনেকুৱা পৰিস্থিতিত তৎকালীন পৰিদৰ্শনত মহা মুখ্য ন্যায়িক দণ্ডাধীশ (CJM) শ্ৰীমতী ৰাজকুমাৰী মহাশয়াৰ মৌখিক অনুমতি লৈ পুখুৰী খনন কৰি পানীৰ সমস্যা (আইৱন) লাঘৱ কৰা হ'ল।

শৌচালয়ৰ বাবে পুখুৰীৰ পৰা পানী ব্যৱহাৰৰ যোগ্য কৰি তোলা হ'ল। সেয়া আজিও নলবাৰী জিলা কাৰাগাৰৰ বন্দীসকলে ডাঃ আব্দুল হাকিম কাদৰীৰ (কয়েদী) অৱদান বুলি চৰ্চাত ভাগ লয় চৰ্চিত হৈ আছে।

অতি পৰিতাপৰ বিষয় আৰু দুখেৰে প্ৰকাশ কৰিব লগা হয় যে, ইমানবোৰ অৱদানৰ উপৰি মোক নলবাৰী জিলা কাৰাগাৰৰপৰা গোৱালপাৰা জিলা কাৰাগাৰলৈ স্থানান্তৰিত কৰা হ'ল। ইংৰাজী ০৮-০৯-২০১০ৰপৰা এতিয়ালৈকে গোৱালপাৰা জিলা কাৰাগাৰত (সংশোধনাগাৰত) অহাৰ পাছত, ২-৪ টা ফুলৰ গছ দৃষ্টিগোচৰ হ'ল, সেয়াও মুমূৰ্ষ অৱস্থাত সেইবোৰক নতুনকৈ জীৱন দান কৰাৰ চেষ্টা কৰিলো, মোৰ পৰিকল্পনাত, নক্সা তৈয়াৰ কৰি সুন্দৰ আৰু শৃংখলাবদ্ধভাৱে ফুলৰ উদ্যান নিৰ্মাণ কৰি যথেষ্ট সন্মানৰ যোগ্যতা অৰ্জন কৰি নিজকে গৰ্ববোধ কৰো। গে'টৰ সন্মুখত ফুলপাত আৰু বুটাম ফুলৰ সংমিশ্ৰণেৰে Welcome-District Jail Goalpara জলজল-পটপটকৈ সকলোৰে লগতে অতিথি (বিশিষ্ট) বৃন্দক অভ্যৰ্থনা জনায়। এই ফুলৰ বাগিচাখনৰ শোভা বৰ্ধনৰ বাবে নতুন নতুন পৰিকল্পনা মাননীয় অধীক্ষক আৰু কাৰাধ্যক্ষ মহোদয়ৰ সহযোগত ৰূপায়ণ কৰা হয়।

অত্যন্ত সুখৰ বিষয় তৎকালীন কাৰা-অধীক্ষক শ্ৰীযুত হৰেণ কলিতা মহোদয়ৰ প্ৰচেষ্টাত, আগ্ৰহত সুন্দৰ এখনি ফুলৰ বাগিচা, ফুলৰ খেতিৰ উদ্যান জেলৰ গে'টৰ বাহিৰত সোঁফালে যি আজিও অব্যাহত আছে। ঝাৰবেৰাৰ ক্ষেত্ৰত বিশেষকৈ মাননীয় অধীক্ষক (বৰ্তমানৰ) শ্ৰীযুত ৰঞ্জিত কুমাৰ বৈশ্য, আৰু মাননীয় কাৰাধ্যক্ষ (বৰ্তমান) শ্ৰীযুত ত্ৰৈলোক্য চন্দ্ৰ কলিতাৰ প্ৰচেষ্টা আজিও অব্যাহত আছে। বৰ্তমান কৃষিৰ ক্ষেত্ৰত শাক-পাচলি আৰু অন্যান্য চবজি উৎপাদনৰ ক্ষেত্ৰত যথেষ্ট গুৰুত্ব দিয়া হৈছে, লগতে বনৌষধি গুণসম্পৰ্ক থকা গছ-তৰু-লতা ৰোপণ কৰা হৈছে। গোৱালপাৰা জিলা কাৰাগাৰত ৭ বছৰ পূৰ্বে কোনো ধৰণৰ ফুলৰ উদ্যান আৰু ঔষধি গছ নাছিল। বৰ্তমান অধীক্ষক মহোদয়ৰ প্ৰচেষ্টাত, আগ্ৰহত কয়েদী আব্দুল হাকিম কাদৰীৰ (ফুলচালিৰ মেট) কঠোৰ পৰিশ্ৰমৰ ফলস্বৰূপে উন্নত মানৰ ফুলৰ বাগিচা আৰু বনৌষধি গছ-ঘাঁহ, যেনে— বগা-ক'লা তুলসী প্ৰায় ২০০ মান, চিত্ৰনলা (সুগন্ধি কীটনাশক), আমলখি, ভোমোৰা, মহানিম আৰু বহুতো বৃক্ষৰোপণ কৰা হ'ল। গোৱালপাৰা জিলা কাৰাগাৰৰ মাননীয় অধীক্ষক শ্ৰীযুত ৰঞ্জিত কুমাৰ বৈশ্য, কাৰাধ্যক্ষ শ্ৰীযুত ত্ৰৈলোক্য চন্দ্ৰ কলিতা মহোদয়সকলৰ প্ৰচেষ্টাত কাৰাগাৰখনৰ ফুলনিখনৰ লগতে স্বচ্ছতা আৰু ধঁপাতমুক্ত পৰিৱেশ সৃষ্টি কৰাত যথেষ্ট অৱদান উল্লেখযোগ্য।

বিগত ০৬-১০-২০১৬ ইংৰাজী তাৰিখত K.K.H.O.U. কৃষ্ণকান্ত সন্দিকৈ মুক্ত বিশ্ববিদ্যালয়, অসম, কাৰাগাৰসমূহৰ মহা-পৰিদৰ্শক মহোদয়ৰ লগতে গণ্য-মান্য ব্যক্তিৰ উপস্থিতিত উদ্বোধন কৰা হ'ল।

উক্ত বিশ্ববিদ্যালয়ৰ অধীনত ১ম বছৰৰ ভিতৰত ২ জন কাৰাবাসী বন্ধু উচ্চ মাধ্যমিক ১ম

বর্ষ পৰীক্ষা দি উত্তীর্ণ হ'ল। ছাত্র দুজন ক্রমে বলেন্দ্র ৰাভা আৰু প্রাণজিৎ বর্মন, ভৱিষ্যতে আৰু ছাত্র বৃদ্ধি পাব, নুই কৰিব নোৱাৰি।

বিভিন্ন কাৰাগাৰত চিলাই মেচিনৰদ্বাৰা প্রশিক্ষণ লৈ প্রতিষ্ঠিত হোৱাৰ বাবে চেষ্টা চলি আছে আৰু প্রায় কাৰাগাৰত কয়েদী ভাইসকলৰদ্বাৰা পৰিচালিত মাহেকীয়া আলোচনী প্রকাশ কৰাৰ সুবিধা পাইছে। উদাহৰণস্বৰূপে, মঙলদৈ জিলা কাৰাগাৰৰপৰা কাৰালিপি নামৰ আলোচনী এখন প্রকাশ পাই থাকে। সেয়া আমাৰ সমূহ কাৰাবাসীৰ বাবে গৌৰৱৰ বিষয়, আমিও এনেকুৱা এটা পদক্ষেপ সময়ত লোৱা উচিত বুলি মই ভাবো।

বিশেষকৈ উল্লেখ কৰিবলগীয়া হ'ল যে, আমাৰ মাননীয় কাৰা-অধীক্ষক মহোদয়ৰ জাননী মর্মে কাৰাগাৰৰ অভ্যন্তৰত ধঁপাতজাতীয় বস্তু, যেনে— বিড়ি, চাধা, চিগাৰেট সম্পূর্ণভাৱে নিষিদ্ধ কৰা হ'ল— ইয়াৰ পৰিণতিত প্রত্যেকজন মানুহৰ বাবে তুলসীপাতৰ প্রতি আকৃষ্ট হোৱা যেন লাগিল, ফলত মানুহৰ কণ্ঠনলী পৰিষ্কাৰ হোৱা, টনচিলজাতীয় ৰোগৰপৰা পৰিত্রাণ পোৱা দেখা গ'ল, এই তুলসীপাত চুহি চাধাৰ পৰিৱর্তে ব্যৱহাৰ কৰি উপকৃত হোৱা শুনা পাওঁ আৰু এই পৰিৱর্তনৰ বাবে বহুতৰ অৱদান অস্বীকাৰ কৰিব নোৱাৰো। যাৰ বাবে এতিয়া জেল নহয় সংশোধনাগাৰ আৰু ডাঙৰ প্রকল্পবোৰ হাতত লোৱা হৈছে, সেইবোৰ বাস্তৱত পৰিণত কৰাৰ বাবে মাননীয় অধীক্ষক মহোদয় শ্রীযুত ৰঞ্জিত কুমাৰ বৈশ্য আৰু কাৰাধ্যক্ষ মহোদয় শ্রীযুত ত্রৈলোক্য চন্দ্র কলিতা, সহ-কাৰাধ্যক্ষ মহোদয়সকলৰ বহুদিনৰ কঠোৰ পৰিশ্রমৰ ফলস্বৰূপে কাৰাবাসীসকলৰ অনুগ্রহত-অনুৰোধত মাননীয় গোৱালপাৰা জিলাৰ আয়ুক্ত (ডি.চি.) মহোদয়ৰ অনুমতি সাপেক্ষে গোৱালপাৰা জিলা কাৰাগাৰাত এখন সমবায় সমিতি মঞ্জুৰী পালে, যোৱা ১৬-০৬-২০১৬ তাৰিখত কাৰাবন্দী সমবায় সমিতি গঠন কৰি সমিতিৰ পঞ্জীয়ন নং G 01/ 2016/17 তাৰিখ ১৬-০৬-১৬। এই সমবায় সমিতিৰদ্বাৰা বহু কাম কৰিবলগীয়া আছে ১। কাৰাগাৰৰ গে'টৰ (প্রধান) বাহিৰত এখন কেণ্টিন উদ্বোধন কৰা হ'ল, যিখন পৰিচালনাৰ দায়িত্ব আমাৰেই বন্ধু কয়েদী মতিউৰ ৰহমানক। ২। এখন প্রদর্শনী ছাউনি য'ত বাঁহ-বেতৰ বনোৱা বস্তু মুঢ়া, কুলা, ডলা, চালনী আৰু বিভিন্ন ধৰণৰ ফুল, ফুলৰ পুলি বিক্রী কৰাৰ বাবে দ্রুতগতিত কাম চলি আছে, অতি সোনকালে ইয়াৰ উদ্বোধনৰ বাবে যো-জা চলি আছে। আৰু বহু ধৰণৰ কামৰ পৰিৱর্তন আৰু সংশোধনাগাৰৰ চিন্তা-ভাবনা চলি আছে। আগন্তুক দিনত আৰু ভাল ভাল পদক্ষেপ লোৱা হ'ব বুলি আমি আশা ৰাখিছো। কাৰাবন্দী ছ'চাইটিৰ পদত থকা

১। শ্রীযুত ৰঞ্জিত কুমাৰ বৈশ্য, কাৰা-অধীক্ষক (সভাপতি)

২। শ্রীযুত কল্যাণ কুমাৰ, সহ-কাৰাধ্যক্ষ (সম্পাদক)

৩। কেণ্টিন পৰিচালনাত, মতিউৰ ৰহমান (কয়েদী) (সদস্য)

গোৱালপাৰা জিলা কাৰাগাৰত পৰিৱর্তন অনাৰ বাবে বহুজনৰ অৱদান আছে, লিখিতভাৱে আজি ৪ বছৰ পূর্বে জেলৰ অধীক্ষক মহোদয়, কাৰাধ্যক্ষ মহোদয়ে উন্নত বাগিচা (ফুলনি) নির্মাণৰ বাবে মোক আব্দুল হাকিম কাদৰীক চার্টিফিকেট প্রদান কৰা হৈছিল। আৰু বিশেষভাৱে উল্লেখ কৰিব লগা হৈছে যে, ইং ০৬-১০-২০১৬ তাৰিখত অসম কাৰাগাৰসমূহৰ মহা-পৰিদর্শক (আই.জি.) কাৰাগাৰ পৰিদর্শন কালত জেলৰ ভিজিটৰ বুকত আব্দুল হাকিম কাদৰী (কয়েদী)ক ফুলনিখনৰ কর্মৰ প্রশংসা পত্র লিখিতভাৱে লিপিবদ্ধ কৰি থৈ গ'ল। আৰু বহুতো কয়েদী,

হাজোতীক ধন্যবাদসহ উৎসাহ দিয়া দেখা পোৱা গ'ল।

মই ক'ব বিচাৰো এজন কাৰাবন্দী মানুহ (আব্দুল হাকিম কাদৰী) ১৩ বছৰীয়া কাৰাবাস জীৱনত কৰ্ম কৰি সুনাম অৰ্জন কৰিব পাৰে যদি অইন কাৰাবন্দী ভাইসকলে চেষ্টা আৰু আগ্রহ থাকিলে নিশ্চয় পাৰে, পাৰিবও।

মই জনাব বিচাৰো যে কাৰাগাৰৰ চাৰিবেৰৰ মাজত অতিবাহিত কৰা দিনবোৰ বাহিৰৰ জীৱনৰ দৰে সমানে অৰ্থৱহ আৰু মূল্যৱান হ'ব পাৰে, অকল নিৰ্ভৰ কৰে ব্যক্তিজনৰ নিজৰ জীৱন-দৰ্শন, কৰ্মৰ যুক্তিযুক্ততাৰ ওপৰত। গতিকে, জেলখানা এখন মন্দিৰ, মছজিদ, গীৰ্জাৰ দৰে, গোটেই পৃথিৱীৰ আৰু মোৰ ভাৰতবৰ্ষৰ জেলত কাৰাবাস থকাৰ পাছতো নিজকে উচ্চস্তৰত প্রতিষ্ঠিত কৰি সন্মান লাভ কৰিছে, নাম উল্লেখ কৰাৰ প্রয়োজন নাই বহু কাৰাবাসী ম্যাদ পাৰ কৰি বাহিৰত তেওঁলোকক আঁকোৱালি লৈ মৰম-সন্মানেৰে আদৰি লৈছে, আৰু উচ্চ সন্মান দিছে। দেশৰপৰা, সমাজৰপৰা সকলোৰে প্রিয়পাত্র হ'ব, মানুহে ক'ব সম্পূর্ণ সংশোধন আৰু মহান ব্যক্তি আখ্যা দিব।

মই এইসকল ব্যক্তিৰ শলাগ ল'ব বিচাৰো যিসকলে মোৰ কাৰাবাস জীৱনত বিভিন্ন ধৰণৰ কৰ্মৰ উৎসাহ-উদ্দীপনাৰ অৰিহণা যোগাইছে, দিছে আৰু সকলো ক্ষেত্রতে সহায়-সহযোগ কৰিছে। সর্বপ্রথম মই তালিকা অনুসৰি সেইসকল মহান ব্যক্তিক সোঁৱৰণ কৰো।

১। স্বর্গীয় ছৰিফুল হক চাহেব (প্রাক্তন অধীক্ষক, গুৱাহাটী)
২। স্বর্গীয় সর্বানন্দ দাস (প্রাক্তন কাৰাধ্যক্ষ, গুৱাহাটী)
৩। শ্রীযুত গোবিন্দ মালাকাৰ (প্রাক্তন কাৰাধ্যক্ষ, তেজপুৰ)
৪। শ্রীযুত মাধৱ দাস (প্রধান প্রহৰী, তেজপুৰ)
৫। স্বর্গীয় বৈকুণ্ঠ তালুকদাৰ (অধীক্ষক, নলবাৰী)
৬। শ্রীযুত মাখন শর্মা (কাৰাধ্যক্ষ, নলবাৰী)
৭। শ্রীযুত ভূমিধৰ দাস (প্রধান প্রহৰী, নলবাৰী)
৮। শ্রীযুত কৰুণা কান্ত গোস্বামী, কাৰাগাৰ চিকিৎসক, নলবাৰী)
৯। শ্রীযুত হৰেণ কলিতা (প্রাক্তন অধীক্ষক, গোৱালপাৰা)
১০। শ্রীযুত মতিলাল সিন্‌হা (প্রাক্তন, সহ-কাৰাধ্যক্ষ, গোৱালপাৰা)
১১। শ্রীযুত ৰঞ্জিত কুমাৰ বৈশ্য (বর্তমান অধীক্ষক, গোৱালপাৰা)
১২। শ্রীযুত ত্রৈলোক্য চন্দ্র কলিতা (বর্তমান কাৰাধ্যক্ষ, গোৱালপাৰা)
১৩। শ্রীযুত কল্যাণ কুমাৰ (বর্তমান সহ-কাৰাধ্যক্ষ, গোৱালপাৰা)
১৪। শ্রীযুত দীপক কলিতা (বর্তমান সহ-কাৰাধ্যক্ষ, গোৱালপাৰা)
১৫। শ্রীযুত অনিল কুমাৰ বিশ্বাসী (প্রধান প্রহৰী, গোৱালপাৰা)

শেষত মই এই ব্যক্তিজনৰ বিশেষভাৱে শলাগ ল'ব বিচাৰো যিজনে মোৰ ১৩ বছৰ পাৰ হৈ যোৱা গুৱাহাটী কাৰাগাৰৰপৰা তেজপুৰ, নলবাৰী আৰু গোৱালপাৰালৈকে প্রতিখন কাৰাগাৰত মোৰ অবিস্মৰণীয় কৰ্মৰ উদাহৰণ প্রত্যক্ষদর্শী— তেখেত অসম কাৰাগাৰ প্রহৰী সস্থাৰ সভাপতি আৰু এসময়ত সম্পাদক পদত অধিষ্ঠিত আছিল। শ্রীযুত অনিল কুমাৰ বিশ্বাসী

আৰু এজন কাৰাবন্ধু তেওঁৰ কথা উল্লেখ নকৰাকৈ মোৰ এই কাৰাপঞ্জীখন আধৰুৱা হৈ থাকিব। তেখেত সর্বগুণসম্পূর্ণ শ্রীখনিন্দ্র ৰায়, জেল বিদ্যালয়, পুথিভঁৰাল আৰু চৰকাৰৰদ্বাৰা নিযুক্ত (পি এল ভি)। তেখেত আৰু মই জিলা কাৰাগাৰত সাংস্কৃতিক অনুষ্ঠান, মেল-মিটিং, আলোচনা-সভা মাঘ বিহু, ব'হাগ বিহু উৎসৱ, পূজা-পার্বণ আৰু আমাৰ পালন কৰিবলগীয়া ১ মাহ (৩০ দিন) ৰমজানৰ ৰোজা লগতে ২টা ঈদ পালনত সভাপতি আৰু কোষাধ্যক্ষৰ পদৰ দায়িত্ব দুজনে সন্মান আৰু মর্যাদাৰ সৈতে নিষ্ঠাৰে পালন কৰাত আজিলৈ কোনো ত্রুটি হোৱা নাই। দীর্ঘ সাত বছৰৰ পৰা প্রিয় বন্ধুজনৰ সম্পর্ক আজিও অটুট, আশা কৰা কাৰাবাসৰ ম্যাদ পূর্ণ হোৱাৰ পাছতো থাকিব। বর্তমান মোৰ লগত কর্ম কৰা ফুলচালিৰ কয়েদী ভাইসকললৈ শলাগ লওঁ। মোৰ অধীনত নিষ্ঠাৰে কামবোৰ কৰাত সহায়-সহযোগিতা কৰে আৰু কৰি আছে।

শেষত মই বিখ্যাত বাস্তৱবাদী দার্শনিক, সাহিত্যিক দুজনৰ উদ্ধৃতি দি মোৰ কাৰাপঞ্জীৰ লিখনি সামৰিছোঁ (১) কাইলৈ কি হ'ব পাৰে কোনেও ক'ব নোৱাৰিব পাৰে। কিন্তু আমি এই মুহূর্তত অথবা আমি যিবোৰ কাম কৰিম, সেইসমূহৰ প্রভাৱ কাইলৈ সংঘটিত ৰূপত পৰিব। আলেকজেণ্ডাৰ ষ্টাডার্ড-বাস্তৱবাদী দার্শনিক। (২) কেৱল জানিলেই নহ'ব, জনাটো সঠিক অর্থত, কার্যত পৰিণত কৰিব লাগিব। কেৱল ইচ্ছা থাকিলেই নহ'ব। লক্ষ্য পূৰণৰ চেষ্টা কৰিব লাগিব, তেতিয়াহে বঞ্চিত সাফল্য আহে। জার্মান সাহিত্যিক জোহান।

লেখক-ব্যক্তিগত অনুভৱকাৰী, সংশোধনাগাৰৰ কাৰাবাসী (বর্তমানলৈ)

আব্দুল হাকিম কাদৰী

ইউনানি আয়ুর্বেদিক চিকিৎসক (চৰকাৰী পঞ্জীয়নভুক্ত)

অসম ইউনানী সমিতিৰ প্রতিষ্ঠাপক আৰু সভাপতি, সম্পাদক (এন জি অ') ২০০২ চন, বিকাশ ৰত্ন গোল্ড এৱার্ডৰ মনোনীত (দিল্লী) প্রার্থী, কাৰাগাৰৰ অভ্যন্তৰত বাহিৰত সমাজ সেৱক হিচাপে জনাজাত। মই এজন যাৱজ্জীৱন কাৰাবন্দিত বন্দী হিচাপে এই কাৰাপঞ্জীখনৰ লিখনিত ভুল-ত্রুটি হোৱাটো স্বাভাৱিক, সেয়েহে ভুলবোৰ ক্ষমা কৰিব।

জয় হিন্দ, জয় অসম, সকলোকে চালাম, নমস্কাৰ জনাই সামৰিছো।

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STUDIES FROM THE FIELD

NOT A LEVEL PLAYING FIELD: ONEROUS CONDITIONS FOR BAIL AND ITS EFFECTS ON THE CRIMINAL JUSTICE DELIVERY SYSTEM

Krishanu Kar

Introduction

"It shocks one's conscience to ask a mason like the petitioner to furnish sureties for ₹ 10,000. The Magistrate must be given the benefit of doubt for not fully appreciating that our Constitution, enacted by 'We, the People of India', is meant for the butcher, the baker and the candlestick maker - shall we add, the bonded labour and pavement dweller."[1]

– Justice Krishna Iyer.

Bail, in recent times, is a highly- debated issue both in India and internationally. There are number of reports that shed light on the state of the criminal justice system in India. The epigraphs below capture the state of affairs aptly:

"If more than 50% of all detainees, and in some countries more than 70% are in pre-trial detention something is wrong. It usually means that criminal proceedings last far too long, that the detention of criminal suspects is the rule rather than the exception, and that release on bail is misunderstood by judges, prosecutors and the prison staff as an incentive for corruption."[2]

Historically, bail was a tool to ensure the appearance of the person accused of an offence at trial or to ensure the integrity of the process by preventing

[1] *Moti Ram & Ors. v. State of Madhya Pradesh,* (1978) 4 SCC 47.

[2] "*Pre-Trial Release and the Right to be Presumed Innocent: A Handbook on Pre-Trial*", International Law, Lawyers Rights Watch Canada (LRWC), March 2013,p. 15.

such a person from tampering with evidence or witness. Under the Criminal Procedure Code of 1973 (hereinafter Cr.P.C.), the police, prosecutors magistrates and judges have been enjoined to exercise the best judgement and discretion within the confines of the law for ensuring the appearance of the person accused of an offence without jeopardizing the interests of the society. In general parlance, bail refers to release from custody, whether it be on personal bond or with sureties. The given lines below, can best explain the purpose of bail:

"*Here the rod is, as it were, held 'in terrorem' over the evildoer, innocuous so long as he behaves well, but ready to descend at any moment if he breaks his promise of good behaviour, for if he does, his bail can be forfeited.*"[3]

But the purpose of bail is being defeated, if one looks closely at the demography of the correctional homes in Assam and other parts of India, a substantial amount of the population in the correctional homes are pre-trial detainees, who are languishing in jails because they cannot afford to pay the unreasonable bail conditions imposed on them by the courts. If bail is what the Law Commission[4] envisages to be a fine equilibrium between the 'Freedom of Person' and 'Interest of Social Order', then why are so many under privileged people languishing in jails because of onerous bail conditions. Isn't it a violation of their 'Freedom of Person'? Why fix the bail at any reasonable sum if a poor man can't make it? Onerous bail conditions not only affect the freedom of person of the detainees but also make a negative impact on their entire family and thus, on the society at large.

Personal liberty and the rule of law find its rightful place in the Constitution which includes measures against arbitrary and indefinite detention. It further provides that no person shall be detained beyond the maximum period prescribed by any law made by the Parliament. Even with the adoption of an elaborate procedure by the judiciary to deal with matters regarding grant of bail, the system is somehow unable to meet the parameters of an archetypal system giving rise to the notion that the bail procedure is unpredictable. In the last few decades, the societal contexts, its relations,

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[3]Moore Fletcher. "*Magistrates 'Law and Suggested Increase of Jurisdiction and Powers*", as reported in STAT. & SOC. INQUIRY SOC'YOF IR. 671, 673 (1893).

[4]41st Law Commission Report, 1969, The Code Criminal Procedure, 1898, Vol. I.

changing pattern of crimes, arbitrariness in exercising judicial discretion while granting bail are compelling reasons to examine the issue of bail and to chart a roadmap for further reform.

I. Jurisprudence behind Conditions for Bail

The literal meaning of the word "bail" is surety [5]. Bail, therefore, refers to release from custody, either on personal bond or with sureties. In *Moti Ram v. State of Madhya Pradesh*[6], the Supreme Court clarified that the definition of the term bail includes both release on personal bond as well as with sureties. It is to be noted that even under this expanded definition, 'bail' refers only to release based on monetary assurance-either one's own assurance (also called personal bond or recognizance) or third party's sureties.

The term bail has not been defined in the Criminal Procedure Code[7], nevertheless, the word 'bail' has been used in it several times and remains one of the vital concepts of criminal justice system. Wharton's Lexicon and Stroud's Judicial Dictionary defines bail as "*the setting free of the defendant by releasing him from the custody of law and entrusting him to the custody of his sureties who are liable to produce him to appear for his trial at a specific date and time.*"

According, to Halsbury's Laws of England:

"*The effect of granting bail is not to set the defendant (accused) free, but to release him from the custody of law and to entrust him to the custody of his sureties who are bound to produce him to appear at his trial at a specified time and place. The sureties may seize their principal at any time and may discharge themselves by handing him over to the custody of the law and he will then be imprisoned.*"[8]

'Bail' essentially means the judicial interim release of a person suspected of a crime held in custody, on entering a recognisance, with or without sureties, that the suspect would appear to answer the charges at a later date; and includes grant of bail to a person accused of an offence by any competent authority

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[5] *Sunil Fulchand Shah v. Union of India,* AIR 2000 SC 1023.
[6] AIR 1978 SC 1594.
[7] *Vaman Narain Ghiya v. State of Rajasthan,* (2009) 2 SCC 281.
[8] *Halsbury's Laws of England,* Vol II para 166 4th Edition., 1998.

under the law. The system of bail poses a conflict in any criminal justice system because it attempts to reconcile the conflicting interests of the accused person who desires to remain free and the State that has an obligation to ensure that such accused appears promptly at the trial.[9] The current scenario on bail is a paradox in the criminal justice system, as it was created to facilitate the release of accused person but is now operating to deny them the release.

A. The body of Law in India as per Statutes and Case-laws:

One of the most frequently voiced criticism on the system of bail is that it is based on money as surety even after various reforms in criminal law, thus, resulting in discrimination with the poor. The financially well-established can easily afford to purchase their freedom, while the victims of the financial bail system- the poor, are jailed because they cannot raise the money.[10] In effect, the ability to pay often becomes the sole factor deciding who goes free and who languishes in jail.[11] The inherent unfairness of this practice raises question, that whether such practice is indeed needed?

According to the Supreme Court of India, bail is devised as a technique for effecting synthesis of two basic concepts of human values, namely the right of the accused person to enjoy his personal freedom and the public interest; subject to which, the release is conditioned on the surety to produce the accused person in court to stand the trial.[12] For instance, in *Public Prosecutor v. George Williams alias Victor*,[13] the Madras High Court explaining the concept of 'bail' has observed that bail or main prize, meant, bailment or delivery of the accused person to their sureties, to be in their custody as opposed to jail. The rationale is that, they being jailors of choice, would have dominion and control over such accused. If the sureties cannot control the accused person during the period of bail, naturally, the Court would

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[9]Foote Caleb , "*The Coming Constitutional Crisis in Bail*"113 U. PA Law Review. 1965, pp.1125 -1180

[10]See Subin Harry I., "*Book Review of R. Goldfarb, Ransom-A Critique of the American Bail System*", 114(4) University of Pennsylvania Law Review, 1966, pp. 630-36.

[11]Miller Warren L., "*Bail Reform Act of 1966: Need for Reform in 1969*" 19 Cath. U. L. Rev. 24 1970.

[12]*Kamalapati Trivedi v. State of West Bengal*, AIR 1979 SC 777.

[13]AIR 1951 Mad 1042.

intervene to shift the custody over to the State.

The Supreme Court in *Moti Ram v. State of M.P.*[14], has observed that the primary method through which bail conditions are imposed, including the condition to appear before the court, is by placing the person accused of an offence under financial obligations and monetary risk regardless of the economic condition of the accused person. This model is prevalent in many parts of the world. The problem arises when more than 21 per cent of the population is living below poverty line.[15] This affects the indigent population and their access to justice. Sections 440 to 450 Cr.P.C., set out conditions for releasing someone who is otherwise determined to be eligible for bail. The notion behind these provisions is that it requires the person accused of an offence to provide monetary assurance, that he will appear before the court as and when required and observe other bail conditions, or forfeit the assurance amount. Thus, before being released, a person who is granted bail would be required to execute a bond agreeing to adhere to the conditions of bail.[16] This bond is for a certain sum of money as set by the Court, if the person defaults on a bail condition, the Court will forfeit the bond and require the person to pay the money as penalty.[17] On failure to do so, the penalty will be recovered in a similar manner as a fine imposed by the Court. If the penalty amount cannot be recovered then the person shall be liable for a civil imprisonment upto 6 months.[18] At this stage, it is required to be noted that failure to appear, without sufficient cause, before the court on the date designated as part of the bail condition, is an offence under section 229A, IPC.

In addition to the requirement of the execution of a bond by the person accused of an offence, the Court may require such accused to provide one or more sureties to stand guarantee that the person will abide by the bail conditions. If the person accused of an offence fails to do so the surety amount will be forfeited. Section 440 of Cr.P.C, provides that the bail amount should

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[14]AIR 1978 SC 1594.

[15]Planning Commission, "Press Note on Poverty Estimates, 2011-12" Government of India (July 22 2013).

[16]Section 441 Cr.P.C.

[17]Section 446 Cr.P.C.

[18]ibid

be fixed "*with due regard to the circumstances of the case and shall not be excessive.*"[19] The High Court or the Court of Session may reduce the amount fixed by the police or the Magistrate.[20] In the case of *Shankara v. State (Delhi Administration)*,[21] the High Court of Delhi placed an obligation upon the State to take into consideration all the factors pertaining to the person accused of an offence. The judgment made the conditions attached to the bail lenient in this case. Any accused charged with minor offences were asked to be released on personal bonds and those charged with major offences were to be released on personal bond along with one surety to the amount of rupees one thousand only.

In *Hussainara Khatoon*[22] the Court commented on the property based nature of the bail system and stated that it is based upon the erroneous assumption that the risk of monetary loss is the only deterrent against fleeing from justice. The Court highlighted that even where an person accused of an offence is to be released on personal bond, the law requires the person to be placed under financial obligation to appear in court through the execution of a bond to that effect.[23] Moreover, the courts mechanically insist that the accused person should produce sureties who would furnish bail for him and, these sureties must again establish their solvency to be able to pay the amount of bail in case such accused fails to appear to answer the charge. The issue of bail for people who do not have access to sureties locally, was at the centre of the controversy in *Moti Ram*[24]. Here, the Magistrate had refused to consider the surety given by the cousin of the accused person because he was not from the same geographical location as the accused. The Supreme Court reversed the order and held that courts cannot reject a surety merely because the surety or the surety's estates are situated in a different district or state. The requirement of local sureties is difficult to attain for out of state under-trial prisoners.

The Supreme Court has also instructed the lower courts to impose

[19]Section 440 (1), Cr.P.C.
[20]Section 440 (2), Cr.P.C.
[21]1996 Cr.LJ 43.
[22]1979 AIR 1369.
[23]Section 441, Cr.P.C.
[24]AIR 1978 SC 1594.

reasonable conditions for bail as the order must be judicious. The Court should not insist for local sureties because if the accused person is not able to meet such requirement even if the order has been passed it may not be possible for the accused person to ensure compliance of such conditions. The court may modify its order to enable him to give surety who need not be a local person. By no means, the order should be so onerous that the purpose of granting the bail would stand defeated as it would not be possible for the person accused of an offence to fulfil those conditions.[25]

As per Section 441(4) of Cr.P.C. a surety should be a fit person. Who is a fit person has not been defined or explained anywhere in the Code. Generally, a surety must be a genuine person. He should not be a bogus person. A surety comes to the Court and gives undertaking to the Court that he will ensure the appearance of the accused. If the accused fails to appear before the Court, the surety bond executed by the surety should be forfeited. The Court can ascertain the genuineness of the sureties. A surety should have a genuine address. He may be asked to produce residential proof. He should not be a vagabond. He should establish his identity. A poor man can be a voter. Likewise, a poor man can be a surety. A surety can be a person without having own house. He can be a tenant. Even a person living in a platform, living in a slum having an acceptable address proof can also stand as a surety. It cannot be denied that a bogus person should not be accepted as a surety. A person who is offering surety must have acceptable residential proof. He may be a tenant, licensee. A beggar can also stand as surety provided he should have some acceptable residential proof. Sometimes, one person may come forward to stand as surety for more than one accused. For example, if there is a question of two sons or two brothers, then, his father, brother, mother, sister etc. may come forward to stand as surety. In such circumstances, question may arise whether the father can choose any one of his son and stand as surety and exclude his other son. The Courts should be satisfied as to the genuineness, identity of the surety and his residential address. It equally applies to the accused. For this purpose, the Courts can accept copies of

[25]See *Moti Ram*, supra note 3; *Keshab Narayan Banerjee v. State of Bihar,* AIR 1985 SC 1666; *Sandeep Jain v. NCT of Delhi*, AIR 2000 SC 714; *M Sreenivasulu Reddy v. State of Tamil Nadu,* (2002) 10 SCC 653; and *Amarjeet Singh v. Government of NCT of Delhi*, JT2002 (1) SC 291.

various important documents.

With regards to under-trial prisoners, in the case of *Supreme Court Legal Aid Committee Representing Undertrial Prisoners*[26], the Supreme Court held that unduly long periods of under-trial incarceration violate Articles 14 and 21 of the Constitution. For this reason, the Court directed that if the accused person has served half of the maximum sentence specified for the offence for which he has been charged, he should be released on bail, subject to fulfilling the conditions of bail imposed on him. This standard was incorporated in the Cr.P.C., through an amendment in 2005, by which Section 436A was added to the Code. This section provides that if the accused person has undergone detention for half of the maximum period of imprisonment specified for the offence that he has been charged with, such an accused shall be released by the court on personal bond with or without sureties. Persons charged with offences punishable with death, do not get the benefit of this provision. The first proviso to the section states that the court, upon hearing the public prosecutor, may order the continued detention of the accused person for a term longer than half of the said period, or release the person accused of an offence on bail instead of personal bond with or without sureties. The court shall record reasons for this, in writing. The second proviso to the section states that no accused person shall be detained for a period longer than the maximum period of imprisonment for the offence. For effective implementation of this provision, the Supreme Court of India laid down guidelines in *Bhim Singh v. Union of India.*[27] It directed the jurisdictional Magistrate/Chief Judicial Magistrate/Sessions Judge to hold one sitting per week in each jail/prison for two months from October 1, 2014 to identify under-trials eligible for bail under Section 436-A of Cr.P.C, and to pass an appropriate order with respect to Section 436-A of Cr.P.C, in the jail itself. It directed the Jail Superintendent of each jail/prison to facilitate the process.

In this context, it is pertinent to note that in an earlier case, *R. D. Upadhyay v. State of Andhra Pradesh*[28], the Supreme Court had held that under-trials charged with attempt to murder should be released on bail if

[26](1994) 6 SCC 731.
[27](2015) 13 SCC 603.
[28]1996 (4) SCALE 11.

their case has been pending for 2 years or more; and that persons charged with comparatively minor offences like theft, cheating, etc., should be released if they have been in prison for more than a year. The Court added two other important instructions:

(i)The trial courts were obligated to consider such persons for bail. The court clarified that it was not necessary for under-trials to move an application for bail.

(ii) The Court directed that where an under-trial is not in a position to furnish sureties, the court should examine whether the person can be released on furnishing a personal bond. In the current system of money bail and release under S. 436A Cr.P.C., after serving half of the maximum sentence, it must be considered that whether, given the duration of maximum imprisonment in many offences, release after serving half the duration serves the cause of justice.

In *Hussain and Anr v. Union of India*[29], the Supreme Court has directed the High Courts to issue directions to the subordinate courts inter alia that bail applications be disposed of within one week. The Court further held that as a supplement to S. 436A of Cr.P.C., consistent with the spirit thereof, if an under trial has completed a period of custody more than the sentence likely to be awarded, such an under-trial must be released on personal bond.

The Supreme Court has also stated that the grant or refusal of bail on economic conditions i.e. monetary surety, violates Articles 14 and 15 of the Constitution of India and runs contrary to the constitutional ethos. Further, it has no correlation with the objective sought i.e. assurance of appearing at every stage of the trial along with the presumption of innocence until proven guilty.[30] However, it must be remembered that in every case where the indigent is unable to afford bail, is not being discriminated against, but the state only demands some security that such accused person will appear at the trial.[31] The threat of forfeiture of one's goods may be an effective deterrent to the temptation to break the conditions of one's release.[32] Thus, persons of different financial status would find the motivation to appear before trial

[29]Criminal Appeal No .509 of 2017.

[30]Foote Caleb, "*The Coming Constitutional Crisis in Bail*" 113 U. PA Law Review. 1965, pp.1125 -1180.

[31]4 Crim. Proc. § 12.2(b) (3d ed.) citing *Pannell v. United States*, 320 F.2d 698 (D.C.Cir.1963)

[32]*Bandy v. United States*, 81 S. Ct. 197 (1960).

at varying amounts of bail, it only seems logical that an effective system of bail considers the individual's ability when setting such amount.[33] The current system of bail based on financial control and objective assessment would lead to suspect classification and discrimination. Moreover, it would also impinge on the fundamental right to fair trial.

B. International Standards on Bail Conditions:

The concept of bail has been recognized in the various international covenants and instruments upholding human values. Article 9(3) of the International Covenant on Civil and Political Rights,1966[34] (hereinafter ICCPR) states that the general rule shall not be detention in custody of persons awaiting trial and release may be conditioned on the guarantees to appear at the trial. Similarly, Article 10 (2) (a) of ICCPR also refers to the same principle as it states that accused must not receive same treatment as a convict. The UN Working Group on Arbitrary Detention (WGAD) observed in their Report[35] that indigent and socially vulnerable groups of populations are disproportionately affected where bail is discretionary.

Denial of bail because of onerous conditions has often been linked to violation of the presumption of innocence and thus the violation of right to liberty. The Supreme Court of Canada in *R. v. Hall*[36] held that the denial of bail has a detrimental effect on the presumption of innocence and liberty rights of the accused. However, in *R. v. Pearson*[37], the court clarified that this principle must be applied at the stage of trial and not at the stage of bail because during bail, guilt or innocence is not determined and hence, penalty must not be imposed.

If a person is given huge amount of bail, then that has been linked to discrimination like that ofon the basis of race. The United States Supreme Court in *Edwards v. California*[38] held that the mere state of being without

[33]Hellmann A., "*The Right to a Pauper's Bail*" Bench and Bar, Kentucky Bar Association 2016.

[34]999 UNTS 171.

[35]Commission on Human Rights, Report of the Working Group on Arbitrary Detention, Dec. 12, 2005 (E/CN.4/2006/7), available at: http://ap.ohchr.org/documents/alldocs.aspx?doc_id=11600

[36][2002] 3 S.C.R. 309.

[37][1992] 3 S.C.R. 665.

[38]314 U.S. 160 (1941).

funds is a neutral fact constitutionally an irrelevance like race, creed or colour. Further, expanding upon indigence and equality in the case of *Hobsen v. Hansen*[39] the court observed that indigent groups are not always assured a full and fair hearing through the ordinary political processes as the present power structure is inclined to pay little heed to even the deserving interests of the politically silent and the invisible minority.[40] These considerations impel a close judicial surveillance and review of administrative judgments that adversely affect them. The Supreme Court of United States has stated bail cannot be said to be excess when set at an amount that is higher than the defendant's ability, if the said amount is reasonable.[41] Contrarily, in *Griffin v. Illinois*[42], the U.S. Supreme Court in its dissenting judgment has questioned:

"*Why fix the bail at any reasonable sum if a poor man can't make it*?"

The effect of mandating an unreasonably high bail is that the indigent is denied equal protection of the laws, if he is denied his freedom on equal terms with other non-indigent person accused of an offence solely based on his indigence.[43]

II. The menace of Onerous Conditions for Bail

A. Empirical Data :

The data collected regarding prison population in India represents a grim scenario. It indicates that 67 per cent of the prison population is awaiting trial in India.[44] Inconsistency in bail system is one of the reasons for the over-crowding of prisons across the country and giving rise to another set of challenges to the Prison Administration and 'State' thereto. Freedoms as guaranteed under Part III of the Constitution, has a unique relation with the ideas and objectives enshrined in the Preamble of the Constitution of India i.e. Justice - economic,

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[39]296 F. Supp. 401 (D.D.C. 1967).

[40]"*Bail and Its Discrimination Against the Poor: A Civil Rights Action as a Vehicle of Reform*", 9 Val. U. L. Rev. 167 1974

[41]*Stack v. Boyle*, 342 U.S. 1 (1951). See generally Alan R. Sachs, Indigent Court Costs and Bail: Charge Them to Equal Protection, 27Md. L. Rev. 154 (1967).

[42]351 U.S. 12 (1956).

[43]*Bandy v. United States*, 81 S. Ct. 197 (1960).

[44]*Amendments related to the Criminal Procedure Code- Provisions related to Bail,* Report No. 268, Law Commission of India, May 2017.

social, and political. It remains one of the solemn duty of the republic and its realisation in its full sense is one of the cherished goal. It has become a norm than an aberration in most jurisdictions including India that the powerful, rich, and influential obtain bail promptly and with ease, whereas the poor languishes in jails.[45] Thus, it is one of the malaise which is affecting the common citizens and family thereto, which not only deny the basic tenets of 'justice' but even human dignity is at stake. Most of the under-trials (70.6 per cent) are illiterate or semiliterate.[46] In the absence of data regarding economic status of prisoners, 'literacy' serves as a useful proxy to appreciate that majority of them belong to the socio-economically marginalized groups.

On our visit to Morigaon District Jail[47] for providing free legal aid we came across a bunch of inmates who had been granted bail but were still languishing in jail for their inability to fetch surety. The table of such inmates is being produced here:-

Sl.No.	Case Number	Offence(s)	Bail Amount	No. of days in Jail even after being granted bail
1.	Morigaon P.S. 152/17	302/34 IPC	15,000 and 1 Surety	165 days
2.	Morigaon P.S. 49/17	341/294/326 IPC	20,000 and 1 Surety	240 days
3.	Mayong P.S. 77/17	302 IPC	20,000 and 1 Surety	163 days
4.	Morigaon P.S. 170/15	342/320/307 IPC	20,000 and 1 Surety	482 days
5.	Mikirbheta P.S 275/17	325 IPC	30,000 and 1 Surety	89 days
6.	Morigaon P.S. 179/10	302 IPC	20,000 and 1 Surety	8 years
7.	Jagiroad P.S:- 72/16	387 IPC	20,000 and 2 Sureties	456 days
8.	Morigaon P.S. 409/16	302/201 IPC	30,000 and 1 Surety	267 days
9.	Mikirbheta P.S. 232/17	302/34 IPC	20,000 and 1 Surety	134 days

[45]Gilbert Jason,"*Blame our bail system for overcrowded Ottawa jail*" The Ottawa Sun (Jan. 14, 2016) available at: http://www.ottawasun.com/2016/01/14/blame-our-bailsystem-for-overcrowded-ottawa-jail.

[46]National Crime Records Bureau, Prisons Statistics (Ministry of Home Affairs, 21st Edition, 2015).

[47]Sixth Visit to Morigaon jail which took place on 12th January, 2018.

It can be noticed that despite getting bail most of these inmates are virtually denied of it because of their weak financial background and the unwillingness of others to be their sureties. They keep on languishing in jails because of their shaky financial and social background. This amounts to violation of their right to liberty guaranteed by Article 21 of the Constitution of India and also discriminates them financially and puts their future at stake.

One inmate in Morigaon District Jail who suffered from onerous bail conditions was interviewed. Her answers depict a grim picture of the criminal justice system in India, where one can assume that only the rich gets justice. A part of that interview is being produced here:-

"Interviewer: Why are you still languishing in jail inspite of getting bail?

Inmate: I dont have ₹ 20,000 to pay.

Interviewer: Aren't your family members helping you to pay the bail amount?

Inmate: No. They fear the official work that they have to go through. Plus, they don't want me out because they feel that their reputation will be destroyed, if I come out of jail and stay with them.

Interviewer: Did you inform the judge about your ordeal?

Inmate: I never got an opportunity to talk to the judge.

Interviewer: How do you plan to deal with this situation?

Inmate: I am waiting for the final judgement. Only after that will I be able to do something."

The social stigma attached to crime exacerbates the situation and leads to that dystopian situation where even the family members of an inmate back out from helping them to get bail.[48] And since most of them are undertrial prisoners they don't get to earn wages through wage work.

To deliver these unfortunate souls out of their ordeal Studio Nilima had filed several bail modification petitions in the Gauhati High Court . In some of these petitions the financial background of the inmates were taken

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[48] "*Bail and Its Discrimination Against the Poor: A Civil Rights Action as a Vehicle of Reform*", 9 Val. U. L. Rev. 167 1974.

into consideration and their bail conditions were diluted . A list containing information about such petitions is being produced here:-

Sl. No.	Petition Number	Change in Bail Amount
1	Criminal Petition Number 36/2018	₹ 30,000 to ₹ 10,000
2	Criminal Petition Number 170/2018	₹ 15,000 to ₹ 5,000
3	Criminal Petition Number 183/2018	₹ 20000 to ₹ 7000
4	Criminal Petition Number 184/2018	₹ 20,000 to ₹ 5,000
5	Criminal Petition Number 592/2018	₹ 30,000 to ₹ 15,000
6	Criminal Petition Number 595/2018	₹ 40,000 to ₹ 15,000
7	Criminal Petition Number 596/2018	₹ 20,000 to ₹ 10000
8	Criminal Petition Number 616/2018	₹ 30,000 to ₹ 5,000
9	Criminal Petition Number 855/2018	₹ 20,000 to ₹ 5,000
10	Criminal Petition Number 872/2018	₹ 25,000 to ₹ 5,000

For some inmates even reduced/modified bail amounts doesn't provide any relief . In the coming portions we will be dealing with the jurisprudence of bail and how to tackle the inefficiencies that have crept into the bail jurisprudence in India .

B. Findings and Analysis:

The data presented in the Chapter A of Part II shows that the bail system has become dysfunctional. It would be unfair on the author's part to attribute such disability to a singular reason. One might imagine that in spite of having such a robust body of law relating to conditions of bail, why do we see a repetition of similar cases every now and then in the lower courts. Some of our key findings are:-

i) The application of the principles laid down by the Supreme Court is not taking place in the lower courts. The principle of "*Bail not jail*", as laid down by Justice Krishna Iyer is being clearly violated. Apart from that the guidelines are not percolating down so much so that the lower judiciary implements it.

ii) There is a negative perception in the minds of the judges, when it comes to granting of bail. Coupled with it is a proclivity of mechanical application of discretion. Even in case of compoundable offences, the bail amount has been fixed at ₹ 30,000. For example, in the case of an inmate (P.S. Case No:- Mikirbheta P.S 275/17), who is a daily wage labourer charged of committing the offence under Section 325 of I.P.C, it can be seen that while imposing a bail condition of ₹30000, the judge didn't take into consideration the financial background of the offender. This reminds us of Justice Krishna Iyer's comment in the *Moti Ram* Case:- "*It shocks one's conscience to ask a mason like the petitioner to furnish sureties for ₹10,000. The Magistrate must be given the benefit of doubt for not fully appreciating that our Constitution, enacted by 'We, the People of India', is meant for the butcher, the baker and the candlestick maker - shall we add, the bonded labour and pavement dweller.*"

iii) There exists a persistent non-discrimination of offences, when it comes to granting of bail. Sometimes offenders who haven't committed grave offences are given such bail conditions that it brings them to par with offender having committed grave offences. In the data that has been presented in this paper, the bail amount for an offence under Section 325 of IPC is at a number of times more than the bail amount fixed for an offence under Section 302 of the IPC. This also portrays the contrast that is inherent in the Criminal Justice Delivery System of India, where a petty offender bears the brunt for belonging to the underprivileged sections of the society which an economic offender gets his way out of the system by paying his way out. The contrast can be perhaps best shown through the comparison of an inmate's Case[49] (P.S. Case No:- Mikirbheta P.S 275/17) to that of P. Chidambaram's. Both are presumed innocent before being convicted, going by the principles of Criminal Justice Delivery System in India. The former, who committed an offence overpowered by impulses is still languishing in jail because he is a wage labourer and is unable to pay ₹ 30000. But the latter whose offence amounts to crores of rupees[50] and consists of a cold application

[49]Currently lodged in Morigaon District Jail.

[50]P.Chidambaram and his son has been accused of committing money laundering in the Aircel-Maxis Deal. https://www.ndtv.com/india-news/in-aircel-maxis-case-p-chidambaram-moves-court-to-seek-anticipatory-bail-1888034 (16th November,6:30 PM).

of mind keeps on getting bail because he can afford to do so. This aligns with Justice Sri Krishna Iyer's observation[51] that the bail system causes discrimination against the poor since the poor would not be able to furnish bail because their financial inability while the wealthier persons, would be able to secure their freedom because they can afford the same. This perhaps portrays the inefficiency of India's bail system at its best.

iv) The persons who languish in jail for their inability to pay the bail amount mostly belong to the under-privileged sections of the society. Thus, their continued incarceration has ramifications on the economic status of their lives. For example, an inmate currently lodged in Morigaon District Jail (P.S. Case No. Morigaon P.S. 49/17) has claimed that because of his continued incarceration, his lands have been encroached by other people, further deteriorating his economic conditions. And being an under-trial prisoners he is not eligible to earn by doing labour activities in the jail. In some cases like that of another inmate in Morigaon (P.S. Case No:- Morigaon P.S. 170/15) the family members do not turn up to secure the release of the inmates because crime is looked down upon by the society. Thus, onerous conditions for bail leads to a vicious cycle which has wider ramifications and leads to a greater structural violence in the lives of the people who are unable to fulfil them.

III. Suggestions to improve Efficacy

A bail condition must not unreasonably violate the rights guaranteed by the Constitution. If the prosecution cannot show through evidence that the person accused of an offence is at the risk of absconding, or is likely to interfere with the judicial process, or may commit the same offence, the accused person should be considered eligible for release, without or with such financial obligations that are not excessive or onerous. All the stake holders must play a robust role to deal with this menace. But one stakeholder that should be leading the vanguard of change is the lower court. Apart from that the Jail Authorities, the Under Trial Review Committee and the District Legal Services Authority also has to play an active role.

[51] *Report of the Expert Committee on Legal Aid: Processual Justice to the People* (1973) (Chairperson: Justice VR Krishna Iyer), Government of India, Ministry of Law Justice.

A. Role to be played by the Courts :

The principles laid down by the Supreme Court has to be applied by the lower courts and conditions shouldn't be imposed mechanically. The principle of '*Bail, not jail*' has to be embraced. An alternative to monetary conditions has to considered by the Courts. The court should consider the unique circumstances of each accused person and develop a method to ensure that bail conditions are effective. For example, if the accused person is a driver by profession, then, even though the offence he is accused of is not related to his work, the Court may require him to deposit his driving license, as a pre-condition for release. Requirement of financial obligations, either through the execution of a personal monetary bond, or through sureties should be the last resort, when no other method is likely to work. If the court seeks the deposit of identity cards, driving license or other documents, it should make available an attested copy of the document to the accused person, certifying that the original has been deposited with the court. Such attested copies should be permitted as proof of identity for availing State benefits, etc. In determining whether the person is likely to abscond, the court should look at factors other than monetary considerations that may keep the person accused of an offence within the authority of the court, such as the presence of family, job, other roots in the community etc. However, an accused person should not be denied bail only because he is a migrant in the city of arrest and does not have ties with the local community. The appearance of such a person may be enforced through other means, as for example through informing the police of the place of ordinary residence of the person accused of an offence, that such accused is on bail and if he is seen in his home district, it should be checked whether he is in compliance with his bail conditions.

If the Magistrate opines that the person accused of an offence is at risk of absconding, sureties may be imposed. Surety may be personal surety or a third person surety and should be according to the paying capacity of the accused person. In determining the conditions of bail, the Court should consider the financial status of the person accused of an offence, and shall ensure that the conditions of bail are not excessive or unduly onerous. Sureties should not be rejected solely because they are not locally situated. To alleviate

concerns regarding the availability of the surety in case of forfeiture, courts should be allowed to direct, that the surety papers be deposited with the court which has jurisdiction of where the surety is located, and that such court can proceed against the surety in case of forfeiture. The bail must be granted subject to the least restrictive conditions to ensure the appearance of the person accused of an offence and the safety of the community.

If an under-trial prisoner is unable to comply with the conditions of the bail, the trial courts should examine the cases of such persons and to conduct an inquiry into the reasons thereof. The trial courts should not only be sensitive but also needs to be extremely vigilant in cases where they are recording orders of bail to ascertain the compliance thereof. In case of inability of a prisoner to seek release despite an order of bail, it should be the judicial duty of all trial courts to undertake a review for the reasons thereof. It should be the responsibility of every judge issuing an order of bail to monitor its execution and enforcement. The trial courts should invest a look in the update of the custody warrants and involve the other stakeholders in the process. While preparing the custody warrants of an Under -Trial Prisoner (UTP), the courts should ensure that in addition to the details/information already mentioned in the custody warrant, it should also contain the following details/information:

(i) At the time of the first remand, the section(s)/offence(s) under which the UTP is being sent to judicial custody.

(ii) Any change(s) in the section(s)/offence(s) during the course of investigation.

(iii) Section(s)/offence(s) under which the final report (charge-sheet) has been filed.

(iv) Section(s)/offence(s) of which the Court is taking cognizance.

(v) On the date cognizance is taken, the Court shall indicate the date on which the right under Section 436A Cr.P.C. will accrue for the UTP. While mentioning this date, in case of multiple offences, the Court should also separately write the date on which half of the maximum sentence of graver offence will expire and the date on which half of maximum sentence of lesser offence will expire.

(vi) Section(s)/offence(s) under which the UTP has been charged by the Court.

(vii) If on a later date there is an amendment in the charge, then the same should be updated in the custody warrant.

(viii) The date on which the UTP is granted bail by the Trial Court or the Superior Court. The said order should be conveyed on each date of hearing when the UTP is produced for remand.

(ix) The aforementioned details/information will have to updated at following stages of a case, i.e. from the stage of first remand to filing of chargesheet to taking of cognizance to framing of charge. The Court must ensure that the custody warrant is updated/modified in the manner stated above.

(x) The trial courts should also maintain a 'Bail Granted Register', in which the list of the bails granted by the court concerned is maintained, this could be examined by the judges concerned to ascertain which undertrial-prisoner/convicted-prisoner has not been released from jail. Reasons for the same could be ascertained through video-conferencing and appropriate orders regarding relaxation/modification of the bail terms would be passed within ten days. The bail application should be expedited and disposed off as soon as possible, regard being to the objective of release of the prisoner expeditiously and reasons for the delay as may be ascertained through video conferencing with the undertrial-prisoner/convicted-prisoner. In case of non-disposal of the cases within the above proposed timeframe the reasons for the same should be incorporated in the "Monthly Work done Statement/ Report" sent to the Supervising Judge/High Court.

(xi) The Courts must also consider accepting 'Income Certificates' before determining bail amounts. Because when bail modification petitions were filed in the Guwahati High Court by Studio Nilima, the High Court took into consideration income certificates before reducing the onerous bail conditions imposed by the lower courts.

B. Role to be played by Jail Authorities:

In addition to the responsibility of the Courts, the Jail Authorities will also have to play an active role to deal with this problem:-

(i) The Jail Authorities must constantly update their records and be in line with any change in the details mentioned in the Custody Warrant of a UTP.

(ii) The Jail Authorities should also inform the UTP and the concerned Court when the UTP becomes entitled to receive benefit of Section 436A Cr.P.C.

(iii) The Jail Authorities must inform the UTP of any change in the section(s) he/she is charged with by the Court.

(iv) The Jail Paralegal Workers should gather instances and ascertain the reasons for the inability to meet the bail conditions and furnish it to the jail authorities and/or to the visiting lawyers of DLSA who, in turn, would prepare an appropriate application for modification/relaxation of the bail conditions. In cases where the undertrial-prisoner/convicted-prisoner have their own private counsel similar/appropriate suggestions would be offered to them by the visiting lawyers; and if so instructed the latter would draft and file requisite applications on behalf of such prisoners also;

(v) The bail order should be communicated by the Jail Authorities to the family of the undertrial prisoner/convicted prisoner, with the latter's consent, so that the family could take steps to meet the bail conditions.

C. Role to be played by District Legal Services Authority:

(i) Legal Literacy Camps should be organized by DLSA regularly in jails to make the UTPs aware about their rights under Section 436A Cr.P.C. and they should also be apprised about the period by which half of the sentence for the common offences is going to be completed.

(ii) The remand advocates/ Legal Aid Counsels appointed in the Criminal Courts by the concerned DLSA may be asked to give a monthly report in respect of the UTPs for whom an application under Section 436A Cr.P.C. may be moved. The remand advocate/ appointed legal aid counsel may be directed to move these applications promptly in the concerned court.

(iii) The legal aid counsels may be instructed that in those cases which are dealt with by them, they should themselves remain alert as to when a person becomes eligible for the benefit under Section 436A Cr.P.C. and take appropriate steps.

(iv) It must also be noted that a person accused of an offence would need access to a lawyer to make an application for bail. As per law, it is

required to ensure that legal aid is provided but, in practice, this occurs only after the charge-sheet is filed. Therefore, access to lawyers in the crucial pre-charging stages is often limited for those who cannot afford a lawyer, and are likely therefore to not be able to afford bail.

(v) The DSLAs can also use the concept of Crowd Sourcing to pay the bail amount. This method is practiced mostly by the Afro-American communities in the United States and can prove to be a good way to deal with the menace of onerous conditions for bail.[52]

D. An Alternative to Money Bail System:

To deal with the menace of onerous bail conditions and to provide a level playing field to the under privileged inmates languishing in jails an alternative to money bail system must be envisaged. A liberal policy of conditions for release without monetary sureties or financial security and release on one's own recognizance with punishment provided for violation will go a long way to reform the bail system and help the weaker and poorer sections of the community to get equal justice under the law. Conditional release may take the form of entrusting the person accused of an offence to the care of their relatives or in supervision. The court or the authority granting bail may have to use the discretion judiciously. When the accused person is unable to find sureties, there will be no point in insisting on bail with sureties, as it will only compel them to be in custody with the consequent handicaps in providing their defence. Other ways like enlarging the category of bailable offences as classified in Cr.P.C., and insisting on expeditious completion of pre-trial procedures that might lead to minimizing the period of confinement, will help dealing with this menace .

Conclusion

Although a gamut of judgements of the Supreme Court exists about the onerous conditions of bail, the ground reality seems to be static. The bail system in India is unfairly skewed towards the rich. The rich buy their freedom while the poor languish in jails jeopardizing their future, because of

[52]Loeb Susan,"*Go Fund Me, Please: Crowdsourcing for Bail As an Insufficient Surety*" Hofstra Law Review, Volume 44, Issue 4.

their inability to afford the bail conditions. One can safely presume that the injustice met by the Bail System in India is a classic example of Prof. Ragnar Nurkse's Vicious Cycle of Poverty. Mechanical application of discretion by the judges of the lower courts coupled with a negative perception towards offenders leads to such onerous conditions of bail.

To deal with this menace all the stake holders must play an active role. The courts have to be more sensitive in their approach and must embrace the principle of '*Bail, not jail*'. Factors like financial background of the offender, risk of absconding and nature of offence should be taken into consideration by the courts while determining bail amounts. The Courts must also consider an alternative to the monetary system of bail. Apart from the courts, the District Legal Services Authorities and the Jail Authorities also should consider bringing in ideas, like crowd-sourcing to deal with the menace of onerous bail conditions and to provide a level playing field to the underprivileged sections of the society and to deliver our Criminal Justice Delivery System from this raging problem.

SENTENCING BY RED TAPE: EXAMINING REMISSION IN THE CORRECTIONAL HOMES OF ASSAM

Anubhab Atreya

Introduction

Remission of sentences is among the most crucial components in the penal process, for both the sentenced person and the correctional administration. For the sentenced person, it provides an impetus for reformation and survival within the correctional homes.While for the correctional administration, it serves as a tool for discipline enforcement and a check against overcrowding. In the Indian penal system, the statutory framework provides for remission of sentences which are handed down by the courts. The current law also vests this power on prison authorities, subjected to the stipulations and processes laid down in the Jail Manual of the state concerned.[1] Remission not being a matter of right is subject to the good behavior of the inmate during his period of incarceration and acts as a tool for maintaining prison discipline.

This article *firstly* contends, that the current framework for remission as present in the correctional homes in Assam, vests discretionary power completely upon the prison authorities without substantial accountability and safeguards. The complete absence of recorded reasons about the grant or

[1]Provisions for remission are included in the procedural law as well as in state specific prison statutes. While powers of remission vest with the 'appropriate government' under the Code of Criminal Procedure, 1973, the more commonly used remission powers are derived from state-specific jail rules which are mostly implemented by the prison authorities.

non-grant of remission, puts the inmate on the wrong end of the information gradient. *Secondly*, it contends the lack of any appellate process for agitating complaints against the award of certain categories of remission, which puts the inmate completely at the mercy of the prison authority. This argument must be understood in the light of the fact that the power dynamic in the prison environment is obviously skewed towards the authorities and the presence of a direct appeal process, coupled with a review mechanism preferably through involvement of other extra-prison authorities will help in realizing the true objectives of remission. *Thirdly*, while taking note of the proposals to do away with remissions/good time completely, which has been made in other jurisdictions, it is argued that remission has the potential to serve the system well but there is no clear data about re-entry scenarios and their success rate. With adequate amendments and modifications, remission may eventually serve its true purpose.

Contrary to the popular perception of sentencing and imprisonment, the correctional system is not without its nuances and variations either. Provisions of parole, furlough and remission provide strategic respite from what Rev. Sydney Smith, the famed English writer claimed was *'a place of punishment from which men recoil with horror-a place of real suffering, painful to the memory, terrible to the imagination...a place of sorrow and wailing, which should be entered with horror and quitted with earnest resolution never to return to such misery...'*[2]

Modern day correctional homes, especially in Assam certainly do not live up to Smith's verbose imagination. With the introduction of a penal philosophy, that is a composite admixture of restorative, retributive, reformative, and deterrent components, the system of correctional administration is no longer the brutal, repressive regime it once was. Despite of the colonial hangover which is quite apparent in jail rules and manuals, the tone and tenor of correctional administration has changed for the better, towards a reformative approach which is manned by a professional cadre of officers and staff.

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[2]Smith, Sydney. "*On the Management of Prisons.*" Wardle, Lockle and Co., London. pp. 226 -232.

Remission can have a pivotal effect on the lived experience of the inmate in a correctional home. Inspite of its seeming importance in the penal process, remission has yet not received even scant attention in academic terms. The judicial treatment of remission has also been mostly restricted to the Code of Criminal Procedure. In reality, during the author's work in correctional homes with *Pratidhwani* it became apparent that remission in practical terms has been reduced to a routine bureaucratic task which is plagued by red tapism. Awareness relating to the importance of remission remains so dismally low among inmates that the procedure of remission is not fully comprehended by majority of them. In such a scenario, it becomes essential to highlight the procedural silences in remission which have gone without scrutiny. It is in this context that this paper sets out its primary argument that remission in the correctional homes of Assam suffer from procedural silences, in at least three interdependent areas: **disposal of conduct reports, opinions of Presiding Judges and disproportionate discretionary power in the hands of correctional administrators.** These, have been compounded by the lack of any appellate process or review committees for grievances relating to award of remission.

Part I of the paper introduces the idea of remission or good time as it is referred to in certain jurisdictions. It also provides an overview of the latest research on remission in the criminological discourse community. In Part II, the paper moves to a description of the remission system in the criminal justice system in India and more specifically to the correctional homes of Assam. In this, it relies on a doctrinal assessment of the relevant provisions in the Constitution of India, the Code of Criminal Procedure, 1973 and the Assam Jail Manual. Having provided a context to the functioning of the remission system in correctional homes, in Part III, the paper draws inputs and inferences from the author's work on five correctional homes in the state of Assam; District Jail, Morigaon; District Jail, Mangaldai; District Jail, Goalpara; Central Jail, Tezpur and Central Jail, Jorhat. The general issues plaguing the system in practice are analyzed in detail before finally arriving at an examination of the discretion and accountability on the part of the prison authorities in the process. In conclusion, the paper contends that while the remission system in practice, in the correctional homes of Assam may have

merit in incentivizing good behavior and prison discipline, but it is lacking in any form of accountability on prison authorities and provision of appeal or review on the part of the inmates.

I. The Idea of Remission

Sentencing is complicated on multiple fronts, both for the sentencer and the sentenced. It is compounded by the socio-economic politics inherent in the process of sentencing. However, it is certain forms of reprieve in sentences like paroles and furlough which provide the sentenced with the motivation to utilize the period of incarceration for reform and rehabilitation. The practice of remitting sentences for time served while meeting certain disciplinary and behavioral standards is one such chink in the monotonous armour that a sentence of imprisonment can become. However, the basis of the practice of remission cannot be said to have been based on any reformative ideals. It has been argued that remission was nothing but an administrative tool to maintain discipline and good behaviour in the jails.

A. Maconochie and his Gentlemen

'The prisoner should carry the key to his own cell.'

Remission as we understand it today developed gradually in penal practice over the centuries, drawing elements and specificities from different legal and penological systems. In contextualizing the practice of remission particularly in Assam's correctional homes and across India in general, it is necessary to map the primary historical influences behind the present-day concept of remission.

At the outset, it is necessary to be cognizant of the fact that the history of remission has not received sufficient attention in penological literature and there remains only a limited number of documented case studies in this area, the case of Alexander Maconochie's penal reforms in Norfolk Island being the most prominent.[3] Apart from Maconochie, there are other historical examples on the use of remission or good time as a process in correctional administration. Frederick Wines cites the example of Vilain XIII, a Flemish

[3] Jacobs, James B. "*Sentencing By Prison Personnel: Good Time.*" *UCLA Law Review*, Vol. 30, No. 217, 1982 pp. 217-269.

noble who believed that prison officials should have the prerogative to extend or shorten a sentence depending upon the conduct of the inmate and himself implemented this idea in his prisons.[4]

Alexander Maconochie, one of the pioneers of modern penology, in his role as Governor of the British prison in Norfolk Island, off the coast of Australia, introduced the 'marks' system by which inmates in his island prison could earn 'marks' through work and good behaviour. Eventually, on accumulation of enough marks, they could be released from the island prison. It can be argued that one of the reasons for the stupendous success in re-entry scenarios of Maconochie's Gentlemen (as prisoners from the island prison were referred to by the locals on shore) was the 'marks' system.[5]

19th century Norfolk Island contained one of the most dreaded penal installations of the British Empire where inmates were used to living in unhygienic, overcrowded conditions overseen by a brutal prison regime with no scope of leaving the island.[6] It was a destination for prisoners who had been sentenced to transportation twice and were seen as hopeless cases. With the appointment of former naval captain and penal theorist Alexander Maconochie as the Governor of Norfolk Island, the prison turned from a tensed and violent settlement into a peaceful and successful correctional centre within a few years. The foundation of this transformation was a combination of Maconochie's inspirational and gentle leadership along with his marks system, which he devised as a combination of reformative opportunity and discipline enforcement. Norval Morris in extending a corollary to Maconochie's philosophy, that a prisoner should hold the key to his own cell claimed that '*when a man keeps the key of his own prison he is soon persuaded to fit it to the lock*'. Maconochie is relevant to this paper primarily because in the yet unwritten history of remission or good time

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[4] Wines, F. H."*Punishment and Reformation: A Study of the Penitentiary System.*" Thomas Y. Crowell Company, 1919, p. 142.

[5]MorrisNorval. "*Maconochie's Gentlemen: The Story of Norfolk Island & The Roots of Modern Prison Reform.*" Oxford University Press, 2002.

Maconochie's work was catapulted into relevance in contemporary penological discourse after Prof. Morris's seminal research into the ramifications of the Norfolk Island experiment for modern day penal systems.

[6]Norfolk Island is an island in the Pacific Ocean located off the coast of Australia.

practices, the story of Norfolk Island is the one which is most well documented.[7]

Maconochie's marks system according to Norval Morris basically consisted of: [8]

- *'Work and behaviour' prison sentences instead of 'time' sentences.*
- *Marks allotted to measure work and behaviour*
- *Progress or regress in marks being known to the prisoner.*
- *Increasing autonomy within the prison as marks accumulate.*
- *Convict groups to work together with the incentive that each in the group could thus earn more marks than each working separately.*
- *Optional and voluntary cell work available, if the convict wish to earn extra marks*
- *Graduated release procedures, including supervision within the community, leading to ultimate freedom.*

While whether this model had any effect immediately on the English correctional administration cannot be contended with authority, as it was dismissed by government officials in Whitehall. But it did display all those principles which eventually came to dominate modern day penology.[9] In certain countries as in the USA where it received support from the American Prison Association, it came to exert some amount of influence contemporaneously.

Over the years, the marks system has found reflection in correctional systems across the world and was a precursor to the remission system. For example, the United States of America refers to the remission system as 'good time' while jurisdictions like India, utilizes the concept of remission through its primary criminal procedure statute coupled with penal statutes which vary from state to state.[10] The concept of remission found reflection in the Code of Criminal Procedure, 1898 which is the precursor to the present

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[7]Jacobs, James B. "*Sentencing By Prison Personnel: Good Time.*" UCLA Law Review, Vol. 30, No. 217, 1982 pp. 217-269.

[8]Supra (n 3)

[9]Barry, J.V. "*The Life and Death of John Price.*"Melbourne University Press, 1964, p.21.

[10]Statutes which outline the details of prison related matters vary from state to state in India as 'Prison' is Entry 4 under the State List or List II of the Seventh Schedule of the Constitution of India.

Code of Criminal Procedure, 1973. Sections 432 and 433 of the 1973 Code which deals with remission corresponds to Sections 401 and 402 of the Code of 1898.[11]

In the correctional administration system of India, the marking system was followed till 1867 when the remission system was introduced.[12] It was based, among others, on the example of the Irish prison system which had successfully implemented **marking** under the influence of Sir Walter Frederick Crofton, the noted penologist who served as the Chairman of the Board of Convict Prisons of Ireland between 1854 to 1862.[13] Crofton's marks system was essentially similar to Maconochie's system in its theoretical basis. It was only after 1867 that the regime of remission in its present-day form came into being. Over the years, remission came to be included in the legal system of the country at multiple levels which is discussed in the following section.

II. The Legal Framework

A. Remission in the Constitutional framework

Apart from the procedural law and the prison related statutes, the Constitution of India itself contains provisions for remission in certain cases. Articles 72 and 161 of the Constitution provides the President of India and the Governor of States powers of remission among others. Art. 72 provides the President of India the power to grant pardons, reprieves, respites,or remission of punishments or to suspend, remit or commute the sentence of a person convicted of any offence mentioned below-

a. In all cases where the punishment or sentence is by a Court Martial;

b. In all cases where the punishment or sentence is for an offence against any law relating to a matter to which the executive power of the Union extends;

[11]This has been taken note of by the Constitution Bench in *Maru Ram v. Union of India,* AIR 1980 SC 2147.

[12]Paul, K.C."*Administration of Jails in Assam(1874-1964)*". Department of Political Science, Gauhati University, 1970.

[13]The Intermediate System of penal reform in Ireland formulated by Sir Walter Crofton made use of the mark system to ensure reformation and discipline. This was in contrast to the English 'Separate System' which was the brainchild of Sir Joshua Jebb. Crofton's Intermediate System essentially carried forward the theoretical basis of Maconochie's system.

c. In all cases where the sentence is a sentence of death.

Art.161 provides that the Governor of a State shall have the power to grant pardons, reprieves, respites, or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends.[14]

The purpose of these provisions is to ensure that public purpose is served by grant of remission in appropriate cases and not to provide the executive 'unbridled power of reprieve'.[15] In practice, remissions granted under these provisions can often become controversial, tinged as they are with political hues. For example the case of the release of the seven convicts in the Rajiv Gandhi assassination case, which was effected through the exercise of the Governor's power of remission under Art.161.[16] In this case, the Tamil Nadu cabinet adopted a resolution recommending the release of seven convicts to the Governor.[17] However, the position that the Governor is bound by the advice of the Council of Ministers even in cases of grant of pardon or remission under Art.161 has been clarified by the Constitution Bench in *Shamsher Singh v. State of Punjab*[18] and reiterated in *Maru Ram v. Union of India*[19].

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[14]The power of remission that is available under Art.72 and Art.161 was clarified by the Supreme Court in *State of Haryana v. Jagdish,* AIR 2010 SC 1690. The power to grant remission under these provisions is within the exclusive domain of the sovereign.

[15]In addition to clarifying the nature of remission itself, judicial decisions have also clarified the limited role of judicial review in challenges to decision taken under Art. 72 in mercy petitions. In *Devender Pal Singh Bhullar v. State of N.C.T of Delhi,* AIR 2013 SC 1975, the Supreme Court held that the court can neither sit in appeal nor exercise the power of review in such cases. However, the court may intervene if it is found that the decision has been taken without application of mind to the relevant factors or the same is founded on extraneous or irrelevant considerations or is vitiated due to mala fide or patent arbitrariness.

With respect to the operation of Art.161, the Supreme Court in *Narayan Dutt v. State of Punjab,* AIR 2011 SC 1296, has held that before the power of the Governor under Art.161 is invoked by any person, the condition precedent to such invocation is that such person or persons must be convicted of an offence against any law and will be subjected to undergo a sentence.

[16]For the judgement in the Rajiv Gandhi Assassination case, see *Union of India v. V. Sriharan@Murugan,* W.P(Crl) No.48 of 2014, decided on 02.12.2015 by the Supreme Court of India.

[17]Manikandan, M."*Tamil Nadu government recommends releasing 7 convicts in Rajiv Gandhi assassination case*", *Hindustan Times,* https://www.hindustantimes.com/india-news/ release-7-convicts-in-rajiv-gandhi-assassination-case-says-tamil-nadu-govt/story-0ZSp514w9r BmnwBAe WJQqO.html.

[18]AIR 1974 SC 2192.

[19]AIR 1980 SC 2147.

B. Remission as envisaged by the Code of Criminal Procedure, 1973

Remission in the Indian legal framework is included both in the procedural law code and the prison statutes of the country and is informed in practice by state-specific rules and government policies. The Code of Criminal Procedure, 1973 contains several provisions outlining and demarcating the power of the government in providing remissions.

S.432(1) of the Code of Criminal Procedure, 1973 provides that:

'when any person has been sentenced to punishment for an offence, the appropriate Government may at any time without conditions or upon any condition which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.'

S.432(2) of the Code of Criminal Procedure, 1973 provides that:

'whenever an application is made to the appropriate Government for the suspension or remission of a sentence, the appropriate Government may require the presiding Judge of the Court before or by which the conviction was had or confirmed, to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion and also to forward with the statement of such opinion a certified copy of the record of the trial or of record thereof as exists.'

Remission means reducing the period of sentence without changing its character, for example, two years of rigorous imprisonment to one year. The right to grant remission under this provision is purely an executive function and vests with the government and not with the judiciary.[20] It has been clarified by the decisions of the Hon'ble Supreme Court and the various High Courts that the question of grant of remission is exclusively within the domain of the appropriate Government.[21] The grant of remission is a matter of policy and it is for the executive branch of the government to decide as to when, to what extent and in what manner remission is to be granted. The courts cannot give any direction in the matter of policy as it is purely within the executive domain of the Government.

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[20] *K. Pandurangan v. S.R.R. Vehisamyas,* AIR 2003 SC 3318; *V. Suresh v. State of Kerala,* 2006 CrLJ 4562 (4563, 4564).

[21] *Gopal Vinayak Godse v. State of Maharashtra,* AIR 1961 SC 600; *K. Pandurangan v. S.R.R. Vehisamyas,* AIR 2003 SC 3318.

A right to be considered for remission, keeping in view the constitutional safeguards of a convict under Articles 20 and 21 of the Constitution of India, is a legal one. Such a legal right emanates not only from the Prisons Act but also from the Rules framed thereunder.[22] That the remission of sentence is not a prisoner's right has also been held by High Courts even though the Supreme Court later went on to clarify in *Sangeet v. State of Haryana*[23] that there do exists a right to be **considered** for remission.[24] Where the State Government had remitted only that part of the sentence of imprisonment of life which was in excess of twenty four years of total imprisonment, the decision of the Government could not be challenged as arbitrary or irrational.[25] As a result of judicial interpretation, the concept and provisions of remission under the Code of Criminal Procedure, 1973 and prison rules has evolved both in conceptual terms and in terms of application. The judicial decisions which are analyzed in the following section are therefore imperative in comprehending the law relating to remission in India.

C. The Indian jurisprudence on remission

Most of the Indian jurisprudence on the issue of remission hasbeen created by litigation on the point of commutation of life imprisonment. The more relevant strand of judicial precedents in the case of this article was initiated by the Supreme Court's judgement in the case of *Maru Ram v. Union of India*[26] and *State of Haryana v. Mahender Singh*[27]. S.B Sinha and H.S Bedi, JJ in their opinion in *Mahender Singh* analyzed the decision in *Maru Ram* as follows:

"*The Constitution Bench was of the opinion that remission schemes offer healthy motivation for better behaviour, inner improvement and development of social fibre. It was observed that remission and short sentencing scheme provides*

[22] *State of Haryana v. Mahender Singh,* 2008 CrLJ 444(451)SC.

[23] (2012) 11 SCALE 140.

[24] *Chaturbahi Desaibhai Patel v. State of Gujarat* 1985 (2) Crimes 856, 859(Guj-DB). In *Jagtar Singh v. State of Punjab,* 1987 CrLJ 606(P&H) the court pointed out that the very concept of mercy rests on the compassion of the mercy giver; there is no such thing as a right to obtain mercy.

[25] *Jabbar Khaja Saudagar v. State of Maharashtra,* 1991 SCC(Cri)157(1); *Pusparaj v. State of Tamil Nadu,* 2007 CrLJ 4426 (4433).

[26] AIR 1980 SC 2147.

[27] (2007) 13 SCC 606.

good guidelines for exercise of pardon power, a jurisdiction meant to be used as often and as systematically as possible and not to be abused, much as the temptation so to do may press upon the men of power."

In the 70s, there was a strong public opinion that the power to grant remissions even in cases of offences which were punishable by death sentence, were being misused by state governments. As a result, Parliament introduced S.433 A in 1978 in the CrPC and provided for a lower limit of 14 years of incarceration before remission could be awarded in case of offences which were punishable by death. The constitutionality of S.433A was challenged in the landmark case of *Maru Ram v. Union of India*[28] which was decided by a Constitutional Bench and the judgement was authored in his inimitable style by V.K Krishna Iyer, J.

It must be noted that certain provisions related to remission, especially those in the CrPC have been enacted by the Central Government under Entry 2 of List III under the head 'Criminal Procedure'. On the other hand, prison rules under the Prisons Act, 1893 are enacted by the State. However, provisions related to remission may be created under List II by the states as they come under prison related matters.

In *Maru Ram*, a rather technical aspect of the nature of remission was elucidated by the Court. Remission was ultimately a component of the execution of sentence and not sentencing itself. As a result, it is clearly in the executive domain. A grant of remission does not alter the sentence or the conviction. It merely provides that some part of the sentence need not be undergone without altering or interfering with the judicial order imposing the original sentence.

The issues which have come before the courts with respect to remission have been mostly concerned with life sentences. In *Godse*[29] and *Sarat Chandra Rabha v. Khagendra Nath*[30] it has been clarified by the Courts that while remission may be useful for the computation of sentences it does not reduce the factum and the quantum of the sentence providing any right to be released. In case of fixed terms of sentences, it may inevitably have the effect of reducing

[28]AIR 1980 SC 2147.
[29]1961 CrLJ 736A.
[30][1961] 2 SCR 133.

the time to be served but in cases of life sentences there is no upper limit of incarceration which can be assumed so that the period of remission can be set off against it. In such cases, release under remission would follow only if the appropriate Government makes an order under S.432 of the CrPC or the powers under Art. 72 and 161 are invoked. In para 72, sub para 6, the Court affirmed the decision in Godse's case which held a sentence of life imprisonment lasts until the last breath and whatever the period of remissions earned by a prisoner, he may be released only if the remaining period of the sentence is remitted by the Government under S.432 CrPC.

An important legal issue relating to remission was resolved by the *Maru Ram* Court, that whether all remissions and short-sentencing schemes as 'special and local law' were saved under S.5 of the CrPC from its provisions. This was held to the contrary because S.433A was a specific and definite provision which had been enacted for a specific purpose.

Another issue that was raised in *Maru Ram* with respect to the remission scheme is that it must not be left to the **fancy, frolic, or frown** of either the State or Central Government. Rather it must be subject to **reason, relevance and reformation**, being as it is an exercise of public power. Describing remission rules as a 'humanising wheel of compassion and reduction of psychic tension', Krishna Iyer, J. insisted that the jurisdiction for providing remission must be used often and as systematically as possible without the abuse of power.

The next substantial decision of the Supreme Court concerning remission came 28 years later in *State of Haryana v. Mahender Singh*[31]. In this case, the primary point of contention was that the Punjab government in formulating a policy by which remission was to be granted under jail rules to convicts was decided on the basis of number of murders committed, was discriminatory in nature. The State has the right to frame prison policies as distinguished from sentencing policies under the Prisons Act, 1894. Section 59(5) provides the States power to make rules relating to remission. It was utilizing this power that the Government of Punjab framed the impugned policy.

[31]2008 Cri L.J. 444

In para 23 of the judgement in *Mahender Singh*, the Division Bench of the Hon'ble Supreme Court held that while remission is not a matter of right for a prisoner, it is the duty of the State Government to consider each individual case for remission. A right to be considered for remission, keeping in view the constitutional safeguards of a convict under Articles 20 and 21 of the Constitution of India, must be held to be a legal one. Such a legal right emanates from not only the Prisons Act but also from the Rules framed thereunder. Although no convict can be said to have any constitutional right for obtaining remission in his sentence, he in view of the policy decision itself must be held to have a right to be considered therefore. Whether by reason of a statutory rule or otherwise, if a policy decision has been laid down, the persons who come within the purview thereof are entitled to be treated equally.

This decision was followed two years later by the Court's decision in *State of Haryana v. Jagdish*[32]. In *Jagdish*, a three judge Bench of the Supreme Court held that the convict must get the favour of the short sentencing policy or remission policy which was prevailing at the time of his conviction. It held that policies of this nature concerning remission or short sentencing must be interpreted liberally and in favour of convicts where possible.

However, it was in 2013 that the Supreme Court examined S.432 CrPC from an expansive lens in *Sangeet v. State of Haryana*[33]. A Division Bench of the Supreme Court held among other findings that the grant of remission is a statutory exercise but to prevent its arbitrary use, certain procedural and substantive checks have been built in to the statute. All of these checks need to be faithfully enforced by the authority granting remission. It also clarified that the grant of remission under S.432 CrPC, was over and above the remission granted to convicts under the Jail Manual or other statutory rules. In case of indeterminate or indefinite sentences like life imprisonment, the power of the appropriate government under S.432 CrPC must be exercised but not on an arbitrary assumption of a notional figure of twenty years of imprisonment. Remission must be given

[32]AIR 2010 SC 1690.
[33]AIR 2013 SC 447.

on a case-by-case basis. The decision reiterated *Mahender Singh* and *Jagdish* on the point that even though remission cannot be claimed as a matter of right, the right to have one's case considered for the grant of remission exists.

With respect to decisions of the Gauhati High Court on remission, a Division Bench of the Gauhati High Court in *Saibal Ganguly v. Government of Assam*[34] reiterated the principle adopted in *Maru Ram* that life imprisonment cannot be stipulated in any term and that a convict undergoing life imprisonment irrespective of the length of the remission earned can claim release only if, the remaining sentence is remitted by the Government. These decisions of the courts have an important role to play in practice, and will be discussed in the following section, as they have percolated into the remission policies formulated by the Government of Assam which impacts the day to day functioning of correctional homes.

D. Remission as applied in the correctional homes of Assam

The legal framework around the Remission System applicable in the correctional homes of Assam is a constituent of S.432 of the Code of Criminal Procedure, 1973 read with Chapter XIX of Rules for Superintendence and Management of Jails in Assam which have been made by the State Government under Section 59(5) of the Prisons Act, 1894. The procedure for remission of sentences of life convicts is further regulated by Office Memorandum No. HMB.143/2010/PT-II.194 dated 06.10.2015 issued by the Government of Assam in the Home and Political Department.[35] It prescribes a procedure which entails all the mandates of the various legal provisions and the decisions of the Supreme Court and the Gauhati High Court.

The Rules for Superintendence and Management of Jails in Assam define remission as a concession granted to prisoners, with a view to shorten their sentences which is subjected to withdrawal/forfeiture/revocation and is not a right. It envisages three kinds of remissions: *ordinary remission, government remission* and *special remission.*

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[34]2010(3) GLT 190

[35]Attached as Annexure I

The award of remission are excluded from cases where life sentence has been awarded after commutation of death sentence. Ordinary remission cannot be awarded in case of any award of simple imprisonment except for any continuous period not being less than one month during which the prisoner labours voluntarily. Remission may be forfeited in cases when the inmate commits certain offences under the IPC enlisted in Rule 329 or assaults a warder or other officer in the Jail.

The power for awarding *ordinary remission* is vested on the Superintendent and also to a Jailor, Assistant Jailor or any other officer who is specially empowered on his behalf. Ordinary remission is awarded to the scale of **two days per month** for thoroughly good conduct and scrupulous attention to all prison regulations. It may be awarded **two days per month** for industry and due performance of the daily task imposed. This scale is specified in Rule 331.

Convict officers are entitled to a special rate of remission under Rule 333. Convict warders, convict overseers and convict night-watchmen are entitled to a higher rate of ordinary per day remission. Prisoners who have been employed for prison services are an integral part of the correctional home. Such prisoners who are employed for cooking, 'sweeping' on Sundays and holidays are eligible to be awarded three days ordinary remission per quarter in addition to any other remission they may earn under Rule 335.

Under Rule 335, a prisoner who has not committed any offence from the first day of the month following the date of his sentence or the date on which he was last punished for a prison offence is awarded 15 days ordinary remission in addition to any other remission earned under the rules.

Government Remission is granted by the appropriate Government on occasions of public importance or public rejoicings.

Special remission may be awarded by the Superintendent to the extent of thirty days in one year and by the Inspector General of the State Government to the extent of sixty days of one year under Rule 342. Special remission may be awarded to any prisoner irrespective of whether he is eligible for ordinary remission or not.[36] A non-exhaustive list of the special services for which special remission may be granted is mentioned in Rule 341 as under:

[36]Prisoners undergoing sentences under Rule 327 are not entitled for special remission.

1. Assisting in detecting or preventing breaches of prison discipline or regulations;

2. Success in teaching handicrafts;

3. Special excellence in, or greatly increased outturn of, work of good quality;

4. Protecting an officer of the prison from attack;

5. Assisting an officer of the prison in the case of outbreak, fire or similar emergency;

6. Economy in wearing cloths

The total remission which is awarded to a prisoner under these rules cannot exceed one-fourth of the sentence at any point in time without special sanction of the state government. Thus, the framework for awarding remission is not merely based on passive disciplinary aspects rather it is also based on rewards for active participatory work. In many ways, the mechanism envisaged through the Assam Jail Manual provides for a reformatory outlook coupled with a useful tool for inducing discipline and good behaviour. In many ways, it bears resemblance to the previously utilized marks system.

The procedure for consideration of remission for life convicts and other convicts sentenced to more than 14 years in aggregate, according to the policy framed by the Government of Assam in the Home & Political Department through Office Memorandum No. HMB.143/2010/PT-II 194 dated 06.10.2015, is as follows:

1. *'All applications made by a convict or on his behalf for remission of sentence should be submitted to the Superintendent of the Jail. The latter in turn will take steps to forward the same to the Presiding Judge of the convicting or confirming court along with the history ticket, copy of the judgements, descriptive roll, report from the District Magistrate and the Superintendent of Police of the district of the convict's court, report from the District Magistrate and the Superintendent of Police of the district of the convict's court, report of the Medical Board in case of old-infirm and terminally ill convicts for his opinion (with reason) about granting of remission.*
2. *No application shall normally be entertained for remission of life sentence before completion of 14 years of imprisonment including the period of*

remission earned. But where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments provided by law, or where a sentence of death imposed on a person has been commuted U/S 433 CrPC into one of imprisonment of life, case of such person shall not be considered unless he/she had served at least 14 years of actual imprisonment. However, in exceptional cases where prisoner is more than 80 years in age or infirm/frail or is suffering from terminal diseases, the application may be processed even if he/she has not completed 14 years of imprisonment as stated above.

3. *In cases where convicting court is a district court, the concerned Superintendent of Jail will obtain opinion/withreasons from the convicting court and submit the proposal of remission to Inspector General of Prisons. In cases where the convicting or confirming court is the High Court, the Inspector General of Prisons will obtain opinion/with reasons from the High Court.*
4. *The Presiding Judge of the convicting or confirming court will record his/her opinion/with reasons and return the proposal to the Superintendent of the concerned Jail or Inspector General of Prisons, Assam as the case may be. The Superintendent of the concerned Jail shall submit to the Inspector General of Prisons, Assam all proposals for remissions twice in a year (during the months of July and January).*
5. *Inspector General of Prisons, Assam after the consideration, will submit the proposal of remission to the Government of Assam along with his recommendations.*
6. *The State Government shall examine the proposal received from Inspector General of Prisons along with the opinion of the Presiding Officer of the convicting or confirming court, as the case may be. While taking decision, the State Government shall have regard in respect of the following class of prisoners:*
   (a) *Convicts who are older than 75 years, convicts who have become frail and infirm or are suffering from terminal deceases and prima facie would not pose any threat to the society as per finding of the Medical Board.*
   (b) *Convicts who have spent their imprisonment with excellent track record of discipline, conduct and hard work.*

7. *Remission of sentences may be granted by the Government of Assam with or without conditions after considering the nature of the crime. While doing so the State Government shall also take into consideration whether remission granted could have adverse effect in the society or shall be detrimental to the interest of the State. The conditions of refuse shall be clearly stated in the order of remission.*
8. *Remission proposals shall be decided on case-by-case merit. No decision in this regard shall be taken on a wholesale manner.*
9. *Proposal of remission rejected by the Government of Assam, after due consideration should not be resubmitted before expiry of 2 years from the date of rejection except where the person is more than 80 years in age or terminally ill.*'

The above policy has been formulated on the basis of all the decisions of the Supreme Court and the Gauhati High Court available on this point along with the provisions of the Code of Criminal Procedure and the Assam Jail Manual. While this policy is fairly comprehensive and has provided a platform for the legal framework on remission to be turned into administrative reality, it suffers from a lack of dynamism. This is because most of the issues relating to remission which have been highlighted in this article can be neutralized with a mere rethinking of the present policy. However, this rethinking must have, as its stimulus, stakeholder feedback from within the correctional homes. During the author's work with *Pratidhwani* in the correctional homes, several remission related issues (which are dealt with extensively in the following section), emanating either from the statute or policy, became apparent.

III. Scope for Change

A. Procedural Issues in Remission

Conduct Reports:

The present system of remission within the correctional homes is implemented rather mechanically. A remission card which is basically a monthly record of remission granted is maintained for each convict. During the time of release, it is attached to the inmate's file for any

correspondence with higher authorities. In cases of life imprisonment, a conduct report is needed from the Deputy Commissioner (DC) and Superintendent of Police (SP) of the district before the person can be released.

The legal basis for the release of inmates can be traced in Chapter XXX 'Releases' of the Rules for Superintendence and Management of Jails in Assam, which must be read with the present remission policy of the state government. A bare reading of the remission policy issued by the government does not give the impression that the conduct report from the DC and the SP are substantive elements of the process. However, most of the correctional homes that were visited during the course of this work presented cases where conduct reports had been delayed, thereby choking the whole remission process.[37] There have been two cases where the jail authorities themselves have written to the DC and SP for a second time reminding them to send the conduct reports but to no avail.[38]

To ascertain the reason as to the delay in the conduct reports, we filed applications under S.6(i)(a) of the Right to Information Act, 2005 addressed to the DCs and SPs of the districts. Among other queries, it sought to know how many conduct reports had been received by their respective offices in the time frame from 01.04.2017 to 01.04.2018 and how many of those reports had been completed and sent back to the respective correctional homes. Of the two DCs who replied, one of the districts had cleared all the conduct reports received in the said period while the other had five pending reports. And among the two SPs who replied, one district had five pending conduct reports and the other had two.[39]

While these numbers may not seem very impactful at first glance, it must be kept in mind that conduct reports are a cog in the wheel of a system, which determines a question of personal liberty as envisaged under Article 21 of the Constitution. For every delayed conduct report, a convict spends several extra

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[37]Central Jail, Jorhat; District Jail, Morigaonand District Jail, Mangaldai reported cases where conduct reports had been delayed for several months on end.

[38]Both these cases were reported in District Jail, Morigaon.

[39]The unanswered applications have been appealed under the provisions of the Right to Information Act, 2005.

days or months in jail. A delay in this process essentially means that the inmates stay in the prison is prolonged for a substantial number of days. Time being relative, it is only an insider's perspective which can vouch for the fact that time does travel slower in captivity. More practically, these bureaucratic bottlenecks may have serious effect on the impetus for reformation that an inmate may have gathered during his years of incarceration.

Opinion of Presiding Judges:

In cases of indeterminate sentences like life imprisonment where the remission available under the Assam Jail Manual is not enough, remission of sentence has to be done under S.432 r/w S.433A. Once the process of remission under S.432 CrPC is initiated made by an application either by the convict or on his behalf, it involves obtaining an opinion from the presiding Judge of the Court before or by which the conviction was had or confirmed. This opinion should be with respect to whether the application for remission should be granted or refused supported by reasons. The judge must forward a certified copy of the record of the trial along with his statement of such opinions. This procedure has been streamlined as a matter of policy by the Government of Assam in the Home & Political Department through Office Memorandum No. HMB.143/2010/PT-II 194 dated 06.10.2015.[40]

While the statutory mandate with respect to the opinion of the Presiding Judge of the convicting court does not leave any room for ambiguity, but there have been examples when even judicial officers did not clearly understand it. A clear example of this is a case record which is on file with *Pratidhwani*, where the presiding judge of the convicting court refused to give an opinion on the basis of the fact that he was a new incumbent in the position and it was his predecessor who had handed down the conviction. He inferred from the very fact that conviction was handed down in the case, it was apparent that his predecessor would not be amenable to give a favourable opinion for remission. This order has led to the inmate's release being delayed for almost a year inspite of being eligible for remission having completed fourteen years of imprisonment.[41]

[40]Annexure I.

[41]A legal intervention in the form of a writ petition (under Article 226 of the Constitution of India) before the Gauhati High Court is being presently pursued in the case.

Discretionary power:

The basic unit of the remission system in the correctional homes is the remission card. It contains the monthly award of remissions available under the Rules for Superintendence and Management of Jails in Assam. The jail authorities have the prerogative to enter the number of days of remission which have been earned and therefore ensure total control over the grant of remission which is available under the jail rules. While it is extremely important to ensure the efficacy of the remission system as a tool for encouraging good behaviour and discipline, it is also distinctive in its lack of procedural safeguards. The inmate has no means of challenging or questioning the remission being awarded to him before any authority other than the granting authority and in most cases, inmates do not have a clear understanding of the remission system.

Fig: Format of remission cards used in Assam

As discussed before, it has been settled by the Supreme Court that while remission may not be a matter of right, but the right to be heard for remission certainly is one.[42] As a necessary corollary, substantive and procedural safeguards must be built into the statute to prevent arbitrary use of remission. However, at least with respect to the remission provided under the jail rules, no safeguards are possible as the granting authority is not subject to verification as long as he provides any reasons for his grant of remission.

[42] *Sangeet v. State of Haryana.*

Conclusion

While this might not have been a situation warranting much attention in an ordinary setting, the dynamic completely changes in correctional homes where the power dynamic is quite unabashedly leaning towards the administration. While during our work in correctional homes no cases of manipulation or extortion over grant of remission according to jail rules were reported, however, we have been made to understand by several stakeholders that such manipulation or extortion is a possibility.[43] Unlike issues like wages, where inmates have a direct understanding of the mechanism concerned or which merely have a pecuniary facet not connected with the length of their incarceration, remission is an issue which they find difficult to discuss with external actors.

All the three issues can be countered by either introducing a direct appeal processfor award of remission or by way of amendment in the jail rules by which inmates or their representatives can appeal for reconsideration of the awards of remission granted to them before an authority, external to the prison department. While the second manner of countering the issues relating to the remission system, could be forming a review committee in the manner of the Under-Trial Prisoners Review Committee which would include several authorities from the district administration along with the judiciary which would monitor grant of remission in the correctional homes. The involvement of district administration and judiciary in the review committee would also facilitate the solution of the conduct report and opinion issues and thus, expedite the remission system.

[43]These stakeholders include inmates and officials of correctional homes who have expressed these doubts during informal interviews.

ANNEXURE I

GOVERNMENT OF ASSAM
HOME DEPARTMENT

No. HMB.143/2010/PT-II 194 Dated :
Dispur, the 6th of October, 2015

Subject: Remission of Sentences of Life Convicts. -

The issue of evolving a uniform policy for granting remission of sentences to life convicts and all other convicts sentenced to imprisonments for more than 14 years in aggregate has been engaging the attention of the Government for quite some time. The power of remission of sentences has been given under the Article 161 of the Constitution and Sections 432, 433 and 433(A) of the Cr.P.C, 1973. The Rule 571 of the 'Assam Jail Manual' hasprovided the guidelines in this regard. In this regard, the Hon'ble Supreme Court after hearing the Criminal Appeal No.490-91 of 2011 ordered on 20th November, 2012 as follows:

"*There is a misconception that a prisoner serving a life sentence has an indefeasible right to release on completion of either fourteen years or twenty years of imprisonment. The prisoner has no such right. A convict undergoing a life imprisonment is expected to remain in custody till the end of his life, subject to any remission granted by the appropriate Government under section 432 of the Cr.P.C which in turn is subject to the procedural checks in that Section and the substantive check in Section 433A of the Cr.P.C.*

The grant of remission is statutory. However, to prevent its arbitrary exercise, the legislature has built in some procedural and substantive checks in the statute. These needs to be faithfully enforced.

Remission can be granted under section 432 of the Cr.P.C in the case of a definite term of sentences. The power under this section is available only for granting 'additional' remission, i.e. for a period over and above the remission

granted or awarded to a convict under the Jail Manual or other statutory rules. If the term of sentence is indefinite (as in life imprisonment), the power U/S 432 of Cr.P.C can certainly be exercised but not on the basis that life imprisonment is an arbitrary or notional figure of twenty years of imprisonment.

Before actually exercising the power of remission under Section 432 of the Cr.P.C, the appropriate Government must obtain the opinion (with reason) of the presiding judge of the convicting or confirming court. Remission can, therefore, be given only on a case-by-case basis and not in a wholesale manner."

The Hon'ble Gauhati High Court has also suggested that while granting remission in respect of life convicts, factors governing such consideration should be, the age of the convicts, the physical strength of the individual as to assess the danger that an individual is likely to pose in the society in the event of his release. Further, it was also opined that the prisoner who have become frail or suffering from terminal diseases, prima-facie would not pose any threat to the society and therefore such cases should be considered accordingly.

In view of the position stated above the Governor of Assam is pleased to lay down the following policy for consideration of the prayer of life convicts and other convicts sentenced to more than 14 years in aggregate in the State of Assam:

10. 'All applications made by a convict or on his behalf for remission of sentence should be submitted to the Superintendent of the Jail. The latter in turn will take steps to forward the same to the Presiding Judge of the convicting or confirming court along with the history ticket, copy of the judgements, descriptive roll, report from the District Magistrate and the Superintendent of Police of the district of the convict's court, report from the District Magistrate and the Superintendent of Police of the district of the convict's court, report of the Medical Board in case of old-infirm and terminally ill convicts for his opinion (with reason) about granting of remission.

11. No application shall normally be entertained for remission of life sentence before completion of 14 years of imprisonment including the period of remission earned. But where a sentence of imprisonment for life is imposed on conviction of a person for an offence for which death is one of the punishments

provided by law, or where a sentence of death imposed on a person has been commuted U/S 433 CrPC into one of imprisonment of life, case of such person shall not be considered unless he/she had served at least 14 years of actual imprisonment. However, in exceptional cases where prisoner is more than 80 years in age or infirm/frail or is suffering from terminal diseases, the application may be processed even if he/she has not completed 14 years of imprisonment as stated above.

12. In cases where convicting court is a district court, the concerned Superintendent of Jail will obtain opinion/with reasons from the convicting court and submit the proposal of remission to Inspector General of Prisons. In cases where the convicting or confirming court is the High Court, the Inspector General of Prisons will obtain opinion/with reasons from the High Court.

13. The Presiding Judge of the convicting or confirming court will record his/her opinion/with reasons and return the proposal to the Superintendent of the concerned Jail or Inspector General of Prisons, Assam as the case may be. The Superintendent of the concerned Jail shall submit to the Inspector General of Prisons, Assam all proposals for remissions twice in a year (during the months of July and January).

14. Inspector General of Prisons, Assam after the consideration, will submit the proposal of remission to the Government of Assam along with his recommendations.

15. The State Government shall examine the proposal received from Inspector General of Prisons along with the opinion of the Presiding Officer of the convicting or confirming court, as the case may be. While taking decision, the State Government shall have regard in respect of the following class of prisoners:

(c) Convicts who are older than 75 years, convicts who have become frail and infirm or are suffering from terminal deceases and prima facie would not pose any threat to the society as per finding of the Medical Board.

(d) Convicts who have spent their imprisonment with excellent track record of discipline, conduct and hard work.

16. Remission of sentences may be granted by the Government of Assam with or without conditions after considering the nature of the crime. While

doing so the State Government shall also take into consideration whether remission granted could have adverse effect in the society or shall be detrimental to the interest of the State. The conditions of refuse shall be clearly stated in the order of remission.

17. Remission proposals shall be decided on case-by-case merit. No decision in this regard shall be taken on a wholesale manner.

18. Proposal of remission rejected by the Government of Assam, after due consideration should not be resubmitted before expiry of 2 years from the date of rejection except where the person is more than 80 years in age or terminally ill.

The above procedure will be subject to order of the Hon'ble Supreme Court dated 23.07.2015 in Writ Petition No. 48/2014.

Sd/-M.G.V.K Bhanu
Addl. Chief Secretary to the Government of Assam
Home & Political Department

No. HMB.143/2010/PT-II 194 Dated :
Dispur, the 6th October, 2015

Copy to:

1. The Director General of Police, Assam for information and necessary action.

2. The Registrar, Gauhati High Court, Guwahati

3. P.P.S to the Hon'ble Chief Minister, Assam for appraisal of the Hon'ble Chief Minister

4. P.S to the Hon'ble Minister, Jails for appraisal of Hon'ble Minister.

5. S.O to the Chief Secretary to the Govt. of Assam for appraisal of Chief Secretary.

6. P.S to the Addl. Chief Secretary, Home & Political Department for appraisal of Addl. Chief Secretary.

7. P.S to the Commissioner & Secretary, Home & Political Department for appraisal.

8. The Addl. D.G cum Inspector General of Prisons, Assam, Khanapara, Guwahati-22. He is requested to furnish a copy of this OM to all the

Superintendent of Jails of the State and all other concerned for information & necessary action.

9. The Secretary/Joint Secretary/Deputy Secretary/Under Secretary, Home & Political Department.

10. The Deputy Commissioner/Superintendent of Police (All) for information and necessary action.

By Order etc.,

Sd./-
Joint Secretary to the Govt. of Assam
Home Department

JUVENILES IN JAILS: THE MISSING LINK BETWEEN PRACTICE & PROCEDURE

Trishna Devi

Introduction

"I don't like jail, they got the wrong kinds of bars in there."

– Charles Bukowski

Human Rights Watch in its world report of 2016 "Children Behind Bars" talks about the overuse of detention of children behind bars.[1] Such children are held in abusive and extremely decrepit conditions where they are deprived of the very basics of life such as education, access to reformative activities and the protection of the rights and privileges given to a child by the law. The last few years has seen much discourse about the conditions of children all over the world and the necessity of providing every child with a better life. Initiatives have been undertaken by countries around the world to provide children with basic facilities, a healthy, safe and inclusive environment for growth and education for a better tomorrow.[2] Much has been written and done about defending the rights of children and helping neglected children reach their full potential. However, in comparison a lot less has been talked about children behind bars and the systematic deprivation of the rights of juvenile offenders.

[1]Bochenek, Michael Gracia, Senior Counsel, Children's Rights Division; "*Children Behind Bars : The Global Overuse of Detention of Children*", Human Rights Watch: www.hrw.org/world-report/2016/children-behind-bars, date of access : 12/09/2018.

[2]Child protection and inclusion, 'Unicef', https://www.unicef.org/what-we-do#protection, date of access: 05/10/2018.

Juvenile offenders are a vulnerable group of children that are often deprived of the basic rights of a child and locked behind in state-run institutions that pay scant regard to their rights.[3] It is quite shocking to note that juveniles are being sent to jails with complete impunity inspite of pre-existing legislation and their rights. In a report published by the Jharkhand State Commission for Protection of Child Rights in 2014,[4] it has mentioned that it has found more than 100 juveniles in three different jails of the State. It is indeed very unfortunate that juveniles are sent to prisons and are being deprived of their basic human rights. The status of juveniles has gone from being children to be protected and cared to children who are exploited and kept in jail,thus, it becomes necessary to study why juveniles are being lodged in prisons.

The initial aim of the paper is to study if juveniles have been incarcerated in jails, to look into the various human rights violations that they have to face and the failure in the mechanism due to which they are sent to jail. Secondly, it aims to bring forth the gap between the theoretical and practical application of the law regarding juvenile offenders. As such it is necessary to understand who is a juvenile and the concept of justice which says juveniles should not be kept in jails.There are many legislations including international conventions, studies on the concept of juvenile justice and procedures on how juveniles should be kept separate from hardened criminals. Hence, the paper also enquires into the present and past legislations of India, regarding juveniles to understand the provisions and their applicability in various cases. Thirdly, there is an enquiry into the practical scenario of juveniles in jails of Assam which results in a discussion of the arrest procedure and how there has been a systematic failure due to which the juveniles landed up in jail. Here arises a question that whether it was an isolated incident or there have been other such incidents as well? Here, the paper probes into the issues and the reasons of the systematic failure of mechanism leading to incarceration of juveniles in prisons. The paper ends with a study of the negative impact of

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[3]Adenwalla, Maharukh, "*Child Protection and Juvenile Justice System for Juvenile in Conflict with Law*", 2006, p.10.

[4]Mahato, Deepak, Hindustan Times, "*Jharkhand: More than 100 juveniles in jails*" https://www.hindustantimes.com/india/jharkhand-more-than-100-juveniles-in-jails/story-odcDqZcckUGYtxaMtPkx2O.html, date of access : 02/10/2018.

keeping juveniles in jail and explores the way forward for discussing the probable practical solutions to avoid juveniles being incarcerated in jails.

I. Who Is A Juvenile?

It has been a tradition of dividing human beings by age, into adults, who are considered to be more responsible and mature and into persons who by age are not considered as adults. The term 'juvenile' basically suggests towards an organism, individual who has not yet matured. It originated from the Latin term '*juvenilis*' meaning a young person.[5] Juvenile is an individual, who is under the age of eighteen years, except under the present presiding law of a nation where the individual attains majority earlier than eighteen years.[6] In India, the current law says the term 'juvenile' means a child below eighteen years.[7] It means that, boys and girls below eighteen years are considered to be juveniles. Earlier the age for juvenility was 16 years for a boy according to The Juvenile Justice Act of 1986, although the age of juvenility for a girl child was 18 years.[8] There were campaigns to increase the age of juvenility to 18 years for boys as well. India is a signatory of the United Nations Child Rights Convention and ratified it on the month of December 1992. The Government of India to bring uniformity in the legislation and conformity with the Child Rights Convention introduced the Juvenile Justice Act, 2000. The Juvenile Justice Act, 2000 raised the age of juvenility of a boy to 18 years.[9] However, in the year of 2012 debates on the criminal responsibility of juveniles resulted in the introduction of the Juvenile Justice (Care and Protection) Act, 2015. In terms of criminal responsibility juveniles are treated differently than adults. The scope of the term 'juvenile' in India is two-fold in the sense that, it includes both children in need of care and protection and also children in conflict with law. Since juvenile offenders are often treated under the criminal system it is quite necessary to understand the concept of a juvenile offenders.

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[5]Juvenile,https://www.etymonline.com/word/juvenile, date of access-23/10/2018.
[6]United Nations Convention on theRights of the Child, 1990, Article 1.
[7]The Juvenile Justice (Care and Protection of Children) Act, 2015, Section 2 (35).
[8]The Juvenile Justice Act, 1986, Section 2 (h).
[9]The Juvenile Justice Act, 2000, Section 2(k).

Criminal responsibility is the ability to make a person responsible for commission of a crime in a capacity legally prescribed by the law of the land. Criminal courts or trial courts are where cases are tried for the first time under the criminal system. It is interesting to note that internationally and in the domestic legislations of many countries there is differentiation in the criminal responsibility of an adult and a person who is considered under age by the law. Juvenile is basically a child or young person who, under the respective legal systems, may be dealt in a manner which is different from an adult.[10] A juvenile is someone whose criminal responsibility is not the same as of an adult, which implies that youthfulness of a person is considered to be a mitigating factor for generating lesser criminal culpability. Juveniles generally do not have sufficient or adequate maturity to understand the complete consequences of a crime during the occurrence of the offence, unlike an adult. Hence a juvenile cannot be criminally tried as an adult in an adult court.[11] The 'Beijing Rules' laid down the precedent for trial principles for a juvenile who needs to be criminally tried.[12] A juvenile who is alleged to have committed or who has been found to have committed an offence is generally called a juvenile offender.[13] In India, a juvenile offender is a child in conflict with law if he has not completed eighteen years on the date of commission of alleged offence.[14] A child in conflict with law must be produced before a special board or the Juvenile Justice Board who tries the cases of the juvenile offenders.[15] The trial proceedings before a Juvenile Justice Board is called an inquiry which must be done in a child friendly atmosphere and in a simple

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[10]United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 29th November 1985, Rule 2.2 (a).

2.2 For purposes of these Rules, the following definitions shall be applied by Member States in a manner which is compatible with their respective legal systems and concepts: (a) A juvenile is a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult.

[11]Merriam-Webster, Since 1828. "Legal Definition of juvenile", www.merriamwebster.com/dictionary/juvenile, date of access: 05/09/2018.

[12]United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 29th November 1985.

[13]Juvenile Offender, United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 29th November 1985.

[14]The Juvenile Justice (Care and Protection of Children) Act, 2015, Section 2 (13).

[15]ibid, Section 10.

manner.[16] It is unlike the proceedings in a criminal court which goes through an extensive and convoluted trial process. It means that a juvenile offender neither can be tried as an adult in the criminal system nor can they be placed under the same restrictions and provisions applicable to adults who have been alleged to or found to have committed a crime.

Formal recognition has been given to juvenile courts for the purposes of deciding matters regarding offences committed by juvenile offenders. The *Black's Law Dictionary* defines Juvenile Courts as *"a court having special jurisdiction, of a paternal nature, over delinquent, dependent, and neglected children. In juvenile court proceedings, due process requires that juveniles have right to notice of charges, to counsel, to confrontation and cross-examination of witness, and to privilege self-incrimination."*[17] Juvenile courts operate under the modus operandi of '*parens patriae*'[18] emphasizing on the rehabilitation and reformation of a juvenile offender rather than punishment. Different countries have enacted different legislations to outline the provisions on the subject of juveniles. The concept of juvenile justice is that area of law which deals particularly with the rights, duties, procedure regarding a juvenile. There has been international convention on rights of a child and a juvenile and also most States enact a code of law regarding juveniles. Hence, a concept of juvenile justice has emerged which has given some guiding principles regarding treatment of juveniles especially juveniles in conflict with law.

II.The International Framework:

In the late 1970s Juvenile delinquency had become a critical problem all over the world, due to the overgrowing young population and maladjustment of the youth. In India alone there were about 202,294 cases reported from the year 1970 to the year 1975 for crimes committed by juvenile offenders.[19] The era starting from 1970's thus gained more focus on the juvenile justice system in the international arena. Different countries

[16]ibid, Section 14.

[17]Campbell Black. M.A, Henry. *Black's Law Dictionary with Pronunciations.* West Publishing Co., Sixth Edition (1891-1991).

[18]Parenspatriae means the State acting as a parent or guardian over the people.

[19]All India level Juvenile Delinquency from 1970 to 1975, https://data.gov.in/resources/all-india-level-juvenile-deliquency-1970-1975, date of access: 05/10/2018.

around the world had different systems in place for adjudicating alleged crimes committed by the under-aged: some countries subscribed to the policy of welfarism in case of juvenile offenders while others continued with the punishment mode. In the United States of America, the 'Child Saver Movement' at the end of the nineteenth century saw the emergence of the first juvenile court in Chicago in 1899.[20] The late 1970's saw support to move non-violent juveniles from secure institutions such as training schools and detention centres to community-based options.[21] Even in the United Kingdom the 1970's and 1980's saw study of youth delinquency and juvenile crime as a key concern for the policy reformers of the nineteenth century.[22]

The rising concerns for juvenile delinquency and the treatment of juveniles saw the topic of Juvenile Justice endorsed as provisional agenda of the 'Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders' held from 25th August to 5th September in Carcass, Venezuela. The Committee of the Congress observed that an attempt should be made to translate general strategies of assisting juvenile delinquent persons into practical guidelines to be implemented in administrations; it is necessary to make plans to integrate into the educational system, the steps to prevent of juvenile delinquency.[23] The Committee recommended that efforts should be made to explore the process of diversion from the criminal justice system in its application to juvenile jurisdiction. The recommendations came as a result of the working paper 'Juvenile Justice: Before and after the onset of Delinquency' prepared by the Secretariat of the United Nations. The paper presented that the concept of juvenile justice '*was derived from a belief that the problems of juvenile delinquency and related problems of youth in irregular*

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[20]J. Bonnie, Richard. Johnson Robert L, M.Chemers Betty, and Schuck Julie A., "*Historical Context, Reforming Juvenile Justice : A Developmental Approach*,"https://www.nap.edu/read14685/chapter/4, date of access:05/10/2018.

[21]Schwartz Ira M., Steketee Martha Wadeand Butts Jeffrey A., "*Business as Usual: Juvenile Justice During the 1980s*", Volume 5, Issue 2 Symposium on Serious Juvenile Crime, Notre Dame Journal of Law, Ethics & Public Policy, 01/01/2012.

[22]Shore, Heather, Leeds Metropolitan University, November 2011, '*Inventing and Re-Inventing the Juvenile Delinquent in British History*.' https://pdfs.semanticscholar.org/03a7/a4c7c7f1bfdcf1a2b7a3ef52d0687c66b100.pdf, date of access: 06-10-2018.

[23]Juvenile Justice : Before and after the onset of Delinquency: working paper prepared by the Secretariat : United Nations, 1980.

situations are not amenable to resolution within the framework of the traditional processes of criminal law. Juvenile justice systems, therefore have been designed to respond to the needs of young offenders'.[24] The requirement for a separate system to deal with juvenile delinquency rather than the common criminal law system was emphasised in the congress which led to the framing of the juvenile justice policy that was later proposed as Bill of Rights for Young Offenders in the United Nations conference in Beijing, China. This Bill of Rights was adopted by the General Assembly on 29th November, 1985 as the 'United Nations Standard Minimum Rules for the Administration of Juvenile Justice' or the 'Beijing Rules' by the Seventh United Nations Congress on the Prevention of Crime and Treatment of Offenders. Adoption of measures for prevention of juvenile delinquency was set down by the 'United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)' as result of the Seventh United Nations Congress. The United Nations further adopted the convention of 'United Nations Rules for the Protection of Juveniles Deprived of their Liberty' on 14th December, 1990 for standardization of treatment of juvenile offenders throughout the world. The conventions laid emphasis on establishing in each national jurisdiction, a set of laws, rules and provisions specifically applicable to juvenile offenders for meeting their various needs while protecting their rights and also implementing the rules provided in the 'Beijing Rules' thoroughly and fairly.[25]

There had been a huge hue and cry over juveniles being locked up with adults in prisons or in institutions where they were continuously abused and beaten up. Tremendous pressure was put upon the national governments all over the world to separate juvenile system from the adult system. Hence the 'Beijing Rules' laid emphasis on minimum detention of juveniles; detention to be used as a last resort measure during trial and juveniles must be kept in a separate institution.[26]

The concept of juvenile justice that emerged put emphasis on the welfare and protection of the rights of the child. A juvenile was to be provided with

[24]Juvenile Justice : Before and after the onset of Delinquency: working paper prepared by the Secretariat : United Nations, 1980.

[25]United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 29th November 1985, Rule 2.3.

[26]ibid, Rule 13.

all care, protection, education, training, counselling, and other necessities that were deemed necessary for the healthy growth and development of him. His social, mental, physical and psychological needs must be given utmost importance. Also his human rights must not be violated, especially his right to privacy. A juvenile should not be given undue publicity and he should not be identified in any way, so that he may not be a subject to stigmatization.[27]

The guiding principles of juvenile justice as such can be concluded that juveniles should be provided with legal protection and their basic human rights should not be curtailed. The aim of the juvenile justice system is to uphold the rights and safety of the child and also to promote the physical and mental well-being of juveniles; imprisonment should be used as a last resort. His deprivation of liberty should be for the minimum necessary period, consistent with human rights and fundamental freedoms along with with a view to counteract the detrimental effects of all types of detention, such as, he should not be detained with adult criminals because of the negative influences that would be detrimental to the reformation of such a juvenile offender.

III.The Indian Concept

In British India, legislations on Juvenile Justice dates back to the Madras Act 1920. The presidency towns of Bombay and Calcutta soon followed it with their own Acts respectively in the years of 1924 and 1922. However, it was the Bombay Children Act 1924, which propagated the formation of a Children Aid Society that looked after the care and protection of children. The modus operandi of the Acts was "welfarism" which means that the purpose and aim of the Acts was the welfare of the child.[28] In the year 1960, the Government of India passed the Children Act 1960, according to which, a boy is under-aged until he is 16 years old and for a girl the limit was set at 18 years of age. The aim of the Children Act 1960, is '*to provide for the care, protection, maintenance, welfare, training, education and rehabilitation of neglected or delinquent children and for the trial of delinquent children in the*

[27]ibid, Rule 8.

[28]Adenwalla, Maharukh, "*Child Protection and Juvenile Justice System for Juvenile in Conflict with Law*,", 2006, p.13.

Union Territories'.[29] The Act provided protection of two categories of children i.e. neglected children and delinquent children.[30] The Act established Children's Courts and provided the power and procedure regarding the same. Observation homes were established for temporary reception of children during pendency of trial or inquiry and Special Schools for delinquent children was also established under the above Act to provide such children with accommodation, maintenance and facilities for education and also provide them with facilities for the development of their character and abilities; give them necessary training for their reformation and shall also perform other functions as may be prescribed [to ensure all round development of his personality].[31] The Act also prohibited the sending of delinquent children to prison except if he is above 14 years and the crime is of a very serious nature. A child if arrested is to be promptly granted bail or if not released on bail he should be sent to observation home and then if he is found to be a delinquent child, he should be sent to a Special School. It can be seen that Indian concept of juvenile justice focuses on the legal care, protection, and reformation of juveniles, consistent with human rights and rights of a child. Also separate institutions other than prisons have been established for the care of juveniles in trouble with law and it clearly emulates the concept that juvenile should be kept separate from adult prisoners.

The Children Act, 1960 was a precursor to the Juvenile Justice Act, 1986 which came as a result of the observation of the Supreme Court where it suggested the Central Government to initiate parliamentary action

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[29]Preamble, Children Act,1960.

[30]Section 2(j) of the Children Act, 1960 defines "delinquent child as a child who has been found to have committed an offence." And Section 2(l) of the Children Act, defines neglected children as

(l) "neglected child" means a child who-

(i) is found begging; or

(ii) is found without having any home or settled place of abode or any ostensible means of subsistence or is found destitute, whether he is an orphan or not; or

(iii) has a parent or guardian who is unfit [or unable] to exercise or does not exercise proper care and control over the child; or

(iv) lives in a brothel or with a prostitute or frequently goes to any place used for the purpose of prostitution, or is found to associate with any prostitute or any other person who leads an immoral, drunken or depraved life.

[31] Children Act, 1960, Section 10 Sub-section 3.

to put forward a uniform policy regarding the various provisions to children in the entire country. The Juvenile Justice Act, 1986 came as a result of the 'Beijing Rules' which put emphasis that in each State (Nation) a set of laws specifically applicable to juvenile offenders should be established.[32] India being a signatory of the Convention and also because of the directions of the Supreme Court of India decided to put forward a set of laws that would specially govern matters regarding juveniles. The Juvenile Justice Act, 2000 the aim of which was '*to consolidate and amend the law relating juveniles in conflict with law and children in need of care and protection, by providing for proper care, protection and treatment by catering to their development needs, and by adopting a child-friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation [and for matters connected therewith or incidental thereto*][33]. The Act substituted the definition of delinquent child with juvenile in conflict with law and increased the age of a child from 16 years to 18 years stating that '*juvenile or child means a person who has not completed eighteenth year of age*'[34]. The law revolving says that if a person has not completed eighteenth year of age as on the date of commission of offence than he will be considered a juvenile in conflict with law. The Act provides for the establishment of the Juvenile Justice Board which has the power to take cognizance in cases of juveniles in conflict with law and adjudicate such cases. According, to the Act no proceedings in an adult criminal court can take place for juveniles and the power to try the case of juvenile in conflict with law is vested only with the Juvenile Justice Board. It is because providing justice to juvenile must contain the child's best interest besides awarding any punishment; a juvenile in conflict with law cannot be kept in prison or jails and they must be either granted bail putting them back under the custody of parent/guardian or in special homes whose aim is rehabilitation and social reintegration consistent with the rights of child.

The change in the Indian Legislation regarding Juveniles came due to the "Nirbhaya Delhi Gang Rape Case" that happened on December 16,

[32]United Nations Standard Minimum Rules for Administration of Juvenile Justice, 1985.
[33]The Juvenile Justice (Care and Protection of Children) Act, 2000.
[34]ibid, Section 2 (j).

2012.[35] This case triggered many changes in the Indian criminal system. The juvenile justice system in India was changed due to the fact that the main perpetrator behind the act was a juvenile. In India criminal responsibility begins from the age of seven years as given by the Indian Penal Code, 1860.[36] However if a child between 7 years to 12 years does not have sufficient maturity or understanding of the consequences of commission of an offence then according to Section 83 of The Indian Penal Code, such action would not constitute as an offence and the person would not be held criminally liable. Children from 12 years to 18 years who have sufficient maturity and understanding are held criminally liable if they have committed an offence but they are dealt under the prevailing legislation relating to juveniles.The main perpetrator being just six months shy of being an adult was given the benefit under the prevalent Juvenile Justice legislation according to which he could not be tried as an adult. Thus, he was only sentenced to three years of remand in an observation home. [37] There were many petitions in the Supreme Court to invalidate the Juvenile Justice Act of 2000 and the perpetrator to be tried as an adult. All these petitions were dismissed which resulted in many heated debates. One fraction of people wanted that the perpetrator who was under 18 years, should not get away with crime just because he was a juvenile while the other fraction mentioned that just because of one juvenile perpetrator an Act should not be invalidated. However, in July 2014, Maneka Gandhi, Minister of Women and Child Development raised the issue of preparing a new juvenile legislation giving the reason that 50% of crimes by juvenile were committed because, most of the teen juveniles thought they could get away with it. As such the Indian Parliament introduced the "Juvenile Justice (Care and Protection) Act, 2015 on 7th of May, 2015 in the Lok Sabha. One of the main changes was that if a heinous offence is committed by a child above the age of sixteen years and the Juvenile Justice Board feels

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[35]*Mukesh & Anr. v. State for NCT of Delhi & Ors.*,(2018) 8 SCC 149, See also, Bandewar, Sunita V S; Pitre Amita; Lingam Lakshmi, "Five years post Nirbhaya: Critical insights into the status of response to sexual assault", *Indian Journal of Medical Ethics Online*, March 28,2018, https://www.researchgate.net/publication/324065452_Five_years_post_Nirbhaya_Critical_insights_into_the_status_of_response_to_sexual_assault, date of access: 24/10/2018.

[36]The Indian Penal code, 1860, Section 82.

[37]ibid 35.

that the juvenile in conflict with law has the mental and physical capacity to commit the crime in circumstances same as an adult and understands its consequences in the same manner as an adult, the Board transfers the jurisdiction of the case to the Children's Court.

India being a signatory of the 'Beijing Rules' have followed the concept that juveniles should not be tried in the adult criminal system as adults[38] Indian legislation places that Juveniles should be placed in Observation homes and on no account should a juvenile be placed in jail. The law prevalent directs that a juvenile should be either allowed to go home after admonition or counselling, do group activities or perform community service; order payment of fine by parents or guardian or be released on probation. A juvenile can also be sent to Observation home (special home) for a period of not more than three years for providing him reformative services including education, skill development, counselling, behaviour modification therapy, and psychiatric support during the period of his stay there.[39] In any case the best interest of the child is paramount, the Indian law follows the reformatory penology policy. It is reflected in the fact that several provisions have been made for reformatory purposes where the procedure for dealing with a child in conflict with law has been laid down. These procedures specifically lay down measures that should be taken up to avoid juveniles from landing in jails when they are being apprehended for a crime.

IV. Juvenile in Jails:

Jails or correctional homes in India are still considered to be a tortuous laboratory where a motley collection of inmates ranging from juveniles to the elderly octogenarian everyday hopes, not of better treatment or various reformatory activities, but of just getting by till they are released from jails. This condition is aggravated by the fact that access to justice for prisoners from marginalised and weaker sections of the society is more of an illusion than reality. Justice Krishna Iyer held in the 1978 case of *Sunil Batra v. Delhi Administration*[40], "*Imprisonment does not mean farewell to fundamental*

[38]Section 23 of the Juvenile Justice (Care and Protection) Act, 2015.
[39]ibid, Section 18.
[40]*Sunil Batra II v. Delhi Administration*,1980 SCC (3) 488.

rights as laid down under Part-III of the Constitution". Even then violation of fundamental rights and constitutional rights in prisons still are huge ongoing issues. One of these major issues is the incarceration of juvenile offenders in jails as found by the report of Jharkhand State Commission for Protection of Child Rights in 2014.[41]

The aim was to find out the practical scenario in the correctional homes of Assam. *Studio Nilima: Collaborative Network for Research and Capacity Building* is a non- profit organisation based in Dighalipukhuri, Assam whose vision is to extend the frontiers of law to create an interdisciplinary practice of legal and policy research in North East India.[42] *Pratidhwani, The Free Legal Services and Awareness Centre* by situating itself in jails of Assam aims to provide inmates with effective legal advice and assistance, free of cost. As part of this initiative the team visited the Morigaon District Jail on October 22, 2017. It was observed during dissemination of information through the Legal Awareness Camp that most inmates were ignorant about their rights. During interaction with the inmates the team came upon three inmates who prima facie appeared to be juveniles and seemed to be in a very poor condition wearing ragged clothes and sandals in the midst of other inmates, the three boys looked very young. Observing this, the team inquired about their age which they claimed to be under eighteen years. Their details such as concerned court and case details were sought out for taking necessary steps where it was found from their records that their age has been marked as 18 years or above in the custody warrant given by the court. These inmates had been languishing in jail for a long period and hence a plea of juvenility was immediately taken up in concerned courts for the three inmates in collaboration with the District Legal Services Authority, Morigaon. After being determined as juveniles in conflict with law through the medium of ossification test[43], the court ordered the cases of two inmates to be sent to Juvenile Justice Board and the inmates to be released from jails as it was not a place for them.[44]

[41]Supra (n 4).

[42]Vision, Studio Nilima, http://studionilima.com/studio-nilima/, date of access : 08/10/2018.

[43]Ossification test is bone radiology test used to determine the age of a person, especially used for determining if a person is above the age of 18 years or not.

[44]Attached as Annexure A.

In Assam, the scenario is unfortunate. In spite of the existing legislations, juveniles in conflict with law (termed hereafter as juveniles) are being tried as adults and sent to prisons. The team has continued visiting Morigaon District Jail, District Jail, Mangaldoi; Guwahati Central Jail; Jorhat Central Jail, Open Air Jail; District Jail, Goalpara and Tezpur Central Jail for providing effective legal services and facilitating access to justice on behalf of the inmates. The author being a part of the above said team found that a number of accused persons claiming to be juveniles in conflict with law are languishing in different jails of Assam for weeks and months. They are being deprived of the safeguards provided by the legislations and their basic human rights. Prompt steps were taken up by the team to convey the matter to the courts through the concerned District Legal Services Authority. The courts took notice of the cases and ordered ossification tests depending on the result of which the accused persons if found to be a juvenile must be released in the care of the Juvenile Justice Board. Thus, through intervention a few juveniles have been released from jail. It behoves the question as to why despite of being there a provision, many slip through the cracks and eventually end up in jail. A discussion is hence necessary to understand the reasons for juveniles landing in jails and in the adult criminal system.

Criminal proceedings in any case begin from the filing of a First Information Report to the police. Investigation of a case and the arrest of alleged offenders are procedures that are predominantly done by the police personnel. In many instances, police have been known to not completely follow the arrest procedure as laid down by the Code of Criminal Procedure, 1973 which states that any child in conflict with law (herein after referred to as juvenile offenders) should be exclusively dealt by child welfare police officer designated in every police station.[45] However, even after the existence of such measures it is often found that in practical scenario there is little to no implementation of these procedures especially in case of juvenile offenders above the age of 14 years. The problem begins at the first instance in the police station where in many cases the police do not ask about the age and details of the offenders.

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[45]The Juvenile Justice (Care and Protection) Act, 2015, Section 107.

Assam type-house complexes with uniformed officers going about their business, tables with piles of files and papers and beside those tables police officers talking to each other in a brusque and familiar manner; police stations in general are intimidating for the alleged offender standing there waiting for his turn, to be interrogated while in the mean time darting furtive glances at the lock-ups apprehending his stay there. *Ali Sheikh (name changed) aged about 17 years narrates his experience and says that he was arrested by the police and brought to the station, nothing except his name was asked.... The police recorded his name and other things but being terrified of the police neither did he ask about the particulars of what was recorded nor did he say anything to the police. He further says that neither he nor his mother signed any arrest memo).* In India, although the alleged reports claim that perception of the police recently has been quite positive among the public; however there is still a fear of police especially among the disadvantaged and weaker sections of the society. Hence, most of the times people who are ignorant about their rights never approach the police for the fear of backlash. This situation is aggravated by the circumstance that in a lot of cases police record the particulars of the accused persons in the arrest memo[46] from the Ejahar submitted by the informant instead of asking the accused persons about his name, ageand other details. This arrest memo should be countersigned by the arrested person and attested by at least one witness, be it a family member of the arrested person or a respectable person of the locality. However, there have been instances where the accused persons were not asked to sign the arrest memo. Even in the cases where the arrested person were asked to sign the arrest memo, they were made to sign without being given the opportunity to read or understand the arrest memo. Being ignorant of their rights most of them sign the memo without the details being explained to them. A few juveniles who understand and protest when their age is deliberately ignored by the police.

The police are known to intentionally depict an underage arrested person as an adult to retain custody.[47] *Raju Phukan (name changed) tells he does not*

[46]The Code of Criminal Procedure, 1973, Section 41(B).

[47]Adenwalla, Maharukh, "*Child Protection and Juvenile Justice System for Juvenile in Conflict with Law*", 2006, p.27.

know about his case and nor his lawyer has communicated with him. He said that he has been in jail for about more 7 months. On being asked about his age he promptly replied that he is 17 years and within few months from now he will be 18. He says that despite telling the police his age to be 17 years, the police deftly ignored him and recorded his age as 19 years. Even when he was taken to the doctor for medical examination the doctor recorded his age from the police records as 19 years despite his repeated protests. Most of the required medical examinations[48] are done in government hospitals which are seriously understaffed and the doctors are over worked. They perform the perfunctory examination for injury, record the details of the accused persons and again send them to police custody. But most of the times the age of the person is not examined to see if they are under 18 years. Most juvenile in conflict with law are caught for petty offences and the medical officer being ignorant towards them, does not bother to ask his age and as a result juveniles often slip through these cracks and land up in custody of the police.

The juveniles are a vulnerable group hence, many guidelines have been established by the law for their care. They are most of the times are unable to understand the complex legal apparatus that functions in the society and therefore, are entitled to another set of proceedings under the present juvenile justice system; as they cannot be made to face the adult criminal system due to their vulnerable age. Hence, they are required to be shifted to Observation Homes and the custody of the juvenile should be handed over to the Juvenile Justice Board. The police due to repeated inconvenience faced in visiting Observation Homes and Juvenile Justice Boards, tend to depict the age of a juvenile as 18 years or above to retain custody. It is doubly true in the case of Assam where there are only five observation homes in the whole state namely Nagaon Observation Home for Girls, Jalukbari Observation Home for Girls, Jorhat Observation Home for Boys, Boko Observation Home for Boys and Silchar Observation Home for Boys.[49] As it can been seen that out of the 33 administrative districts in Assam only five districts has homes for

[48]The Code of Criminal Procedure, 1973, Section 54.

[49]List of Government Run Observation Homes under ICPS; Government Run Institutions; Child Protection Sector, www.socialwelfare.assam.gov.in/portlet-innerpage/government-run-institutions,: date of access14/09/2018.

custody of juvenile offenders. The administrative districts are very far from the Observation Home and the police due to hassle of shifting the juveniles from custody to the observation homes often prefer to write the age of juveniles as that of an adult. Most police stations suffer from staff shortage, they can only afford to deploy a set of policemen to take the accused persons to the court. In such a case it is very difficult to send police personnel to take juvenile to observation home for handing over their custody, more so when there is a serious constraint of transportation. A basic police station in Assam has only one van for transportation of accused persons to the court which is most of the times regularly used. As such due to such constraints of money, transport, and staff, the police instead of approaching the Juvenile Justice Board and handing over the custody of the juvenile to Observation Home, incorrectly depict the age of juvenile as that of an adult and retain custody.

The juvenile is thus now in police custody even after many safeguards of the law. He should have been as per law forwarded to the Juvenile Justice Board within 24 hours by the child welfare officer in every police station.[50] Even if he has been arrested for a heinous crime and is above the age of 16 years, it is the duty of the police to produce him before the Juvenile Justice Board who after proper inquiry [51] shall pass an order for a need for his trial to be as an adult and transfer such case to be heard by the Children's Court that has jurisdiction to hear such offences.[52] However, bypassing the safeguards and laws the juvenile is produced before the normal criminal court instead of a Juvenile Justice Board or a Children's Court just because his age has been recorded incorrectly, depicting him as an adult. In the court the magistrates and judges only observe whether accused is present or absent for they are too occupied to interview every accused. Also the juvenile offenders who cannot understand the complex legal system are often afraid to speak out in the court nor are they given a chance to do so, mainly because all the accused persons in a district are produced together in the court at a specified time, where they are only asked about their presence. The magistrates note

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[50]The Juvenile Justice (Care and Protection of Children) Act, 2015, Section 10.
See also Rule 8 of the Juvenile Justice (Care and Protection of Children) Model Rules, 2016.
[51]TheJuvenile Justice (Care and Protection of Children) Act, 2015, Section 15.
[52]The Juvenile Justice (Care and Protection of Children) Act, 2015, Section 18 sub-section 3.

down their presence, order them to judicial custody and then move to the next case. They pay scant regard to the accused persons to observe that a juvenile might also be amongst the accused persons produced before him.

Raju Phukan (name changed) says that he has been to the Court but he does not understand the proceedings.He has been in jail for more than 7 months and, neither his family has come to see him in months nor has his lawyer. He has been abandoned by everybody hence, even though he has his matriculation certificate as proof it is not possible to present because it is at home and he is not being able this to communicate with anyone. After five days in police custody when he went to the Court, he never got the chance to say to the magistrate either about his age or the fact that he was beaten up in police custody. He says "Chairat bahi thaka coat pindhi thaka manuh jane naam matile, aasu sir buli kau. Baki nu amak aaru beleg ki kaba diba."[53] So it is not a surprise that he has been languishing in jail for more than seven months.Thus, the juvenile is now remanded to jail custody where he is exposed to hardened criminals. Raju Phukan is only one case but there are many juveniles who are languishing in jails like him. Sadly, in many jails of Assam there is no proper segregation between young offenders, under trial prisoners and convicts.

The juveniles are exposed to the adult criminal system where they have to stay with habitual offenders and hardened criminals in jail. They are a particularly vulnerable group that is exposed to the negative impacts, influences and effects of a prison life which severely harms the overall growth of the juvenile. Now, the jail authorities are helpless but to keep the juvenile in jail as the Court has remanded the juvenile in custody of the jail. However, a good practice was seen in Jorhat Central Jail during a jail visit. In the office where the author was talking with the jail authorities a recently arrested young lad with his particulars was brought to the jail. He was scruffily dressed and was wearing sandals. The assistant jailor checked his belongings then he was brought to the office where he was asked about his age, name, address and other particulars which were then recorded. After which he was explained the rights he was entitled to and the rules of the jail, his recorded details were also shown and explained to him properly. Later, after completion

[53]English Meaning : "When the person in black coat sitting on the chair calls our name, we say present sir. Who will allow us to talk about something else?"

of necessary procedures and formalities he was then admitted to the jail. There have been a few jails that on observing prima facie that the accused person is a juvenile sends letters to the court informing them of the matter and requesting proper proceedings. Some jails have been successful in this regard. However more often such lucky conjectures do not happen and the juveniles end up languishing in jail forced to bear with the adult criminal system. By now all the systems which were responsible for providing care and protection to a juvenile and safeguard his rights have failed and the juvenile has landed in jail where he will remain.

It is a total systematic failure that even when the law especially provides that a child in conflict with law or a juvenile must be kept in a "*place of safety*", which does not include a police lock-up or jail, a juvenile has ultimately landed in jail. The juvenile continues to languish in jail due to lack of access to justice and legal aid counsel who in most cases do not bother to communicate with the accused persons. The juvenile most of the time being unaware of his rights has neither approached the jail authorities nor has he taken a plea of juvenility before the court of law. The counsels on behalf of the juveniles have also not taken up the plea of juvenility before the court, as there is little to no communication with the juvenile accused persons. In the meantime the juvenile is in the company of hardened criminals. Only when his trial has started he will be asked to provide his statement to the court under Section 313 of Code of Criminal Procedure, 1973. At that time he will only be asked to tell his present age, meaning that sometime ago he has already crossed the age of juvenility. Thus, it will escape the notice of most people that he was a juvenile at the time of commission of alleged offence. But if the juvenile is fortunate enough not to have crossed the age of juvenility or his statement is taken earlier, the juvenile runs into the trouble of producing proof in form of documents. Now a school certificate or a birth certificate is considered as the best proof and documentary evidence for ascertaining the age of the juvenile as per as Section 92 (2) of the Juvenile Justice (Care and Protection of Children) Act, 2015. Some of them are able to provide proof but since most of them does not have contact with their family they are unable to provide documents.

The court then orders ossification test to be done to determine the age.

In some fortunate cases the ossification results show the person to be below 18 years of age and the juvenile after suffering violation of his rights is finally able to go out of the jail. However, there is big lacuna in the ossification test. The ossification test is dependent upon the joining of the gap in the bones of the carpels of the hand and if the gap is filled up, the person is considered to be above 18 years. Now the fault lies in the fact that body maturity happens in a period of time and not at an exact particular age. So, in many cases even a seventeen year old can have joined or filled up gaps and then the above test would declare him as an adult in spite of being under-aged. The second problem lies in the fact that the test only shows whether a person is above 18 years of age or not; it does not provide the exact details or date. For example, if a person at the date of commission of alleged offence was 17 years and 6 months old but after another six months his ossification test is done then he will obviously be shown as an adult. It will not be possible to find out his exact age and calculate the age at the time of commission of offence. As a result, the juvenile will remain in jail and be tried as an adult. This is not a new phenomenon. There have been cases where juveniles have spent many years in jail and undergone trial and only after years of trial, a plea of juvenility has been raised. In the case of *Abhay Kumar Singh v. State of Jharkand*[54], since the petitioner had already spent 3 years and 8 months in detention he was ordered to be forthwith released on bail and criminal proceedings against him to be quashed if inquiry is not completed within 3 months.

It is indeed a very serious problem and a vicious cycle which has trampled the rights of juveniles provided by the legislation, especially the juveniles from poor and weaker sections of the society. It has led to gross human rights violation leading to severe detrimental impact on the mind of juvenile and has completely failed the systematic machinery of providing justice to everyone. The impact of sending juveniles to institutions where adult criminals are kept and exposing them to the negative influences of a jail does not keep the best interest of the children.

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[54] *Abhay Kumar Singh v. State of Jharkand*, 2004 CrilJ 4533 (Jharkhand).

V. Impact of Juvenile Being In Jails:

Children being in jail never serves the best interest of the child. The Convention on Rights of Child in Article 3 clause 1 says "*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*".[55] It means that at every instance, decision regarding a child will be taken by considerating the welfare of the child. Article 40 Clause 4 of Convention on Rights of Child in regard to juvenile provides that '*a variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence*'.[56]

In India, observation homes or places of safety have been established by the various juvenile justice legislations where the process of rehabilitation and social integration is undertaken for the juvenile offenders, to bring them back to society. These observation homes or special homes are not prisons; they are homes used as a last resort measure where effective counselling is provided to the juvenile offenders to reform them. Their physical, mental, psychological health and other aspects are taken into consideration. Their Constitutional rights such as:

i) Right to free elementary education for children (Article 21A);

ii) Right to be protected from being abused in any form by an adult [Article 39 (e)];

iii) Right to being free from bonded labour (Article 39) and

iv)Right to good nutrition and proper standard of living (Article 27) are well taken into account and they are provided with education, skill development training, counselling and others that are necessary for a child to attain full growth and development. However, as soon as juvenile lands up in jail he is dispossessed from the very basic human rights a child is entitled to, such as proper care and protection, education, safeguard from abuse and

[55]United Nations, Convention on the Rights of Child, 1990, Article 3 (1).

[56]ibid, Article 40 clause 4.

most importantly a right to live with dignity and proper standard of living.

Many children in conflict with the law are also victims of discrimination, for example, when they try to get access to education or to the labour market. However, the effects are quite severe when a child lands up in jail. Aside from the discrimination that they face, the severe mental trauma and physical trauma that undermines their good growth in manifold. Also the criminal contamination faced in detention with adults is quite grave and serious.[57] Generally, the name of a juvenile offender is not allowed to be published and his records not entered into the criminal system. However, if he is tried as an adult the juvenile may be subject to stigmatization where if he is permanently identified as a 'criminal' it would hamper his future prospects and destroy his growth.

Juveniles because of their young age are highly vulnerable and susceptible to negative influences of a prison.[58] Juveniles require special attention regarding food/nutrition, education, medical facilities, recreational facilities and others. In adult prisons where juveniles become a minority most of their needs are sidestepped in favour of other prisoners and as such they are deprived of their basic needs and rights. Educational facilities are not properly available in most adult jails. There is huge lack of counselling for juveniles, life skills training and other rehabilitative support for juveniles in jail. These will completely hamper their physical and mental health. Insufficient nutrition and hard labour would lead to degradation of body initiating many medical problems for the juvenile. Lack of specialised medical facilities would lead in juveniles not getting proper medical attention. These is a degradation of their basic fundamental right to have a healthy life and would in future show serious health problems for the juvenile.

The most negative thing about juvenile being tried in the adult system is that they will be sentenced as an adult and hence remain for long years in jail. While the maximum custody for a juvenile is three years in an observation home.[59] Those then land up in prison have to serve a long sentence. This is

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[57]United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules").

[58]United Nations Rules for the Protection of Juveniles Deprived of their Liberty.

[59]Juvenile Justice (Care and Protection) Act, 2015, Section 18.

even more so because of poverty they are not able to go on bail or in some cases not even granted bail, whereas if they were tried under the juvenile justice system the scenario would have been different. But because of the complete systemic failure they have landed up in jails. This has a huge detrimental effect on juveniles because this violates all the basic human rights given to them and stops any process of reformation and social integration. It indeed fails the whole juvenile justice system as it exposes the juvenile to the brutal realities of the prison. Most juveniles face victimization, abuse severe mental and physical trauma because of the older inmates in jail. Abuse is rampant among the inmates who taking advantage of the young age of the juveniles make them their personal slaves. Sexual assault is a specific risk for boys who become the target of fellow stronger inmates. They are pushed deep into the abyss of sexual abuse as being young and vulnerable,they have to depend on the stronger inmates to survive prison who in return provide protection for sexual favours. Article 33 of the Convention of Rights of Child specifically states that it is the duty of the State to protect children from sexual exploitation and sexual abuse. However,most juveniles in prisons are victims of sexual and physical abuse. There have been instances of severe physical violence on juveniles in jails by other inmates where they have been severely beaten up, stripped naked and plain attacked.[60]

The severe mental harm and trauma faced by the juveniles is heart rendering. The physical abuse and staying long periods in the deplorable conditions of prisons at a young age can have lasting effects on mental health of the juveniles. In an age where they have less understanding of the world, allowing them to face the brutality of prisons is not only detrimental to the healthy growth of a positive and balanced mind but is also fatal to the growing mind-set of the juvenile. In special homes, they are provided with counselling to mitigate the negative effects of committing an offence as most juveniles do so because of their lack of understanding the consequences of their actions. Once an offence is

[60]Bochenek, Michael Garcia, Senior Counsel, Children's Rights Division; *Children Behind Bars : The Global Overuse of Detention of Children*, Human Rights Watch, 2016: www.hrw.org/world-report/2016/children-behind-bars, date of access :12/09/2018.

See also, Para 2, *Dharamveer v. State of UP*, 1979 3 SCC 645.

committed most of them go into deep shock or face severe mental trauma. Counselling helps mitigate such effect and help them reintegrate with the society. Hence, staying in jails could completely stop such a reformative process and put the juvenile's mental health in serious risk as there is no counselling available in jails. The juvenile would simply be lost to the hardened criminals who would seize this as an opportunity to expose them to the criminal tactics. The criminal mentality of hardened criminals would influence them thus, luring them in committing crimes and making them fall into the deeper abyss of criminal world. It is interesting to note that here has been debate regarding child terrorists. Vulnerable children have been brainwashed to be terrorists which has sparked the debate that since such children are already criminals they should be put in jail. However, contra views has been forwarded that such children should be protected and counselled properly.

Survival in the prison is the highest priority for juvenile offenders in jail and this leads them to do many undesirable things which they would have been protected from, if they were in an observation home. One of such an thing is working as a drug and alcohol runner. Vulnerable children who are drug addicts if by fault lands up in prison are often used as runners for older inmates and their drug dependency is increased. This puts a stoppage towards any positive reformation of the juvenile. Others are made to work as runners for alcohol, tobacco and other things as a favours in return for protection by the senior criminals in the jail and thus, a juvenile is completely pushed off in to the criminal world. As such most of these children face severe mental trauma, depression, anxiety, post-traumatic stress disorder and other mental problems. Unlike their peers who benefited from the existing legislation and either went home with a reprimand and counselling or was sent to observation home where they were protected; these juveniles in jails had to struggle to survive in prison forgetting their childhood and innocence. The main objective to provide care and protection to these children remains a dream. By the time, such children leave prison, they become hardened criminals and the objective to reduce delinquency in general becomes unsuccessful; only lost innocence can be mourned and a criminal created by the failure of

the system can be dreaded.

Necessity dictates that a practical solution should be found so that juvenile offenders do not land in jails. One way to address this problem would be to provide a manner where registered non-government organisations could approach the court on behalf of juvenile offenders if they observe or apprehend any children in conflict with law in police custody instead of observation home. Another way would be to conduct official interviews and maintaining of such record by every jail, wherein if a person claims to be a juvenile, copies of such a form after the signature of the appropriate authority and with the signature of the accused is sent to the concerned court within 24 hours along with providing a copy to the District Legal Services Authority and District Child Protection Officer, so that they can work together. In the meantime, the accused can be in protective custody of the District Child Protection Officer. The concerned authorities can then take appropriate measures regarding the matter alongwith the District Child Protection Officer be empowered to act in such matters. Procedures such as the determination of age should be completed as quickly as possible so that the juveniles can be sent to observation homes and their cases referred to Juvenile Justice Board. Also, the researcher would like to suggest bi-monthly visit of the District Child Protection Officer to the district jails,to find out if any juveniles are present there. And in cases where juveniles are found, procedures should be implemented so that such matter can be immediately taken up before the concerned court and Juvenile Justice Board so that measures to prove his age can be done and his guardians can be asked to be present in the court with the proof of him being a juvenile. It is quite important that practical measures are adopted so that juveniles do not slip through the cracks of the system land up in jails, which would end up in their basic human rights being violated.

Conclusion :

The aim is to find a practical solution so that no juvenile are sent to jails for as Justice Bhagwati said in *Sheela Barse v. Union of India*[61], "*On*

[61] *Sheela Barse v. Union of India*, (1980) 3 SCC 632.

no account should the children be kept in jail and if a State Government has not got sufficient accommodation in its remand homes or observation homes, the children should be released on bail instead of being subjected to incarceration in jail". Juvenile offenders or a 'child in conflict with law' because of their young age is one of the most vulnerable group of people. Treating them as adults will not only adversely affect their impressionable minds but also mixing with hardened criminals would further lead them towards criminal activities. The aim of justice and law is to reform these children so that they can live in the mainstream society and have a second chance in life. Locking them up in police custody or jails hampers the very objective of justice. Hence, it remains quite necessary that an accused person on claiming to be below 18 years of age is produced either before the court or the Juvenile Justice Board so that they can determine the age of the person and act appropriately. It is necessary to find a practical solution so that juveniles can be detected early and can be sent as soon as possible to the care of their parents/guardians or the observation home and their cases must be forwarded to Juvenile Justice Board. It has been seen that there has been a systematic failure due to which juveniles land up in prisons. This leads in degradation to their very basic human rights, leading into violation of their fundamental rights. Hence, it becomes imperative to take steps to ensure that juveniles do not land up in jails.

Annexure A

The details of the inmates have been produced in the table below:

Sl No.	Jail	Case No.	Age Claimed	Result
1	Morigaon District Jail	G.R 1974/2017	14	The Court found the accused to be a juvenile from bone ossification report submitted on 07.11.2017 and by order dated 20.11.2017, sent his case to the Juvenile Justice Board and the inmate was released from jail

2	Morigaon District Jail	G.R 1608/2017	17	The Court found the accused to be a juvenile from bone ossification report submitted on 10.11.2017 and by order dated 20.11.2017, sent his case to the Juvenile Justice Board and the inmate was released from jail
3	Morigaon District Jail	G.R 1973/2017	16	His ossification test results showed that he was above 18 years so he was retained in judicial custody

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PERCEIVING CORRECTIONAL ADMINISTRATION FROM THE PERSPECTIVE OF CORRECTIONAL STAFF

Sourabh Roy

Introduction

"*It is said that no one truly knows a nation until one has been inside the jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones.*"

– Nelson Mandela[1]

Over the years, the society has witnessed numerous changes in the dynamics of various institutions. Such changes become necessary as they help in keeping the society in pace with the complexities associated with the contemporary times. The institution of prison or correctional home is one such example which has oriented itself to its transitional role in an evolving society. This is reflected by the manner in which 'prisons', in the current times, are referred to as ***correctional institutions*** rather than ***penal institutions***.[2]

Prison, also known as correctional home, jail and etc. (in accordance to regional usage) plays an important role in the criminal justice mechanism of the legal system of a country. It is the penal laws of a country which provide and maintain the security of persons and property by strictly prohibiting

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[1]Mandela, Nelson. *Long Walk to Freedom.* Boston: Little Brown, 1994. p. 105.

[2]MacCormick, Austin. "The Prison's Role in Crime Prevention." *Journal of Criminal Law and Criminology* 41.1 (1950): 36-48.

criminal acts that imperil them.[3] However, when the penal laws are flouted due to a criminal act of an individual, then such an individual is institutionally accommodated in a facility for convicts and under-trial prisoners (for the period of trial), as a kind of punishment. The innate purpose of such imprisonment is to serve only as a deterrent for future criminal acts in the society but over the years, this notion has progressively shifted towards the goal of reformation of inmates too.

The reformative approach of correctional homes contributes immensely in the integration of the inmates with the society and also gives them an opportunity to secure their livelihood, post release, rather than remain hardened and spiteful towards the society. Therefore, it becomes imperative on the part of the members of the correctional staff (also referred to as 'jail staff' or 'prison officer') to create and maintain a favourable environment within such correctional homes to realize the criminal justice system's *raison d'etre* of reformation and rehabilitation of offenders into the society, during the period of their imprisonment.

Nonetheless, the role and working of correctional homes in India has been pursued as an issue of fervent discussion at various forums for quite some time now because of the apathetical conditions that have been highlighted in their administration and management. Such apathy rendered to the stakeholders of the prison system in India, especially the inmates and the correctional staff, would have pushed them to a corner which would be regarded as the origin of corruption, inhumanity and hardening of criminal tendencies among them.[4] Situations like this stand directly antithetical to consider India as a 'welfare state' despite its possessing a constitutional framework which seeks to achieve "*a significant extent of socio-economic and political equality; freedom and opportunity for individuals to express themselves in work and leisure; along with striving for social justice.*"[5]

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[3]Bayles, Michael D., *Priniciples of Law: A Normative Analysis*. Dordrecht: D. Reidel Publishing Company, 1987. p. 291.

[4]Tiwari, Arvind. "Human Rights Approach to Prison Management: Issues & Challenges." *The Indian Police Journal* 60.2 (2013): 41-78.

[5]Robson, William A. "India as a Welfare State." *The Political Quarterly* 25.2 (1954): 116-31.; The presence of 'fundamental rights' enshrined in Part III and 'directive principles of state policy' provided in Part IV of the Constitution highlight that India has been envisioned to be a welfare state.

It is also unfortunate to observe that members of the correctional staff are prone to relatively less focus in the discourse regarding reforms in the prison system of India. Such a fact is, at the same time, not surprising to notice as correctional staff-members are often negatively portrayed in the public standpoint and media. This could also explain the reason for the comparatively lower position of correctional staff-members in the social standing to other "uniformed" service officials like the police staff-members. Hence, it also becomes difficult to obtain much academic literature regarding the study of correctional staff-members, possibly, due to such lingering prejudices of the society despite their spending considerable time and energy in similarly harsh environments, to which the prisoners are exposed to.[7]

The presence of deplorable conditions of service for the members of correctional staff would be detrimental to the administration of criminal justice in the country. The existences of such conditions are reflected by the provision of inadequate salaries, negligent remuneration and benefits as well as sub-standard and unhygienic accommodation and infrastructure facilities to staff-members. This is also associated with the difficulties related to overcrowding of prisons due to high number of under-trial prisoners and the concurrent shortage of staff. Hence, it furthers the burden on the staff-members which could result in the decay of the quality of facilities provided for the inmates. Thus, such pressing issues of the correctional staff which requires to be expediently addressed as human rights in prison are intrinsically linked to the service and working conditions of the staff-members who are satisfied during the course of their service, and would further implement such values in the treatment of prisoners.[8]

As per the provisions of the International Covenant on Civil and Political Rights (ICCPR), the criminal justice mechanism is required to

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[6]Detention Monitoring Tool. "Staff working conditions: Addressing risk factors to prevent torture and ill-treatment." *Penal Reform International.* 2013. Web. 13 August 2018. <https://s16889.pcdn.co/wp-content/uploads/2016/01/factsheet-3-working-conditions-2nd-v5.pdf>

[7]Bierie, David M. "The Impact of Prison Conditions on Staff Well- Being." *International Journal of Offender Therapy and Comparative Criminology* 56.1 (2012): 81-95.

[8]Liebling, Alison. *Prisons and Their Moral Performance: A Study of Values, Quality, and Prison Life*. Oxford: Oxford UP, 2004. p. 375.

fulfil its "*essential aim of reformation and social rehabilitation*" of prisoners.[9] Even so, to realize this, scholars like Alison Liebling believes that "*the moral quality of prison life (which is requisite for such reformation and rehabilitation) is enacted and embodied by the attitudes and conduct of the correctional staff-members.*"[10] Hence, the objective of this paper is to critically analyse the pertinent issues which revolve around the aspects of the service and working conditions of the correctional staff-members along with their living conditions, especially from the context of correctional homes in Assam.

The paper has been branched into several parts with the historical development of prison administration in India being briefly discussed in Part I. Following this, Part II shall deal with the role and functioning of the correctional staff which would provide a conceptual perspective. Further, Part III of this paper shall highlight the variety of problems and its implications, which are faced by the members of the correctional staff in their day-to-day management of correctional homes. Part IV of the paper shall look into the legal framework and guidelines, inclusive of the international, national and regional standards, which encircle the structure and functions of correctional staff-members in the prison administration. Subsequent to the analyses of the system made in the preceding parts, Part V shall give a road ahead in this discussion by providing possible suggestion which would be prudent enough to tackle the problems troubling the conditions of the correctional staff. Finally, the paper is concluded by elucidating the necessity of looking after the welfare of correctional staff and the importance of the role that is played by them, in the smooth and efficient functioning of the criminal justice system of the country.

Part I
Historical Outline of Prison Administration in India

The idea of correctional homes or better known as 'prisons', have existed in society since the ancient times as it was necessary to keep certain

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[9]International Covenant on Civil and Political Rights art. 10 para 3. 16 December 1966. 999 U.N.T.S. 171.

[10]Liebling, Alison. "Distinctions and distinctiveness in the work of prison officers: Legitimacy and authority revisited." *European Journal of Criminology* 8.6 (2011): 484-99.

anti-social elements in a place that was authorised by the sovereign to maintain the tranquillity within the society by protecting it against criminal acts.[11] The concepts of giving punishments in those times were regressive in comparison to the modern era as it was focussed on the humiliation of the offenders rather than the proper maintenance of prisons.[12]

In India, Lord T.B. Macaulay introduced "the contemporary system of prison administration", as he had to pronounce the despicable conditions, prevailing in the prisons in those times, as "shocking to humanity" at the time of a presentation before the Legislative Council in 1835.[13] Subsequently, a committee, referred to as the 'Prison Discipline Committee', had been established to propose steps to raise the standards of discipline in prisons and had submitted its report in 1838.[14] As per its report, the committee had highlighted the issue of corruption among the prison staff, lax discipline and a system of employing prisoners for labour on roads. Hence, it had made recommendations of increasing the rigorousness of the treatment meted out to the prisoners while ignoring the fulfilment of their basic needs and idea of reformative approaches.[15]

In 1864, Lord Dalhousie appointed the 'Second Commission of Enquiry' which had been charged with looking into the issues of prison management and discipline.[16] The Commission had reiterated the recommendations of the previously established 'Prison Discipline Committee'.[17] However, it is interesting to note that the Commission had also made mentions, which were regarded to be inherently subordinate

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[11]"National Policy on Prison Reforms and Correctional Administration." *Bureau of Police Research & Development.* 2007. Web. 27 July 2018. <www.bprd.nic.in/WriteReadData/userfiles/file/5261991522-Part%20I.pdf>

[12]Kini, Ananth. "A Critique on Prisons in India in the light of Re Inhuman Conditions in 1382 Prisons." *ILI Law Review* 2 (2017): 72-89.

[13]Bureau of Police Research & Development. (n 11)

[14]Math, Suresh Bada, Pratima Murthy, Rajani Parthasarathy, C. Naveen Kumar, and S. Madhusudhan, eds. *Mental Health and Substance Use Problems in Prisons: Local Lessons for National Action.* Bangalore: NIMHANS, 2011. p. 32.

[15]ibid

[16]Bureau of Police Research & Development. (n 11)

[17]Paranjape, N.V. *Criminology & Penology with Victimology* . 16th ed. Allahabad: CLP, 2014. p. 478.

to maintenance of discipline and prison management, concerning accommodation, improvement in diet, clothing, bedding and medical care.[18] The notion of enacting regulations for prison management was introduced at a 'Conference of Experts' in 1877 and consequently, a draft bill on prison laws was produced with regard to the resolution of establishing uniformity in the system, which was adopted during the conference.[19] The 'Fourth Jail Commission' was appointed in 1888 by Lord Dufferin, which was of the view to have a single legislation for prison management enacted, if uniformity within the system had to be achieved.[20] The recommendations of the Fourth Jail Commission were further expanded by the suggestions made by the 'All India Committee on Jail Administration' in 1892[21] and as a result, all of these recommendations were brought together into the statute of the Prison Act of 1894.[22]

Nonetheless, the appointments of various jail reform committees did not benefit the prison administration in attaining the approach of reformation because the inmate was perceived as a component in the prison administrative set-up rather than regarding him as an individual with basic human rights during the British Raj.[23] It was at this juncture, when the British authorities had realized that the prison administration in India required an overhauling reform and had appointed the 'All India Jail Committee' to look into the modalities of revamping the existing system in 1919-1920.[24] Hence, the committee, under the chairmanship of Sir Alexander Cadrew, had endorsed "the reformation and rehabilitation of inmates" as an objective for effective prison administration.[25]

The report of this committee threw ample light on the necessity of prison staff training, medical care and aid to inmates along with other

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[18]ibid

[19]Math, Suresh Bada. (n 14) p. 32.

[20]Bureau of Police Research & Development. (n 11)

[21]Paranjape, N.V. (n 17) p. 478.

[22]Roy, Sudipto. "Jail Reforms in India: A Review." *Kriminologija & Socijalna Integracija* 11.1 (2003): 33-40.

[23]ibid

[24]Bureau of Police Research & Development. (n 11)

[25]ibid

[26]Roy, Sudipto. (n 22) p. 36.

reformatory measures in prison[26], as the committee was of the opinion that prisons should possess a reformative effect on inmates in addition to its deterring influence.[27] Hence, this change in attitude among the British authorities could also be contemplated to be a portrayal of the resumption in the further development of Welfarism in England which had been brought to a halt by the First World War.[28]

After obtaining independence from the British rule in 1947, several committees, both at the local and central level, were constituted such as the East Punjab Jail Reforms Committee (1948-49), Madras Jail Reforms Committee (1950-51), Assam Jail Enquiry Committee (1956), All India Jail Manual Committee (1957), Working Group on Prisons (1972), etc. and contributed to the steady development of prison administration in India.[29] Amid the aforementioned committees, it is intriguing to observe that the Working Group on Prisons had put forward, inter alia, the suggestion of focussing on the appropriate training of prison staff-members and the enhancement of their service condition, which was advanced in its report in 1973.[30]

Part II

Appreciating Correctional Staff and its nature of work

"The Prison Service is the most complex organisation I have encountered and its problems some of the most intractable."

– Sir Raymond Lygo[31]

Correctional staff are intrinsically regarded to be an important participant

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[27]Paranjape, N.V. (n 17) p. 479.

[28]Woodroofe, Kathleen. "The Making of the Welfare State in England: A Summary of Its Origin and Development." *Journal of Social History* 1.4 (1968): 303-24.; The recommendations of the All India Jail Committee (1919-1920) could not come into being during the British Raj because of the occurrence of the World Wars and the rising vigour of the Indian independence movement. See Roy, Sudipto. (n 22) p. 36.

[29]Kini, Ananth. (n 12) p. 73.

[30]Bureau of Police Research & Development. (n 11)

[31]Lygo, Raymond. *Management of the Prison Service*. London: Home Office, 1991. p. 2.

in discerning the ground realities of the conditions of correctional homes.[32] Scholars have also found that the practice of a correctional home is manifested in its staff-members through factors such as their attitude, approach to their work and treatment of inmates.[33] Yet, it is not astounding for members of the correctional staff to find themselves being adversely depicted as "*insensitive authoritarian figure*" in the opinion of public through films, despite their valuable service to the society.[34] *Vinashak*, a Bollywood movie from the year 1998, lucidly reflects such a notion as the jailor in the film was portrayed as the antagonist who had turned his prison into "*a centre for illicit weapons and narcotic substances*". However, the reason of such a portrayal could be found in the collective neglect of the system rather than the misdoings of the correctional staff.[35]

Exploring the sphere of correctional staff is quite captivating as they possess "*a distinct, socially significant and historically under-examined role*".[36] Thus, the analysis of correctional staff is regarded to be significant because of three reasons.[37] First of all, members of the correctional staff perform an important responsibility of the state which has a humanistic influence on the inmates. Second, it is requisite to comprehend the impact caused upon them such as constant pressures, stresses and tensions due to their conspicuous distinctiveness as an organisation. Finally, understanding the nature of the work of correctional staff provides an account of broader social issues like power, order, inequality and resistance, as per the conventions followed in the correctional homes of the contemporary era.

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[32]Molleman, T., and T.C. van der Broek. "Understanding the links between perceived prison conditions and prison staff." *International Journal of Law, Crime and Justice 42* (2014): 33-53.

[33]Liebling, Alison, and Ben Crewe. "Prison Life, Penal Power and Prison Effect". *The Oxford Handbook of Criminology*. Eds. Mike Maguire, Rod Morgan and Robert Reiner. 5th ed. Oxford: Oxford UP, 2012. 895- 927.

[34]Tiwari, Arvind. (n 4) p. 55.

[35]"Prison Visiting System in India." *Commonwealth Human Rights Initiative*. 5 March 2016. Web. 15 August 2018. <www. humanrightsinitiative.org/publications/prisons/ prisons_visiting_system_in% 20India.pdf>

[36]Bennett, Jamie. *The Working Lives of Prison Managers: Global Change, Local Culture and Individual Agency in the Late Modern Prison*. Basingstoke: Palgrave Macmillan, 2016. p. 1.

[37]ibid

The occupational nature of the correctional staff is considered to be a 'protective service'.[38] This is also recognizable with the functions associated with this job[39], such as:-

a) preserving effective security in the custody of the inmate held in confinement.

b) delivering care, with humanity, to prisoners.

c) providing ample space to the inmates to address their offending behaviour.

d) assisting with the quotidian management of the organizational atmosphere in the correctional home.

Nevertheless, the reality shows that the tasks of the correctional staff, significantly differs between correctional homes and regions as in some regions, members of the correctional staff hardly goes into the inmates' boundary[40], while in other places they go out of the way to establish a positive connection with the inmates to water down tensions apart from resorting to the use of force.[41] Hence, many functions of the correctional staff and their problems would be similar among various regions but in addition to this, this part would also throw sufficient light on the key issues of the correctional homes in Assam.

The requirement of noteworthy professional skills and alertness among the members of the correctional staff is considered to be beneficial for the cause of the modern management of correctional homes.[42] However, the deplorability of their working and service conditions would have substantial effects on their work attitude, which consequently impacts the correctional institutions in whole.[43] Therefore, the need for assessing the correctional staff's circumstances of work and service becomes exigent as it is widely believed that the staff's working situation influences their manner of treating

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[38]Liebling, Alison. "Prison officers, policing and the use of discretion." *Theoretical Criminology* 4.3 (2000): 333-57.

[39]ibid

[40]Coyle, Andrew. *Managing prisons in a time of change*. London: International Centre for Prison Studies, 2002. p. 36.

[41]Liebling, Alison, David Price, and Guy Shefer. *The Prison Officer*. London: Routledge, 2012. p. 8.

[42]Coyle, Andrew. *Managing prisons in a time of change*. (n 40) p. 69.

[43]Lambert, Eric G., Jianhong Liu, and Shanhe Jiang. "An Exploratory Study of Organizational Justice and Work Attitudes Among Chinese Prison Staff." *The Prison Journal* 98.3 (2018): 314-33.

the inmates which, in turn, also affects the inmates' perception of the correctional home conditions.[44]

Figure 1 : Impact of relationship between the staff-members and the inmates of correctional homes.
[Source : Molleman T and van der Broek T.C. (2014)]

Part III

Badgering problems of the correctional staff and its implications

"Rules in our prison have been tightened up. There are more frequent searches... What is required, of course, is not more frequent searches but a better class of wardresses, more educated and better paid."

– Vijaya Lakshmi Pandit [45]

It is common to find the perception of the correctional home culture to be gloomy and discourage among the members of the correctional staff because they view themselves to be a component of "*an unvalued and unappreciated occupational group.*"[46] Such an assessment is also the result of the persisting apathetic response meted towards mitigating several factors which are inimical to the service and working conditions of the correctional staff such as overcrowding in correctional homes, lack of adequate recruitment of staff, dilapidated physical infrastructure, disparity in pay, absence of career-enhancement, etc. Hence, the need to analyse the essence of the various constraints of the correctional staff remains as the objective of this remaining part.

Overcrowding

"Almost all over India overcrowding in prisons has become a common problem. In some prisons the cells and barracks which were originally meant for

[44]Molleman, T., and T.C. van der Broek. (n 32) p. 38.

[45]Pandit, Vijaya Lakshmi. *Prison Days*. New Delhi: Speaking Tiger, 2018. p. 130.

[46]Crawley, Elaine, and Peter Crawley, "Understanding prison officers: culture, cohesion and conflicts". *Understanding prison staff*. Eds. Jamie Bennett, Ben Crewe and Azrini Wahidin, Devon: Willian Publishing, 2008. 134-50.

accommodating inmates have been converted into store-rooms, godowns, workshops, etc. The original authorized accommodation of an institution is thus slowly shrinking whereas the daily average population and the total admission indicate a steady increase. As a consequence, overcrowding has assumed the proportions of a major problem for the Correctional Administration."[47]

This was the observation made by the All India Jail Manual Committee, which had been constituted in 1957 and fascinatingly, it still holds water for the present climate of correctional administration in India.[48] It is a commonly-acknowledged fact that most correctional homes in India are plagued by the problem of overcrowding.[49] In a letter addressed by Justice R.C. Lahoti, one-time Chief Justice of India to the then Chief Justice of India on 13th June, 2013, he had also pointed that the difficulty of overcrowding carried the day in 1382 correctional homes of India, as per a report that had been published in the national edition of Dainik Bhaskar.[50]

Overcrowding pertains to the circumstances in which the inmates accommodated in a correctional home are more than the sanctioned strength.[51] Overcrowding is understood by analysing the occupancy rate of correctional homes which is defined as "*the number of inmates staying in correctional homes against the sanctioned capacity for 100 inmates.*"[52] In India, the average occupancy rate of the correctional homes is estimated to be 114.4% which implies the issue of overcrowding.[53] However, the occupancy rate of the correctional homes in Assam, despite being less than the national average, is 109.7%.[54] This shows that the drawback of overcrowding continues to hamper the smooth management of correctional administration in Assam. As per the Comptroller and Auditor General's report on the Government of

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[47]Neier, Aryeh, and David Rothman. "Prison Conditions in India." *Human Rights Watch.* 1991. Web. 14 July 2018. <www.hrw.org/sites/default/files/reports/INDIA914.pdf>

[48]ibid

[49]Paranjape, N.V. (n 17) p. 483.

[50]*Re: Inhuman Conditions in 1382 Prisons*, AIR 2016 SC 993 (India). para 6.

[51]"Prison Statistics India, 2015." *National Crime Records Bureau.* 18 November 2016. Web. 7 July 2018. <http://ncrb.gov.in/statpublications/psi/Prison2015/Full/PSI-2015-%2018-11-2016.pdf>

[52]ibid; If occupancy rate is less than 100, then it highlights the availability of space for inmates in correctional homes. However, an occupancy rate which is more than 100 would signify overcrowding in them.

[53]Kini, Ananth. (n 12) p. 85.

[54]National Crime Records Bureau. (n 49) p. 15.

Assam, it highlighted that overcrowding of inmates was a problem in 18 jails but the registered capacity of 12 jails remained unoccupied for the period of 2012-16.[55]

It is common to find the problem of overcrowding in the correctional homes for reasons like the rise of inmate population, deficient infrastructure, high imprisonment rates and strict sentencing procedures, huge number of under-trial prisoners, dearth of non-custodial measures and sanctions and various social, economic and political factors.[56] It is also appalling to find the growing population of under-trial prisoners in the correctional homes have a notable contribution to the issue of overcrowding as they constitute a large majority of those confined in judicial custody.[57] This problem has several repercussions on the management of correctional homes as it becomes difficult to provide acceptable standards of sanitation and hygiene along with adequate medical facilities to the inmates.[58] Simultaneously the cost of running an overcrowded correctional home also becomes expensive due to the severe crunch in resources, both material and human, which are required to meet the needs of the inmates in such a place.[59] In totality, such attributes interact with each other and depresses the entire climate in correctional homes.[60]

Another problem which is unique to the state of Assam is the presence of a very significant amount of illegal immigrants and as the Supreme Court had observed, it is not at all surprising to witness the absence of a detention

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[55]Accountant General (Audit) Assam. "Epitome of CAG's Reports on the Government of Assam For the Year ended 31 March 2016." *Comptroller and Auditor General.* 2016. Web. 22 August 2018. <www.agasm.cag.gov.in/forms/audit_report/epitome2.pdf>

[56]United Nations Office for Project Services (UNOPS). "Technical Guidance for Prison Planning." *United Nations.* 2016. Web. 14 July 2018. <https://content.unops.org/publications/Technical-guidance-Prison-Planning-2016_EN.pdf?mtime=20171215190045>

[57]Law Commission of India. Congestion of Under-trial Prisoners in Jails. Report No 78. February 1979. p. 1. para 1.5.

[58]Teja, B.K. "Living Conditions and Human Rights of Inmates." *National Human Rights Commission*. 2013. Web. 17 June 2018. <http://nhrc.nic.in/Documents/Publications/Living_Conditions_HR_of_Inmates_Vol_I.pdf>

[59]Bhat, Mudasir A. "Prison Laws in India: A Socio-Legal Study." *Uttarakhand Judicial & Legal Review* 2.1 (2014): 93-108.

[60]Teja, B.K. (n 58)

[61]Order dated 12/09/2018 in *Re: Inhuman Conditions in 1382 Prisons AIR* 2016 SC 993 Writ Petition(Civil) 406/2013.

centre being established in Assam either.[61] However, this issue exacerbates the current problem of overcrowding in the correctional homes as the foreign nationals are 'temporarily' detained in the correctional homes in the absence of a dedicated detention centre.[62] To solve this crisis, the state of Assam has responded by earmarking the land in Goalpara where the detention centre would be established and it has been asked by the Apex Court to accelerate its construction as the Central Government had sanctioned the amount of ₹ 46.51 crores for the same.[63]

Inadequacy of Correctional Staff

In the field of academics, scholars argue that provision of a custodial duty to inmates such as convict-warders, in managing the correctional homes to aid the correctional staff's function of maintaining institutional security, is an inefficacious exercise which stands antithetical to the objective of correctional administration i.e. reformation of inmates.[64] Nonetheless, the existence of this practice still continues and increasing the recruitment of correctional staff could be highly effective in dealing with this matter.

Under-staffing creates a constant pressure in the management of correctional homes[65] because there would be staff-members, who would have been already given some other responsibilities but again be burdened with additional duties as the requisite financial and manpower assets are lacking for the system.[66] The Prison Statistics report of India, under the initiative of the National Crime Records Bureau (NCRB), stated that among the sanctioned strength of 80,236 for the entire correctional staff in India, only 53,009 members constituted for the actual strength.[67] Thus, it could be

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[62]Saha, Soumyajit. "Detained Until Deported: Thousands Declared 'Foreigners' in Assam Wait in Limbo." *The Wire*. February 2018. Web. 3 October 2018. <https://thewire.in/politics/detained-deported-thousands-declared-foreigners-assam-wait-limbo>

[63]Order dated 12/09/2018 in *Re: Inhuman Conditions in 1382 Prisons* AIR 2016 SC 993 Writ Petition(Civil) 406/2013

[64]Narag, Raymund E., and Clarke R. Jones. "Understanding Prison Management in the Philippines: A Case for Shared Governance." *The Prison Journal* 97.1 (2017): 3-26.

[65]Tiwari, Arvind. (n 4) p. 69.

[66]Narag, Raymund E., and Clarke R. Jones. (n 64) p. 5.

[67]National Crime Records Bureau. (n 51) p. 139.

inferred that an unfortunate 66.1% of the total sanctioned strength of correctional staff had been filled in reality.[68]

The state of Assam fares slightly better than the national average in this field by having an actual strength of 51,238 members occupied for a sanctioned strength of 77,128.[69] This accounts for 74.3% of the total sanctioned strength of its correctional staff.[70] Yet, this seems contradictory as the members of its correctional staff have been despaired on the manner of being burdened with additional work quite regularly due to the shortage of staff and lack of recruitment in the correctional homes. The Superintendent of the Tezpur Central Jail had pointed to the effect of this problem ranging on the security of the correctional home. He had also claimed that people from outside the premise of Jail have been witnessed to throw mobile phones into it due to the lack of adequate staff for external perimeter security of the correctional home.[71]

The reader at this stage might probably notice the construction of a link between the issues of overcrowding of inmates and shortage of correctional staff in correctional homes, which carries along with itself detrimental effects on the machinery of its administration. Hence, one might also ponder about the pressure that is placed upon an insufficiently-staffed members of the correctional staff in managing the daily affairs of the correctional homes which also constitutes for maintaining the custody of a highly excessive number of inmates and their affairs that pertains beyond its gates. This shall be discussed in detail in the following stages of this paper.

Working conditions of the correctional staff

It is generally said that the environment variables of a place greatly determines an individual's behaviour of work relative to the circumstances. Similarly, the working conditions of a correctional home have a significant influence in the performance of the correctional staff.[72] It is ordinary to find

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[68]ibid
[69]ibid
[70]ibid
[71]Interview with Superintendent of Tezpur Central Jail (Tezpur, Assam, India, 26 June 2018)
[72]Narag, Raymund E., and Clarke R. Jones. (n 64) p. 20.

deprived working conditions in the correctional homes for reasons like the insufficient space, inadequate staff and lack of operational funds needed for its maintenance.[73]

Figure 2 : Condition of a quarter for staff-members of the Jorhat District Jail. Left- Toilet. Right- Interior and exterior of the quarter.
(Source: Pratidhwani: Free Legal Aid and Awareness Centre)

The physical infrastructures of the correctional homes are often found to be debilitative in nature. Hence, the working atmosphere of the correctional staff, consequently, dampens. Such was the case in the Tezpur Central Jail, the Morigaon District Jail, the Goalpara District Jail and the Jorhat Central Jail. The cracks on the walls and ceilings of the offices of these correctional homes were conspicuous which reflects on the passive attitude for maintenance. There was no sight of upgrade in the furniture used such as the desk, chairs, cupboards, etc. in these places. The absence of efficient space utilization in the office of some correctional homes like the Tezpur Central Jail as the office appeared to be nothing less than a muddle of tables and chairs occupied by the members of the staff. The unsatisfactory height of the boundary walls of the correctional homes pose a problem to the staff-members despite the acute shortages of security staff as 68 escapes have been noted in the correctional homes of Assam

[73]ibid

from 2012 to 2015.[74] Another official from the Goalpara District Jail said that the ideal height of the perimeter wall should range between 18 feet to 22 feet. However, in reality, the perimeter wall stands close to 14 feet in height, which reflects the lax approach in improving the physical infrastructure of the correctional homes.

It was also fascinating to observe in the Tezpur Central Jail and Morigaon District Jail that despite the space-crunch in the offices, the visiting rooms of the inmates were found to be attached to them. Hence, it is not clear whether such arrangements are a result of the management or mismanagement of the office space but an official of the Morigaon District Jail did state his frustration towards such an arrangement contending that the staff members are not able to work in peace due to their nature of being proximate to the outdoors.

While it is normally assumed that the scale of pay and service conditions exhibits the importance of the service contributed to the society[75], the pay provided to the correctional staff is very low. Thus, talented individuals are not provided with any incentive to join the service by offering low levels of pay.[76] In Madhya Pradesh, the M.P. Public Service Commission kept the posts of Assistant Jailors, Naib-Tehsildars and Sub-Inspectors of Co-operative Societies/ Excise Department on the same scale with a common examination and similar academic qualification prescribed. However, in the initial stages, the government demotes the post of the correctional staff by prescribing a lower scale of pay.[77]

The issue of lower scale of pay is also contended to be a persisting problem according to members of the correctional staff of Assam. After holding interviews based on lightly structured talk with the officials of the correctional homes in Tezpur, Morigaon, Goalpara and Jorhat, it was visible that the pay scale provided to them was not considered to be sufficient. Thus, the 7th Assam Pay and Productivity Pay Commission had

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[74]Accountant General (Audit) Assam. (n 55)

[75]Allen, Rob. "Global Prison Trends 2016." *Penal Reform International.* May 2016. Web. 20 May 2018. <https://s16889.pcdn.co/wp-content /uploads/2016/05/Global_ prison_trends_ report_2016.pdf>

[76]Coyle, Andrew. *A Human Rights Approach to Prison Management.* London: International Centre for Prison Studies, 2002. p. 28.

[77]"Prisons and Human Rights." *Commonwealth Human Rights Initiative.* April 1998. Web. 22 June 2018. <http:// humanrightsinitiative.org /publications /prisons /bhopal_ 98__workshop_ report.doc>

recommended that the post of Superintendent of Jail Gr. II and Lady Superintendent were upgraded with grade pay of ₹ 5,400.[78] It had also made the recommendation of bringing the grade pay for Warder, Head Warder and Chief Head Warder at par with the grade pay of Constable, Head Constable and Assistant Sub-Inspector of Police at ₹ 2200, ₹ 2700 and ₹ 2900 respectively in order to address the disparity of scale of pay among uniformed services.[79] Yet, the delay of implementing these recommendations have agitated the members of the correctional staff as the Assam Jail Officers Association had forwarded a memorandum to the Anomaly Committee seeking a grade pay of ₹ 9100 for the rank of Assistant Jailors.[80]

In the existing structure of managing correctional homes, a staff-member could be asked to work for as many hours as per requirement, without the provision of compensatory allowances for overtime other than the payment of the regular salary.[81] This factors the very long work and unpredictable hours for correctional staff, which also creates stressed environment to work in.[82] Along with the provision of less pay and absence of compensatory allowance for overtime, the members of the correctional staff are also stifled with disparity in provision of other allowances like kit allowance and ration allowance, with other governmental services like the police personnel. Thus, the memorandum that had been submitted to the Anomaly Committee had also contained the demands of providing compensatory allowance and ration allowance up to the rank of jailor, at par with that provided to the police personnel.[83]

The grey area in the framework of correctional administration in Assam comprises of the detention of 'declared foreigners' in its correctional homes.

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[78]Finance Department. "Report of 7th Assam Pay and Productivity Pay Commission." *Government of Assam.* 18 November 2016. Web. 2 August 2018. <https://finance.assam.gov.in/sites/default/files/swf_utility_folder/departments/agriculture_com_oid_2/do_u_want_2_know/7th%20Assam%20Pay%20%26%20Productivity%20Pay%20Commission.pdf>

[79]ibid

[80]Finance Department. "Report of the Anomaly Committee." *Government of Assam.* 2017. Web. 2 August 2018. <https://finance.assam.gov.in/sites/default/files/swf_utility_folder/departments/agriculture_com_oid_2/menu/document/Report%20of%20Anomaly%20Committee.pdf>

[81]Coyle, Andrew. *Managing prisons in a time of change.* (n 40) p. 54.

[82]ibid

[83]Finance Department, 'Report of the Anomaly Committee'. (n 75)

However, the absence of the regulations on such individuals in the prison manuals makes it difficult for them to take care of themselves and also, the correctional staff-members to take care of them. For example, as jail manual rules are not legally applicable to detainees, it also signifies that they are prohibited from working for a wage which could be distressing for their family members too.[84] Hence, a good practice has been noticed among some of the staff-members who have expended money from their own sources to assist such detainees in their welfare. However, such benevolence eventually ends up being a burden for the members of correctional staff themselves.

Another bone of contention which concerns the correctional staff is the matter of promotion in their service. The prospects of promotion in the correctional service is considered to be very stationary and provide upward mobility in their career concerned.[85] It is a fact of life in this service that an average of 20-22 years of service could be beneficial in getting a promotion from one rank to another as per the opinion of an official from the Morigaon District Jail. The situation pertaining to promotion is even worse among the lower echelons of the correctional staff due to the existence of a number of warders who have been denied the opportunities of promotion for the last two decades.[86] For redressing this issue, the 7th Assam Pay and Productivity Pay Commission had made a suggestion of permitting the Warders, Head Warders and Chief Head Warders possessing graduate qualification to appear for the procedure of direct recruitment to higher posts such as Assistant Jailor.[87]

The current system of correctional administration clearly represents the female members belonging to the correctional staff are a part of the minority and a lot of distinct hurdles are placed before them, in their work.[88] The

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[84]Saha, Soumyajit. (n 62)

[85]Bedi, Kiran. *It's Always Possible: Transforming one of the largest prisons in the world.* 9th ed. New Delhi: Sterling Publishers, 2012. p. 51.

[86]Commonwealth Human Rights Initiative. (n 77)

[87]Finance Department, 'Report of 7th Assam Pay and Productivity Pay Commission'. (n 78)

[88]Rope, Olivia, and Frances Sheahan. "Global Prison Trends 2018." *Penal Reform International.* May 2018. Web. 22 June 2018. <https://s16889.pcdn.co/wp-content/uploads/2018/04/PRI_Global-Prison-Trends-2018_EN_WEB.pdf>

consequence of a male-dominated system is that the requirements of the female staff-member are not paid with much heed. While discussing this issue with Ms Nayama Ahmed, an assistant jailor in the Tezpur Central Jail, she sheds light on the conditions of hygiene and sanitation for the prison staff.[89] She mentions that the ladies' washroom is in such a pathetic condition that the female staff-members are forced to use the gents' washroom. This highlights another severe infrastructural defect in the prison where there is an absence of the provision of separate washrooms for men and women. Being a married woman, who is blessed with 2 children, she also contended that she is left with no other option but to hire domestic helps to take care of her children due to the paucity of time that she can accord to her children.[90] Thus, she feels that having a crèche in the prison would be highly beneficial and productive to all the female staff-members of the prison including her. Hence, the question that ponders around one's head upon knowing such realities is whether the institutions of the state are still contributing to prevalence of gender-inequality in the society.

Living conditions of the correctional staff

It is important to realise that the living conditions of the correctional staff has close proximity to the conditions within the premise of the correctional home. This includes bad physical infrastructure, inadequate space, air and light along with deficiency in efficient sewerage system and waste management or other unhygienic circumstances.[91] In addition to these, the remoteness or inaccessibility of the location of the correctional homes further makes it imperative to provide appropriate living conditions to the correctional staff.[92] The construction of decent staff quarters for correctional

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[89]Interview with Ms Nayama Ahmed, Assistant Jailor, Tezpur Central Jail (Tezpur, Assam, India, 26 June 2018)

[90]ibid

[91]UN Special Rapporteur on Torture. *Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention.* para 9 and 229-237. 5 February 2010. U.N. Doc. A/HRC/13/39/Add.5.

[92]United Nations Office for Project Services. (n 56) p. 206.

personnel has been argued to augment their morale which is beneficial in the effective performance of the duty.[93]

Nonetheless, the living conditions of the correctional staff in the correctional homes of Assam looked very decaying. Such an observation was evident from the corrugated metal roofs which appeared to be rusted and the multiple cracks on walls of the staff-quarters in the correctional homes of Tezpur, Morigaon, Goalpara and Jorhat.

Figure 3 : Staff-quarter at the Tezpur Central Jail.
(Source: Pratidhwani: Free Legal Aid and Awareness Centre)

The correctional staff-members in Jorhat complained that due to lack of maintenance of these quarters, rainwater seeps into these places through the leaking roofs during the monsoons. An official from the Goalpara District Jail maintained that even though there is a provision of running water facility, it relies itself on the power supply to run the water-pump. However, the Jail, unlike other correctional homes, is not provided with a separate sub-station/ transformer for supply of electricity and is left with no choice but to share it with the power supply of the town. Unfortunately, due to the occurrence of frequent power-cuts, its impact is felt while one is trying to obtain water for oneself. The provision of water for the inmates fare better

[93]Tiwari, Arvind. (n 4) p. 65.

than that provided to the correctional staff of Jorhat District Jail as the inmates are provided with tanks for their supply but the correctional staff are supplied from the nearby pond. The conditions of the washrooms were horrendous in Jorhat as the staff-members had to access the toilets which were located outside their quarters. Hence, the impact on the sanitation and hygiene of the correctional home can be aptly reflected from such a groundwork.

Therefore, by providing a graphical illustration of the problems persisting in the management of correctional homes, at this stage of the paper, it is my hope to provide an even more straightforward perspective of the argument.

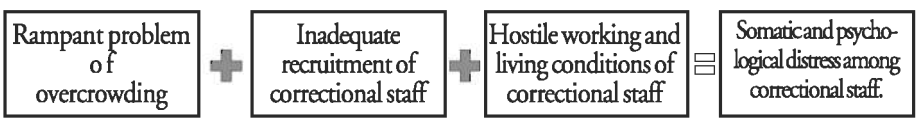

Figure 4 : Pictorial representation of the problematic hurdles that the members of correctional staff constantly deal with and its plain effect on them.

Stress and burnout among the correctional staff is not unusual as they are factored by circumstances like lack of training, under-confidence in crisis-management, working conditions, duties and responsibilities along with distribution of staff.[94] Such factors lead to rising levels of sickness related leaves taken which further aggravates stress among them.[95] From the aforementioned situations, it can also be manifested that certain basic needs of the correctional staff- members have been systematically stymied, which illustrates the institution to them as undependable, unsafe or even dubious, and consequently considering such feelings as a psychopathological threat.[96]

If this problem is not nipped in the bud, then it is possible for the correctional staff-members to channel their frustration towards the inmates which can also appear as aggression towards them and hence, contributing towards the dehumanising conditions of the inmates in correctional homes.[97] Such responses are legitimate in terms of relative deprivation theory, which

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[94]Math, Suresh Bada, Pratima Murthy, Rajani Parthasarathy, C. Naveen Kumar, and S. Madhusudhan. (n 14) p. 154.

[95]ibid

[96]Maslow, A.H. "A Theory of Human Motivation." *Psychological Review* 50.4 (1943): 370-96.

[97]Tiwari, Arvind. (n 4) p. 68.

states that a sentiment of dissatisfaction exists when an inconvenient discrepancy is observed between 'value expectations' and 'value capabilities' by the people.[98]

Part IV

Legal Framework and Guidelines concerning the correctional staff

It is well-known that a satisfactory comprehension of the legal framework of a system is a condition precedent to introduce the policy stimuli that would be required to revamp the existing structure of management and administration of correctional homes. There are various international documents, national and state legislations and case laws along with the guidelines of various committees which carry the jurisdiction to look after the correctional administration in India. However, to remain in consonance with relevance of the topic discussed, only required parts of these sources shall be discussed in this section.

International Standards

On 17 December 2015, the United Nations General Assembly (UNGA) adopted the resolution on the revised Standard Minimum Rules for the treatment of prisoners[99] (also known as the Nelson Mandela Rules) after they were accepted to be revised for reflecting the progress in contemporary correctional practices, on the request of the UNGA to the Commission on Crime Prevention and Criminal Justice.[100]

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[98]Mummendey, Amelie, Thomas Kessler, Andreas Klink, and Rosemarie Mielke, "Strategies to Cope with Negative Social Identity: Predictions by Social Identity Theory and Relative Deprivation Theory." *Journal of Personality and Social Psychology* 76.2 (1999): 229-45.; Value expectation refers to the benefits and levels of material comfort to which people convince themselves as their rightful prerogative. Value capabilities are the benefits and levels of material comfort which they could acquire and retain in their capability. See Spence, J. E. Rev. of Why Men Rebel, by Ted Robert. *Community Development Journal* 7.3 (1972): 199-200.

[99]UNGA United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). 17 December 2015. U.N. Doc. A/RES/70/175.; The UNGA made it apparent, in 'preliminary observation 2' annexed to the Rules, that it was not appropriate to apply all of the rules regardless of time and location as it did acknowledge the motley of legal, social, economic and geographical positions in the world.

[100]UNGA Twelfth United Nations Congress on Crime Prevention and Criminal Justice. 21 December 2010. U.N. Doc. A/RES/65/230.

The Nelson Mandela Rules focusses on the requirement of, "*careful selection of every grade of the personnel, since it is on their integrity, humanity, professional capacity and personal suitability for the work that the proper administration of the institutions depends.*"[101] Thus, the provisions concerning the correctional staff revolve from Rule 74 to Rule 81 of the Nelson Mandela Rules.[102] Other international norms which are applicable to the correctional

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[101]The Nelson Mandela Rules. (n 99) Rule 74(1)

[102]ibid, Rule 74

1. The prison administration shall provide for the careful selection of every grade of the personnel, since it is on their integrity, humanity, professional capacity and personal suitability for the work that the proper administration of the institutions depends.

2. The prison administration shall constantly seek to awaken and maintain in the minds both of the personnel and of the public the conviction that this work is a social service of great importance, and to this end all appropriate means of informing the public should be used.

3. To secure the foregoing ends, personnel shall be appointed on a full-time basis as professional prison staff and have civil service status with security of tenure subject only to good conduct, efficiency and physical fitness. Salaries shall be adequate to attract and retain suitable men and women; employment benefits and conditions of service shall be favourable in view of the exacting nature of the work

Rule 75

1. All prison staff shall possess an adequate standard of education and shall be given the ability and means to carry out their duties in a professional manner.

2. Before entering on duty, all prison staff shall be provided with training tailored to their general and specific duties, which shall be reflective of contemporary evidence based best practice in penal sciences. Only those candidates who successfully pass the theoretical and practical tests at the end of such training shall be allowed to enter the prison service.

3. The prison administration shall ensure the continuous provision of in-service training courses with a view to maintaining and improving the knowledge and professional capacity of its personnel, after entering on duty and during their career.

Rule 76

1. Training referred to in paragraph 2 of rule 75 shall include, at a minimum, training on: (a) Relevant national legislation, regulations and policies, as well as applicable international and regional instruments, the provisions of which must guide the work and interactions of prison staff with inmates; (b) Rights and duties of prison staff in the exercise of their functions, including respecting the human dignity of all prisoners and the prohibition of certain conduct, in particular torture and other cruel, inhuman or degrading treatment or punishment; (c) Security and safety, including the concept of dynamic security, the use of force and instruments of restraint, and the management of violent offenders, with due consideration of preventive and defusing techniques, such as negotiation and mediation; (d) First aid, the psychosocial needs of prisoners and the corresponding dynamics in prison settings, as well as social care and assistance, including early detection of mental health issues.

2. Prison staff who are in charge of working with certain categories of prisoners, or who are assigned other specialized functions, shall receive training that has a corresponding focus.

Rule 77

All prison staff shall at all times so conduct themselves and perform their duties as to influence the prisoners for good by their example and to command their respect.

staffconsist of the Bangkok Rules of 2000[103], European Prison Rules of 2006[104], Principles and Best Practices of the Inter-American Commission of Human Rights of 2008[105] and Havana Rules of 1990.[106]

Along with these, it can also be inferred from SDGs 5, 8 and 16 of the United Nations Sustainable Development Goals[107] that the correctional staff should be protected from all kinds of discrimination.[108] Further, the scale of

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Rule 78

1. So far as possible, prison staff shall include a sufficient number of specialists such as psychiatrists, psychologists, social workers, teachers and trade instructors.

2. The services of social workers, teachers and trade instructors shall be secured on a permanent basis, without thereby excluding part-time or voluntary workers.

Rule 79

1. The prison director should be adequately qualified for his or her task by character, administrative ability, suitable training and experience.

2. The prison director shall devote his or her entire working time to official duties and shall not be appointed on a part-time basis. He shall reside on the premises of the prison or in its immediate vicinity.

3. When two or more prisons are under the authority of one director, he or she shall visit each of them at frequent intervals. A responsible resident official shall be in charge of each of these prisons.

Rule 80

1. The director, his deputy, and the majority of the other personnel of the institution shall be able to speak the language of the greatest number of prisoners, or a language understood by the greatest number of them.

2. Whenever necessary, the services of an interpreter shall be used.

Rule 81

1. In a prison for both men and women, the part of the prison set aside for women shall be under the authority of a responsible woman staff member who shall have the custody of the keys of all that part of the prison.

2. No male staff member shall enter the part of the prison set aside for women unless accompanied by a woman staff member.

3. Women prisoners shall be attended and supervised only by women staff members. This does not, however, preclude male staff members, particularly doctors and teachers, from carrying out their professional duties in prisons or parts of prisons set aside for women.

[103]UNGA United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), Rules 29-35. 6 October 2010. U.N. Doc. A/C.3/65/L.5.

[104]Council of Europe: Committee of Ministers. Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules. Rules 71-91. 11 January 2006. Rec(2006)2.

[105]Inter-American Commission of Human Rights. Resolution 1/08,Principles an Best Practices on the Protection of Persons Deprived of Liberty in the Americas. Principle XX. 13 March 2008. No. 1/08.

[106]UNGA United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990) UN Doc A/RES/45/113 Rules 81-87

[107]"Sustainable Development Goals." *United Nations Development Programme.* January 2016. Web. 28 July 2018. <www.undp.org/content/undp/en/home/sustainable-development-goals.html>

[108]Rope, Olivia, and Frances Sheahan. (n 88) p. 23.

pay and working conditions should depict the challenging nature of correctional work along with encouraging more recruitment of female correctional staff.[109]

National Standards

As had been discussed in Part I of this paper, the contemporary system of correctional administration in India is the heritage of the British Raj in India. The British felt the exigent need of a uniform legislation for correctional administration and thus, enacted the Prisons Act of 1894. As noted by scholars like Amarendra Mohanty, the Act was based on the deterrent policies of the British to a large extent but however, did not take the effort of understanding the flipside of the problem i.e. treatment of inmates.[110]

Prisons Act of 1984[111] looks after the machinery of correctional homes in India and the provisions of the Act, which concern the correctional staff-members, are laid down in the following.

- Appointment of the Inspector General and the officers of the prison.[112]
- Responsibilities and functions of officers of prison.[113]
- Duties of the superintendent of prison.[114]
- Functions of medical officer.[115]
- Responsibility of jailer in prison.[116]
- Powers of Deputy and Assistant Jailers of prison.[117]

Thus, it can be said that even though the legislation provides clarity on the functions of the correctional staff, it remains silent on their conditions of service and work. However, recommendations have been suggested by various other commissions and committees, which had been constituted for reforms in correctional administration. The Government of India had requested the assistance of Dr W.C. Reckless, a noted criminologist, under

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[109]ibid

[110]Bhat, Mudasir A. (n 59) p. 103.

[111]Prisons Act. No. 9 of 1894. INDIA CODE. Web. 8 August 2018. <https://indiacode.nic.in/handle/123456789/2325?view_type=browse&sam_handle=123456789/1362>

[112]ibid, Ss. 5, 6

[113]ibid, s. 8

[114]ibid, s. 11

[115]ibid, s. 13

[116]ibid, s. 16

[117]ibid, s. 20

the United Nations Technical Assistance Program in 1951, who had propounded the call for reorganizing the correctional administration on the modern parameters.[118] This paved the path for the constitution of the All India Jail Manual Committee, 1957-59, which had prepared a Model Prison Manual for the state governments to revise their existing prison manuals.[119]

In 1980, the All India Committee on Jail Reforms was constituted by the Government of India under the chairmanship of Justice Anand Mulla.[120] Hence, this committee, which is better known as the Mulla Committee, had submitted its report in 1983 that had provided more than 500 recommendations to modernize the correctional homes on progressive lines. Among its many valuable recommendations, it is interesting to observe that it had also recognized the importance of the correctional staff.[121] With regards to its recommendations regarding the correctional staff, the Mulla Committee suggested the development of correctional service as a professional career where the State "*shall endeavour to develop a well-organized prison cadre based on appropriate job requirements, sound training and proper promotional avenues.*"[122] It had also laid down that the job status, remuneration and service conditions of correctional staff should be reflective of the qualifications and functions related to the job.[123]

The gradual progress in the revamp of correctional administration in India has also been commendable with constitution of several committees in the last few decades such as Kapoor Committee (1986), National Expert Committee on Women Prisoners (1987), All India Model prison Manual Committee (2000), All India Committee on Reforms in Criminal Justice (2003), All India Committee on National Draft Policy on Prison Reforms and Corrections (2007) and Committee on Draft Policy on Criminal Justice reforms (2007).[124]

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[118]Tiwari, Arvind. (n 4) p. 53.
[119]ibid
[120]ibid
[121]Bureau of Police Research & Development. (n 10)
[122]ibid
[123]ibid
[124]Tiwari, Arvind. (n 4) p. 54.

The Supreme Court of India has been quite ardent in its stance to improve the current situation of the correctional homes and ameliorate the problems which have been plaguing them. The response of the judiciary towards reforms in the correctional administration has been prompt in the manner it brought its views forward in the *Hussainara Khatoon v. State of Bihar*[125] and *Ramamurthy v. State of Karnataka*[126] where the Apex Court dealt with the issues of overcrowding and the rising population of under-trial prisoners.

However, in the recent times, the Supreme Court pronounced another landmark judgment with regards to reforms in the correctional administration on March 14, 2016. In *Re-Inhuman Conditions in 1382 Prisons*[127] delves into the problems of overcrowding in correctional homes and huge number of undertrials. The Apex Court issued many guidelines to deal with the same[128], which also includes establishment of the Under Trial Review Committee in all the districts which would prepare the appropriate procedure to secure the release of under-trial prisoners for effective utilization of Sections 436 and 436A of the Code of Criminal Procedure, 1973.[129] This was viewed

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[125]AIR 1979 SC 1360 (India).

[126]AIR 1997 SC 1739 (India).

[127]AIR 2016 SC 993 (India).

[128]ibid

[129]Code of Criminal Procedure. No. 2 of 1973. INDIA CODE. Web. 8 August 2018. <https://indiacode.nic.in/bitstream/123456789/1611/1/197402.pdf# search=Code%20of%20 Criminal%20 Procedure %20Code%20of%20Criminal%20Procedure>

s.436- In what cases bail to be taken.

(1) When any person other than a person accused of a non- bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail: Provided that such officer or Court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided: Provided further that nothing in this section shall be deemed to affect the provisions of sub- section (3) of section 116 or section 446A 1 .

(2) Notwithstanding anything contained in sub- section (1), where a person has failed to comply with the conditions of the bail- bond as regards the time and place of attendance, the Court may refuse to release him on bail, when on a subsequent occasion in the same case he appears before the Court or is brought in custody and any such refusal shall be without prejudice to the powers of the Court to call upon any person bound by such bond to pay the penalty thereof under section 446.

s.436A- Maximum period for which an under trial prisoner can be detained

Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as

to be a great aid in engaging the issues of overcrowding in correctional homes. The Supreme Court had also instructed that there should be apposite and efficient utilization of the available funds for the betterment of the conditions of correctional homes which would be beneficial to both the inmates and the members of correctional staff. Such a guideline seems pertinent to the context of Assam as it was highlighted that funds, accumulating to ₹ 49.15 crore, remained unexpended during 2011-16 because of the abundant allocation towards salary against vacant posts and huge delay of releasing funds in the ending months of the year.[130] The Supreme Court also instructed the Ministry of Home Affairs to conduct an annual review of the Model Prison Manual 2016 to make it relevant with the moving time. Thus, upon going through the guidelines, it might seem that the Apex Court did not take the mishaps affecting the correctional staff into account. Yet, it clearly appears that the Court has taken several issues of correctional administration into consideration which would gradually ameliorate the problems of the correctional staff, indirectly if not directly.

The Model Prison Model 2016[131] has caught the attention of the recent trends in reformation of correctional administration. It is viewed to be 'a living document' that would update itself with the trends of the following time as the Apex Court has clearly emphasised on the annual review of the document. It comprises of 32 chapters which discuss about the blue-print of functioning a correctional home. Of these, Chapters II, III, IV and V present the structure of the correctional administration along

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one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties.

Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail instead of the personal bond with or without sureties.

Provided further that no such person shall in any case be detained during the period of investigation inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law.

Explanation - In computing the period of detention under this section for granting bail the period of detention passed due to delay in proceeding caused by the accused shall be excluded.

[130]Accountant General (Audit) Assam. (n 55)

[131]Government of India. *Model Prison Manual 2016*. New Delhi: Ministry of Home Affairs, 2016.

with the duties and functions of the correctional staff.[132] However, it is encouraging to observe that the Model Prison Manual 2016 holds a separate chapter which gives an insight for the welfare of the staff-members.[133] Yet, the reality does not seem to represent the view which is being provided by the Model Prison Manual 2016.[134] Perhaps, the momentum of complete reformation would require some more time, which could completely change the scenario of correctional administration.

Regional Standards

The correctional administration in the state of Assam is guided by the following:-

a. Assam Prisons Act of 2013

b. Assam Jail Manual 1987

c. The Assam Jail Service Rules of 1986

The legislation for the correctional administration in Assam comes with the enactment of Assam Prisons Act of 2013. This Act is emulous to the Prisons Act of 1894 but tailored according to the requirement of the state. Chapter IV of the statute holds relevant for the purpose of this paper as the provisions from Section 6 to Section 19 lay down the duties and functions of members of the correction staff of Assam such as the Inspector General, Superintendent, Medical Officer, Jailor, Deputy Jailor and the remaining others. Unfortunately, there is nothing in this statute which delivers a stand on the welfare of the staff as seen in the Model Prison Manual 2016.

The framework related to correctional administration in Assam is still governed by the Assam Jail Manual[135] which was published in 1987. The Assam Jail Manual, revised again after 1934, comprises "the laws including Rules, Regulations, Orders, etc. which govern the conditions of prisons and

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[132]Chapter II- Institutional Framework; Chapter III - Headquarters Organization; Chapter IV - Institutional Personnel and Chapter V - Custodial Management.

[133]Chapter XXX- Staff Development

[134]Government of India. *Model Prison Manual 2016.* (n 131) p. 283.; Rule 30.31 states that no staff-member shall be required to work for more than 8 hours a day. However, the reality of the issue of work hours has been clearly depicted in the preceding part.

[135]Saraf, B.P., and Ashok Saraf, *Assam Jail Manual.* Guwahati: GLR Publishing House, 1987.

the prisoners."[136] However, the Assam Jail Manual remains silent on the matters of staff development or even their conditions of work, despite holding that the appalling conditions of the correctional homes are a product of the high ignorance that is persistent among the public with regards to this issue.[137] Hence, as had been mentioned earlier, the correctional administration would not be able pursue the reforms it desires, if the component of correctional staff and their facets is kept in dark.

The Assam Jail Service Rules of 1986 lays down the service conditions and recruitment procedure of members of the correctional staff in Assam. These rules have been made by the Governor of Assam as per the power conferred upon him by the proviso to Article 309 of the constitution of India[138] read with Section 59 (10) of the Prisons Act, 1894.[139] However, it is not uncommon to find that certain proponent of these Rules like the scale of pay appear to be meagre and not reflective of the contribution provided by the staff-members to the society. Hence, these Rules also seek the requirement to be updated in order to bring it in consonance with the progressing eras.

Post the developments of the *Re-Inhuman Conditions in 1382 Prisons* case[140], the Supreme Court has issued many orders for the adoption of the Model Prison Manual 2016 in the all the correctional homes across India. Therefore, the need for an updated document to guide the correctional administration in Assam has also reach its saturation point. Hence, the Inspector General (Prison) of the Assam Prison Headquarter contended that

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[136]ibid

[137]ibid

[138]INDIA CONST. (1950), art. 309- "...Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act."

[139]Prisons Act, 1894 (India), S. 59- Power to make rules.-[The State Government may] make rules consistent with this Act-...

(10) for the government of prisons and for the appointment of all officers appointed under this Act

[140]AIR 2016 SC 993 (India).

in light of the recent trends surrounding this issue, the policy would be bring a single comprehensive document which would comprise the highly necessary parts of the Model Prison Manual 2016, Assam Prisons Act of 2013 and Assam Jail Manual of 1987.[141] Hopefully, this revised Jail Manual for the correctional administration of Assam would consist of a part, solely dedicated for the welfare of the correctional staff.

Part V

Road ahead for the Correctional Staff

Throughout out the theme of this paper, the role of the correctional staff has been continuously emphasised for, not just the running of the correction administration, but also for the efficient functioning of the criminal justice mechanism. The reformation of inmates ultimately remains as the core objective of correctional homes and a healthy staff-inmate relationship is the most effective way to achieve this. Hence, when the interests of the correctional staff are handled, then that would contribute to an ethical atmosphere in the staff's attitude towards the inmate.[142] Therefore, it remains an impending necessity to find a prudent approach to deal with the troubles of the correctional staff, which ranges from overcrowding of inmates to the inadequacy of staff members. Their depressing working and living conditions also needs to find a solution which itself is inclusive of bad working conditions due to decaying physical infrastructure, low scale of pay along with its disparity among uniformed service, absence of compensatory leaves, etc.

There is the need for more funds to be invested in the system to meet with the urgent need for the improvement in the conditions of the correctional homes.[143] Hence, the Bureau of Police Research and Development (BPR&D) did an analysis of the present conditions and based on its analysis, 'Modernization of Prisons' was initiated as a non-plan scheme with a total outlay of ₹1800 crore across 27 states.[144] With the

[141]Interview with the Inspector General (Prisons) (Guwahati, Assam, 4 September 2018).

[142]Tiwari, Arvind. (n 4) p. 57.

[143]ibid. p. 64.

[144]Government of India. *Outcome Budget 2009-2010.* New Delhi: Ministry of Home Affairs, 2010. p. 116. para 4.82.

subject of correctional administration coming under the ambit of the state in the constitutional machinery of the India[145], the State governments also had to pitch into the funding of this scheme on cost sharing basis of 25: 75 with the Central government respectively, which was planned to be executed from 2002-03 to 2006-07.[146] These funds would witness its utilization for undertaking necessary tasks such as building of more correctional homes to allay the issue of overcrowding, improving the sanitation and supply of water along with bettering the living conditions of the correctional staff.[147] Such steps would definitely create a successful manner to boost their morale too.

Due to the existing problems attached to the correctional administration, the staff-members are constantly battling high levels of stress while managing their workload. Such kind of workload- stress could aggravate for the worse if not handled with sufficient care. Scholars like David Bieris have placed forward the contention that an intricate nexus is involved with cluttered living conditions (a problem pertinent to the local context) and growth of health issues, rise of stress and other such complications.[148] This contention could be also be corroborated by the staff-members of the correctional homes in Tezpur, Morigaon, Goalpara and Jorhat as had been learned while engaging in interviews with them.

The Inspector General (Prisons) had also acknowledged the problem of staff-shortage in the correctional homes of Assam and has responded to this problem by stating that the recruitment of staff would be conducted under the helm of the State Police Recruitment Board.[149] He remains hopeful that sufficient recruitments would be made to fill in the sanctioned strength of the staff.[150] Yet, such a procedure of recruiting correctional staff remains a perplexing concept despite the several Jail Reforms Committees and the Model Prison Manual of 2016 suggesting the establishment of a separate

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[145]Under the Seventh Schedule of the constitution of India, the subject of 'correctional system' comes under List II or State List at Entry 4.

[146]Government of India. *Outcome Budget 2009-2010.*(n 136) p. 116. para 4.82.

[147]ibid. para 4.84.

[148]Bierie, David M. (n 7) p. 83.

[149]Interview with Inspector General (Prison). (n 141)

[150]ibid

cadre for correctional administration which would be referred as "Indian Prisons and Correctional Services."[151]

The other methods which have been suggested by the members of the correctional staff, to amend the issues of continuing stress and pressure among them, also involves the idea of efficient training, involving counselling sessions and presenting recreational facilities. Among these suggestion, it is common to find that all of these refer to an instant but effective approach in dealing with the depressing problems of the correctional administration, which would otherwise take a gradual period of time for reformation.

Tailoring the standards of training to deal with the exigent and real problems circulating their working conditions, would be an efficacious manner to have the staff-members adapted the existing scenario. Thus, regular training of correctional staff would be beneficial in their well-being itself. With the rising complexities present in our realities, taking care of one's mental health is imperative, especially for the correctional staff due to the nature of their work. A similar view was also opined by the Inspector General (Prison) and he had also focussed on the benefits of Yoga in the preservation of one's mental well-being.[152]

"All work and no play makes Jack a dull boy." This proverb also stands true for the staff-members as they have made their frustration apparent due to the absence of any kind of recreational activity such as sports facilities. Few officials of the Tezpur Central Jail, the Goalpara District Jail and the Morigaon District Jail have also testified to this sort of frustration despite the Model Prison Manual 2016 making it clear that sports facilities should also be provided to the staff-members.[153] Finally, by acknowledging the contribution of the correctional staff towards the society, it would be very helpful in fostering their morale.[154] The Superintendent of the Tezpur Jail had stated that this could be achieved by being appreciative of correctional staffs' nature of works which could also be reflected by according awards to them.[155]

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[151]Government of India. *Model Prison Manual 2016.* (n 131) p. 281.; Rule 30.13.
[152]Interview with Inspector General (Prison). (n 141)
[153]Government of India. *Model Prison Manual 2016.* (n 131) p. 285.; Rule 30.49.
[154]The Nelson Mandela Rules. (n 99) Rule 74(2).
[155]Interview with Superintendent of Tezpur Central Jail (n 66)

Certain aggrieved staff-members have also contemplated to take recourse to the higher courts of the land for the enforcement of their rights and seeking to resolve the highlighted and other allied difficulties bothering the correctional administration. Nevertheless, the norm among these courts i.e. the Supreme Court and the High Courts, is to abstain themselves from intervening in policy matters which are exclusive to the sphere of the legislature or the executive.[156] In the case of *Supreme Court Employees' Welfare Association v. Union of India*[157], the Supreme Court maintained that it could not redress issues concerning pay scales of employees in furtherance of its jurisdiction under Article 32.[158]

Similarly, it has also declined to resolve disputes pertaining to pay scale of employees in the case of *Prabhat Kiran Maithani v. Union of India.*[159] The Apex Court continued maintaining that provision of allowance and the rate at which it is provided to a section of employees, is a matter of policy and could not be challenged.[160] Hence, in *Dr. Duryodhan Sahu v. Jitendra K. Mishra*[161], the highest constitutional court of the country made it a point to hold that it would not entertain public interest litigations (PIL) with regards to service matters. It had also passed the direction to the High Courts to dismiss such petitions on basis of the abovementioned decision[162]. However, bearing the principles of 'welfare state' in mind, the Supreme Court clarified that a party

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[156]Datar, Arvind P. Datar *Commentary on the Constitution of India.* 2nd ed. Vol. 1. Nagpur: Wadhwa, 2007. p. 546.

[157]AIR 1990 SC 334 (India).

[158]INDIA CONST. (1950), art. 32- "Remedies for enforcement of rights conferred by this Part

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed

(2) The Supreme Court shall have 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 this Part

(3) Without prejudice to the powers conferred on the Supreme Court by clause (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2)

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution."

[159]AIR 1977 SC 1553 (India).

[160]*Union of India v. Nanu Dev Arya*, AIR 2004 SC 2449 (India).

[161]AIR 1999 SC 114 (India).

[162]*Dattaraj Nathuji Thaware v. State of Maharashtra*, AIR 2005 SC 540 (India).

would be permitted to enforce the protection of Article 14[163] regarding issues of any discrimination, where the respondent comes under the ambit of a "State" as per Article 12[164] of the Constitution of India.[165]

In the current times, there have also been various findings, reports and committees which have provided ample documentation to depict the correctional staff's distressing state of affairs in correctional homes. Therefore, it is necessary to see that sufficient awareness of this issue exists among the authorities, civil society participants, academics and the public in whole. Such kind of awareness helps in creating an atmosphere which is necessary to trigger the public-spirited community in taking actions for prison reforms to ensure the betterment of the conditions in correctional homes which have the welfare of both the inmates and staff-members at stake.

Conclusion

The jurisprudence of correctional administration has evolved a lot with flow of time which has benefitted the society. Nevertheless, such a passage of time also brings along with a lot of intricacies in the system which require meticulous and patient efforts in dealing them. Thus, a consistent strategy should be adopted to bring reforms in the correctional administration, which would involve the revamp of the existing legal framework, proactive approach of the appropriate authorities and most importantly, the constructive position of the judiciary in correctional justice.

In light of these circumstances, the primordial steps that are to be taken, consist of assessing the sufficiency of staffing arrangement in correctional homes to ensure apt inmate-staff ratios. It is also necessary to address the low scales of pay and bad working conditions of the correctional

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[163]INDIA CONST. (1950), art. 14- "Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth"

[164]ibid, art. 12- "Definition- In this part, unless the context otherwise requires, the State includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India"

[165]*Som Prakash Rehi v. Union of India*, AIR 1981 SC 212 (India).

staff as talented individuals must be attracted to handle one of the most complex public services. Adequate training must be secured for the staff-members, prior to and regularly during course of service so that the correctional administration remains up-to-date with dynamic trends observed in the system.

The response of the judiciary has been prompt to redress such afflictions in the correctional administration, which has also been exemplified by the constitution of a three-member Supreme Court committee on prison reforms under the chairmanship of Justice Amitava Roy, a retired judge of the Supreme Court along with Inspector General of Police, BPR&D and Director General (Prisons) Tihar Jail, New Delhi as its members.[166] It has been envisaged for this committee to provide its recommendations on issues related to the implementation of the Model Prison Manual 2016 by States and Union Territories (UTs), training manuals for members of the correctional staff by BPR&D, overcrowding in correctional homes and other such matters, which are in consonance with the Terms of Reference of the committee.[167]

Therefore, the focus should be shifted to the existence of an efficiently managed correctional home which would be factored by ambient and humane environment.[168] In fact, lessons could be learnt even from the good practices of other uniformed services too. One such example, which also deals with the problem of institutional gender-inequality is that of the Director General of Uttar Pradesh Police, Mr O.P. Singh's decision to set up crèche facilities at police stations across the state and hence, recognizing the contribution of such facilities in improving the efficiency of the institution.[169]

Perhaps, this might also contribute in creating a notion of organizational justice and its connection with the work-attitude of the correctional staff, if such practices are adopted by the administration in actuality.[170] Therefore,

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[166]Order dated 25/09/2018 in *Re: Inhuman Conditions in 1382 Prisons,* AIR 2016 SC 993 Writ Petition(Civil) 406/2013 (Reportable)

[167]ibid

[168]Coyle, Andrew. *Managing prisons in a time of change* (n 40) p. 97.

[169]Chakraborty Rathikrit and Arindam Ghosh. "Cop mom takes baby to work, makes UP Police plan crèches." *The Times of India.* October 2018. Web. 1 November 2018. <https://timesofindia.indiatimes.com/city/lucknow/cop-mom-takes-baby-to-work-makes-up-police-plan-creches/articleshow/66407930.cms>

[170]Lambert, Eric G., Jianhong Liu, and Shanhe Jiang. (n 43) p. 2.

these circumstances further influences a rights based approach in their interaction with the inmates, which would guarantee the reformation and rehabilitation of the inmates.

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*MUKOLI KARAGAR**: A CASE STUDY OF MAHENDRA NAGAR OPEN JAIL, JORHAT

Pushpanjali Medhi

Introduction

The modern prison administration system in India has been a legacy left by the British. The idea of prison reforms came with the arrival of Lord Thomas Babington Macaulay in India, as a part of the Indian Law Commission. Through his note was submitted to the Legislative Council in India on December 21, 1835, Lord Macaulay drew the then British administration's attention towards the pathetic conditions of the prisoners habited in the Indian prisons.[1] Emphasising upon the inflicting of imprisonment as a form of punishment, Macaulay stressed on the importance of regulation of prison administration.[2] He was of the opinion that while a fear must be instilled into the minds of the offenders which would make them dread imprisonment, the treatment meted out to the imprisoned individuals must also not be inhumane in nature.[3] He described the prevalent conditions at the Alipore Jail in Calcutta as, "*Hundreds of the worst and most desperate criminals are collected in one great body and no visitor could enter the gates without danger*" and that the prisons were in a state that was "*shocking*

* 'Open Jail' in Assamese.

[1]"Historical Evolution of Humanisation of Prisons". *Shodhganga*, http://shodhganga.inflibnet.ac.in/bitstream/10603/95339/8/08_chapter%203.pdf, accessed on 28/08/2018.

[2]ibid

[3]ibid

to humanity" stand proof to the conditions of the prisons during that time.[4]

After independence, prison reforms in India has witnessed a major paradigm shift where the values of 'reformation and rehabilitation' of offenders were given importance. However, even now the jail administration system in India is often viewed as an oppressive and archaic institution which emphasises on the incarceration of convicts rather than their reformation. The concept of open jails in this regard has been a revelation. This system could be elementary in reducing overcrowding in jails and a way of rewarding good conduct of convicts. The concept also is beneficial in rehabilitating these convicts so that they find a way of becoming self-reliant and also provide labour for public works.

In the decision of the Supreme Court in *Maru Ram v. Union of India*[5], the judgement authored by V.K Krishna Iyer, J. emphasised that the expression 'prison' and 'imprisonment' must be given a wider connotation and include any place notified for detention persons.[6] It cited the instance of open jails to illustrate the fact that 'stone walls and iron walls' are not a sine qua to constitute jails. If conditions of imprisonment in the sense of restraint on personal liberty and freedom exist, then it could indeed be a prison.

The concept of open jail has seen major developments in Rajasthan and Maharashtra which have 29 and 13 fully functioning open penal institutions respectively. However, the idea has not been fully utilised in the rest of the country. Assam has only one such open institution situated in Jorhat, which serves as the only one in the entire region of Northeast India.

Rajasthan Prison Rules define open jail system as *'prisons without walls, bars and locks'*.[7] The functioning of open institutions entirely moves away from the environment of a closed prison. The virtual absence of bars provides another perspective into the purpose of reformation and stands in contrast to the normally perceived idea of 'jails'.

Through this paper, the feasibility and effectiveness of the open jail

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[4]Ahmed, Zubair. "*Jail Reforms in India: A study of Indian Jail Reform Committees*".(International Journal of Multidisciplinary Education and Research, Vol. 1, Issue 2, 2016,) p1 www.educationjournal.in/download /22/1-3-35.1.pdf .

[5]AIR 1980 SC 2147.

[6]ibid para 71.

[7]Awasthi, Sonakshi. "What is an open prison?", *The Indian Express*", https://indianexpress.com/article/what-is/what-is-an-open-prison-4980425/.

system has been studied as opposed to the conventional jails, keeping in mind the perspective of jails being institutions of rehabilitation and reformation of offenders rather than being a punitive measure for their incarceration. The author has taken up the Mahendra Nagar Open Jail, Jorhat as a case study to evaluate the process of administration of this kind of institution and the inherent challenges that are faced which is preventing the concept from being more widely and effectively utilised.

I. Overview of the Mahendra Nagar Open Jail, Jorhat

A. The Jail Proper

The Mahendra Nagar Open Jail is situated in the Borbheta locality of Jorhat. Established in 1964, the open jail serves as the only one in the state of Assam. Located about 306 kilometres from the Guwahati, the open jail premise is situated right next to the Central Jail, Jorhat. The *Swahid Kushal Konwar aaru Kamala Miri Turon* serves as the entrance to the pathway which leads to the premises of the jail proper. Unlike its neighbouring Central Jail, no imposing walls can be found to make a visitor wary, or serve as a standout feature. If one misses the blue and red sign, tell tale colours of Assam Police, there is no other indication that would point towards the existence of a 'jail' at the end of that pathway.

Fig.1: The *Swahid Kushal Konwar aaru Kamala Miri Turon* serves as the entrance.

The *Mukoli Karagor* at Jorhat currently houses only twenty-two inmates, even though it has the capacity of a hundred. The inmates are mostly from the upper Brahmaputra valley district of Assam, with Sivasagar topping the list.

The First United Nations Congress on the Prevention of Crime and Treatment of Offenders, 1955 recommended that the selection of prisoners for such open correctional homes should in accordance with the specific country's prison system.[8] The prisoners may be sent to such institutions either right at the beginning of their sentence or after they have served a part of their sentence in a convention closed prison.

Only convicted prisoners are allowed to apply for stay at the Open jail, Jorhat. Rule 5 of the Assam Management of Jails (Supplementary Provisions) Rules, 1968 lays down the criteria for the eligibility of prisoners for admission to 'colonies' which includes the following:

a. Those convicted non-habitual prisoner, who are serving the term of imprisonment of five years or more, who have served a minimum of 1/3rd of their sentence including the period of remission,[9] and have at least a year or more of the sentence to be served. Discretion is given to the Inspector General of Prisons, in exceptional cases, to consider prisoners who are non-habitual offenders and serving a sentence of three years.

b. The prisoner must not be more than 60 years of age or younger than 21 years of age as on the date which he is admitted to the open jail.

c. The prisoner must be of good health and capable of doing hard work. He must not be suffering from any long term illnesses.

d. The applicant during his time in the conventional prison has to mandatorily display good conduct.

e. The prisoner must be willing to work within the jail premises.

Rule 5 also allows for an exclusion criteria where Prisoners who have

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[8]Recommendation III, United Nations, Resolution and Recommendations adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders (August 29, 1955).

[9]Remission periods are awarded to prisoners in Assam based on the provisions of the Assam Jail Manual and are categorised into Ordinary and Special remission: the former related to good work and conduct within the jail premises and the latter awarded for completion of any special task assorted to the prisoner in the prison.

been convicted under Sections 109 and 110 of the Code of Criminal Procedure[10] and prisoners, who have been convicted of dacoity, poisoning, escape, counterfeiting coins and stamps, and unnatural offences.[11] The provision further curtails the admission of female convicts and the convicts who are serving sentences of simple imprisonment.[12]

Rule 5 (3) provides a few criteria according to which preference can be allowed to certain applicants-prisoners who are permanent residents of Assam, have a background in agricultural work, who have family ties and most importantly, prisoners who during their imprisonment in a conventional prison, have shown a sense of trust, responsibility and self-discipline.[13]

According to the Manual, the Inspector-General of Prison, every year either in the month of January or any other time as (s)he deems fit, may call for the descriptive rolls of the prisoners, from the respective Superintendents of the jails in Assam, who may be eligible for admission to the open jail. The discretion here lies in the hands of the Superintendents on the delivery of the descriptive rolls of the 'eligible' prisoners', and they monitor the conduct of the prisoners in their respective jails. Although, discretion lies within the Superintendents, the rolls can only be sent after *express consent* has been taken of the prisoner concerned. If the prisoner does not wish to be transferred, then the Superintendent will have no authority to recommend his name.

After the recommendations are made, the Inspector-General of Prisons selects and then orders the transfer of the selected prisoners from their closed prisons to the open jail premises where they are kept in the 'Reception Ward' which is segregated from the other inmate wards of the jail.[14] During the time they are in the reception ward, under the orders of the Inspector-General, the prisoners are subject to thorough screening after which they are eligible for transfer to the colony and their names are entered in the

[10]Section 109 of the Code of Criminal Procedure, allows the arrest of certain persons under the orders of an Executive Magistrate if the person has been suspected of the intention to commit a cognizable offence. Section 110, of the Code allows an Executive Magistrate to order the arrest of a person to ensure good behaviour if the person has been suspected of being a habitual offender.

[11]Rule 5(2) (i) Assam Management of Jails (Supplementary Provisions) Rules, 1968.

[12]Rule 5(2) (ii) Assam Management of Jails (Supplementary Provisions) Rules, 1968.

[13]Rule 5 (3) (i), (ii), (iii) and (iv) Assam Management of Jails (Supplementary Provisions) Rules, 1968.

[14]Rule 6 Assam Management of Jails (Supplementary Provisions) Rules, 1968.

separate admission registers, which is mandatorily maintained by the open jail authorities.[15]

B. Image of a village community

Within the open jail premises, the first structure that stands is the administrative block where the offices of the Superintendent, the Jailor, the assistant Jailors and other administrative staff is situated. A beautiful pathway, surrounded by flower shrubs on its sides, leads to the structure that serves as the administrative building of the jail. There is no *sipahi* at the entrance to pass nervous yet apprehensive looks at the visitors. Gone are the imposing gates with huge locks which keep the world inside a jail locked away from all the external elements.

The administrative building was built way back in 1964,[16] is almost falling apart-and does look like any other India Government office-with dusty files piling one atop another, holding data in ruled lines saving them for an unknown posterity.

The garden in front of the office building, is dotted with flower shrubs too, the grass drizzled with the signs of an early morning shower giving the perfect picture of any rural household.

The inmates are allowed to rear their own poultry and farming. This is the predominant occupation that is available to the prisoners. However, with only twenty-two prisoners, it becomes difficult for the prisoners to yield as much produce as they can, given that the jail owns close to 60 bighas of cultivable land. Furthermore, the jail does not have adequate supplies for agriculture, even if the colony was envisaged to be a primarily agricultural based community. A tractor that was provided to the jail by the government only ran for 4 days, as claimed by the jail authorities and that too the fuel was paid for by authorities and not the state.

Currently, the prisoners can only plant paddy, in the low lying parts of the land, but the cultivable land can also be used for tea plantation and sugarcane plantation. Earlier the inmates did have some sugarcane

[15]ibid

[16]Interview with Mahendra Nagar Open Jail, Jorhat prison staff (Jorhat, Assam, India, 26 August 2018).

cultivation but that has been discontinued due to inadequate supply of required facilities like seeds and tools owing to which most the land now lies uncultivated.

Fig. 2: Cultivated paddy fields in the Open air jail, Jorhat

Fig. 3: Uncultivated higher land beyond the paddy fields

Akin to any typical Assamese locality, beyond the paddy fields was built a *naamghar* which hid behind the shade of a tall, old banyan tree, which came with its own series of myths. The *naamghar*, as the prison authorities informed was built with the money that was raised by local community living near the jails and was refurbished with tiled floors with the contribution of the inmates themselves. A temple was also built within the campus right next to the *naamghar*. The job of caretaking for both the institutions has

been allotted to the inmates as well as to the one who takes the community ownership of the space.

Fig. 4: *Naamghar* situated within the Open air jail campus, Jorhat

C. Life in an Open Jail

"*Mukto botah, akash dekhisu... Raatir akashot tora dekhisu*"[18] -claimed one of the inmates at Open Jail, Jorhat. Most of these inmates who have spent about an average of a decade in conventional jails until their names were nominated to be shifted to the open jail at Jorhat have experienced the conditions of both the types of institutions. Their attitudes make the relaxed environment of the jail almost palpable. Not being locked up after the evening bell and allowed to walk freely within the campus has made a huge impact on the inmates' mental health and here they work freely, without any fear. Their stay at the colony has led to their change of heart, claimed another inmate.

Kenyon J. Scudder, who was first appointed as the Superintendent for Open Institution for Men in Chino, California and served from 1940 to

[18] "*I can breathe freely; I can see the sky, watch the stars at night.*" In Assamese, as expressed in interview by one of the inmates of the Mahendra Nagar Open Jail, Jorhat (Jorhat, Assam, India, 26 August 2018).

1955[19], believed that there is no other way to bring regeneration in prisoners except in freedom-that rehabilitation is possible only through change within the individual and not through coercive methods.[20] Scudder, one of the strongest proponents of open institutions, justified them as: "*The open fields, the absence of gun guards, no regimentation, men allowed to go to meals and to work unescorted, challenge each individual to begin again to stand on his own feet. Here he is constantly faced with the ease of escape. The fact that he rejects this possibility...indicates he has taken a great moral step, a great social step. By accepting this responsibility he has admitted to himself that he wishes to be social rather than asocial individual.*"[21] His analysis finds its significance, if one were to study the quality of life of inmates in an open jail, as opposed to the ones living in a conventional jail.

Furthermore, the inmates are allowed to live with their families on the open air jail campus in the Guest houses built near the office. This limited accommodation is provided at the expense of the state, where the family members [22] are allowed to stay up to 3 days entirely upon the discretion of the Superintendent.[23] Even though, lodging is provided by the state, the family members have to provide for the food at their own expense. With the prior approval of the Superintendent, the inmate is also allowed to live in the guest house with their family members; but they are not exempted from the work that they have been allotted in the campus.

The rate of escapes from open prisons is much lower than conventional prisons. This can be accredited to the fact that these prisoners who are recommended for transfer to the open jails are selected with extreme care

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[19]Devlin, John C. "Kenyon J, Scudder; Was Prison Official and Crime Expert", (*The New York Times*, Sept. 29 1977), https://www.nytimes.com/1977/09/29/archives/kenyon-jscudder-was-prison-official-and-crime-expert.html.

[20]Scudder, Kenyon J. "*Prisoners are People.*"(Doubleday, 1952), p. 28 as read in Paranjape, N.V. "Criminology & Penology with Victimology."(Central Law Publications 2014), p. 520.

[21]Kenyon J. Scudder quoted in Jones, H. and P. Cornes, "*Open Prisons.*" Routledge and Klegan Paul, London, 1977 as read in Baxi, Upendra. "*The Crisis of the India Legal System.*" (Vikas Publishing House, 1982,) p. 200.

[22]Including father, mother, father-in-law, mother-in-law, wife, uncle, wife, aunt, brothers, sisters, sons, daughters, sons-in-law, daughter-in-law, grandchildren, nephew and niece according to Rule 3, the Assam Superintendence and Management of Jails (Supplementary Provisions) Rule, 1968.

[23]Rule 4, the Assam Superintendence and Management of Jails (Supplementary Provisions) Rule, 1968.

and a thorough study of their background.[24] Furthermore, most of these prisoners come from challenging financial backgrounds and therefore, they prefer to stay at the open prison as it provides them with a viable chance at employment. Other aspects that also have an effect on the low rate of escapes are nature of the custodial authorities, nature of employment that is provided to the inmates, the nature of the security arrangements, etc. However these regimes vary from state to state.[25]

Disciplinary issues are not as severe as in closed ones and this can be credited partially to the practice of not using 'criminogenic punishments' for the violations of the standards laid down in the rules of the jail manual.[26] Such violations are usually dealt with by minor punishments such as warnings, denial of remissions or leaves, fines, withdrawal of privileges if any.[27] The only major punishment usually awarded to an inmate for such violations is return to the closed prison.[28]

In the environment of an open prison, a healthy relationship is maintained between the administrative staff members and the inmates; with non-existence of hostility between the two parties. The prison officers too show a certain amount of trust in the inmates, and this phenomenon is apparent in the rapport that the staffs maintain with their inmates in the Open Jail, Jorhat. Jeremy Bentham's idea of the "Panopticon"[29] with its oppressive structures of the watch-tower does not find its relevance in the functioning of an open prison. As opposed to dark, dingy cells meant to be under constant supervision, the Open

[24]Baxi, Upendra. (n 21) p. 200.

[25]ibid

[26]ibid, p. 201.

[27]ibid

[28]ibid

[29]The idea of a "Panopticon" was introduced by Jeremy Bentham as a highly efficient system of imprisonment which mandates a watch tower as the centre of the prison structure surrounding which would be separate cells for the prisoners. This setting was meant to bring in a 'disciplinary society' which Foucault in his book Discipline and Punish describes as "Panopticism"-method of installing power to control bodies in space; and a desired result of that would instill fear into the minds of the prisoners, "*a state of consciousness and permanent visibility that assures the automatic functioning of power*", even if the actual system of surveillance and exercise of power is discontinuous. Jeremy Bentham, Plan of the Panopticon, The *Works of Jeremy Bentham*, (ed. Bowring Vol. IV, 1843,) pp. 171-3 as read in Foucault, Michel. "*Discipline and Punish: the Birth of the Prison.*" (Vintage House, 2nd ed. 1995,) pp. 195-201.

Jail at Jorhat has wide open fields, front yards and an exceptional presence of camaraderie between the prison officials and the inmates. Therefore in such jails no criminogenic informer system is found that the jail authorities usually install (in closed prisons) by recruiting the convicts as 'moles' amongst the inmates.

D. Service Conditions of the Staff

The virtual absence of great imposing walls as they exist in closed prisons caters to the idea of preservation of discipline within the ecosystem of an open jail. The jail authorities also do not have to face severe disciplinary issues in an open jail as compared to conventional prisons. This aspect of an open institution has been credited to the absence of an environment which could give rise to criminogenic behaviour amongst the inmates.[30]

Although, the basic forms of authority to maintain control and regimen may entail the common types of punishment that are used against the inmates, unlike a closed prison, there is no concept of a 'history ticket' in an open jail. Although, in the Jorhat open jail, a 'descriptive roll' is collected on each inmate which chronicles the inmate's name, age, address, sentence and a other vital information such as the remission earned.

Fig. 5: A Sample of the 'descriptive roll' of an inmate collected from the authorities of the open jail.

[30]Bani, Upendra. (n 21) p. 201.

The authorities at Open Jail find their life here significantly easier and more fulfilling than any other jails they have worked before. "*We don't have to keep watching our backs all the time here. Working in an Open Jail has done well for my own mental health-which only inspires me to work harder for the reformation of our inmates here*", claimed one of the jail authorities.[31] According to them the walls of a closed prison impose upon the inmates which also increase their tendency to indulge in delinquent behaviour. The calmer environment of an open jail, contrasting with the tensed atmosphere of a conventional prison, also impacts the relationship that the authorities maintain with the prisoners-and this becomes apparent from the cooperative functioning of the jail with the prisoners staking their ownership of the space.

E. Specific Issues

Understaffing

Not unlike most jails in the state, the open air jail at Jorhat is also understaffed as against the sanctioned staff positions. The jail also does not have a resident medical and health officer and the post is filled by the Medical Officer from the neighbouring Central Jail, Jorhat who works at the open jail on deputation-which could turn into a major issue in the event of a medical emergency.

Posts like that of peon and store keeper are essential for the smooth running of the office, but they have remained vacant at the open jail for some time now. The post of the Bamboo and Cane instructor also lies vacant as the earlier flourishing bamboo and cane industry in the prison has been stalled due to the lack of supply of raw materials to be provided by the state.

Under filled Capacity

The open air jail has a registered capacity of a hundred, yet only twenty-two inmates are lodged as on August 26, 2018. Most of these inmates are

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[31]Interview with Mahendra Nagar Open Jail, Jorhat prison staff (Jorhat, Assam, India, 26 August 2018).

residents from the districts of the upper Brahmaputra valley of Assam as portrayed in the table below:

Name of the District	Number of Inmates	Distance from Jorhat
Sivasagar	6	58.2 kms
Jorhat	4	--
Tinsukia	3	180.2 kms
Golaghat	3	39.9 kms
Lakhimpur	3	74.5 kms
Sonitpur	1	165.7 kms
Mangaldoi	1	257.3 kms
Bongaigaon	1	484.8 kms

Table: Distance from Open jail, Jorhat to the resident districts of the inmates

This phenomenon can be attributed to the fact that since the jail is situated in Jorhat, most prisoners do not opt for staying at the open jail as that would mean living far away from their home districts; away from their families. Even for those inmates who are currently living at the Jorhat open jail, travelling for their families become expensive which only a few can afford. Therefore, even though the option of staying with their families is available to them, they can only afford it one time in a year or even once in two years. In the past years there have been several instances where a prisoner lodged in a closed prison has opted to remain there despite being nominated to be shifted to the Open jail since the latter would mean living out their residential district and hence, far away from their families.

Because of the under filled capacity, the jail has also not been able to function to its maximum capability with regards to activities the inmates are supposed to participate in during their stay in the open prison. With respect to agriculture, the only occupation available to the inmates currently, the low man power leads to the inmates who are currently lodged, working rigorously under hard conditions and still not being able to yield enough produce.

Lack of activities for the inmates

Living at the open jail has resulted to be a boon to many inmates but has become as inconvenience for those prisoners who were pursuing vocational training at their respective conventional closed jails, and had to leave without completing the course because of their transfer to the Open jail. Rule 7 of the governing Assam Superintendence and Management of Jails (Supplementary Provisions) Rule, 1968 provides for availability of recreational and cultural activities of the inmates, but provision for these is available at open air jail at Jorhat.[32] The inmates at Open Jail, Jorhat barely have any complaints other than the lack of activities for them. Most of them shared the concern that while they are lodged here they are not learning or being trained in anything that will help them rebuild their lives after they have served their sentences.

A contrast in this matter can be drawn with the inmates of the open jails in Rajasthan which serve as a good example for all the open jails in the country. The prisoners are not only employed outside the jail premises but also have access to various other activities and vocational training.

Even in Andhra Pradesh, prisoners from the closed prisons, who have shown "good behaviour", are employed outside the jail in the nearby petrol pumps, allowing them the opportunity to earn better wages as compared to their daily allowance for the work within the jail premises.[33]

II. Prisons are for Reformation and Rehabilitation

A layman's idea of a 'prison' would portray the image of a conventional closed prison. However, prisons are not just institutions meant to keep 'hardened' and deviant characters locked up- whose presence in the society makes the individuals comprising that society vulnerable to the acts committed by such 'criminals'. This perspective has evolved through the years as changes in the attitude towards jail administration have come in.

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[32]Rule 7, Assam Superintendence and Management of Jails (Supplementary Provisions) Rule, 1968.

[33]PTI, "Even in Andhra Pradesh, prisoners of the closed prisons are employed outside the jail in the nearby petrol pumps, which also allows a higher rate of income", *The Times of India*, February 11, 2018, https://timesofindia.indiatimes.com/india/telangana-prisons-department-eyes-to-run-total-100-petrol-pumps-by-year-end/articleshow/62873080.cms.

Prisons not only keep the deviants away, but also to reform them through blanketing the conditions which had initially motivated them into deviance in the first place.[34] Therefore, now after-care service has been regarded as an integral part of penal programmes, where guidance and counselling is provided to prisoners after their terms of imprisonment is over; often termed as "released person's convalescence".[35]

The concept of *parole* had traditionally served as a method for rehabilitation of offenders through maintaining their connection with the world outside the prison walls. This system has been essentially expanded through the idea of open peno-correctional institutions, a device that is the product of the 21st century, which has worked in the convalescence and rehabilitation of offenders by bridging the gap between their years behind bars in a conventional prison system and their life outside as a free man.[36]

A. Role of Open Prisons

It is now a well established notion amongst the modern Anglo-American penologists that persons who have been declared offenders have a better chance at reformation through 'humane treatment and constructive rehabilitative process' as opposed to mindless punishment.[37] The world of criminology and penology has moved on from the deterrent and retributive theories of punishment which harbour on the notions of revenge and incapacitation of the criminal to a more liberal outlook where reformation of the criminal is given importance-that the crime should be banished and not the criminal.[38] A reformist would look at sanctions as means of rehabilitation and bring the changes within the criminal, basing on the premise that it is the circumstances which turn individuals into criminals.

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[34]Puppala, Anusha. "Run entirely by prisoners, this Hyderabad petrol bunk is all about second chances", *The News Minute*, July 11, 2016, https://www.thenewsminute.com/article/run-entirely-prisoners-hyderabad-petrol-bunk-all-about-second-chances-46328.

[35]Paranjape, N.V. "*Criminology & Penology with Victimology.*" (Central Law Publications, 2014), p. 517.

[36]ibid

[37]Bates, Sanfor . "*Anglo-American Progress in Penitentiary Affairs.*" Studies in Penology, 1964 as read in ibid.

[38]Mishra, Shikha. "Theories of Punishment- A Philosophical Aspect." *Imperial Journal of Interdisciplinary Research (IJIR)*, Vol. 2 Issue 8, 2016, pp. 74-76.

The reformative theory was brought in as the opposition to the deterrent approach which omitted the idea of welfare of the criminal. The Supreme Court in the case of *Narotam Singh v. State of Punjab*[39] had laid down that a reformative approach towards punishment must be taken up by courts, which must be the object of criminal law, putting emphasis on rehabilitation without offending 'community conscience' and serve the larger need of social justice.

Under the Universal Declaration of Human Rights, it is mandated that- "*No one shall be subjected to torture or to cruel, inhuman or degrading treatment of punishment.*"[40] This provision is also applicable on the prisoners to prevent them from being subjected to inhuman treatment. Furthermore, Article 8 of the International Covenant on Civil and Political Rights (ICCPR) also provides that forced and compulsory labour may not be included as method of punishment as part of imprisonment.[41] Article 10 of the ICCPR lays down that, "*The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.*"[42]

The idea of Open Prisons was also discussed in the United Nations Standard Minimum Rules for the Treatment[43], better known as the Nelson Mandela Rules, which India is a signatory to also prescribes the concept of Open Prisons in its Rule 89 which states that-

"*The Open prisons, by the very fact that they provide no physical security against escape but rely on the self-discipline of the inmates, provide the conditions most favourable to the rehabilitation of carefully selected prisoners.*"[44]

The restorative theory of justice too emphasises on the idea of reformation by including the aspect of community involvement.[45] This school of thought believes that community involvement plays a major role in terms of both reparation and rehabilitation of the offenders.[46] The

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[39](1974) 4 SCC 505

[40]Article 5, Universal Declaration of Human Rights.

[41]Article 8 of the International Covenant on Civil and Political Rights (ICCPR), UNGA Res. 2200A (XXI) of 16 December 1966.

[42]Article 10, ibid.

[43]Adopted by the United Nations General Assembly in its 70th session, on December 17, 2015.

[44]Rule 89, United Nations Standard Minimum Rules for the Treatment, 2015.

[45]Newburn, Tim "*Criminology.*"(Routledge, 2007,) p. 749.

[46]ibid

practical implementation of these theories implicate that for a crime to be prevented and for a criminal to be reformed, removing the individual from the midst of the society, banishing them behind bars will not serve the purpose.

In this regard the open prison system serves as an integral element in the scheme of reformation of prisoners, which has over the years been recognised as one of the most important aspects and goals of the prison system.[47] The specific characteristics such as, release on parole, integration into the society, participation in the wage system through agriculture and vocational training, etc. that are present in an open institution provide the fundamental elements required for rehabilitation and convalescence of prisoners.

B. Historical Development of the Idea

The first dialogue on the concept of 'open peno-correctional institution' was first started at the Twelfth Penal and Penitentiary Congress held in 1950 at The Hague. The discussion revolved around the idea of whether traditional prisons could be replaced with the idea of open prisons, and for the first time the broad contexts around the idea was deliberated upon.[48]

The United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Geneva in 1955 (hereinafter the First UN Congress) deliberated upon the formal and operational structure of the open penal and correctional institutions.[49] They were convinced that if the traditional "tensions" and "barriers" were removed from the arrear of penal correctional homes, then the open institutions with their minimum security structure and a treatment which revolved around self-discipline of the inmates would any day be a better alternative to traditional prisons with its imposing walls and limiting iron bars. It was their contention that if the inmates was removed from closed jails and were given an open community with a sense of ownership, the true fundamentals of penalising offenders and keeping

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[47]Paranjape, N.V. (n 34) p. 517.

[48]Vibhute, Khushal I. "*Open Peno-Correctional Institutions in India: A Review of Fifty-Five Years, Experiences and Expectations.*" (Max Planck Institute for Foreign and International Criminal Law, 2006), p. 5.

[49]ibid

them under restraints-which are ideally reformation and rehabilitation of such offenders-would have a better potential at being achieved.[50] The Congress also came up with certain principles and recommendations for the administration of such open peno-correctional homes, which are still considered relevant in this area and finds its reflections in the guidelines formulated by several states for the running of the open prisons.[51]

According to the First UN Congress an open jail was termed as an open institution which could be defined as, "*An open institution is characterized by the absence of material and physical precautions against escape (such as walls, locks, bars, armed or other special security guards), and by a system based on self-discipline and the inmate's sense of responsibility towards the group in which he lives.*"[52]

In the decades following the Congress, the idea of open jails has travelled into the Anglo-American, European, and Asian countries that have set up minimum security open peno-correctional homes based upon the recommendations placed by the UN Congress. The change in the narrative has not stalled here, what had altered was the mindset; the aspect of accepting open prisons as an alternative to conventional prisons and a effective measure to rehabilitate offenders.[53]

Thus, the fundamental difference between an open jail and a closed jail could be analysed in the way of their administration and philosophy. As enunciated by Sir Alexander Paterson, the Member Secretary of the Prison Commission of the UK from 1922 to 1927, a better justification for open jails cannot be provided than this-"*You cannot train a man for freedom in captivity*".[54] A conventional jail or a prison revolves around the idea of 'lock psychosis' and 'suspicious attitude' which is often integrated through the practices of constant headcount, inspection, etc.[55]

Charles E. Heilmann describes an open institution as, "*...a penal institution which is characterized by the absence of those security devices usually*

[50]ibid
[51]ibid
[52]ibid
[53]ibid, p. 6
[54]ibid, p. 5
[55]ibid

associated with a prison-walls, fences, guard towers, barred or otherwise secured windows, heavy locks and bolts, and even security personnel-all to be found in the conventional prison and all in use there to prevent escape."[56] Heilmann, addressed the *unusual* behaviour that the open prison staff have towards the inmates, an air of tolerance and lenience, which is 'typical' in an open institution-where in its 'calm and unruffled' environment prevails a relaxed habitat which also proves to be gratifying for the prison officials,[57] the phenomenon that also exists in the functioning of Open Jail, Jorhat. Therefore, a case can be made for the idea of open prisons as it, through the favourable circumstances, much unlike the closed prisons, provide the inmates which a much higher chance at rehabilitation and reformation.

Kenyon J. Scudder's appointment as the Superintendent for Open Institution for Men in Chino, California was a revolutionary step towards the development of the open prison ideal. The institution opened on July 10, 1941 with a mere thirty-four inmates and four prison officials, although the number of inmates slowly grew up to two thousand four hundred.[58] Furthermore, these inmates were employed in forestry camps which were administered by the institution and the numbers of escapees were also negligible, ranging from four to one percent.[59] The philosophy of the open correctional homes in the United States was paved by the Declaration of Principles of the American Correctional Association, in 1960 which upheld the notion that no system of penal correction should deprive any offender, after serving his sentence, a chance to rehabilitate and possibly return to the society.[60] The declaration also laid down that it would be a 'gross violation' of the idea of open prisons, if the employable inmates are not given the opportunity to engage in productive work, and also in the bid to ensure restoration, such inmates must also be provided with the opportunity for education and improving their vocational skills which would be of use to them once they have gone back to being members of the society outside the

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[56]Heilmann, Charles E. "Open Prisons, British Style" (*The Prison Journal*, Vol. 58, No. 2, 1978,) p.4.

[57]ibid

[58]Paranjape, N.V. (n 34) p. 520.

[59]ibid

[60]ibid at p. 520

prison.[61] The use of such institutions, as advanced by the declaration is to develop the 'spirit of energetic, resourceful and organised citizen participation' within the prisoners.[62]

In England, the discussion around the concept of open institutions started around 1914, ideally to be situated in the distant and remote parts of the country.[63] The concept revolved around the idea of rehabilitating young offenders-investing their time in strenuous agricultural activities so as to teach them the virtues of hard work, integrity, honesty etc.[64] Although the idea was hidden under the layers of incidents brought in by the first World War.

With the end of the war, the call for open institutions was again put forward by a pamphleteer and the experiment started with younger boys housed at Rochester Borstal, in 1923 where the inmates were in the evenings allowed to attend classes at a local technical college and also work under supervision beyond the walls.[65]

With this the idea eventually grew and saw the first open institution starting in the United Kingdom in the form of a borstal in the county of Nottinghamsphire, Lowdham Range which opened in 1930.[66] The young boys moved into this open institution, accompanied W.W. Llewin, their Governor, from a closed institution, about 100 miles away in Middlesex, in a walk that was dubbed "the happy hike" and this historic event was chronicled in a volume named "Boys in Brown".[67]

Similar ventures were started in Wakefield Prison, Yorkshire where an open institution was built nine miles away from the closed prison and was rendered an autonomous institution, New Hall camp.[68] However this was not termed an 'open prison' and these were referred to as men "living in open conditions"; as it was a common perception that 'open' and 'prison' are

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[61]ibid
[62]ibid
[63]Heilmann, Charles E. (n 56) p. 4.
[64]ibid
[65]ibid
[66]ibid, p. 5.
[67]ibid
[68]ibid

contradictory terms.[69] It was only after a few years in 1946, that the first institution under the term of 'open prison' was started in Leyhill, Glocestershire following which several categories of open prisons were set up for both men and women inmates, also including those serving longer jail terms.[70]

The genesis of open prisons in India is often traced back to the 18th century, under the British administration, that prisoners were employed outside the jail premises for the purposes of construction of roads, railway lines, cleaning of drains, digging canals and similar occupations which required back-breaking hard work.[71] These prisoners had to work under extreme circumstances and were always under supervision of the prison authorities. This practice was condemned by the All Indian Jails Committee as 'inhuman prison labour' and this labour practice was discontinued till 1877 when it was brought into the prison administration system again ad discussed in the Prison Conference that was held that year.[72] Their recommendations, however, did not have any major impact as the jail administration system did not witness any major reforms until post independence. However, by now the policy of oppression and deterrence was to a certain extent replaced by the ideals of reformation and rehabilitation of prisoners through resocialisation which included corrective labour practices where they were employed in open conditions, aimed at effective reformation and re-initiation of the prisoners into the mainstream social fabric.[73]

The appointment of Dr. Walter Reckless, United Nations Expert on Correctional Work, to visit the jails in India and study the prison administration system from 1951-52 to recommend effective measures for the modernisation of the Indian Prisons system led to the formation of the All India Jails Manual Committee was appointed in 1957 by the Government of India to prepare a Model Prison Manual and also suggest prison reforms in India.[74] In their report while laying down the principles to govern prison administration in India, the Committee emphasised that a prison should be

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[69]ibid
[70]ibid
[71]Vibhuti, Khushal I. (n 48) p. 7.
[72]ibid
[73]ibid
[74]ibid

an institution, "... *for correctional treatment, where major emphasis shall be given on the reduction and reformation of the offender. The impact of institutional environment and treatment, shall aim at producing constructive changes in the offender, as would be having profound and lasting effects on his habits, attitudes, approaches and on his total value schemes of life.*"[75] It was in this committee's report, that for the first time, recommendations were made to set up open penal institutions or open jails, which would not have the defining characteristics of conventional prisons like physical confinement, and would be based upon the ideals of self-help and self-discipline for constructive rehabilitation and reformation of the inmates.[76]

Based upon the recommendations of the Committee and Dr.Reckless the then Central Bureau of Correctional Services constituted a Study Group on Open Prisons in India, which observed that the philosophy behind setting up of prisons had changed in India post-independence.[77] The policy of deterrence, revenge and inhumane treatment were slowly getting replaced by the idea of constructive rehabilitation and reformation of the prisoners through effective prison reforms surrounding the idea of employment of these prisoners; and the most successful form of employment, as recommended by the Group was when the inmates were employed outside the premises of the prison, '*which help in restoring their self-respect and giving them a sense of pride and achievement.*'[78]

The All India Committee on Jail Reforms (1980-83), set up by the Government of India, under the leadership of Justice Anand Narain Mulla, to assess the working of open prisons in India and provide constructive suggestions on the administration of these jails, also put in their recommendations echoing the tangent taken by the Study Group.[79] Their report emphasised on the paradigm shift that was witnessed in the attitude towards prison reforms from pre to post-independence: "*In the post*

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[75]Cited in, Government of India, Report of the All India Committee on Jail Reforms (1980-83), (Ministry of Home Affairs, New Delhi, 1984), vol. I, para. 2.14.1, at p. 12 as read in ibid.

[76]ibid, pp. 7, 8.

[77]ibid, p. 8.

[78]Central Bureau of Correctional Services, *Open Prisons in India*, pp. 4-5, as read in ibid.

[79]ibid, p. 9.

Independence period there was growing realization of the need for change of attitude towards the treatment of offenders and attention began to be given to the introduction of humanising influences in prisons. Many experimental schemes for the reformation and rehabilitation of prisoners were introduced. Of all such experiments, the employment of prison labour in open conditions under minimum security in the early fifties proved every (sic) successful from every point of view. Even though the practice of employing prisoners in open conditions is more than a century old, the objective of this practice has vastly changed over the years, especially in the post Independence era. Whereas, originally it aimed at extracting hard labour from the prisoners under conditions which were humiliating and dehumanising, now it aims at providing them with useful work under conditions which help in restoring their self-respect and giving them a sense of pride and achievement."[80]

The first open prison was set up in the state of Uttar Pradesh, right next to the Model Prison in Lucknow, in 1949.[81] Similarly in the year 1954, the Mauli Ali Agricultural Colony was set up for convicts in 1954.[82] And then, a year later an open prison was established at Yerwada, in Maharashtra, as a part of their prison reforms. With the success of these open jails, gaining the attention of prison administration all over the country, several open air correctional homes were established by different State Governments. 17 states in the country have reportedly set up open jails, in which Rajasthan leads with twenty-nine open camps followed by Maharashtra, which has thirteen such camps, which the Home Department has recently planned to increase by another six in Dhule, Latur, Ratnagiri, Sindhudurg, Wardha and Yeotmal districts.[83] Kerala and Tamil Nadu have 3 open air camps each while, Gujarat and West Bengal have 2 open air camps. They are followed by the states of- Andhra Pradesh, Assam, Bihar, Himachal Pradesh, Jharkhand, Karnataka, Madhya Pradesh, Odisha, Punjab, Telangana and Uttarakhand which have one open air jail each.

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[80]ibid

[81]Paranjape, N.V. (n 34) p. 527.

[82]ibid.

[83]PTI, "Maharashtra govt to start six new open jails", *Business Standard*, https://www.business-standard.com/article/pti-stories/maharashtra-govt-to-start-six-new-open-jails-118062801224_1.html accessed

Although these states may have open air jails/camps, they are not similar in the nature that they are administered as each has their specific jail manuals. While some of these institutions are given the nature of places for employment for prisoners, some other states treat them as a convalescence home for the pre-release treatment of prisoners-some experts are also of the opinion that these open air prisons mostly serve as a reformation and rehabilitation of convicts who have been rendered '*victims of circumstances*'[84] and deserve a second chance at leading a better life as a more integral part of the society.[85] In the Maharashtra and Tamil Nadu prison manuals, open prisons have been simply defined as, '*any place so used permanently (or temporarily) under any order of the State Government for the detention of prisoners [under clause (1) of section 3 of the Prisons Act, 1894]*'.[86] In West Bengal, on the other hand, open prisons have been given a slightly broader definition: '*a Prison not surrounded by walls or fencing of any kind*',[87] characterising the essence no imposing walled nature of open prisons, echoing the definition of Rajasthan Jail Manual, '*prisons without walls, bars and locks*'. In the Assam Prison Manual, open jails have been termed "colony" and defined as, "*an open air agricultural-cum-industrial reformatory Jail, which may be independent or an annexe to a Central or District Jail.*"[88]

The Nelson Mandela Rules[89], while defining Open Prisons in Rule 89, also provide that to prevent overcrowding, the number of inmates in closed, and conventional prisons should not be so large so that it may hinder the individualisation of treatment given to the prisoners,[90] thus empathising on the welfare of the prisoners. The rules also mandate that the open prisons too should house a minimal number of prisoners but also warning against the fact

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[84]Paul, K.C."*Administration of Jails in Assam(1874-1964)*". (Department of Political Science, Gauhati University, 1970.) p. 221

[85]Paranjape, N.V. (n 34) pp. 527-528

[86]S. 2 (b), Maharashtra Open Prison Rules, 1971; Government of Tamil Nadu, *The Tamil Nadu Prison Manual*, vol. II, chap. XXXVI: Open Air Prisons, vol. II, p. 149; as read in K.I. VIbhute p. 9

[87]Government of West Bengal, *West Bengal Jail Code*, chap. XXXIX: Open Prisons, sec. 635.

[88]Sec. 2(1) , The Assam Superintendence and Management of Jails (Supplementary Provisions) Rule, 1968 (Open Prison Rules)

[89]Adopted by the United Nations General Assembly in its 70th session, on December 17, 2015.

[90]The rules elucidate that the ideal total number of prisoners as maintained by some countries is 500.

that if the number of prisoners allotted are below the minimum bar, this may lead to no proper facilities being provided to such prisons.

C. Structural issues in implementation

As prisons, remain a subject on the State List under the 7th Schedule of the Constitution of India, their administration also depends upon the State Governments of each states. They are further governed by separate jail manuals and the practical aspects of the administration, basing upon these manuals and the attitude of each State Government obviously differs. The few (of many) definitions stated above clearly demonstrate this disparity.

The idea of open jails and its necessity has been dealt with by the Supreme Court as well in several cases. In the case of *Dharmbir v. State of Uttar Pradesh*[91], the Apex Court had ordered the State Government of Uttar Pradesh to accommodate two young offenders, in their early 20s, in one of the open prisons in the State, regardless of the technicalities of the law. The Court further opined, that in context of the well-known vices, '*which are unmentionable in a judgment; haunt the long careers of incarceration, especially when young persons are forced into cells in the company of callous convicts who live in sex-starved circumstances.*'[92] Emphasing on the rehabilitation and reform of such young offenders and ensure, '*decriminalization of the criminal and restoration of his dignity, self-esteem and good citizenship, so that when the man emerges from the forbidding gates he becomes a socially useful individual*'[93], the Court reiterated the benefits of utilising open jails in the case of young and impressionable offenders.

Furthermore, in the case of *Ramamurthy v. State of Karnataka*[94], with regards to the advantages of open jails, the Supreme Court opined that this system of prison administration was one of the most beneficial for the reformation of a prisoner, which must be considered as one of the prerequisites of the prison management. The Court iterated that even though the open-

[91](1979) 3 SCC 645.
[92]ibid, para 2.
[93]ibid
[94](1997) 2 SCC 642.

air prisons have their own set of problems which stem mostly from management of such prisons, such problems are not of the nature that they cannot be sorted out-"*For the greater good of the society, which consists in seeing that the inmate of a jail comes put, not as a hardened criminal but as a reformed person, no managerial problem is insurmountable. So, let more and more open-air prisons be opened. To start with, this may be done at all the District Headquarters of the country.*"[95]

The importance of open jails was discussed extensively during several proceedings in the matter of *Re Inhuman Conditions in 1382 Prisons*,[96] where the Supreme Court had directed the Government to ensure setting up of more open prisons and the implementation of the Model Prison Manual, 2016[97] for better administration of these open institutions. The Court has also directed the Ministry of Home Affairs, Government of India to constitute a Supreme Court Committee under the Chairmanship of former Judge of the Apex Court, Hon'ble Mr. Justice Amitava Roy who will review the implementation of the Guidelines contained in the 2016 Manual in all the States and Union Territories. The Committee has also been directed to look into the feasibility of setting up more and the potential of establishing Open Prison Camps in India and provide suggestions in this regard.

Although these recommendations and directions from the highest court in the country remain and the introduction of manuals for setting up and better management of open prisons show the interest of the government in the exploration of the concept of open prisons as an alternative to closed prisons, the idea has not been fully exploited in the country. Although, states like that of Rajasthan and Maharashtra have set exemplary records in this

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[95]ibid, para 50.

[96]In the Supreme Court of India, Writ Petition (Civil) No. 406 of 2013.

[97]The New Model Prison Manual, 2016 was approved by the Union Home Minister Rajnath Singh to bring in basic uniformity of laws relating to prison reforms and has been distributed in the States and Union Territories. The Manual deals with Open Institutions in Chapter XXIII. Press Information Bureau, Government of India, Ministry of Home Affairs, "Union Home Minister approves New Prison Manual 2016", http://pib.nic.in/newsite/PrintRelease.aspx?relid=134687 accessed 1/11/2018 Rao, G. Ranga and Vinod Kumar, Lok Sabha Secreatriat, "*Prison Reforms in India*", Reference Note, p. 8 http://parliamentlibraryindia.nic.in/writereaddata/Library/Reference%20Notes/Prison_reforms_in_India.pdf.

regard, other states still are a far cry from being ideals in the setting up and administration of open jails.

Smita Chakraburtty's study in the Open Jails in Rajasthan showed that closed prisons are 78% more expensive than open prisons.[98] For her comparative study she chose Central Jail, Jaipur (closed prison) and Sanganer Open Camp (open prison) as her case studies and the findings were based upon the aspects of: i. number of prisoners, ii. total salary of the prison staff, iii. total expenses incurred in running the prisons (based on the expenses on per prisoner). As per her findings, in an open jail only one Prison staff is required as against eighty prisoners against the ratio of one Prison Staff against six prisoners in a closed jail.[99] Furthermore, the cost of paying the salary for the Jaipur Central Jail (closed prison) staff members is sixty times more than the expenses of the salary for the staff members of Sanganer Open Prison.[100]

The Supreme Court had also ordered the Ministry of Home (MHA) to organise a meeting with the Director General and Inspector General of Prisons, from all the states and union territories in the country; the amicus curie appointed by the Court in the matter of *1382 Prisons*[101], Gaurav Agrawal and Smita Chakraburtty to discuss the feasibility of setting up open prisons in other parts of the country, in the first week of February.[102] This closed door meeting held between the MHA and these stakeholders from all over the country was held on February 13, 2018.[103] Although, Rajasthan stands as an exemplary position regarding open prisons, another often neglected aspect of open jails in Rajasthan was also discussed in this meeting by the Director General and Inspector General of Prisons, Rajasthan-that inmates in these open jails often after serving their sentences do not wish to move out because they are being provided housing and a stable occupation during

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[98]Chakraburtty, Smita. "*Open Prisons of Rajasthan*" Rajasthan State Legal Services Authority, November 2017, http://rlsa.gov.in/open_prisons_of_rajasthan_rslsa.html accessed 10/8/2018

[99]ibid p. 6.

[100]ibid p. 7.

[101]In the Supreme Court of India, Writ Petition (Civil) No. 406 of 2013 (n 96).

[102]ibid, order dated 12/12/2017.

[103]Dasgupta, Sucheta. "*Open Prisons: Unshackle these Fetters.*" India Legal, March 3 2018, http://www.indialegallive.com/constitutional-law-news/supreme-court-news/supreme-court-initiative-on-open-prisons-unshackle-these-fetters-44867.

their stay.[104] This goes on to show that even though the concept of open prisons has flourished in this state, but some fundamental issues remain. Even though these prisoners are rehabilitated during their stay in the open prisons, their refusal to move out also shows their apprehension towards the life after these camps and the uncertainty of it; and this detail has shown itself as a major administrative issue for the prison authorities thus indicating structural issues in the concept of open prisons.

Despite these issues, there are several suggestions that have been forwarded by Ms. Chakraburtty in her report which are worth taking into consideration, in the context of Assam as well:

◆ Construction of Open Prisons in every district: [105]

With regards to Rajasthan it has been suggested that two open prisons should be constructed in every district. This suggestion can be put into practice in Assam as well. Construction of open prison in every district would prove beneficial for the prisoners who do not wish to be transferred to the Open Jail, Jorhat because of the distance from their hometowns. However, no matter how beneficial this would be for such inmates, the aspect of whether the State can spare enough resources for such a plan to effectively provide rehabilitation and opportunities for employment to such prisoners must also be taken into account.

◆ Open Prisons should also be allowed to house Under-Trial Prisoners (UTPs): [106]

The criminal trials often continue for a prolonged period, sometimes years, which also means the UTP is incarcerated in the prison for such period. Since open prisons are an experiment on how 'minimal restraint' affects a prisoner, UTPs who the prison authorities through a screening can attest to be trustworthy, who have been incarcerated for a long period of time, can be

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[104]Interview with Inspector General of Prisons, Assam (Guwahati, Assam, India, 9 September 2018).

[105]Chakraburtty, Smita. (n 98) p. 28.

[106]ibid

[107]ibid

shifted to open prison camps. However, this suggestion has to be treated with caution as the chances of an UTP escaping could be much higher than a convict. Furthermore, if such screening procedure for an UTP is ever put into practice, the process developed must be certain. In this regard, Chakraburtty in her report has classified certain categories of UTPs which may be considered for open prisons:

- Women Prisoners so that they may be allowed to keep contact with their family members (Pregnant Woman Prisoners, Woman Prisoners with young children, Woman Prisoners with disability, Aged prisoner);[107]
- Aged and physically infirm/unwell prisoners so that their families can take care of them while staying in open jails;[108]
- Selection of prisoners basing on their nature of offence (Onetime offence, accidental offence, petty offence, low risk prisoner[109])[110];
- Accused persons lodged as prisoners who had surrendered themselves in the court or the police station;[111]
- Prisoners who are undergoing extradition requests.[112] In this matter, Chakraburtty highlights the exceptionally poor conditions of prisons in India as a result of which United Kingdom in the recent past had refused the extradition of accused persons in two cases.[113]

Other suggestions also proposed by Chakraburtty include access to legal aid, access to adequate medical facilities (which is lacking in Open Jail, Jorhat), better pay and choice of work and that prisoners should be lodged in their home districts.[114] These suggestions should also hold their value with regards to the situation in Assam.

The purpose of prisons can be put into dual aspects: eliminating deviants' characters from the society with the idea of protecting the society at large

[108]ibid

[109]An undertrial prisoner who hasn't shown any violent traits during his/her stay in the closed prison.

[110]Chakraburtty, Smita. (n 98) p. 28.

[111]ibid

[112]ibid

[113]Sonwalker, Prasoon . "Poor jail conditions, violence cited to avoid extradition from UK to India." *Hindustan Times*, May 6, 2018 https://www.hindustantimes.com/world-news/torture-most-cited-cause-by-accused-to-avoid-extradition-from-britain-to-india/story-13hAstEQTGJmiXpxdXd6XP.html.

[114]Chaktaburtty, Smita. (n 98) p. 29.

from such characters; and reformation and rehabilitation of such characters by removing them from the conditions that had pushed them into becoming offenders.[115] Some of these inmates despite what they may have committed before their life in prisons, must be given another chance at reforming themselves if they do fulfil the criteria of eligibility for open prisons which can be termed as a 'human alternative' to closed prisons.[116]

Conclusion:

Open jails offer the idea of reformation to prisoners. The prisoners who are chosen to be shifted to open jails is because they had shown exceptional behaviour as compared to the others in the closed prison they were lodged in-which also make them trustworthy by in the eyes of their prison officers. These prisoners also have the vision of one day separating themselves from the chain of events which led to their conviction and then jail term; they want to move one and have hopes and dreams of the time in their lives which they will lead once reunited with their families, out of the clutches of the *bars*.

It is pertinent to note here that the objective of open jails being to induce successful re-entry and acclimatisation to society, in that effect the idea of open jails has been successful. Therefore, there is an immediate need for opening up more open jails in Assam so that prisoners can stay closer to their home districts and do not have to choose closed prisons over open air institutions on the account of financial difficulty. Furthermore, the open jail in Jorhat is only open to male prisoners and this inequality ought to be removed so that female prisoners are also given the chance to live in open prisons. Children usually live with their mothers in the female wards of prisons; the free and healthy environment of an open jail could also be beneficial for the growth and development of these children.

With six jails in the state also being designated detention centres for Declared and Convicted Foreign Nationals, Assam is facing issues of overcrowding and inadequacy of resources in these jails. Therefore, an

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[115]Paranjape, N.V. (n 34) p. 517.

[116]Chakraburtty, Smita. "A human alternative." *The Telegraph*, Feb. 21 2018, https://www.telegraphindia.com/opinion/a-humane-alternative/cid/1463806.

alternate option that open jails introduce needs to be explored, keeping in mind the viability of being able to provide for such institutions in terms of resources, employment opportunities for the inmates and special training for the prison staff.

The modern prison administration has definitely moved on from just a legacy of the British. However, the jail system in India is often viewed as an oppressive and archaic institution which emphasises on the incarceration of convicts rather than their reformation. The concept of open jails in this regard has been a revelation. This system could be elementary in reducing overcrowding in jails and a way of rewarding good conduct of convicts. The concept also is beneficial in rehabilitating these convicts so that they find a way of becoming self-reliant and also provide for labour for public works. The idea has reportedly developed extensively in the rest of the country, as compared to Assam, now that Maharashtra is opening six more open jails in the near future. The Mahendra Nagar Open Jail in Jorhat too is struggling with its own issues of understaffing, under filled capacity, lack of investments etc. which does hinder this open institution from functioning effectively. Efforts need to be made to also make the open jails financially independent, thus reducing the costs on the state.

A disparate development of the idea of open jails has been seen in the country. Therefore, better regulation policy is required for the open jails, which could be applicable nationwide, with specific reservations allowed depending upon the needs and circumstances of each state.

FIELD NOTES

INDEFINITE INCARCERATION: DOCUMENTING STUDIO NILIMA'S INTERVENTIONS IN THE DETENTION CENTRES OF ASSAM

Studio Nilima

Pratidhwani: Free Legal Aid and Awareness Centre (A Unit of Studio Nilima) began operating in September, 2017 with a mandate to provide legal aid and awareness with a specific focus on the correctional homes of Assam. While it was known to the team that six correctional homes in the state were also designated detention centres for declared and convicted foreign nationals but we had never estimated the strains and stresses that this mechanism had created on the detainees and correctional administration. Over the months, as *Pratidhwani* began engaging with the detention centres like Central Jail, Tezpur and Central Jail, Jorhat; the magnitude of the problem soon became apparent. Most of the correctional homes were not equipped to deal with detainees who were neither convict nor under trial prisoners. Neither did they have the infrastructure to ensure full separation between the ordinary inmates and the detainees. Not surprisingly, there was no applicable legal framework for the treatment of the detainees as the Assam Jail Manual which governed correctional homes did not envisage such a situation. As a result, there was no clarity as to the manner in which the children of these detainees would be treated or whether the detainees could work for wages in the prison like other inmates who had been sentenced to rigorous imprisonment.

In view of this, it was felt necessary that some legal intervention in this matter was urgently required to address the marked regulatory and administrative silence in the area. *Pratidhwani*'s documentation was utilised to give shape to the application which became Studio Nilima's Interlocutory Application (I.A) in *Re-Inhuman Conditions in 1382 Prisons* (hereinafter referred to as 'Inhuman Conditions matter'), Writ Petition (Civil) No. 406/2013 before the Supreme Court of India. The Supreme Court passed several orders in this matter substantially resolving the issue of separation of families and medical facilities in detention centres, along with fast tracking the process of construction of a new detention centre. Some of the issues raised in the application remain pending before the Court and is scheduled to be heard early next year.

In a prison environment, seemingly ordinary issues can have devastating impact on the lived experience of inmates. One such telling example is the lack of access to any work within the correctional homes which makes most detainees pass their days in crushing boredom. This is compounded by the fact that unlike convicts who have definite knowledge of the duration of their incarceration or under trials who can look forward to trial, most detainees live under an impression of indefinite incarceration awaiting deportation or final hearing of their appeals in courts, both processes which they do not fully comprehend.

The correctional homes which are also detention centres themselves face administrative issues due to this situation. Correctional officers and staff now find themselves dealing with a group of inmates for whom no specific guidelines or manuals exist. This is in addition to the perennial problems of understaffing, poor service conditions, lack of infrastructural support etc which correctional staff have to deal with on a daily basis. However, they have been administering the centres with a mix of ad hoc implementation of the Assam Jail Manual coupled with a humanitarian approach. But the lack of infrastructure and staff have stunted most of their efforts at ensuring that the detainees have access to basic human rights.

What was worrisome was the fact that in spite of six correctional homes across the state had been designated as detention centres, only 998

declared foreign nationals could be accommodated in them. The State of Assam itself has gone on record to state that 91, 609 persons have been declared foreigners of which 72, 486 are absconding pegging the percentage of abscondance to 79.12%. [In an affidavit filed before the Supreme Court of India in Studio Nilima's Interlocutory Application in *Re-Inhuman Conditions in 1382 Prisons*, Writ Petition (Civil) No. 406/2013]

Introduction

This illegal and arbitrary detention of individuals in various district jails of Assam has primarily resulted due to the failure on the part of the authorities to specify clarity in the rules and regulations which would be applicable on persons falling under the category of declared foreign nationals (hereinafter referred as DFNs). The said DFNs are presently under detention along with those who are convicted foreign nationals. DFNs refer to the segment of people who have been detected as Foreigners by an opinion of the Foreigner's Tribunal under the Foreigners (Tribunals) Order, 1964 (hereinafter referred to as the 1964 Order). It is pertinent to mention that although this segment of declared foreign nationals is a heterogeneous group of people disparate in nationality, ethnicity, linguistic or religious practices, and while the vast majority of them are alleged to be nationals of Bangladesh, there are others who have been declared to be citizens of Afghanistan and Pakistan respectively. Furthermore, by illegally detaining these people without proper sanctions in detention centers, the authorities confused the procedure involved in handling DFNs and convicted foreign nationals, who are foreigners who have been imprisoned through the normal criminal justice process for committing specific offences whether under immigration laws (ex Foreigner's Act and the Passport Act or other statutes like the Indian Penal Code). Most of the convicted foreign nationals have completed their sentences after being convicted by the courts and are being indefinitely detained pending deportation to their country of origin with no proper arrangements. Furthermore, by illegally detaining these individuals without proper sanctions and detention centers, the authorities have grossly abused their powers and have acted in a mala fide manner.

Notification No.PLB.149/2008/88 dated 17.06.2009 issued by the Home and Political Department, Government of Assam, Notification No.PLB.149/2008/50 dated 01.12.2009 issued by the Home and Political Department, Government of Assam and Notification No.PLB.121/2015/44 dated 24.09.2014 issued by the Home and Political Department, Government of Assam notified the correctional homes of Central Jail, Tezpur, Jorhat, Dibrugarh and Silchar and the District Jails of Goalpara, Kokrajhar as detention centers for declared foreign nationals without any clarification as to the legal basis of this decision.

According to the Fortnightly Prison Population Report dated 15.05.2018 published by the Department of Home and Political, Government of Assam, there are a total of 986 DFNs lodged in the six-notified detention centres/correctional homes in Assam. As on 30.04.2018 records of the District Jail, Goalpara reveal that out of the total number of DFNs detained, 50 were convicted foreign nationals of which 49 were nationals of Bangladesh. More importantly travel permits for 33 such DFNs had already been issued for a period of three months by the Office of the Assistant High Commissioner, Bangladesh Assistant High Commission, Guwahati. However, as informed by the Jail Administration during our visit their deportation to Bangladesh remained subject to an approval from the Ministry of External Affairs, Government of India. Eventually, these individuals were only deported in 29th July, 2018 after the issue came to be repeatedly reported in the media.

In the course of its work, the *Pratidhwani* team visited the three notified detention centers in Assam namely the Central Jail (Tezpur), Central Jail (Jorhat) and District Jail, Goalpara. The details of the DFN's currently lodged in these centers are as follows:

Detention Center	Date of Visit	Total No. of DFNs
Central Jail, Jorhat	21.04.2018	119
Central Jail, Tezpur	22.06.2018	277
District Jail, Goalpara	30.04.2018	182

Of the rest Central Jail (Silchar) houses 109 DFNs, out of whom 99

are male and 10 are female. Central Jail (Dibrugarh) houses 56 DFNs, all male, and 152, all female DFNs are detained in District Jail, Kokrajhar.

Amongst the above-mentioned group of convicted declared nationals, a group of around 18 belong to the Rohingya Muslim community from Myanmar who were convicted for illegal entry and stay in India and were sentenced to undergo imprisonment for six months. Even though the above said members have completed their sentence, they were not released from detention which compelled them to approach the Hon'ble High Court of Gauhati in the form of a Writ Petition being WP(C) Number 2745/2014. One of the principal grounds taken by these members before the high court was that despite being victims of communal violence and ethnic clashes, due to their continued detention regardless of them carrying out their sentence, they have not been able to make a representation before the United Nations Human Rights Commission (hereinafter referred to as "UNHRC") for conferring them with the status of refugees.

The Hon'ble High Court of Gauhati after having heard the community passed a detailed order on 04.01.2017. It was duly recorded by the court that no decision had been taken by the Government of India regarding interim arrangement for lodging of the DFNs prior to their deportation and that the existing camps may be wholly inadequate to deal with the increasing number of detainees. It was thereafter directed by the court that responsibility of deciding the status of these individuals was vested with the Central Government, regard being made to whether they were allowed to stay in India by granting them refugee status through correspondence with the UNHRC, provided that if for this purpose their physical presence was required, then the Central Government shall do the needful to lodge the individuals in New Delhi. However, the Hon'ble High Court further stated that if the Central Government was of the opinion that these detainees were admittedly foreign nationals and should be deported from India, then subsequent steps must be taken within a period of three months. As a result, the Rohingya detainees have been awaiting a decision from the Government of India on their status as a refugee or a foreigner for more than 18 months, and consequently a Contempt Petition (Cont. Case Number 449/2017) has been filed in the

Gauhati High Court for non-compliance of the order dated 04.01.2017 in which notice was issued on 29.01.2018. On 28.03.2018, the court asked the Ministry of External Affairs, Government of India to pursue the matter with the Myanmar embassy in order to expedite the deportation process. Thereafter, on 02.05.2018 it was stated before the court by Central Government that Myanmar Embassy is yet to respond to the proposal of the Indian Government regarding deportation of the 18 Rohingya Muslims.

I. Legislative History Concerning Declared Foreign Nationals in Assam

The relevant statutes that govern the identification, detection, detention and deportation of foreigners in Assam are the Foreigner's Act, 1946 read with the 1964 Order, the, Citizenship Act, 1955, Passport (Entry into India) Act, 1920, the Immigrants (Expulsion from Assam) Act, 1950 and the Passport Act, 1967.

As per Section 2(1)(b) of the Citizenship Act 1955, "illegal migrant" is a foreigner who has entered into India without a valid passport or other travel documents or any other document or came to India with a valid passport or other travel documents and such other documents, but stayed beyond the permitted period of time. Vide Section 6A(1)(e) of the Citizenship Act, 1955, a person shall be deemed to be a foreigner on the date on which a Tribunal constituted under the 1964 Order submits its opinion to the effect that he is a foreigner to the officer or authority concerned.

At the commencement of the Constitution of India, Article 5 stated that every person who has his domicile in the territory of India and who was either born in the territory of India; or either of whose parents were born in the territory of India; or who has been ordinarily resident in the territory of India for not less than 5 years immediately preceding such commencement shall be a citizen of India. As an exception, Article 6, is important for the determination of some of the questions arising in this article, states as follows:

"*Rights of citizenship of certain persons who have migrated to India from Pakistan. --Notwithstanding anything in Article 5, a person who has migrated*

to the territory of India from the territory now included in Pakistan shall be deemed to be a citizen of India at the commencement of this Constitution if

(a) he or either of his parents or any of his grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted); and

(b) (i) in the case where such person has so migrated before the nineteenth day of July, 1948, he has been ordinarily resident in the territory of India since the date of his migration, or

(ii) in the case where such person has so migrated on or after the nineteenth day of July, 1948, he has been registered as a citizen of India by an officer appointed in that behalf by the Government of the Dominion of India on an application made by him therefore to such officer before the commencement of this Constitution in the form and manner prescribed by that Government: Provided that no person shall be so registered unless he has been resident in the territory of India or at least six months immediately preceding the date of his application."

Section 3(2)(e) of the Foreigners Act, 1946 (hereinafter referred as 'Act') provides powers to the Central Government to make orders qua foreigners as enumerated below:

"2. Power to make orders.-

(2) In particular and without prejudice to the generality of the foregoing power, orders made under this section may provide that the foreigner-

(c) shall remove himself to, and remain in, such area in 1 [India] as maybe prescribed;

(d) shall comply with such conditions as may be prescribed or specified-

(i) requiring him to reside in a particular place;

(ii) imposing any restrictions on his movements;"

On 23.09.1964 in exercise of the powers conferred under section 3, the Central Government published the Foreigners (Tribunal) Order, 1964 (hereinafter referred as '1964 Order'). Under the 1964 Order, a Tribunal has been constituted to provide an opinion to the effect whether the person is a foreigner or not. The 1964 Order has been subsequently amended in the year 2012, with respect to procedure for disposal of question the

following amendments have been made and incorporated:

"3. Procedure for disposal of questions

(1) The Tribunal shall serve on the person to whom the question relates a show cause notice with a copy of the main grounds on which he or she is alleged to be a foreigner. This notice should be served as expeditiously as possible, and in any case, not later than ten days of the receipt of the reference of such question by the Central Government of any competent authority.

(2) The Tribunal shall give him or her a reasonable opportunity to show cause by filing a representation. Ordinarily, not more than ten days' time from the date of service of the notice as aforesaid should be given to file such a representation.

(3) The Tribunal shall give him or her a reasonable opportunity to produce evidence in support of his or her case. Ordinarily, not more than ten days' time should be given to produce such evidence."

It is necessary to mention here that under the scheme of the Act read with the 1964 Order the Foreigner's Tribunal constituted there under, on a reference made to it, is required to only give an opinion whether the concerned individual is or is not a foreigner. Therefore, on this basis alone it is apparent that the role of the tribunal is restricted to providing an opinion and the same is not final or conclusive. The relevant clause is reproduced herein below:

"(9) After the case has been heard, the Tribunal shall submit its opinion as soon thereafter as may be practicable, to the officer or the authority specified in this behalf in the order of reference. Every case should be disposed of within a period of 60 days after the receipt of the reference from the competent authority."

Assam has always been a receiving economy of migrants, starting from the colonial rule. But the recent crisis emanating from migration is the result of prolonged migration preceding and post partition and the consequences of demographic change due to the migration of erstwhile East Bengali Hindus and Muslims that continued even after partition. Post-Independence migrants from East Pakistan or Bangladesh came to be categorized as irregular migrants who are undocumented or illegal migrants who came to India or to Assam in search of better livelihood opportunities

or they can be categorized as forced migrants. As per Article 6, therefore, 1948 became the baseline for such persons as were referred to in Article 6 for being citizens of India.

The Immigrants (Expulsion from Assam) Act, 1950 was enacted to protect the indigenous inhabitants of Assam. The statement of objects and reasons of this Act states that "*during the last few months a serious situation had arisen from the immigration of a very large number of East Bengal residents into Assam. Such large migration is disturbing the economy of the province, besides giving rise to a serious law and order problem. The bill seeks to confer necessary powers on the Central Government to deal with the situation.*" In pursuance of this object, Sections 2 and 4 states as follows:

"2. Power to order expulsion of certain immigrants. -

If the Central Government is of opinion that any person or class of persons, having been ordinarily resident in any place outside India, has or have, whether before or after the commencement of this Act, come into Assam and that the stay of such person or class of persons in Assam is detrimental to the interests of the general public of India or of any section thereof or of any Scheduled Tribe in Assam, the Central Government may by order-

(a) direct such person or class of persons to remove himself or themselves from India or Assam within such time and by such route as may be specified in the order; and

(b) give such further directions in regard to his or their removal from India or Assam as it may consider necessary or expedient;

Provided that nothing in this section shall apply to any person who on account of civil disturbances or the fear of such disturbances in any area now forming part of Pakistan has been displaced from or has left his place of residence in such area and who has been subsequently residing in Assam.

4. Power to give effect orders, etc.-

Any authority empowered by or in pursuance of the provisions of this Act to exercise any power may, in addition to any other action expressly provided for in this Act, take or cause to be taken such steps, and use or cause to be used such force, as may in its opinion be reasonably necessary for the effective exercise of such power."

Furthermore, it must be noted that on account of Section 4 of the

Illegal Migrants (Determination by Tribunal) Act, 1983, (hereinafter referred to as 'IMDT Act'), the Immigrants (Expulsion from Assam) Act, 1950 was superseded and the provisions of the said Act ceased to apply to the State of Assam. The Hon'ble Supreme Court in the year 2005, in *Sarbananda Sonowal v. Union of India*[1], has struck down the IMDT Act and the Rules as being wholly unconstitutional as they clearly negated the constitutional mandate contained in Article 355 of the Constitution of India. In para 83 of the decision, the Court revived the application of Immigrants (Expulsion from Assam) Act, 1950 along with the Passport (Entry into India) Act, 1920; the Foreigners Act, 1946 and the Passport Act, 1967 to the State of Assam. The directions issued by the court are reproduced below:

"84. In view of the discussion made above, the writ petition succeeds and is allowed with the following directions:

(1) The provisions of the Illegal Migrants (Determination by Tribunals) Act, 1983 and the Illegal Migrants (Determination by Tribunals) Rules, 1984 are declared to be ultra vires the Constitution of India and are struck down;

(2) The Tribunals and the Appellate Tribunals constituted under the Illegal Migrants (Determination by Tribunals) Act, 1983 shall cease to function;

(3) All cases pending before the Tribunals under the Illegal Migrants (Determination by Tribunals) Act, 1983 shall stand transferred to the Tribunals constituted under the Foreigners (Tribunals) Order, 1964 and shall be decided in the manner provided in the Foreigners Act, the Rules made thereunder and the procedure prescribed under the Foreigners (Tribunals) Order, 1964.

(4) It will be open to the authorities to initiate fresh proceedings under the Foreigners Act against all such persons whose cases were not referred to the Tribunals by the competent authority whether on account of the recommendation of the Screening Committee or any other reason whatsoever.

(5) All appeals pending before the Appellate Tribunal shall be deemed to have abated.

(6) The respondents are directed to constitute sufficient number of Tribunals under the Foreigners (Tribunals) Order, 1964 to effectively deal

[1](2005) 5 SCC 665

with cases of foreigners, who have illegally come from Bangladesh or are illegally residing in Assam."

As a result of the ruling the application of the above-mentioned proviso to Section 2 of the Immigrants (Expulsion from Assam) Act, 1950 was also revived. It was during the census of 1951 that a National Register of Citizens was prepared under a directive of the Ministry of Home Affairs containing information village-wise of each and every person enumerated therein. Details such as the number and names of persons, the houses or holdings belonging to them, father's name or husband's name, nationality, age, the means of livelihood were all indicated therein.

During the period from 1948-71 there was large scale migration from East Pakistan in to the state of Assam. As a result of subsequent representations, made by All Assam Students Union and others, Parliament enacted the IMDT Act applicable only to Assam. The IMDT proved to be inconclusive due to the continuous influx of illegal migrants from the neighbouring countries. Seeing the continuous influx despite the legislation being in place the civilian population started the Assam Movement (1979-85) or Asom Andolan with an objective to seek expulsion of undocumented migrants. The said movement was the culmination of civilian opposition against the rise in the number of voters in the electoral rolls. The All Assam Students' Union (AASU) and the All Assam Gana Sangram Parishad (AAGSP) spearheaded the movement. The leaders stated that the movement was against undocumented immigrants, and demanded their expulsion.

The said movement culminated in the Assam Accord on 15.07.1985 between the AASU, AAGSP and the Central and the State Governments, pursuant to which, Section 6A was inserted in the Citizenship Act in 1985. The Statement of Objects and Reasons of the Act specifically states that it is the legislation required to give effect to the Assam Accord. In the same vein, Section 6A is presently under challenge before the Supreme Court (in *Assam Sanmilita Mahasangha v. Union of India,*[2] *Assam Public Works v. Union of India*[3], and *All Assam Ahom Association v. Union of India*[4]).

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[2]WP(C) No. 562 of 2012
[3]WP (C) No. 274/2009
[4]WP(C) No. 562 of 2012)

Thereafter, on 08.11.1998 the then Governor of Assam submitted an extensive report to the President of India on the continued grave threat posed by the influx of people from Bangladesh to Assam. In this backdrop a writ petition was filed in year 2000 assailing the constitutional validity of the IMDT Act and the rules framed thereunder.

On 14th July, 2004, in response to an unstarred question pertaining to deportation of illegal Bangladeshi migrants, the Minister of State, Home Affairs, submitted a statement in the Parliament indicating therein that the estimated number of illegal Bangladeshi immigrants into India as on 31st December, 2001 was 1.20 crores, out of which 50 lakhs were in Assam.

In *Sarbananda Sonowal v. Union of India*[5], the Hon'ble Supreme Court referred to the Assam Accord and to the huge influx of illegal migrants into the state of Assam and came to the conclusion that the said Act and the Rules made thereunder operated in the reverse direction i.e. instead of seeing that illegal migrants are deported, it did the opposite by placing the burden of proof on the State to prove that a person happens to be an illegal migrant. It went on to hold that Article 355 of the Constitution of India had been violated, in as much as the Union had failed to protect the state of Assam against the external aggression and internal disturbance caused by the huge influx of illegal migrants from Bangladesh to Assam and went on to hold that the 1983 Act was a violation of Article 14 as well. In as much as this Act was struck down, the Immigrants (Expulsion from Assam) Act, 1950 together with the Foreigners Act, 1946 and the Foreigners Tribunal Order, 1964 were now to be the tools in the hands of Government to do the job of detecting illegal migrants who were then to be deported.

Given the magnitude of the problem, a Foreigners (Tribunals for Assam) Order of 2006 was promulgated by the Central Government. Through the said Order the Central Government amended the 1964 Order principally making the same inapplicable to the state of Assam. The said action of the government was again struck down in *Sarbananda Sonowal (II) v. Union of India*[6], being found to be unreasonable and

[5](2005) 5 SCC 665 (supra)
[6](2007) 1 SCC 174

arbitrary and which instead of expeditiously discovering illegal migrants and deporting them, again did the opposite.

II. Present Regulatory Loopholes Leading to Ambiguous State of Affairs Concerning DFNs

In Assam, the identification and detection of foreigners is the responsibility of the Assam Police Border Organisation. However, the jurisdiction of the Assam Police Border Organisation in foreigner detection and its power to issue notices and make referrals to the Foreigners Tribunals does not have any strict statutory basis.

The Foreigners Tribunal in Assam was set up in the year 1962 under the erstwhile Prevention of Infiltration of Pakistani Scheme. The scheme inter alia provided the procedure for detection and issuance of Quit India notices.

Drawing from the provisions of the above-mentioned scheme, and seeing the burgeoning influx in the number of DFNs who go untraced and undetected, the State Government as an interim arrangement on 17.06.2009 issued a notification in order to impose restrictions in the movement and also to make necessary arrangements vis-à-vis residence of the DFNs as well as to facilitate their deportation. As per the notification, the Governor of Assam ordered that the movement of persons who are detected as foreigners by the Foreigners Tribunal shall be restricted and they shall be required to reside in the Detention Centres set up by the State Government immediately after they are held to be foreigners and till the time they are deported. Secondly, the state police officers have been entrusted with the process of detection and deportation of foreigners. The said notification failed to provide for the exact modalities as well as remained silent on the following crucial issues:

a) the procedure for detecting and notifying the DFNs;

b) the detention centers wherein the DFNs shall be kept till they are deported; and

c) issuing specific time lines in which the order task can be undertaken so as to expedite the process.

As the above-mentioned notification did not provide for the exact

modalities of the notified detention centres, subsequent notifications were issued notifying the prisons in question as temporary notified detention centres. The said task was undertaken by the State Government without any exposition as to the rationale of having a detention centre to provide basic amenities to DFNs in the first place.

On 01.12.2009 another notification was issued by the State Government notifying the District Jail, Goalpara as a separate Detention Centre on a temporary basis till further detention centres are established.

Thereafter, on 24.09.2015 a subsequent notification was issued wherein the State Government notified that Central Jails of Jorhat, Dibrugarh and Tezpur will serve as Detention Centres. Central Jail, Dibrugarh would accommodate only male inmates whereas Central Jails of Jorhat and Tezpur would accommodate both male and female inmates. The notified detention centres are located across six districts; while Jorhat and Dibrugarh are in the upper reaches of Assam, Silchar is in the Barak Valley. Kokrajhar on the other hand is a town in the Bodoland Territorial Area Districts. Goalpara is in the south-western part of the state bordering the boundary between Assam and Meghalaya. Importantly, it is adjacent to the international boundary between India and Bangladesh in the West. It is pertinent to mention that while a proposal for the setting up of a separate detention centre has been initiated in Dakurbhita area of Goalpara district for the DFNs, no construction has begun as yet even though land has been allotted for the same.

The practical implication of these notifications is that DFNs are being currently accommodated in prisons along with inmates (under trials as well as convicts), the said DFNs are exposed to the prison environment in its entirety and for all effective purposes are being treated as inmates. The scattered location of the detention centres across the State also has ramifications on the detainees as for example the notified detention centre in Central Jail, Dibrugarh only contains male detainees and the one in Kokrajhar houses only female detainees. Therefore, in cases of family units who have been detained, separation becomes inevitable.

The manner in which the notifications have restricted the DFNs in the correctional homes is not in harmony with the provisions of the

Assam Jail Manual itself. The present conditions of all the 986 DFNs are also in direct violations of the international standards for detention of illegal migrants.

Adding to this predicament, the Government of Assam through the above-mentioned notifications have failed to specify rules or regulations which would be applicable to the DFNs currently under detention. As a result, the authorities have been compelled to apply selectively, the provisions of the constituent statutes and regulations of the Assam Jail Manual on the DFNs, which are prescribed for the under trial prisoners and convicts.

Under Section 3 of the Foreigners Act, 1946 which confers power upon the Central Government and under Section 12 of the said act the power to make orders under Section 3 of the Act may be delegated to a subordinate authority subject to such conditions as may be contained in the authorization. Section 12 further authorizes the authority empowered under the Act to further delegate powers to any such authority subordinate to it. Thus effectively, vide Section 12 the State Government is empowered to further delegate the function to any authority subordinate to it, in writing. However, an order under Section 3 passed by any authority subordinate to the State Government without proving the State Government's notification of delegating its authority to such subordinate authority is completely arbitrary, invalid and dehors the provisions of the Act.

The above delegation of the authority must be specific and express. In the State of Assam, the procedure that is followed for detecting foreigners is also fraught with procedural lapses. The Assam Border Police, which is known as the second line of defence in checking foreign infiltration is also responsible for detecting foreign infiltrators. If it suspects that a person is a foreigner, then the Assam Border Police serves him notice to appear before it and prove his or her citizenship, by producing requisite documents in reasonable time. If the Assam Border Police are not satisfied with the documents then it registers a reference case against that person to be tried by the Foreigners Tribunal established by the 1964 Order. The said exercise undertaken by the Police and State Government in general, without express delegation goes completely against the intention of section 3 read with section 12.

Furthermore, the Assam Police refers to the Prevention of Infiltration of Foreigners Scheme to issue the above-mentioned notices on the proceedee, it is not known whether apart from the said scheme there is any other statutory force based on which such notices are being issued and the said scheme by itself cannot be treated as delegation of powers under Section 12 of the Foreigners Act. Therefore, without any legal proof such actions on the part of the border police is non-est in law and lacks jurisdiction. As a corollary, the subsequent referrals on the basis of these notifications will also be bad in law and ex-facie illegal.

III. Illegal Detentions and Inadequate Legal Representation of DFNs

The international standards for detention of foreigners/asylum-seekers for immigration related reasons specify that such detention must not be within the prison facilities or jails. Guideline 8, Para (iii) of the UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention (hereinafter, referred to as UNHCR Guidelines) states that *'The use of prisons, jails, and facilities designed or operated as prisons or jails, should be avoided. If asylum-seekers are held in such facilities, they should be separated from the general prison population.'*

The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment which was adopted by the United Nations General Assembly Resolution 43/173 on 9 December, 1988 states in Principle 8:

"Persons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons."

In India the Prisons Act, 1894 which is part of the Assam Jail Manual defines 'prisons' in Section 3 as:

"3. Definitions: In this Act-

(1) "prison" mean any jail or place used permanently or temporarily under the general or special orders of a State Government for the detention of prisoners, and includes all lands and buildings appurtenant thereto, but does not include-

(a) any place for the confinement of prisoners who are exclusively in the custody of the police

(b) any place specially appointed by the State Government under S.541 of the Code of Criminal Procedure

(c) any place which has been declared by the State Government, by general or special order, to be a subsidiary jail;"

The said enactment also defines three classes of prisoners under Section 3; which are *criminal prisoner, convicted criminal prisoner* and *civil prisoner.* The dichotomy in the case of the DFNs is that while they do not qualify as any of these three classes of prisoners specified under the Act, they have been detained in a facility, which qualifies the definition of prison under Section 3.

As per the phrasing of Section 6A of the Citizenship Act, 1955 a person is detected to be a foreigner on opinion of the Tribunal. However, as per informal sources it has been brought to the notice of the Pratidhwani team that orders are being routinely passed by the Tribunals 'declaring' such individuals as foreigners without application of mind and without conducting any substantial investigation and detection. From the objective of the Foreigners Act, it is clear that it is an Act to confer upon the Central Government or the State Government, as the case may be, certain powers in respect of foreigners. It can therefore be inferred that a reference to the Central Government becomes necessary before the opinion of the Foreigners Tribunal can be treated as final. In the absence of this component, the present process stands patently illegal. The Gauhati High Court has consistently held and emphasized that the opinion rendered by the Tribunal is not in the nature of a declaration. However the State Government has refused to take this fact into account and in turn has declared all such individuals as foreigners under the Act.

Furthermore, there is qualitative difference between those who are 'foreigners' as opposed to the 'detected foreigners', as the person against whom the Tribunal has rendered an opinion has both; a) an option of appeal and b) order of the State Government subsequent to the opinion. In such a scenario, a DFN individual cannot be conclusively treated as a foreigner for the purpose of Section 3 of the Foreigners Act, 1946.

The legal validity of the procedure of detention of the foreigners itself seems to be vague and ambiguous as the Foreigners Tribunal only render a non-conclusive opinion. In the case of *Maneka Gandhi v. Union of India*[7], it has been held that law cannot prescribe some semblance of procedure, however, arbitrary or fanciful, to deprive a person of his personal liberty. The procedure cannot be arbitrary, unfair or reasonable. In treating the opinion as a declaration and thereby considering it to make an order under Section 3 of the Foreigners Act, 1946 is arbitrary and unreasonable and thus violates Article 21 of the Constitution of India. One of the primary grounds for illegal detention is where the detention is without any authority of law. As has been laid down under Article 21 of the Constitution, liberty can be curtailed only in accordance with the procedure established by law, it is undoubted that some law of the land must authorize detention, otherwise the same would ex-facie be illegal. In the case of the DFNs, it is not clear on which basis detention is carried out. It may be merely on the basis of an opinion of the Tribunal.

In *Ram Narayan Singh v. The State of Delhi and Ors.*[8], the Hon'ble Supreme Court observed that those who feel called upon to deprive other persons of their personal liberty in the discharge of what they conceive to be their duty, must strictly and scrupulously observe the forms and rules of the law. It was a case in which a writ of Habeas Corpus was filed on the ground that the remand of the detenue was bad. The Court allowed the writ of Habeas Corpus and directed the release of the detenues. It is no doubt true that the Court will not normally interfere with the day-to-day operations of the State during investigation, but improper remands and unnecessary detention in jails cannot be countenanced on the ground of discipline and security.

Records available with *Pratidhwani* have revealed three differing sets of procedures which are being adopted by the detaining authorities for handing over custody of the declared foreigner national subject to a finding/ opinion of the Foreigners Tribunal. These are:

a. In several cases, proceedees with opinions from the Foreigners

[7]AIR 1978 SC 597
[8]1953 S.C.R. 852

Tribunals against them have been summoned to the office of the Deputy Commissioner of the concerned district and detained.

b. In certain other cases, the Superintendent of Police (Border) of the concerned district has taken proceedees into custody ostensibly under the provisions of the Foreigners Act, 1946 read with the 1964 Order.

c. In another set of cases, the Foreigners Tribunal itself has directed remand of the proceedees into custody.

Therefore, different procedure of detention is being followed in the notified detention centres in the absence of a valid specified procedure in accordance with the law stipulated for the DFNs.

During the course of *Pratidhwani*'s work, the correctional home administration in the state of Assam revealed that the dietary allowance given to the detainees/declared foreign nationals is the same as earmarked for non-labouring prisoners and under trials under Rule 368, Chapter XXI of the Rules for Superintendence and Management of Jails in the State of Assam which is a constituent of the Assam Jail Manual. However, unlike other convicted inmates, they are not entitled to paroles/ leaves as like other inmates covered by the same Rules. Apart from this, the DFNs are not even allowed to communicate with their family members. In Goalpara District Jail cum Detention Centre, for the sake of humanity and basic human rights the prison staff occasionally allow the detainees to communicate with their family members although there are no specific rules/ guidelines to that effect. Thus, the absence of a substantive law to regulate their lives in incarceration amounts to violation of substantive due process guaranteed under Article 21 of the Constitution of India.

The right to fair trial has been interpreted to be one of the implicit rights contained within the Right to Life as enshrined under Article 21 of the Constitution of India. As a minimum, the right to fair trial therefore inter alia includes the right to be heard by a competent, independent and impartial authority, the right to be heard within a reasonable time, right to counsel, etc. In accordance with the underlying principles of the right to fair trial, clause 3 of the 1964 Order makes it incumbent on the Foreigners Tribunal, on receiving a reference, to serve on the person to whom the question relates (hereinafter referred to as the proceedee), a copy

of the 'main' grounds on which he is alleged to be a foreigner and give him a reasonable opportunity of making a representation and producing evidence in support of his claim.

It has been reported that notices clarifying the grounds, which form the basis of the reference, are not being communicated to the DFNs. The notices which are routinely being served on such proceedees, merely stipulate the date and time of the appearance before such Tribunals along with written objections and trustworthy documents.

There has been a plethora of cases which are being preferred before the Hon'ble Gauhati High Court by private lawyers on behalf of such proceedees wherein the validity of such notices are routinely being assailed. However, for many DFNs who cannot afford a private lawyer, such procedural lapses go unnoticed and unchallenged, effectively denying them their basic and fundamental right to fair trial. Even the minimal numbers of detainees who have engaged private lawyers do so at the cost of heavy financial loss and insolvency. The communication with their counsel is extremely limited due to various reasons like lack of comprehension of the judicial process and the fact that often lawyers based in Guwahati are contacted through relatives.

The issue is further complicated by the fact that Section 12 of the Legal Services Authority Act, 1987 which outlines the criteria for providing legal services does not enlist the category of DFNs. Section 12 is produced below:

"S.12 of the Legal Services Authority Act, 1987 provides:

Every person who has to file or defend a case shall be entitled to legal services under this Act if that person, is-

(a) a member of a Scheduled Caste or Scheduled Tribe;

(b) a victim of trafficking in human beings or beggar as referred to in Art.23 of the Constitution;

(c) a women or a child;

(d) a person with disability as defined in clause (i) of section 2 of the Persons With Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996);]

(e) a person under circumstances of underserved want such as being a

victim of a mass disaster, ethnic, violence, caste atrocity, flood, drought, earthquake or industrial disaster; or

(f) an industrial workman; or

(g) in custody, including custody in a protective home within the meaning of clause (g) of section 2 of the Immoral Traffic (Prevention) Act, 1956 (104 of 1956), or in a juvenile home within the meaning of clause (j) of section 2 of the Juvenile Justice Act, 1986 (53 of 1986), or in a psychiatric hospital or psychiatric nursing home within the meaning of clause (g) of section 2 of the Mental Health Act, 1987 (14 of 1987); or

[(h) in receipt of annual income less than rupees nine thousand or such other higher amount as may be prescribed by the State Government, if the case is before a court other than the Supreme Court, and less than rupees twelve thousand or such other higher amount as may be prescribed by the Central Government, if the case is before the Supreme Court."

According to the authorities vested with the responsibility of implementing the scheme of legal aid under the said Act, the above provision limits the jurisdiction of the District Legal Services Authority from providing legal aid to DFNs. In certain instances, members of the District Legal Services Authority have themselves expressed their helplessness at the condition of the DFNs and have made verbal representations before the Assam State Legal Services Authorities seeking guidelines and directions for providing legal services to such detainees.

It is however important to mention that the foreign nationals detained in the correctional homes include a significant number of women and children who are covered under Section 12(c) of the said Act and therefore the interpretation given by the Legal Service Authorities in the State of Assam is not consistent with the provision of the Act and has resulted in denying effective free legal services to a huge proportion of the DFNs.

Moreover, free legal aid is a guaranteed fundamental right under Article 21 of the Constitution of India, which is available to any person and evidently therefore the interpretation sought to be given by the Legal Service Authority in the State of Assam is in clear violation of Article 21 of the Constitution of India. Reference in this regard may be made to the

case of *State of Maharashtra v. Pragaji Vashi*[9]. While interpreting Article 21 in the light of Article 39-A, the Hon'ble Supreme Court held that:

"*The right to free legal aid and speedy trial are guaranteed fundamental rights under Article 21 of the Constitution. The Preamble to the Constitution of India assures 'justice, social, economic and political'. Article 39A of the Constitution provides `equal justice' and `free legal aid'.* "The Hon'ble Supreme Court has further held that the lawyer's services constitute an ingredient of fair procedure to a prisoner who is seeking for liberation for his through the Court's procedure. Bhagwati, J., observed in *Hussainara Khatoon v. State of Bihar*[10] :

"Now, a procedure which does not make available legal services to an accused person who is too poor to afford a lawyer and who would, therefore, have to go through the trial without legal assistance, cannot possibly be regarded as 'reasonable, just and fair."

In *Khatri v. State of Bihar (II)*[11] the Hon'ble Supreme Court reiterated that the State Governments cannot avoid their constitutional obligation to provide free legal service to the poor accused by pleading financial or administrative inability. Thus, this state of affairs with respect to legal aid among the declared foreign nationals is a violation of the Constitutional provisions.

Pratidhwani has perused the records of various writ petitions filed before the Gauhati High Court. It is found from a mere perusal that the defense of the DFN's has been seriously compromised in a lot of cases because of ignorance and/ or negligence of the counsels appearing for the defense in the Tribunals for which the detainees have been highly prejudiced. There have been further allegations that in spite of having received substantial payments, counsels in a number of cases, have failed to appear at the time of hearing or have not exhibited proper documents which were made available to such lawyer on behalf of the detainees. From the records of such proceedings, a trend has developed whereby the defense lawyers have simply exhibited certain documents and have failed to produce witnesses

[9]AIR 1996 SC 1
[10]AIR 1979 SC 139
[11]AIR 1982 SC 928

from the native villages who could have deposed as regards the citizenship claims of such detainees. In the face of such inadequate defense, it was incumbent on the various Foreigners Tribunals to ensure a fair trial and direct the compliance of an adequate legal representation for the detainee. Under the stringent provisions of the Act the burden of proof is on the alleged proceedee and it is therefore required under Article 21 of the Constitution of India to ensure effective legal representation to the proceedee by the Tribunals, which has not been made effective in the State of Assam. Appropriate guidelines are therefore, required to be laid down in this regard.

The case of Kaibut Ali, who has been detained in Jorhat, for the past 16 months, is instructive in this context. It was informed to the *Pratidhwani* team that no notice was served to him from the Foreigners Tribunal. Even though his wife, Maharjaan Begum, often visits him in the camp, things in his family have not been easy which consists of his widowed mother and five children. Kaibut has no knowledge of whether his name has been included in the National Register of Citizens (NRC) and claims that he has also voted in the elections post 2001. Despite having owning some land in Barpathar, Ali's family is financially struggling as the cost of this litigation has gone up to Rs. 76,000. Regardless of all the expenses paid for legal representation, Ali was not completely aware regarding which stage his trial at the Jorhat Foreigner's Tribunal was and had no knowledge of his next date for hearing. In another instance, Md. Asadullah, who is presently lodged in the Jorhat Detention Centre claims that when his case was in trial at the Foreigner's Tribunal in Golaghat, his case had continued for five years. But when the case was shifted to Jorhat, he had appeared twice on summoned dates and even then, the order declaring him as a foreign national was passed ex parte. While, the law mandates that the procedure of the reference case is to be concluded within 60 days under Section 3(14) of the 1964 Order, in the Applicant's observations from the narrative within the notified detention centres, it is apparent that this procedure is not being precisely adhered to. Thus, the detainee's right to be heard by a competent, independent and impartial authority, within a reasonable time has been violated.

In another case Subhas Chandra Roy, aged 57 years, was first served a notice from the Foreigners Tribunal, Nalbari but he alleged that this case was on trial before he was served the notice. According to the notices served, Roy would appear on dates fixed. He alleges that the Magistrates were never present to hear his case, he was told that he will be served another notice from the court but that notice was never served. A year later he was asked to submit certain documents by the tribunal which included: LP school certificate from 1969, State Education Board of Assam High School Leaving Certificate from 1977, Gauhati University under-graduate course registration Certificate, his Permanent Residential Certificate, Father's NRC from 1951, Schedule Caste certificate from 1977. A notice did arrive from Tamulpur but that was past the last date that was mentioned on the notice to appear before the tribunal. Later, he alleged, the case was argued ex parte. Since then he has been in detention and has not been able to afford any lawyer to take up his matter. He alleges that his case is not being taken up by the statutory Legal Service Authorities. This is possibly in view of the interpretation of Section 12 made by the statutory Legal Service Authorities as stated above.

The right to have access to legal representation is also concordant with international standards of detention as for example the UNHCR Guidelines on Detention which in Guideline 7, paragraph 47 (ii) provides that free legal assistance should be provided where it is also available to nationals similarly situated, and should be available as soon as possible after arrest or detention to help the detainee understand his/her rights. The UNHCR Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention contend that detention must be a measure of last resort. It must be shown in the light of the present circumstances of the persons concerned that there were not less invasive or coercive means of achieving the same ends. In Guideline 4.3, para 39, several measures have been provided which may serve as alternatives to detention. These include registration/deposition of documents, bond/bail, designated residence, community release/supervision, reporting conditions, electronic tagging and home curfew. It also stipulates that the principle of minimum intervention must be the guiding principle

for States in designing alternatives to detention.

However, in the case of the declared foreign nationals and the convicted foreign nationals in Assam, it is quite clear that alternatives to detention have never been considered substantially in practice. While the scope of the Guidelines in para 4 limits its ambit to detention of asylum-seekers, refugees and other persons seeking international protection on immigration related grounds, it also provides that many of the standards laid down in the report which are applicable *mutatis mutandis* to persons found not to be in need of international protection or other migrants.

The Hon'ble Supreme Court has asserted in *Kartar Singh v. State of Punjab*[12] that the procedure contemplated by Article 21 is that it must be "right, just and fair" and not arbitrary, fanciful or oppressive. In order for the procedure be right, just and fair, it must conform to the principles of natural justice.

The ex-parte orders passed by the tribunals violate one of the cardinal principles, i.e., *audi alteram partem*. When a person's citizenship is in question, it threatens the very legality on the basis of which his entire family claims rights. Thus, the procedure where the citizenship of a person is tested, should be such that it gives the person a fair opportunity to prove his case. Instead of that the procedure is such that it violates the principles of fair trial and thus is ultra-vires to the Constitution of India.

IV. Access to Documents and Indefinite Period of Incarceration

The average years of incarceration for the detainees in the notified detention centre is 8 years and 6 years at Central Jail, Tezpur and Central Jail, Jorhat respectively. It can be easily surmised that a large cross-section of these detainees have been denied the right to fair and speedy trial and are still languishing in the notified detention centres. It is also pertinent to mention that the multiplicity of documents, which are necessary to prove citizenship under the current legal framework, creates further confusion among detainees. For example, a large number of detainees are under the impression that the printed slip containing the NRC Legacy data code is

[12](1994) 3 SCC 569

definitive as proof of citizenship. This is compounded by the fact that the districts like Dhubri, Morigaon, Goalpara, etc which are the home districts of a large number of the detainees display relatively low literacy rates in contrast to very high rates of population growth.

In another instance, Rina Mondal, aged 38 years, detained presently in Central Jail Jorhat, informed *Pratidhwani* team that it was her mother who was declared a foreigner in 2003 because of certain ambiguity related to her name as recorded in the school register. Mondal was of the view that the case was dismissed because no notification was issued in after her mother's death. Mondal's family was originally from Tinsukia and she was married into another family and shifted to a town called Doomdooma within Tinsukia. She was declared D-voter as a result of the case against her mother and was asked to submit the latter's death certificate by the police officials in Doomdooma. On the day that she submitted the certificate Mondal was escorted from the police station to the Deputy Commissioner's office and then to jail. Mondal adds that she was not even allowed to go to her residence to let her husband know about the case. The manner in which Mondal, in the instant case, was confined and detained clearly violated the rights guaranteed to her under the guidelines laid down in the case of *D.K. Basu v. State of West Bengal*[13], which stipulates that a person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lock-up, is entitled to have one friend or relative or other person known to him or having interest in his welfare be informed, as soon as practicable, that he has been arrested and is being detained at a particular place. The arrested person or detainee is also entitled of being made aware of this right to have someone informed of his arrest or detention. This requirement as a right of the arrested person or detainee was also discussed in an earlier case of *Joginder Kumar v. State of U.P.*[14]

The confusion with respect to the documents is exacerbated by the fact that there has been substantial litigation in this area. The prime example

[13]AIR 1997 SC 610
[14](1994) 4 SCC 260

of this situation is the issue with regard to the validity of the certificate issued by the Gram Panchayat Secretary. A Division Bench of the Supreme Court in *Rupajan Begum v. Union of India*[15] held that the certificate issued by the Gram Panchayat Secretary is not a proof of citizenship even though it can be used as a 'supporting document' for claims of inclusion in the National Register of Citizens. Often such decisions passed by the Hon'ble Supreme Court and Hon'ble Gauhati High Court do not percolate down clearly to the grassroots.

Reference in this regard may also be made to the UNHCR Guidelines specifically to Guideline 6 which establishes that indefinite detention is arbitrary. This has been considered as a principle of international human rights law. The guidelines provide that detention should not be for any longer than necessary, and to guard against this arbitrariness, definite maximum periods of detention must be set in the national legislations, without which detention can become prolonged and in some cases indefinite.

One of the primary concerns for the DFNs in the notified detention centres of Assam is that there is virtually no statutory yardstick by which they can gauge the period of time they would remain incarcerated. In Goalpara Detention Centre it was noticed that 33 persons had been issued travel permits by the Assistant High Commissioner of Bangladesh vide letter No.GT/022/18/002, dated 08.05.2018. These travel permits have a validity period of 3 months but in order to deport these people from the Detention Centres, a permit is needed from the Home Ministry which normally takes a lot of time to get issued thus furthering the detention of the DFNs. While these individuals were subsequently deported on 29th July, 2018, their fate remained unclear even to the correctional administration at the time of *Pratidhwani*'s visit.

The Supreme Court has held in the *Sunil Batra v. Delhi Administration*[16] that constitutionally viewed, punitive deprivation of personal freedom must be goal oriented and humanely restorative, apart from being deterrent. In the case of *Phul Singh v. State of Uttar Pradesh*[17],

[15]C.A No. 20858 of 2017 dated 05.12.2017
[16](1978) 4 SCC 494
[17](1979) 4 SCC 413

the Hon'ble Supreme Court held that reformation and reintegration are the primary objectives of punitive imprisonment. Thus, continuous imprisonment is neither the vision nor the objective behind imprisonment. As per the our investigations, there are families in the detention centre in Central Jail who have been detained for the past ten years or more. The purpose behind the establishment of the Detention Centres, as mentioned in the 1964 Order, is to detain them until they are deported to their country of origin. But Government of Bangladesh has time and again made it clear that they are not going to accept persons declared as DFNs by the Foreigners Tribunals. According to the Government of Bangladesh, the DFNs still claim that they are Indian Citizens. In such circumstances, the DFNs seem to be caught in a loop between the Indian and Bangladesh Governments. While the Indian Government claims that they are of nationals of Bangladesh, the Government of Bangladesh is not ready to accept the same. As a result, they remain detained indefinitely.

Reference in this regard may be made to the case of Sambhu Ali alias Zahangir Alem who came into India through Petrapole-Benapole border checkpoint in North 24 Parganas district of West Bengal. He worked as a daily wage labourer in Sibsagar and was caught while trying to enter a tea estate. Ali was taken to the Sibsagar Deputy Commissioner's office where his name and signature were taken. He was first kept at the District Jail, Sibsagar for one and a half years, then at the District Jail, Goalpara for another one and a half years and has been detained in the Central Jail, Jorhat for the past two and a half years. Ali, who has been in India for the last seven years of which he has spent five and a half years incarcerated in the jails, mentioned that he wants to be deported to Bangladesh or at least some contact can be established with his family, so that they can be given the knowledge of his detention.

The procedure for deportation of illegal migrants after they have been detected to be illegal migrants according to para 25 of the affidavit submitted by the Union of India before the Hon'ble Supreme Court in the matter of *Assam Sanmilita Mahasangha v. Union of India*[18] stated: (as

[18]WP (C) No. 562 of 2012

quoted in para 45 of the judgment):

"It is submitted that the existing mechanism/procedure for verification of nationality inter alia include that State Government provides details of declared person in a prescribed format indicating full details/contact address in Bangladesh including photographs to the Ministry of Home Affairs. Such cases received from the State Government are referred to the Ministry of External Affairs for taking up the matter of verification of nationality with Bangladesh authorities through diplomatic channel. The Ministry of External Affairs refers such cases to Bangladesh authorities. Such cases are investigated by the Bangladesh Home Ministry and they send their report to Bangladesh Foreign Ministry. In turn, they intimate Indian Ministry of External Affairs about the nationality verification or status of such persons. If some of the cases are not confirmed by them, in that event we request the Bangladesh authorities from the Bangladesh High Commission or Deputy High Commissions in Kolkata or Mumbai, as the case may be, to avail of consular access for interaction with such detained persons. The Bangladesh authorities depute their representative for interaction with such persons who are detained in detention centres/jails. If such persons disclose their addresses in Bangladesh then their nationality is confirmed. Some of them still claim that they are Indian nationals and in that event Bangladesh authorities are unable to confirm/nationality of such persons. Persons whose nationalities are confirmed by the Bangladesh authorities, are repatriated to Bangladesh immediately. It is mentioned that many of the declared illegal migrants do not disclose their address, contacts of their relatives in Bangladesh. In such cases, it becomes very difficult for Bangladesh authorities for verification of nationality of these persons. In the current years nationality of 32 Bangladeshi nationals who were in the detention centres/jails in Assam were confirmed by the Bangladesh authorities and they have been repatriated."

An important facet of the deportation issue is the case of the convicted foreign nationals who are also facing indefinite incarceration. However, since they have claimed themselves to be foreign nationals in the course of their trial through the ordinary criminal system, the Government of the People's Republic of Bangladesh accepts these persons after checking the authenticity of their claims of being Bangladeshi

Nationals. Once the scrutiny is complete, the Government of Bangladesh issues them visas and travel permits. The case of Muslim Rohingyas is a peculiar one who are also detained in the detention centres and present yet another facet to the issue. As has been mentioned earlier, there are 18 Rohingya Muslim refugees from Myanmar in the Central Jail, Tezpur. However, their legal status remains unclear and therefore they continue to face indefinite detention. The impugned notification by Government of Assam mandates that the notified Detention Centres are to keep the foreigners immediately on declaration as such foreigners by the Foreigners Tribunals till such persons are deported to their place of origin. It is quite apparent that since the Government of Assam has set no time frame, these declared foreigners, are resigned to incarceration for an indefinite period of time.

The case of Md. Ayash is a pertinent example of the Rohingya perspective of the indefinite detention issue. Md. Ayash, detained in Central Jail, Tezpur, is a Rohingya Muslim and had entered India through Manipur and claims that he was on his way to the refugee camp of the UNHCR in Delhi. He left Rakhine in Myanmar along with his family after the violence of 2013. 18 other Rohingya Muslims are also detained here in the jail even the above-mentioned decision of the Hon'ble Gauhati High Court in W.P(C) 2745/2014 delivered on 04.01.2017, that mandates their transfer to the refugee camp in Delhi. He mentions that there are close to 40,000 people in these camps but the 18 are confined within this jail due to an order of the Assam Government even after they have been provided asylum by UNHCR in Delhi. He points out that they have preferred a contempt petition (449/2017-18) against the non-compliance of the High Court order.

Thus, in consideration of the above-mentioned facts, it is apparent that the DFNs in the notified detention centres of Assam face indefinite incarceration, which is not just bad in law but also demeans the objectives and purpose behind incarceration as envisaged by the law in India.

V. Detention in Separate Detention Centres and Separation of Family Units

One of the resultant conditions of detention of the DFNs in the notified detention centres of Assam is that of separation of families. During visits made to the centers, the *Pratidhwani* team has personally interacted with several detainees who have been separated from their families. The problem is caused by the separation of families either due to detention in separate detention centres or children living outside the detention centre, the same has also been noted in the Report authored by Mr. Harsh Mander in his erstwhile capacity as Special Monitor for the National Human Rights Commission (hereinafter referred to as NHRC). The Report has documented several cases including the case of Subhas Chandra Roy, who has also been documented by *Pratidhwani*. According to the report, Mr. Mander made a written representation to the NHRC stating his grievances. However, no action has been forthcoming as yet.

The primary reason for the separation of families is that all members of a family may not be declared as foreigners by the Tribunals simultaneously. Often a mother may be a declared foreigner consigned to a detention centre while her husband and children (above the age of 6 years) may be leading normal lives. Further, only children up to the age of 6 years can be admitted to the prison under Rule 882 of the Rules for Superintendence and Management of Jails in the State of Assam if they cannot be placed with relations or otherwise properly provided for. The Rules also places the onus upon the District Magistrate for making alternative arrangements once the child attains 6 years and cannot stay within the prison any longer. The provisions of the Assam Jail Manual are applied upon the DFNs becoming another source for the separation of family units.

An example of such a case is of Harila Khatun lodged at the detention centre in Central Jail, Tezpur. She stated that she travelled from Bihar with her husband. Despite having all the necessary documents like Ration Card, ID Card, Aadhaar Card (all of which she had submitted to her lawyer), she has been declared a D-voter by the Election Commission of India. She mentions that her husband and her parents have no issues with their

documents and only she has a case against her. Apparently, her house was burnt down in an accident and because she had been declared a D-voter she could not claim anything from the state. Her family is still in Satiya (Sootea) and it was the Foreigners Tribunal in Satiya (Sootea) that declared her a Foreign National. Records suggest that no appeal has been preferred before the High Court. Be it noted here that the notified detention centre in Central Jail, Dibrugarh accommodates only male inmates whereas Central Jails of Jorhat and Tezpur would accommodate both male and female inmates. In such a case, male and female members of the same family may be assigned to different detention centres.

By the Notification No. MU/NRC/HC-FT/537/2018/15 dated 02.05.2018 in furtherance of the decision of Hon'ble Gauhati High Court in W.P(C) No. 360 and No.1610 of 2017, the State Government directed the Superintendent Police (Border) to make references of brothers, sisters and other family members of Declared Foreigners to the Foreigner's Tribunals. Their names are not to be included in the NRC until finalization of such references. This notification was recently challenged before the Hon'ble Gauhati High Court in *Azizul Haque v. Union of India*[20]. The Hon'ble Gauhati High Court vide its Judgment dated held that there was no error or infirmity with the notification. However, judgement dated 02.05.2017 passed in W.P(C) No. 360 and No.1610 of 2017 from which Notification No. MU/NRC/HCFT/ 537/2018/15 draws reference is presently under challenge before the Hon'ble Supreme Court in *Assam Sanmilita Mahasangha v. Union of India*[21].

One of the ramifications of the detention conditions of the DFNs is their children cannot remain in the detention centre beyond the age of 6 years according to the provisions of the Assam Jail Manual. This has unwelcome manifestations in the growth and development of the child whose education may be impeded due to the lack of proper guidance from parents. Secondly, once a child is separated from the parents there is increased scope for exposure to criminality which might potentially result in

[20]WP (C) 3432/2018.
[21]WP (C) No. 562 of 2012

delinquency. In many cases, the sole breadwinner of the family, in most cases the father of the child is himself lodged in the detention centre thereby bringing financial uncertainty on the child's future have encountered several cases where children requiring care and guidance have to forgo such rights due to their parents being detained in correctional homes. One such example is the case of Rabiya Begum, who has been detained at the Central Jail at Jorhat for the past three years. In her family, it was only her ailing husband Sunti Ali, who is also detained in Jorhat, and Rabiya who were declared as foreign nationals. Her three sons Sajikul Ali (age 18), Asikul Ali (13 years) and Sobikul Ali (11 years) live in Golaghat without the supervision of any other adult. Out of her three children, only one is a major and they have been living in Golaghat, separated from their parents, without any care being given to them. While giving her representation, Rabiya broke down in tears as she stated that her children's education had come to a grinding halt due to her detention.

Rabiya's case is not an isolated incident and similar instances can be found in all the detention centres. Jarina Begum, another DFN in Jorhat, has been detained in the jail for the past two years. Her son (6 years) is disabled and was entirely under her care till she was arrested. Her daughter, Marjina Begum, for whose education Jarina has worked hard is now a graduate but cannot look for a job as Marjina has to look after her brother.

Chand Mohan Goswami, detained in Goalpara, had moved to Howli, Barpeta from Guwahati, where he once owned a shop, after his wife's death along with his two minor daughters where he worked as a daily wage labourer. Goswami has not seen his daughters and has no knowledge of their whereabouts since the time of his arrest. Expressing his fear for their safety, Goswami hopes for the day when he will be allowed to leave the detention centre so that he can track down his daughters.

The Central Jail, Jorhat, in their reply to an RTI filed by *Pratidhwani* dated 05.07.2018, stated that 3 male and 2 female children of the DFNs are residing within the detention centre of the jail with their mothers in the female ward. These children are all below the age of 6 years. As per the procedure indicated in the reply dated 06.07.2018 once a minor cross

the threshold age, they are handed over to the family members of the child (if they are willing to adopt the child). In case there are no family members available to undertake the custody of the child, he/she is handed over to the Children Home. This procedure is only followed after necessary orders are received from the appropriate authority. However, since all the children of the Declared Foreign Nationals are under the age of 6, the Jorhat Central Jail authorities have not had the necessity to employ this procedure yet. Furthermore, the information regarding the number of Children Homes that are attached to the detention centres and the conditions of such Children Homes is currently unavailable. Hence, the practicability of this procedure is still ambiguous.

The problem is compounded manifold in the case of the Rohingya children who do not have guardians outside the detention centre who could provide for them. The socio-political and economic circumstances of their detention may also contribute to exposure to potential criminality or radicalisation. It is therefore imperative that this situation is handled seriously.

These instances indicate the violation of the rights of these children under the Rights of Children to Free and Compulsory Education Act, 2009. They do not receive the protection and care of their families during these formative years either. Most of these children are not under any system of foster care or supervision, thereby increasing the risk of exposure to delinquency. The Convention on the Rights of the Child, (CRC) 1989, which was acceded to by India on 11.12.1991 postulates that every child, regardless of its nationality, immigration status or statelessness shall be treated by the State Parties within whose jurisdiction the child resides without any discrimination.

Furthermore, the Convention also mandates the protection of the best interests of the child while providing the child the right to life, survival and development. The child's right to family unity has also been recognized in Article 5, 8 and 16 of the Convention on the Rights of the Child which has been ratified by India. Article 9 of the Convention also recognizes the child's right not to be separated from their parents against their will. Article 20(1) of the Convention also provides that a child, who

is temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the state. As there is no specific framework for the prison staff regarding the administration of these DFN, there also exists no specialised framework or regulations for the treatment of minor children declared as foreigners and minor children whose parents are declared foreigners (Children have not been expressly declared foreigners by the Tribunals). The report submitted by Office of the United Nations High Commissioner for Human Rights on challenges and best practices in the implementation of the international framework for the protection of the rights of the child in the context of migration addresses this vacuum. In its finding, the OHCHR asserts that a well-defined perspective into the special needs and vulnerabilities of children are often overlooked when policies are formulated to regulation national migration and the attached legislations, due to the assumption, that these policies operate under, that all or most migrants are adults.

The Committee on the Rights of the Child, established under the United Nations Convention on the Rights of the Child to regulate and monitor its implementation, in its General Comment No. 6 on the "Treatment of unaccompanied and separated children outside their country of origin" provides for a comprehensive direction to the Party States and other stakeholders, including assigning a guardian or a legal representation to such children, and such assigned guardian much be well equipped to safeguard the best interests of the child.

In the recent judgment passed by the United States District Court in the Southern District of California, in the case of *Ms. L.; et al v. U.S. Immigration and Customs Enforcement ("ICE")*[22] this issue of children being separated and detained from their parents was discussed extensively. The Court addressed the concern that detention of an alien child and separation of families poses a serious risk to the child's welfare. Asserting that the State acting within its powers to detain individuals lawfully and apprehending those who illegally enter the country are well within its

[22]Case No.: 18cv0428 DMS (MDD)

administrative powers, the Court declared that in spite of these powers, the right to family integrity is still mandatory for the detainees. The fact that no due procedure had been applied in the context of this case to (a) track the children after they had been separated from their families, (b) establish communication between the separated parents and their children, (c) reuniting the parents and children after they had served their criminal sentence, was condemned by the Court as a 'startling reality'. In our observations, in the detention centres of Assam, there are several instances similar to the situation of separation of families at the US border.

VI. Illegal Detention of Mentally Disabled DFNs

There are various provisions under the Prisoners Act, 1900 and the Assam Prisons Act, 2013 which provide for the treatment and removal of mentally ill prisoners to mental asylums in the State. In *Sheela Barse v. State of Maharashtra*[23], the Hon'ble SC stated that people suffering from mental health issues should be taken proper care of and should be subjected to adequate treatment and if required sent to mental health hospitals.

During the visits of the *Pratidhwani* team, as noted above, the condition of mentally ill inmates was found to be poor, in general, in various correctional homes of Assam. To that effect, a Public Interest Litigation titled *Studio Nilima: Collaborative Network for Research & Capacity Building v. State of Assam*[24] has been preferred before the Hon'ble Gauhati High Court. The affidavit filed by the Government of Assam dated 09.02.2018 in the said PIL demonstrates that a large section of people with mental health problems are incarcerated in the prisons.

The relation between the prison environment and the debilitating effect it has on the mind is well documented. The nature of their detention and the lack of any trained medical/clinical expertise is a fertile ground for mental illness among the DFNs of the notified detention centres. Absence of trained in-house counsellors and psychiatrists attached to the jails is a perennial feature across all the centres that have been visited. This is a

[23](1987) 3 SCC 373

[24]PIL 55 of 2017 in the Gauhati High Court.

contravention of the directions issued in the judgement dated 15.09.2017 in *Re- Inhuman Conditions in 1382 Prisons*[25], by the Hon'ble Supreme Court. In point 5 of para 57, the Court directs State Governments to appoint counsellors and support persons for counselling prisoners.

In the case of DFNs, none of the above-mentioned rules and regulations are followed. Since they are neither treated as convicts or under trial prisoners and since there are no other guidelines made available for their detention period. This has serious paralyzing effect on the mental health of such persons, particularly women detainees. This fact has also been emphasised in Mr. Mander's Report to the NHRC. Records officially attained from the Jail Authorities indicate the number of mentally ill detainees undergoing treatment at Lokapriya Gopinath Bordoloi Regional Institute of Mental Health, Tezpur to be 58 as on 31.05.2018.

During *Pratidhwani*'s visit to Tezpur Detention Centre, the team came across a woman detainee, among several other cases, who is suffering from serious mental disability, which according to other inmates was developed in course of her indefinite incarceration. It may be asserted that separation of family members, no knowledge about their whereabouts often leads to irreparable mental damage. On the contrary, because of the lack of a legal regime to regulate the DFNs, they are not provided the facilities which other mentally ill prisoners are provided according to the laws, rules and regulations. Continued incarceration of the mentally ill inmates in the correctional homes and lack of proper medical care and attention have grossly affected the mental conditions of such persons and if immediate steps in terms with the rules are not taken the same would exacerbate the situation.

VII. Financial & Infrastructural Constraints on Jail Administration

The impugned notifications providing for detention of DFNs and its subsequent notifications have cast an additional burden on the prison authorities. It is essential to note that this state of affairs leads to the existing resources, from funds to infrastructure, being split among the

[25]WP(C) No. WP (C) 406 of 2013

inmates and the DFNs. In the absence of any extra funds from the Government of India, the prison authorities are placed in a difficult position of fending for hundreds of additional detainees with the same resources. This has direct ramifications on both infrastructural conditions and human rights of the DFNs as well as other inmates.

To cite one such example, both the notified detention centres in Tezpur and Goalpara have no segregation between detainees of the detention centre and the inmates of the correctional homes for lack of space. For much the same reasons, common areas are shared between detainees and inmates across all the detention centres we visited. To that effect, the *Pratidhwani* team has been informed that the Central Jail, Tezpur has preferred a representation to the Assam State Legal Services Authority (based on copy of minutes of the Under Trial Review Committee, Sonitpur, Tezpur obtained through RTI held on 25.02.2016 and similar resolution passed on 29.09.2016). The corollary to this situation is that the effect of this funds crunch with respect to infrastructure and the general amenities are felt by the inmates and the DFNs in the notified detention centres. Funds are allocated by the Home Department, Government of Assam for the administration of jails in Assam. The Inspector General of Prisons, Assam, which receives the actual allocation, then disburses it to the individual jails.

According to the Audit Report on Social, General and Economic (Non- PSUs) Sectors for the year ended 31.03.2016 of the Comptroller and Auditor General of India, in the period from 2011-12 to 2015-16, the total provision of funds for the administration of jails was Rs. 322.54 crore. In our visits, most correctional administrators have mentioned to a paucity of funds being disbursed to the jails. However, in spite of these contentions, the savings from the allocation amounted to Rs. 49.15 crores. All the notified detention centres that have been visited by the team presented with a long-drawn process for allocation of funds for infrastructure improvement both for the inmates and the jail authorities. This situation also percolates to the condition of the DFNs who are lodged in the same detention centres. Taking into consideration the current state of the DFNs where they do not have access to any means of self-sufficiency, the

Government of India is duty bound to provide certain minimum standard of living to the foreign nationals, so that their right to live with dignity under Article 21 of the Constitution of India is not violated.

Conclusion

As is evident from the above contentions, India has no specific bilateral agreement with Bangladesh on the issue of illegal migrants or deportation till date. In such a case, the detention of the DFNs, who are allegedly Bangladesh nationals, is almost indefinite as the deportation process becomes extremely long drawn. This also implies that the stay of the DFNs in the notified detention centres is inevitable in the absence of alternative arrangements. Such a situation naturally presents conditions of human rights violations. The overburdened jail administration is also placed at a precarious position due to lack of state funds, facilities and regulations to deal with this sudden responsibility of accommodating a class of people who are neither convicts nor under trial prisoners.

The State of Assam is placed at a critical juncture with the publication of the National Register of Citizens due early next year. It is definite that a large number of persons who had applied for inclusion of names in the NRC would be delisted in the final NRC. Such persons will be required to file their claims before the Foreigners Tribunal and on disposal of such claims and/or objections; the final NRC is scheduled to be released in early 2019. This opens up the prospect of lakhs of persons who would be required to be detained as DFNs and in absence of appropriate detention centres would be detained in various notified detention centres within the State of Assam. It is a natural inference that the magnitude of this issue will eventually increase manifold and a huge crisis of violation of human rights is imminent.

This is because the total capacity of all the correctional homes in Assam amounts to a meagre 8888 according to the website of the Inspector General of Prisons, Assam. On the other hand, the separate detention facility that has been proposed in the Dakurbhita area of Goalpara district is envisaged as a 3000-seater facility. All of these facilities put together

would not be able to accommodate even a tiny fraction of the projected number of detected foreigners if the Government of Assam follows the present stance with respect to detention as reflected in its notification. Moreover, accommodation of the DFNs in correctional homes itself would amount to illegal detention in violation of Article 21 of the Constitution of India.

As has been noted earlier, the indefinite incarceration of the foreigners through a process which has several legal lacunae is a violation of the procedural due process guaranteed to persons under Article 21 of the Constitution of India. The detention of DFNs in notified detention centres, some of which are already suffering from perennial overcrowding is a violation of human rights. It is also a fact that such detention leads to an environment within the correctional homes which has the potential to fuel communal tensions due to the existing socio-political realities. In the closed environs of a correctional home where most of the DFNs feel aggrieved and frustrated, volatile situations may quickly escalate into law and order situation which the under staffed authorities would find difficult to handle.

In fact, there is ample evidence that this frustration is already at boiling point. On 13-14.11.2017, 150 convicted foreign nationals at the detention centre in District Jail, Goalpara went on an indefinite hunger strike demanding that their requests for deportation be urgently processed. In March, 2018, the DFNs in the detention centre at Goalpara also staged an indefinite hunger strike with a slew of demands which included transfer to their native district so that their families do not have to travel extremely long distances. As the final list of the NRC is only a few months away, the stance adopted by the Government of Assam in detaining any person against whom an opinion is rendered by the Foreigners Tribunal is not practicable, keeping in mind that they would ultimately be lodged in the correctional homes. In the present scheme of things, it would generate a humanitarian crisis.

Pratidhwani's work in the correctional homes in Assam and the engagement of its team with the inmates placed it in a unique position to identify the crisis that the foreigner's issue has created within correctional

homes. Infact the magnitude of the administrative and legal chaos that had been created by the incarceration of DFNs came as a surprise owing to the fact that it has been mostly discussed in media reporting from either the perspective of regionalism or human rights.

Studio Nilima's I.A in Re-Inhuman Conditions in 1382 Prisons before the Supreme Court of India

It was therefore felt necessary that some legal intervention in this matter was urgently required being mindful of the fact that there was a marked regulatory and administrative silence in the area. Studio Nilima's Interlocutory Application (I.A) in *Re-Inhuman Conditions in 1382 Prisons* (hereinafter referred to as 'Inhuman Conditions matter')[26], before the Supreme Court of India was mentioned before a bench of Madan B. Lokur J. and Deepak Gupta J. on 1st August, 2018. Ms. Uttara Babbar, Advocate on Record at the Supreme Court of India appeared pro bono in the matter for Studio Nilima.

The application came up for hearing before the Bench the next day, that is, on 2nd August, 2018. The Court issued notice in the application and noted that all the prayers in the application were not within the ambit of the areas being considered in the Inhuman Conditions matter. However, the living conditions in the detention centres and its ancillary issues were clearly relevant. The Court noted that detention centres were not existing independent of prisons in Assam. It therefore sought replies from the State and the Central Government on the facilities and living conditions of the persons in the detention centres. On the point of legal aid, Mr Surinder S. Rathi, Director, NALSA who was present in court submitted that legal aid was being provided to the persons housed in the detention centres. Noting that the subject of access to legal aid was a part of Article 21, the Court also directed that the ground level scenario of access to legal aid may be confirmed. The application was subsequently listed for 24th August, 2018.

The application was not heard on 24th August as the State and the

[26]Writ Petition (Civil) No. 406/2013

Union sought further time to file their affidavits and the matter was listed for 27th August. The application again came up for hearing on 29th August by which time the both the State and the Union sought further time for one week to respond. In the meantime, the amicus curiae in the Inhuman Conditions matter, Mr. Gaurav Agrawal, Advocate, Supreme Court of India visited the detention centre in District Jail, Goalpara and submitted a note detailing his observations to the Court.

When Studio Nilima's application was heard on 12th September after both the State and the Centre had submitted their affidavits, the Court took into account the issues highlighted in Mr. Agrawal's note.

1. Lack of guidelines for detention or detention manual: It was noted that the Union of India had stated that the guidelines for keeping DFNs in detention centres were under process and were being formulated. The Additional Solicitor General (ASG) Mr. A.N.S Nadkarni appearing for the Union of India stated that manuals for detention centres containing these guidelines will be prepared. In view of this, the Court directed that the detention manual be prepared at the earliest.

2. Construction of separate and exclusive detention centres: The Union of India stated before the Court that an amount of Rs. 46.51 crore had already been sanctioned to the State Government of Assam for the construction of the detention centre. It also referred to the fact that a communication had been sent on 10th September, 2014 to all the States to set up exclusive detention centres for the DFNs and CFNs. The State of Assam on the other hand stated before the Court that it had earmarked land for the construction of a detention centre in Goalpara itself. As a result, the Court directed the State of Assam to ensure that the construction of the detention camp is carried out at the earliest.

3. Separation of family members: The Court noted from Mr. Agrawal's submission that if a child is below six years of age, then he is kept with the mother. If the child is above six years of age and if the child is female then she is kept with the mother but if the child is male, he is kept with the father. In the opinion of the Court, separation of families does not serve any purpose and is instead detrimental to family life. The State of Assam has stated before the Court in its affidavit that necessary

arrangements can be made to accommodate family members of DFNs in the same detention centre. Infact transfer of 5 male DFNs from Central Jail, Tezpur to Central Jail, Kokrajhar is being processed on their own request to be reunited with their families.

4. Conversion of kitchens from firewood to LPG: The Court directed the State of Assam to look into the issue of providing LPG connections to the detention centres and also the other facilities enumerated by the Ministry of Home Affairs in its letter dated 9/10th September, 2014.

The Court directed Mr. Tushar Mehta, Additional Solicitor General appearing for the State of Assam that conversion of the former Central Jail premises in Guwahati (located in Paltan Bazar) which has been lying vacant into a detention centre may be considered.

Subsequently, the matter came up for hearing on 20th September and Mr. Tushar Mehta, Additional Solicitor General appearing for the State of Assam submitted that steps have been taken to set up the new detention centre in Goalpara and it would take about a year to establish it. He also submitted that some families have been reunited. Ms. Uttara Babbar appearing for Studio Nilima submitted that hardly five families have been re-united since the Court has taken up the matter.

The State of Assam was directed to file an affidavit indicating the position of the new detention centre and separation of families. The Court directed the State to include the position of the detention centre/jail in Goalpara particularly with regard to the living conditions of the detenues, medical facilities and also the availability of cooking gas-LPG connection in replacement of fire-wood for cooking.

The Court directed the Union of India that the detention manual should be ready within two months. Mr. A.N.S Nadkarni, ASG appearing for the Union of India clarified that some circulars have been issued by the Ministry of Home Affairs laying down guidelines with regard to detention centres which would hold the field till the detention manual is finalized. The Union of India was directed to file an affidavit in this regard.

The matter came up for hearing on the 31st October, 2018 and orders were passed on the following issues:

1. Setting up of new Detention Centres: Broader details of the

tender as well as time for construction which has not been indicated in the State's affidavit should be provided to the Court.

2. Re-union of Families: Since the State has stated that 47 detenues will be reunited among the different Detention Centres. Studio Nilima presented 15 names of women DFNs in the District Jail, Kokrajhar who needed to be reunited with their families. The Court has directed the State to clearly indicate how much time will be needed to carry out the transfer since it appeared to the Court that no purpose was being served in separating the families.

3. Cooking Gas facilities in Detention Centre: The Court directed that the process of providing LPG pipeline and renovation of District Jail, Goalpara must be completed within three weeks. Details of the steps being taken for providing LPG high pressure pipeline in Tezpur, Silchar and Kokrajhar Jail cum Detention Centres must be provided in the detention centres.

4. Medical facilities in other Detention Centre: The details of medical facilities in other detention centres should also be stated on affidavit.

The application subsequently came up on 2nd November, 2018 and orders were passed on the following issues:

1. Setting up of New Detention Centres: The Court mentioned that it expected the State to adhere to the timeline of 31.08.2019 of setting up the new detention centre especially keeping in mind the fact that the executing agency is the Assam Police Housing Corporation Ltd.

2. Reunion of families: The Court directed that the reunion of the 47 DFN/family members must be completed within seven days and in any event within a maximum period of ten days since substantial time has already elapsed.

3. Cooking gas facilities in detention centres of Tezpur, Silchar and Kokrajhar: The State of Assam must adhere to the timeline stated in the affidavit of providing LPG high pressure pipeline in these three jails-cum-detention centres within the financial year 2018-19.

4. Medical facilities in other detention centres: The Court took

on record the affidavit of the State of Assam on the state of medical facilities in the detention centre.

5. Preparation of Detention Manual: While the Detention Manual/ Guidelines are under preparation by the Union of India it must ensure that the circulars/guidelines issued by it are adhered to by the State of Assam.

With this order, the application was disposed of with regard to these particular issues while for the other pending issues the application has been listed for February. The final judicial determination of the DFN issue therefore remains alive in the context of the major issues even as it attracts media attention across the country. In the meanwhile, the *Pratidhwani* team at Studio Nilima continues to document the issues relating to detention of DFNs in the correctional homes of Assam and actively pursues possible state and legal intervention where possible.

BEST PRACTICES IN CORRECTIONAL ADMINISTRATION: AS SEEN IN ASSAM'S CORRECTIONAL HOMES

Studio Nilima

In the course of *Pratidhwani*'s work it has interacted with several key stakeholders of the correctional administration in the state of Assam cutting across the rigid rank hierarchies that often form an indispensable part of uniformed services. The approach of the correctional administration has been generally positive and at times even entrepreneurial as it strives to make noticeable impact with limited resources. In its work, *Pratidhwani* has conducted interviews and interacted with members of the administration ranging from the IG(Prisons) Mr. Ranjan Sharma, ACS to assistant jailors and warders in the district jails. It is worth noting that the work and zeal of some of the members of the administration have resulted in several good practices being implemented in the correctional homes.

Central Jail, Jorhat

The administration of Central Jail, Jorhat has been successful in creating an environment which is pleasant and is conducive to reformation and reflection. Mr. Sanjib Kumar Chetia (currently Superintendent of Central Jail, Dibrugarh) and his team have been instrumental in bringing immense change in the environment at Central Jail, Jorhat during his term as Jailor in Jorhat.

To cite just one example, as one steps into the central courtyard of

Central Jail, Jorhat it is impossible not to notice a large board in both English and Assamese which contains the primary directions of the Supreme Court in *D.K Basu v. State of West Bengal* (with regard to arrest and detention). The beautification programme undertaken at the premises of the correctional home has resulted in a positive environment while also creating a platform for the jail inmates to showcase their talents. This has also resulted in the preservation and showcasing of the old artefacts from the colonial era which were lying in the jail premises. The correctional home also implements a programme coordinated with the Industrial Training Institute that provides a 30-day skill training course to the training course to the inmates.

The correctional home at Jorhat has emphasised on the involvement of civil society in improving the infrastructure without being solely dependent on the government. There are 39 water sheds which are being used for harvesting rainwater and to meet the water needs of the inmates. A tank has been newly constructed in 2017 and water is drawn to the tank by boring method. This was done under the aegis of the Ld. District and Sessions Judge, Vinod Kumar Chandak and was donated by Makhan Gattani, Liladhar Gattani and Lokesh Gattani of Jorhat in the fond memory of their father Shiv Dayal Gattani.

The correctional home at Jorhat has housed several luminaries of the freedom struggle during its colonial existence. One such illustrious occupant has been freedom fighter Pitambor Deva Goswami. The cell where Pitambor Deva Goswami was lodged during his incarceration at the hands of the British has been beautifully preserved. It is a red painted semi-Edwardian styled brick house cum cell with a small veranda. The cell has been renovated by the authorities and a huge portrait of Pitambor Deva Goswami along with a board giving a brief bio note of his life has been hung inside the cell. In general, the correctional home at Jorhat displayed several best practices in terms of promoting team work among inmates in ensuring proper sanitation, awareness programs relating to menstrual health and providing robust recreational facilities like a functioning gymnasium.

District Jail, Mangaldai

Pratidhwani's visit to the correctional home at Mangaldai was a

revelation in terms of the impact that education can have on the lived experience of inmates. As will be evident in the detailed inmate profiles that follow, skill development and educational programmes are not mere rhetoric or tools of mechanical engagement in a 'prison' environment. Rather they become anchors of sustenance for inmates who look at opportunities for meaningful engagement as a means of reformation.

Arup Jyoti Deka

Arup is one of the inmates who is pursuing graduate level education from inside the jail. As he begins to recount his life and experience at the correctional home, he emphasizes on how the setting up of an education center in the jail has been a watershed moment in the lives of the inmates as it finally allowed them to have hopes about their futures.

Arup hails from Nuzura village in Darrang district under P.S Mangaldai (P/O Deonomori). Arup mentions that he entered jail custody on 21st March, 2012. Before being incarcerated he was in the second year of the Higher Secondary course and was supposed to appear for the finals very soon. His education therefore remained in limbo as soon as he was incarcerated. He belongs to a family of four children of which he is the third eldest.

Arup recounts that it was initially difficult to pass each day in jail. However, with every passing day it was difficult to pass each day in jail. But he received adequate support from the supervisors, authorities and his fellow inmates. Being encouraged by the Mr. Munindranath Sharma, Superintendent, Mangaldai District Jail, Arup and some fellow inmates organised themselves into a team to work for social welfare and development in the correctional home. As a result of this effort, the wall magazine of the correctional home called Karalipi was inaugurated on 15th August, 2015. Arup also mentions that it was former Superintendent Mr. Jundeb Chaudhury who had initially planted the idea of a wall magazine in their minds. He points out the fact that something as simple as a wall magazine can have great effect on the morale of the inmates as they have taken ownership and thereby responsibility of maintaining it. Arup also proudly mentioned that the name and reputation of the Mangaldai Jail had increased because of the wall magazine.

As a result of initiatives like Karalipi several inmates expressed their desire to continue their education further. It was thought a KKHSOU (Krishna Kanta Handiqui State Open University) Centre at the jail would be helpful for this purpose and the inmates expressed the same desire to the superintendent as well as the office staff of the jail. The Superintendent Mr. Sharma, Dr. Dibyajyoti Rajmedhi (the doctor of the correctional home), pharmacist Mr. Biswajyoti Borah encouraged this initiative and contacted Mr. Manoj Sharma, then registrar of Brilliant Academy and Mr. Birinchi Kumar Borah, assistant registrar of KKHSOU. As a result of these efforts the KKHSOU centre was established in the correctional home.

Eleven inmates of the correctional home enrolled in the two-year curriculum and were able to successfully clear the exam. Arup himself secured the first position among the correctional homes in Assam in the first exam of the first year with an aggregate of 75.7%. In the recently declared results of the second-year exam, Arup secured the first position in Assam and two other inmates, Dhrubajyoti Hazarika and Illias Purty secured the 6th position and 10th position respectively. Of the seven who gave the examination, two students passed with first division, one with second division and one with third division.

Arup states that he has completed 7 years of his sentence and hopes to spend the rest of them in learning various things. His primary motivation for continuing his study is that after he gets out of jail he will be able to contribute to social work which he was involved in even before being sent to custody. His objective will be to ensure that he people understand the dangers of incarceration and breaking the law and raise awareness about the necessity to avoid breaking the law. Arup concludes by saying that he was thinking about writing various books, from the experiences of his life, and have already written parts of them.

Illias Purty

Illias Purty states that he came to the correctional home on 1st of April, 2009 in a witch killing case. Before coming to the correctional home, he had worked in the factory of a tea estate as sub-assistant. Illias has a wife and small child and old parents who stay separately. While he received support

from his fellow inmates and other organisations during his early days in the correctional home, he still remained skeptical. However, Mr. Brajen Das, the then Jailor encouraged him to continue working in the correctional home and promised him that he would increasingly be allotted work of increasing responsibility. As a result, he was soon given work in the pharmacy during the course of which he expressed his desire to continue his education to the authorities.

Subsequently when the KKHSOU centre was started in the jail he enrolled in the Higher Secondary course where he secured the 10th position among correctional homes in the first year. He soon enrolled himself in the graduate course where he wishes to excel and inspire his fellow inmates to do better too. Illias tells us that he has only one aim in life which has been reinforced by his exposure to education, that is educating his own child. He tells us that self-realisation having dawned on him he spends 2 hours every morning studying and between work. After counting at 1pm every day, all the inmates enrolled in the KKHSOU courses sit inside the jail and plan their studies and exams in the library.

Dhruba Jyoti Hazarika

Dhruba states that he came to the correctional home on 21st March, 2012. Coming from Nuzura village in Darrang district, Dhruba says that he was confused about how he would be able to spend his life in jail. However, the opening of the KKHSOU center in the jail has provided him a constructive option to spend time in the correctional home along with providing him the option of securing his future after his sentence is over.

In the first-year exam, Dhruba was among the 11 students who enrolled in the centre and secured 6th rank among correctional homes in the state in the Higher Secondary course. While he remains perplexed that he did not succeed in appeal either in the High Court or the Supreme Court, Dhruba remains hopeful of continuing his education so that he can assimilate into society as a productive member after he has served his time.

Central Jail, Tezpur

The correctional home at Tezpur bears witness to the fact that a positive

attitude among the leadership in a correctional home can have a huge impact on the atmosphere. Mr. Mrinmay Kumar Dawka, Superintendent at the central jail stated to the *Pratidhwani* team during its visit that in improving the infrastructure of the jail he has always been insistent on the jail looking like an ashram as opposed to a place of incarceration as it aids in the process of reformation. In changing the atmosphere of the correctional campus, Mr. Dawka has insisted on displaying inspirational quotes on the jail campus like "*Karmai Dharma*" at strategic places. The lush gardens within the campus bear testimony to the change in attitude and policy in the administration of the correctional home.

The building which functions as the school inside the campus is named after Krishna Kanta Handique. The same building also functions as the digitised legal aid clinic from Monday to Saturday, 11 am to 3 pm. The clinic was inaugurated by the Ld. District and Sessions Judge, Mr.Ashok Kumar Borah.The clinic also houses a small library which houses a few Assamese, English, Hindi and Bengali books. While most of the books in the vernacular languages are either religious or spiritual books like Gurudpuran, Bhagavad Gita, etc., the English column includes titles like Shadow in Cages, Essentials of Discipline, etc.

Central Jail, Guwahati

The Central Jail at Guwahati too has seen a positive impact with a KKHSOU centre being instituted in 2004 which offers courses on Mass Communication. Pyena Sharma and Sargam Rabha, who are inmates have been able to get Master's Degree in the first class.

Moreover, there has been LED Bulb training program, whereby 30 persons have completed the training and attained certificates. Along with that there has been a production on around 700 LED Bulbs. Organisations like Manav Sarathi in collaboration with Director, ASTEC and Department of Instrumentation, Gauhati University to impart vocational skills to the inmates. Two batches of students have successfully completed the course in the two months that it has been running.

There is also an electrician training programme under the skill development programme. A bamboo cane industry was set up in 2017,

July. The female members of the jail are trained in cutting, knitting and tailoring. The State Skill Development Authority has also contributed and set up tailoring training for both male and female inmates. The marketing of these products happens at a kiosk which has been createdin front of the jail.

Soon, IGNOU also has set up a center in the jail with a Masters of Political Science course. Of the KKHSOU course, Purna Sharma got first class, second rank in 2012 whereas Sargam got first class,first rank. Sankar Narayan Nandi and Sanju Bordoloi qualified BMC whereas two others qualified BA, PG DC and PG DY (Diploma in Yoga).

Students at the KKHSOU centre also teaches to work in Legal Aid Service as para-legal volunteers and also to teach. A wall magazine, by the name of Spandan, exhibits articles, poems and stories. There is also a music school named Suror Pansol which also teaches keyboard to the students. 10/12 students attained first year,first class in Bhatkhande. The jail has received gifts and donations from various institutions and organizations, including special quality table, flute set etc. Moreover, a library has been set up in the jail, which has about 750 books subscribes to several daily newspapers.

Our Contributors

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Abantee Dutta is the co founder of Studio Nilima: Collaborative Network of Research and Capacity Building, a collective of researchers, lawyers and law students based in Guwahati, Assam, India. Presently a Masters candidate at the School of Conflict Analysis and Resolution, George Mason University, USA, her interests lies in post conflict reconstruction of societies, with specific focus on Assam

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Trishna Devi has completed her BBA. LL.B. (5 years integrated course) from NEF Law College, Guwahati. She is presently working as a legal associate in Pratidhwani, Free Legal Services and Awareness Centre, a unit of Studio Nilima. Her main interests lie in Human Rights Law especially its translation into the municipal laws of a State. She is also keenly interested in Criminal

Law and Corporate Law. As a lawyer she firmly believes in that society and law should be syncretic to each other and law should evolve with the society. She has firmly believes that efficient and quality legal service should be available to all classes of society. She is an amateur storyteller, who loves to turn her plots to stories and tell others. She is deep fan of mythology and the paranormal and loves to read a range of genres in her free time, especially works of great philosophers.

Sourabh Roy

Sourabh is a fourth year B.A. LL.B (Hons.) student at National Law University and Judicial Academy, Assam. He is interested in a variety of topics which lies within a spectrum of environmental protection and technological advancement. Yet, he has a severe penchant for public policy and legal research. It is his conviction that these would serve him in good stead to have a better understanding of the complexities in the society, which would be beneficial in chalking out effective and localized solutions. He has also worked as a volunteer with IDIA (Increasing Diversity by Increasing Access), which he feels, has made him realize the privileges and opportunities which he used to take for granted. In addition to these, Sourabh likes calling himself a football fanatic and a gallivanting gastronome besides being an ardent numismatist and an eclectic reader. Sourabh's paper on the service conditions of prison administrative staff is the result of his research fellowship at Studio Nilima.

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Krishanu is currently pursuing B.A. LL.B. (Hons.) in National Law University and Judicial Academy Assam. His interests lie in Constitutional and Business Laws. Krishanu is an avid debater and has won and chaired many Model United Nation conferences and Parliamentary Debates. After graduation, Krishanu wants to litigate.

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About Studio Nilima

Studio Nilima is a not for profit research collective based in Guwahati. It seeks to be at the forefront of engaging and initiating dialogues on the contemporary public policy concerns of the northeast of India. It brings together lawmakers, thinkers, learners, policy makers, academicians, and practitioners from across the arts to unfold new ways of learning, thinking, research and practice.