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Solitary Confinement: A Comparative Analysis

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The prevalence of solitary confinement as a form of punishment is still there today in many developed and developing nations despite the counter effect that it has on the prisoners and as a result on society. There is a question on the effectiveness and efficacy of implementing this form of punishment. It becomes important to analyze why it is still present in the Penal Codes of nations like India which has been slowly progressing towards a restorative form of punishment. Moreover, even with similar Penal Codes, nations like Myanmar and Pakistan use this form of punishment in a different way from India very blatantly. This article seeks to analyze how and why there is a difference in the implementation of the law through a keyhole comparison. Through a secondary analysis of all the reports available, irregularities have been pointed out in the usage of this form of punishment in all the three nations and the use of it as a tool for suppression. The misuse and malpractice of this punishment are what leads us to the conclusion that this must be removed from the law of these nations.

Keywords: *solitary confinement, penal code.*

INTRODUCTION

The impact of solitary confinement has been debated since the nineteenth century when its damaging attributes came into the picture. A form of punishment that seeks to physically and socially isolate a prisoner in 4 walls for a maximum period of the day is Solitary Confinement. Its an Umbrella Term that includes a range of denominations which includes but is not limited

to protective custody, disciplinary segregation, restrictive housing, and supermax.¹A universal definition is not there for the term solitary confinement and there are considerable varieties in policies, regulations, and practices² but the objective remains the same which is to exert social control over the person who is a prisoner in the extreme form.

The effects that solitary confinement has on both the mental and physical health of the prisoners are not hidden from anyone. Several research has proved again and again that the aggravated effect of keeping a person isolated without any contact with the outside world is cruel and barbaric. Though this is the generalized version that prevails, prisoners have come forward and shared their horrifying ordeal in solitary confinement. These include depression, hopelessness, anxiety and stress hallucinations, paranoia, outbursts of violence, psychosis, and suicidal tendencies. The United States is one of the developed nations where Solitary Confinement is blatantly prevalent as a form of punishment or as a form of torture. Again, though it is used even today, it has been proved that there has been no positive effect on the prisoner as a whole, rather it violates the basic human right that a prisoner has even though State has a right to curtail the liberty of the prisoner.

The revised United Nations' Standard Minimum Rules for Treatment of Prisoners (Mandela Rules) is referred for guidance for the treatment of incarcerated people. These rules have specifically prohibited the use of prolonged solitary confinement for more than 15 days. It also mentions that it should be used as a last resort and not just any minor offence or disciplinary purposes that happens inside the prison. The United Nations Rules for Protection of Juveniles Deprived of their liberty and the Bangkok Rules for Treatment of Women Prisoners prohibit the use of solitary confinement as a form of punishment for women and children. Though these are the international standards that are set, rarely they are incorporated into the municipal laws of a State.

The Penal Codes of India, Myanmar, and Pakistan are essentially similar as they originated from their colonial rulers. So, the provisions for solitary Confinement are also the same.

¹ A. Shames, J. Wilcox, & R. Subramaniam, *Solitary Confinement: Common Misconceptions and Emerging Safe Alternatives* (VERA Institute of Justice, New York 2015)

² RG Morris, 'Exploring the effect of exposure to short- term solitary confinement among violent Prison Inmates.' (2016) 32 (1) J Quantitative Criminal, 1-22

However, each of these nations has adopted the provision in a different way taking into account the government, the existing jurisprudence, or the dominating religion. These subtle differences have had different impacts. Solitary Confinement, though allowed in each of these nations, the level of its use is on extreme ends. Through this project, an effort has been made to throw light on the similarities and differences of these nations.

ORIGIN OF SOLITARY CONFINEMENT

The eastern States Penitentiary in Philadelphia is where the first experiment on solitary confinement was done in 1829. The belief behind this type of punishment was that prisoners will be isolated from the outside world with a Bible that will give them time to contemplate and then realize the enormity of their actions. They also saw it way to prevent the cruel punishments of that time. It was an experiment that was initiated by the Quakers expecting the result that the prisoners will be able to rehabilitate themselves and will return to society as morally clean citizens.³This led to different nations following in the footsteps and establishing Pennsylvania modern prisons or various systems resembling it. Though the particulars regimes of all these regimes were different there were similarities which included around 23 hours in a cell where the prisoners slept, ate, worked, and washed. There was also the provision of prison schools and churches but they were also inherently flawed.

The results of the experiment were completely opposite from what it was thought to be. Negative effects were seen on the body and mind with the prolonged use of solitary confinement which resulted in the Pennsylvanian model getting out of use by the 19th century. But later it was found that it was prevalent during the cold war and WW II period as a coercive tool to manipulate soldiers. Though it was characterised as one of the most torturous punishments, it never fully vanished as a form of punishment.

SOLITARY CONFINEMENT IN INDIA

In the nineteenth century, separate confinement was used by the Britishers to isolate prisoners. This was different from solitary confinement which involved complete isolation of the person.

³ Peter Scharff Smith, 'A Religious Technology of the Self : Rationality and Religion in the Rise of Modern Penitentiary' (2004) 6 (2) Punishment and Society, 195-220

Separate confinement meant the incarceration of the prisoner in a separate cell with visits from the prison officer or the chaplain.⁴With colonialism, Solitary confinement was used as a form of punishment in India and was incorporated into the IPC.

Section 73 and Section 74⁵ of the Indian Penal Code mention solitary confinement. It essentially provides that solitary confinement can be awarded by the court when the accused has committed the offence which amounts to rigorous punishment. The term of confinement should not exceed three months where the time period is provided according to the length of the incarceration. Section 74⁶ sets out a limitation on the period of solitary confinement. A convict can only be placed in solitary confinement only in two instances, for discipline and if they are facing capital punishment. Moreover, Section 30 (2) of the Prison Act⁷ gives jail authorities the power. Exactly similar terms are also found in the Penal Code of Pakistan and Myanmar as Myanmar's Penal Code is a copy with minor variations of the Indian Penal Code, 1860.

There are pertinent interpretations and rules laid down by the courts of India in different judgements regarding Solitary confinement. One of the most important cases is *Sunil Batra v Delhi Administration*.⁸The Supreme Court in this case held that though the prisons act gives the power to the prison authorities to put the accused in solitary confinement, it should be on the ground that the prisoner is under death sentence which is finalised. Furthermore, if there is a total deprivation of interaction with other co- prisoners it would amount to a violation of Article 21 and Article 19⁹.

In the case of *Charles Sobhraj Superintendent, Central Jail*¹⁰, the Supreme Court has specifically mentioned that fair procedure must be used for harsh isolation of convicts through cellular confinement in the absence of which Article 21 of the constitution should not be violated. Similarly, in another case, SC has mentioned that only in exceptional cases prisoners

⁴ Miles Ogborn, 'Discipline, Government and Law: Solitary Confinement in the Prisons of England and Wales 1830-1837' (1995) 20 (3) *The Royal Geographical Society*, 295-311

⁵ Indian Penal Code, 1860, ss 73 and 74

⁶ Indian Penal Code, 1860, s 74

⁷ Prison's Act, 1894, s 30(2)

⁸ *Sunil Batra v Delhi Administration* (1979) 4 SCC 409

⁹ Constitution of India, 1950, art.21 and art.19

¹⁰ *Charles Sobhraj v Superintendent, Central Jail* (1978), AIR 1514

can be kept in solitary confinement. Moreover, prisoners must not be kept in solitary confinement for long periods of time. Only in the rarest of rare cases, prisoners can be kept in solitary confinement according to Article 21 of the Indian constitution. Along similar lines, in the case of *Shobhraj Chauhan v UOI*, it was held that solitary confinement prior to the rejection of a mercy petition by the President is unconstitutional.

From the above instances. It is apparent that Indian Courts have recognised the rights of prisoners regarding solitary confinement. Right against solitary confinement has been recognised under Article 21 by the Supreme court.¹¹ It has been declared an “anarchic and remorseless practice which can cause enormous torment, agony and anxiety” to prisoners.¹² Though, on the face of it, this appears as if the system as a whole is against solitary confinement, there are instances where solitary confinement is used as a tool to harass the prisoners. There is still debate happening on whether imprisonment in for example, ‘anda cells’ would classify as solitary confinement or not. It has been claimed that the cell is used for the protection of inmates but in effect, it has a legally ambiguous nature.¹³ Several numerous former Anda cell detainees have mentioned the horrendous conditions in these cells. The most horrifying description was given in the context of Arun Ferreira’s case in 2014. In the most recent instance, Gautam Navlakha was moved to an anda cell. This is a violation of the Right to dignity under Article 21 as it was held in the case of *Maneka Gandhi v UOI*. There have many instances where courts have favoured solitary confinement in India as a way to discipline the prisoners. Though the division bench of Uttarkhand High Court has mentioned that the period to keep a convict sentenced to death should be the shortest possible time after the convict has exhausted all possible resources, this is not followed in all the cases and by all prison officials. The 42nd Law Commission Report has recommended the abolition of solitary confinement and its removal from the Indian Penal Code. Even though the rights of prisoners are recognised in India, the instances where convicts are tortured or are kept in inhumane conditions are seen.

¹¹ *Unni Krishnan & Ors. v State of Andhra Pradesh* (1992), AIR 2178

¹² *State of Uttrakhand v Mehtab, Sushil and Bhura* (2018)

¹³ Nidhi Suresh, ‘Prisoner Mirza Himayat Baig recounts solitary confinement as Anda Cell’ (*The Caravan*, 31 October 2019) <<https://caravanmagazine.in/law/himayat-baig-solitary-confinement-anda-cell>> accessed 22 May 2022

COMPARATIVE ANALYSIS OF PAKISTAN

The penal code of India and Pakistan are similar and hence the provisions regarding solitary confinement are also similar. On the face of it, the laws are along the lines given in its international obligations insofar as they are related to torture provisions under the UNCAT and ICCPR. Solitary confinement as a punishment is a common disciplinary measure practiced in detention centres in Pakistan.¹⁴ Pakistan Prison Rules postulate all the conditions that are required for the imposition of solitary confinement.

DFAT reported that there exist so called death cells in Pakistan jails which are similar to solitary confinement. There are also reports of individuals who have stayed in these jails for more than four decades. It is regularly ordered by prison authorities for a variety of infractions committed by prisoners under trial or convict. Moreover, NGOs have reported several times that many persons accused of blasphemy remain in solitary confinement for longer time periods than mentioned in the Penal Code. Even Juveniles are kept in solitary confinement for periods of up to thirty days a term where they are deprived of all rights which is contrary to the U.N. Rules of Protection of Juveniles.¹⁵

Under International rules, solitary confinement used for the protection of detainees must be used as a last resort and for the shortest time possible.¹⁶ The use of confinement for blasphemy is directly against this provision. The overcrowding of jails is a problem that is common in both India and Pakistan. But the fact remains that in India, the recognition of the rights of prisoners is much more prominent than in Pakistan. One of the most pertinent differences is the award of solitary confinement for Blasphemy. This is not something that has existed in India whereas it is prevalent in Pakistan and is used as a method to suppress under the guise of protection. The example that can be used is Asia Bibi, who was in solitary confinement for 9 years as she was sentenced to death due to blasphemy and was later acquitted. There are not

¹⁴ 'Prison Bound: The Denial of Juvenile Justice in Pakistan' (*Human Rights Watch*, 1 November 1999) <<https://www.hrw.org/report/1999/11/01/prison-bound/denial-juvenile-justice-pakistan>> accessed 22 May 2022

¹⁵ U.N Rules for the Protection of Juveniles Deprived of their Liberty, 1960, r 67

¹⁶ United Nations Standard Minimum Rules for the Treatment of Prisoners, 2016 r 43(1) (a)

many judgements where the courts have recognised solitary confinement as barbaric and inhumane, unlike in India. In Pakistan, torture by police is widespread and is rarely penalised.

This makes it apparent that police and prison officials have much more freedom to do whatever they want unlike in India where there are punishments and recognition of abuse of power by the police. Moreover, the safeguard provided in Section 29¹⁷ of the Pakistan Prison Act, 1894 regarding mental health risks is also disregarded. In India, the court has recognised the risks posed by solitary confinement to mental health, and hence the system as a whole is conscious of the same. The reality in India is not as grim as in Pakistan. Though abolishment of solitary confinement is not something that both nations contemplate, India on record is much ahead in confirming the international standards on solitary confinement when compared to Pakistan.

COMPARATIVE ANALYSIS OF MYANMAR

Same as India and Pakistan, Myanmar's Penal code provides for solitary confinement along similar lines. The Burma Jail Manual that is used today provides for solitary confinement for offences that include 'showing disrespect to a jail officer', making groundless complaints, and immoral or indecent behaviour which shows that the broad classification puts much power in the hands of prison officials. Like India, there are also specific provisions in Myanmar that specify the conditions in which solitary confinement should be awarded but there are discrepancies in implementing these conditions.

Myanmar has been notorious for segregating political prisoners, criminal convicts who are forced to work in labour camps, and civilian members of ethnic minorities suspected of any contact with the armed opposition in solitary confinement. The UN Special Rapporteur on Myanmar and many human rights organisations have acknowledged the same. Its use as a form of torture is not limited to the convict being sentenced to rigorous imprisonment. It is used during interrogation as a coercive interrogation technique. It is also used to punish the convicts upon arrival in the prison. A specialised cell known as a dog cell exists which is used for segregating the prisoners.

¹⁷ Pakistan Prison Act, 1894, s 29

Moreover, prisoners are transferred to remote prisons where their families could not meet them.¹⁸ Political prisoners, essentially are kept in inhumane conditions without proper meals and sanitation. Since the whole process is in the hands of military intelligence, these prisoners have no escape from this torture. The report by Amnesty International mentions the cases of several prisoners who were tortured mercilessly in solitary confinement.¹⁹ A case study conducted on Myanmar's political prisoners in 2015 presents direct interviews with several prisoners who have been staying in barbaric and inhumane conditions in prisons. These were the conditions when Myanmar had a chance of having a stable and democratic government. After the coup, the situation worsened with no authority for the tortured to approach.²⁰

It is apparent that there is a drastic difference between India and Myanmar as far as Solitary Confinement is concerned. Unlike India, Myanmar uses a blatant display of state power over innocent civilians as well as convicts. Moreover, there is no acknowledgement of the rights of prisoners by the government and neither by the Court. This leaves much more power in the hands of law enforcement officers to mould the law in whatever way they want to whereas Indian laws have restricted the power of prison officials and law enforcement officers and have put human rights on a much higher pedestal than Myanmar. This is not limited to solitary confinement.

India, as mentioned above, has prominent case laws which have tried to corroborate the regulations for solitary confinement with international obligations as much as possible. Moreover, there are several organisations working for the benefit of convicts. This is in blatant

¹⁸ 'The experiences of ex political prisoners in Burma and Challenges to reintegration' (*Burma Link*, 25 May 2016) <<https://www.burmalink.org/aapp-fpps-launch-report-entitled-release-restart-life-beginning-experience-political-prisoners-burma-challenges-reintegration/>> accessed 22 May 2022

¹⁹ 'Myanmar, The Institution of Torture' (*Amnesty International*, 13 December 2000) <<https://www.amnesty.org/en/documents/asa16/024/2000/en/>> accessed 22 May 2022

²⁰ Lara Owen & Ko Ko Aung, 'Myanmar Coup: The women abused and tortured in detention' (*BBC News*, 9 December 2021) <<https://www.bbc.com/news/world-asia-59462503>> accessed 25 May 2022 ; 'Jailed Myanmar Now Reporter put in solitary confinement after starting fast for Ramadan' (*Myanmar Now*, 6 May 2021) <<https://myanmar-now.org/en/news/jailed-myanmar-now-reporter-put-in-solitary-confinement-after-starting-fast-for-ramadan>> accessed 22 May 2022; Victoria Milko & Kristen Gelineau, 'Myanmar Military Uses Systematic Torture across country' (*AP News*, 28 October 2021) <<https://apnews.com/article/myanmar-torture-military-prisons-insein-abuse-390fe5b49337be82ce91639e93e0192f>> accessed 22 May 2022; 'Prisoners Held in Solitary Confinement after raising three fingers to Myanmar Junta' (*The Irrawaddy*, 18 March 2022) <<https://www.irrawaddy.com/news/burma/prisoners-held-in-solitary-confinement-after-raising-three-fingers-to-myanmar-junta.html>> accessed 22 May 2022

contrast to the conditions in Myanmar where the prisoners tortured have no authority to approach for enforcement of their rights. Without consideration for any international obligation and human rights, Myanmar has been trying to suppress all resistance with solitary confinement. The impunity with which it happens in this nation is not something that can ever happen in India.

CONCLUSION

Solitary Confinement as a form of punishment has huge disadvantages on the justice system as a whole. Whether it becomes necessary in prisons in certain situations is another debate in itself. But the fact remains that not having a proper mechanism to control the use of solitary confinement can be worse. This is shown in the case of Myanmar which has used it as a form of suppression. Similarly, in Pakistan, it is used for minor offences like Blasphemy which again, gives discretion to the authorities to adjudge the punishment in whatever way they like. The situation in India is a little different. Though there are express judgements that prohibit this form of punishment except in certain situations, there are incidences where prison authorities take the law into their own hands.

For these nations, where overcrowding of prisons is a common situation and prisoners already live in worse conditions, solitary confinement should not be used in any condition even if it is restricted. In the end, it comes down to power and control over a person. If the example of the United States is taken in this case where despite being better prison conditions, solitary confinement is used, it proves the above statement. Where the disadvantages are more than the benefits it is better to discard the provision. Solitary Confinement can never be a part of rehabilitative or restorative justice toward which the world is moving today.