

DEATH OF PRISONERS

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ABSTRACT

Solitary Confinement is the psychological death of prisoners. It's an additional punishment with respect to the punishment accorded by the court which itself violates the principle of double jeopardy i.e. a person cannot be punished twice for the same offence. There have been instances wherein inmates on death-row were kept under solitary confinement. Supreme Court in various instances has recognised that solitary confinement leads to irrevocable mental illness. Thus Section 73 and 74 of IPC, violates the very essence of Article 21 of the Constitution. The prisoners are coerced away from their statutory and constitutional rights. The unavailability of the protection of their rights and torture inflicted upon them is equivalent to their death eventually profaning their Right to Life. Even the exception under Article 21 i.e. 'procedure established by law' does not hold true in instance of solitary confinement as the implications of such punishment are more than what is the prescribed punishment given 'in letter'. In light of restorative justice, solitary confinement is a torture. India is signatory to Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1987) which abolishes solitary confinement except in the rarest of rare cases. Solitary confinement does not fulfil the very aim of 'reformation' rather it serves as a callous method of deterrence as it makes very difficult for a prisoner to join back the mainstream of the society, as he does not hold a normal mental capability anymore. This paper aims to examine the constitutional validity of Section 73 and 74 of IPC and define the 'rarest of rare cases' in which solitary confinement may be accorded and the regulations to be laid down regarding any such accordance.

Keywords: Solitary Confinement, Psychological Death, Prisoners, Punishment, Torture, Right to Life, Reformation, Deterrence

There is no excuse for human rights abuse, whether in the name of security or in the name of liberation. - Jrene Khan

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I. INTRODUCTION

The Indian Criminal Justice Administrative system follows a deterrent policy and at the same time, reinforces the rights of the prisoners under the Constitutional vision as envisaged by our Constitutional-makers. Time and again it has been reiterated by the Supreme Court that prison walls do not keep out Fundamental Rights.¹¹³⁵ The fundamental rights relevant to this paper include Article 14, 19, and 21. Other than restrictions provided for Article 14 and 19, Article 21 provides for that a person's right to life and liberty can't be abridged except wherein the procedure established by law provides for it. Our constitutional scheme stands against dehumanizing treatment, torture, or cruelty to the prisoners. Contrary to it and in line with our deterrent policy, 'solitary confinement' is one such punishment that has been provided under the Indian legal system. The conferment of legal status to 'solitary confinement' violates the principle of restorative justice. The effect of solitary confinement harms the prisoner as well as society. Furthermore, the constitutional and legislative restrictions placed on solitary confinement fall short of protecting the rights of the prisoners and fulfilling the objective of the same. While considering the constitutionality of 'solitary confinement', it is important to consider the actual implementation and effect of solitary confinement.

II. SOLITARY CONFINEMENT- MEANING

The Prisons Act 1894 is one of the earliest legislation in India regulating prisons and prisoners. However, the Act of 1984 and the Indian Penal Code, 1860 fails to define 'Solitary Confinement'.

Black's Law Dictionary defines the term 'solitary confinement' as 'solitary confinement that gives a prisoner extremely limited access to other people'¹¹³⁶. Solitary Confinement is separation and keeping in isolation, any prisoner within jail premises. It means complete isolation of a prisoner from all human contact and confinement in a cell, so arranged, that he has no direct interaction with or sight of any human being and no employment or instruction.

¹¹³⁷ Rule 44 of 'Mandela Rules'¹¹³⁸ states that,

¹¹³⁵ *T.V. Vatheeswaran v. State of Tamil Nadu*, AIR 1983 SC 361.

¹¹³⁶ *Black's Law Dictionary* (8th edn, 2004).

¹¹³⁷ P.S.A. Pillai, *Criminal Law* 342 (13th edn, Lexis Nexis 2017).

¹¹³⁸ United Nations Standard Minimum Rules for the Treatment of Prisoners (10 Dec, 2018) https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf.

“Solitary confinement shall refer to the confinement of prisoners for 22 hours or more a day without meaningful human contact. Prolonged solitary confinement shall refer to solitary confinement for a time period in excess of 15 consecutive days.”

Solitary Confinement is prohibited and condemned by various International Conventions and human rights organizations.

III. SOLITARY CONFINEMENT IN INDIA

In India, Solitary Confinement can be either awarded by the Judiciary, at the time of awarding of a sentence, or by the Executive itself. In the present case, the Executive is the Prison Authorities. Under Jail Manual of different Prisons, this power has been conferred upon varying Officers of the Prison. For instance, under Rule 61 of Delhi Prisons (Admission, Classification, Separation, Remission, Reward and Release of Prisoners) Rules, 1988, the power is given to the Inspector General of Prisons.

With regards to Judicial Solitary Confinement, section 73 and 74 of Indian Penal Code, 1860 provide for solitary confinement as a substantive punishment. It is further regulated by sections 29 and 30 of the Prisons Act 1894.

Section 73 of the Code states that solitary confinement can only be given to those convicts who are eligible to be sentenced to rigorous imprisonment under the Code or under any other law. Section 53 of the Code, defines rigorous imprisonment as imprisonment with hard labor. The Court may then, by its sentence, order that for some portion(s) of imprisonment the convict be kept under solitary confinement. However, the section strictly provides that in no case shall the total time under solitary confinement be more than 3 months. It further lays down that if the total term of imprisonment is 6 months, then solitary confinement shouldn't be provided for more than 1 month; 2 months of solitary confinement when imprisonment term in total is not more than 1 year; and if the imprisonment term is more than 1 year, then solitary confinement shall not be more than 3 months.

In furtherance to section 73, **section 74** of the Code provides for the execution of solitary confinement. It lays down the principle that such a sentence of solitary confinement would be carried out in intervals, and cannot be carried out together. It provides that the intervals between periods of solitary confinement should not be of lesser duration than the duration of such periods. Implying that, for instance, if a prisoner is kept in solitary confinement for 3 days then he can only be kept in solitary confinement again after 3 days or more. According

to section 74, the general rule is that such a period of solitary confinement should not exceed 14 days at one stretch. However, when 3 months of solitary confinement is awarded than the period of such solitary confinement should not be more than 7 days in any one month of the duration of imprisonment awarded, where the interval between periods of solitary confinement is not less than such periods of solitary confinement.

According to **section 29 of the Prisons Act 1894**, only those cells in prison are to be used for solitary confinement where a prisoner can communicate with an officer of the prison, at any time. Further, a prisoner who has been kept in solitary confinement for 22 hours or more shall be visited by the Medical Officer or Medical Subordinate at least once in a day. Medical Subordinate has been defined under section 3(8) of the Act to include an Assistant Surgeon, Apothecary, or qualified Hospital Assistant. It is pertinent to note that under section 3(8) even an Apothecary (in other words, a pharmacist) or just a qualified Hospital Assistant can visit the prisoners kept under Solitary Confinement. A person kept under Solitary Confinement goes through various mental healthcare issues, in which the Medical Subordinate under section 3(8) lacks the required competency. It is to be further noted that the statute only mandates for visiting facility; it is silent upon such opinion of the Medical Officer or Medical Subordinate being binding whereby the prisoner shall be released from solitary confinement. It further fails to mention another relevant aspect that is, under what health conditions should the prisoner be allowed to be kept in solitary confinement. Delhi Jail Manual states about two grounds whereby the Order of Medical Officer prisoner can be released from solitary confinement, i.e. injurious to mind and body.¹¹³⁹

Section 30 of the Act essentially lays down that the prisoners who are on death row be kept separately from the other prisoner, in other words, be kept under solitary confinement. The constitutionality of section 30 (2) was upheld by the Supreme Court in the case of *Sunil Batra v. Delhi Administration and Ors*,¹¹⁴⁰ in 1978. The Court further held that section 30(2) mandated for statutory confinement, and not 'solitary confinement' as such.¹¹⁴¹ However, section 30(2) was held to be unconstitutional in 2014 by the Uttarakhand High Court in the case of the *State of Uttarakhand v. Mehtab & Sushil @ Bhura*¹¹⁴².

¹¹³⁹ Delhi Prisons (Prisoners Property, History Ticket, Civil Prisoners, Unconvicted Prisoners, Judicial Solitary Confinement, Cells and Treatment therein) Rules 1988, r 56(8).

¹¹⁴⁰ AIR 1978 SC 1675.

¹¹⁴¹ *Shatrughan Chauhan v. Union of India*, (2014) 3 SCC 1.

¹¹⁴² Crim. Appeal no. 01 of 2014 (Uttarakhand HC 2018).

It is to be noted that under the judicial solitary confinement, the terms, period of solitary confinement, its frequency is specifically defined in the judgment. However, under executive solitary confinement, few safeguards are provided, including sections 29 and 30 of the Prisons Act 1894. This provides wide scope for misuse and maltreatment.

IV. EFFECT OF SOLITARY CONFINEMENT

Solitary confinement— “the hole” as it is has been referred by prisoners—has been internationally recognized as a form of torture and experts, legal, behavioural and medical, believe it can lead to more problems rather than remedies.¹¹⁴³ The real-life experience of solitary confinement as written by Mohammed Amir Khan in his book¹¹⁴⁴ leaves one shocked and traumatized.

It is stated by many empirical studies that solitary confinement leads to the “socio-psychological death” of the prisoners. It leaves a very critical and irrevocable psychological impact on the prisoner. It happens because of minimal environmental stimulation as well as social isolation.

Uttarakhand High Court recognized various such studies in detail, in the case of *State of Uttarakhand v. Mehtab & Sushil @ Bhura*¹¹⁴⁵. Some of them are as follows:

- In the article “**Psychiatric Effects of Solitary Confinement**”, by author Stuart Grassian, published by Washington University Journal of Law & Policy; the article dealt the entire gamut of solitary confinement and its scientific harms to the convicts. It stated that solitary confinement can cause severe psychiatric harm. It has indeed long been known that severe restriction of environmental and social stimulation has a profound deleterious effect on mental functioning.
- In a comprehensive article “**A Death Before Dying, Solitary Confinement on Death Row**”, by American Civil Liberties Union, various devastating effects of prolonged solitary confinement were highlighted. “*Empirical research consistently demonstrates that prisoners subjected to isolation suffer many of the same symptoms caused by*”

¹¹⁴³Usha Rani Das, ‘Solitary Confinement: Out Of The Hell Hole’ *India Legal* (Delhi, 10 December 2018), <<http://www.indialegallive.com/top-news-of-the-day/legal-eye-articles/solitary-confinement-out-of-the-hell-hole-47928>> accessed 17 September 2018.

¹¹⁴⁴Mohammed Amir Khan & Nandita Haksar, *Framed as a Terrorist: My 14-year struggle to prove my innocence*

¹¹⁴⁵Crim. Appeal no. 01 of 2014 (Uttarakhand HC 2018).

physical torture. Research shows that people subjected to solitary confinement exhibit a variety of negative physiological and psychological reactions.”

- A sourcebook on “**Solitary Confinement**”, written by Sharon Shaley, highlights the negative health effects of solitary confinement on prisoners.

UN Standard Minimum Rules for the Treatment of Prisoners (2015), also known as the ‘Mandela Rules’ recognize the harmful effects of solitary confinement and prohibit them. **Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment** (1987), to which India is a signatory, abolishes the practice of ‘solitary confinement’ except in ‘rarest of rare cases’.

In the USA, the Supreme Court in *In Re Medley*¹¹⁴⁶ (1890) had explicitly recognized the harmful effects of solitary confinement. It stated that it leads to massive psychiatric effects. It observed that: “*A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others, still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.*” It was accepted by the court that ‘solitary confinement’ was a much harsher punishment than the death itself.

Commonwealth Human Rights Initiative in its report (2015) stated that solitary confinement ‘*induces a psychiatric disorder characterized by hypersensitivity to external stimuli, hallucinations, panic attacks, cognitive deficits, obsessive thinking, paranoia, and a list of other physical and psychological problems.*’¹¹⁴⁷

It is further stated that the prisoners who are mentally more resilient also suffer from significant psychological pain during the period of isolated confinement and significantly impair the inmate’s capacity to adapt successfully to the broader prison environment. They become volatile, impulse-ridden, and internally disorganized.¹¹⁴⁸ Thus, because of their mental imparity, they are a danger to society as well as the prison authorities.

¹¹⁴⁶ 134 US 160 (1890).

¹¹⁴⁷ Commonwealth Human Rights Initiative, Jail Mail- Prison Reform Update (Oct. 31, 2015), <<https://www.humanrightsinitiative.org/publication/jail-mail-human-rights-day-2018-prison-reforms-has-anything-changed-on-the-ground>> accessed 2 February 2020.

¹¹⁴⁸ Stuart Grassian, “Psychiatric Effects of Solitary Confinement” (January 2006) Washington University Journal of Law & Policy

V. VIOLATES THE CONSTITUTIONAL VISION

It is an accepted fact that there lies a considerable difference between the law as laid down by the statutes and during the actual effect upon its implementation. Even Supreme Court in the case of *Shatrughan Chauhan v. Union of India*¹¹⁴⁹ observed that ‘*it is completely unfortunate that despite enduring pronouncement on the judicial side, the actual implementation of the provisions is far from reality*’ and urged the jail authorities to comprehend and implement the actual intent behind judicial verdicts. Krishna Iyer, J., in another case stated that ‘*Disciplinary autonomy, in the hands of mayhem-happy jail staffers, may harry human rights.*’¹¹⁵⁰ Thus, even the Apex Court accepted that the actual intention behind any law gets distorted during its implementation; and implementation of Solitary Confinement is one other example for the same.

In the case of the *State of Uttarakhand v. Mehtab & Sushil @ Bhura*,¹¹⁵¹ Uttarakhand High Court held that the solitary confinement of a death-row convict as unconstitutional. The Hon’ble High Court held that the death sentence under section 30 of the Prisons Act 1894, should be final, conclusive and that the death-row convict should have completely exhausted his legal rights, as well as constitutional remedies. The Court based its judgment upon the ratio that the practice of solitary confinement of a death-row convict violates Article 20 (2) and Article 21 of the Constitution. It further observed that,

“There is no scientific reason why the convict sentenced to death should be kept in isolation for indefinite period till he exhausts all his constitutional and legal remedies. It causes immense pain, agony, and anxiety to the condemned convict. It is violative of Articles 20(2) and 21 of the Constitution of India. A man, even sentenced to death, has certain privileges and rights which cannot be denied to him due to colonial mindset.”

Unlike a normal person, a prisoner cannot claim all his rights but that such a restriction is not absolute. It is always subject to the crime committed by the prisoners and the sentence so awarded; hence no straight jacket formula can be applied to it.

<https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1362&context=law_journal_law_policy>
accessed 12 December 2018.

¹¹⁴⁹ (2014) 3 SCC 1.

¹¹⁵⁰ *Sunil Batra v. Delhi Administration & Ors.*, AIR 1978 SC 1675.

¹¹⁵¹ Crim. Appeal no. 01 of 2014 (Uttarakhand HC 2018).

Upon a cursory glance, the Constitution does not have any specific provisions for securing prisoners' rights but such rights have been read down in Part III of the Constitution. Even though they stand behind iron bars, they do not disqualify for a 'person'. Many rights like the Right to Freedom are applicable to prisoners as they guarantee prisoners speedy trial, free legal aid, right against torture, right against inhumane and degrading treatment.¹¹⁵²

Article 21 of the Constitution serves as a major role in litigating for the prisoner as it has been used by the Supreme Court in an ample number of cases to safeguard some important rights of the prisoners. In the case of *State of Maharashtra v. Prabhakar Pandurang*¹¹⁵³, it was held that the conditions of detention cannot be extended to deprivation of other fundamental rights consistent with the fact of detention.

In the case of *D.B.M. Patnaik v. State of Andhra Pradesh*¹¹⁵⁴, it was held by the court that convicts are not by the mere reason of their detention, denuded of all the fundamental rights they possess. Supreme Court held that the right of personal liberty and some of the other fundamental freedoms are not to be totally denied to a convict during the period of incarceration.

In the case of *Charles Sobraj v. Superintendent, Central Jail, Tihar*¹¹⁵⁵ the Apex Court held that the prisoners are subject to all the fundamental rights that are guaranteed to a citizen under the Constitution of India against any kind of discriminatory treatment by the prison authorities.

The State cannot, by law or otherwise, deprive any person of the right to live with basic human dignity. Torture or cruel, inhuman, or degrading treatment or punishment which trenches upon human dignity would be impermissible under our Constitution. Thus, the Supreme Court elevated immunity against torture or degrading treatment to the status of a fundamental right under Article 21.

In the case of *Sunil Batra v. Delhi Administration*¹¹⁵⁶ the Court laid down a number of guidelines stating that the treatment directed towards the prisoners must only pass the tests of Articles 14, 19 and 21 of the Constitution of India.

¹¹⁵² *Sunil Batra v. Delhi Administration*, AIR 1980 SC 1579.

¹¹⁵³ AIR 1966 SC 424.

¹¹⁵⁴ AIR 1974 SC 2092.

¹¹⁵⁵ AIR 1978 SC 1514.

¹¹⁵⁶ AIR 1980 SC 1579.

It is observed that solitary confinement is violative of Article 21 and 19 since it segregates a prisoner from the common form of the jail environment. The prisoners are isolated from meeting anyone and moreover are made to stay alone, which violates their various fundamental freedoms.

In furtherance to it, prison authorities have a tendency to execute a dictatorial rule in the prison premises, as has been duly recognized by the Apex Court in various instances. Thereby, the chances of misusing such an injurious weapon as solitary confinement are dangerous. It is no doubt that the prison authorities do not have sufficient infrastructure whereby they have failed in keeping different types of prisoners differently such as under trial prisoners, convicts of heinous crimes, etc. Further, punishment like solitary confinement, where there is no human contact allowed except for daily medical visits, provides prison authorities with malicious opportunity to illegally extend the tenure of solitary confinement. This makes solitary confinement another way to inflict mental agony to the prisoner, without leaving any conventional physical marks. The mental trauma, psychological pain that a prisoner is made to go through, because of solitary confinement, is immense than what is prescribed by the court order. The prisoner is ripped from his 'dignity' because of this degrading treatment. This takes the 'life' part away from the prisoners, as has been evident from various impacts of solitary confinement.

Article 20 (2) states that no person shall be prosecuted and punished for the same offense more than once and hence provides for the concept of 'Double jeopardy'. The jail authorities have no right under law to punish the offender as that purpose is fulfilled by the judiciary. Hence, when they impose solitary confinement upon such prisoners in an arbitrary manner they rather punish the offenders twice for the same offense i.e. firstly, by the court on legal grounds and secondly, by the jail authorities on dictatorship grounds which is completely unacceptable under the Constitution. It, thus, becomes an additional punishment that a prisoner is made subject to.

VI. **AGAINST REFORMATIVE JUSTICE**

As stated earlier, solitary confinement leads to more harm than helping any of the stakeholders i.e., the prisoner, prison authorities, and the society. According to the principle of reformatory justice, the criminal activity causes harm to society and the aim of the judicial system is to correct that harm. Our society is increasingly moving towards a reformatory form

of the judicial system. In the case of *Sunil Batra v. Delhi Administration Authorities and Ors*,¹¹⁵⁷ D. A. Desai, J., observed that in the context of the modern reformist's theory of punishment, jail is being treated as a correctional institution. He further stated that *'The Court has, therefore, to strike a just balance between the dehumanizing prison atmosphere and the preservation of internal order and discipline, the maintenance of institutional security against escape, and rehabilitation of the prisoners.'*

However, solitary confinement is a representation of anarchic law, holding no relevance in present times. Objective behind this anarchic law was: Prison discipline and correction purposes. It is pertinent to note that solitary confinement can have two kinds of impact on a prisoner: psychological disorder, making it hard for him to merge into mainstream of society, or minimal exposure to external stimuli makes them near to impossible to adjust in the society. Possibility of them becoming aggressive post- confinement increases by a lot. Solitary confinement leaves a permanent impression on the lives of the prisoner. In another word, it is a legal form of torture that can be inflicted on the prisoner. Thus, the practice of solitary confinement becomes counter-productive to the very reasons it was first introduced as a punishment under the Indian Penal Code, 1860.

Furthermore, prisoners post-confinement are more prone to commit violent crimes than before. It increases the rate of recidivism. Thereby, increasing the cost for the State.

It is to be noted that solitary confinement became part of Indian plenary provision in the year 1860. The given provision, still in practice a century later, negates the fundamental essence of reformation, correction, and also international law. Since the advent of Convention Against Torture, the absolute prohibition against torture and other acts of cruel, inhuman, or degrading treatment or punishment has become accepted as a principle of customary international law. By continuing the practice of solitary confinement, India violates core CAT principles and customary international law.¹¹⁵⁸ It's time that India also recognizes that putting prisoners under solitary confinement as an impermissible and unreasonable prison power.

VII. CONCLUSION

¹¹⁵⁷ AIR 1978 SC 1675.

¹¹⁵⁸ Commonwealth Human Rights Initiative, Jail Mail- Prison Reform Update (Oct. 31, 2015), <[http://www.humanrightsinitiative.org/publications/prisons/Jail%20Mail%20%20Abolish%20Solitary%20Confinement%20\(31.10.15\)%20\(English\).pdf](http://www.humanrightsinitiative.org/publications/prisons/Jail%20Mail%20%20Abolish%20Solitary%20Confinement%20(31.10.15)%20(English).pdf)> accessed 2 February 2020.

To conclude, the practice of sections 73 and 74 of Indian Penal Code 1860, along with sections 29 and 30 of the Prisons Act 1894, provides for an 'additional' and 'separate' punishment than prescribed by the law; thus infringing upon fundamental rights of the prisoner. In light of the aforementioned factors and the international obligations of India, the provisions relating to solitary confinement should be declared as unconstitutional and struck down. The provisions should be carved as such so that they do not infringe upon the fundamental rights of the prisoners. They should further fulfill the purpose of the correction and prison discipline. Thus, comes the concept of 'rarest of rare' cases in solitary confinement.

It is suggested that solitary confinement be provided for, only by judicial order, taking into consideration the mental and physical health of the prisoner, the socio-psychological impact of solitary confinement, and only in 'rarest of rare' cases.

In the case of *C. Muniappan and others Vs. State of Tamil Nadu along with connected appeal*^[25], Hon'ble Supreme Court laid down the social effect of punishment and proportional considerations, when the principle of rarest of the rare rule is to be applied. It laid down that the principle of rarest of the rare cases to be applied to the death penalty when the 'collective conscience' of the society is so shocked that no other alternative is applied. The "rarest of the rare case" comes when the convict would be a menace and threat to the harmonious and peaceful co-existence of the society.

It is further suggested that the same logic be applied while awarding of judicial solitary confinement. Judicial solitary confinement is provided only in exceptional cases, where the Court might feel that it is in the best interest of the society, maintaining peace and harmony in the prison and when no other alternative is available, that he be confined separately.

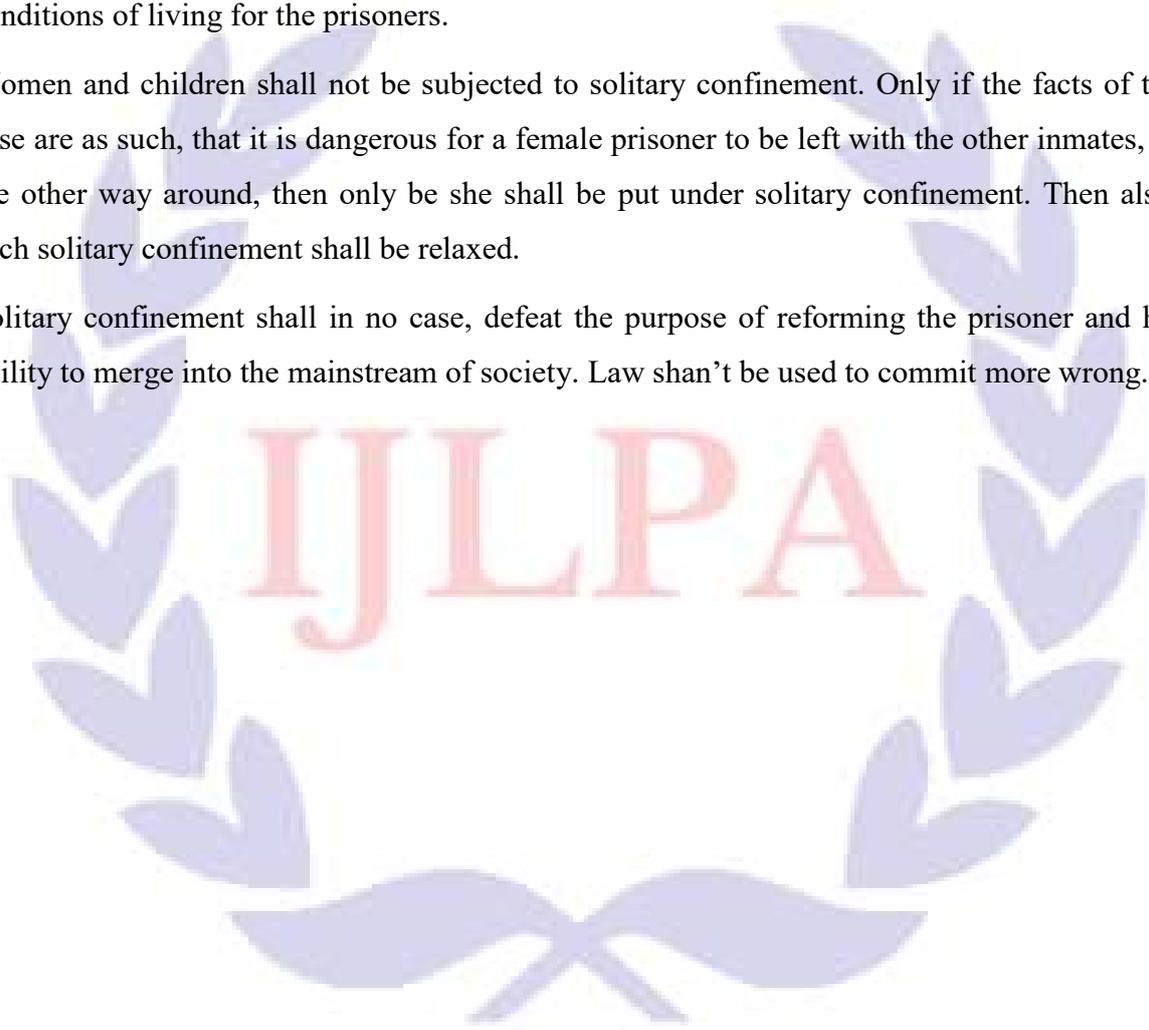
In furtherance of the same, the implementation of such judicial order should be carried out strictly. Prisoners should be made aware of their rights and access to justice shall be provided for in any case of infringement. Strict adherence to regulations shall be observed by the jail authorities.

Furthermore, the cell used for the purposes of solitary confinement shall have a yard attached to it, wherein the environmental stimulus is available for the prisoner. This exposes the prisoner to external stimuli, without actually interacting with any other prisoner. Along with it, the cell is made for as humane conditions as possible. Medical check-ups are done every

day by competent Medical Officials who specialize in diagnosing psychological harm. The consecutive number of days for which a prisoner can be put under solitary confinement be reduced to less than 14 days. Arrangements be made wherein the prisoner is allowed to have one meal outside of his cell; and considering the facts of the case, he is allowed to interact with other inmates. The Standard of prisons shall be maintained to provide for humane conditions of living for the prisoners.

Women and children shall not be subjected to solitary confinement. Only if the facts of the case are as such, that it is dangerous for a female prisoner to be left with the other inmates, or the other way around, then only she shall be put under solitary confinement. Then also, such solitary confinement shall be relaxed.

Solitary confinement shall in no case, defeat the purpose of reforming the prisoner and his ability to merge into the mainstream of society. Law shan't be used to commit more wrong.



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WORDS SPEAK