LAW COMMISSION OF INDIA

ONE HUNDRED THIRTY-FIFTH REPORT

ON

WOMEN IN CUSTODY

1989

Tel. No. 384475

M.P. THAKKAAR
CHAIRMAN

LAW COMMISSION
GOVERNMENT OF INDIA
SHASTRI BHAVAN
NEW DELHI

D.O. No. 6(3)(10)/88/LC(LS)

December 14, 1989.

To

Shri Dinesh Goswami,
Minister of Law and Justice,
Government of India,
Shastri Bhavan,
New Delhi.

Dear Minister,

Re: Presentation of 135th Report.

The Commission as presently constituted has already presented two suo motu reports targeted at redressal of grievances of women viz:-

"132nd Report entitled "Need for amendment of the provisions of Chapter IX of the Code of Criminal Procedure, 1973 in order to ameliorate the hardship and mitigate the distress of neglected women, children and parents"

and

133rd Report entitled "Removal of Discrimination against women in matters relating to Guardianship and Custody of Minor Children and Elaboration of the Welfare Principle".

Presented thereafter was the 134th Report designed to ameliorate the condition of the workmen sustaining employment injuries and of the dependants of deceased workmen involved in fatal accidents in the course of employment entitled:-

"Removing Deficiencies in Certain Provisions of the Workmen's Compensation Act, 1923".

The Report being presented herewith, the 135th Report, is centred on the problems of the 'Women in Custody'. This report is the outcome of a reference made to the Commission by the then Minister of Law and Justice while forwarding a

copy of the report (in two volumes) of National Expert Committee on "Women Prisoners" vide his letter dated December 13, 1988.

The Commission has suggested the addition of a separate chapter in the Code of Criminal Procedure incorporating the safeguards calculated to protect the women in custody being recommended in the course of the Report so that the Police and Jail authorities, the women concerned in criminal matters, as also the activist women's welfare organisations can inform themselves as regards the safeguards, the former, to comply with the same, and the latter, to enforce their compliance. It is hoped that the Recommendations, if and when accepted, will take adequate care of problems of the women in custody.

With warm regards,

Yours faithfully,

(M.P.THAKKAR)

Encl: 135th Report.

CONTENTS

CHAPTER I

INTRODUCTION

1.1. Genesis and scope.- This report is concerned with certain questions relating to women in custody and has been prepared in pursuance of a reference made to the Commission by the Ministry of Law and Justice.

Minister of Law and Justice has forwarded a copy of the Report submitted by the National Expert Committee on Women Prisoners at the behest of the Minister of State, Department of Youth Affairs and Sports, Women and Child Development. The Minister of State has requested the Law Commission to examine the two issues arising out of the Report Vol.I- one issue relating to Nari Bandigriha Adalats in the nature of mobile judicial camps (vide para 478 of the Report Vol.I) and the second issue relating to the efficacy and relevance of various legislations having a bearing on women's status in custody and criminality (vide para 480.4 of the Report). The aforesaid paragraphs, namely, 478 and 480.4 of the Report, read as under:-

> "478. In addition to the separate Women's Courts or Family Courts, it is recommended that Nari Bandigriha Adalats be held in the nature of mobile judicial camps as an immediate modality for rendering speedy redress to women in custody. Whereas the Family Court or Women's Courts can be the

stable permanent mechanism, the mobile adalats or court is required as an immediate as well as instant corrective step. Such camps and courts should be held urgently and routinely in social welfare and mental health custodial institutions also to clear the backlog of pending cases, and to render speedy justice. The mobile adalats should be conducted on a district-wise or cluster basis so as to cover all prisons and non-prison custodial institutions. Its objectives should be to provide speedy justice.

480.4 A critical assessment of the efficacy and relevance of various legislations bearing on women's status in custody and their criminality should be undertaken by the Law Commission in consultation with other legal social science and social defence bodies of repute and their findings should form the basis for concrete reform by way of depenalisation, decriminalisation, de-institutionalisation, etc.".

1.2. Question for consideration.- The letter of reference quoted above contemplates the consideration of two issues, one of which is of a limited character (mobile courts), while the other is of a more general nature. The question of creation of separate court for women under-trial is one which concerns the organisation of the courts and administrative matters. The request made for a critical assessment of various legislations regarding women in custody and their criminality would involve an examination of provisions scattered in several statutes, which are concerned with women in custody, including women in institutions dealing with mentally ill persons. It would seem that examination of these

statutory provisions will involve a study of the following enactments:-

(a) The Code of Criminal Procedure, 1973 in so far as it contains any provisions concerned with women in custody.

(b) Indian Penal Code, in so far as it deals with sexual offences against women in custody.

(c) The Code of Civil Procedure, 1908 - provisions regarding women in custody.

(d) The Probation of Offenders Act, 1958 in so far as its provisions are silent as regards any special consideration to be given to women first offenders.

(e) Provisions in any other law on a matter within the Union List or the Concurrent List, which are especially concerned with the arrest and detention of women.

1.3. Method adopted.- While we propose to deal in this report with the questions mentioned above, it would be convenient to take up first an assessment of various laws relevant to women in custody and thereafter to examine the suggestion regarding creation of mobile courts for rendering speedy redress to women in custody.

CHAPTER II

CODE OF CRIMINAL PROCEDURE: PROVISIONS CONCERNED WITH WOMEN IN CUSTODY - DEFICIENCIES IDENTIFIED AND RECOMMENDATIONS FORMULATED

2.1. Safeguards in the Code.- The concern of the law to prevent harassment and exploitation of women who have had the misfortune of being sent to prison for a violation of the law is manifest in the various provisions that the Code of Criminal Procedure, 1973 has made in regard to the arrest and detention of women generally, including, in particular, women accused of an offence. For example, in regard to the search of women at the time of arrest, the law has taken care to provide that it shall not be permissible for a male police officer to search a woman. Then, if an accused person, whether male or female, is to be examined medically, some safeguards have been provided regarding women. Besides this, of course, the constitutional and legal safeguards applicable in the field of personal liberty are as much available to women, as to others.

However, on examining the various provisions of the Code of Criminal Procedure, 1973, it would appear that on some matters of detail, there is scope for further safeguards being introduced in order to provide adequate protection to such

women. Suggestions in detail in this regard will be made in the next few paragraphs.

2.2. Section 46, Cr.P.C. 1973: Arrest.- Our law provides certain detailed rules as to the mode of arrest by the police or other persons acting in aid of law enforcement. Section 46 of the Code of Criminal Procedure, 1973 lays down that in arresting a person, the police officer or other person making the arrest shall actually touch or confine the body of the person to be arrested, unless there be submission to the custody by word or action. The rest of the section is not material for the present purpose. Dealing with this section, the Law Commission, in its Report on Rape and Allied Offences,[1] expressed the view that a provision should be added to the effect that in the case of women, their submission to custody shall be presumed unless proved otherwise, and that the police officer should not actually touch the person of the woman for making arrest. The recommendation of the Commission in this regard was to add the following proviso in section 46(1) of the Code:

> "Provided that where a woman is to be arrested, then, unless the circumstances indicate to the contrary, her submission to custody on an oral intimation of arrest shall be presumed, and unless the circumstances otherwise require or unless the police officer arresting is a female, the police officer shall not actually touch the person

of the woman for making her arrest."

We are of the view that the above recommendation should be implemented by enacting a suitable provision.

2.3. Time of arrest.- In the same report[2], the Law Commission examined the question of the time of arrest of women and expressed the view that except in unavoidable circumstances, no woman should be arrested after sunset and before sunrise. For this purpose, the Commission recommended the insertion of a new sub-section in section 46 of the Code of Criminal Procedure, 1973, in the following terms:-

> "(4) Except in unavoidable circumstances, no woman shall be arrested after sunset and before sunrise, and where such unavoidable circumstances exist, the police officer shall, by making a written report, obtain the prior permission of the immediate superior officer for effecting such arrest or, if the case is one of extreme urgency, he shall, after making the arrest, forthwith report the matter in writing to his immediate superior officer, with the reasons for arrest and the reasons for not taking prior permission as aforesaid".

This recommendation also deserves implementation without delay, in a suitable manner. We would add a further provision that the report should be sent to the competent Magistrate also. Incidentally, we may mention that a provision of the nature recommended in the earlier report was proposed in the Cr.P.C. (Amendment) Bill, 1988, clause 9 (now

lapsed).

2.4. Medical examination: Sections 53 and 54 Cr.P.C., 1973.- A number of sections of the Code of Criminal Procedure, 1973 deal with medical examination of the accused. Such examination (as contemplated by the Code) is of two types. In the first place, the Code deals with medical examination of the accused, in order to secure evidence of crime. Whether or not the accused consents to such an examination, it can be undertaken to secure evidence of crime (section 53). The examination is to be done by a registered medical practioner at the request of the investigating agency. Here, the Code makes a specific provision, by requiring that in the case of a female accused, the examination should be done by a female medical practitioner.

2.5. Section 54, Cr.P.C., 1973, to be amended.- There is, however, another type of medical examination contemplated by the Code, where the accused himself or herself desires such examination, in order to prove his or her innocence (section 54). It is in this context that the Code needs a small improvement. Where a female accused desires such an examination in order to prove her innocence, she can avail herself of the facility provided in the relevant

provision of the Code. But, at present, the Code is silent as to how far a woman can insist that such examination must be done by a female registered medical practitioner and with strict regard to decency. It could not have been the view of the legislature that such a provision is not needed. But presumably, the matter seems to have escaped notice at the time when the provision was drafted.

2.6. Section 54, Cr.P.C., 1973: Medical examination by a woman doctor.- Our recommendation is that the Code should be amended, by providing that whenever the person of a female is to be examined under section 54, the examination shall be made only by or under the supervision of a female registered medical practitioner, and with strict regard to decency. It is true that when the accused herself requests such examination, she will also make it a condition that the examination shall be by a woman only. Nevertheless the law should, in our view, itself provide for this safeguard.

2.7. U. P. Amendment.- Incidentally, we may also note that section 54 has been amplified in the State of Uttar Pradesh by U.P. Act 1, 1984, by inserting the following paragraph:

"The registered medical practitioner shall forthwith furnish to the arrested person a copy of the report of such examination, free of cost".

We recommend that this proposition should be inserted in the Code. Clause 14 of the Cr.P.C. (Amendment) Bill, 1988 may be compared.

2.8. Intimation of rights.- We have one more suggestion to make regarding section 54 of the Code of Criminal Procedure, 1973, though the suggestion is not confined to woman. It is obvious that a person in custody is in need of protection of the nature conferred by section 54. But often, the arrested person does not know his or her rights in this respect. The Supreme Court has suggested, inter alia, that the Magistrate should inform the arrested person about this right in case that person has any complaint against torture by the police[3]. Besides this, there is the important question of the general approach towards custodial torture. Such torture should not be approached by the Court in a casual manner[4]. It appears to be useful to add a suitable provision on the subject. We recommend that a provision should be inserted in the Code to provide as under:

"The Magistrate shall, whether or not the arrested person makes a request for examination of the body under this section, inform that person about his right to such

examination, in order to bring on record any facts which may show that an offence against the body has been committed with respect to such person after he was arrested".

2.9. Section 160, Code of Criminal Procedure, 1973.- The Code of Criminal Procedure has a long Chapter on the investigation of offences. This Chapter, inter alia, gives various powers to police officers engaged in investigation. In general, the police can summon any person believed to be acquainted with the facts of the case and such person can be directed to come to the police station for the purpose. But, in the case of persons below 15 years, and also in the case of all woman, it is specifically provided in section 160(1), proviso, of the Code of Criminal Procedure, 1973 that they shall not be called to the police station for the above purpose, but they should be examined in their place of residence. This is an eminently sound provision, but, unfortunately, there is no specific sanction provided in that section for its infringement. We shall revert to this point later.[5]

2.10. Section 160(1), proviso, Cr.P.C. 1973: Examination at the residence.- At present, the proviso to section 160(1) reads as under:-

"Provided that no male person under the age of fifteen years or woman shall be

required to attend at any place other than the place in which such male person or woman resides".

Although the intention underlying this proviso must have been that the persons concerned should be examined in their house, some ambiguity arises in this regard, because the expression "place", employed in the proviso, is not very precise. As defined in section 2 of the Code, the word "place" includes house, building, tent, vehicle and vessel. Now, this definition is inclusive. It does not indicate very clearly that in the context of section 160(1), proviso, the word "place" means the actual dwelling place of the minor or woman. It is possible that it may be construed as meaning the locality of residence over which the police officer concerned has the jurisdiction. It appears desirable to avoid such a misconstruction.

It may be stated that the Law Commission, in its Report on Rape and Allied Offences,[6] recommended that it should be provided that no male person under the age of fifteen years or woman shall be required to attend at any place other than his or her dwelling place. We are of the view that this recommendation should also be carried out, by suitably amending the Code of Criminal Procedure, 1973.

2.11. Section 160(1), Cr.P.C., 1973: Association of women social workers.- Apart from the above amendments, it would be proper to provide that when a young person below fifteen years or a woman is examined by the police during investigation, a relative or friend of such male person or woman or a representative of a recognised organisation interested in women and children's welfare should be allowed to be present. This point was also considered by the Law Commission in its Report on Rape and Allied offences, which favoured an amendment of section 160(1), Cr.P.C., 1973 for the purpose[7]. In our view, such a change is eminently desirable and we recommend that the following proposition should be incorporated in the Code of Criminal Procedure:

> "Where during investigation the statement of a male person under the age of fifteen years or of a woman is recorded by a male police officer, either as first information of an offence or in the course of an investigation into an offence, a relative or friend of such male person or woman, and also a person authorised by such organisation interested in the welfare of women or children as is recognised in this behalf by the State Government by notification in the

official gazette, shall be allowed to remain present throughout the period during which the statement is being recorded".

2.12. Violation of section 160,Cr.P.C. and proposed section 166A, I.P.C.- The question of providing a penalty for violation of the proviso to section 160(1) of the Code of Criminal Procedure, 1973 was examined by the Law Commission of India, in its Report on Rape and Allied Offences[8]. The Commission noted, that merely summoning a person in violation of this statutory mandate would presumably be punishable as wrongful restraint under section 341, Indian Penal Code, which provides a maximum penalty of imprisonment up to one month or fine up to five hundred rupees. This, in the opinion of the Commission, was not adequate. Probably, a charge under section 166 of the Indian Penal Code (public servant disobeying direction of law with intent to cause injury to any person) could be made. But, in the opinion of the Commission, it would be better to have an express provision to cover such a violation, and the provision could be appropriately placed in the Chapter of the Indian Penal Code on "Offences by or against public servants". The recommendation of the Commission, therefore, was that section

166A should be inserted in the Penal Code, in the following terms:

"166A. Whoever, being a public servant-

(a) knowingly disobeys any direction of the law prohibiting him from requiring the attendance at any place of any person for the purpose of investigation into an offence or other matter, or

(b) knowingly disobeys any other direction of the law regulating the manner in which he shall conduct such investigation, to the prejudice of any person,

shall be punished with imprisonment for a term which may extend to one year or with fine or with both".

It was also recommended that the proposed offence should be cognizable, bailable and triable by any magistrate.

We are of the view that this recommendation should be carried out, as a preventive measure against malpractice or acts of indifference which may create situations of harassment to women.

2.13. Section 416, Code of Criminal Procedure, 1973: Capital sentence on a pregnant woman.- Section 416 of the Code of Criminal Procedure,

1973 provides that if a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed and may, if it thinks fit, commute the sentence to imprisonment for life. We think that the time has come to make commutation of the sentence mandatory in such cases and we recommend that section 416 should be so amended. For this purpose, for existing section 416 Cr.P.C., the following section should be substituted:-

> "416. Death sentence on pregnant woman.- If a woman sentenced to death is found to be pregnant, the High Court shall commute the sentence to one of imprisonment for life.".

Our intention is that the commuted sentence should be subject to further remission in appropriate cases.[9]

2.14. Detention in women's institutions: Section 417A, Cr.P.C., 1973 (proposed).- In regard to the detention of a woman after arrest, a matter which requires consideration is the place where she is to be detained. This question was also examined by the Law Commission in its Report[10] on Rape and Allied Offences. The recommendation was that if there are no suitable arrangements in the locality for such detention, the women should be sent to an

institution established and maintained under the Women's and Children s Institutions (Licensing) Act, 1956.

We recommend that such an amendment may be made in the Code in an appropriate manner subject to adding a rider to the effect that this should be done wherever practicable, for such institutions may not exist in some areas.

2.15. Section 432, Cr.P.C., 1973.- We now come to the duration of imprisonment with special reference to a sentence of imprisonment for life. Ordinarily, imprisonment for life works out to imprisonment for a particular number of years, and, until the insertion of section 433A in the Code of Criminal Procedure, 1973 (by Act No. 45 of 1978), the matter remained in the discretion of the Government under section 432 of the Code. Section 432 empowers the appropriate Government, inter alia, to suspend or remit sentences, conditionally or otherwise. Of course, remission cannot be claimed as a matter of legal right[11]. But, in practice, the net effect of remissions granted by the State Government was such that life imprisonment came to be reduced to about 10 to 12 years imprisonment. The position was substantially changed when in 1978, section 433A found its way into the Code.

2.16. Section 433A, Cr.P.C.- Besides section 43 , section 433 of th Code of Criminal Procedure 1973, provides that, without the consent of the person sentenced, the appropriate Government may commmute certain sentences. This power includes:

(a) commutation of sentence of death for any other punishment provided by the Penal Code, and also

(b) commutation of a sentence of imprisonment for a term not exceeding 14 years or fine. Here again, a convict cannot demand to be released after 14 years, where he had been sentenced for imprisonment for life; a specific order under section 433A is necessary.[12]

But the power has now been expressly made subject to section 433A of the Code (inserted in 1978) which reads as under:-

"433A. Notwithstanding anything contained in section 432, 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 under section 433 into one of imprisonment for life, such person shall not be released from prison unless he has served

at least fourteen years of imprisonment".

2.17. Position of women prisoners.- We are referring to these provisions of the Code in order to enable us to discuss certain questions concerning women prisoners. In the case of a woman prisoner, sentenced to imprisonment for life (and therefore subjected to the stringent provisions of section 433A of the Code of Criminal Procedure, 1973), is it proper that the law should insist on the prisoner's undergoing minimum 14 years of imprisonment mandatorily laid down in section 433A? The non-osbstante clause in section 433A makes it clear that such minimum imprisonment operates, notwithstanding the power of the appropriate Government to suspend and remit the sentence. We are not, at the moment, concerned with the constitutional validity of this section, which has been upheld.[13] Our anxiety is about the likely effect of this drastic provision on women prisoners. It appears to us that there will be many cases in which the categorical application of this section to women prisoners must cause grave hardship - for example, where the woman's husband dies suddenly while she is in jail, or where a young daughter of the woman is now nearing puberty. A study of the law reports will show that in many cases[14], the courts have considered

it proper to recommend to Government that a sentence of life imprisonment passed for murder should be replaced by a lesser sentence.

2.18. Point for consideration.- The point to be considered is whether women should not be exempted from the bar imposed by section 433A. We think that such a step is required in the interests of justice and can be safely taken without any great risk to security. Removal of the bar would not mean that women sentenced to imprisonment for life will automatically be released at the expiry of 14 years or any other period. It would only mean that the power of the appropriate Government to grant remission, on the merits, under section 432 or section 433 of the Code of Criminal Procedure would become exercisable. The appropriate Government would then be free to go into the circumstances of each case. We find that section 433A has been held not to apply to persons convicted under the Borstal Schools Act[15]. In our view, the same approach should be adopted in regard to women, particularly because, for women, prolonged imprisonment may not only affect their mental health, but may also prejudice the welfare of the other members of the family.

We may mention that in Maru Ram's case[16], the

Supreme Court expressed some uneasiness about the rigid approach reflected in section 433A.

2.19. Recommendations as to section 433A, Cr. P.C. (Proposed section 450F Cr.P.C.).- Our recommendation, therefore, would be that from the scope of section 433A of the Code of Criminal Procedure, 1973, there should be excluded the case where the person on whom a sentence of imprisonment for life is imposed, or in respect of whom a sentence of death has been commuted into a sentence of imprisonment for life, is a woman.

2.20. Reduction of life imprisonment- section 432 Cr.P.C.: A case from Allahabad.- Although the present Report is not directly concerned with the Government's powers to remit punishment as such, it is worthwhile noting the facts of a recent Allahabad judgment, because those facts illustrate how situations may arise when the sentence of life imprisonment (which is the least severe sentence for murder) may still prove to be too severe on the facts of a particular case. In the Allahabad case,[17] a mother had committed murder of her infant son and then herself attempted to commit suicide. She was aged only 17 years at the time of the offence. There was no apparent motive for the murder, which was committed in rage. As a

result of her act, she had not only lost her son, but she had also lost the sympathy of her husband, who refused to keep her in his house after this tragic incident. The High Court, while awarding the sentence of life imprisonment to the woman, made observations to the effect that the case was one in which a part of the sentence of imprisonment should be reduced by the State Government under section 432 of the Code of Criminal Procedure, 1973. This is only one sample case, illustrating the proposition that, in particular cirumstances, even life imprisonment may turn out to be too severe a sentence for murder. If so, section 433A of the Code needs revision[18].

2.21 Grant of bail to women: section 437, Cr P.C.:- Some questions relating to bail also fall to be considered. At present, the Code of Criminal Procedure, 1973, when dealing with the question of bail, does take into account the fact that women deserve special consideration. While directing the court not to release a person on bail where he is accused of an offence punishable with death or with imprisonment for life, the Code [in section 437(1)] takes care to provide that this prohibition shall not apply where the accused is a woman (there are other exceptions, which are

not material for the present purpose)[19]. In general, the courts have taken due note of this provision and women are not ordinarily denied bail, even if the offence committed is a serious one. Nevertheless, the absence of a more specific provision emphasising the duty of the court to take into account the fact that the accused is a woman, can be regarded as a lacuna in the present law. We are of the opinion that the time has come to emphasise this aspect, and that it is desirable to amend the relevant section of the Code of Criminal Procedure for the purpose.

2.22. Present section.- At present, section 437(1) of the Code of Criminal Procedure, 1973 reads as under:

> "437.(1) When any person accused of, or suspected of, the commission of any 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 other than the High Court or Court of Session, he may be released on bail, but -
>
> (i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;
>
> (ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a non-bailable and cognizable offence:

Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm;

Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason;

Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if h is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court."

2.23. Recommendation.- Our recommendation is that the first proviso to section 437(1) of the Code should be revised as under:

"Provided that where the person referred to in clause (i) or clause (ii) is under the age of sixteen years or is a woman or is sick or infirm, the court shall direct that such person be released on bail, unless the

court, for reasons to be recorded, considers it proper not to release such person on bail".

2.24 Pregnant woman: suspension of sentence of imprisonment. (proposed section 450G, Cr.P.C.).- While all necessary steps should be taken to ensure that women in custody are looked after properly, it also appears desirable to think of certain protective measures as regards pregnant women. We are of the view that the convicting court should have a power to suspend the execution of any sentence of imprisonment that might have been passed on a pregnant woman. At present, the criminal law of the country gives no such discretion to the court; and we regard this as a lacuna in our procedural law. The peculiar needs of a pregnant woman ought to be taken into consideration by the trial court; and the law should contain a provision, vesting in the court a discretion to suspend execution of the sentence of imprisonment (whether it be for life or for a specified term), subject to certain safeguards, where the person sentenced is a pregnant woman.

In brief, our proposal is that at the time of passing a sentence of imprisonment for life or imprisonment for a specified term, the court should have power, if the woman sentenced is

pregnant, to direct suspension of execution of sentence, having regard to certain considerations. The suspension would be operative till the pregnancy comes to an end and such period thereafter as the court may specify. During such period the woman sentenced will be required under a bond to keep peace and be of good behaviour and (if the court so directs) to observe such other conditions as may be specified. We are also making provisions as to details of the procedure to be adopted, for asking or compelling the woman to surrender. The period of suspension of sentence will not result in the reduction of the sentence of imprisonment as imposed by the Court.

2.25. Treatment of female prisoners.- Apart from the amendments which we have so far recommended regarding the procedure to be adopted in dealing with women in custody at the stage of arrest, investigation, inquiry and trial, it is, in our opinion, also necessary that the sentence of imprisonment (where such a sentence is imposed by the court on a woman) shall be carried out in the proper spirit. Imprisonment, no doubt, imposes restrictions on the liberty of the person sentenced thereto; but it does not permit cruelty, harassment, exploitation or other maltreatment of a person in prison, nor does it allow an attitude

of lethargy or indifference towards the prisoner.

Even as regards the restriction of liberty, a sentence of imprisonment does not justify undue, unusual, excessive or improper restraint to the prisoner. In stating this proposition we may be stating what is obvious or well known, but there are occasions when even that which is well known may have to be given a statutory shape in the interest of uniformity and certainty, and in order to make the law on the particular subject comprehensive.

2.26. Specific proposals regarding female prisoners: power to be given to High Court.- Approaching the matter from the above angle, we propose the insertion in the Code of Criminal Procedure of certain specific provisions as to female prisoners. Our scheme contemplates that the High Court be vested with the power to ensure that the safeguards to be so inserted are complied with, and we regard this provision as a key provision which will guide and control the working of all the remaining safeguards that we recommend in this behalf.

Accordingly, our first recommendation in this regard is that the High Court on the administrative side should be vested with a power to direct the Sessions Judges to satisfy

themselves that female prisoners are protected and properly looked after in accordance with the various provisions that we are going to recommend. Further, the High Court should have power to take such measures as may be desirable in order to move the State Government to take necessary action (for ensuring compliance with those provisions).

2.27. Medical examination.- As regards the specific safeguards, we propose that a female prisoner on admission to jail should be medically examined by a lady medical officer and, wherever deemed necessary for medical reasons, she should be kept separately in a female enclosure for such period as in the opinion of the medical officer may be necessary. Medical examination of female prisoners should also be made on readmission to the jail after release for a specific purpose.

While this provision will apply to every female prisoner, some specific provision should be needed in the case of a female prisoner who is pregnant. Our proposal in this regard are as under:-

> (i) If the officer incharge of the medical officer suspects that a female prisoner is pregnant, the female prisoner shall be sent to the District hospital for detailed examination and report.

(ii) The Lady Medical Officer of the District Government Hospital to whom the female prisoner has been referred shall certify the state of her health, pregnancy, duration of pregnancy and probable date of delivery and the special diet, if any, to be prescribed and other measures to be adopted.

(iii) Gynaecological examination of the female prisoner shall thereafter be performed in the District Government Hospital by a lady medical officer and proper pre-natal and ante-natal care shall be provided to the female prisoner, according to medical advice.

(iv) In cases of advanced stage of pregnancy, the female prisoner shall be shifted to a female ward of the Government Hospital.

(v) Such a pregnant female prisoner shall be kept in the woman's ward of the Government Hospital for not less than fifteen days after the birth of a child or for such longer period as may be advised by the Gynaecologist.

2.28 Transit of female prisoners. Certain safeguards also appear to be desirable as regards the transit of female prisoners. Such transit may be -

(a) from one jail to another, or

(b) for being taken to the court, or

(c) for investigation.

Our recommendations on the subject are as under:

(1) A female prisoner shall not be handcuffed and shall not be required to wear any fetters or cross-bars during such transit.

(2) A female prisoner shall be escorted by the Matron or Female Warden, if required to leave the female enclosure and such matron or female warden shall remain with the

prisoner till her return to the enclosure or release from the jail.

(3) A female relative of the female prisoner shall be allowed to accompany the female prisoner during transit of the nature mentioned above.

2.29. Place of Detention.- It will be convenient to include, as a part of the provisions relating to female prionsers, the new provision regarding the place of detention of women, to which we have already made a reference, this being a recommendation of the Law Commission in its Report on Rape etc. which, in our view, deserves to be implemented.

The gist of the proposal is that where there are no suitable arrangements in the locality for the detention of a woman, the woman shall be sent to an institution maintained under the Woman and Children's Institutions (Licensing) Act, 1956 or an institution recognised for the purpose by the State Government.

2.30. Inspection of jails.- It is common experience that bare legislative provisions stand the risk of non-implementation unless proper machinery is devised to oversee their enforcement. As a part of such machinery, we recommend the inspection of jails by a judicial officer, preferably a lady officer (where one is

available), to be nominated by the Sessions Judge, or, where a Lady Judicial Officer is not available, a male Judicial Officer accompanied by a Lady social worker. At places other than the Headquarters of the Court of Session, they will, at least once in every two months, make a surprise visit to jails for inspection, with a view to:

(i) providing the arrested females an opportunity to communicate their grievances;

(ii) ascertaining the conditions in the jails and verifying whether the requisite facilities are being provided and the provisions of the law (relating to female prisoner) being observed;

(iii) bringing to the notice of the Sessions Judge lapses, if any, on the part of the officers in charge of jails in regard to female prisoners.

At the Headquarters of the Court of Session, the Sessions Judge shall carry out similar inspections of the jails.

The Sessions Judge shall forward copies of the inspection reports to the Commissioners of Police (or other corresponding officer), the Inspector-General (Prisons) and the State Government, and may make such recommendations as may be required on the facts and in the circumstances of the case.

If the authorities fail to carry out the recommendations of the Sessions Judge, the matter shall be brought to the notice of the High Court.

2.31. Jail visitors.- Apart from surprise visits by judicial officers as above, it is desirable that at stated intervals visitors appointed by Government also visit the jails. In this regard our recommendations are as under:-

(1) The Central Government or the State Government (as the case may be) should, for every District or jail, appoint not less than three visitors for the purpose. Of these at least one shall be a medical officer and two shall be social workers, of whom at least one shall be a woman, wherever practicable.

(2) Not less than two visitors (out of whom at least one shall be a lady social worker) should, once in every six months, make a joint inspection of every part of the jail in the District in respect of which they have been appointed. Their function will be to ascertain the conditions prevailing therein and to check if the requisite facilities are being provided and the provisions of the law are being complied with and the directions given by the competent

court are being carried out, regarding woman prisoners.

(3) The visitors shall send the inspection report to the Sessions Judge for further action.

2.32. Scope of the provisions regarding female prisoners: Definition.- These provisions are meant to apply to every "female prisoner" - an expression which is proposed to be defined as meaning a woman detained in jail, whether during investigation, inquiry or trial or after conviction or under a law providing for preventive detention. For this purpose, "jail" will include a police lock-up, a prison and a place where persons are kept under detention under a law providing for preventive detention.

2.33. Role of courts in regard to prisoners.- It would be appropriate to make a few observations as to why, in our proposals, the Sessions Judges and the High Courts have been invested with certain important functions connected with the protection of women in prison. The administration of justice in a civilised society (we are concerned here mainly with criminal justice) is a process which does not begin or end with the criminal prosecution. Its roots lie much earlier, and its

consequences extend far beyond the court room. The criminal justice system, viewed properly, begins with the formulation of a penal statute, whether it be the Penal Code representing the general criminal law, or a special or local law concerned with this or that segment of social regulation. Enforcement of the legislation so enacted is undertaken by the police and other law enforcement agencies, who must act in aid of the criminal statute, but in conformity with the procedure laid down by law. If a prima facie case of the violation of a penal statute is found, the matter proceeds to court and comes within the direct cognisance of the judiciary. Sentencing, and alternatives to sentencing, loom large only at the end of the trial. What happens after sentencing really carries out the objective underlying the criminal law, though it is chronologically remote from the trial and much ence is pronounced. It is only because the court has passed a sentence or ordained any other alternative for the particular offender that the apparatus of corrections comes into operation. The court, in its turn, administers justice by applying and interpreting the criminal law. The whole is, thus, an integrated process, though the thread that runs

through the entire process is not immediately perceived by those who see its working only at one of the levels.

It also bears mention that during recent years, the courts exercising writ jurisdiction have increasingly come to be concerned with what is sometimes called "prison justice". This jurisdiction they exercise usually to enforce fundamental rights, the most important being the right guaranteed by article 21 of the Constitution. This article guarantees to every person the right to life and personal libertry, of which that person must not be deprived "except according to procedure established by law". Unfolding the various implications of this article, and elaborating the quality of the "procedure" that must be observed before depriving any person of personal liberty, the higher judiciary in India has discharged the responsibility of enunciating various safeguards which must be complied with. Many of the judicial decisions on the subject deal with prisoners. In this manner, courts, which are most eminently qualified to deal with matters of procedure, have provided guidelines to law enforcement officials, as well as to those concerned with prisons, in regard to the treatment of prisoners and connected

matters. This not only carries out the constitutional mandate which is obvious but it also unfolds the nuances of procedure -- an aspect which is worth pointing out. In this manner, the nexus between procedure and prisons is made more and more concrete by judicial decisions. Some of the important decisions in this area have been listed in Appendix II. A perusal of these pronouncements will show that the developments in this sphere have been intensive and extensive.

We believe that the proposals which we have made in this report regarding women prisoners, wherein the primary responsibility is placed on the shoulders of the judiciary, would be regarded as furthering and promoting the approach manifest in the judicial pronouncements on the subject, which deal with the treatment to be accorded to prisoners in the light of the constitutional requirement of "procedure established by law" and show the essential nexus between courts and prisons.

CHAPTER III

INDIAN PENAL CODE: SEXUAL ABUSE OF WOMEN IN CUSTODY

3.1. Sexual abuse and the Indian Penal Code.- We now turn to the provisions of the Indian Penal Code which contain the general substantive criminal law of India. It is needless to mention that most of its provisions as to offences against the human body - to the extent to which these provisions can be availed of by persons in custody - are applicable to all victims, irrespective of sex. But the sexual abuse of women has received specific attention in several sections of the Code. The most frequently invoked sections of the Code in this context are section 354 (indecent assault on women), sections 375-376 (rape) and sections 376B, 376C, 376D. Some of these will be referred to in this Chapter.

3.2. Custodial rape.- One can note, at the outset, the special safeguards provided by the law to prevent harassment, exploitation and sexual abuse of women. In regard to the substantive law, two changes made in the provisions of the Indian Penal Code relating to rape and allied offences must be noted at this stage. The Criminal Law Amendment Act (43 of 1983), focussing its attention on custodial rape, has, in the first

place, made the punishment for such rape more stringent. For this purpose, section 376 (2) of the Code, as inserted in 1983, deals specifically with rape by a police officer in certain circumstances (including rape of a woman in his custody), rape committed by a public servant on a woman in his custody as such public servant, rape by a person who is on the management or staff of a jail, remand home or other place of custody or of a women's or children's institution, when the rape is committed in respect of an inmate of such jail, etc., and rape by a person who is on the management or staff of a hospital, when the rape is committed on a woman in that hospital. For such custodial rape, the minimum punishment laid down in section 376 (2) is rigorous imprisonment up to ten years, which is higher than the minimum punishment of seven years imprisonment prescribed for an ordinary case of rape. Of course, in both the cases, the imprisonment can be for life.

The legally prescribed minimum can be relaxed by the court for adequate and special reasons, to be recorded in writing. "Hospital", as defined in the Code includes, inter alia, an institution for the reception and treatment of persons requiring medical attention or rehabilitation.

3.3. Custodial Sexual abuse.- The second important amendment made in the Penal Code in 1983 (so far as is material for the present purpose) was the insertion of sections 376B, 376C and 376D to deal with custodial sexual abuse, not amounting to rape. These sections (omitting certain definitions given in sections 376C and 376D) are quoted below:-

> "376-B. Intercouse by public servant with woman in his custody.- Whoever, being a public servant, takes advantage of his official position and induces or seduces, any woman, who is in his custody as such public servant or in the custody of a public servant subordinate to him, to have sexual intercourse with him, such sexual intercourse, not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.
>
> 376-C. Intercourse by Superintendent of jail, remand home etc.- Whoever, being the superintendent or manager of jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institutions takes advantage of his official

position and induces or seduces any female inmate of such jail, remand home, place or institution to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.

376D. Intercourse by any member of the management or staff of a hospital with any woman in that hospital.- Whoever, being on the management of a hospital or being on the staff of a hospital takes advantage of his position and has sexual intercourse with any woman in that hospital, such sexual intercourse, not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine."

3.4. Present position adequate.- It will be noted that the punishment prescribed for offences under sections 376B, 376C and 376D, IPC is imprisonment up to five years and fine. Offences which technically do not amount to rape, or cannot be proved to have satisfied all the legal requisites of rape, are taken care of, by these three

specific sections. The offences are cognisable, but no arrest is to be made without a warrant or without an order o a Magistrate All the offences are bailable and can be tried by the Court of Session only. So far as we can see, these sections have not raised any problems in practice so far.

It may also be repeated that section 376 of the Indian Penal Code (the main section relating to rape) itself has been now amended to provide minimum punishment for custodial rape.

It appears to us that the present provisions of the Penal Code designed to deter potential offenders from committing rape or cognate offences including subtler forms of seduction or harassment, are fairly adequate so far as woman in custody are concerned. In the absence of serious practical difficulti s brought to our notice, we do not consider it necessary to recommend any change in these provisions.

CHAPTER IV

CODE OF CIVIL PROCEDURE

4.1. Arrest under the Code.- In order to complete our coverage of procedural laws, we may deal, in brief, with the Code of Civil Procedure. So far as we can see, a person can be arrested under that Code, either (i) when he is a witness who does not appear in obedience to a summons issued by the civil court,[1] or (ii) is a person in respect of whom arrest before judgment may become necessary[2] because of certain improper conduct on his part during the pendency of the litigation or (iii) if, after the passing of a decree against him, he fails to satisfy the decree, and the decree is of such a nature that a warrant of arrest can be issued against him in execution.[3]

4.2. Arrest of women otherwise than in execution.- Cases of women witnesses being arrested for failure to obey the summons can arise in theory, but, in practice, they are hardly known. The same applies to cases of arrest before judgment. Hence the first two situations[4] mentioned above possess no importance in regard to women.

4.3. Arrest in execution.- As regards arrest of the judgment debtor in execution of a decree, section 56 of the Code of Civil Procedure, 1908

categorically prohibits the arrest of a woman in execution of a decree for money. Theoretically, where the decree is not for money, an arrest in execution is permissible, even if the woman is the judgment debtor. But such cases are extremely infrequent.

4.4. The resultant position is that arrest of women in civil process does not seem to present any practical problems of a serious magnitude which need attention from the point of view of law reform.

CHAPTER V

PROBATION OF OFFENDERS ACT, 1958.

5.1. The Probation of Offenders Act, 1958.- The Commission would also like to make a few suggestions as to the release of women on probation. For the present purposes, it is enough to describe, in brief, the scheme of the principal provisions of the Probation of Offenders Act, 1958, which is in force in most parts of India excepting certain areas where release on probation is governed by section 360 of the Code of Criminal Procedure, 1973 or by a local Act (as in U.P). The Central Act of 1958 reflects the increasing emphasis on the reformation and rehabilitation of offenders as useful and self-reliant members of society, without subjecting them to the deleterious effects of jail life. The Act contemplates release of an offender without sentencing him. The release is of two types. There may be release of the offender after "admonition" (section 3) or - which is more frequent - there may be release of the offender on probation of good conduct (section 4).

5.2. Section 3: release on admonition.- Under section 3 of the Probation of Offenders Act, 1958, when any person is found guilty of having

committed an offence punishable under sections 379, 380, 381, 404 or 420 of the Indian Penal Code or any offence punishable with imprisonment for not more than two years or with fine or with both under the Indian Penal Code or any other law and no previous conviction is proved against the offender, the Court may release him after due admonition having regard to the circumstances of the case, including the nature of the offence and the character of the offender. The offences mentioned in this section cover theft and some of its aggravations, criminal misappropriation of property and cheating committed in order to induce delivery of property, etc. There is no restriction as to age or sex of the offender; but the offence must be of the specified category. It would be seen that the range of the section is fairly narrow as regards the offences covered.

5.3 Section 4: release on probation of good conduct.- A wider power is conferred by section 4 of the Probation of Offenders Act, 1958. Section 4 confers on the court power to release an offender on probation of good conduct, if such person is found guilty of an offence "not punishable with death or imprisonment for life", and if the convicting court is of opinion that, having regard to the circumstances of the case,

including the nature of the offence and the character of the offender, it is expedient to release him on probation of good conduct. The release is to be ordered on the offender entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the court may direct, and, in the meantime, to keep the peace and be of good behaviour. The offender must have a fixed place of abode within the jurisdiction of the court, or he must have such a place of abode or place of regular occupation in which he is likely to live during the period of the bond. Before making such order, the court is to take into consideration the report, if any, of the probation officer concerned, in relation to the case. The release order may be accompanied, if the Court so decides, by a supervision order. In such a case, the offender remains under the supervision of a probation officer named in the order. The period of supervision is to be There is no restriction as to age or sex of the offender in this section also, provided the other conditions of the section are satisfied. The offence must not be punishable

really intended to mean "not punishable with death or with imprisonment for life". In other words, the section excludes not only (i) capital offences, but also (ii) offences for which the punishment, or one of the punishments provided, is imprisonment for life.

5.4. Section 6: offenders under 21 years of age.- The power of the Court to release an offender on admonition or probation, as formulated in sections 3 and 4 of the Probation of Offenders Act, 1958, is discretionary.[1] But that Act, by section 6, contemplates that in the case of young offenders, that power must be exercised ordinarily, unless the Court convicting the offender is satisfied that having regard to the circumstances of the case, including the nature of the offence and the character of the offender, it would not be desirable to deal with him under section 3 or section 4, and if the Court passes any sentence of imprisonment on the offender, it shall record its reasons for doing so.

5.5. Sections 21 and 22: Juvenile Justice Act, 1986.- Section 6, Probation of Offenders Act, summarised above[2] must now be read with the provisions of the Juvenile Justice Act, 1986. Under section 21 of that Act, the juvenile court is authorised (i) "to allow the juvenile to go

home after advice or probation" or (ii) to direct that the juvenile be sent to a special home for a specified period. Imprisonment in the traditional sense is out of question for a juvenile offender who is tried before the juvenile court under the Juvenile Justice Act, 1986. Section 22 of the Act makes a specific provision in this regard, in sub-section (1), quoted below:

> "(1) Notwithstanding anything to the contrary contained in any other law for the time being in force, no delinquent juvenile shall be sentenced to death or imprisonment, or committed to prison in default of payment of fine or in default of furnishing security:
>
> Provided that where a juvenile who has attained the age of fourteen years has committed an offence and the Juvenile Court is satisfied that the offence committed is of so serious a nature or that his conduct and behaviour have been such that it would not be in his interest or in the interest of other juveniles in a special home to send him to such home and that none of the other measures provided under this Act is suitable or sufficient, the Juvenile Court may order the delinquent juvenile to be kept in safe custody in such place and manner as it thinks fit and shall report the case for the orders of the State Government."

5.6. Inter-relationship of section 6 with other sections of the Probation Act.- It may be noted that section 6 of the Probation of Offenders Act, 1958[3] is not, in itself, an independent source of power to release an offender on probation or admonition. Rather, it draws the attention of the court to the need for exercising the power, if a

person under 21 years of age is found guilty of an offence punishable with imprisonment (but not with imprisonment for life), by placing a restriction on the court's power to sentence such person to imprisonment and by requiring the court to record its reasons for passing a sentence of imprisonment on the offender, if the court passes such a sentence.

5.7. As mentioned above, the power to release an offender on admonition (section 3) and the power to release on probation (section 4) are both wide enough to cover male as well as female offenders. But, in these provisions there is no emphasis as such, on the need to pay special attention to the desirability of probation where the offender is a female. Having regard to the problems that have arisen in the past in regard to females in custody, it would be worthwhile to introduce some such emphasis. One method of achieving this emphasis would be to require the court to take account of the fact that the offender is a woman in cases to which the Probation Act applies. Having regard to the fact that the object of the Probation Act is to encourage reformation in substitution for mere deterrence and to create facilities for out-of-jail treatment rather than incarceration inside the jail, it would be

appropriate if that objective is carried out more emphatically in regard to women.

5.8. Suggested amendment of section 3, Probation of Offenders Act.- If the above reasoning is accepted, then section 3 of the Probation of Offenders Act could be amended by inserting certain words.[4] The latter part of section 3, main paragraph, would then read as under:-

> ".....and the Court by which the person is found guilty is of opinion that, having regard to the circumstances of the case, including the nature of the offence and the character of the offender and the fact that the offender is a woman, it is expedient so to do, then, notwithstanding anything contained in any other law for the time being in force, the Court may, instead of sentencing him to any punishment or releasing him on probation of good conduct under section 4, release him after due admonition".

5.9. Suggested amendment of section 4(1) Probation Act.- On similar lines, section 4(1) of the Probation Act could be amended by inserting certain words which would require the Court to have regard to the fact that the offender is a woman. After such an amendment, section 4(1), main paragraph, would read as under:-

> "(1) When any person is found guilty of having committed an offence not punishable with death or imprisonment for life and the Court by which the person is found guilty is of opinion that, having regard to the

circumstances of the case, including the nature of the offence and the character of the offender and the fact that the offender is a woman, it is expedient to release him[5] on probation of good conduct, then, notwithstanding anything contained in any other law for the time being in force, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period, not exceeding three years, as the Court may direct, and in the meantime to keep the peace and be of good behaviour".

5.10. Section 360, Code of Criminal Procedure, 1973.- In areas where the Probation of Offenders Act, 1958 does not apply, section 360 of the Code of Criminal Procedure, 1973 regulates the topic of release of offenders on probation. Amendments in that section could, wherever necessary, be made on the same lines as those suggested above in the Probation Act. However, as a matter of criminological policy, it would be preferable to bring the whole of India within the scope of the Probation of Offenders Act.

5.11. Juvenile Justice Act.- As regards the Juvenile Act, 1986 the definition of "juvenile" in that Act covers girls up to the age of 18 years, and there is hardly any need to increase that age.

CHAPTER VI

MENTAL HEALTH ACT, 1987

6.1. Women prisoners and the Mental Health Act, 1987.- Apart from the arrest, detention and conviction of a person which may lead to custody, occasions for the imprisonment of women may also arise where, even though there is no charge of crime, a woman is kept in detention under legislation relating to mental health. India has recently enacted the Mental Health Act, 1987, and a reference will be made here to such provisions of that Act as are important for the present purpose.

6.2. Admission to mental institutions.- The Mental Health Act, 1987 contemplates the establishment of psychiatric hospitals and psychiatric nursing homes, which are the principal institutions in which persons mentally ill are to be treated (section 5). Admissions to such institutions for treatment may result (i) from a request made by the mentally ill person or his guardian, or (ii) (even without such request) on the application of the relative or friend of the mentally ill person, subject to the observance of certain medical and other formalities. Patients admitted under the former category are called

"voluntary patients" (sections 16 to 18), while the patients admitted under the latter category are called "patients admitted under special circumstances" (section 19). Formal admission to a psychiatric institution is effected by a "reception order". The application for reception order may be made by the medical officer incharge of the psychiatric hospital or psychiatric nursing home or by the spouse or any other relative of the mentally ill person (section 20).

Section 2(1) of the Act defines a mentally ill person as meaning a person who is in need of treatment by reason of any mental disorder <u>other than mental retardation</u>.

The police is also authorised to take into protection any person found wandering at large within the limits of the police station, where the police officer has reason to believe that such person is so mentally ill as to be incapable of taking care of himself. Subsequent proceedings take place before a Magistrate (sections 23 to 25).

A person who is merely mentally retarded does not, in general, come within the ambit of the Mental Health Act. The expression "mental disorder" itself is not defined in the Act but, if the mental disorder is of such a nature or magnitude that the treatment is needed, then the

person suffering from it would become a mentally ill person.

6.3. Keeping in detention.- Keeping a person as an inpatient in a psychiatric hospital or psychiatric nursing home is ordered by the District Court after enquiry (sections 26 to 36). Usually, it is the order of the District Court which achieves indefinite detention of a mentally ill person in an institution.

6.4. Mentally ill persons.- The Act also provides for the admission and detention of "mentally ill prisoners", being mentally ill persons for whose detention or removal to a psychiatric institution an order has been made under some other enactment. The enactments specified include the Prisoners Act and enactments relating to armed forces, as also sections 330 and 335 of the Code of the Criminal Procedure, 1973.

6.5. Visitors: section 37.- We now come to specific points concerning mental health legislation insofar as provisions contained in such legislation are material for women patients. Psychiatric hospitals and psychiatric nursing homes must have at least 5 Visitors in the scheme of the Mental Health Act, 1987. Section 37 provides as under in this regard:

"37. (1) The State Government or the Central Government, as the case may be, shall appoint for every psychiatric hospital and every psychiatric nursing home, not less than five Visitors, f whom at least one shall be a medical officer, preferably a psychiatrist, and two social workers.

(2) The head of the Medical Services of the State or his nominee preferably a psychiatrist shall be an ex officio Visitor of all the psychiatric hospitals and psychiatric nursing homes in the State.

(3) The qualifications of persons to be appointed as Visitors under sub-section (1) and the terms and conditions of their appointment shall be such as may be prescribed."

6.6. Recommendation regarding section 37.- Amongst the visitors to be appointed by the Government under section 37, Mental Health Act[1], two are to be social workers. In our view, at least one social worker should be a woman, wherever that is practicable, so that suspected malpractices against female in-patients can be looked into and, wherever necessary, suitable preventive measures can also be suggested. We recommend that section 37(1), Mental Health Act, 1987, should be amended by adding, after the words "two social workers", the words "of whom at least one shall be a woman, wherever practicable".

6.7. Section 81, Mental Health Act: Indignity to be avoided.- Section 81 of the Mental Health Act, 1987 contains a comprehensive provision for

punishing indignity or cruelty to mentally ill persons. The provision reads as under:-

> "81. (1) No mentally ill person shall be subjected durin treatment to any indignity (whether physical or mental) or cruelty.
>
> (2) No mentally ill person under treatment shall be used for purposes of research, unless-
>
> (i) Such research is of direct benefit to him for purposes of diagnosis or treatment; or
>
> (ii) Such person, being a voluntary patient, has given his consent in writing or where such person (whether or not a voluntary patient) is incompetent, by reason of minority or otherwise, to give valid consent, the guardian or other person competent to give consent on his behalf, has given his consent in writing, for such research.
>
> (3) Subject to any rules made in this behalf under section 94 for the purpose of preventing vexatious or defamatory communications or communications prejudicial to the treatment of mentally ill persons, no letters or other communications sent by or to a mentally ill person under treatment shall be intercepted, detained or destroyed"."

6.8. Section 81, Mental Health Act, 1987.- Section 81, Mental Health Act, 1987 quoted above[2], is applicable to persons of both the sexes and the prohibition of indignity or cruelty should, of course, take care of harassment of women or torture also. No doubt, serious harassment of a sexual nature is not specifically focussed upon by section 81. But, then, the Indian Penal Code (particularly after its amendment in 1983), takes sufficient care of serious sexual offences,

including seduction committed by the superintendents or other officers in charge of custodial institutions (sections 376B, 376C and 376D of the Indian Penal Code)[3]. In this position it does not appear necessary to expand the scope of section 81 of the Mental Health Act, 1987 for the above mentioned purpose.

6.9. Penalty for violation of section 81.- However, we must note that the penalty provided for the infringement of section 81, Mental Health Act, 1987 is rather mild. Such infringement appears to be governed by section 85 of the Act, quoted below:

> "85. Any person who contravenes any of the provisions of this Act or of any rule or regulation made thereunder, for the contravention of which no penalty is expressly provided, shall, on conviction, be punishable with imprisonment for a term which may extend to six months, or with fine, which may extend to five hundred rupees, or with both".

6.10. Amendment of section 85, Mental Health Act, recommended.- We have not been able to discover any other section of the Act which could be invoked for dealing with such infringement. It appears to us, that the punishment of imprisonment upto six months, provided by section 85, Mental Health Act[4] may not be adequate for dealing with an infringement of section 81, particularly where

the victim of the malpractice is a woman.[5] There is need for a higher punishment, to deal adequately with subtle forms of sexual and other harassment in respect of mentally ill patients. Our recommendation, therefore, is that in the Mental Health Act, 1987 a new section (section 84A) should be inserted, in the following terms:

> "84A Penalty for contravention of section 81.- Any person who contravenes the provisions of section 81 shall, on conviction, be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to five thousand rupees, or with both".

6.11. International developments.- In connection with women in custody for reasons of mental ill health, it would be of interest to note some of the international developments[6]. The position has been thus stated:-

> 'In 1975, in Singapore, the International Council of Nurses (CN) adopted a resolution on the "Role of the Nurse in the Care of Detainees and Prisoners". In the same year, the World Medical Association (WMA) adopted its famous Tokyo Declaration on "Guidelines for Medical Doctors concerning Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment".'.

The organisation of other health professions such as, psychiatrists, psychologists, etc., also formulated their own codes of ethics in this field

at the same time. As a consequence, on December 18, 1982, the United Nations General Assembly adopted, 'Principles of Medical Ethics Relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (for full text of these codes see Radical Journal of Health, issue on Human Rights and Health, September-December, 1988)".

CHAPTER VII

OTHER LAWS

7.1. Other enactments.- The main enactments relating to women in custody have been dealt with, in the preceding chapters. These chapters cover the two procedural codes, provisions of the law of corrections and the general substantive criminal law, as also the Mental Health Act. A woman can be arrested and detained in custody for an offence under a special or local law also. But, so far as we can see, such special or local laws would not be directly relevant to the problems of possible malpractices concerning women in custody, in the sense of raising any issues peculiar to women. In any case, if an offence under a substantive law, whether general or special, has been committed by a woman, the procedural machinery which comes thereafter into operation, in the shape of arrest matters, would generally be that contained in the Code of Criminal Procedure of 1973, on which we have already made necessary recommendations.[1]

7.2. Prevtive detention.- Apart from penal legislation proper, the Indian Statute book contains several enactments for the preventive detention of persons suspected of specified

prejudicial activities. Women as well as men can be detained under these laws; and, in theory, there could be occasions for the exploitation or harassment of women detained in custody under such laws. By and large, however, such exploitation can be appropriately dealt with by the special provisions inserted in the Indian Penal Code in 1983, in the shape of section 376 (as amended in 1983) and sections 376B, 376C and 376D (as inserted in 1983)[2]. In this position, we are not making any special recommendation regarding laws providing for preventive detention. Of course, such safeguards as are contained in the Constituition, or in the relevant enactment, for the protection of persons in preventive detention, would continue to be availablee

7.3. Decrimnasation and allied objectives.-

We may note that in the suggestion made by the National Expert Committee on women, it has been indicated[3] that in the context of a critical examination of laws relevant to women in custody, attention may also have to be paid to the need for e-penalisation, de-criminalisation and de-institutionalisation. No doubt, the idea underlying this valuable suggestion is to draw attention to a consideration of the question how far the content of the criminal law needs change,

in the shape of (i) possible removal from the statute book of offences for which the criminal law is not an appropriate instrument and (ii) adoption of measures in other respects to ensure that there may be prevention, at the very threshold, of the entry of a woman into an institution of a custodial nature. It is obvious, that any comprehensive examination undertaken with the first objective mentioned above will have to cover the entire criminal law of the country. This would be a very big undertaking. Although such an undertaking would be useful in several respects, its focus would not necessarily be on women criminals only. It would necessistate a re-evaluation of every criminal statute of the country in order to assess whether the penal sanction is really needed for the offences dealt with by each statute.

7.4. Objectives to be kept in mind.- The sheer magnitude of the task would be forbidding. In our view, the more practical course would be to bear in mind the above objectives, whenever a particular enactment is taken up for review, and to suggest necessary reforms, consistent with the protection of society and the interest of justice. We would also like to mention that the changes recommended by us in this report in regard to

arrest, bail and probation should, to some extent[4], operae as a preventive, i.e., they would keep women out of the custodial apparatus. Those changes, while not achieving de-criminalisation in a direct manner, will have the effect, at least, of reducing the number of women in custody.

CHAPTER VIII

MOBILE COURTS

8.1. Mobile Courts.- In the reference made to the Law Commission, one of the questions posed for consideration relates to mobile courts for the trial of women prisoners. The suggestion made in this regard, in paragraph 478 of the Report of the National Expert Committee on Women Prisoners, is to the effect that "Nari Bandi Griha Adalats" should be established in the nature of mobile courts, as an immediate modality for rendering speedy redress to women in custody. It has been stated that whereas the Family Court or Women's Court can be the stable permanent mechanism, the Mobile Adalat or Court is required as an immediate, as well as instant, corrective step. The further suggestion is that such camps and courts should be held urgently and routinely in order to clear the backlog of pending cases. According to the suggestion, the Mobile Adalat should be conducted on a district-wise or cluster-wise basis, so as to cover all prisons and non-prison custodial institutions. The objective envisaged in the suggestion is to provide speedy justice to women in custody.

8.2. Some practical aspects noted.- While we

appreciate the spirit underlying the suggestion, it seems to us that there might be some practical aspects to be considered if the suggestion is to be implemented. On the one hand, if the mobile court is held near the prison wherein women prisoners are housed, then there would be the practical problem of transporting the court personnel, the witnesses and others concerned with the case, as well as the records. The analogy of traffic offences would not be quite appropriate. The questions involved in trials relating to traffic offences are extremely simple; ordinarily, no witnesses are examined and the matter is decided after perusing the report of the traffic constable on duty. In contrast, in offences which involve a potential sentence of imprisonment, more than one witness will normally have to be examined. Documents and articles have to be kept ready for the trial. Some of these articles would be valuable from the pecuniary point of view. A few others, while having no monetary value as such, might be crucial to the case, for example, weapons, clothes and other articles which have been examined by forensic scientists. It is also common experience that all witnesses are not in attendance at the same time, so that the Mobile Court would have to visit the prison more than once.

8.3. Another complex problem must be visualized and tackled.- When a female figures as a co-accused alongwith one or more male accused in a criminal case triable exclusively by a Court of Sessions, the trial of the male accused may have to be separated. But it will entail examination of the same witnesses by two different courts. And the question which calls for an answer is how to overcome a situation where conflicting decisions may be rendered by two different courts, for, the courts concerned may disagree in assessment of the evidence of identical witnesses and reach conflicting conclusions. In order to escape from such a situation, cases triable by Court of Sessions may be excluded from the purview of mobile courts in case the idea is considered feasible and desirable otherwise. Of course, the same problem will arise in cases not exclusively triable by a Sessions Court and perhaps there is no solution other than to live with the problem.

8.4. Small number of women prisoners.- Besides this, the number of women prisoners under trial in a particular district jail or sub-jail whose cases are ripe for trial, would not be so large that one court, sitting the whole day, would be utilised to dispose of a large number of cases. In other words, if the facility suggested is created, the

proportionate benefit likely to result therefrom would be negligible. Again, if the idea is to combine a number of district jails, there would be problems of jurisdiction and personnel. It appears doubtful whether the suggestion will yield a positively fruitful result when all the aspects mentioned above are taken into account.

8.5. Reduction of number of women prisoners.- This does not, of course, mean that in this sphere one should abandon all efforts at improvising the legal position regarding speedy and smooth trial of cases relating to women in custody. Elsewhere in this report, suggestions have been offered for effecting certain changes in the substantive criminal law, the law of procedure and the law relating to mental health institutions. In this context, we attach particular importance to the law relating to the grant of bail to women, on which we have made specific suggestions in the appropriate chapter.[1] If these sugestions are carried out, then it should be possible to bring down the number of women in custody; and, if that happens, the question of providing mobile courts would not survive, even if the creation of such a facility is regarded as practicable. As far as possible, the objective should be to see that the number of women under-trial prisoners is kept

within the minimum. Our suggestion to amend the law relating to probation[2] should also be viewed in that perspective. Such an amendment, would result in reducing the number of women entering the prison after conviction.

CHAPTER IX

POSITION REGARDING PRISONS

9.1. Constitutional position.- Many of the matters discussed in the Report of the National Expert Committee on Women Prisoners relate to the actual administration of prisons, and the question may arise whether any reforms in this regard could be considered. By way of illustration, one can mention the following topics, representing areas where possibilities of harassment, exploitation or annoyance to women prisoners in custody may arise:

CHAPTER IX

POSITION REGARDING PRISONS

9.1. Constitutional position.- Many of the matters discussed in the Report of the National Expert Committee on Women Prisoners relate to the actual administration of prisons, and the question may arise whether any reforms in this regard could

(a) Physical protection.

(b) Accommodation and sanitary conditions.

(c) Physical and mental health of prisoners, particularly when a prisoner is likely to be injuriously affected mentally by discipline or treatment.

(d) Separation of prisoners of each sex.

(e) Safety from fellow prisoners.

(f) Solitary confinement.

(g) Treatment of prisoners.

(h) Social aspects, such as meetings with members of the family and friends.

(i) Temporary release and parole.

9.2. Matters within the competence of States.- While the topics which have been mentioned by way

of vital importance to the well being of prisoners, it will appear that a pretty large bulk of the subject would fall exclusively within the legislative competence of States. This is because the topic of prisons and prisoners falls within the State List. For this reason, necessary legislative action will have to be taken by the States. We may quote the material part of State List, entry 4:-

> "4. Prisons, reformatories, borstal institutions and other institutions of a like nature and persons detained therein."

This entry is wide enough to cover prison conditions.[1] Hence we are not dealing with the topics mentioned above.

CHAPTER X

CONCLUSIONS AND RECOMMENDATIONS

In the light of the discussion made in the earlier Chapters of the Report, the Commission is of the opinion that it is essential to make appropriate provisions in order to foreclose harassment of women in custody and in order to protect such women to the extent possible. It is felt that amendment of each individual provision, as existing in the Code of Criminal Procedure, may not sufficiently serve the purpose. The provisions which call for amendment in the light of the discussion made hereinbefore are scattered in different chapters of the Code of Criminal Procedure. Under the circumstances, the amendments made especially with an eye on protecting the women in custody from harassment and avoidable hardship will not come into focus if effected in each individual provision and the officials concerned may not become fully aware of such provisions without making a special effort in this behalf. So also, the women's organisations and the relatives of the concerned women in custody may experience the same difficulty in informing themselves about the rights of such women. In the Commission's opinion, it is, therefore, desirable that, as far as possible, the

provisions especially made in this behalf may be incorporated in a separate Chapter of the Code of Criminal Procedure so that the concerned officials, as also the women's organisations and the women in custody and their relatives, can, without much effort, apprise themselves of the rights of such women and the obligations of the concerned officials.

For the sake of convenience, a draft of the proposed chapter relating to arrest, interrogation and custody of women (and, incidentally, of children) and the proposed provisions embodying the conclusions of the Commission is being set out hereinafter. But before doing so, the conclusions and recommendations may be broadly indicated:

Substance of Recommendations in a nutshell

(1) In the event of a woman being required to be arrested, the police officer concerned shall not actually touch the person of the woman and may presume her submission to custody. This recommendation is being made in order that the dignity of the concerned woman is maintained. (Paragraph 2.2)

(2) Ordinarily, no woman shall be arrested after sunset and before sunrise. In exceptional cases calling for arrest during these hours,- (i) the prior permission of the immediate superior officer shall be obtained, or (ii) if the case is of extreme urgency, then after arrest a report with reasons shall be made to the immediate superior officer and to the Magistrate. (Para 2.3)

(3) Whenever a woman is medically examined, the examination shall be conducted only under the supervision of a female

registered medical practitioner, with strict regard to decency. (Paragraph 2.6)

(4) The concerned woman shall be informed about her right to be medically examined, in order to bring on record any facts which may show that an offence against her has been committed after her arrest. (Paragraph 2.8)

(5) A copy of the report of the medical examination shall be furnished to the woman. (Paragraph 2.7)

(6) A woman shall not, under section 160, Cr.P.C., be required to attend for interrogation at any place other than her dwelling house, and section 160 of the Code should be amended for the purpose. (Paragraph 2.10)

(7) When the statement of a woman is recorded during investigation, a relative or friend of the woman or an authorised representative of an organisation interested in the welfare of women shall be allowed to remain present. (Paragraph 2.11)

(8) Where a woman is convicted of an offence to which section 360, Cr.P.C. applies, whilst exercising the power of the court to release the offender on probation or on due admonition, etc., as exercisable under that section, due regard should be paid to the fact that the offender is a woman. (Paragraph 5.10)

(9) The prohibition imposed by section 433A, Cr.P.C. on the reduction (by the Government) of the period of imprisonment (of offenders sentenced to imprisonment for life) below a minimum period of 14 years should not apply to a woman. (Paragraph 2.19)

(10) Where a pregnant woman is sentenced to imprisonment (whether for life or for a specified term), the court should have power to direct that execution of the sentence be suspended till termination of the pregnancy and a specified period thereafter, subject to certain conditions. (Paragraph 2.24)

(11) The High Court on its administrative side should have power to direct the District and Sessions Judges to

satisfy themselves that female prisoners are protected and properly looked after, in accordance with the provisions that we are recommending in this regard.

For ensuring compliance therewith, the High Court should have power to take appropriate measures to move the State Government. (Paragraph 2.26)

The following concrete protective measures are recommended as regards female prisoners:

(a) On admission to jail, a female prisoner should be medically examined. If medically necessary, she should be kept separately in a female enclosure. On each occasion of readmission to jail after temporary release, the same course should be adopted (Paragraph 2.27).

(b) Where a female prisoner is suspected of pregnancy whilst in custody, she shall be sent to the District Government Hospital. In case of advanced pregnancy, she shall be shifted to female ward of the Government hospital (Paragraph 2.27).

(c) A female prisoner shall not be handcuffed or made to wear fetter cross-bars during transit from one jail to another or to the court or for investigation. (Para 2.28) Besides this, she shall be escorted by the Matron or Female Warden, if she is required to leave the female enclosure. During transit, a female relative shall be allowed to accompany her. (Para 2.28)

(d) Where there are no suitable arrangements for housing women prisoners, they should be sent to a suitable institution wherever practicable. (Para 2.29)

(e) At places other than Sessions headquarters, a judicial officer (preferably a lady judicial officer) shall make an inspection of the jail where the women in custody are detained. Such inspection shall be made at least once in every two months and the District and Sessions Judge may make appropriate recommendations in the light of the inspection report. (Para 2.30)

At the Sessions headquarters, the Sessions Judge shall carry out such inspection. The object is to ensure that measures for the protection of women as recommended in this report are implemented. Copies of these Inspection Reports shall be forwarded to the concerned officers. (Paragraph 2.30)

(f) Apart from surprise visits as above, jails where there are women prisoners shall be visited by visitors appointed by the Government. Of these jail visitors, one should be a medical officer and two should be social workers (of whom, wherever practicable, one shall be a woman). Two visitors should visit the jail at least once in six months and make a report to the Sessions Judge. (Para 2.31).

(g) These provisions should apply, not only to women prisoners, but also to women in custody in police lockups or as detenus under a law providing for preventive detention, irrespective of whether the woman is kept in custody during investigation, inquiry or trial or after conviction etc. (Para 2.32)

(12) As a consequence of our comprehensive recommendation relating to medical examination of women involved in the criminal process, consequential amendment may be made in section 53 of the Code of Criminal Procedure, 1973. (Paragraph 2.6)

(13) In section 160(1), Cr.P.C., 1973 (which prohibits the summoning of woman, etc., during investigation by the police), certain verbal changes should be made. (Paragraph 2.10)

(14) Section 416, Cr.P.C. should be amended to make the commutation of death sentence passed on a pregnant woman mandatory. (Paragraph 2.13)

(15) At present, by section 437(1), Cr.P.C., a restriction is imposed on the releasee, on bail, of a person accused of an offence punishable with death or imprisonment for life, but the first proviso to that sub-section vests in the court a discretion to release on bail certain categories of persons

(persons below the age of 16 years, women, and sick and infirm persons).

The recommendation is that in such cases, the court shall direct that such persons shall be released on bail, unless the court, for reasons to be recorded, considered it proper not to release such person on bail. (Paragraph 2.23)

(16) For violation of the mandate contained in section 160(1), Cr.P.C. (which provides that a person below 15 years or a woman shall be examined only at his or her residence), a specific penal provision should be inserted in the Indian Penal Code, as section 166A. (Paragraph 2.12)

(17) In deciding about release on admonition of an offender under section 3 of the Probation of Offenders Act, 1958, the court should have regard also to the fact that the offender is a woman (where the person convicted is a woman). (Paragraph 5.8)

(18) Section 4(1) of the Probation of Offenders Act, 1958, which empowers the court to release offenders convicted of certain offences on probation of good conduct, should be amended to provide that in deciding about such release, the court shall have regard also to the fact that the offender is a woman (where the person convicted is a woman). (paragraph 5.9)

(19) Section 37(1), Mental Health Act, 1987 should be amended so as to provide that among the five visitors to the institutions falling within the section, at least one shall be a woman, wherever practicable. (Paragraph 6.6)

(20) For punishing the offence under section 81, Mental Health Act, 1987 (Indignity, etc., on a mentally ill person in custody), a new section 84A should be inserted, prescribing, for the above offence, a punishment of imprisonment up to 2 years or fine up to Rs.5000 or both. (Paragraphs 6.9 and 6.10)

Set out in the Appendix I to this Report are our recommendations in the form of draft

amendments in the relevant enactments, that is to say, -

(a) the Code of Criminal Procedure, 1973;

(b) the Indian Penal Code;

(c) the Probation of Offenders Act, 1958; and

(d) the Mental Health Act, 1987.

We hope that these recommendations, if implemented, will alleviate the hardship of women in custody to a great extent. We conclude this report on this optimistic note.

(M.P. THAKKAR)
CHAIRMAN

(Y.V. ANJANEYULU)
MEMBER

(P.M. BAKSHI)
MEMBER

(C.V.G. KRISHNAMURTY)
MEMBER SECRETARY

NEW DELHI, DATED THE 14th DEC., 1989.

APPENDIX I

RECOMMENDATIONS IN THE FORM OF DRAFT AMENDMENTS IN VARIOUS ENACTMENTS

RECOMMENDATION I

The following amendments should be made to the Code of Criminal Procedure, 1973 by inserting a new Chapter relating to arrest and custody of women to be inserted after Chapter XXXIIIA:-

CHAPTER XXXIIIA

SPECIFIC PROVISIONS AS TO ARREST, INTERROGATION AND CUSTODY OF WOMEN AND CHILDREN

450A. Application of the Chapter.- The provisions of this Chapter shall, as regards the matters covered thereby, apply notwithstanding anything to the contrary contained in any other provision of this Code. (See Chapter X).

450B. Arrest of women.- (1) Where a woman is to be arrested under this Code, then, unless the circumstances indicate to the contrary, her submission to custody on an oral intimation of arrest shall be presumed, and unless the circumstances otherwise require or unless the police officer arresting is a female, the police officer shall not actually touch the person of the woman for making her arrest. (See para 2.2)

(2) Except in unavoidable circumstances, no woman shall be arrested after sunset and before sunrise, and where such unavoidable circumstances exist, the police officer making the arrest shall, by making a written report, obtain the prior permission of the immediate superior officer not below the rank of an Inspector for effecting such arrest or, if the case is one of extreme urgency, he shall, after making the arrest, forthwith report the matter in writing to his such immediate superior officer, with the reasons for arrest and the reaons for not taking prior permission as aforesaid and shall also make a similar report to the Magistrate within whose local jurisdiction the arrest has been made. (See para 2.3)

450C. Medical Examination of women.- (1) The Magistrate before whom an arrested female is produced shall, whether or not such female makes a request for examination of her body under section 54, inform her about her right to such examination, in order to bring on record any facts which may show that an offence against the body has been committed with respect to such female after her arrest. (See para 2.8).

(This amendment can in due course be made applicable to males also)

(2) Whenever the person of a female is to be examined either under section 53 or under section 54, the examination shall be made only by or under the supervision of a female registered medical practitioner, and with strict regard to decency. (see para 2.6).

[Present sub-section (2) of section 53, Cr.P.C. to be deleted]

(3) The registered medical practitioner holding an examination under section 53 or section 54 shall forthwith furnish to the arrested female a copy of the report of the examination, free of cost. (See para 2.7).

[This amendment can in due course be made applicable to males also]

450D. Women and children attending for investigation.- (1) A male person under the age of fifteen years or a woman shall not be required to attend under section 160 at any place other than his or her dwelling place. (See para 2.10)

[Present proviso to section 160(1), Cr.P.C. to be deleted].

(2) Where, under this Code, the statement of a male person under the age of fifteen years or of a woman is recorded by a male police officer, either as first information of an offence or in the course of an investigation into an offence, a relative or friend of such male person or woman, and also a person authorised by such organisation

interested in the welfare of women or children as is recognised in this behalf by the State Government by notification in the Official Gazette, shall be allowed to remain present throughout the period during which the statement is being recorded. (See para 2.11).

450E. Admonition and probation under the Code.- Where the person convicted by a court is a woman, the court shall, in exercising its discretion as to release of the offender on probation under sub-section (1) of section 360 or release of the offender after due admonition under sub-section (3) of that section, have due regard to the fact that the offender is a woman. (See para 5.10)

450F. Period of detention of women sentenced to imprisonment for life.- Nothing in section 433A applies to a case where the person on whom a sentence of imprisonment for life is imposed, or in respect of whom a sentence of death has been commuted into a sentence of imprisonment for life, is a woman. (See para 2.10)

450G. Pregnant woman and suspension of imprisonment.- (1) When a pregnant woman is convicted of any offence and the court sentences her to imprisonment for life or for a specified

term, the court may, if it thinks fit, at the time of passing such sentence, regard being had to the age, character or antecedents of the offender, the circumstances in which the offence was committed and the circumstances of the woman herself, direct-

(a) that execution of the sentence of imprisonment in her case shall be suspended till she is delivered of a child or the pregnancy is otherwise terminated and such period thereafter, as the court may specify, expires, and

(b) that, during such period of suspension of execution of sentence, she shall be released on her entering a bond with or without sureties -

(i) to appear and undergo sentence on the expiry of such period and,

(ii) in the meantime, to keep the peace and be of good behaviour, and to observe such other conditions, if any, as the court may impose.

(2) An order under this section may be made by an Appellate Court, or by the High Court or the Court of Session when exercising its power of revision.

(3) When an order has been made under this

section in respect of any woman, the High Court or the Court of Sessions may, on appeal when there is a right of appeal to such Court or when exercising its powers of revision, set aside or modify such order in the interest of justice.

(4) The provisions of sections 121, 124 and 373 shall, so far as may be, apply in the case of sureties offered in pursuance of the provisions of this section.

(5) The Court, before directing the release of a woman under sub-section (1), shall be satisfied that the woman or her surety, if any, has a fixed place of abode or regular occupation in the place for which the Court acts, or in which the woman is likely to live during the period named for the observance of the conditions.

(6) If the Court which convicted the woman or a Court which could have dealt with the woman in respect of her original offence, is satisfied that the woman has failed to observe any of the conditions of her recognizance, it may issue a warrant for her apprehension, and after hearing the parties, revoke or set aside the order of suspension and direct that the sentence be executed forthwith for the period to which she has been sentenced.

(7) Where the period for which the execution of a sentence of imprisonment passed on a woman is

suspended by the court under sub-section (1) expires, -

(a) the woman shall surrender herself to that court or to such other court as may be directed by that court in its order;

(b) if she does not so surrender herself, she shall be arrested under a warrant to be issued by such court; and

(c) the court before which she surrenders herself, or the court before which she is produced on arrest under its warrant, as the case may be, shall direct the sentence to be executed for the period to which she has been sentenced.

(8) Where, in respect of any woman, execution of the sentence of imprisonment has been suspended under the provisions of this section, the period of suspension shall not be set off against the term of imprisonment imposed on her; and the liability of such woman to undergo imprisonment in accordance with the sentence, on the expiry of the period of suspension of sentence, shall remain unaffected by the suspension. (See para 2.24).

[Compare the decision in Champalal v. State of Maharashtra, AIR 1982 SC 791; (1982) Cr.L.J. 612. (contrast section 428, Cr.P.C., 1973)].

450H. Female prisoners.- The High Court on its administrative side may direct the Sessions Judges to satisfy themselves that female prisoners are protected and properly looked after, in accordance with the safeguards contained in sections 450I to 450N and may take such measures as may be desirable in order to move the State Government to take necessary action. (See para 2.26)

450I. Medical examination.- As far as practicable the following provisions shall be complied with, regarding the medical examination of female prisoners and consequential action:-

(a) On admission to jail, every female prisoner shall be medically examined by a lady medical officer and, wherever deemed necessary for medical reasons, be kept separately in a female enclosure for such period as, in the opinion of the Medical Officer concerned, may be necessary.

(b) Every female prisoner shall also be medically examined on her readmission to jail after release one bail, parole or furlough, by a lady medical officer.

(c) If the officer incharge or the medical officer suspects that a female prisoner is pregnant, the female prisoner shall be sent to the District Hospital for detailed examination and

report.

(d) The Lady Medical Officer of the District Government Hospital to whom the female prisoner has been referred under clause (c) shall certify the state of her health, pregnancy, duration of pregnancy and probable date of delivery and the special diet, if any, to be prescribed and other measures to be adopted.

(e) Gynaecological examination of the female prisoner shall thereafter be performed in the District Government Hospital by a lady medical officer and proper pre-natal and ante-natal care shall be provided to the female prisoner according to medical advice.

(f) In cases of advanced stage of pregnancy, the female prisoner shall be shifted to a female ward of the Government Hospital.

(g) A pregnant female prisoner referred to in clause (f) shall be kept in the women's ward of the Government Hospital for not less than fifteen days after the birth of a child or for such longer period as may be advised by the Gynaecologist. (see para 2.27).

450J. Transit.- (1) A female prisoner shall not be handcuffed and shall not be required to wear

any fetters or crossbars during her transit from one jail to another or for the purpose of being taken to the court or for investigation.

(2) A female prisoner shall be escorted by the Matron or Female Warden, if required to leave the female enclosure and such matron or female warden shall remain with the prisoner till her return to the enclosure or release from the jail.

(3) A female relative of the female prisoner shall be allowed to accompany the female prisoner during her transit from one jail to another or for the purpose of being taken to the court or for investigation. (See para 7.28)

450K. Place of detention.- Where a woman is arrested and there are no suitable arrangements in the locality for keeping her in custody in a place of detention exclusively meant for women, she shall be sent to an institution established and maintained for the reception, care, protection and welfare of women or children, licensed under the Women's and Children's Institutions (Licensing) Act, 1956 or an institution recognised by the State Government as far as practicable except in cases where any special law requires that she should be sent to a protective home or other place of detention authorised for the purposes of such special law. (See paras 7.14 and 7.15)

General (Prisons) and the State Government and may make such recommendations as may be required on the facts and in the circumstances of the case.

(4) If the authorities fail to carry out the recommendations of the Sessions Judge, the matter shall be brought to the notice of the High Court for suitable action. (See para 2.30)

450M. Appointment of Jail Visitors.- (1) The Central Government or the State Government, as the case may be, shall, for every district or Jail, appoint not less than three visitors, of whom at least one shall be a medical officer and two shall be social workers, of whom at least one shall be a woman, wherever practicable.

(2) Not less than two visitors, out of whom at least one shall be a lady social worker, shall, once in every six months, make a joint inspection of every part of the jail in the district in respect of which they have been appointed, with a view to ascertaining in regard to female prisoners the conditions prevailing therein and whether the requisite facilities are being provided and the provisions of the law are being complied with and whether the directions, if any, given by the Sessions Judge, or the High Court or the Supreme Court, as the case may be, are being carried out.

General (Prisons) and the State Government and may make such recommendations as may be required on the facts and in the circumstances of the case.

(4) If the authorities fail to carry out the recommendations of the Sessions Judge, the matter shall be brought to the notice of the High Court for suitable action. (See para 2.30)

450M. Appointment of Jail Visitors.- (1) The Central Government or the State Government, as the case may be, shall, for every district or Jail, appoint not less than three visitors, of whom at least one shall be a medical officer and two shall be social workers, of whom at least one shall be a woman, wherever practicable.

(2) Not less than two visitors, out of whom at least one shall be a lady social worker, shall, once in every six months, make a joint inspection of every part of the jail in the district in respect of which they have been appointed, with a view to ascertaining in regard to female prisoners the conditions prevailing therein and whether the requisite facilities are being provided and the provisions of the law are being complied with and whether the directions, if any, given by the Sessions Judge, or the High Court or the Supreme Court, as the case may be, are being carried out.

(3) The visitors shall send a report of their inspection to the Sessions Judge, who shall deal with such report in the same manner as has been provided in section 450I in respect of the report of inspection submitted by a judicial officer. (See para 2.31)

450M. Definitions.- (1) For the purposes of sections 450N to 450W (both inclusive),-

(a) "female prisoner" means a woman detained in jail, whether during investigation, inquiry or trial or after conviction or under a law providing for preventive detention, and

(b) "jail" includes a police lockup, a prison and a place where persons are kept under detention under a law providing for preventive detention. (See para 2.32)

RECOMMENDATION II

Certain other amendments are also necessary in the Code of Criminal Procedure, 1973, as under:-

(1) section 53(2) of the Code should be deleted. (See para 2.6)

[This is consequential on the changes made by recommendation No.1 *supra*. See proposed section 450C(2)]

(2) In section 166(1) of the Code of Criminal Procedure, 1973, the proviso should be deleted. (See para 2.10)

[Consequential on proposed section 439A, Cr.P.C.].

(3) Section 416 of the Code should be revised as under:

> "416. Death sentence on pregnant woman.- If a woman sentenced to death is found to be pregnant, the High Court shall commute the sentence to one of imprisonment for life", (See para 2.13).

(4) The first proviso to section 437(1) of the Code of Criminal Procedure, 1973 should be revised as under:

> "Provided that where the person referred to in clause (i) or clause (ii) is under the age of sixteen years or is a woman or is sick or infirm, the court shall direct that such person shall be released on bail, unless the court, for reasons to be recorded, considers it proper not to release such person on bail". (See para 2.23).

RECOMMENDATION III

The Indian Penal Code should be amended in the following manner:-

For violation of the mandate contained

in section 160(1), Code of Criminal Procedure, 1973 (to the effect that a person below 15 years or a woman shall be examined only at his or her residence), a specific penal provision should be inserted. The proposed provision (section 166A) may be on the following lines:-

"166A. Whoever, being a public servant -

(a) knowingly disobeys any direction of the law prohibiting him from requiring the attendance at any place of any person for the purpose of investigation into an offence or other matter, or

(b) knowingly disobeys any other direction of the law regulating the manner in which he shall conduct such investigation, to the prejudice of any person, shall be punished with imprisonment for a term which may extend to one year or with fine or with both".

The proposed offence (section 166A - IPC) should be cognisable, bailable and triable by any Magistrate. (See para 2.12)

RECOMMENDATION IV

The Probation of Offenders Act, 1958 should be

amended in the following manner:-

A

Section 3 of the Probation of Offenders Act, 1958 (which deals with the power of the court to release a convicted offender on admonition) should (in its latter part, main paragraph) be amended, by providing that in deciding about such release, the court shall have regard to the circumstances of the case, including the nature of the offence and the character of the offender (as at present), and the fact that the offender is a woman. (see para 5.8)

B

Section 4(1) of the Probation of Offenders Act, 1958, which empowers the court to release offenders convicted of certain offences on probation of good conduct should (in its main paragraph) be amended on the same lines as section 3 of the Act recommended to be amended as above, that is to say, the court shall have regard also to the fact that the offender is a woman. (see para 5.8)

RECOMMENDATION 5

Mental Health Act, 1957 should be amended in the

following manner:-

A

Section 37(1), Mental Health Act, 1987 should be amended so as to provide that amongst the five visitors to the institution falling within the section, out of the two social workers envisaged by the section, at least one shall be a woman, wherever practicable. (See para 6.6)

B

For the offence under section 81, Mental Health Act, 1987 (indignity, etc, on a mentally ill person in custody), a new section 81A should be inserted in the Act, prescribing, for the above offence, a punishment of imprisonment up to two years or fine upto Rs.5000 or both. (See paras 6.9 and 6.10)

APPENDIX II

List of some recent rulings concerning prisoners

1. P.M. Patnaik v. State of A.P., AIR 1974 SC 2092; 1975(3) SCC 185.

2. Hiralal Mallick v. State of Bihar, (1977) 4 SCC 44; AIR 1977 SC 2236.

3. Mohammad Giasuddin v. State of A.P., (1977) 3 S.C.C. 287; AIR 1977 SC 1926.

4. Sunil Batra v. Delhi Admn., (1978) 4 SCC 494; AIR 1978 SC 1675.

5. Charles Sobhraj v. Delhi Admn., (1978) 4 SCC 104; AIR 1978 SC 1514.

6. Madhav Hayak v. State of Maharashtra, (1978) 3 SCC 544; AIR 1978 SC 1548.

7. G. Narasimhulu v. Public Prosecutor, A.P., (1978) 1 SCC 240; AIR 1978 SC 429.

8. L. Vijay Kumar v. Public Prosecutor, (1978) 4 SCC 196; AIR 1979 SC 1485.

9. Maneka Gandhi v. Union of India, (1978) 1 S.C.C. 248; AIR 1978 SC 597. (This case has been relied on in cases regarding prisoners).

10. Hussainara Khatoon v. Home Secretary, AIR 1979 SC 1360; 1980 (1) SCC 81.

11. Hussainara Khatoon v. State of Bihar, I-V, (1980) 1 SCC 93.

12. Dharambir Singh v. State of U.P., (1979) 3 SCC 645; AIR 1979 SC 1595 (work training).

13. Kishore Singh v. State of Bihar, (1980) 2 SCC 406; AIR 1980 SC 847.

14. Prem Shankar v. Delhi Admn., (1980) 3 S.C.C. 526; AIR 1980 SC 1535 (Hand-cuffed).

15. Sunil Batra v. Delh Admn., AIR 1978 SC 1675; 1978 (4) SCC 494.

16. Sunil Batra v. Delhi Admn., (1980) 3 SCC 488; AIR 1980 SC 1579 (Physical protection).

17. Kishore Singh v. State of Rajasthan, AIR 1981 SC 625; (1981) 1 SCC 503 (Torture of Prisoners).

18. Nandlal v. State, AIR 1981 SC 2041 (Counsel).

19. Francis Coralie v. Union Territory of Delhi, (1981) 1 SCC 608; AIR 1981 SC 746; (1981) 2 SCR 516.

20. Veena Sethi v. State of Bihar, (1982) 2 SCC 583; AIR 1983 SC 339.

21. Rakesh Kaushik v. B.L. Vij., Supdt. Central Jail, New Delhi, (1980) Suppl. SCC 183; AIR 1981 SC 1767.

22. Kadra Pehadiya v. State of Bihar, (1981) 3 SCC 671; AIR 1981 SC 939.

23. Prabha Dutt v. Union of India, (1982) 1 SCC 1; AIR 1982 SC 6.

24. Harbans Singh v. State of U.P., (1982) 2 SCC 101; AIR 1982 SC 849.

25. Munna v. State of U.P., (1982) 1 SCC 545; AIR 1982 SC 806.

26. Sant Bir v. State of Bihar, AIR 1982 SC 1470; 1982 (3) SCC 131.

27. Sheela Barse v. State of Maharashtra, (1983) 2 SCC 96; AIR 1983 SC 378.

28. Marie Andre Leclere v. State, AIR 1983 SC 1092; 1984 (2) SCC 443.

29. Khatri v. State of Bihar, (1983) 2 SCC 266.

30. Rudul Sah v. State of Bihar, AIR 1983 SC 1086 (Mentally ill persons).

31. Shrinivas v. Delhi Admn., (1982) 3 SCC 209; AIR 1982 SC 1391.

32. Sheela Barse v. State of Maharashtra, (1987) 4 SCC 373.

33. Mathur v. State of Bihar, AIR 1984 SC 1094; 1984 (4) SCC 90.

34. State v. Prabhakar, AIR 1966 SC 424; (1966) 1 SCJ 679 (Freedom of expression).

35. Sheela Barse v. Secretary Children's Aid Society, (1987) 3 SCC 50, 54; AIR 1987 SC 656.

36. Ramesh Kumar Singh v. State of Bihar, (1987) Supp. SCC 335.

37. Prithviraj Chakravarti v. Delhi Admn. JT 1988 (4) SC 773 (Intervening Prisoners).

38. Sheela Barse v. Union of India JT 1988 (3) SC 15.

NOTES AND REFERENCES

CHAPTER II

1. Law Commission of India, 84th Report (Rape and allied offences: some questions of substantive law, procedure and evidence), page 14, paragraphs 3.5. to 3.8. (April, 1980).

2. Ibid.

3. Sheela Barse Vs. State, AIR 1983 SC 378, 382 para 4 (vii).

4. D.J. Vaghela, (1985) Criminal Law Journal 974 (Gujarat).

5. Para 2.12, infra.

6. Law Commissison of India, 84th Report (Rape and allied offences: some questions of substantive law, procedure and evidence), page 17, paragraphs 3.17. and 3.18 (April, 1980).

7. Law Commission of Commission of India, 84th Report (Rape and allied offences: some questions of substantive law, procedure and evidence), page 18, paragraphs 3.24 and 3.25 (April, 1980).

8. Law Commission of India, 84th Report (Rape and allied offences: some questions of substantive law, procedure and evidence), pages 16 and 17, paragraphs 13.6 to 13.20 (April, 1980).

9. Paragraphs 2.15 to 2.19, infra.

10. Law Commission of India, 84th Report (Rape and allied offences: some questions of substantive law, procedure and evidence), pages 14 and 15, paragraphs 3.9 and 3.10 (April, 1980).

11. Shambhaji, (1974) 1 SCC 196.

12. Naib Singh Vs. State of Punjab, (1983) Criminal Law Journal 1345 (SC).

13. Maru Ram Vs. Union of India, AIR 1980 SC 2147: (1980) Criminal Law Journal 1440.

14. See para 2.20, infra.

15. State of A.P. Vs. Vallabhgaram Ravi. (1984) Criminal Law Journal 1511 (SC).

16. Maru Ram Vs. Union of India, AIR 1980 SC 2147. (1980) Criminal Law Journal 1440.

17. Rukmina Devi Vs. State of U.P. (1989) Criminal Law Journal 548, Allahabad (V.P. Mathur and N.K. Lal., JJ).

18. Para 2.19, supra.

19. For text of section 437(1), see para 2.22 infra.

CHAPTER IV.

1. Order 16, rule 10(3) CPC.

2. Order 38, rule 1 CPC.

3. Order 21, rules 32 et seq., CPC, read with section 51, CPC and Order 21, rule 30, CPC.

4. Para 4.1, supra.

CHAPTER V

1. Paras 5.2 and 5.3, supra.

2. Para 5.4, supra.

3. Para 5.4, supra.

4. Para 5.2, supra.

5. The words in the masculine need not be changed. See section 13, General Clauses Act, 1989.

CHAPTER VI

1. Para 6.5, supra.

2. Para 6.9, supra.

3. Chapter 3, supra.

4. Para 6.9, supra.

5. Para 6.8, supra.

6. Radical Journal of Health, issue on Human Rights and Health, September, December, 1988, as summarised by Aman Jesani, "Medicine at risk", (22nd July, 1989) Economic and Political Weekly, page 1633.

CHAPTER VII

1. Chapter II, supra.

2. Chapter III, supra.

3. Chapter I, supra.

4. Chapters II and V, supra.

CHAPTER VIII

1. Chapter II, supra.

2. Chapter V, supra.

CHAPTER IX

1. Maru Ram Vs. Union of India, AIR 1980 2147, paras 15, 16 and 23.

CHAPTER X

1-2. This amendment can in due course be made applicable to males also.

3. Present section 160(1) proviso to be deleted.
