

ANALYSING THE CHANGING DIMENSIONS OF PUNISHMENT AND AN ATTEMPT TO RESOLVE THE PROBLEMS OF WOMEN PRISONERS IN THE LIGHT OF RESTORATIVE JUSTICE PRINCIPLES

Dr. Anu Prasannan*

Abstract

“You can tell the condition of a nation by looking at the status of its women”

These are the words of Pandit Jawaharlal Nehru, the great leader of India’s Independence movement and the first Prime Minister of India. Although Indian society has transformed to a great extent by stretching its arms for the protection of women, the question still remains as to whether the nation has fulfilled the dreams of our constitution makers. The answer is reflected in the discrimination against women throughout all stages of their life, even as a foetus in the womb of the mother and continued as an infant, child, adolescent and even as an adult. Indian culture and religious tradition has undermined her status and has subjected her to more and more discrimination. Her position is unimaginable if she is declared an offender by the society and is convicted and subjected to punishment and spends her rest of the life in the prison. Although the system of imprisonment represents a curious combination of different objectives and theories of punishment which have been changing progressively, the plight of women prisoners and their unresolved problems are endless and still remain unresolved. The wide discretion in the hands of police and jail authorities mostly violates the basic human rights of women prisoners. This is increasing in spite of the Indian Constitution, International Conventions and prison based restorative justice that has emerged across the States as well as internationally. Prison reforms introduced from time to time are also not truly implemented by the government and therefore the question pertains as to whether the restorative justice principles and programmes truly come to the rescue of women prisoners or not.

Keywords: *Indian Constitution, International Convention, Women Prisoners, Prison Reforms, Restorative Justice, Theories of punishment.*

* Asst. Professor of Law @ Karnataka State Law University’s Law School, Hubballi

INTRODUCTION

Indian society, being a patriarchal society dominated by males, has always looked upon women as inferior to them. Although there is a transformation in recent times, women still come under the discriminated section of society. Woman though an embodiment of goddess Saraswathy, Lakshmi and Durga is dragged to the streets by her own family, humiliated by her own blood, molested and brutally raped by her male counterpart whom she thinks as her own brothers. In situations when she retaliates she becomes an offender and law breaker and once again dumped to the four walls of the dark prison and forgotten by the same society itself thereby violating her basic human rights. Her position is unimaginable if she is declared a habitual offender by the society and is convicted and subjected to punishment and spends her rest of the life in the prison. It is seen that women belonging to lower economic strata because of their economic situations and distressed family environment are dragged to unlawful activities such as prostitution, drug trafficking, drug dealing, theft etc. The major portions of the female prisoner's population are involved in these illegal activities for their own survival and for the fulfilment of basic needs. Although the system of imprisonment represents a curious combination of different objectives and theories of punishment which has been changing progressively, the plight of women prisoners and their unresolved problems are endless and still remain unresolved. The wide discretion in the hands of police and jail authorities mostly violates the basic human rights of women prisoners. This is increasing in spite of various provisions in the Indian Constitution for the protection of women, International Conventions framed by the United Nations and prison based restorative justice that has emerged across the States as well as internationally. Prison reforms introduced from time to time are also not truly implemented by the government and therefore, the question pertains as to whether the restorative justice principles and programmes truly come to the rescue of women. The situation calls for a need to analyse the rights available to them, the problems faced by them in prison, and the restorative justice in prison reforms.

RELATED PROBLEMS FACED BY WOMEN PRISONERS IN THE MIDST OF EXISTING LEGAL RIGHTS

As of 2016, the Indian prisons are home for 18,498 women wherein, relatively less percentage of women lives in exclusively female prisons and majority are housed in female

enclosures of the general prison.¹ Traditionally most of the prison inmates are males and the prison conditions and environment are therefore, shaped to meet the needs of males and do not cater to the special needs of women prisoners. Women prisoners suffer from double disadvantage that is, being a woman herself and being vulnerable to physical and sexual abuse of the police and jail authorities who themselves are bound to protect her. The gender disadvantage and discrimination gets worsened during imprisonment because of the existing prison conditions. They include:

- Lack of prison capacity²
- Shortage of staff³
- Lack of basic amenities⁴
- Inhuman treatment towards the children of women prisoners⁵
- Custodial torture⁶
- Inaccessibility of legal services⁷

¹ Recommendation for uniform nationwide collection of prison statistics was made by Committee on Jail Reforms led by Justice A.N. Mulla in 1983 which was taken up by the National Crime Record Bureau (NCRB). NCRB published the first Prison Statistics in 1995 which continued uninterrupted up to 2015. However, statistics for 2016 was released only in 2019 without giving an explanation for the long delay and even without information as to the future steps.

² Overcrowding in prison is the prime threat to prison authorities and even to the inmates. The condition worsens if the inmate is a woman

³ There is shortage of staff and also scarcity of senior level supervisory officers in prison wherein, the National Prison Manual prescribes the appointment of one lady DIG attached to the Prison Headquarters to look after women prisons, staff and prisoners in the state. See GOVERNMENT OF INDIA, WOMEN IN PRISONS INDIA 21 (MINISTRY OF WOMEN AND CHILD DEVELOPMENT 2018).

⁴ Most of the women prisoners are mothers and they stay in the prison with their children and the children are denied minimum education and medical facilities. The inadequacy of medical facilities even result in the death of prison inmates.

⁵ The Amicus curie appointed in *Re-Inhuman Conditions In 1382 prisons* informed the bench that the children below the age of 6 years in the prisons of Faridabad, Haryana are not even allowed to leave the prisons and those who crossed 6 years are released from the prison but there was nothing to indicate as to how such children are looked after.

⁶ Instances of custodial violence and rape are on the rise. A parliamentary panel has expressed concern over the high occurrences of custodial rape cases in Uttar Pradesh, from where over 90% of such cases have been reported over the past few years. As per the NCRB Statistics New Delhi ranks first in crimes against women. See *Crime in India 2016 Statistics*, NATIONAL CRIME RECORDS BUREAU, MINISTRY OF HOME AFFAIRS. (March 25, 8.30 PM), ncrb.gov.in

Cases like *Dharmarajan v. State of Kerala*, 2002 Cri. L. J 2571, *Aman Kumar, Om Prakash and Satbir Singh v. State* 1987(2) DLT319; *Ram Kumar v. State of Himachal Pradesh*, AIR 1995 SC 1965; *Tuka Ram and Another v. State of Maharashtra*, 1979 AIR 185 are some of the cases in the long array that reflects violence against women.

⁷ Women due to their ignorance do not even avail the benefits provided under Sec. 437 Cr.P.C. Sec. 437 of the Code of Criminal Procedure envisages the provision as regards bail in case of non-bailable offences, which may

However, recently Indian Judiciary has been active in responding to human right violations in Indian jails and has recognised a number of rights of prisoners by giving widest possible interpretation to Articles 21, 19, 22, 37, and 39A of the Constitution of India⁸ in a positive and humane way. The Supreme courts and High courts have commented upon the deplorable conditions prevailing inside the prisons resulting violations of prisoner rights which shows a growing concern with the rights of the victims. However, there are cases like Kamalanathan wherein, SC even went to the extent of pronouncing that the police can use third degree on the victim girls in order to make them speak the truth. Such approach of the judiciary has the danger of strengthening the State at the cost of the rights of the citizens.⁹ Before analysing the restorative justice programmes an attempt is made once again to glance the rights of the inmate women prisoners that has been analysed time and again without much relief to them. There are a number of rights for women prisoners which are provided by different committees appointed for prison reforms and also by United Nations. These rights incorporated in the Prison Act 1894¹⁰ and the Prisoners Act, 1900¹¹ are listed as follows:

- The female prisoners have the right to live separately from the male prisoners.
- The search and examination of the female prisoners shall be carried out by the Matron under the general or special order of the Medical Officer; hence, the management and administration of prisons come under the domain of the State Governments
- A person arrested without warrant must be immediately informed the grounds of her arrest and in case of every arrest she is entitled to apply for bail
- On arrest the police are to immediately give intimation of arrest to the Legal Aid Committee and such committee is to take immediate steps to offer legal assistance at state cost.

or may not be granted depending on the discretion of the court. But proviso to this provision exempts women, and empowers court to grant bail to a woman irrespective of the gravity of the crime

⁸ Prison is a State subject under Entry 4 of the State Subjects List of the Seventh Schedule to the Constitution of India.

⁹ There are plenty of instances to prove third degree by police authorities wherein, the torture and murder of Thangjam Manorama alias Henthoi, a thirty-two year old woman, by the battalion of the 17th Assam Rifles in Manipur had sent shockwaves across the State. The torture of this young woman drove some elderly women to parade naked sparking protests all over the State. See *Justifying Third Degree*, THE HINDU, August 10, 2004.

¹⁰ The question of cruelty to prisoners is dealt by Prison Act, 1894.

¹¹ The Prisoners Act, 1900 deals with certain regulations of prison to be followed by Jail authorities.

- Soon after arrest, the Police must obtain the name of any relative or friend to whom she would like to be informed about her arrest
- The Magistrate before whom she is produced shall inquire whether she has any complaint of torture or maltreatment in police custody and to inform her that she has a right under Sec. 54 of the Cr.P.C to be medically examined.¹²
- In case of women prisoners with children, the child shall not be treated as an under trial /convict
- Option for temporary release/parole in order to enable an expectant prisoner to have her delivery outside the prison.
- Women prisoners shall be allowed to keep their children with them till they attain the age of six years.
- Children of women prisoners shall be given proper education and recreational opportunities.¹³
- Jail manuals and other relevant Rules, Regulations, Instructions etc., shall be amended within three months so as to comply with the above directions.¹⁴

All these directions derived from the judicial pronouncements, Statutory and Constitutional provisions, International Conventions are pointing towards the prison reforms in the lines of reformatory approach. The need to prison reforms has come into focus during last few decades and the courts have reiterated that the existing prison conditions are not conducive for their reformation.¹⁵ In *T.K. Gopal v. State of Karnataka*¹⁶ the court went ahead and advocated therapeutic approach in dealing with the criminal tendencies of prisoners. Court held, the therapeutic approach aims at curing the criminal tendencies which were the product of a diseased psychology. There may be many factors, including family problems. We are not concerned with those factors as therapeutic approach has since been treated as an effective method of punishment which not only satisfies the requirements of law that a criminal should be punished and the punishment prescribed must be meted out to him, but also reforms the

¹² *Sheela Barse v. State of Maharashtra*, 1993 Cr.L.J. 642

¹³ In many States small children are living in prisons that are not at all equipped to keep small children.

¹⁴ For more details, See MONICA SAKHRANI, *CITIZEN'S GUIDE TO CRIMINAL LAW*, HRLN, (Universal Law Publishing Co. 2009).

¹⁵ In *Rama Murthy v. State of Karnataka* (1997)2 SCC 642; the court had identified nine issues facing prisons and needing reforms. They are: (i) over-crowding (ii) delay in trial (iii) torture and ill-treatment (iv) neglect of health and hygiene (v) insubstantial food and inadequate clothing (vi) prison vices (vii) deficiency in communication (viii) streamlining of jail visits (ix) management of open air prisons.

¹⁶ (2000)6 SCC 168

criminal through various processes, the most fundamental of which is that in spite of having committed a crime, may be a heinous crime, he should be treated as a human being entitled to all the basic human rights, human dignity and human sympathy. It was under this theory that this court in a stream of decisions, projected the need for prison reforms, the need to acknowledge the vital fact that the prisoner, after being lodged in jail, does not lose his fundamental rights or basic human rights and that he must be treated with compassion and sympathy.¹⁷

In this background, Justice R.C. Lahoti invited attention to the inhuman conditions¹⁸ prevailing in 1382 prisons in India and pointed out that State cannot disown its liability to the life and safety of a prisoner and there are hardly any schemes for reformation for the first time offenders and prisoners in their youth and to save them from coming into contact with hardened prisoners. All these call for the need to look into restorative justice in prison reforms.

PRINCIPLES OF RESTORATIVE JUSTICE IN PRISON REFORMS

The transitional shift in the criminal justice system, that is, from the pragmatic rigorous legal system towards an enquiry into the detailed behaviours of the wrongdoers and the particulars of the facts and causes and thereby the rehabilitation of the offender comprehends the birth of restorative justice.¹⁹ In the words of Russ Immarigeon, *Restorative justice is a process*

¹⁷ Justice R.C. Lahoti highlighted on some of the major issues like:

- (i) Overcrowding of prisons
- (ii) Unnatural death of prisoners
- (iii) Gross inadequacy of staff and
- (iv) Available staff being untrained or inadequately trained

For more details see *Re-Inhuman Conditions in 1382 Prisons*, W.P (Civil) No. 406/2013.

¹⁸ It is pertinent to note that Justice Lahoti has brought an important issue to the forefront and by an order dated 5th July, 2013 the letter was registered as a public interest writ petition.

¹⁹ Restorative justice principles show a gradual change from the existing theories of punishment namely, the

- Deterrent theory
- Preventive theory
- Retributive theory
- Reformatory theory and
- Expiatory theory.

The word 'restorative' means to restore or make restitution, that is, to bring back to an original condition or to put someone back in a former position. On the other hand, 'justice' is the quality of being just; conformity to the principles of righteousness and rectitude in all things; strict performance of moral obligations; practical conformity to human or divine law; integrity in the dealings of men with each other; rectitude; equity; uprightness or fairness or a scheme or system of law in which every person receives his/her or its due from the system, including all rights, both natural and legal.

*that brings victims and offenders together to face each other, to inform each other about their crimes and victimization, to learn about each other's backgrounds, and to collectively reach agreement on a 'penalty' or 'sanction'.*²⁰

It is in fact, an evolving concept that has given rise to different interpretations in different countries. There are many terms that are used to describe the restorative justice movement. These include "communitarian justice", "making amends", "positive justice", "relational justice", "reparative justice", "community justice" and "restorative justice", among others.²¹ A restorative process is one in which the victim and the offender and, where appropriate, any other individuals or community members affected by a crime participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator.²²

The five-fold assumptions underlying restorative programmes are as follows²³:

- the response to crime should repair as much as possible the harm suffered by the victim
- offenders should be brought to understand that their behaviour is not acceptable and that it had some real consequences for the victim and community
- the offenders can and should accept responsibility for their action
- victims should have an opportunity to express their needs and to participate in determining the best way for the offender to make reparation and
- that the community has a responsibility to contribute to this process

In 1985, the General Assembly adopted a Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power²⁴ which stated, *informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.*

²⁰ RUSS IMMARIGEON, THE IMPACT OF RESTORATIVE JUSTICE SANCTIONS ON THE LIVES AND WELL-BEING OF CRIME VICTIMS: A REVIEW OF THE INTERNATIONAL LITERATURE IN RESTORATIVE JUVENILE JUSTICE: REPAIRING THE HARM OF YOUTH CRIME 306 (Gordon Bazemore and Lode Walgrave Monsey ed., 1999).

²¹ 10 DAVID MIERS, AN INTERNATIONAL REVIEW OF RESTORATIVE JUSTICE, CRIME REDUCTION RESEARCH SERIES PAPER, 88-89, (Research, Development and Statistics Directorate 2001).

²² Examples of restorative process include mediation, conferencing and sentencing circles. A restorative outcome is therefore, an agreement reached as a result of the restorative process. Examples of restorative outcomes include restitution, community service or any other programme to accomplish reparation of the victim.

²³ See UNITED NATIONS OFFICE ON DRUGS AND CRIME, HAND BOOK ON RESTORATIVE JUSTICE PROGRAMMES, (Criminal Justice Handbook Series, 2006).

²⁴ General Assembly Resolution 40/34 of 29 November 1985, para. 7.

Further, the United Nations Economic and Social Council with a view to encourage member States to adopt and standardize restorative justice measures in the context of their legal systems adopted the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters.²⁵ The core part of the Basic Principles deal with setting the parameters for the use of restorative justice and the measures that should be adopted by member States to ensure that participants in restorative processes are protected by appropriate legal safeguards.

Some of the restorative programmes adopted in the prisons of western countries in the line of restorative justice are as follows:

- Victim-Offender Mediation (VOM) to address the needs of victims while ensuring that offenders are held accountable for their offences.²⁶
- Community and family group conferencing to confront the offender with the consequences of the crime, develop a reparative plan and in more serious cases to determine the need for more restrictive supervision or custody.²⁷
- Community service projects in which offenders put back something into the community.²⁸
- Victim awareness/ empathy/ impact projects in which offenders learn about the impact of crime on victims, often through experiential exercises and role plays.²⁹

²⁵ ECOSOC Res. 2000/14, U.N. Doc. E/2000/INF/2/Add.2 at 35 (2000).

²⁶ They are the earliest restorative justice initiatives and are generally restricted to less serious offences. These programmes can operate at the pre-charge, the post-charge/pre-trial and post-charge stages, and involve the willing participation of the victim and the offender. It can also offer a pre-sentencing process leading to sentencing recommendations. Victim-Offender Mediation can also be used during the offender's incarceration and can become part of his rehabilitation process even in the case of offenders serving long sentences. There are three basic requirements that must be met before Victim-Offender Mediation can be used:

- The offender must accept or not deny responsibility for the crime
- Both the victim and the offender must be willing to participate
- Both the victim and the offender must consider it safe to be involved in the process.

²⁷ The focus is much broader than that of regular mediation. Community conferencing is also used sometimes as alternative measure programme through which an offender can be diverted from the criminal justice system. The circle usually consists of those most concerned about the offender and the victim and any other member of the community with an interest in the process.

²⁸ Here prisoners may undertake some voluntary work that is beneficial to the community.

²⁹ Sycamore Tree is a victim awareness programme based on the Bible story of Zacchaeus wherein, volunteers who have been victims of crime come into prison to tell their own stories and impact of crime on their lives. At the end of the programme, prisoners are given the opportunity to take part in symbolic acts of restitution, taking the first step towards making amends for their past behaviour. These may include poems, letters and art and craft items. For more information see Arthur Bolkas, *Victim Awareness: Helping Offenders Break The 'Cycle Of Victimization'*, PRISON FELLOWSHIP AUSTRALIA, PARLIAMENT OF VICTORIA, (July, 20, 2019, 11.00 PM), <http://www.parliament.vic.gov.au>

ACCESS TO RESTORATIVE JUSTICE PRINCIPLES BY WOMEN PRISONERS AND CONCLUDING REMARKS

The dissatisfaction and frustration with the formal justice system in strengthening the traditional justice practices, both internationally and nationally, have led to alternative responses to crime and social disorder, which is more evident in the existing prison reforms. Many of these alternatives provide the parties involved, and often also the surrounding community, an opportunity to participate in resolving conflict and addressing its consequences. Very recently Supreme Court has issued directions to all State governments to establish 'open prisons'³⁰ as a measure to usher in reforms for inmates and also to prevent over-crowding, appoint counsellors and support persons for counselling prisoners, particularly first time offenders; and to provide telephone and video conferencing facilities to enable the prisoners to speak to their lawyers and family members.³¹ In *Rahmath Nisha v. The Additional Director General of Prison and others*³² recognising that the privacy and dignity of the prisoners should be scrupulously protected court added that conversation between prisoner and his spouse should be unmonitored. Theoretically, the difficulties of the prisoners are over after his release. But in practice, this is rarely the case. The case is totally different in case of women prisoners who will have to face the stigma associated with her years of stay behind the bars. So with this understanding after care programmes are also envisaged at the instance of the Central Government.³³ Therefore, India and Indian prisons live in the lines of therapeutic, reformatory and restorative justice. It is true that prison based restorative justice programmes have emerged across the States as well as internationally.

³⁰ The main objectives of establishing open prisons are to : reduce overcrowding in jails, to reward good behaviour, to give training in self-reliance, to enable prisoners to live with family members (in some States)

³¹ *Supreme court passes slew of directions on prison reforms across India*, TIMES OF INDIA, New Delhi, September 15, 2017

³² WP (MD) No.12488 of 2019. Hon'ble Supreme Court has take note of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules) in *Re: Inhuman Conditions in 1382 Prisons* and referred Rule 58 of the said rules:

58.1. Prisoners shall be allowed , under necessary supervision, to communicate with their family and friends at regular intervals:

(a) By corresponding in writing and using, where available, telecommunication, electronic, digital and other means; and

(b) by receiving visits.

2. where conjugal visits are allowed, this right shall be applied without discrimination, and women prisoners shall be able to exercise this right on an equal basis with men. Procedures shall be in place and premises shall be made available to ensure fair and equal access with due regard to safety and dignity"

³³ A few aftercare homes and shelters were set up in some states but because of lack of sustained interest and paucity of funds, most of them were either closed or became defunct. See S.M.A.QADRI, AHMAD SIDDIQUE'S CRIMINOLOGY & PENOLOGY 205-208 (6th ed. 2009).

However, while these methods heal harms between victims and offenders but they have little impact on the extent to which prisoners are confined. Much of the efforts even exclude the consideration of restorative justice programmes as a mitigating circumstance to support early release from confinement. They have not lived up to their expectation or possibilities as an alternative to penal confinement.³⁴ When it comes to women, they commit fewer, less serious crimes and have significantly lower re-involvement in offending than their male counterparts.³⁵ Therefore, gender matters and plays an important role here. Studies conducted in western countries even show that very less numbers of female offender cases go through to conference, and that there is a perception in the field that women who have committed an offence are more reluctant to engage in restorative justice.³⁶ There is less awareness on the restorative justice programmes among people and even on prison inmates. No doubt, these practices go a long way in ensuring fairness, for a State like India implementation of these restorative processes is indeed difficult in view of the rising crimes and criminals. What is required is to create more awareness among them so that it could truly heal the harms between victims and offenders and will be a solace for the woman prisoners. For this what is required is coordination between the Government and Judiciary and as an initiative to take stringent measures against those protectors of law who become the real offenders by dragging the women to the darkness of crimes and offences.

³⁴ Carolyn Hoyle, *Restorative Justice Critical Concepts In Criminology*, (Routledge 2009).

³⁵ Rumgay, *Scripts For Safer Survival: Pathways Out Of Female Crime*, 43 THE HOWARD JOURNAL OF CRIME AND JUSTICE, ISSUE 4, (2004); J. Graham And B. Bowling, *Young People And Crime*, (Home office 1995);9(1) MCIVOR et al, 2004, CRIMINOLOGY AND CRIMINAL JUSTICE, THERAPEUTIC JURISPRUDENCE AND PROCEDURAL JUSTICE IN SCOTTISH DRUG COURTS, 29-49 (Sage 2009).

³⁶ Miles, *Income Inequality, Equality of Opportunity, And Intergenerational Mobility*, 27 Journal Of Economic Perspectives, No.3, (2013).