

GENDER RESPONSIVE PROGRAMMING IN JAIL A NORM IN 21ST CENTURY

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Abstract

Owing to our patriarchal and traditional society, women have been kept on a lower footing and when she alleged as offender her position becomes miserable as woman prisoner. Female criminality is rare subject of study in male dominated society. Though United Nations and its agencies are making rules, some NGOs, private groups are addressing these issues, but still there is so much gap that there is always a scope of research. This paper bids for gender programming of prison and measures for treatment of women offenders. The number of female crimes and inmates is on significant rise due to various socio-economic changes. Female offenders are in process of treatment brought to jail for rehabilitation. But old prison are still male cordial and female are forced to share the same jail which were once not programmed for them and spend their custodial days in acuteness. Jail a criminal justice agency is distress for female-prisoners which lacks women's particular basic needs. They have to compromise their dignity. Female are giving birth to babies behind the bars, raising them in filthy cell and setting up a perfect platform for medical tragedy. This hidden crisis is so much fatal that sometimes inmates die in jail without getting their day in court. This paper deals with problems which female offenders are expose of like young females' education, unemployment, violence, privacy and so on. Besides problems the paper analyses the rules made by United Nation, the measures

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taken by legislatures of states, judicial approaches, and reports by various governmental and non-governmental organisations on issues of female prisoners. The paper also throws some rays on manner of arrest of female offenders. At last, this paper comprises of conclusion and valuable suggestions in the criminal justice system.

Keywords: *Women-Offenders, Prison-Administration, Women-Dignity, Privacy, Violence*



INTRODUCTION

“The rule here is total silence, we make no pretense of rehabilitation. Here, we are not priests, we are processors. Meatpacker processes live animals into edibles one, we process dangerous mans into harmless ones. This we accomplish by breaking you. Breaking you physically, spiritually. And, here strange things happen to the head, put all hope out of your mind.”¹

This is the decade of action as we have to achieve Sustainable Development Goals (SDGs hereafter) our shared vision by the year 2030. Gender equality is one of the 17 said SDGs. Gender equality is fundamental to building a just, sustainable, and peaceful society.² Gender equality is a value that the Indian Constitution enshrined in the Preamble, Fundamental Rights, Fundamental Duties, and Directive Principles. The Indian Constitution not only guarantees gender equality but also gives power to the state to make laws for the extra protection of women. There have been many remarkable signs of progress over the decades in this process but same time there are numerous gender discrimination challenges that are yet to be resolved. Discrimination on basis of gender in the criminal justice system is one of those challenges which needs to be addressed on an urgent basis.

Justice is the first virtue of social institutions³ and access to justice for all is a prerequisite for substantive equality, human rights, and sustainable development as well as the foundation of peaceful, just, and inclusive

¹ See Papillon movie, The warden in the reclusion cell of the infamous penal system in French Guiana

² Sustainable Developments Goals, available at <https://www.un.org/sustainabledevelopment/gender-equality/>, (last visited on June. 8, 2023).

³ Rawls John, *A Theory of Justice* 3, (Belknap Press, 2005)

societies. Access to justice for all is severely hampered by gender-based discrimination in the criminal justice system. Women are disproportionately impacted and face substantial difficulties in accessing justice as victims, alleged criminals, witnesses, or inmates.⁴

Prison is an integral part of a criminal justice system that upholds the rule of law by keeping convicts and alleged offenders and securing them justice. It also helps in the rehabilitation and reintegration of convicts and incarcerate them for several correction programs. Prison houses a good number of populations in their enclosed walls, so the administration of prison becomes important. Jail should be able to provide inmates with a humane experience and opportunities for assistance and an environment for rehabilitation.

Prison administration, a legacy of colonial rule, has no prior evidence in ancient and medieval India. There was a concept of detention and offenders were detained till trial. But for punishment, incarceration was a creation of British rule. The motive of imprisonment was terror and the theory of justice was retributive. After independence, the prison and its administration are made the subject of list II under schedule VII and attention shifted from confinement to training; punishment changed into reform and rehabilitation. Retributive theory is making way for the reformatory theory of justice.

The management of Indian prisons is nonetheless opaque, outdated, and rife with systematic abuses. Prisons are always overcrowded. And in the prison administration, the overcrowding makes the existing infrastructure and basic amenities inadequate. Because of the prison atmosphere and the

⁴ Gender in Criminal Justice System, available at <https://www.unodc.org/unodc/en/justice-and-prison-reform/cpcj-gender.html>, (last visited on: 08.06.2023)

treatment that inmates get, the goal of reformation and rehabilitation remains a utopia.

President Droupadi Murmu on celebration of constitution day gave the audience a brief account of her travels to many prisons in India and the conditions of the prisoners. As per the latest data available from 2015, Indian prisons shelter 17,834 women.⁵ A small minority of the prison. But a minority do have needs. Only 17% of women inmates live in special female prisons, whereas the majority are kept in ordinary prisons' female enclosures. They are denied their rights in prison designed for male prisoners.

Women in the prison are from poor economic backgrounds, marginalized sectors of communities, or from societies where women's education is not the norm, due to the failure in achieving the goals of culturally defined models imposed by the societal institutions, based on religion, region, caste, custom or stereotypical perceptions of women's position. The majority of detained women do not have enough money to go for bail or to hire a lawyer. Being illiterate and unaware of their legal rights make them prey. It puts women in a vulnerable position and more often open to coercion.

Women's offending more often depends on women's poverty. Situations like their inability to pay fines or to pay for bail by themselves, make them more prone to be detained. Most of the time being a victim of domestic violence and sexual abuse before imprisonment makes incarcerated women

⁵ Government of India "Report on Women in prison" (Ministry of Women and Child Development 2018).

suffer more likely than men from mental disabilities.⁶ This makes them deprived, discriminated and vulnerable.

Vulnerability urges additional protection. But very little consideration has been given to the gender-based needs and problems of women offenders. United Nations Human Rights Committee explained that states have “a positive obligation toward persons who are particularly vulnerable because of their status as persons deprived of liberty.” The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems have some specific provisions on the implementation of the right of women to access legal aid.

Famous Mathura rape case in police custody. Rape of Saran teenage girl in police custody⁷, and of a woman by jail Jamadar in Sheikhpura⁸ are an example of few victims of poor jail security. Sori a prisoner charged as a Maoist conduit says “Adivasi prisoners are always the most vulnerable, we were made to clean the common toilets daily.”⁹ Byculla jail convict death.¹⁰ These punishments were not part of their sentence. Sir Alexander Paterson a prison reformer said a man is sent to prison as punishment and not for punishment. But here Paterson’s principle doesn’t seem to apply. Here women prisoner has to make the best of what they are offered otherwise

⁶ Atabay Tomris, *Handbook on women and imprisonment* 14 (United Nations Office on Drugs and Crime, Vienna, 2013).

⁷ Arrested for murder, girl raped in custody, *available at* <https://www.ndtv.com/patna-news/arrested-for-murder-girl-raped-in-custody-465369>, (last visited on: 10.06.2023)

⁸ Woman raped by jail staff in sheikhpura jail, *available at* <https://timesofindia.indiatimes.com/city/patna/woman-raped-by-jail-staff-in-sheikhpura-jail/articleshow/20129322.cms>, (last visited on: 12.06.2023)

⁹ Teesta Setalvad, “Woman prisoners recount jail horror stories”, *CJP*, Jan. 21, 2019.

¹⁰ On complaining about two eggs and five pieces of bread a convict named Manjula Shetye was murdered by jail staff.

they have to suffer more than what is written in the sentence. Some have to give birth in a filthy cell, behind the bars, while some have to die in waiting for medical assistance. The Prison food system denies people healthy choices. When one is stripped of her freedom and choice, it can be impossible to make the right decisions. Prison restricts their autonomy, breaches their privacy when women toilet, bath, sleep or undress and make them traumatized and hinders their rehabilitation and re-entry.

Violence is the norm in most of the prisons. Both prisoner on prisoner and officer on the prisoner. There is the frequent incident of abuse and brutality, abuses range from subtle humiliation to rape¹¹, most abuses go unreported. As most prisoner victims don't want to report due to shame and other issues, correctional staff remain silent in respect of code of silence. And third is the absence of reliable national or state statistics which provide an accurate statistical description of incidents of brutality and abuse in jail. So, what we get from the news are a handful of incidents. Wall of jails are an iron curtain for abuse of rights but not for privacy.

No period in the history of our republic is of more educative value than the period of national emergency. A Flood of political arrests was done. Top opposition leaders were send to jail. This incident of being incarcerated made them feel the hardships of prison life. Hereafter the political and judicial activism can be sensed in the prison reform. Three committees were formed in the chairmanships of Justice Mullah, R.K Kapoor, and V.R. Krishna Iyer. In the area of judicial activism, the cases like Sunil Batra¹² a decision against solitary confinement, Sheela Barse letter as a writ petition,

¹¹ Supra note 6 at 12

¹² *Sunil Batra v. Delhi Administration*, AIR 1980 SC 1579

Hussainara Khatoon¹³ the decision for free legal aid and procedural due process things, Veena Sethi¹⁴ decision charges were dropped against 16 unsound prisoners. Judicial intervention in the matter relating to prison was not known or frequently practiced before 1970. Before 1970 the courts, employed the “Hands-Off” doctrine¹⁵. It means courts abstained from interfering in prison affairs and declined the opportunity to hear prisoners’ claims.¹⁶ and, drew an iron curtain. The prison affairs were not touched by court. But from the case of *Morrissey v. Brewer*¹⁷ court extended the due process to prisoners. Dissent of justice Douglas was followed in the case of Sunil Batra in India and ruled that prisoners qualify for constitutional rights and its protection.

CONSTITUTIONAL PROTECTION FOR A WOMAN PRISONER

Indian Constitution doesn’t have any particular provisions for the treatment of women prisoners but it protects children and women from positive discrimination an example of the Aristotelian theory of justice. Rights owe their origins to basic value as autonomy, dignity, equality, and survival.¹⁸

The preamble of the Indian Constitution assures the dignity of the individual. Article 14 talks about equality before the law or the equal

¹³ *Hussainara Khatoon & Ors v. Home Secretary, State of Bihar*, AIR1979 SC 1369.

¹⁴ *Mrs. Veena Sethi v. State of Bihar and Ors*. AIR 1983 SC 339.

¹⁵ Robert A. Surrrette “Drawing the Iron Curtain: Prisoners’ Rights from *Morrissey v. Brewer* to *Sandin v. Conner*” 72 *Chicago-Kent L.R.* 923, 924 (1983)

¹⁶ Barry R. Bell, “Prisoners’ Rights, Institutional Needs, and The Burger Court”, 72 *V.A. L. REV.* 161, 162-63 (1986).

¹⁷ 408 U.S. 471 (1972)

¹⁸ Hass Michael, *International Human Rights a Comprehensive Introduction* 3 (2nd Ed. Routledge 2014)

protection of the laws.¹⁹ Article 15 prohibits discrimination on the ground of sex, but to bring women on equal footing with men, the state can make a special law for women.²⁰ Article 20 protects against conviction for offenses in case of ex-post facto law, double jeopardy, and self-incrimination.²¹ Article 21 one of the widest rights says “No person shall be deprived of his life or personal liberty except according to procedure established by law.”²² Article 22 protects against arrest and detention and says the arrested person must be informed about the ground of arrest and gives the right to consult and be defended by a legal practitioner of his choice.²³ Article 39A was added through the 42nd amendment to broaden the feather of social justice. It bids for free legal aid²⁴ to justice-seeking economically challenged people.

The Prisons Act 1894

Originally made on the principle of deterrent theory in the pre-independence era the Act envisages prison administration, health care, maintenance, bedding, clothing, employment of prisoners, etc. One good thing was that female prisoner were excluded from handcuffing. In the post-independence era, many of the act's provisions become void as they were against the principles of fundamental rights.

Jail Manuals

It speaks for administration of jail and providing a good environment to prisoners. It gives place to work and education for better rehabilitation and

¹⁹ The Constitution of India, Art.14

²⁰ Ibid, Art. 15

²¹ Ibid, Art. 20

²² Ibid, Art. 21

²³ Ibid, Art. 22

²⁴ Ibid, Art. 39A

improves the chances better re-entry. For the employment of women convicts there is scope cleaning grain, cloth repair etc. training knitting, needle work, and domestic kind work. Which is a step towards the re-entry venture of female prisoner after the sentence and make them independent. For literate prisoner there is facility of books. For the pregnant women, it says child- birth should be refrained as much possible in the jail and if not, there will be facility of midwife.

Female convicts shall ordinarily be employed on repair of clothing cleaning grain etc. and shall whenever possible be given instruction in needle work, knitting and other domestic industries.

International Measures

Starting from the United Nations Charter's preamble which is determined to reaffirm the faith in fundamental human rights, in the dignity and worth of a human person, and the equal rights of men and women.²⁵ Article 1 set out its purposes and principles, which include respect for human rights and fundamental freedoms for all without distinction as to sex.²⁶ It further gives responsibility of protection and reaffirmation of faith in fundamental freedom to its organs to like General Assembly, The Economic and Social Council, and the International Trusteeship System.

Universal Declaration of Human Rights a customary international law, protects fundamental human Rights which under Article 3 lays that "Everyone has the right to life, liberty and security of person"²⁷ and Article 5 "No one shall be subjected to torture or to cruel, inhuman or degrading

²⁵ The United Nations Charter

²⁶ Ibid, Art. 1

²⁷ Universal Declaration of Human Rights, Art. 3

treatment or punishment.”²⁸ These model laws are gender neutral and protect the human rights of all. Other than this part of the international bill of rights, Article 7 of the International Covenant on Civil and Political Rights states that torture and other cruel, inhumane, or degrading treatment or punishment are prohibited²⁹ and as per Article 10, everyone who is deprived of their liberty must be treated with regard for their inherent human dignity and with humanity.³⁰

Article 2 of the Convention against Torture lays its objective to prevent acts of torture in any territory under its jurisdiction, each state party is required to implement appropriate legislative, administrative, judicial, and other measures.³¹

Principle 1 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment says all people subject to any type of detention or incarceration must be treated with humanity and respect for their inherent dignity.

Principle 2 of Basic Principles for the Treatment of Prisoners “there shall be no discrimination on the grounds of race, color, sex, language, religion, political or other opinions, national or social origin, property, birth or other status.” Whereas principle 6 “All prisoners shall have the right to take part in cultural activities and education aimed at the full development of the human personality.”

²⁸ Ibid Art. 5.

²⁹ UN General Assembly, *International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), (Dec. 10, 1966), Art. 7.

³⁰ Ibid Art. 10.

³¹ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res 39/46, (Dec. 10, 1984), Art. 2.

United Nations rules for the treatment of women prisoners and non-custodial measures for women offenders (Bangkok Rules). These Bangkok rules specifically apply to women prisoners and offenders, considering the need generally assembly adopted it in 2010.

Rule 4 talks about allocation to nearest prisons,³² rule 5 says personal hygiene,³³ rule 6 denotes health-care services and medical screening,³⁴ rule 19 says, while search effective measures shall be taken to ensure women prisoner's dignity and several other provisions regarding no close confinement to pregnant and breastfeeding mothers.³⁵ Rule 36 gives protection to juvenile female prisoners.³⁶ Rule 40 focuses on developing classification methods to address gender and circumstances specific needs of women prisoners and address them on an individual basis which will help them in early rehabilitation and reintegration into society.³⁷

According to the Eighth Amendment of the United States Constitution³⁸ People in prison have a right to basic and adequate health care. Attorney at Prison Law office Rita Lomio warns us and says “a prison sentence should never become a death sentence for people with treatable medical and mental health conditions,”³⁹ Supreme Court of the United States in *Estelle v. Gamble* said that holding government has an “obligation to provide medical

³² UN General Assembly, *United nations rules for the treatment of women prisoners and non-custodial measures for women offenders*, Rule 4, (Dec. 21, 2010).

³³ *Ibid*, Rule 5

³⁴ *Ibid*, Rule 6

³⁵ *Ibid*, Rule 19

³⁶ *Ibid*, Rule 36

³⁷ *Ibid*, Rule 40

³⁸ Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

³⁹ *Jensen v. Shinn* cv-12-00601-PHX-ROS

care for those whom it is punishing by incarceration”⁴⁰

SEVERAL COMMITTEES FOR BETTER TREATMENT OF PRISONERS AND PRISON ADMINISTRATION

Some of the important committees are made to assess the prison conditions. All India Jail Manual Committee (1957), Working Group on Prisons (1972), All India Prison Reforms Committee (1980-83) known as Mulla Committee, All India Group on Prison Administration, Security and Discipline known as R.K. Kapoor Committee (1986). And. One for women prisoners as National Expert Committee on Women Prisoners known as Justice Krishna Iyer Committee 1987

The Supreme Court/High Courts issued crucial directives then the Government of India introduced section 436A of the Cr. PC to liberalize the bail restrictions. inserted a plea-bargaining chapter in the Criminal Procedure Code. And, to decrease overcrowding, enhance hygienic conditions, and also give better facilities to inmates and prison staff, the Scheme for Prison Modernization was started in 2002.

National Expert Committee on Women Prisoners

In 1986 The National Expert Committee on Women Prisoners was made under the chairmanship of Justice Krishna Iyer. In 1987, the Committee submitted its report after assessing the situation of women in prisons and made many suggestions like, women in jail should know what their rights are. Women in jail should only be searched by female police officers. As soon as women are entering into prison, they should be given a medical

⁴⁰ *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)

check-up by a woman doctor. Women in jail should be able to get in touch with their families and consult with their lawyers, social workers, and non-profit groups. Women who are in jail should be able to keep their kids with them. Women in prison should be more involved with voluntary organizations of women. Women prisoners should be kept in separate jails. Women in jail should have access to special prosecutors who can present their cases.

Other than this Justice V. R. Krishna Iyer's committee proposed a National Policy for Custodial Justice for Women. It placed specific emphasis on the requirement that a specialized approach is used in the processing, care, and rehabilitation of female convicts. Regarding the Justice Krishna Iyer Committee's other recommendations, one called for the establishment of a National Authority on Custodial Justice. He proposed that the National Authority on Custodial Justice, a single body that would consider all custody-related issues, including those involving women in mental hospitals or prisons.

The report inter-alia states that "women hood and childhood even in criminal wrappings and behavioural aberrations deserve to be nursed in dignity and restored to working normally, using all the material, moral and spiritual resources at the society's command". In his report, Justice Krishna Iyer had observed that the "existing malpractice and the delinquencies in the various forms of custody tend to affect women more adversely than men. This is since women are still a marginal group in the custodial population and tend to be less vocal, demanding, and violent in demonstrating against custodial or other injustices. With this in mind, specific and specialized interventions are necessary to restore the existing imbalance in the criminal correctional justice system vis-à-vis women". But due to certain

departmental conflicts between the department of social justice and the department of women and child development then the part of the ministry of home affairs and human resource development the recommendations made by Justice V. R. Krishna Iyer's committee were not implemented. Currently, the department of women and child development is a separate ministry.

Recommendations of Ministry of Women & Child Development

Recommended the suitable implementations of existing rules. There should be a national commission for prisons. Routine and thorough inspections of prisons. Additionally, special procedure should be established at time of arrest in order to protect the interest of women and their children. At last, recommended amendment in national Model prison Manual, 2016.

Case Laws

*Sheela Barse v. State of Maharashtra*⁴¹ a letter by a public-spirited female journalist regarding custodial violence against female prisoners was considered a Writ Petition and the Supreme court as a constitutional obligation directed the State of Maharashtra to protect the female prisoner in lock-ups and opened the road of justice for deprived women.

In case of *Nilabati Behera v. State of Orissa*⁴², on the issue of the safety and security of prisoners, Supreme Court said that the state has to ensure the safety and security of the prisoner. And, in case any damage is inflicted upon the victim by the act of the state's officer then the repair shall be done.

⁴¹ AIR 1983 SC 378

⁴² AIR 1993 2 SC 746

In *R.D. Upadhyay v. State of Andhra Pradesh & Ors.*⁴³ Certain guidelines were issued. In the jail, there should be proper opportunities for education and recreation with the space of a creche and nursery. The female convict and her child should have separate utensils, clean water to drink, vaccination, medical care, and safe and clean places to sleep. A child in prison with a mother should not be treated as a convict. It further held for better conditions and accommodation for pregnant women and the option for parole or temporary release. And allowing the mother convict to keep her child till the attainment of the age of six years.

Post-release support and reintegration programs to help women prisoners successfully transition back into society is not a reality in India. Efforts on programs like assistance with job placement, access to social welfare schemes, provision of identity documents, and guidance in accessing healthcare and other service should be priority of jail administration.

CONCLUSION AND SUGGESTIONS

It is evident that there are adequate number of national and international laws to protect women prisoner in jail, to rehabilitate and reform. Presence of jail manual for prison administration. But implementation of existing laws is sheer failure. That's why influx of women in prison is hard to tackle. Instances of violation of prisoner's human rights and poor prison administration keeps haunting. From outside we can just observe and read the violations of prisoners' rights and sympathize to it and urge for better programming. But, what about who went through it. Therefore, it is very urgent to address this issue and to implement the recommendations of committees, the existing legislations, the guidelines and directions of cases

⁴³ AIR 2006 SC 1946

and to abide with the principle of international laws.

In Indian societies women are always subjected to exploitation and they have to face a lot of social stigmas. They are not even treated as citizens and most often their rights are also violated or overlooked. After all this, unfortunately if a woman commits any crime and is imprisoned for this, then it's another misery for already miserable woman. Keeping the above discussed issues in mind, it's pivotal that the environment and circumstances surrounding the women should be favourable both in and out of the jail. It is suggested that the women inmates should be kept in open jail. The authorities who provide for the administration of jail should ensure that the gender program laws should be implemented in a manner that are beneficial for women inmates.

