PRISON & UNDER TRIAL REFORMATIVE JUSTICE: A CRITICAL ANALYSIS OF FICTION & REALITY OF PRISON

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Abstract

"Prison - a place where the criminal justice system puts its whole role."

The Performa, if fails will make the whole criminal justice in vain. The doctrine behind punishment for a crime has been changed due to the evolution of new human rights jurisprudence. The concept of reformation has become the watchband for prisons. Human Rights suggest that no crime should be punished in a cruel, degrading or in an inhuman manner.[1]*On the secondary, it is held that any punishment that amounts to cruel, degrading or inhuman should be treated as an offence by* itself. [2] The contrary caused to the criminal justice and its mechanism has been adopted universally.

Universally, it becomes a well-accepted rule that the mechanism in criminal administration must follow reformative policies.[3] *It is also in evident that all undertrials shall be treated with respect with the inherent dignity and value as humans.*[4] *It is also strongly argued that the community can never tolerate a scheme of correction that does not maintain a connection with the evilness of the crime done.*[5] *Thus punishment always retains a subjective role. In this purview, the rights guaranteed under the International legal system must be looked into and legislative concern for the same in India*

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[1] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984

[2] Id. at Article 4

[3] International Covenant on Civil and Political Rights, 1966, Art.10 (3) mandates that the essential feature of the correctional system should be reformation and rehabilitation of prisoners.

[4] Basic Principles for the Treatment of Prisoners1990, Principle1.

[5] Frank Pakenham, Lord Longford, the Idea of Punishment (1961), Geoffrey Chapman, London, p. 55.

INTRODUCTION

The term prison has been defined in the Prisons Act, 1894 in an exhaustive manner.[6] Prison can be any place by virtue of a government order being used for the detention of prisoners. Thus even a jail comes under the purview. A similar definition has been given to prison by Prisoners Act, 1900.[7] It excludes police custody and subsidiary jails. According to International Human Rights, prison can be only a place for the treatment of convicted persons. According to this imprisoned person means a person deprived of personal liberty as a result of his conviction in any offence and imprisonment means such condition of an imprisoned person.[8] The modern idea about prison has been envisaged by the judiciary; even the concept of open jails has been evolved. Krishna Iyyer, J opined prison as:

"A reformative philosophy, rehabilitative strategy, therapeutic prison treatment and enlivening of prisoner's personality through a technology of fostering the fullness of being such a creative art of social defence and correctional process activating fundamental guarantees of prisoner's rights is the hopeful note of national prison policy struck by the constitution and the court. "

Thus now all the dignity that human holds is availed inside the four walls of the prison. Prison life takes away many freedoms from an inmate like; liberty, heterosexual relations, security autonomy and so on.[9] The concept of penal reform had its birth from the reformative theory of punishment.[10] The reformative aspect thinks of incorporating humane values into the prison system and the prison officials have to work for the achievement of the same.[11]

THE LEGAL FRAMEWORK ON PRISONER'S RIGHTS

Indian Constitution formulates prison administration as a portfolio of state to legislate on.[12] The Fundamental responsibility of administration is to ensure custody and control of

[6] The Prisons Act, 1894, s. 3 (1)
[7] See s. 2 (b).
[8] See Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, 1988.
[9] Gresham Sykes, "The Pains of Imprisonment" in Norman Johnston, Leonard Savitz et al. (edi.), The Sociology of Punishment and Correction (1962), John Wiley & Sons, Inc, New York, p.131
[10] Rupert Cross, Punishment Prison and The Public (1971), Stevens and Sons, London, p. 43
[11] M.J. Sethna, Society and the Criminal (3rd Ed.,1971), N.M. Tripathi Pvt. Ltd., Bombay, p.35
[12] The Constitution of India, 1949, Schedule 7 List II, Entry 4.

prisoners.[13] A National Framework is needed to vary State Legislations to control the inconsistency in the prison management.

India still runs with a century-old legislative framework for prison administration.[14] Prisons Act is only focused on the classification of prisoners by their nature and status of imprisonment. It failed to look down the principles laid down by the judiciary into its premises as well as recommendations by the human rights law. Prisons Act also attempt to cast the responsibility of prison administration over the state.[15] Even the solitary confinement is still retained in the Act against which the judiciary had made their coherent dissent.[16] The liberty to move, talk, Share Company with co-prisoners if substantially denied would be volatile of Art. 21, unless it has the backing of law and this law should lay down a fair, just and reasonable procedure.[17]

It concerned about the prisoner's right to and meet visitors but that too is confined to under-trial prisoners and civil prisoners.[18] The concept of prison labour and earning are very vague from the Act.[19] Moreover, the environment is an unseen one which makes things more complicated. To conclude, it is important to point out that it still maintains separate confinement as a punishment for the offences done inside the prison[20] as the policies of rehabilitation and reformation are still have to be made into the Act.

JUDICIAL INITIATIVES IN PRISON JUSTICE

"Society must strongly condemn crime through punishment, but brutal deterrence is fiendish folly and is a kind of crime by punishment. It frightens, never refines; it wounds never heals"- Krishna Iyer.[21]

The Indian Prison Administration was structured and modified by virtue of judicial initiatives. Some essential rights were incorporated into the Indian legal system by the judiciary. The below-given analysis will help to pin down the judicial activism in enhancing

[13] Paul F. Cromwell, Jr., Jails and Justice (1975), Charles Thomas Publisher, Springfield, p. 95
[14] The Prisons Act, 1894
[15] Id. at s. 4
[16] Id. at s. 29
[17] *Sunil Batra* v. *Delhi Administration* AIR 1978 SC 1675
[18] Id. 15 at s. 40
[19] Id.
[20] Id. at s. 46 (8)
[21] "Justice in Prison: Remedial Jurisprudence and Versatile Criminology" in Rani Dhavan Shankardass (Ed.), Punishment and the Prison: Indian and International Perspectives (2000), Sage Publications, New Delhi, p.58

the rights of prisoners.

Reformation as the objective of punishment: Krishna Iyer, J. was the person who argued for orienting reformative treatment of prisoners. In all the judgments, he incorporated reformative values into the prison administration. The concept of crime was also redefined. It was observed that[22]:

"Crime is a pathological aberration that the criminal can ordinarily be redeemed that the state has to rehabilitates rather than avenge. The sub-culture that leads to anti-social behaviour has to be countered not by undue cruelty but by re-culturisation. Therefore, the focus of interest in penology is the individual and the goal is salvaging him for society. The infliction of harsh and savage punishment is thus a relic of past and regressive times."

The Court also supported the Gandhian approach of treating offenders as patients and the therapeutic role of punishment. Krishna Iyer, J. delivering the judgment also pointed out that the judge must use a wide range of powers in reformatting the criminal.[23] Thus the concept of reformation was planted even out of the four walls of the prison.

Free from torture and cruel treatment: The Supreme Court in other instances established that the prison treatment should not cause any kind of torturous effect. Even the practice of separate confinement and solitary confinement was reviewed. The court clearly pointed out that the prison authorities cannot make prisoners to solitary confinement and hard labour.[24] As to locate these practices, the Supreme Court directed the district magistrates and sessions judges to visit prisons in their jurisdiction and afford effective opportunities for ventilating legal grievances. They were to make rolling enquiries and take preferred remedial action. Thus the concept of judicial activism was recognized by the Supreme Court through this judgment.

Discussing on the same premise the court vehemently criticized the practice of using bar fetters unwarrantedly.[25] The court held the treatment of a human being which offends human dignity, imposes avoidable torture and reduces the man to the level of a beast, would certainly be arbitrary and questionable under Art. 14. Thus putting bar fetters for a usually

[22] *Mohammed Giasuddin* v. *State of Andhra Pradesh*, AIR 1977 SC 1926

[23] The judgment observes that the judge have to use their power to provide actual hospital treatment for the prisoners and liberal parole in advancing the reformation of prisoners

[24] *Sunil Batra* v. *Delhi Administration*, AIR 1980 SC 1579

[25] Id.

long period, day and night, and that too when the prisoner is confined in secure cells from where escape is somewhat inconceivable without any due regard for the safety of the prisoner and the security of the prison is not justified.

The human right to be safe in prisons as mandated by the international human rights law is being incorporated into Indian law by judicial initiatives. International law gives widest possible protection[26] to the prisoners from torture and that kind of a protection can only be accommodated by the legislature.

Maladministration in prison: Every under trial has got a right to enjoy all the liberties and freedoms entrusted to a normal human by the international human rights laws.[27] The authorities must be focused to look after the management of prisons with this outlook. It has been powerfully argued that any inconsistency in the administration of prison will also cause bound over the human rights of prisoners. The view of Indian Judiciary also accompanies this, to a greater extent. Talking about the maladministration in prison, apart from the official codes the foundation of discipline between the prisoners will also be of a high rising factor of concern. The Indian prison experiences even made the Supreme Court ask whether the prison term in Tihar jail is a postgraduate course in crime.[28] Serious allegations were made against the unhealthy relations between jail authorities and criminals and the same has been going on in the present days and if we look a few years back, the Supreme Court ordered to launch a prosecution against some Superintendents and other jail officials for offences punishable under Ss. 120B, 217 & 218 of the Indian Penal Code.[29] Concluding this judgment, the court preferably observed that:

"...norms relating to entry of persons to the jail, maintenance of proper records of persons who entered the jail have been observed more in the breach than in observance and the rules and regulations have been found thrown to the winds ... What is still more shocking is that persons have entered the jail, met the inmates and hatched conspiracies for committing murder. The High Court appears to have justifiably felt aghast at such acts of omissions and commissions of jail officials which per se constituted offences punishable under various provisions of the IPC and has, therefore, necessarily directed the launching of criminal

[26] The body of Principles for the Protection of All Persons, Under Any Form of Detention or Imprisonment, 1988, See Principle 6 and its explanation
[27] See Basic principles for the Treatment of Prisoners, 1990, Principle 5
[28] *Rakesh Kaushik* v. *B.L. Vig, Supdt. Central Jail, New Delhi*, AIR 1981 SC 1767
[29] *State of Maharastra* v. *Asha Arun Gawali*, AIR 2004 SC 2223

prosecution against them, besides mulcting them with exemplary costs.''[30]

The reformative ideal justice was variably spoiled at the consent and convenience of jail authorities and the same went against the basic aims of human rights laws. The court in other instances stressed the need to provide a proper atmosphere, leadership, environment situations and circumstances for re-generation and a reformatory approach.[31] Illegal cognizance between criminals and prison officials make all these aims in vain.

Freedom of speech and expression: Prisoners alike others can access other human rights made in Universal Declaration of Human Rights and international covenants.[32] Indian judiciary had also relied upon the right of a prisoner to enjoy the right to freedom of speech and expression.[33] It is the judiciary which took such a view before the *Kesavananda Bharati* judgment came and evolution of the concept of justice as fairness and reasonable. It is worthwhile in discussing the judicial declaration of the right of the press to interview prisoners. The aforesaid judgment has certain implications over the right of prisoners in exercising their right to freedom of speech and expression.

A Writ Petition was filed under Art. 32 by the Chief reporter of Hindustan Times, Smt. Prabha Dutt seeking a writ of mandamus or order directing the respondents Delhi Administration and Superintendent, Tihar jail to allow her to interview two convicts Bill and Ranga who were under a sentence of death, whose commutation petition to the President was rejected.[34] The Court held the restricted right to interview the prisoners subject to their willingness to attend the same. The freedom of press person to interview an undertrial prisoner will not be like that of the prisoner sentenced to death. Supreme Court remarked that the right to interview a prisoner will not become an exclusive right as in the case of life convict and it should be decided on merits depending on each case.[35]

Right to have healthy atmosphere in prison: The Supreme Court identified nine major problems afflicted upon the prison administration system, namely, overcrowding, delay in trial, torture and ill-treatment, neglect of health and hygiene, insubstantial food and inadequate clothing, prison vices, deficiency in communication, streamlining of jail visits

[30] Id.
[31] *Sanjay Suri* v. *Delhi Administration*, AIR 1988 SC 414
[32] Supra note 20
[33] *State of Maharashtra* v. *Prabhakar Prandurang Sanzgiuri & Anr.*, AIR 1966 SC 424
[34] *Prabha Dutt* v. *Union of India*, AIR 1982 SC 6
[35] State, through Supdt. Central Jail New Delhi v. Charulatha Joshi and another, AIR. 1999 SC 1379

and management of open-air prisons, among which, an unhealthy living premise was recognized as a severe problem.[36] A decade after this judgment situation remained the same and the same was revealed before the court by another judgment.[37]

The bitter experiences of the prisoners were made through a letter by one of the prisoners P. Bharathi of central Prison, Puducherry to one of the Honorable Judges of Supreme Court. The letter was ordered to be treated as a writ petition. It talked about the poor hygienic condition and maintenance inside the prison and also restrictions on the visit by relatives of the prisoner. There was no toilet facility inside the cell to answer the call nature during night time. Two plastic buckets with a lid were provided for this purpose during night time and in the next day morning, the buckets containing excreta are made to be cleaned by the inmates of the cell on a turn basis. This was made as per the existing prison rules and the authorities accepted that the rules require a radical change to fall in line with present-day requirements. This judgment will help to realize the disparities in state legislation as well as the need for a centralized legal framework in regulating the prison affairs.[38]

On prison labour: Prison labour also involves certain inconsistencies with human right. The extent of labour to a prisoner will depend upon the punishment and nature of imprisonment. But prison labour must be understood as a tool for reformation instead of taking it as a form of punishment. Following this doctrine Krishna Iyer, J. in a leading case law directed the prison authorities to engage a convict in agriculture as he traditionally belongs to that sector of the society.[39] The Court further concluded the objective of prison labour as,[40]

"When prisoners are made to work, a small amount by way of wages could be and should be paid so that the healing effect on their minds is fully felt. Moreover, proper utilization of services of prisoners in some meaningful employment, whether as cultivators or as a craftsman or even in creative labour will be good from the society's angle as it reduces the burden on the public exchequer and the tension within."

This approach by the court has been criticized as the argument supports the use of income of a prisoner against his expenses inside the prison. On the other hand, the government should not take afoul from the income of a prisoner as it can be used for the well-being of his family

[36] *Ramamurthy* v. *State of Karnataka*, (1997) SCC (Cri) 386
[37] *P. Bharathi* v. *Union Territory of Pondicherry & Others*, 2007 Cri. L. J. 1413
[38] Id.
[39] *Faramir & Another* v. *State of Uttar Pradesh*, (1979) 3 SCC 645
[40] Id.

or according to his lawful aspirations. The old position was based on the conviction that the man who broke the law has placed himself in debt of society for which he has to compensate.[41] This can also be done in creating earning habits and making a prisoner self-confident. Need for adequate wages by prisoners were again raised before the Supreme Court and where the court held the application of the Minimum Wages Act, will be of great use.[42] The real message to be conveyed by prison labour was made herein as, reformation should be a major objective of a punishment and during incarnation, every effort must be made to re-create the effective man out of a convicted prisoner. An assurance to him that his hardworking and capacity to build actively would eventually develop into handsome saving for his own rehabilitation would help him to get facilitation of the moroseness and desperation in his thoughts and fundamental fabric must be relied upon while toiling with the rigorous of hard labour during the period of his jail life. In this judgment, the court recommended to the State concerned to make law for setting apart a portion of wages earned by the prisoners to be paid as compensation to the deserving victims, of the offence, the commission of which entailed the sentence of imprisonment to the prisoner either directly to through a common fund to be created for this purpose or in any other feasible mode.

In addition to the above rights, the judiciary had glorified more rights which constitute certain new rights for prisoners. Under Para 873, the Punjab Jail Manual, a body of the condemned convict, after it falls from the susurration is required to remain suspended for a period of half an hour. This practice was contested to be violative of the right to dignity and fair treatment continues in respect of the dead body of the condemned man.[43] Glorifying the extent of the right to dignity the Court observed that:[44]

The right to dignity and fair treatment under Article 21 of the Constitution of India is not only available to a living man but also to his body after his death. The jail authorities in the country shall not keep the body of any condemned prisoner suspended after the medical officer has declared the person to be dead. The limitation of half an hour mentioned in Para 873 of the manual is directory and is only a guideline. The only mandatory part of the above quoted Para is that the condemned person has to be declared dead by the medical officer and

[41] Frank Pakenham, Lord Longford, The Idea of Punishment (1961), Geoffrey Chapman Publication, London, p.

[42] In the matter of Prison Reforms, Enhancement of Wages of Prisoners, etc, AIR 1983 Ker 261. See also the *State of Gujarat & Another* v. *Hon. High Court of Gujarat*, AIR 1998 SC 3164.

[43] *Paramanand Katara* v. *Union of India & Another*, (1995) 3 SCC 248

[44] Id

as soon as it is done the body has to be released from the rope.

The inherent and aforesaid speculation of every human life is there with the prisoners. Judiciary cannot give any ultimate saturation to the prisoners as it can only look upon the matters made to them. It is contended that the state must develop a new legal framework within which the prison administrations enhance and so developed national law must be focused on all the above mentioned legal rights propounded by the judiciary along with the international human rights guarantee.

LACUNAE IN LEGISLATION

Primarily the recommendations by the state secretaries were the premise from which the prison reforms were introduced. This was changed by the introduction of *Mulla Committee on Jail Reforms*.[45] The committee headed in the chairmanship of Mulla made a National Policy on Prisons. It also contended for the constitution of a national commission on the prison.[46] It took more than two-decade for the Indian legal system to draft certain laws in regards to the Mulla recommendations.[47] The bill so prepared was well supported by the draft bill made by the National Human Rights Commission. The Commission made follow up over the 1996 bill and developed another model bill within a period of two years.[48] This bill made by Commission attempted to consolidate the entire developments made in India after Mulla recommendations. Stepping with NHRC; Government of India drafted a new bill in the same year.[49] This bill was identified as a consolidated version of Indian laws on the prison.[50] But still, it remains as a chance of luck as it is kept away from parliament.

CONCLUSION

Despite the inadequacies in legislation, the judiciary on its own creative spirit had contributed much to prison administration thereby ensuring fundamental human rights of prisoners. Many of those rights were recognized by the international human rights law. Any change brought out in a penal system cannot be called as penal reform.[51] The concept penal reform had changed in a way that there should always be a nexus between penal reform and the

[45] Jayasree Lakkaraju, Women Prisoners in Custody (2008), Kaveri Books, New Delhi, p. 138.
[46] Id. at p 117
[47] The Indian Prisons Bill, 1996
[48] The Prison Administration and Treatment of Prisoners Bill, 1998
[49] The Prison Management Bill, 1998
[50] Supra note 20
[51] Rupert Cross, Punishment, Prison and The Public (1971), The Hamlyn Trust, London, p.43

reformatory theory of punishment.[52] The era of hands-off doctrine in prison administration is left behind in the history all over the world[53] and now it is always a matter of judicial scrutiny. Indian prisons are equally corruptive; like any other public institutions.[54] The new law should be also careful to cure the menace of corruption from the prisons. It is true that the prisoner is far more likely to be reformed if he can recognize the justice of the penalty than if he cannot.[55] Law on prisons should always find a free space in itself for the treatment of prisoners based on their conviction.

[52] Id.

[53] Mike Place and David A. Sands, "The Evolution of Judicial Involvement" in Paul F. Cromwell, Jr., Jails and Justice (1975), Charles Thomas Publisher, Springfield, pp. 237-45. 52 Indra J. Singh, Indian Prison: A Sociological Enquiry (1979), Concept Publishing Company, Delhi, pp. 160-161.

[54] Supra n. 29 at p.59

[55] Id.