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WOMEN PRISONERS: LAW, LEGAL SYSTEM AND ROLE OF LEGAL AID CLINIC

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Abstract

Prisons have been central to the debate in India and often been the centre of the debate itself. Centre of debate mainly because the model we choose and the outcome often experienced. “Every saint has a past and every sinner a future” was the motto when we choose the model aspiring a ‘correctional’ institution wherein by its very nature and functioning it will bring desired change of their inmates. However, when we see the outcome it is a bizarre situation, beginning with ill-treatment, torture, inhuman conditions and finally attitude of hostility and belligerency against the inmates. Thus, making the institution itself a ‘prisoner of the system’.

The present works critically examines the legal system regulating the prison system of India and the possibility of establishing a symbiotic relationship between the prison and the legal aid clinics which could be mutually beneficial to both

Keywords: Prison; Prison System, Legal Aid Clinic, Women Prisoners etc.

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Introduction

Prisons have been central to the debate in India and often been the centre of the debate itself. Centre of debate mainly because the model we choose and the outcome often experienced. “Every saint has a past and every sinner a future” was the motto when we choose the model aspiring a ‘correctional’ institution wherein by its very nature and functioning it will bring desired change to their inmates. However, when we see the outcome it is a bizarre situation, beginning with ill-treatment, torture, inhuman conditions and finally attitude of hostility and belligerency against the inmates. Thus, making the institution itself a ‘prisoner of the system’.

Our country has been a proud nation espousing ‘equality’ at every chance it gets.¹ Gender equality has been one of the equalities that it has strived to achieve or at least it has been an ‘equality’ that is often heard in the cries of women empowerment. Legislative arrangements were made towards achieving these ideals into reality by drafting dozens of laws and regulations viz., Immoral Traffic (Prevention) Act, 1956, the Dowry Prohibition Act, 1961, the Maternity Benefit Act, 1961, the Medical Termination of Pregnancy Act, 1971, the Equal Remuneration Act, 1976, the Commission of Sati (Prevention) Act, 1987, the Pre-Conception & Pre-Natal Diagnostic Techniques (Regulation and

Prevention of Misuse) Act, 1994, the Prohibition of Child Marriage Act, 2006, the Sexual Harassment of Women at Work Place (Prevention and Protection) Act, 2013.

Women Prisons: Issues of Insufficiency

The Constitutional framework as well as legislative policies enshrined through various legislative enactments see the women ‘as a group that needs saving rather than which needs saving from,’ hence ‘criminality’ of this group went largely unnoticed and along with it female criminals went unnoticed too. Though the prisoners have been part of academic research and administrative and judicial reforms, female prisoners have largely been ignored. Except Kerala and Tamil Nadu, other states either have either one or nil number of women prisons. Hence the majority of women have compounds inside male prisons. We have more open jails (63) and special jails (43) than women jails. These figures themselves paint a sorry picture and no excuse can be made for this curtailment of rights which the Krishna Iyer Committee had recommended as far as 1987.² In fact, the Prison Statistics reflects that the women prisons stood at 19 in 2013 and came down to 18 in 2014. The same is not true anymore as female

prisoners have been witnessing an increase not just in India but world over.³

The Ministry of Women and Child Development released a report on “Women in Prison (2018)” dealing with prison from a women's perspective. The report contains a comprehensive list of 134 recommendations for improving the lives of women under incarceration, addressing a wide range of issues. Before this report, various changes in the National Model Prison Manual 2016 have also been suggested to bring it in line with international standards and norms.

Vulnerability of Women Prisoners

The law has not been ignorant of the vulnerability of women who run in conflict with the law. It has been instrumental in creating new space for the women inside every space, be it social, economic or political. The Criminal Justice System is not untouched by this approach. Special concessions have been made in their favour such as during arrest, search etc.⁴ But, when it comes to the prison system, we fail to find a similar attitude towards women. The huge number of undertrial populations inside the prison substantiate the same. Out of 17,834 women, 11,916 women are undertrial which is the same percentage as for men. Unlike men, this causes the additional problem – of their dependent children. A total of 374 women convicts with their 450 children and 1,149 women undertrials with their 1,310 children were lodged in various prisons in the country at the end of 2015.⁵ This is a grim picture more so because if not eliminated, this number should be brought down as much as possible as adverse psychological and physiological effects on such children are well documented.

There are some more concerns with respect to women prisoners that are more glaring than the others. Sexual harassment of women prisoners being the foremost one as sexual harassment of women in custody has been the biggest blot on our state.⁶ The recent reports of rape of around girls/inmates of shelter home from Bihar, Uttar Pradesh, Madhya Pradesh, and now from Maharashtra are enough to threaten institutional morale. According to the prison statistic reports, 189 custodial rapes were reported in 2014 and 91 in 2015 just in the state of UP. Again in 2013, there was only one reported incident of rape which increased by 197% in 2014 to 197 rapes and dropped to 95 in 2015. The committee of women empowerment has in fact expressed its doubt on these numbers, and observed that “either just the state of UP has this problem or other states are not being honest about the figures.”⁷ The trend continues, in 2013 there were a total of 1482 female deaths which dropped to 46 in 2014.⁸

Overcrowding in itself isn't the problem but the effect it has on the right to human dignity and privacy, right to basic needs such as hygienic and sanitary living

conditions, drinking water, adequate nutrition, clothing, bedding etc, is the problem. Though one might argue that the occupancy rate of females is much lower at only 70% and hence overcrowding is not a problem they face but that would be an incorrect assumption. This figure does not depict a true picture as even though a state might have a lower occupancy rate the presence of a jail where the female is sent to prison is not shown. Central Jail of Chhattisgarh for example, has 789 prisoners against the capacity of 342.⁹ And might I add, there is no women's prison here. The same is true for Karnataka. Only 2.9% of women are in open prisons as against their share of a population being 4.3% (108 and 3670 men). In Chhattisgarh, Jharkhand, UP, Uttarakhand, West Bengal, and Delhi, the occupancy rate is over a hundred. This space shrinks, even more, when we add the children living with their mothers. It may further be added that there is a complete lack of policy coordination with respect to the availability of prisoner and prison policy.

Systemic stigmatisation and victimisation of Women Prisoners

It is believed, and rightly so, that “the stigma of a jail term sometimes ruined a woman's life because her family would refuse to take her back even after her release.”¹⁰ Thus, apart from institutional problems counted above, prison as ‘a system’ is facing altogether a new set of challenges and that is post-release ‘stigmatisation’ and ‘victimisation’ of women prisoners. People working on Women Prisoners have categorically stated that women prisoners are generally unaware and misinformed of the peculiarities of their case, unlike their male counterparts. This causes severe hardship not only during the incarceration period but even thereafter. Thus, mothers-in-law and sister-in-law's, arrested under dowry laws are the worst sufferers because they get abandoned by their parental family as well as they're in-laws.

Post-incarceration ‘stigmatisation’ and secondary ‘victimisation’ of these women inmates is significantly different than that of men. That may be termed as ‘worst’. During incarceration, these inmates require sincere medical attention, which is often neglected or denied simply, that leaves her incapable in handling the stigma. As per 2015 figures, a total of 347 women suffer from some form of psychiatric ailments and we have a total of 18 psychiatrists for all prisoners, male and female, in the entire country! This would probably be the case where both sexes are getting an equal mal-treatment. However, annual prison statistics are highly inadequate to reflect on the condition of women in prisons. There is no dedicated section which sheds light on them. There is no data record on how women are being prepared for life after prison. Considering that most women are imprisoned in jails

primarily meant for men, it indicates that they must often be denied an equal opportunity for work and rehabilitation.

A report of the Human rights Watch in the 1990s had observed that there exists a third category of female inmates categorized as 'non-criminal lunatics' which included victims of crimes such as rape to ensure their attendance during trials. I do not know if this still is the case but it's appalling, to say the least. This is why maintaining regularly updated detailed data becomes vital. Justice Geeta Mittal in a recent judgment remarked that "The marginalization and discrimination experienced by women in society do not stop at the prison entrance. Rather it continues to impinge on their lives even when in State custody, perhaps in its most aggravated forms."¹¹

It is not denied that there are certain systemic issues, need to be addressed at a different level. For example, flawed rules about surety, their solvency, and requirement of 'local surety', which often restrict the release of prisoners even after being bailed by the court. Solvency of the surety is with regard to property, and to get the solvency, one has to go to a collector. If a person is from another state, and he has to get a solvency certificate from a Collector, it leads to further corruption. At the time when our government and courts look too open and liberal in outlook, the condition of prisoners is not only pathetic but also, when we look these issues from the perspective of women, legal system appears *non-est*.

Role of Law School and Their Legal Aid Clinic

Issues relating to prison and prisoners are multiple. The same should be addressed collectively. However, there is a limited but dynamic role of Law School in this. There are two institutions working with common or shared objectives within and beyond the prison. The first one is 'jail clinic', which is expected to be a functional free legal aid clinic in all the prisons across India. Apex Court and NALSA both have been active enough in pressing the establishment of jail clinics. The purpose of establishing jail clinics is that as soon as a new person is lodged in jail, he has the opportunity to meet the legal aid counsel there. The second is, Legal Aid Clinic mandatorily run by all the Law Schools, be it national law schools, Law Departments as well as private law universities/colleges. As per the mandate of Bar Council of India, statutes of various Law Universities, these clinics are supposed to offer free legal aid to all concerned.

The domain of free legal aid is also much wider now. Apart from giving typical legal aid, these clinics are expected to bring the desired result by providing another kind of support including medical, social, behavioural and psychiatric. The clinic should get actively involved at all functional levels, and take up

cases of prisoners who are either undertrial or sentenced where such prisoners or accused, as the case may be, cannot afford legal services. The new Prison Manual of 2016 which has provisions for access to legal aid services, rights of prisoners, etc. Report on 'Women in Prisons' launched by the Ministry of Women and Child Development further recommended making legal aid more effective, and suggested that legal consultations must be conducted in confidentiality and without censorship. For persons with language barriers or sensory disabilities, adequate arrangements must be made by the prison administration to ensure that such persons do not face any disadvantage by providing an independent interpreter.

Unfortunately, both of these clinics have, though functional in their own domain, failed to produce any concrete result. Even after siphoning huge amounts of public money, Jail visiting advocates working with SLISA/NALSA are supposed to visit jails on a regular basis, but reluctance is more than visible here. NALSA itself quoted that many jail clinics are existing on paper only, and they are actually not working. Even the idea about having a full defense lawyer has not yet been materialized. There are reports about general complacency and attitude problems. Advocates for prisoners are inconsistent with marking their presence in court, which is why remand of prisoners is unduly extended. One of the reasons of their failure is twofold coordination between Jail Clinic and Legal Aid Clinic run by Law Schools at various levels viz., Prison, Region office and state level, and similar lack of coordination between National Legal Services Authority, State Legal Service Authority, Jail Clinic, and Legal Aid Clinic run by Law Schools. To bring uniformity and collaboration, something like a State Level Coordination Committee or a National Forum, with all stakeholders could be a starting point.

Whether Law School's Legal Aid Clinic Could be Instrumental

Law School's Legal Aid Clinic could be very instrumental in revitalizing the idea of Free Legal Aid. India, presently has 23 National Law Schools and more than 3000 Law Colleges and Law Departments could do something great. These law school's Legal Aid Clinic, often guided by a trained faculty member, staffed with brilliant young minds with zeal to perform could be more than effective. What is required is to give these clinics recognition and develop a symbiotic relationship with prison and other government machinery. Commonwealth Human Right Initiative has compiled the following outcome for any effective coordination between these Legal Aid Clinics:

Short Term benefit to the System

- (i) This will include creating awareness among prisoners of their rights;

- (ii) Securing appointment of legal aid lawyers;
- (iii) Identifying and assisting persons illegally detained or suitable for release;
- (iv) Assisting vulnerable groups like juveniles in prison, mentally ill inmates, prisoners of foreign origin.;
- (v) Establishing a mode of clinical legal education – hence sensitizing future lawyers to problems in the existing criminal justice system;
- (vi) Documentation of problems/issues within the criminal justice system.

Further, some long-term benefit would also arise to the system including:

- (i) Institutionalizing mechanisms to prevent unnecessary detention.
- (ii) Ensuring early access to legal aid for indigent defendants and undertrials. Increasing prisoner's confidence in the legal aid system.
- (iii) Raising awareness among prison staff on legal procedure
- (iv) Monitoring the equality of legal aid.
- (v) Improving coordination between the Prison Department and legal services Authorities.
- (vi) Identification of systemic gaps within the criminal justice system and striving to bridge the same.
- (vii) Collection of information leading to strategic litigation.

Benefit to students and the legal aid clinic would include:

- (i) Provides real-life work experience to students.
- (ii) Students get exposed to the problems faced by poor and marginalized groups of the society and those within the criminal justice system.
- (iii) Students learn about their professional responsibilities to sustain and support the rule of law. Human rights and social justice.
- (iv) Students learn how to intervene in the legal system and improve legal services through referral solutions.

Summation:

There appears to be a deficit between the legal system and the social reality of women in prisons. Though the law preaches equality between genders, the social reality is just the reverse. One must admit that we made the prison system primarily for men and it had to be stretched to accommodate women. Only this admission can guide us for necessary overhauling. Existing prison facilities and programmes need a relook and gender perspectives must be considered while dealing with this group. Law School's legal aid clinic could be a forum where, if access is given, gender issues could play their own narrative.

End Note

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¹ Art. 14, Constitution of India, 1949

² Justice Krishna Iyer Committee on Women Prisoners (1986-87)

³ <http://www.prisonstudies.org/news/world-female-imprisonment-list-fourth-edition>.

⁴ See Section 46(1), 46(4), 53, 160, 416, 437 etc. of the Code of Criminal Procedure, 1973. Report on 'Women in Prisons' launched by the Ministry of Women and Child Development has further recommended that "bail should be granted to those under-trial women who have spent one-third of their maximum possible sentence in detention, by making necessary changes in Section 436A of the CrPC which provides for release after half of the maximum sentence has been served. The report also recommends that a maximum time frame may be decided for release of women prisoners after bail is granted but surety is not produced. This would ensure that poor or financially dependent women are not left to languish in prisons."

⁵ Report by Ministry of women and Child, June 2018, page 100.

⁶ A law student might not remember many cases but if one of the cases that almost all know is the infamous 'Mathura rape Case'.

⁷ http://164.100.47.193/isscommittee/Empowerment%20of%20Women/16_Empowerment_of_Women_10.pdf

⁸ *Ibid.* p. 51

⁹ Prison Statics India, p. 21

¹⁰ Sanjoy Hazarika, *For Women In India Prisons, A 'Grim Picture'*, N.Y. TIMES, Feb 29, 1988.

¹¹ In Poonam Rani v. State, CRL. A. No 711/2012. Decided in 2017.