

# Women prisoners in India: tracing gender gaps in theorising imprisonment

## Abstract

It explores the existing theories of imprisonment concentrating on women prisoners. The male centric bias of the criminology is highlighted and it is analysed that how it has adversely affected the cause of women prisoners. It tries to link various social concepts like social justice, social choice with women prisoners and try to locate the women prisoners in the broader spectrum of social life. The paper tries to create a nexus between the hegemony and the problem of women prisoners and ascertain whether hegemony is in any way related or responsible for the problems faced by women prisoners. The adequacy of the existing literature and its failures to address the women prisoners is also included.

**Keywords:** women, imprisonment, prisoners, social exclusion, patriarchy

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## Introduction

Prison is a difficult area to be investigated and studied. It is non-competitive in the sense that it does not have any sister organization doing the same function. It safeguards itself from any foreign intrusion into its monopolistic governance. It is well structured to rule out the possibilities of entry of outsiders. Everything we want to know about the prison administration is laid down in the Jail Manuals. Every State is having its separate Jail Manual since "Prison" falls in the "State List" under the Indian Constitution. The Oxford English Dictionary defines Prison as, "A place properly arranged and equipped for the reception of persons who by legal process are committed to it for safe custody while awaiting trial or for punishments."<sup>1</sup> The definition highlights one of the very primary functions of prison i.e. "safe custody". However, there are various other functions of prison like: retribution, retaliation, penitence, neutralization, vindication, deterrence, general deterrence and special deterrence, removal from society, rehabilitation, resocialization and protection of a criminal from society.<sup>2</sup> However, not many of these functions are fulfilled. As a matter of fact, prison has a very delicate function to be performed i.e. to balance the reformative and the punitive functions of the prison. Usually the reformative goals are overpowered by the punitive goals. "In fact, the structure of the prison system is an uneasy balance between the different functions it is designed to meet. The dilemma between the demands of control and the desire for change as it were, between punishment and rehabilitation places the prison system in an uneasy and irrational equilibrium."<sup>3</sup> Prison has a very peculiar place in the society. In a society there are various organizations which compete with each other for available and limited resources. Prison does not face any such competition. Apart from separating the inmates from the outer world, it also bestows upon them the tag of "criminal" which serves the prisoner even when he has moved out. Thus, prison also plays the role of stigmatizing and crippling the person for life. As Dahir says,<sup>1</sup> "Prisoners emerge as dissocialized outcasts."<sup>4</sup> As a matter of fact, prison has a society of its own. It's a different world altogether behind the gates of jails. The hierarchies which are prevalent in the world are present inside the prison too. There exists a ruling class and a subjugated class. Even in the subjugated class there are hierarchies like political prisoners, under trials, convicted or security prisoners etc. Each of them has different rights. However, this is different story

altogether that prisoners usually don't have access to the jail manuals. When prisoner is a woman the case becomes special. Women in the Indian society are not safe even in their homes. In a prison when their mobility and freedom is curtailed they become more vulnerable. They leave their gender roles behind to be called a prisoner. Unlike male prisoners, they suffer more pain and trauma because they cannot face separation from their families and loved ones. Since Aristotle calls equality among unequals as inequality, the male and female prisoners should not be treated alike. The female inmates because of their biological needs deserve extra attention and have different demands than their male counterparts. There have been reports of sexual abuse and custodial rapes apart from the regular torture exercised on them. There are problems of overcrowding, unhygienic conditions, lack of sanitary napkins, and lack of education facilities for the children of inmates etc. As Kiran Bedi<sup>2</sup> writes about the Tihar Jail in her book "It's Always Possible", "Here, women prisoners were subjected to the most humiliating experiences, which robbed them of what little dignity and self-respect they reached the prison with. It must be considered some sort of miracle that these women managed to cling on to their sanity, despite the overwhelming odds they faced."<sup>5</sup> Around 280 women were herded into the place with sanctioned capacity for 60. Only 20 of them were convicted, the rest were under trials. According to a Report of the Project funded by the Planning Commission, Government of India on "Women Prisoners & Their Dependent Children", in Uttar Pradesh, the convicted and under trial ratio is 1:8 among women prisoners. In case of women prisoners, the theory in India got struck with the women criminality rather than their status as prisoners. The theory focussed on "causative explanations" rather than the "contextual explanations". Even in the theory, women prisoners were tackled as deviant women and the studies on women prisoners became studies on women and crime. The focus shifted from 'prisoners who are women' to 'women who are criminals.' It acts as a great hindrance for the reform movements for women because it was perceived that normal women never take recourse to crime. The women criminals are biologically and psychologically abnormal and no amount of good practices can reform them. This paper tries to highlight the male centric bias of criminology which results in treating women prisoners with the same yardstick with which male prisoners are treated. This also leads to blanket legislations with no special provision for women prisoners. It tries to advocate a special case for women prisoners and why they should be treated differently from male prisoners.

<sup>5</sup>Bedi, Kiran; "Its Always Possible- Transforming One of the Largest Prisons in the World" (2002); Sterling Publishers Pvt. Ltd.; New Delhi; p.88.

<sup>1</sup><http://oxforddictionaries.com/definition/prison>

<sup>2</sup>Dahir, R.N (1979).; "Prison as a Social System"; Lawrence Verry; p.4

<sup>3</sup>Ibid

<sup>4</sup>Ibid, pp.4

## Materials and methods

Qualitative research methodology was used in writing this paper. Majorly the secondary sources were relied upon. The secondary data included the studies on prisons and prison reforms. The various reports of various Committees on Prison reforms, Jail Manuals and various other existing field reports were also looked into.

### Women and patriarchy

Gender continues to be one of the most talked about and debated topics. So much so that “women” has become a separate category to be worked upon. Every marginalised section of the society has a further categorisation of women in it. If we take women as an excluded section of the society then we shall be mistaken, because women are not excluded section of the society. They are differently integrated into the society.<sup>3</sup> They are marred by the patriarchal society. The Indian society is synonym with the patriarchal society. A patriarchal society is one in which descent and group placement, inheritance and succession are all “harmoniously” in the male line; where post marital residence is patrilocal; and where familial authority resides with the senior male members.<sup>6</sup> Thus, by the very definition of patriarchy women is very cleverly denied any control over the sources of income and thus denied the economic independence. Any society where women are not easily given the right to economic independence, her social status can easily be imagined. In Indian society no difference is made even if a woman of the family is educated and earning. She can never be the “head” of the family even if she is the sole earner of the family. It’s the male member who heads the family; rather he is the one who dominates the scene. Women in India have a very peculiar place. She is equated with Goddesses but is simultaneously raped in the lonely lanes of Gurgaon. She is expected to follow a certain code of conduct according to which she is meant to be feminine, submissive, and motherly. This is nothing but just the stereotyping of women. India is a country where the Goddess of wealth is shown at the feet of her husband just to create an ideal for the normal illiterate women. “Pati Parmeshwar” i.e. husband is equivalent to God is taught to girls since childhood. Women are expected to know what is good and what is bad and thus should never go wrong in her public demeanour. This situation is more or less same in both rural and urban India. The problem is graver in rural parts where people are marred by illiteracy, poverty and ignorance. Indian society exhibits a powerful dichotomy of gender. The most glaring aspects of such dichotomy are witnessed on the issue of women offenders and prisoners. In such circumstances if any woman commits a crime, she is seen as abnormal and misfit for the society. Even if her crime is not proved she is never accepted back into the society. It is really problematic that the criminality of women and men are seen separately. Crime is not expected from woman. She is expected either to succumb to circumstances or if under any circumstances she commits a crime then questions are raised on her womanhood.

### Women prisoners and social exclusion

The term social exclusion is of recent origin. Rene Lenoir writing about a quarter of a century ago is given credit of authorship of the expression. The expression since then has been extensively used in writings on poverty and deprivation. In our discussion on women prisoners we are concerned with the “deprivation factor”. Even in the practical context of identifying “the excluded” in France, Rene Lenoir,

<sup>6</sup>Uberoi, Patricia (2009); “Your Law & My Custom- Legislating the Family in India”; Critical Quest; New Delhi; p. 3.

as Secetaire d’ Etat a l Action Sociale of the French Government, spoke of the following as constituting the “excluded”- a tenth- of the<sup>4</sup> French population: “mentally and physically handicapped, suicidal people, aged invalids, abused children, substance abusers, delinquents, single parents, multi- problem households, marginal, asocial persons, and other social misfits”<sup>7</sup> Women Prisoners can be dealt under the category of “marginal” and “social misfits”. The Positivist theories on women prisoners deal with the aspect of women criminals being the misfits or being not normal enough to be integrated into the society again. The women offenders are seen as patients suffering from some biological and psychological diseases. Rather than regarding them as fallen victims of some peculiar situation, women offenders are regarded as abnormal beings. Suvarna Cherukari in her book “Women In Prison-An Insight into Captivity & Crime” quoted Ceasre Lombroso (1895) who gave the Positivist theory and focused on the biological and psychological make-up of the individual in determining criminal behaviour. He maintained that deviants are less highly evolved than ‘normal law abiding citizens’. This lead to a tenuous assumption that a woman exhibiting criminal tendencies “is not only an abnormal woman, she is biologically like a man”. According to this approach, women were driven by their biological inferiorities. Belknap (2001) argued that given this context it is hardly surprising that Kleptomania, a biological explanation for middle-class white women’s shoplifting, was identified in the late 19th century as a ‘uterine ailment’.<sup>5</sup> She showed that in the late 1970s and 1980s, even today, pre-menstrual syndrome (PMS) has been considered as a biological problem of all women, a causative factor contributing to their irrationality, instability, and even criminality.<sup>8</sup> In yet another dominant strain, Otto Pollak employs a Freudian approach to formulate a positivist account of women’s criminality. Smart compares Pollok’s analysis to Eve’s deceit with Adam (in the Bible): “it is Pollok’s contention that women are the masterminds of criminal organisations; that they are the instigators of crime rather than the perpetrators; that they can and in fact do manipulate men into committing offences whilst remaining immune from arrest themselves.”<sup>9</sup> This, analysis is highly problematic because it does not reflect anything on the women criminality, rather it depicts the malfunctioning of the criminal justice system which is unable to prove the criminality of women offenders. The labelling of women as perpetrators of crime is merely the shifting of burden of criminality from the offenders to women. It can be understood as a kind of conspiracy against women that even if she is not directly involved in crime and law cannot convict them, the society shall still boycott them. In a study of convicted women inmates in the jails of three states in India: Punjab, Haryana and Himachal Pradesh, Singh (1982) argues that there is a significant relationship between menstruation and crime Borrowing Dalton (1960) contention that deterioration occurs in a school girl’s work and in her behaviour during menstruation, Singh notes that fifty three percent of his respondents were ‘menstruating or in premenstruum’ while they committed their offences: “As for the relationship between the nature of crime committed and menstruation, menstruation seems of greater importance in crimes of violence..... This could mean that the hormonal changes cause women to commit crime during this period.”<sup>10</sup> This contention is again highly problematic because criminality has nothing to do with the biological makeup of either men or women. As a matter of fact the mobility

<sup>7</sup>Amartya, Sen (2004); “Social Exclusion- Concept Application and Security”;

Critical Quest; New Delhi; p.1

<sup>8</sup>Cherukari, Suvarna (2007); “ Women in Prison- An Insight Into Captivity and Crime”;Cambridge University Press India Pvt.Ltd.p.7

<sup>9</sup>Ibid; p.3

<sup>10</sup>Supra 16; p.5

of women is hampered during menstruation. Moreover, no scientific explanation can be found for such an argument. Moreover, it squarely ignores the social pressures which work within and outside the households. Women crimes are reduced merely as reaction to their menstrual cycles. Further, what justification this theory shall attribute to the cases of elderly respondents who are convicted for killing or harassing their daughter-in-laws? Another problem area which this theory raises is this that it clearly negates the scope of reformative punishment. The menstrual cycle is a natural thing and thus, attributing women criminality to her biological functioning makes it incurable. In India, following early Western sociological explanations on female criminality, Ahuja (1969) conducted one of the first studies on female offenders in India. He focused on documenting the crimes and composition of the population of women inmates in India. He argues that families often undergo strain and this call for adjustment.<sup>11</sup> However, sometimes women fail to adjust, and this may result into criminality. This theory is highly problematic and deficient as it focuses on the women's maladjustment rather than on the strains inherent in the family, culture, and gender systems themselves. Thus, the positivist theorists are exponents of social exclusion of women offenders because they consider women criminality as incurable and thus the reintegration of women offenders into the society is out of the scope of their studies.

### Patriarchy & prison

When we talk about women prisoners then our focus is on the "jail administration". The jail is a patriarchal place where woman is sent to get back her lost glory or womanhood. Prison redefines the norms of society and morality for women and acts as an agent of social control. It tries to mould the women prisoners so that they can again fit into the same society where they violated certain social and legal norms. How does the patriarchal hegemony play out in the prison? Hegemony according to the Greek root of the word 'egemon' is the dominance of a state over another, it means literally the "leader, ruler, often in the sense of a state other than his own". Gramsci describes hegemony as "a relation, not of domination by means of force, but of consent by means of political and ideological leadership."<sup>6</sup> It is the organisation of consent.<sup>12</sup> Now, patriarchy is defined by Patricia Uberoi as a society in which descent and group placement, inheritance and succession are all harmoniously in the male line.<sup>13</sup> Thus, 'hegemonic patriarchy' can be understood as the dominance of the male authority over the females and with its prolonged exercise it gains legitimacy and the consent of the female population also. The female counterparts believe in the claimed supremacy of the males and thus affirming to the structure laid by them. The problem arises when this structure is replicated in other social and political institutions. It then results into the hegemonic governance of the public institutions. The State becomes a patriarchal institution which reaffirms the "familial ideology" of patrilineal kinship through law and public policy. The maintenance and property laws reflect the legal regulation of the womanhood and they serve and legitimise the women's economic dependency. Women who affirm to the cherished ideals of womanhood are given protection of both the society and the law and those who fail to live up to the ideals are penalized. This hegemonic patriarchy is replicated inside the prisons also. Prison is in fact an ultra masculine world where women who fail to live up to the ideals of womanhood are locked

<sup>11</sup>Ibid; p.7-8

<sup>12</sup>Beyer, Cornelia. "Hegemonic Governance". <http://turin.sgir.eu/uploads/Beyer-Hegemonic%20Governance%20Turin.pdf>

<sup>13</sup>Uberoi, Patricia (2009); "Your Law & My Custom- legislating the family in India; Critical Quest; New Delhi; p.1.

into. The patriarchal political power is linked with the use of coercion which gains legitimacy due to the governance being hegemonic.<sup>7</sup> Patriarchy and hegemonic masculinity are the cornerstones of the society both inside and outside the prison.<sup>14</sup> The Prison is essentially a patriarchal and hierarchical institution used as a tool of social control and punishment both inside and outside of the criminal justice system.

### Social control & women prisoners

The credit for equating prison with social control goes to Michel Foucault.<sup>8</sup> The contribution of Michel Foucault cannot be ignored in contributing to the ideology of producing "docile bodies" from the prison. 'To write today about punishment and classification without Foucault is like talking about the unconscious without Freud.'<sup>9</sup> (Stanley Cohen)<sup>15</sup> Foucault writes that, "The classical age discovered the body as object and target of power. It is easy enough to find signs<sup>10</sup> of the attention then paid to the body- to the body that is manipulated, shaped, trained, which obeys, responds, becomes skilful and increases its forces."<sup>16</sup> Now, the attributes which he points out, aim at making the body the most docile feature of any prison. He says that the body has always been the most controlled thing. But, there were few new features to this control. The utility was infused into the docility of the bodies and the mixed effect of both was called "Discipline". Foucault preferred to call it as an 'art of body'.<sup>17</sup> In his words, "the historical moment of the disciplines was the moment when an art of the human body was born, which was directed not only at the growth of its skills, nor at the intensification of its subjection, but at the formation of a relation that in the mechanism itself makes it more obedient as it becomes more useful, and conversely."<sup>18</sup> Thus, discipline produces 'docile' and 'subjected' bodies. Feminist responses to Discipline and punish have mainly focused on its concept of 'discipline,' extending Foucault's analysis of disciplinary practices to the formation of feminine 'docile bodies' in all areas of everyday life. As Adrian Howe notes, this feminist emphasis on his disciplinary thesis rather than his ideas about penal practices left "something of a lacuna in feminist analyses of penalty per se".<sup>19</sup> A further exploration of the possibilities of feminist-Foucauldian analyses, however, could provide interesting new angles in the feminist study of penalty. 'Foucault's ideas about the establishment of a 'carceral network,' understood as an extension of surveillance and normalisation throughout society [...] connect in self-evident ways to feminist sociologies of the social control of women, thereby providing an analytical space in which women can be included in any properly-constituted 'social' analysis of penalty.'<sup>20</sup> The model of "perpetual surveillance" – of the 'Panopticon' – as penal policy and its transportation into society as a whole with the purpose of general social control also needs to be considered within a gendered framework: Does the panoptical principle have specific implications for female prison inmates? Some research suggests that whilst disciplinary regimes in the nineteenth century were similar in many ways for both men and women, "surveillance and regulation were 'always'<sup>11</sup> closer and more omnipresent than that usually directed

<sup>14</sup>Giller, Olga; "Patriarchy on Lockdown: Deliberate Indifference and Male Prison Rape"; 10 Cardozo Women's Law Journal.659; p.2.

<sup>15</sup>Schwan, Anne; "Disciplining female Bodies: Women's Imprisonment and Foucault";

<sup>16</sup>Foucault, Michel (1995); "Discipline & Punish- The Birth of the Prison"; Vinatex Books Edition; USA; p.136

<sup>17</sup>Ibid; p.137

<sup>18</sup>Ibid; p.138

<sup>19</sup>Howe, Adrian (1994); "Punish and Critique: Towards a Feminist Analysis of Penalty"; Routledge; London; p.110.

<sup>20</sup>Ibid; pp.115-116

at men” (Howe quoting Dobash, Dobash and Gutteridge).<sup>21</sup> The panoptical institution for women in particular implicitly provides a model of the “perfect” patriarchal society because it trains women to subject to the constant surveillance by an (invisible) patriarchal ‘eye’ in society at large – an ‘eye’ which ‘gazes,’ observes and prescribes how to look, how to behave, where to go and where not to go – thus executing social control over all women. As feminist research has suggested, there are noticeable parallels between the policing of women’s everyday lives and their policing through formal regimes such as the prison. Pat Carlen in her book “Women’s Imprisonment: A Study in Social Control” draws upon this Foucauldian framework. In her book she deals with the socio-biographies of thirty-nine women with criminal convictions in Scotland’s only women’s prison, Cornton Vale. She raises an interesting question: Is the modern prison really about crime and punishment? She argues that Scottish women most likely to be arrested are those who have stepped out of ‘proper’ domesticity. Her research shows that, unlike the disciplinary regimes in most men’s prisons, Cornton Vale exercises greater control over women by establishing a family unit system. Such a system enables rigid surveillance in gender-specific ways, (emphasising domestic work, and family roles through disciplinary mechanisms). She argues that:

“Familiness is one dominant conceptual axis along which women’s imprisonment is conceived by the Scottish judicial and penal authorities. Femininity is another. Together with the insistence that deviant women should be interpellated as members of a family and reconstructed as lifelong candidates for domesticity is the insistence that, because prisoners in Cornton Vale are treated as women, they should behave accordingly.”<sup>22</sup> She questions the validity of the prisons per se. She doesn’t believe in the legitimacy of the prisons. She says, “Why do such myths about the possibilities of a benign prison persist and multiply? First, because imprisonment so nearly violates so many human rights that democratic governments need continually to re-legitimise its systematic and almost exclusive use against certain classes and categories of lawbreakers for quite minor crimes.”<sup>23</sup> In another study on women’s imprisonment in England, Wales and Scotland Carlen and Worrall write about the treatment of women prisoners’ by the authorities. They argue that the main purpose of education and training in women’s prisons is disciplinary and limited to rudimentary skills. Most of the vocational training in women’s prison involves domestic cooking, laundering, use of domestic appliances and home decorations. (Footnote) They draw attention to the lack of trained officers to address the inmates’ problems and their apprehensions about future. Women inmates are not acquainted with skills that may enable them to find jobs after leaving the prison. These factors, combined with the relative isolation of many inmates from their families, mean that women prisoners leave the prison with no place to go. “Today’s so called ‘new admissions’ will too often be yesterday’s so-called ‘released prisoners’.” (Footnote) In India also, Justice V.R.Krishna Iyer although advocates rehabilitation of women prisoners but suggests all womanly or stereotypically womanly works like mother- crafts, baby sitting, domestic service including good cooking.<sup>24</sup> Adrian Howe in her book, “Punish and Critique- towards a Feminist Analysis of Penalty”, argues that there is classification even among women prisoners, like mothers, wives etc. The penalty differs

<sup>21</sup>Ibid; p.144

<sup>22</sup>Cherukari

<sup>23</sup>Carlen, Pat: “Women’s imprisonment: Models of reform and Change”; Probation Journal 2002 49:76; pp.78-79

<sup>24</sup>Shankardass, R.D. (ed) (2000); “ Punishment and the Prison: Indian and International Perspectives”; Sage Publications; New Delhi; p. 66

according to the gender roles. “Thus, women who display appropriate feminine and middleclass characteristics are more likely to be treated more leniently than those who are working-class, black, unmarried or in any other manner perceived as ‘deviant’.”<sup>25</sup>

### Social choice & women prisoners

Social Choice Theory is the study of systems and institutions for making collective choices, choices that affect a group of people. Social choice theory is breaking off (from philosophy) to provide progress on political philosophy questions about how societies ought to be making collective choices.<sup>26</sup> Now if we try to employ social choice theory to the case of women prisoners, then we might realise that there is inherent problem with the social choice theory. Often, overt preferences may be a result of the situation in which people live. This is especially bothersome if people have adapted their preferences to adverse circumstances. In the case of women prisoners, the problem arises because women since long have got accustomed to the patriarchal practices in the jails and they don’t know any other ways. The social choice theory works only when there is agency with the choice makers. The women prisoners or prisoners are devoid of any agency. Agency can be defined as the ability to set and pursue one’s own goals and interests, which prisoners don’t possess. The policy makers take all the decisions for the prisoners. Bina Agarwal’s<sup>27</sup> bargaining power theory also applies to prisoners. According to this theory, the ability to bring about change or legal change depends upon the bargaining power of the group which wants the change. She says that legal change can be understood as the outcome of contestation or bargaining between different interest groups enjoying different degrees of bargaining power vis-à-vis State. Among the factors that affect people’s bargaining power with the State are the size and cohesion of the group seeking change; support from elements within the State, as well as from civil society actors; entrenched property and political structure; social perceptions; and social norms.<sup>28</sup> Prisoners don’t have any bargaining power and probably that is the reason we don’t hear much about any changes in the laws relating to prisoners. The advantage of this theory is that it does not see State as a monolithic structure which is inherently, uniformly or trans-historically “patriarchal”. Rather it is seen as a differentiated structure within which and through which gender relations are constituted, via a process of contestation and bargaining. This conceptualisation also underlines the possibility of the State being subject to challenge and change. Now, there are various factors which affect a person’s bargaining power with the State in seeking legal change. Some of them are:

- I. Whether he or she acts as an individual or through a group and the size and cohesiveness of the group;
- II. Support from the State;
- III. Support from civil society groups, social reformers etc;
- IV. Entrenched property and political structures;
- V. Social perceptions;
- VI. Social norms.<sup>28</sup>

<sup>25</sup>Supra 27, p.125

<sup>26</sup>Peter, Fabienne; “Gender and the Foundations of Social Choice: The Role of Situated Agency”; Feminist Economics; 9(2-3);2003;13-32

<sup>27</sup>Agarwal, Bina; “ Bargaining and Legal Change: toward gender equality in India’s Inheritance Laws”; IDS Working Paper; October 2002; Institute of Development Studies; Brighton, Sussex

<sup>28</sup>Ibid; p.4

If we examine these factors in terms of women prisoners then we will find that they don't have any of these factors working in their favour. They don't have any group or union to voice their grievances. Social perceptions and norms work against them. As prisoners they don't have any access to any property and political structures don't affect them. State legislates for them and civil society sometimes works for them. However, this is not enough because State keeps on reinforcing the patriarchal set up of the prison.

### Male centric bias

#### “Females are secondary”<sup>29</sup>

Theoretical foundations are about drawing links with earlier analysis of similar problems. Suvarna Cherukari points out theories in these areas are beset by the twin difficulties posed by the male centric bias of mainstream criminology and the limitations of its Eurocentric origins.<sup>30</sup> Rani Dhavan Shankar dass points out that the women experiences in the area of criminality and ‘penalty’ have been systematically excluded as priorities for analysis in some contexts.<sup>31</sup> In the following I shall try to deal with existing theoretical considerations on women prisoners. Moreover, I would also try to expose the inadequacies of western theoretical frameworks in understanding female criminality. The feminist analysis of penalty has begun only a decade ago and they have also primarily focused on women imprisonment. There has been extensive work on the analysis of penalty from various perspectives like Marxist, Libertan or Positivist. But all the perspectives suffer from being male centric. Adrian Howe says that “The problem is not simply that the new theorisations of punishment ignore women or threat them as footnotes to the main event- the punishment of men; they also overlook the question of gender, or better still, the deeply sexed nature of punishment regimes and, by extension, their own analytical frameworks.”<sup>32</sup> Mary Bosworth<sup>13</sup> says that, “Not only is there little acknowledgement of the effect of masculinity on penal policy but the notion of ‘femininity’ is rarely theorised.”<sup>33</sup> She quotes Elaine Player: “If the problem is conceived not in terms of how women can be fitted in to a system for men, but in terms of how women prisoners can be afforded an equal opportunity to minimise the unintended pains of imprisonment and to maximise their capacity for self support outside, then the potential for different strategies and methods of organisation presents itself.”<sup>34</sup> Mary Bosworth also deals with the issue of “Identity” and how it is central to understanding women’s experiences of imprisonment, revealing that imprisonment is legitimised by, and therefore reliant on a particular construction of (docile, feminine) subjectivity. She says that, “women in prison are caught between competing expectations of values and behaviour that centred upon an implicit valorisation of a passive feminine subjectivity. However, the boundaries of possible behaviour and self expression are continually disputed as the women strive to assert themselves as agents.”<sup>35</sup> Rani D Shankardass<sup>14</sup> in an article titled “Women, Crime and Jail justice: Theoretical Formulations and Indian Realities” talks about the problem of treating prisoners as homogeneous group. It leads to the neglect of women prisoners as a

separate group with special needs and demands. She says that, “The promise of a theoretically neutral and uniform criminology that seeks to provide universal answers, or at least ‘categories’ of answers, to criminological inquiries inevitably runs into trouble when it is brought face to face with:

- I. the ideologically formed views of women, and their deviancy and criminality accumulated down the ages;
- II. The many realities against and within which the subject of women offenders would need to look at.

The two encounters could pull in different directions, each making out a different case for more firmness as well as one for more leniency in dealing with offending women can be made out of this mix of the two encounters; either way, women offenders emerge in almost every society as the great freaks in need of ‘special handling’; in some societies they are considered greater freaks than others. Eamonn Carrabine writes, “If gender is ever considered in male prison it tends to be only discussed in relation to prisoners.<sup>15</sup> This analytical focus on prisoners misses the important point that gender relations are embedded in institutional settings and are enacted through the translation of discursive definitions of conduct.”<sup>36</sup> He further says, “My claim is not only are there competing definitions of hegemonic masculinity but also that gender is constructed in and performed through discourse.” Mary Bosworth in her book “Engendering Resistance and Power in Women Prisons” cites the Statement of Purpose of HM Prison Service 1996 in Britain as “Her Majesty Prison Service serves the public by keeping in custody those committed by the Courts. Our duty is to look after them with humanity and help them lead law abiding and useful lives in custody and after release.”<sup>37</sup> Thus, the objects of the Prison in West are rehabilitative and reformative and the prison got placed awkwardly as a beneficial institution. Deterrence and reform were joint aims which were advocated simultaneously and as early as Bentham and the 1779 Prison Act. This development of placing prisons as the beneficial institutions can be credited to the social analysis of penalty rather than focusing on penology. In “The Power to Punish”, David Garland & Peter<sup>16</sup> Young argue that the “transformation in the study of punishment can be summarized as a development from penology to the social analysis of penalty..... The move to the social analysis of the penal realm may be described as an explanation of the social foundation of penalty and contending that an alternative range of practices is possible.”<sup>38</sup> It becomes important to discuss a bit about the theories of punishment here since the social analysis of the penalty has resulted into the deliberations over the reform practices for criminal justice system. Punishment is no new concept. Adam and Eve were sent to the earth as a punishment. Parents punish their kids, teachers punish their students and lovers punish each other. Punishing is inherent in the human nature. The State takes the threads from the society only. “To punish” literally means “to make someone experience something unpleasant for doing something criminal or wrong” or “to treat harshly or unfairly”.<sup>39</sup> Punishment thus presupposes the existence of some wrong or crime. Good and right cannot be a subject to punishment. However, the reality is not always this.

<sup>29</sup>This statement made in 1998 by Andrew Winston, the chairman of the Virginia Board of Corrections, essentially sums up the position of women in Prisons.

<sup>30</sup>Supra 16; p.1

<sup>31</sup>Supra 32; p. 385

<sup>32</sup>Supra 27; p.2

<sup>33</sup>Bosworth, Mary (1999); “Engendering Resistance: Agency and Power in Women Prisons”; Ashgate Pub. Ltd. p.39

<sup>34</sup>Ibid; p.60

<sup>35</sup>Supra 32; p.120

<sup>36</sup>Carrabine, Eamonn; “Discourse, Governmentality and Translation: Towards a social theory of imprisonment”; *Theoretical Criminology*; Vol.4(3): 309-331; p.324

<sup>37</sup>Supra 41; p.37

<sup>38</sup>Garland, David & Peter Young (1983); “The Power To Punish- Contemporary Penalty and Social Analysis”; Humanities Press; New Jersey; pp.2-5

<sup>39</sup> Oxford English Dictionary; p.730

The theories of punishment do not deal with the issue that what is punishment. Rather they deal with the justification for punishment. Throughout the history of philosophy, there has always been many debates over the justification of legal punishment. From these debates, there have been several theories which have been created. The two main theories which play major roles in these debates are the utilitarian and retributive theories.

Utilitarian theory: "All punishment is mischief. . . . If it ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil."

### Bentham<sup>40</sup>

The basic principal of utilitarianism<sup>18</sup> is "greatest good for greatest number of people." Punishment can thus be justified as a necessary evil which tries to do maximum good by removing the wrongdoer from the society. Though punishment means that wrongdoer shall be unhappy but it is in pursuance to ensure happiness of the maximum number of people. Crime is an evil which will lead to more grave evil if left unpunished and thus punishment is inevitable. The proponents of utilitarianism say that it serves following functions:

1. Deterrence: 'Deterrence' refers to the reduction in crime as a result of making crime too costly to the would-be criminal. "pricing" crime too high. The individual deterred may still desire to commit the crime in question but will not do so given the likelihood and severity of punishment.
  - I. Special: The tendency of the punishment to deter the person punished from future criminal acts.
  - II. General: The tendency of the punishment of one person to deter others from committing criminal acts.
2. Incapacitation: 'Incapacitation' refers to removal of the opportunity or ability of the potential criminal to commit criminal acts (sometimes only of a certain sort).
3. Rehabilitation (Reform): Rehabilitation takes place when the character of the person punished is altered so that he or she no longer desires to commit the sort of act for which he or she was punished. The amount of punishment is also crucial to a utilitarian. It must be just harsh enough that it brings about the above stated three effects. The punishment should fit the crime done and not the wrongdoer.

### Retribution theory

Another major theory in the subject of the justification of legal punishment is retributive. This theory argues that only the guilty should be punished and that the punishment is used as revenge against the guilty. What is interesting is that, compared to the utilitarian view, retributivism is not as concerned about the final goal, but is more concerned with the reason for punishment. They do not focus on the social benefit, as they do not agree with punishing the innocent. The retributists disagree heavily with the utilitarians. The major goal of this theory is to make the wrongdoer take responsibility for the suffering, pain or loss inflicted on victims by repairing the injustice to society. They argue, that a wrong must be made right, and that the wrongdoer must repay his debt to society. A common retributive approach is to punish the wrongdoer only, as he deserves the pain and suffering for his crime. This can be compared to the common

"eye for an eye" practice. There are three main views that deny this view. Firstly, moral guilt is a necessary condition for justified when punishing a wrongdoer. Also, moral guilt is a sufficient condition for justifying punishment, and the amount of punishment that should be given to the wrongdoer is dependent on how morally unjust the crime was. However, in reality we find that it is the mixture of both the theories which finds expression in the criminal justice system.

### Women prisoners - an unaddressed entity in Indian penal history

For a substantial period of Indian Penal history, women prisoners remained an unaddressed entity. Even presently they are not adequately addressed. Gerda Lerner (1986) an American Women's Historian wrote words that literally became a manifesto, "Women have a history and women are a history."<sup>41</sup> Women don't find any mention in the history of Indian penology. There may be various reasons for such glaring absence, for example, the ignorance of the women criminality in the society because it never grew as threat to the public imagination or the women criminals constitute a negligible portion of overall criminals. It's only now after sixty four years of independence we are witnessing the flush of 'pro-women' laws. If we try to trace the history of law making in India or anywhere else in the world, we find that women remained an "unaddressed entity" in the penal history.

Prison as it exists today was introduced in India by the British along-with the colonial legal package. The modern prison in India originated with the Minute by TB Macaulay in 1835. Western jurisprudence accorded historical and conceptual sanctity to the institution of prison. Rani D. Shankardass in her book "Punishment and the Prison: Indian and International Perspectives" argues that the rise in modern system of imprisonment is rife with contradictions and paradoxes. Intellectual speculations locate the rise of the modern prison at the beginning of the Industrial society. Shankardass shows the contradiction in Bentham's logic of 'legal individual' in a penal code vis-a-vis a collective individual and Kant's distinction between ideal rational and actual individual. Kantian retributivism is of the view that it is the proportion that makes punishment morally justifiable. Prison as an institution became the ground on which such 'morally legitimate punishments' could be administered. Mary Bosworth in her book "Engendering Resistance and Power in Women Prisons" cites the Statement of Purpose of HM Prison Service 1996 in Britain as "Her Majesty Prison Service serves the public by keeping in custody those committed by the Courts. Our duty is to look after them with humanity and help them lead law abiding and useful lives in custody and after release."<sup>42</sup> Thus, the objects of the Prison in West are rehabilitative and reformatory and the prison got placed awkwardly as a beneficial institution. Deterrence and reform were joint aims which were advocated simultaneously and as early as Bentham and the 1779 Prison Act. This development of placing prisons as the beneficial institutions can be credited to the social analysis of penalty rather than focusing on penology. In "The Power to Punish", David Garland<sup>17</sup> & Peter Young argue that the "transformation in the study of punishment can be summarized as a development from penology to the social analysis of penalty. . . . . The move to the social analysis of the penal realm may be described as an explanation of the social foundation of penalty and contending that an alternative range of practices is possible."<sup>43</sup>

<sup>41</sup>Supra 16;p.53

<sup>42</sup>Supra 41; p.37

<sup>43</sup>Supra 46; pp.2-5

<sup>40</sup>Burke, Roger Hopkins (2012); "Criminal Justice Theory- an Introduction"; Routledge Taylor & Francis; London & New York; p.148

### Lord macaulay commission report, 1835

The history of prison reform can be traced back to the appointment of the Committee on 2 January 1836 of which Lord Macaulay was a member. Surprisingly, despite of criticizing the Islamic modes of punishments, Lord Macaulay rejected all notions of rehabilitative and reformatory ideas of punishment as were prevalent in the West and proposed to develop the prisons as the sites of oppression and exploitation. Even as the caste sensibilities of the Indian population was regarded as an impediment for applying Western model of prison in India. Lord Macaulay believed that a criminal justice system is a failure without a proper punishment system. Thus, he laid all the emphasis on the modes of punishment, classification of prisoners, separation of different classes of prisoners and the strict surveillance of prisoners by employing inspectors. The present Prison Act was passed in 1894; it between the Macaulay Commission and the Prison Act, four major developments took place. In 1836, came the Prison Discipline Committee Report, it per se rejected all the notions of reform and rehabilitation and recommended to establish the office of Inspector General of Prisons and to separate different classes of prisoners. As a result of these recommendations the first Inspector General of Prisons was appointed in 1844 and the post was made permanent in 1850. Finally, with the enactment of I.P.C. in 1860(Chapters II & III), the prisons became the most important instrument of the penal administration in India. Later, the Commission of Jail and Management and Discipline' 1864, the Calcutta Conference' 1877 and the Fourth Jail Commission in 1888, repeated the recommendations and observations of the earlier two Committees and focused only on the adherence to strict surveillance, administration and discipline. Finally, the Central Prison Act was passed in 1864 which was the enshrinement of the exploitative policies of the British regime which was indispensable so as to curb the Indian National Movement. The British maintained the prisons as the sites of oppression and resistance against the Indian struggle for freedom and so Lord Macaulay framed the Prison Act of 1894 sans the Statement of Purpose! As Datir is quoted, "the jail officials were to follow the Prison Act of 1894..... almost every prisoner will be required to be punished daily".<sup>44</sup> Shockingly enough the Prison Act of 1894 still remains in force with very nominal amendments and that too in 1957.<sup>19</sup>

### The Indian jails committee (1919-20)<sup>20</sup>

For the first time in the history of Prisons "Reformation and Rehabilitation of offenders" were identified as the main objectives of the prison administration. Even this Committee recommended the separation of female prisoners. Even today the reality remains in stark contrast to the law.

### Post-independence scenario

After independence, separate Jail Reform Committees were framed for different States. However, the Government of India invited Dr.WC.Reckless, a United Nation's expert on correctional work during 1951-52 to study prison administration in the country and suggest ways and means of improving it. Shockingly enough even he missed out on women prisoners. Till now, barely lip service has been paid to women prisoners.

<sup>44</sup>Bandyopadhyay, Mahuya. "Reform and everyday practice: Some issues of prison governance; Contributions to Indian Sociology; December 2007;41(3):391.

### All India committee on jail reforms (1980-83) - mulla committee<sup>21</sup>

The Mulla Committee was appointed to make a comprehensive review of the prison administration in the country. This Committee had submitted its report on jail reforms to the Home Ministry on 31<sup>st</sup> March'1983. The Mulla Committee felt that the problems of women prisoners are different and the Jail Superintendents must deal with them differently. The needs of women are different and their sociological backgrounds also differ. In the absence of proper orientation for the jail staff, the Committee commented, the custodial justice to women prisoners have become a problem. The Committee observed:

"Women offenders in India face peculiar problems of rehabilitation during their post-release period. Indian social customs make women ex-offenders more vulnerable to suspicion and rejection. The stigma of having been in a prison has been much more adverse consequences for women than for men. The social system imposes many limitations on them and considers them as outcasts. The Committee was informed that in some parts of the country, women ex-prisoners have to undertake expensive pilgrimage, followed by the holy bath and a community feast before they are permitted to come back to their village to lead a normal life. Much thought, therefore be given to the problem of rehabilitation of women offenders both economically and socially....The special status of women in Indian society also justifies provisions of special work programmes during their incarceration suiting their needs and more lenient conditions of review of their cases for premature release, so as to enable them to unite with their families as early as possible."<sup>45</sup> Finally in 1986 first ever Committee on women prisoners was established under the Chairmanship of Neeraja K. Sohoni. The contributions of this Committee were significant and it relied heavily upon the Western ideas of reforming the prisons. It proposed fair and equal wages of habilitative value to both male and female prisoners since Article 23 of the Indian Constitution guarantees protection against exploitation and prohibits 'beggar' or 'forced and unpaid labour'.<sup>46</sup> Internationally, The International Covenant on Civil and Political Rights (ICCPR) is the core international treaty on the protection of the rights of prisoners. India ratified the Covenant in 1979 and is bound to incorporate its provisions into domestic law and state practice. The International Covenant on Economic, Social and Cultural Rights (ICESR) states that prisoners have a right to the highest attainable standard of physical and mental health. Apart from civil and political rights, the so called second generation economic and social human rights as set down in the ICESR also apply to the prisoners. The earlier United Nations Standard Minimum Rules for the Treatment of Prisoners, 1955 consists of five parts and ninety-five rules. Following are the rules pertaining to women prisoners:

Rule 6(1): The following rules shall be applied impartially. There shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Rule 8: The different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment. Thus,

<sup>45</sup>Report of the All India Committee on Jail Reforms (1980-83); p.186

<sup>46</sup>Report of the National Expert Committee on Women Prisoners (1986-87); p.127

(a) Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate; 23.

- I. In women's institutions there shall be special accommodation for all necessary pre-natal and post-natal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the institution. If a child is born in prison, this fact shall not be mentioned in the birth certificate.
- II. Where nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a nursery staffed by qualified persons,

Where the infants shall be placed when they are not in the care of their mothers 53

- I. In an institution for both men and women, the part of the institution set aside for women shall be under the authority of a responsible woman officer who shall have the custody of the keys of all that part of the institution.
- II. No male member of the staff shall enter the part of the institution set aside for women unless accompanied by a woman officer.
- III. Women prisoners shall be attended and supervised only by women officers. This does not, however, preclude male members of the staff, particularly doctors and teachers, from carrying out their professional duties in institutions or parts of institutions set aside for women. The enshrinement of these principles is found in our local and national law.

## Conclusion

In case of women prisoners, the theory in India got struck with the women criminality rather than their status as prisoners. The theory focussed on "causative explanations" rather than the "contextual explanations". Even in the theory, women prisoners were tackled as deviant women and the studies on women prisoners became studies on women and crime. The focus shifted from 'prisoners who are women' to 'women who are criminals.' It acts as a great hindrance for the reform movements for women because it was perceived that normal women never take recourse to crime. The women criminals are biologically and psychologically abnormal and no amount of good practices can reform them. The women prisoners were researched totally out of context of their social milieu. Their economic background, educational qualification, sexual history etc. were squarely ignored while dealing with them. They were merely classified on the basis of the crime committed by them and with span of time in the prison, even this classification withers away. The women prisoners need to be studied in context of their backgrounds and social positions. It needs to be examined that what makes them criminals. For example in Gorakhpur jail it was told that most common crime for which women are convicted is of dowry death. What provokes the regular housewives who adhere to social norms to suddenly burn their daughter-in-laws like cold blooded murderers. The causative explanations need to be looked into. Whether they become part of the crime willingly or are forced into it is never pondered over. We suddenly start looking upon them as the cruellest creatures who are not supposed to be so because they are women. The criminality and women is one of the most uncomfortable paradoxes faced by the Indian society. Thus, it can be concluded that often the modern liberal

state with its unified legal machinery looks for uniform categories. The discussion on punishment shows that for a comprehensive theory we need to move beyond these uniform categories. The need for one specific perspective is not so much to completely exhaust or round off a phenomenon in terms of categories but to open the multiple possibilities of thoughts. Amendments in the legal system are required to give exclusive status to women prisoners. This is only possible if male centric bias is overlooked and honest efforts are made to theorise imprisonment so as to address special requirements of women prisoners.

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## Conflicts of interest

The author declares that there is no conflicts of interest.

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