



“Privatisation Of Prisons: A Distorted Probability In India?”

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Abstract

In this paper, I have presented views in contrary to the concept of privatisation of prisons, with respect to India and why it would not be enforceable and effective in India. Privatisation essentially means delegating or transferring operation and management of a facility or system to a private company that provides services like medical facilities, goods and services, shelter and housing, vocational training and so on, in exchange for a fee from the State. Evidently, the purpose or objective, with which the prison was established, is to deter crimes by punishing the offender or to rehabilitate and reform the offender in order to ensure their eligibility to maintain their livelihood outside the prison.

This paper further brings into focus the theories presented by Marx with reference to Foucault’s theory of Discipline and Punishment, shedding light on how the prison system works and how the privatisation of prisons is a political agenda perpetuated in order to economically benefit a country rather than reforming the prisoners. This paper also analyses this concept in respect of relevant case studies such as the Stanford Prison Experiment, the PPP agreement of Tihar Jail and privatisation of prisons in the United States of America and how it affected the rights of the prisoners.

Keywords- Prison System, Privatization of Prisons, PPP Agreement, Indian Constitution, Marxist Theory.

Introduction

Michel Foucault in his book “Discipline and Punish” has critically analysed both the concepts as against the primary question of what is the actual purpose of establishing a prison system¹. As opposed to the popular beliefs, according to Foucault, the purpose of establishing a prison system has evolved from a period of time. In the early ages, there was no concept of prisons as such because under the monarch, torture and public displays of torture were given more importance. However, in the second half of the 18th century,

¹ Jouet, M, “Foucault, prison, and human rights: A dialectic of theory and criminal justice reform”, ‘Theoretical Criminology’, Volume 26 Issue (2), (available at www.journals.sagepub.com).

protests were prevalent against public executions and the objective of crime shifted from violent crimes to that related to properties and thus, the form of punishment or penalty changed from torture to discipline.

Thus, the idea of establishing a prison system originated in order to enforce discipline into the prisoners. Foucault has enunciated this, by stating that the focus has now shifted from displays of public torture, i.e., “torture of the body” to mental pain, i.e., “torture of the soul”. The 19th century regime, focused more on making the body, “docile” by applying the tools of discipline. Thus, the object of prisons was more to create docile bodies and discipline the incorrect deviancy amongst the offenders.

Now as stated, privatization is delegation or transfer of operation and management of a facility or system to a private company that provides multiple services including healthcare and medical facilities, shelter and housing, vocational training, food and grocery, call privileges and so on, in exchange for a fee from the State. Now, in the Indian context, it is essential to note that maintenance of a prison system is a specified State function, embedded in the Constitution, under Schedule 7 List II (Item No. 4). The Supreme Court has also stated, in a number of cases, that “a delegation of an essential State function would be an express violation of the provisions of the Constitution”. Additionally, the function associated with prisons are related to depriving a person of their physical liberty by putting them behind bars and limiting their interactions. Taking into account how grave and how serious this task is, the Supreme Court has emphasised that this task is not a child’s play and requires a sound logic, reasoning and a procedure established by law.

Arguments Against

Let us assume, the privatisation of prisons is allowed, it would certainly affect the State machinery. Firstly, since the method of effectively put into effect the privatisation at such a level in India, is through a PPP agreement, that translates to Public-Private Partnerships, which can be defined as a collaboration between a governmental agency or the government and a private sector company. Furthermore, the terms and conditions of such agreement will have to be carefully drafted and should be devoid of any vagueness or loopholes that can be taken advantage of. Secondly, with drafting a contract, there comes the possibility of utilizing the confidentiality clause on part of the private company. Thirdly, a question can be posed in regards to the criteria or standard used by the State in order to choose a specific private company to enter into contract with. The State may be asked to provide the selective procedure to choose the specific private company and it will make sense that in either case, questions can be raised on the selection.

Thus, not only will it be a burdening task and an elaborate one but also it can result in a blanket from the public scrutiny through lack of accountability and transparency, along with increased rates of corruption in India.

We are well aware that the Constitution of India is the supreme law of the land and it not only provides but also protects the basic fundamental rights of the citizens and it is the basic fundamental right of a person to file a writ petition under Article 226 of the Indian Constitution. However, as per Article 226, a writ cannot be issued against a private entity or a private company because the writs are prerogative in nature and any law that violates the fundamental rights of the citizens is void under Article 13 of the Indian Constitution.

Thus, in case of any breach of any fundamental rights of the prisoners, he is deprived of the very first and very important remedy. The argument that the prisoner has the option to file a civil or a criminal petition but it runs the risk of delay and an unnecessary hindrance to the implementation of the prisoner's right.

Since, the primary aim of the private sector is to gain profits, it is a fact that it will focus more on the economic exploitation of the prison labour and the prison resources, thus, privatisation of prisons will result in monopolisation of prisons and increased competition for maintaining efficiency. It would further result in a laid-back approach towards adhering to the necessary legally sound principles on which the prison system is established and a more profit driven mentality. In addition to this, there is a probability that in order to increase efficiency, the companies will not think twice before cutting the corners or impose overtime and thereby, increasing the risks of labour riots, higher staff overturn, indirect exploitation and higher incarceration rates as well.

In the year 2014, Tihar Jail entered into a PPP Agreement with DEIEM India and MFE Pvt. Ltd.² with the aim to produce a sustainable collaborative social business model and to have dual benefits for the convicts incarcerated in Tihar Jail and their families. According to the reports, it was stated that the labour relations of MFE Pvt. Ltd. within the company itself were rocky and there have been several cases of labour strikes, non-payment of overtime wages and sexual harassment cases were reported. However, their outcome has not been made public or discovered in full capacity.

Similarly, in the United States of America³, after the implementation of the 13th Amendment Act when it had put into effect the privatisation of prisons, it was revealed that the major benefactors of the ALEC, i.e., the organisation dealing with the facilities inside the privatised prisons, were responsible for making major decisions on the policies of the prison and it was a major concern since, the benefactors were mainly politically associated or were bureaucratic. There were very few numbers of law makers or legal policy advisors.

Furthermore, it was also revealed that the conditions of prisons deteriorated as the services provided were not up to the mark of quality and quantity. This revelation brought into light another major concern that due to the contractual obligation, it is a legal obligation for the State to pay the company irrespective of whether their services are qualitative.

Thus, this argument runs parallel to the Marxist perspective on political economy of punishment that emphasises on interconnections between penal institutions and the economy of the State. He stresses on the role of punishment in political class struggles and in maintenance of the state-power dynamic or stabilizing the ruling class hegemony.

Thus, if looked from this perspective, it can be seen that the particular penal policies such as the 13th Amendment in the United States of America and the PPP Agreement with Tihar Jail, were introduced not

² Ullah Faiz, "Tihar Jail's increased use of prison-private partnerships is a cause for worry", (September 18, 2014), (available at www.scroll.in).

³ Banamali Barik, "The Prison System and Human Rights in an era of Liberalisation and Privatization", (available at www.thelawbrigade.com).

with the object of “crime control” or to be “sociologically effective” but as a means to control and exploit the poor class, i.e., the prisoners, inclusive of the convicts and under-trial prisoners.

Conclusion

Another concern that arises out of this association is that there would be an increased pressure not only on the prison authorities but also on the prisoners. The Stanford Prison Experiment⁴ is an important case study to mention. A research study done on ‘impact of privatisation of prisons on prison conditions’ observed that there were higher rates of inmate-on-inmate assaults among private prisons as compared to public prisons. Besides, a lack of accountability and proper checks and balances and sanctions can result in higher discriminatory environment inside the prisons. The Stanford Prison Experiment expressly laid out how a prison system can affect the psychology of a non-associated person and give them the tyrant complex, so it is not a viable concern that officials having no prior experience of the prison atmosphere or about the serious pressure of maintaining one, can break without proper training and since, the primary objective to not be a correctional facility, hence, the lack of transparency can definitely lead to the assorted “tyrant” behaviour and reaping worse results than the Stanford Experiment.

Lastly, majority of inmates employed, if the possibility of a privatisation of prison in India becomes enforceable, would comprise of a majority of under-trial prisoners since the current statistics on prison population in India reveals the same. Thus, employing them under this facility will leave no option for them to back out on their own volition.

Therefore, privatisation of prisons may reap economic benefits to the State but it would prove detrimental to the State machinery itself and the democratic set up of India would not make it easier for the privatisation to be enforced efficiently.

⁴ “Standford Prison Experiment: A simulation Study on the Psychology of Imprisonment”, (available at www.prisonexp.org).