

Binayak Sen in solitary confinement

By Murali Karnam, Consultant, Prison Reforms Programme, Commonwealth Human Rights Initiative

“A threat of injustice anywhere is a threat to justice everywhere!”

When society's response to injustice can be selective, a pervasive injustice made normal by state is hardly surprising. The debate on the archaic nature of prisons and their practices seems never ending. The solitary confinement (a practice said to have been institutionally rejected) of Dr. Binayak Sen, a civil rights activist in Raipur central prison even before his trial has once again invoked the image of wide spread but low laying terror houses stamping the rights of the hapless masses. The nation is moving very fast in many fields of innovation but quietly carrying with it eighteenth century penal institutions.

Much was said about the dreaded practice of solitary confinement by the Supreme Court during the heydays of judicial activism in the last century. With his appeal against the death sentence pending, Sunil Batra was caged in solitary confinement in Tihar prison. The audacity and slightness with which prison officials justified the practice shocked the nation and actually opened the eyes of judiciary to the penal institution and its practices in India. But has anything changed since then?

A prison practice that denies detainees all human communication and interaction is continued with ingenuity in different forms by the state. Other variants of solitary confinement - separate, silent and cellular punishments - are very much legally alive and kicking in practice. These forms, though legally different, are not so different in practice; all originated together, from the same experiments and theories of punishment and reformation.

The ease with which the principles and practices underlying a rejected form of punishment can be imposed under a different name can best be understood by an appreciation of their simultaneous origin and parallel development. All were invented in Europe when it was in search of secondary forms of punishments as the primary punishments of death and transportation eliminated offenders altogether from society. Such a system should “at once punish to deter and amend to restore”. Separate confinement was considered sufficient for the ‘less heinous class of criminals’.

The birth of solitary confinement was a product of a theory of separation of offenders. ‘Moral Philosophy’ (1775) of Paley lays down that “half the vices of low life arise from aversion to labour and therefore there might be two means of eradicating this—one by solitary confinement with hard labour, which make industry a new habit—the other by solitary confinement with nothing to do, which shall render idleness intolerable”.

The potential for these isolation type regimes to have very harmful consequences for the person concerned was recognised early. In 1821 the solitary system without work was introduced in New York on an experimental basis as a regular method of control. Under the system, 80 prisoners were confined in separate cells, in absolute solitude, permitting no exercise and providing an insufficient supply of air, light and food. Mind and body were crushed under this clumsy and barbarous experiment; some died, many were driven mad, twenty-six were pardoned, and the rest were removed at the end of one year.

The disastrous American experiment had lasting influence, both on the acceptability of solitary confinement as punishment and in framing alternative theories of prison discipline, informing a move to experiment with moderate ‘silent’ systems (association without communication) and to modern reformatory theories that began with religious and public instruction.

The Bengal regulations act introduced solitary confinement for breach of prison discipline during 1830s. The Bombay and Madras regulations provided for it as judicial punishment in 1832. Though the Macaulay Committee of 1838 recommended changes to the Bengal regulations to make it only a judicial punishment, it eventually agreed to its imposition for breach of prison-discipline, "under such restrictions as to the term, such rules of formality, and such control, as will be a security from every misuse of the power with which officers in charge of gaols must necessarily be entrusted" ii.

Gradually solitary confinement was replaced, its purpose served sufficiently by 'separate' and 'cellular' confinements, introduced as completely new forms of confinement in 1920. Solitary confinement legally disappeared as a punishment for breach of prison discipline but continues in practice with different names in different states (known as 'single cell' in Andhra Pradesh). At present prison manuals provide only for 'cellular' and 'separate' confinements, though in practice these are hard to distinguish from the original practice and the same underlying principles and philosophy inform the current practices, having become de facto solitary confinement in all but name in the hand of dictatorial prison authorities.

The fact is that, like solitary confinement, there have been several forms of punishments that were experimented with, proved disastrous and having been modified and refined their variations created and continued. They are readily available for the state in practice and keep alive the possibility of making life harder for potential offenders including political dissenters. Why is it so surprising when it is used against Binayak Sen? Can civil society afford such a selective response?

ⁱ *Report of the Commissioners for Pontenville Prison 1843-47*. The London Quarterly Review, volume 28-29, January 1848. p. 97.

ⁱⁱ Committee on Prison Discipline, page.29