

CORRECTIONAL & REHABILITATIVE TECHNIQUES OF PUNISHMENT: A NEED FOR LEGISLATIVE REFORM IN INDIA

*And as diseases vary, aids must vary;
A thousand kinds of ill, a thousand cures.*
- Jeremy Bentham

Vidit¹

I. INTRODUCTION

Penal Law is an instrument of social change.² A healthy administration of criminal law is essential for a proper functioning of the constitutional democracy.³ The successful rehabilitation of the offender is the responsibility of the criminal justice system. The object of punishment in the scheme of the modern social defence is correction of the wrong doer who in many cases may be a mere manifestation of a deep rooted psychosocial maladjustment for which the society itself may be responsible in a number of ways. The present research study endeavours to evolve modern correctional techniques keeping in mind the best practices around the globe. In Indian milieu, what role correctional and rehabilitative measures will play in reestablishing the criminal justice system and also in reintegrating the offender in India?

II. PUNISHMENT: A PARADIGM SHIFT FROM CRIME TO A CRIMINAL

The term punishment has not been defined in Indian Penal Code, 1860. However, Oxford Dictionary defines punishment means to make an offender suffer an offence. Punishment is the conscious infliction upon a disturbing individual of undesired experience solely in the interest of his welfare.⁴ At another place, punishment has been considered as a means of social control.⁵ Ihering said that punishment is a means to a social end.⁶ In Moral Education, Durkheim boldly stated that “punishment is nothing but meaningful demonstration i.e. punishment has no

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² Dr. KI Vibhute, *PSA Pillai's Criminal Law* (Lexis Nexis Butterworths, India, 10th edn.).

³ Law Commission of India, *156th Report on The Indian Penal Code* Vol-I, 15 (April, 1992).

⁴ D.R. Taft, *Criminology* 3rd Edition p-353.

⁵ W.C. Reckless, *The Crime Problem* p-487.

⁶ B.N. Mani Tripathi, *Jurisprudence: Legal Theory* (Allahabad Law Agency, Allahabad, 17th edn. 2006).

conscious intention at its core, but is born out of an emotional and psychological reaction to an offence caused.⁷

The Code of Hammurabi in the year of 1780 BC is said to express the concept of punishment in the form of *lex talionis* (the law of equal retaliation). The same is clarified in Mosaic Code as “an eye for an eye, a tooth for a tooth...a life for a life”. Kant was also of the view that human beings are free and while doing any act they must recognize their deeds and accept their *deserts*.⁸ In 18th Century period of enlightenment, the Italian Professor, *Cesare Bonesana Marchese di Beccaria* (1738-1794) in his book *Dei Delitti e della Pene* (On Crime and Punishment) opined that the punishment should be *proportionate* to the harm done to society, should be identical for identical crimes, and should be applied without any reference to social status of the either the offender or the victim.

Jeremy Bentham of Neo-Classical School said that punishment should be primarily justified because of its deterrent effects. The 19th century heralded the era of positivism which was influenced by the science. It discarded both the ideas of classical and neo classical school. It negated the proportionality principle for awarding the punishment and the deterrence effect of punishment. It shifted the focus of punishment from crime to criminal. The offender doesn't require the blame rather the treatment.

The reform in correctional services is closely linked to what is now a widely known article *What Works?* by Robert Martinson (1974) published in *The Public Interest*.⁹ After reviewing existing prison reforms initiatives, he reported that “with few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism”

This led to the movement of “*Nothing Works*”. And now the question before the scholars is what should be done? It further, led to the movement of “*get tough*” with the deterrent approach in their mind which resulted into the worldwide increase in prison population. It changed the whole philosophy of correction. Now the researchers, law and policy makers delved the issue with a

⁷Available at: <http://www.spr.tcdlife.ie/seperatearticles/xixarticles/theorypunishment.pdf> (Visited on June 15, 2014).

⁸Immanuel Kant, *Groundwork of the Metaphysics of Morals* (1785), available at: <http://www.kton.demon.co.uk/punishment.htm#back18> (Visited on June 15, 2014).

⁹Francis T. Cullen and Paul Gendreau, “Assessing Correctional Rehabilitation: Policy, Practice, and Prospects”3 *Criminal Justice*110 (2000).

new approach to develop those rehabilitation techniques which would really help the offender in his rehabilitation and reintegration in the society.¹⁰

III. CORRECTIONAL AND REHABILITATIVE TECHNIQUES: CONCEPTUAL FRAMEWORK

The term 'Correction' is more aptly applied to refer the rehabilitation of the offender. It is a generic term which implies 'to correct', 'amend' or 'put right' the criminal behavior. It is concept of "*self engineering chain*" where the person is actor as well as reactor, an active participant in the development of self.¹¹ Some believes that it is a revolving door¹².

Rehabilitation is said to be based on consequentialism approach of punishment. The consequentialism approach postulates consequence of sentence. Rehabilitation is the one except deterrence and incapacitation. It has also one major limitation that it can be resorted to only after going through the whole process of criminal justice system.¹³

Rehabilitation finds theoretical justification on the premise that offender commits crime because of unfavourable social circumstances. Hence it is an obligation of the society to intervene and right of the offender to take help from the society. Another justification is based on the utilitarianism of Bentham. That way should be adopted which produces greatest happiness of the greatest number of people. The rehabilitation theory also advances the concept of restorative justice. In this light research problem can be summarized.

Jeremy Bentham, in his book, *Principles of Legislation*¹⁴, said that a penal system ought not to be thought cruel because it includes a great variety of punishment. The multiplicity and the

¹⁰ Available at: <http://www.scribd.com/doc/203575637/Risk-Need-2007-06-e> (Visited on June 10, 2014).

¹¹ Donald T. Shanahan, *The Administration of Justice: An Introduction* 317-318 (Holbrook Press Inc., Boston). Cited in S.P. Singh Makkar, "Correctional Objectives of Prison: A Critique on Justice Krishna Iyer's Correctional Meditation" 39 *PULR* 143 (1992).

¹² Donald T. Shanahan, *The Administration of Justice: An Introduction*, (Holbrook Press Inc., Boston) p – 317-318, Cited in S.P. Singh Makkar, *Correctional Objectives of Prison: A Critique on Justice Krishna Iyer's Correctional Meditation*, 39 *PULR* 143 (1992).

¹³ Travis C. Pratt, Jacinta M. Gauet.al., *Key Ideas in Criminology and Criminal Justice* (Sage Publications. Inc., 2011), available at: - http://www.sagepub.com/upm-data/36811_6.pdf (Visited on June 11, 2014).

¹⁴ Jeremy Bentham, *The Theory of Legislation* (Lexis Nexis Butterworths, New Delhi, 2007).

variety of punishment prove the industry and the cares of legislature. The more we study the nature of offences and of motives, the more we examine diversity of characters and circumstances, the more we shall feel the necessity of employing different means to counteract them. Variety in punishment is one of the perfections of a penal code.

A burden shared is a burden lessened is the philosophy behind the rehabilitation of the offender in the community. *Rob White* in his writing¹⁵ discussed the conceptual foundation of rehabilitation in great detail. He also discussed various correctional and rehabilitative techniques. He was of the view that rehabilitation is based on two approaches i.e. justice approach and welfare approach. Punishment in most of the countries derives its philosophy from either of these two approaches. The third approach of rehabilitation emanates somewhere between these two and emphasizes on restorative justice.

The main philosophy of community correction includes two different orientations.¹⁶ **Community incapacitation** in which the main emphasis is on concept of community safety and offender control. This involves intensive monitoring and supervision of offenders in community settings. The aim of community corrections, from this perspective, is to keep offenders under close surveillance and to thereby deter them from re-offending. **Community rehabilitation** in which efforts are made to change offender behavior in positive ways as well as improving community relationships by use of supportive, participatory measures. The aim of community corrections, from this point of view, is to prevent recidivism through behaviour modification via some type of therapeutic or skills-based intervention. The emphasis is on personal development and enhanced capabilities.

D.A. Andrews and J. Bonta developed the Risk–Need–Responsivity (RNR) Model which first emerged out of Canada in the 1980s, during the heyday of the “nothing works” pessimism around rehabilitation.¹⁷

In the criminal justice process, *risk assessment* is the process of determining an individual’s potential for harmful behavior toward himself or herself or others. They further classified risk as

¹⁵Rob White, “Community Corrections and Restorative Justice”, 16 *Current Issues in Criminal Justice*, available at: <http://www.austlii.edu.au/au/journals/CICrimJust/2004/11.pdf> (Visited on June 7, 2014).

¹⁶ Ibid.

¹⁷ Jan Looman & Jeffrey Abracen, “The Risk Need Responsivity Model of Offender Rehabilitation: Is There Really a Need For a Paradigm Shift?” 8 *IJBCT* 34 (2013).

static and dynamic risk. The concept of “need” is related to “risk” in the sense that individuals whose needs are not met might be said to be at risk of a harm of some sort. Needs are categorized as criminogenic and non-criminogenic needs. Further, *responsivity* principle states how the offender responds to the treatment meted out to him. It also says that treatment or correctional method should be applied after assessing the risks and needs associated with the offender in question as to maximize the effect of applied correctional method. It is the basic concept in corrective and rehabilitative techniques which lays emphasis on evidence based application of correctional techniques. They also developed an assessment tool for this purpose.¹⁸

IV. CORRECTIONAL & REHABILITATIVE TECHNIQUES IN INDIA

The concept of punishment is not new to India. *Manusmriti* or Code of Manu extensively deals with the concept of punishment. With regard to Muslim Law, the *Holy Quran* is said to contain punishment for variety of offences. The punishment is quite harsh. With the advent of British rule in India, the Indian Penal Code was enacted in the year of 1860 which governs punishment till today. It is observed that in India the choice of punishment is very limited. The Indian Penal Code, 1860 in Section 53 prescribes only five kinds of punishment i.e. death, imprisonment for life, imprisonment with labour rigorous or simple, forfeiture and fine. In all these, imprisonment has been widely used punishment.¹⁹

The prisons have been considered the most potent tool to achieve the objectives of punishment. However, imprisonment does not seem to be yielding required results of fulfilling the objectives of punishment on various counts. Such objectives could be achieved only if incarceration motivates and prepares the offender for a law abiding and self-supporting life after his/her release. The key areas where prisons fail to address are education and employment.²⁰

The celebrated authors Ratan Lal and Dhiraj Lal, in their book, *The Indian Penal Code*, were of the clear opinion that punishment provisions in Indian Penal Code have become somewhat

¹⁸ Available at: <http://marisluste.files.wordpress.com/2011/07/riska-modelis-2.pdf> (Visited on June 10, 2014).

¹⁹ ‘Prisons’ is a State subject under Entry-4 (Prison Reformatories, Borstal Institutions and other institutions of like nature) in the State List (List-II) of the Seventh Schedule to the Constitution of India. Therefore, the management and administration of Prisons falls in the domain of the State Governments. The Prisons are governed by, inter alia, The Prisons Act, 1894 and the Prison Manuals/ Rules/ Regulations framed by the respective State Governments from time to time.

²⁰ Chris Hale, Keith Hayward, et.al., *Criminology 563* (Oxford University Press, 2005).

obsolete and need reconsideration. The object of any concession given to an offender should be to convince him that normal and free life is better than free jail. The rehabilitation aspect should be given proper place in the criminal justice system.²¹ The reformatory view of penologist suggests that punishment is only justifiable if it looks to the future and not to the past. They say that punishment should not be regarded as settling an old account but rather as opening a new one.²²

V. CHALLENGES BEFORE THE EXISTING SYSTEM OF REHABILITATION

The institutional mechanism of executing the punishment of imprisonment is on the verge of collapse and the challenges are self-evident i.e. lodging, boarding, food, clothing, bedding, discipline, health services, understaffing, recreation, rehabilitation and reintegration. The prisons are overcrowded due to increase in prison population. Simultaneously, the cost of maintaining the prisoners is rising and the prison administration has always been neglected in the budgetary allocation. Hence the quality of prison life is substantially compromised. In post-independence era, the Indian government took various steps to bring about substantial reforms in prison administration²³. The key areas where prisons fail to address are education and employment²⁴. The *Prison Assessment and Proposed Rehabilitation and Reintegration of Offenders Report*²⁵ in its key recommendations, has recommended the establishment of a restorative justice program to minimize offenders being incarcerated for minor offences.

Overcrowding in Prisons

According to World Prison Population List, more than 10.2 million people are held in penal institutions throughout the world, mostly as pre-trial detainees/remand prisoners or as sentenced

²¹K.D. Gaur, *Commentary on the Indian Penal Code, 1860*(Universal Law Publishers, New Delhi, 2013).

²²Dr. Krishna Pal Malik, *Penology, Victimology & Correctional Administration in India*42(Allahabad Law Agency, Allahabad).

²³Jail Administration in India, Dr. Walter C. Reckless Commission Report, 1952, The All India Jail Manual Committee 1957-59, All India Committee on Jail Reforms, 1980-83 (Mulla Committee).

²⁴Chris Hale, Keith Haywood, et.al., *Criminology*, (Oxford University Press 2005) p-563.

²⁵A joint publication of the Government of Maldives and the United Nations Development Programme. Available at: <http://www.mv.undp.org/content/dam/maldives/docs/Democratic%20Governance/prisons%20report.pdf> accessed on 06-06-2014

prisoners. Almost half of these are in the United States (2.24m), Russia (0.68m) or China (1.64m sentenced prisoners)²⁶

With regard to India, National Crime Records Bureau's *Prison Statistics, 2012* states that 3,85,135 prisoners are kept in prison as on 31-12-2013 as against the sanctioned capacity of 3,43,169 prisoners. The Occupancy rate in the year 2010 was – 115.1%, in 2011 – 112.1% and in 2012 – 112.2%.

Overcrowding undermines the ability of prison systems to meet the basic needs of prisoners, such as healthcare, food, and accommodation. This also endangers the basic rights of prisoners, including the right to have adequate standards of living and the right to the highest attainable standards of physical and mental health.

Human Rights Violations

It is the philosophy of Indian criminal justice system that convicts are not by mere reason of the conviction denuded of all the fundamental rights which they otherwise possess.²⁷ Imprisonment deprives the offender of his liberty and self-determination. Prison is a place where the human rights of the prisoners are unofficially violated and officially denied.²⁸ The analysis of Prison Visit Reports of several States by National Human Rights Commission presents a mix picture of the offender rehabilitation. Most of the prisons are overcrowded. The infrastructure is more than 100 years old of many jails in UP. There are complaints of assault on prison staff by hardcore criminals who have political protection. Medical and food facility is also not up to the mark. The most important part of rehabilitation is vocational training which is ill equipped and outdated. It

²⁶ World Prison Population List, 10th edn., Roy Walmsley, International Centre for Prison Studies, available at: <http://www.prisonstudies.org> (Visited on 12-06-2014)

²⁷ Article 5 of the Universal Declaration of Human Rights, Article 6 of the Universal Declaration of Human Rights, 1948, Article 10(1) of the International Covenant on Civil and Political Rights, 1966 etc. clearly elaborates the same.

²⁸ Country Reports (INDIA) on Human Rights Practices for 2013, US Dept. of State, available at: <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper> (Visited on 12-06-2014). Also see: Annual Report 2012-13 of Ministry of Home Affairs.

There are many instances in which the Apex Court has taken note of the issues related to prison vices i.e. *Sunil Batra v. Delhi Administration*, AIR 1980 SC 1579; *Sunil Batra v. Delhi Administration* (1978) 4 SCC 409; *Charles Sobraj v. The Suptd., Central Jail, Tihar* AIR 1978 SC 1514; *Ramesh Kaushik v. B. L. Vig, Superintendent And Another* AIR 1981 SC 1767; *Inder Singh & Another v. The State (Delhi Admn.)* AIR 1978 SC 1091; *Kishore Singh v. State of Rajasthan* AIR 1981 SC 625; *Prem Shankar Shukla v. Delhi Administration* AIR 1980 SC 1535; *Rajendra Prasad Etc. v. State Of Uttar Pradesh* AIR 1979 SC 916.

In post-independence era, the Indian government took various steps to bring about substantial reforms in prison administration. Jail Administration in India, Dr. Walter C. Reckless Commission Report, 1952, The All India Jail Manual Committee 1957-59, All India Committee on Jail Reforms, 1980-83 (Mulla Committee).

affects the offender's post release integration in the society in the absence of competition and non-modernized prison industry²⁹. On the other hand, the Delhi Women Prison gives a quite satisfactory report. The issue of prison torture has recently come up before Delhi's Additional Sessions Judge who took serious note of the incident and ordered an enquiry into the matter³⁰. In August the Ministry of Home Affairs reported to parliament that 318 cases of custodial torture were reported from various states from April 1, 2012, to February 15, 2013. The ministry also stated that for the same period the states reported 126 cases of custodial deaths³¹.

Disparity in Sentencing

There are no sentencing guidelines in India. The Indian Penal Code prescribed offences and punishments for the same. For many offences only the maximum punishment is prescribed and for some offences the minimum may be prescribed. The Judge has wide discretion in awarding the sentence within the statutory limits. There is now no guidance to the Judge in regard to selecting the most appropriate sentence given the circumstances of the case. Therefore each Judge exercises discretion accordingly to his own judgment. There is therefore no uniformity³². In *Bachan Singh v. State of Punjab*³³, the Supreme Court reaffirmed the dictum in *Jagmohan v. State of U.P.*³⁴ that standardization of punishments is well-nigh impossible and that formulation of sentencing policy is the function of the legislature which the court cannot embark upon.

²⁹ Available at: http://nhrc.nic.in/Documents/Reports/jail_01_clal_svm_pr_up.pdf (Accessed on August 13, 2014)

³⁰ Available at: <http://timesofindia.indiatimes.com/city/delhi/Custodial-torture-cant-be-tolerated-Court/articleshow/38567414.cms> (Accessed on August 13, 2014)

³¹ Country Reports (INDIA) on Human Rights Practices for 2013, US Dept. of State, Retrieved from - <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/#wrapper> on 12-06-2014. Also see: Annual Report 2012-13 of Ministry of Home Affairs.

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³² The Committee on the Reforms of the Criminal Justice System, 2003 had the same views. The same has been accepted the Apex Court and High Courts in a number of decisions. *State of Punjab v. PremSagar*(2008) 7. SCC 550 Available at: <http://legalperspectives.blogspot.in/2009/12/sentencing-policy-thurst-of-criminal.html> (accessed on 12-06-2014)

³³ (1980) 2 SCC 684

³⁴ (1973) 1 SCC 20

In *Bachan Singh case* the Supreme Court refrained from stretching its arms in the matter of awarding death penalty. Later on, in *Macchi Singh case*, it opened its doors for rationalizing the principle of rarest of rare principle which has not been uniformly applied in determining the sentence of death or imprisonment for life. The Supreme Court in *SwamyShraddananda (2) v. State of Karnataka*³⁵ observed that there is a lack of evenness in the sentencing process.

Recently, in *Sangeet v. State of Haryana*³⁶, the Supreme Court observed that a balance sheet cannot be drawn up for comparing the two. The considerations for both are distinct and unrelated. The Sentencing has become judge-centric sentencing rather than principled sentencing. *Sangeet v. State of Haryana*³⁷ is an instance which clearly establishes that the Supreme Court is on the path of formulating a sentencing policy which is not materialized yet.

The same views also exist for the remission power of the government which has been snatched by the Supreme Court in the name of doing complete justice between the parties wherein the Supreme Court has said that it has the power to award the sentence of life imprisonment specifying the number of year e.g .life imprisonment for 25 years thus curtailing the power of the government to remit the sentence before 25 years.³⁸

Since the number of punishment is limited and indeterminate punishment is mentioned in most of offences in Indian Penal Code, this situation leads to disparity in sentencing and doesn't give the choice to trial court judges in awarding the sentence.³⁹

High Rate of Recidivism

The NCRB, 2013 report states that the share of recidivists among all offenders increased to 7.2% during 2013 as compared to 6.9% in 2013. In absolute terms, the number of past offenders

³⁵ (2008) 13 SCC 767

³⁶ (2013) 2 SCC 452

³⁷ (2013) 2 SCC 452

³⁸ *SwamyShraddanand (2) @ Murali Manohar Mishra v. State of Karnataka*, (2008) 13 SCC 767; *Gurvail Singh @ Gala v. State of Punjab*, (2013) 2 SCC 713; *Union of India v. V. Sriharan @ Murgan WRIT PETITION (CRL.) NO. 48 OF 2014*, decided on 2nd Dec, 2015.

³⁹ The Sentencing Reform Act of 1984 created the *U.S. Sentencing Commission*, The Crime and Disorder Act 1998 in U.K. created the *Sentencing Advisory Panel*. The Criminal Justice Act 2003 set up the *Sentencing Guidelines Council*. Also See: *Bachan Singh v. State of Punjab* (1980) 2 SCC 684; *Jagmohan v. State of U.P.* (1973) 1 SCC 20.

involved in repeating IPC crimes during the year 2013 was 2,53,498 as compared to 2,26,729 in the year 2012 accounting for an increase of 11.8% in 2013 over 2012. 77.0% (1,95,183) out of the total recidivists (2,53,498) during the year 2013 were those who were convicted once in the past, 17.4% (44,171) were convicted twice, while 5.6% (14,144) were habitual offenders i.e., they were convicted thrice or more in the past. The rising rate of recidivism clearly reflects that the present punishment policy has failed in achieving the objective of rehabilitation and reintegration of the offender.

Retributive Approach

When we use the words “*just deserts*” or principle of “*proportionality principle*”, they indicate that the punishment is to be determined keeping in mind the various circumstances which may influence the sentence i.e. approach of the Supreme Court in determining the punishment is still guided by the retributive objective of punishment.

High Cost in Maintaining the Prisons

The increased budgetary allocation for prisons clearly reflects the high cost required in maintain the prisons. The sanctioned budget for the year 2014-15 (4,27,881.2 lakhs) has increased by 14.3% in comparison to the year 2013-14 (3,74,496.7 lakhs) at All- India level. Majority of States/UTs have reported increased budgetary allocation for the year 2014-15.⁴⁰ The expenditure chart tells the true story. 56.8% money is spent on food and 0.8 and 0.9% money is spent on welfare activities and vocational skills.

However, with a view to reduce overcrowding in jails, Government of India started a Non-Plan Scheme namely “Modernization of Prisons” in 2002-03 in 27 states for five years, with an outlay of Rs.1800 crore on a cost sharing basis in the ratio of 75:25 between the Central and State Governments respectively.⁴¹ For the second phase, memorandum was submitted by Ministry of Home Affairs to 14th Finance Commission amounting to 13,962.60 crore.⁴²

⁴⁰ Available at: <http://ncrb.nic.in/StatPublications/PSI/Prison2014/CHAPTER-12.pdf> (Accessed on 01/08/2016)

⁴¹ Available at: <http://mha1.nic.in/PrisonReforms/pdf/SchemeMP-131011.pdf> (accessed on 01/08/2016)

⁴² Available at: <http://pib.nic.in/newsite/PrintRelease.aspx?relid=123486> (accessed on 01/08/2016) but no action has yet been taken in this regard.

The institutionalization requires a lot of infrastructure investment and personnel. But the question still remains to be answered is whether it is proceeding in the right direction or would it produce the

VI. JUDICIAL RESPONSE

The Apex Court is well aware of the deteriorating situation of the prisons as well as of the prisoners living there. This Court identified as many as nine issues facing prisons and needing reforms. They are: over-crowding, Delay in trial, Torture and ill-treatment, Neglect of health and hygiene, Insubstantial food and inadequate clothing, Prison vices, Deficiency in communication, Streamlining of jail visits, Management of open air prisons.⁴³

Emphasizing the reformatory aspect of punishment and the mode of incarceration as well, V.R. Krishna Iyer, J. in *Mohammad Giasuddin v. State of Andhra Pradesh*⁴⁴ observed that reformation should be the dominant objective of a punishment and during incarceration every effort should be made to recreate the good man out of a convicted prisoner.

In modern civilized societies, however, reformatory aspect is being given somewhat greater importance. If you are going to punish a man retributively, you must injure him. If you are to improve him- you must improve him, and men are not improved by injuries.⁴⁵ Today humanization view is that sentencing is a process of reshaping a person who has deteriorated into criminality and the modern community has a primary stake in the rehabilitation of the offender as the means of special defence, hence a *therapeutic* rather than an *in terrorem* outlook, should prevail in our criminal courts.⁴⁶

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⁴³ Rama Murthy v. State of Karnataka, (1997) 2 SCC 642

⁴⁴ AIR 1977 SC 1926; Shivaji v. State of Maharashtra 1973 Cri LJ 1783 (SC)

⁴⁵ Mohd. Giasuddin v. State of A.P. AIR 1977 SC 1926; Saradhakar Sahu v. State of Orissa 1985 CrLJ 1591; Nadella Venket Krishna Rao v. State of A.P. AIR 1978 SC 480; Rajender Prasad v. State of U.P. AIR 1979 SC 916

⁴⁶ Mohd. Giasuddin v. State of A.P. AIR 1977 SC 1926

⁴⁷ Sunil Batra v. Delhi Administration (1978) 4 SCC 409; State of AP v. Challa Ramkrishna Reddy AIR 2000 S.C. 2083; Common Cause v. Union Of India AIR 1996 SC 1620; State of Gujarat v. Hon'ble High Court of Gujarat

does not spell farewell to fundamental rights.”⁴⁸In *Re - Inhuman Conditions in 1382 Prisons*⁴⁹, the Supreme Court hinted the need to install the Management Information System software in all Central and District prisons. It also said that it is not necessary or compulsory that an under trial prisoner must remain in custody for at least half the period of his maximum sentence only because the trial has not been completed in time.⁵⁰ There are number of compoundable offences in which no attempt was made to compound the offences. Attempt in this direction too will yield certain positive result in decongesting the prisons.

Recently, the Supreme Court, to prevent the growing incidents of custodial death and torture resulting in gross violation of human rights issued guidelines to all the states to install CCTV cameras in all the prisons and police stations.⁵¹The principle of sovereign immunity is not available to the state in cases of contravention of fundamental rights of the citizens by its officers⁵².

VII. WAY FORWARD: ALTERNATIVES TO IMPRISONMENT

(A) INTERNATIONAL SCENARIO

The modern penology emphasizes that offender is a social being who commits crime in the society and has to revert to the society after serving the punishment, it is better to make the efforts for the rehabilitation of the offenders with the help of the community where the society may play vital and constructive role in the rehabilitation and reintegration of the offender.

The *United Nations Standard Minimum Rules for Non-custodial Measures*(Tokyo Rules) states that imprisonment shall be used only as a measure of last resort and provides a list of alternatives

(1998) 7 SCC 392; *Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu* 2005 CrL. L.J. 944; *R.D. Upadhyaya v. State of Andhra Pradesh* AIR 2006 SC 1946.

⁴⁸ *Charles Sobraj v Superintendent Central Jail, Tihar, New Delhi* AIR 1978 SC 1514

⁴⁹ (2016) 3 SCC 700

⁵⁰ This observation was made by the Hon'ble judges while responding to the Advisory issued by Ministry of Home Affairs regarding Section 436-A which says that in case of multiple offences, the prisoner should be kept in prison unless he undergoes the half of the imprisonment for the offence punishable with maximum punishment.

⁵¹ *Dilip K. Basu v. State of West Bengal*, 2015 SCC OnLine SC 651: (2015) 41 SCD 800.

⁵² *State of M.P. v. ShyamSundar Trivedi* (1995) 4 SCC 262

for pretrial or post sentencing stage and requires the member states to develop the alternatives to prison which would be more suitable for rehabilitation of offender within the community.⁵³

There exist other punishments also in international community which have been developed taking into account the abovementioned circumstances. These punishments are referred to as alternatives to imprisonment. In these punishments, the emphasis is more one the role of the society.

The Tokyo Rules describes the following correctional techniques:

Sentencing authorities may dispose of cases in the following ways:

- a) Verbal sanctions, such as admonition, reprimand and warning;
- b) Conditional discharge;
- c) Status penalties;
- d) Economic sanctions and monetary penalties, such as fines and day-fines;
- e) Confiscation or an expropriation order;
- f) Restitution to the victim or a compensation order;
- g) Suspended or deferred sentence;
- h) Probation and judicial supervision;
- i) A community service order;
- j) Referral to an attendance centre;
- k) House arrest;
- l) Any other mode of non-institutional treatment;
- m) Some combination of the measures listed above.

Post-sentencing dispositions may include:

- a) Furlough and half-way houses;
- b) Work or education release;

⁵³ Article 37 of the Convention on the Rights of the Child, 1989, Article 2 of Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 5 of Code of Conduct for Law Enforcement Officials, Principle 6 of Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Standard Minimum Rules for the Treatment of Prisoners are also to the same effect.

- c) Various forms of parole;
- d) Remission;
- e) Pardon.

UNITED STATES

Before the passing of The Sentencing Reform Act of 1984, the judges have unfettered discretion in awarding the sentence which led to the disparity in sentencing policy. The Sentencing Reform Act of 1984 (part of The Comprehensive Control Act, 1984) totally restructured the system of sentencing. It abolished the parole and established US Sentencing Commission.

In the United States Code Title- 18 provides various community corrections include probation — correctional supervision within the community rather than jail or prison — and parole — a period of conditional, supervised release from prison. After release on probation or parole, electronic monitoring (EM) is used to supervise the release of the offenders to ensure public safety. If used cautiously, the electronic monitoring has been found to be successful in rehabilitation and reducing recidivism.

The United States Sentencing Guidelines regulates criteria for awarding probation, supervised release, community confinement, home detention, community service, restitution, fines and forfeitures, shock incarceration programme, intermittent confinement.

UNITED KINGDOM

The U.K. Powers of Criminal Courts Sentencing Act of 2000 contains general provisions regarding a community orders and community sentences and a curfew order, community rehabilitation order, a community punishment order, a community punishment rehabilitation order, a drug treatment and testing order, attendance order, a supervision order, an action plan order are all covered by the definition of community order and community sentences and monitoring of orders. These orders have certain limitations.

CANADA

Correctional and Conditional Release Act, 1992 of Canada governs the community corrections. Earlier the corrections were governed by Penitentiary and Parole Acts. The new law overhauls the correctional system of Canada and is considered to be a milestone in correctional history which significantly promotes the protection of human rights in the correctional process⁵⁴. The new legislation, however, also declares that public safety will be the prime purpose of the Act. It provides for the various mechanisms through which an offender can be rehabilitated in the community settings. It includes conditional release, parole, long term supervised release and statutory release.

OTHER STATES

Article 44 of the *Criminal Code of Russian Federation* provides for the punishment which can be imposed on the offender. They fines, deprivation of the right to hold specified offices or to engage in specified activities, deprivation of a special and military rank or honorary title, class rank and of government decorations, compulsory works, corrective labour, restriction in military service, confiscation of property, restricted liberty, arrest, service in a disciplinary military unit etc.

French Penal Code, 1994 differentiates in punishment for felonies and misdemeanors. For felonies, it prescribes criminal imprisonment from 10 years to life. However, various penalties are provided for misdemeanors including a fine, day-fine, citizenship course, community service and penalties entailing a forfeiture or restriction of rights etc.

Fiji has recently overhauled its law by passing new Corrections Act in the year 2008. It has also set a target for reducing recidivism by 25% till 2014. In 2008, the Prisons Act was substantially amended by **Malaysian** Government to allow the implementation of a parole system (modelled to some extent on Australian experience). Between July 2008 and the end of August 2012, over 4,500 prisoners were released on parole and success rates are reportedly very good (over 95%). Since 2010, the Prison Department has also administered the Compulsory Attendance Order,

⁵⁴ Federal Community Corrections Strategy - Vision to 2020
Retrieved from – <http://www.csc-scc.gc.ca/parole/002007-1001-eng.shtml> on 12-06-2014.

under which offenders who might otherwise have been imprisoned are required to undertake community work.

Singapore has reoriented its system towards improving rehabilitation and reintegration outcomes whilst maintaining a firm focus on discipline. Importantly, there is evidence of positive results: recidivism rates have dropped significantly from 2000 to 2009 and the rate of imprisonment has dropped too.

In **Australia**, Correctional policy and legislation is primarily the responsibility of six States and two Territories and each faces some specific economic, political and other pressures. Other areas of interest include high risk offenders and the use of technology such as ‘Skype’ and GPS tracking devices.⁵⁵

A survey of the system of punishment operating in various countries would show that the concept of deterrence cannot be entirely eliminated from the present day policy of criminal law. However, the reformatory theory of punishment has gained considerable importance and it aims at reformation by stressing that the offender should be while being punished by detention, there is need to expose him to educative, healthy and ameliorating influences. If the offender can be re-educated and traits of his character can be reshaped, he can be put once again in the mainstream.

(B) INDIAN SCENARIO

The Law Commission in its 42nd Report did not recommend any change in the nature of punishment. It didn't find favour for banishment and externment. Compensation to victim and duty to make amends were not suggested. Taking motivation from Soviet experience, it recommended for inclusion of corrective labour but by way of a separate legislation. Section 76A was recommended to include public censure for certain offences. With regard to the minimum sentence, it recommended that it should be resorted to only in exceptional cases⁵⁶. It also recommended certain changes in Section 64-69, 71 and 75 of Indian Penal Code, 1860 and

⁵⁵ Asia Pacific Conference on Correctional Administration (APCCA):32nd APCCA Report, 2012, available at:http://www.apcca.org/uploads/APCCA_Report_2012_Brunei.pdf(Visited on June 11, 2014).

⁵⁶ The same view was endorsed by the Law Commission in its 156th report.

the insertion of new Section 55 to specify that imprisonment for life shall mean imprisonment with hard labour.⁵⁷

In India, attempt was made to include modern correctional techniques by proposing The Indian Penal Code (Amendment) Bill, 1978 which provided for community service, public censure, disqualification for holding office and payment of compensation. These punishments didn't find favour by Law Commission.⁵⁸ The Bill lapsed due to the dissolution of Lower House and since then the law is static and no further attempt was made to widen the scope of punishment under Section 53.

It cannot, however, be said that Indian criminal justice system is totally devoid of reformatory approach. There are ample provisions which clearly reflect it. At the pre-trial stage, bail provisions, compounding of offences and plea bargaining etc. At the post trial stage, Section 360 and 361 of Code of Criminal Procedure, 1973 provides for admonition to first time offender for an offence punishable with imprisonment less than 2 years. Conditional discharge is also provided for. Section 357-359 of Code of Criminal Procedure, 1973 provides for compensation to victims of crime. Post sentencing stage includes parole, commutation and remission of sentence (Article 72 and 161 of the Constitution of India, 1950). Finally, the best example of corrective and rehabilitative approach is set by Juvenile Justice (Care and Protection of Children) Act, 2015.

The criminal jurisprudence dealing with the imposition of sentence has undergone a drastic change with the enactment of the Probation of Offenders Act, 1958 which is a milestone in the progress in the modern liberal trend of reform in the field of penology. It is the result of the recognition of the doctrine that the object of the criminal law is more to reform the individual offender than to punish him.⁵⁹

However there are various instances where community service as a mode of punishment has been awarded by all the courts. For instance, BMW hit and run case⁶⁰ Supreme Court awarded it.

⁵⁷ Law Commission of India, 42nd Report on Indian Penal Code (June, 1971).

⁵⁸ Law Commission of India, 156th Report on The Indian Penal Code Vol-I, 15- 41 (April, 1992).

⁵⁹ *Ratan Lal v. State of Punjab* AIR 1965 SC 444; *Punch v. State of Orissa* 1993 Cri LJ 953.

⁶⁰ *State Tr. P. S. Lodhi Colony, New Delhi v. Sanjeev Nanda* (2012) 7 SCC 120.

Delhi judiciary has also done it.⁶¹ Similarly ‘Public censure’ as punishment is provided in Narcotic Drugs and Psychotropic Substances Act, 1985⁶² and the Food Safety and Standards Act, 2006⁶³ are recognized in special legislations. Another issue is the reform of juveniles. Recent debates post 16 December Nirbhaya murder case followed by *Salil Bali v. Union of India*⁶⁴ and *Dr.SubramaniamSwamy v. Raju, The Member, Juvenile Justice Board*⁶⁵ have raised various issues that needs to be explored.

*All India Committee on Jail Reforms (1980-83)*⁶⁶ emphasized that imprisonment is not always the best way to meet the objectives of punishment, the government shall endeavor to provide in law new alternatives to imprisonment such as community services, forfeiture of property, payment of compensation to victims, public censure etc. in addition to the ones already existing. Different treatment approaches are necessary because programmed treatment cannot be equally applicable to all types of offenders, treatment modalities should not be constant for all the offenders in all geographical areas and circumstances.

*The Committee on Reforms of Criminal Justice, 2003*⁶⁷ popularly known as *Malimath Committee Report* also recommended that the judge has wide discretion in awarding the sentence within the statutory limits. There is now no guidance to the Judge in regard to selecting the most appropriate sentence given the circumstances of the case. There is need for such law in our country to minimize uncertainty to the matter of awarding sentence. Different kinds of punishment are the need of the hour.

It has also been recommended by *The National Criminal Justice Policy, 2006*⁶⁸ that the policy should be to increase the choices in punishment and make the other functionaries of the system

⁶¹*Saghir Ahmad and Another v. Jamia Millia Islamia University* MANU/DE/1152/2002; *Nitin Saxena v. State & Another* MANU/DE/2498/2010.

⁶²Section 40.

⁶³Section 64 of the Act is analogous to Section 16 of The Prevention of Food Adulteration Act, 1954.

⁶⁴(2013) 7 SCC 705.

⁶⁵MANU/SC/0849/2013.

⁶⁶Donald T. Shanahan, *The Administration of Justice: An Introduction* 317-318 (Holbrook Press Inc., Boston). Cited in S.P. Singh Makkar, “Correctional Objectives of Prison: A Critique on Justice Krishna Iyer’s Correctional Meditation” 39 *PULR* 143 (1992).

⁶⁷Government of India, Report: *Committee on Reforms of Criminal Justice System* 170, 171 (Ministry of Home Affairs, 2003).

⁶⁸Government of India, Report: *The National Criminal Justice Policy* (Ministry of Home Affairs, 2006).

(like probation service and correctional administration) to have a voice in the sentencing process and administration.

*The National Policy on Prison Reforms and Correctional Administration, 2007*⁶⁹ has also pointed out that imprisonment is not always the best way to meet the objectives of punishments the government shall endeavour to provide; in law new alternatives to imprisonment.

*The Prison Assessment and Proposed Rehabilitation and Reintegration of Offenders Report*⁷⁰ in its key recommendations, has recommended the establishment of a restorative justice program to minimize offenders being incarcerated for minor offences.

Different treatment approaches are necessary⁷¹ because programmed treatment cannot be equally applicable to all types of offenders, treatment modalities should not be constant for all the offenders in all geographical areas and circumstances.

VIII. CONCLUSION & SUGGESTIONS

It can safely be concluded that Indian Prison system has been shown to be counterproductive and it seems that it has also lost sight of rehabilitative aspect of punishment. Now it no more addresses the Gandhian perspective of punishment and the way the prisons are expected to reform the criminals. The prison overcrowding is mainly due to under trials. Here the courts and the government may rely more on plea bargaining, compounding of offences, effective legal aid to the poor, bail provisions and section 436-A of the Code of Criminal Procedure, 1973. Special Fast Track Courts, special courts, lokadalats and video conferencing may also be used for this purpose. Similarly, the potential of probation, parole and furlough should be exploited to the maximum extent.

⁶⁹Government of India, Report: *The National Policy on Prison Reforms and Correctional Administration* (Ministry of Home Affairs, 2007).

⁷⁰ A joint publication of the Government of Maldives and the United Nations Development Programme, available at: <http://www.mv.undp.org/content/dam/maldives/docs/Democratic%20Governance/prisons%20report.pdf> (Visited on June 6, 2014).

⁷¹ S.P. Singh Makkar, "Correctional Objectives of Prison: A Critique on Justice Krishna Iyer's Correctional Meditation" 39 *PULR* 143 (1992).

Though prison and rehabilitation is state subject but central legislation is the need of the hour to bring uniformity in bringing these alternatives to the statute book. It is not the duties of judges only to implement these in the absence of law. For, all the stakeholders should come together for successful implementation of these alternatives after bringing a law for this purpose. The incorporation of above discussed alternatives will have transformational effect on the criminal justice system. These alternatives will give more choice to the judges in awarding the punishment and tailoring the sentence. These alternatives to imprisonment will help in upholding and restoring the rule of law in the prisons wherein the corrupt practices and human rights violations are rampant. The alternatives would also better protect the liberty of the offenders and will work as a check on the human rights abuses. Though it seems utopia but it is based on the premise that a person becomes a criminal due to society so society should come forward and take up the responsibility in reforming the criminal. The evil effects of incarceration may be minimized by resorting to the alternatives since the person as a convict or under trail will not be deprived of his liberty, would be able to earn his livelihood, be in better position in preparing his defence and social ties also will not get disrupted. Hence, it becomes pertinent to develop and give legal recognition to modern kind of punishments in general statutes in order to rationalize the existing punishment mechanism.