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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

"POTENTIALITY OF COMMUNITY SERVICE AS A REFORMATIVE MODE OF SENTENCING IN THE LIGHT OF NEW CRIMINAL LAWS IN INDIA"

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Abstract

The Criminal laws in India, having a long past of 160 years are held to be of grievous colonial touch and draconian in nature. Emphatically a long duration of independence has ignorantly applied these laws in the same form as it was. Judicial interpretations somehow managed to guide the justice system of the country but a country without a strong legal framework is at the dawn of injustice. Considering the requirement the Legislature has recently taken an initiative and enacted the new criminal laws within a short duration giving it no time to be analyzed among the learned group. Giving reformative effect to the penal provisions in the Criminal Laws was one of the objective of the legislature, which was recently fulfilled by glorifying the provision of "Community Service" into the new enactment. But how far this would bring into transformation among the sinners is a question of import. Keeping in mind the importance of self adoption into the societal as well as legal changes, this chapter focuses upon the pros and cons of the "Community Service" as a reformative mode of sentencing.

Introduction

Criminal Law is based upon the concept of punishment. It is the most reputed 'Command Theory' of John Austin that law is the command of the sovereign, which is backed by sanction.[1] Punishment is grounded on the concept of 'Rule of Law'. Punishment is vital to maintain law and order in the society and to make sure that no one is deprived of social, economic and political justice. The importance of punishment may be quoted in the words of Manu as: "Penalty keeps in restraint, penalty protects them, the penalty remains awake when people are asleep, therefore the wise have regarded punishment may be a source of righteousness".[2] Thus, Punishment is the form of social control which helps the society to sustain its rules and regulations.

Our Criminal Justice System has gone through several stages of transformation and still now it is a ray passing through the prism of the society. Through all the refractional rays it has been tried to be modified and bring into some sort of remedy that will go beyond the traditional mode of punishments and will help to transform the society at the very beginning.

Transformative Justice

According to Mia Mingus, transformative justice is a political framework and approach for responding to violence, harm and abuse. It can be thought of as a way of "making things right", getting in "right relation" or, creating justice together. As defined by American activist Mariame Kaba, transformative justice is a framework that focuses on community-building and collective solidarity against the repressive mechanisms of the carceral state. Transformative justice divests from traditional methods of state-sanctioned punishment, such as police, prisons, courts and juvenile delinquency programs, as it is based on the assumption that these institutions inflict more harm on individuals through surveillance and social control, which fosters even more violence and harm both within prisons and communities on the outside. Transformative justice uses a systems approach, seeking to see problems, as not only the beginning of the crime but also the causes of crime, and tries to treat an offence as an opportunity for transformation of victims, offenders and all other members of the affected community.[3]

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1 N.V Paranjapee, *Studies in Jurisprudence and Legal Theory*, 33 (Central Law Agency, Allahabad, 8th edn. 2016).

2 Divyanshi Gupta, "*Theories of Punishment", available at*: https://articles.manupatra.com/article- details/Theories-of-punishment (last visited on: June 11, 2024).

3 Transformative Justice available at: https://en.wikipedia.org (last visited on July 8,2024).

Reformative Theory of Punishment

There are several theories of punishment that has evolved since time immemorial. Like the Deterrent theory, Retributive theory, Expiatory theory, Preventive theory Reformative theory, Multiple approach theory of Punishment. The purpose of punishment is to reform or change the character of the criminals. In the early criminal justice system, there was no distinction between adults and juvenile offenders. Hence, there was no difference in punishment. Over several cases and periods, it was realized that the youngsters between certain ages should be treated differently in the matters of punishment. As they can be easily influenced or tempted by any person and thus, result in any criminal act without any intention to do it.[4]

For Example: A man 50-year-old, intimidate a minor to add poison in X's food. The minor added poison without any intention to commit a crime. Delinquency is an act or behaviour which is not normal. Juvenile delinquency is the participation by the minor in illegal acts. Most of the counties including India are now tackling the problem of a juvenile on the priority basis by a separate body and juvenile courts.

According to the reformative theory, the object of the punishment is to reform of criminals. This theory is based on the principle given by Mahatma Gandhi that 'Condemn the sin, not the sinner'.[5] This theory lies upon the principle that "you cannot cure by killing." Even as per J. V.R. Krishna Iyer, "every saint has a past, every sinner has a future…. the humanistic approach should not obscure our sense of realities."[6] The reformative theory seems to strengthen the character of the man so that he may not become victim of his own temptation. This theory would consider punishment to be curative or to perform as doctor's medicine. But the critics of this theory say that, if criminals are sent to the prison to be transformed into good citizens, a prison will no longer be a prison but a dwelling house.

[4] Tanu Priya, "*Reformative Theory"*, *available at*: https://www.lawctopus.com/academike/reformative- theory- of-punishment/ (last visited on: June 1, 2024).
[5] *Ibid*.
[6] *Ibid*.

Potentiality of Reformative Laws in India

There are Certified Industrial Schools under the provision of the Borstal Schools Act.[7] The English Borstal Law has been adopted in India for reforming criminals. To effectuate this type of punishment, the Probation of Offenders Act was passed in 1958. There are at present several Children Homes, Observation Homes, Borstal Institution & Reformatories functioning throughout India where adequate educational & vocational training is imparted to young offenders. The States have also established After Care Association & Child Aid Societies for the rehabilitation of juveniles who need care & protection after their release from Homes, Borstal & Reformatories. Over times, it has been seen that the Reformative theory has worked well upon the non-habitual offenders but what is the position of reformative theory with regard to a class of offenders those who are habitual in committing offences poses a doubt before us. Moreover, how much it is effective in curing the adult offenders is a matter of research and analysis.

A perfect and accurate system of criminal justice could never be based on any single theory of justice but it would have to be a combination of all. It has to be kept in mind that offender is not only a criminal to be punished but also a patient to be treated. This idea is the most recent one.

As per the observation of J. Krishna Iyer in *Rakesh Kaushik v. Superintendent of Jail*[8], "If the potentials of prisoner-person are unfolded, a robber may become a Valmiki, and a sinner may become a saint".

Moreover, In *TK Gopal v. State of Karnataka*[9], the Supreme Court stated that "The law requires that a criminal should be punished and the punishment prescribed must be meted out to him, but at the same time, reform of the criminal through various processes, despite he having committed a crime, should entitle him to all the basic rights, human dignity, and human sympathy."

In a most recent judgment, the Supreme Court in *Javed Gulam Nabi Sheikh* v. *The State of Maharashtra and anr.*[10], held that, "Criminals are not born out but made. The human potential in everyone is good and so, never write off any criminal as beyond redemption. This humanist fundamental is often missed when dealing with delinquents, juvenile and adult. Indeed, every saint

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[7] Sashikant Saurav, "*Penology- Treatment of Offenders*", *available at*: https://www.google.com/search, last visited on: June 12, 2024.

[8] 1986CRILJ566, *available at*: https://indiankanoon.org/doc (last visited on: July 8, 2024).

[9] AIR 2000 SCW 1669, *available at*: https://indiankanoon.org/doc (last visited on: July 8,2024).

[10] Crl.A. 2787/2024, *available at*: https://www.latestlaws.com/latest-news (last visited on: July 8, 2024).

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has a past and every sinner a future. when a crime is committed, a variety of factors is responsible for making the offender commit the crime. Those factors may be social and economic, may be the result of value erosion or parental neglect; may be, because of the stress of circumstances, or the manifestation of temptations in a milieu of affluence contrasted with indigence or other privations."[11]

Analyzing Provision For Kinds Of Punishments Under Old Criminal Law: A Conflict With The Reformative Theory

In the Indian Criminal Justice System, the concept of punishment has overwhelming effect though. The Indian Penal Code[12] has stated under Section 53[13], the kinds of punishment that may be inflicted upon the accused depending upon the nature and gravity of the offence that has been committed. This provision includes Death, Imprisonment for life, Rigorous Imprisonment, Simple Imprisonment, Forfeiture of Property and Fine. Most of these punishments go against the reformative theory that India aims to follow. Therefore, by relooking into the provisions of the old Criminal Law as is recently repealed, it can be seen that, the penal system of India was totally based upon punishing the criminals rather than reforming them and bringing them back into the main stream of the society. While India, since long has an aim to convert itself into a reformative state, it has failed to incorporate so into the penal provisions in the long duration of 160 years.

Moreover, what shall be the appropriate punishment was held to be based upon the facts and circumstances of the case. There was no strict yardstick to follow the nature and gravity of the offence. Though this is the critical analysis of Indian Penal System, but it is even more difficult to sanguine a perfect straight jacket formula for deciding punishment depending upon the factual matrix in a changing society.

On the other hand, quoting Friedmann's observation in his classical work, "Law in Changing Society", the Supreme Court in *Sevaka Perumal* v. *The State of Tamil Nadu*[14] pointed out that, criminality continues to be, as it should be, a decisive reflection of 'social consciousness of society'. Therefore, in operating the sentencing system, law should adopt the corrective machinery or the

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[11] *Ibid*.
[12] Indian Penal Code, 1860(Act 45 of 1860), s.53.
[13] *Ibid*.
[14] (1991) 3 S.C.C. 471, *available at*: https://indiankanoon.org/doc (last visited on: July 8, 2024).

deterrence, based on factual matrix. Undue sympathy to impose inadequate sentence would do more harm than good to the justice system as it would undermine public confidence in the efficacy of law and society would no longer endure under such serious threats. It is, therefore, the duty of every Court tp award proper sentence having regard to the nature of the offence and manner in which it was perpetuated or committed etc.

In recent times, alternatives to these punishments are being adopted by various countries to "reform" criminals. Alternative sentencing is defined by Quakers as options that benefit society and are therefore more useful to the community as a whole than punishment. Long since, Indian Criminal Justice System has tried to follow the reformative theory and has found out several discrepancies and limitations in the form of punishments.

As per Sir Winston Churchill, "The mood and temper of the public in regard to the treatment of crimes and criminals is one of the most unfailing tests of the civilization of any country"[15]. All the offences cannot be punished or addressed through same kind of treatment to offenders.

Community Service: History meaning and its Implication in India under the New Criminal Law:

- *History of Community Service*

The global dimension of restorative justice brings about community service as an approach that ushers in a new dawn in the justice system, a departure from purely punitive methods. By actively involving offenders in community service, the proposed approach aims to repair the harm caused by offences, rebuild trust and relationships, and provide opportunities for personal growth and development. The extensive utilisation of the Community Service as a punitive measure has tremendously increased all over the world. It was first introduced in the House of Correction at Bridwell Palace in London in 1553. The first organized community service program meant systematically to be used in place of short prison sentences were established in ad-hoc basis in California in the 1960's. Thus, community service was indirect alternative to imprisonment. In the United Kingdom, Parliament enacted legislation in the early 1970's giving the courts specific powers

[15] Naveen Talawar, "*Revolutionising Justice: Emergence of Community Service Punishment in The Indian-Criminal-Justice-System*", *available at*: https://www.verdictum.in/columns (last visited on: June 12. 2024).

to order community service as a sentencing sanction. The formal origin of community service happened in England and Wales with the "Wootton Report" or "Non-custodial and Semi-custodial Penalties". This 1970 report advocated for alternatives to imprisonment, and offenders should be required to perform some type of community service in appropriate instances. Further, it also stressed the reasons for implementing community service as an alternative, stating that it is a constructive and inexpensive option that brings communal restitution. This community service system was found to have the maximum positive outcome of any correctional initiative in England and Wales over the previous three decades. The Criminal Justice Act of 1972, which has become the Powers of Criminal Courts Act 1973, adopted the "Wootton Report" recommendations. It was Lenin who also stressed on the importance of community service.[16]

It first dawned upon India in the 42nd report of the Law Commission. Then an Amendment bill was introduced in the Parliament which was passed in the Rajya Sabha but due to the proclamation of emergency it could not be passed in the Lok Sabha and it lapsed. Again, the Law Commission in its 156th report urged the need to implement community service in Indian Penal system.[17]

- *Meaning of Community Service*

Sentence of Community service is an order of the Court under which an offender is required to perform unpaid work of benefit to the community under the supervision of the Probation Officer, who shall also provide rehabilitative counselling and appropriate guidance to the offender. Lord Macaulay, the draftsman of IPC has seen no importance at his time to incorporate the provision of community service as punishment under IPC. But social changes in recent times have demanded so. Still, it is worth emphasising that the Indian courts have passed several orders awarding community service as punishment by invoking section 482 of the 1973 Criminal Code, which confers inherent power upon the High Court to secure the overarching goal of justice. For instance, under this discretionary provision, the High Court of Delhi has directed offenders to clean shoes and rinse utensils at a *Gurudwara*. Yet, although the Indian judiciary has taken this initiative to grant community service, its discretionary nature may lead to inconsistent application and a lack of transparency, and cannot replace a proper legislative framework.

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[16] *Ibid.*

[17] Priyanshi Gupta, *"Community Service: As a Part of Sentence in India"*, *available at:* https://vlex.in/vid (last visited on: June 12, 2024).

- *Implication of Community Service in India*

The implication of community service can be traced back to the section 15(4) of the Juvenile Justice (Care and Protection of Children) Act,2000[18]. But this had no mention in IPC.

In *Sanjiv Nanda* v. *State of Delhi*[19], the famous BMW hit and run case, the Apex Court for the first time ruled that, the convicted accused will not have to put in any more jail time. He has been asked to do two years of community service and to donate 50 lakhs which will be to help the victims of road accidents.

In *Babu Singh* v. *State of U.P.*[20], the Apex Court ruled that, All deprivation of liberty is validated by social defence and individual correction along an anti-criminal direction. Public justice is central to the whole scheme of bail law. Fleeing justice must be forbidden but punitive harshness should be minimised. Restorative devices to redeem the man, even through community service, meditative drill, study classes or other resources should be innovated, and playing foul with public peace by tampering with evidence, intimidating witnesses or committing offences while on judicially sanctioned "free enterprise", should be provided against. No seeker of justice shall play confidence tricks on the Court or community. Thus, conditions may be hung around bail orders, not to cripple but to protect. Such is the holistic jurisdiction and humanistic orientation invoked by the judicial discretion correlated to the values of our Constitution.

The Bharatiya Nyaya Sanhita (BNS)[21] represents a significant departure from the colonial-era Indian Penal Code (IPC) of 1860. Among its notable provisions is the use of 'community service' as a form of punishment for petty offences under Section 4(f), as opposed to the traditional punitive measures of imprisonment or fines. While the inclusion of community service represents a progressive approach to criminal law, its implementation raises several concerns. The BNS proposes community service as a punishment for a variety of minor offences, including theft of property worth less than Rs. 5,000, attempted suicide with the intent to restrain a public servant, and public intoxication that causes annoyance. Unlike the IPC, which primarily imposes imprisonment and fines, the BNS includes community service as an alternative punitive measure but is not very much explicit with the

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[18] The Juvenile Justice Act,2000 (Act 56 of 2000), s. 15.
[19] (2012) 8 SCC 450, *available at*: https://main.sci.gov.in/supremecourt (last visited on: July 8, 2024).
[20] 1978 AIR 527, *available at*: https://vlex.in/vid/special-leave-petition-civil (last visited on: July 8, 2024).
[21] The Bharatiya Nyaya Sanhita, 2023 (Act 45 of 2023).

idea and its implementation in a proper manner.

Concluding Remarks

Thus it can be seen that**,** community service align with the principles of restorative justice and contribute to the broader goals of transformative justice within the criminal justice system in India. Community service is considered as one of the trending mode of punishment, keeping pace with the reformative theory in India, which is considered to bring into highest outcome in reducing recidivism in Indian subcontinent as compared to the traditional incarceration. But the socio-economic conditions and cultural heritage of the country along with incomplete laws relating to Community service do not allow the proper implementation of this mode of punishment. There are also several gaps and problems in the present legal scenario to resolve the implementation procedure. Moreover the effectiveness of community service in our country is not a proved mechanism to accomplish restorative justice. Not only this, there can be legal and ethical concerns about forced labor, especially if the community service work is not properly aligned with the offender's skills or if it is used as a means of cheap labor exploitation. Tracking and verifying the completion of community service hours can also be administratively burdensome. Along with these, public might perceive community service as a "soft" punishment, which can lead to a lack of confidence in the justice system. Victims of crime might feel that justice has not been adequately served. So, how much is its potential in being an alternative to traditional punitive measures remains unsolved unless the loopholes as mentioned are cured. Lastly, whether community service is effective in India also to reduce recidivism in long term and bring the offenders into the mainstream of the society is a question to be analyzed in due course of time.

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