



WHITE BLACK
LEGAL
LEGAL

VOLUME 1: ISSUE 10

|| May 2020 ||

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Website: www.whiteblacklegal.co.in

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With this thought, we hereby present to you

WHITE BLACK LEGAL: THE LAW JOURNAL

ALTERNATIVES TO IMPRISONMENT **WITHIN THE CRIMINAL JUSTICE SYSTEM**

Name : Manasi Desai

ABSTRACT

Bernard Shaw had once quoted that if one were to punish a man retributively, one must injure him. But if one seeks to reform a man, one must improve him and men are not improved by injuries. Imprisonment, is a widely used form of punishment in modern times so much so that the prisons are overflowing with criminals and yet there seems to be no decrease in the crime rate. In India, the rate of imprisonment, which is 30 out of 1,00,000, is relatively less as compared to that across the globe. However, the percentage of pre-trial detainees is significantly high, which is 67% at the moment.¹ A number of reasons may be attributed to this, such as delays in imparting justice, inefficiency of the criminal justice administration, huge backlog of cases, etc. In fact, research even shows that confining individuals to prisons may prove to be counterproductive, as instead of being reformed, the convict may be exposed to hardened criminals. There are various alternatives available against the punishment of imprisonment and the employment of these alternatives becomes even more pertinent, especially during the time of this Covid-19 pandemic, wherein prisons were considered as hotbeds for the spread of this virus² and hence in order to curtail this outbreak, thousands of inmates were released on bail or parole.

The paper discusses a few such alternatives to imprisonment and in the light of the same, the various applicable statutory provisions in India and abroad have also been discussed and analysed along with the relevant case laws.

¹ *Alternatives to imprisonment*, Penal Reform International, available at: <https://www.penalreform.org/where-we-work/south-asia/alternatives-imprisonment/>.

² Sonam Saigal, *Jails turn into hotbeds of disease*, The Hindu, (May 25, 2020) <https://www.thehindu.com/news/cities/mumbai/jails-turn-into-hotbeds-of-disease/article31666835.ece>.

BRIEF HISTORY OF PRISON ADMINISTRATION IN INDIA

Penology developed in Ancient India under the head of 'danda-niti'. In the Vedic period, when the State or the King was not responsible for the maintenance of law and order situation, it was the aggrieved party itself that had to take certain steps to seek justice. Often the aggrieved party would wait outside the offender's house, not allowing him to come out until his claim was satisfied.³ Thus, the type of justice that was sought in such cases was retributive in nature. But in the Later Vedic period, the Dharma Sutras provided for the different types of punishment. Arthashastra,⁴ written by Kautilya, is one such treatise that provides for the various forms of punishment. So is Manusmriti,⁵ but the punishments prescribed in these treatises were severe and often involved mutilation, stoning, flogging, branding, pillories and even capital punishment. Their main objective was deterrence. However, in the medieval period, the offences came to be classified under three categories: offences against God, State and private individuals. Here, the king was considered to be answerable to no one and all the individuals were expected to follow law and order.

The modern criminal justice administration began only during the British period. Lord Macaulay is considered as the founder of prison reforms. In 1836, a Committee was appointed under his insistence to look into the conditions of prisons in India. In 1870, the first Prison Act was passed to regulate the laws concerning prison administration and in 1894 another Prison Act was passed. This Act limited its application to the punishments and prison work. It did not cover the effect of treatment or result of punishments. The Prison Act of 1894 still remains in force and forms the present law governing the management and administration of prisons in India.⁶

ALTERNATIVES TO IMPRISONMENT

In December 1990, the United Nations General Assembly adopted a resolution on UN Standard Minimum Rules for Non-Custodial Measures. The main aim of this resolution was the promotion of use of non-custodial measures instead of imprisonment and it contains a set of basic principles for the same.⁷ In consonance with this India also has various provisions that

³ A.S. ALTEKAR, STATE AND GOVERNMENT IN ANCIENT INDIA, Jainendra press, Delhi 245 (1958).

⁴ KAUTILYA, THE ARTHASHASTRA (L.N. Rangarajan ed., 1992).

⁵ MANU, THE LAWS OF MANU (translated by George Buhler, 1990).

⁶ S.K. Pachauri, *History Of Prison Administration In India In 19th Century : Human Rights In Retrospect*, Proceedings of the Indian History Congress, Vol. 55 (1994), pp. 492-498, available at: <https://www.jstor.org/stable/44143401>.

⁷ United Nations: General Assembly Resolution On U.N. Standard Minimum Rules For Non—Custodial Measures, International Legal Materials, Vol. 30, No. 5 (Sept 1991), pp. 1361-1374, available at: <https://www.jstor.org/stable/20693619>.

had been enacted to ensure that several alternatives are available to the punishment of imprisonment. These can be availed at different stages of criminal justice administration: pre-trial, sentencing and post sentencing.

PROBATION

Section 360 of the Code of Criminal Procedure, 1973 and section 4 of Probation of Offenders Act, 1958 contain provisions for probation in India. In probation, the offender is released from the prison for good conduct and is kept under supervision for a certain period. This measure serves as both, deterrence and reformation. It will cause deterrence because the offender may be called back to serve the sentence as soon as he commits another offence, and reformation because the offender is provided with assistance and guidance to change. Probation may only be granted in cases of first offence and where the nature of the offence may be trivial.

In *Jugal Kishore Prasad v. State of Bihar*,⁸ the Supreme Court observed that the object of this provision is to ensure that the offender does not become an obdurate criminal because of his association with hardened criminals.

ADMONITION

Admonition is like a warning given to the offender so that he doesn't repeat the same offence again. The court can release an offender after due admonition and this can be done after considering the character, age, physical or mental condition and the trivial nature of the offence committed. But an admonition can only be granted in case of first offence and where the punishment does not exceed two years imprisonment.⁹

FINE

In case of certain offences, especially those that are pecuniary in nature, fine may be imposed to create deterrence. In case of some offences like the offence of robbery¹⁰ both fine and imprisonment may be imposed. However, when no limit has been prescribed for the imposition of fine by the statute, it must not be unreasonable and excessive¹¹ and it must always consider the paying capacity of the accused. The same was held in *Adamji Umar Dalal v. State*,¹² where the Supreme Court held that while imposing the fine the pecuniary circumstances of the accused must be given as much regard as the gravity of the offence.

⁸ *Jugal Kishore Prasad v. State of Bihar*, (1972) 2 SCC 633.

⁹ The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament (1974), s. 360(3).

¹⁰ The Indian Penal Code, 1860, No. 45, Imperial Legislative Council, (1860), s. 392.

¹¹ *Id.* s. 63.

¹² *Adamji Umar Dalal v. State*, A.I.R. 1952 SC 14.

PAROLE

It is the conditional release of the prisoner for a certain period under supervision after the prisoner has served a part of his sentence. Parole does not change the status of the prisoner; however, he/she is granted partial liberty. The prisoner so released is kept under strict supervision by the authorities and in case he violates the conditions of his release, he is taken back in custody.¹³ Also, the primary difference between parole and furlough is that parole will entail a suspension of a sentence while furlough is treated as a part of the sentence itself. Parole does not strictly fall under the category of alternatives to imprisonment; however, it does deserve a mention all the same.

In *State of Haryana v. Mahander Singh*,¹⁴ it was held by the Supreme Court that parole means the release of prisoner, convicted for a very long-term after serving a part of his sentence under a condition that will allow for his incarceration if he misbehaves.

In Canada, the prisoners are allowed to visit their sick relatives or friends. Also, in England, the prisoners are even allowed to remain at the bed side of the relative who is dying. While in Japan, parole is considered as one of the most important feature of a progressive treatment system that will impart a mitigated treatment to the prisoner, but at the same time expect them to carry out their responsibilities just like a healthy minded citizen.¹⁵

COMPENSATION

Compensation¹⁶ to victims is based on the concept of restitutive justice and derives its origin from the old Germanic law, ancient Hindu law and the code of Hamurabi. In *Sarawan Singh v. State of Punjab*,¹⁷ the Supreme Court also laid down that the amount of compensation granted must depend on various factors such as the nature of offence, injuries and even consider the paying capacity of the accused.

COMMUNITY SERVICE

India does not have any provisions for community service as an alternative to imprisonment yet. But in countries like USA the judge is, in fact, empowered to grant a community service order. This not only helps to reduce the prison population, but also offers a chance to the

¹³ Poonam Lata v. M. L. Wadhawan, (1987) 3 SCC 347.

¹⁴ State of Haryana v. Mahander Singh, (2000) 3 SCC 394.

¹⁵ Penal and Correctional Institution in Japan, Ministry of Justice, Japan (1957) p. 2526.

¹⁶ The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament (1974), s. 357.

¹⁷ Sarawan Singh v. State of Punjab, (1978) 4 SCC 111.

offender to give back to the society. The court may order the offender to render services like, volunteer work, tree plantation, sanitation work, etc which will benefit the society at large.

Also, in the United Kingdom, the British Parliament had enacted the Criminal Justice Act of 1972 that introduced community service as an alternative to imprisonment. However, the Act failed to the extent that it did not specify that the orders must be reparative rather than punitive and this created confusion. Another Act was passed in the year 1982 which cleared these ambiguities.¹⁸ Community service still continues to be a very useful alternative to imprisonment, especially for those guilty of petty offences. It allows the criminals a chance to serve the society, which in turn may generate a sense of belongingness and thus help in the reformation process.

OPEN PRISONS

According to the First United Nations Congress, an open prison entails the treatment of the convicts without the existence of the precautions against the escape of the same, such as walls or bars or confinement in general. It inculcates a sense of self-discipline and responsibility in the offenders and hence in turn seeks to reform them.¹⁹

In India the All India Jail Manual Committee had recommended this system of open prisons. Also, in the case of *Dharambir v. State of Uttar Pradesh*,²⁰ the Supreme Court had encouraged the setting up of these open prison institutions as these had various advantages. They safeguarded the young offenders against several vices that they may have had to suffer, had they been confined to ordinary prisons.

The system of open camps has also been introduced by countries like Norway and Sweden.

OTHER ALTERNATIVES

Forfeiture of property, externment of offender, suspension or commutation of sentence, remission, reprove and respite are other alternatives that are available against imprisonment. Pardon may be granted by the President²¹ or the Governor²² and it completely exonerates an offender as if he had never committed the crime in the first place.

¹⁸ Christopher Bright, *Lesson 3: Programs, Community Service, Centre for Justice and Reconciliation*, available at: <http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-3-programs/community-service/#sthash.FjjBO9bL.dpbs>.

¹⁹ United Nations, Resolution and Recommendation adopted by First United Nations Congress on the Prevention of Crimes and Treatment of Offenders, (August 29, 1955), p.76.

²⁰ *Dharambir v. State of Uttar Pradesh*, (1979) 3 SCC 645.

²¹ INDIA CONST. art. 72.

²² *Id.* art. 161.

Further, the Juvenile Justice (Care and Protection of Children) Act was enacted in the year 2000. It provides for a child-friendly approach when it comes to administration of criminal justice in case of children in conflict with the law. It expressly states that such a juvenile cannot be sentenced to death or imprisonment for life.²³ It also contains provisions for a juvenile to be placed in Observation Homes²⁴ and Special Homes²⁵ and is meant to safeguard the juvenile from the harshness of the prison life and to expedite the process of reformation.

CRITICAL ANALYSIS

The major concerns faced by any criminal justice system at this point in time is the overcrowding of the prisons. In India, currently the prison system is working at 117% of its capacity²⁶ and in densely populated states like Uttar Pradesh and Sikkim, the occupancy rate is 176.5% and 157.3% respectively, which is very high, almost inhuman.²⁷ This problem is the root cause of other major problems in prisons like the lack of adequate sanitation facilities, supply of food, healthcare, living conditions, etc which in turn affect the mental state of the inmates. While some prisons are comparatively empty, a few others are flooded with prisoners, so much so that in one prison, the inmates are only allowed to nap for 3 to 4 hours daily to make up for the sleeping space.²⁸ There may even be other problems like, poor staffing and problems with maintenance of law and order situation in the prisons. But these problems can be easily solved if adequate prison reforms are introduced.

If we take the case of USA, the Massachusetts Department of Correction (herein “MA DOC”) had introduced several reforms in order to reduce the prison population. Thus, the Average Daily Custody and the Jurisdiction were both 4% less as compared to the figures in 2014.²⁹ The same could also be done in India if the available alternatives are used more often instead of merely confining the offender to prison.

In fact, there are several advantages associated with the use of alternatives, the first and the foremost being that the problems arising out of overcrowding will be solved. Prisons will only

²³ The Juvenile Justice (Care and Protection of Children) Act, 2000, No. 56, Acts of Parliament (2000), s. 16(1).

²⁴ The Juvenile Justice (Care and Protection of Children) Act, 2000, No. 56, Acts of Parliament (2000), s. 8.

²⁵ *Id.* s. 9.

²⁶ *Supra* note 1.

²⁷ In Re : Contagion of Covid 19 Virus In Prisons, Suo Motu Writ Petition (Civil) No.1/2020

https://main.sci.gov.in/supremecourt/2020/9761/9761_2020_1_1_21537_Order_16-Mar-2020.pdf.

²⁸ Asif Iqbal, *Problems with our Penal Institutions: An Assessment*, Manupatra, (Jan 20, 2004), available at: <http://elibrary.symbal.ac.in:2053/pers/Personalized.aspx>.

²⁹ Massachusetts Department of Correction, *Prison Population Trends 2015*, (March 2016), National Digital Library, available at: <https://ndl.iitkgp.ac.in/document/>.

function according to their capacities and the convict's right to live with dignity will be ensured.³⁰

Not only this but the young convicts, who are still at an impressionable state, will not be exposed to seasoned criminals that may also be present in the jails. Alternative approaches to punishment provide for a better environment to smoothen the reformation process so that the offenders can develop into healthy minded citizens that will contribute to the society.

The provision for open prisons and community service as an alternative to punishment will inculcate a sense of self-discipline and belongingness in the offender and the need to reform will arise within the offender out of his own volition i.e. the offender himself will realise the repercussions of his actions and he may develop a need to change those criminal instincts or to compensate for what has already been done because after all, it is only the psyche of the individual that will drive the need for change. No amount of external reinforcements can bring about this.

However, there are also various drawbacks associated with the use of these alternatives. One of these being the fact that the use of an alternative to imprisonment may let the offender roam about freely in the society and this may cause a law and order situation. The primary aim of imprisonment is isolation of the criminal from the society, so that society at large will be protected and the process of reformation of the criminal can take place in a safe and secure environment, cut off from the society i.e. inside a prison. But under the reformatory system, when the criminals, instead of being imprisoned are let off in the society, it may affect the safety of the society at large. Thus, very often these provisions of alternatives may even be misused by the offenders. Instead of punishment, the offenders are given a free pass. Also, the implementation of these alternatives may not always be feasible in monetary terms. The state may not always have the adequate resources to construct and monitor open prisons or reformation and correction institutes or observation home, etc. as prison administration is a state subject.³¹

The assumption that the reformatory system will inculcate a sense of guilt in the accused is very idealistic. It has to be noted that it is not very easy to transform a criminal mind. For instance, once the tiger becomes a man-eater, it is very difficult for it to go back after it has already tasted human flesh. Very often, even after years of imprisonment, there is absolutely

³⁰ Sunil Batra vs. Delhi Administration, 1980 AIR 1579, 1980 SCR (2) 557.

³¹ INDIA CONST. Schedule seven, List II.

no change in the offender and the offender commits another criminal act as soon as he is released. Changing this is not an easy task.

CONCLUSION AND SUGGESTIONS

In Fyodor Dostoevsky's words, '*the degree of civilization in a society can be judged by entering its prisons*'. Despite the numerous recommendations and committee reports, the conditions of Indian prisons continue to be dilapidated and dismal. Prisoners continue to live in inhuman conditions without the provision of even the basic necessities required for sustenance of life. Surrounded by such sub-human conditions, how can one expect the criminals to undergo important life transformation?

It is because of this reason that the need for use of alternatives to imprisonment is felt. India already has provisions for parole, probation, compensation, etc. but what India needs now is the setting up of open prisons and camps to reform convicts. If other countries can implement these, so can India.

Provisions for Community Service orders need to be included so that the criminal will not just be punished for what he has done, but will also be given a chance to give back to the society. Also, awareness camps need to be set up in and around the society so as to expedite the process of reformation.

Moreover, it is the criminal mind that needs to be changed. In medicine, no person will attempt to treat an individual without possessing the requisite knowledge that is necessary to understand the nature of the ailment or its causes. Similarly, our approach towards the criminals must also be lined in a similar fashion. Not every criminal can be reformed by imposing a single type of punishment i.e. imprisonment. Thus, it is not just the redressal of that one particular act that was committed, it is the treatment of the criminal mind that needs to be looked into.³² As Mahatma Gandhi once said, '*crime is the outcome of the diseased mind and jail must have an environment of hospital for treatment and care.*'

³² P.K. TARAPORE, PRISON REFORM IN INDIA, Oxford University Press (1936), National Digital Library, available at: <https://ndl.iitkgp.ac.in/document/>.

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