

TAKING ALTERNATIVE METHODS TO PUNISHMENT SERIOUSLY

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Abstract

Punishments are one of the prime factors of criminal justice system. It serves many purposes and act on a person in many ways. However, in many cases punishment aimed to create a change in the society is actually creating serious problems to the society. Lack of proper execution of punishments, occasions of human rights violations, overcrowding of prisons, debates on capital punishment etc points to the need for a change in methods of punishments under criminal justice. Many countries have already adopted innovative techniques in punishments forwarding the motion that it should be capable of making changes in offenders and reduce the social stigma about them. Also it helps in effectively managing the cost of carrying punishments and to create a sense of responsibility in the minds of offenders. It also reduces the level of punishments given for small offences and will help to reach the ends of justice in its true sense. This paper is an attempt of the researcher to find out the scope of alternative methods of punishments in criminal justice system in India. It will be looking upon the present condition in India with regards to alternative punishments considering various methods existing in other countries and how those can help in Indian situations.

Keywords: Community Service, Modern Punishments, Criminal Justice, Electronic Tagging, less incarceration.

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WHAT DO PUNISHMENTS SERVE?

The concept of punishment is as old as human history. It showed its existence from the time when laws were first codified. Initially it was on the principle of 'eye for an eye'¹ and considered it as just to allow the punishments in same manner that a crime is committed. Later thoughts were changed, how a better life can be made possible for mankind, by forming a 'social contract' for pursuing good of every person in society. However in this level also the concept of punishment maintained its existence². Thus the concept of punishment is always associated with an element of justice.

In criminal law, punishment of criminal for the offence committed makes it awe-inspiring and deterrent³. It has the a prime objective of imposing appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime⁴. Main purposes of such punishments are deterrence, incapacitation, rehabilitation, retribution, and restitution⁵. It is true that the punishment should serve justice but ultimately it must help to prevent such incidents of offences happening in society and for that the twin policy of correction and deterrence⁶ should be followed.

In modern day the concepts related to punishments are undergoing many changes. The scheme of modern social defence of punishments is more in favour of correcting the wrong doer and not taking punitive vengeance on an offender, whose acts in many cases may be a mere manifestation of a psycho-social maladjustment, for which society itself may be responsible⁷. There is still criticism of punishments in recent times as some opines that the modern penology has abandoned the rehabilitation element⁸ and punishments are now acknowledged to be an inherently retributive practice⁹. These practices are widely criticised

¹ Ushistory.org. (n.d.). *Hammurabi's Code: An Eye for an Eye* [online] Available at: <http://www.ushistory.org/civ/4c.asp> [Accessed 12 Mar. 2017].

² Friend, C. (n.d.). *Social Contract Theory* | *Internet Encyclopedia of Philosophy*. [online] Available at: <http://www.iep.utm.edu/soc-cont/> [Accessed 12 Mar. 2017].

³ Sagar V R K K, *Sentencing Discretion and IPC*, 3 SCC Journal 45 (1994).

⁴ Alister Anthony Pareira V State of Maharashtra (2012) 2 SCC 648

⁵ Criminal Law, University of Minnesota Libraries Publishing edition, 2015, at p.17

⁶ *Supra* note 5

⁷ Edited by Thomas, K. and Rashid, M. (2014). Ratanlal & Dhirajlal's The Indian penal code. 34th ed. Gurgaon, Haryana: LexisNexis, p.86.

⁸ Miller v. Alabama, The Oyez Project at IIT Chicago-Kent College of Law (http://www.oyez.org/cases/2010-2019/2011/2011_10_9646) (Accessed 3 Mar 2017).

⁹ Hugo Adam Bedau & Erin Kelly, *Punishment*, *The Stanford Encyclopedia of Philosophy* (Spring 2010), <http://plato.stanford.edu/archives/spr2010/entries/punishment/> (last visited Mar 11, 2017).

by various scholars¹⁰. Same was observed by KRISHNA IYER, J., “as the punitive strategy of our penal code does not sufficiently reflects the modern trends of correctional treatment and personalised sentencing”¹¹. Thus the concept of having only retribution is getting weaker day by day and the view that punishments should make the convict realise that he has committed an act that is not only harmful to the society but also to his own future as an individual and part of society¹².

The reformatory and incapacitation element related to punishments are getting popular throughout the world today. Punishments not only have an element of deterrence now but also play a role in reforming an offender back to a law abiding citizen. This is a part of the therapeutic approach, which tries to treat the criminal tendencies as a result of diseased psychology¹³. Even though incapacitation in its classical sense results in turning offenders to animals¹⁴, with the use of modern technological developments the incapacitation will only restricts the activities of a person, not his basic liberties. On the basis of all this discussions, in the opinion of researcher, it is high time for India to think whether some additions should be made to Section 53 of Indian Penal Code 1860.

WHAT IS ALTERNATIVE PUNISHMENT?

The new libertarian views and human rights movements resulted in reformation in methods of punishments in many parts of world. The question of death penalty is a highly debatable issue in modern day also and the researcher does not wish to enter in to the same. The discussion happening here will be mostly related to those punishments that are generally considered as an alternative to imprisonment.

In many societies prisons were actually a new concept and are counterproductive in rehabilitation of people charged with minor offences¹⁵. There are more than 10.35 million

¹⁰ See Mike C Marteni, *Criminal Punishment and Pursuit of Justice*, 2 Br. J. Am. Leg. Studies (2013)

¹¹ Shivaji V State of Maharashtra AIR 1973 SC 2622

¹² *Supra* note 8 at p.87

¹³ *Ibid*

¹⁴ Piers Hernu, *Norway's Controversial 'Cushy Prison' Experiment – Could It Catch On in the UK?*, DAILY MAIL, July 25, 2011, available at <http://www.dailymail.co.uk/home/moslive/article-1384308/Norways-controversial-cushyprison-experiment--catch-UK.html> (last visited Mar 12, 2017).

¹⁵ Dirk van Zyl Smit, *Handbook of basic principles and promising practices on Alternatives to Imprisonment*, 2007, United Nations Office On Drugs And Crime

prisoners in the world at present¹⁶ and the number is growing day by day. Many prisons witness overcrowding resulting in lowering standards set by United Nations and other organisations. Human rights courts and tribunals consider the loss of liberties through imprisonment as degradation of human dignity¹⁷. Criminal justice professionals in many countries are advocating the reservation of imprisonment only for the most dangerous offenders and to consider alternative punishments for first time and non-violent offenders.

Any punishment other than spending time in jail or prison can be considered as alternative methods of incarceration¹⁸. These does not make the crime a less serious one but only have the objective of reducing the number of prisoners and considering the imprisonment as last resort¹⁹. It helps in reducing the prison costs and promotes the rehabilitation of offenders who might have done the offence in a sudden boil of blood.

WHY ALTERNATIVE PUNISHMENTS?

Modern trend of using alternative methods in punishments are based on humanitarian concepts and cost management. Some of the thoughts that promote such punishments are:

- 1) Courts have more sentencing option: The traditional form of punishment does not consider what makes a person to do such offences and how to rehabilitate such persons from a condition that will lead the person to commit the same again. Each offender is unique in nature. The restriction on committing an offence should be same for everyone but the punishment for each offender should be in accordance with the circumstances²⁰. If courts are given with options other than the usual ones, it can do more cost effective sentencing that will promote rehabilitation of offender and protection to public²¹.
- 2) Saving tax payer's money: One of the main criticisms of imprisonment is that it is creating a huge economic burden. This is creating a situation where a person is paying for the maintenance of an offender who committed an offence against him. In some

¹⁶ R. Walmsley, *World Prison Population List*, Institute of Criminal Policy Research, Birkbeck University of London, 2016

¹⁷ *Supra* note 17

¹⁸ FAMM, *Alternatives to Incarceration in a Nutshell* Available at <http://famm.org/wp-content/uploads/2013/08/FS-Alternatives-in-a-Nutshell-7.8.pdf>

¹⁹ See Matti Joutsen and Ugljesa Zvekic, "Noncustodial sanctions: Comparative Overview" in Ugljesa Zvekic (ed.), *Alternatives to Imprisonment in Comparative Perspective*, UNICRI/Nelson-Hall, Chicago, 1994, pp. 1-44.

²⁰ *Supra* note 11

²¹ *Supra* note 21

countries prison management is costing more than education²². Alternative punishment methods are cheaper in nature and reduces economic burden.

- 3) Prevents prison overcrowding: Overcrowding in prisons is creating a huge crisis throughout the world. The imprisonment for every stage of criminal procedure is also contributing to this. This results in violence in prison and creates dangerous environment for prison staff²³. Alternative methods help in reduction of these conditions. There are also suggestions by organisations in relation to this²⁴.
- 4) Strengthening communities: An important problem faced by prisoners is the isolation by community when they return to it. Also such punishments separate offenders and families which will negatively affect both the sides. Alternative methods can help in solving problems and rehabilitating the offenders by making them do productive work in community.
- 5) Reduction of crime rates: Alternative methods of punishments helps in reduction of crime rate to an extent. Studies shows that 40% released persons are coming back to prison with in three years²⁵. Alternative methods concerned to offences related to narcotics are helping the offenders to not to do it again.
- 6) Public support: In many countries public support for providing alternative punishments to non-serious and non-violent offenders is increasing and imprisonment should be done only when these alternatives fail²⁶.

WHAT ARE CONSIDERED AS ALTERNATIVE METHODS NOW?

Around the globe there are various methods that are used as alternative to imprisonment. United Nations recognised the importance of alternative punishments and came with certain

²² Public National Security Plan, National Secretary of Public Security, Ministry of Justice, Brazil, 2002 (English version, Instituto Cidadania) Available at <http://www.mj.gov.br/senasp/biblioteca/documentos/PUBLIC%20SECURITY%20NATIONAL%20PLAN%20ingl%C3%AAs.pdf>

²³ Penal Reform International. (n.d.). Prison overcrowding - Penal Reform International. [online] Available at: <https://www.penalreform.org/priorities/prison-conditions/key-facts/overcrowding/> [Accessed 20 Mar. 2017].

²⁴ Penal Reform International. (2012). 10-Point Plan to Address Prison Overcrowding - Penal Reform International. [online] Available at: <https://www.penalreform.org/resource/10point-plan-address-prison-overcrowding/> [Accessed 20 Mar. 2017].

²⁵ Pew Centre On The States, State Of Recidivism: The Revolving Door Of America's Prisons, Exhibit 1, Available At http://www.Pewcenteronthestates.Org/Uploadedfiles/Pew_State_Of_Recidivism.Pdf.

²⁶ Nat'l Council On Crime & Delinquency, Attitudes Of Us Voters Toward Nonserious Offenders And Alternatives To Incarceration 1 (June 2009), Available At http://www.Nccdcrc.Org/Nccd/Pubs/2009_Focus_Nonserious_Offenders.Pdf.

rules that provide alternatives in every phase of proceedings²⁷. Some of the most widely considered methods are:

1. Community Service: One of the oldest and most accepted forms of alternative punishment is community service. It is a way of punishment mostly recognised as a part of probation. Here offenders will be asked to do unpaid work in civic and non-profit manner. This was originated from the idea of rehabilitation of offenders and existing punishments not serving its purpose. Community service gives benefit to the offender, court, community and victim simultaneously²⁸. Former Italian Prime Minister Silvio Berlusconi, Actress Paris Hilton are the known faces who had undergone through this.
2. Probation/Community Correction: This method is executed by reducing the rights that a person can enjoy when living in society. Various conditions will be attached to it and a probation officer will be appointed to whom the offender have to report continuously. This programme is concentrating mainly on non-violent offenders²⁹. It also includes Intensive super vision programmes and Day reporting. This can be helpful in cases related to sex offences.
3. Electronic Monitoring: It is a method executed with the help of modern technology; a device will be attached to the offender's body creating a continuous watch. It can be active or passive in nature³⁰. Only offenders who are violating the conditions are imprisoned³¹.
4. House Arrest/Home Confinement: Offenders are required to stay in their house and certain pre-approved areas³². There will a supervising officer appointed for effective

²⁷ United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), 1990 Available At <http://www.ohchr.org/Documents/ProfessionalInterest/tokyorules.pdf>

²⁸ Community Service, Federal Corrections and Supervision Division Administrative Office of the U.S. Courts. February 2001

²⁹ Marcus Neito, Community Correction Punishments: An Alternative To Incarceration for Nonviolent Offenders, California State Library (1996) Available at <http://library.ca.gov/CRB/96/08/index.html>

³⁰ *Ibid*

³¹ *Supra* note 11

³² *Ibid*

execution of this. It can be in three mode, Curfew, Home detention and Home Incarceration³³.

5. Community Residential Centres: It is a round the clock hour supervision for non-violent offenders which works by surrendering the paychecks and earnings directly to authorities to pay the restitution. The goal of this method is to integrate the offender back to local environment and provide skills so that further committing of offences can be avoided³⁴. Economic offences are mostly punished through this method.
6. Residential Treatment Centres/ Drug Courts: These methods are for the rehabilitation of offenders who are involved in offences related to alcoholic abuse and narcotic substances. It provides specialised services and trainings for such offenders. Drug courts are a setup dealing with issues related to drug abuse which differ in its working from place to place³⁵.
7. Boot Camps: Also known as a shock incarceration programme is targeted on changing the inmate's behaviour through training in model of military boot camps. Specialized training for developing self-discipline and proper education is also given here so that after the term the person can lead a normal life in society. Offenders who are completing this programme earlier can find a job and be released earlier on probation³⁶.
8. Public Shaming: This is useful in punishing petty offences which cannot be justified if provided with usual punishments. Court will order the offender to do some act that creates public humiliation for a short period of time. It has been used in United States many times³⁷.

HOW ALTERNATIVE METHODS EXISTS IN DIFFERENT PARTS OF WORLD?

Various thought are arising from different parts of the world in relation to how to reduce the number of prisoners and how more offences can be removed from grass root level. Decriminalisation of certain offences is considered as a first step along with providing

³³ *Supra* note 32

³⁴ *Ibid*

³⁵ *Supra* note 21

³⁶ *Ibid*

³⁷ *See* United States V Gementera , 2004 Available at <http://caselaw.findlaw.com/us-9th-circuit/1105137.html>

adequate punishments depending on the nature of offences. Not all socially undesirable acts should be classified as crime³⁸. The intensity of offences should be viewed with existing social level and should be periodically re considered. Australia, by decriminalised public drinking, has benefited a lot from procedures and was able to make changes in level of offence³⁹.

There are also voices to reduce the detentions in each stages of trial. In case of punishments many countries have already started following the alternative methods suggested by United Nations⁴⁰. Among those community services have wider acceptance from the governmental level itself. This is given as a choice to the offender in most of the cases.

In Unites States community service is considered as a prominent way of punishment and is given under law⁴¹. It serves the public protection and rehabilitation simultaneously⁴². There are conditions also attached with the same which will help the probation officer to carry out the terms easily and make changes in life of the offender. This was helpful in cases of tax fraud⁴³, bank robbery⁴⁴, escaping from custody⁴⁵, possession of fire arms and giving false information⁴⁶ etc. There are also certain guidelines provided for the same so that problems related to execution of the same can be avoided⁴⁷. All methods that are mentioned above are used by courts in United States⁴⁸.

In United Kingdom the concept of community service was existing from 1972⁴⁹ onwards. This was as a result of suggestions by Wootton Committee. There are also guidelines for determining whether a person can be eligible for community service or not⁵⁰. It also has a greater emphasis on rehabilitation of offenders and is having a generic nature⁵¹. Community

³⁸ *Supra* note 17

³⁹ R. Sarre, *An Overview of the Theory of Diversion: Notes for Correctional Policy Makers*, paper presented at the Best Practice Interventions in Corrections for Indigenous People Conference convened by the Australian Institute of Criminology Adelaide, 13-15 October 1999.

⁴⁰ *Supra* note 30

⁴¹ 18 U.S.C § 3563(b)(12)

⁴² 18 U.S.C § 3553(a)(2)(C)and(D)

⁴³ U.S. V Adler 52, F.3d 20 (C.A.2 (N.Y), 1995)

⁴⁴ United States v. Andrews, 353 F.3d 1154 (10th Cir. 2003)

⁴⁵ United States v. Hillstrom, 988 F.2d 448 (3d Cir. 1993)

⁴⁶ United States v. Jones, 158 F.3d 492 (10th Cir. 1998)

⁴⁷ Chapter 3: Community Service (Probation and Supervised Release Conditions), US Courts

⁴⁸ *Supra* note 21

⁴⁹ Section 15, Criminal Justice Act 1972

⁵⁰ Community Service Order (1975), Home Office Research Studies, London: Her Majesty's Stationary Office

⁵¹ Section 177, Criminal Justice Act 2003

services are usually given when offences that does not have the seriousness of issuing a warrant is committed⁵². This is given as a choice for the offenders in certain cases⁵³. Similarly Electronic tagging⁵⁴ was also having wide recognition in United Kingdom. Community Service is given in cases of sexual offences⁵⁵, shop lifting⁵⁶, conspiracy, fraud⁵⁷ etc.

In Australia also community service is widely used as an alternative to imprisonment⁵⁸. This is considered as a corrective method in itself and not as an alternative option of imprisonment. Electronic monitoring is also widely used there⁵⁹.

In Panama electronic surveillance is making great advancement in criminal justice system⁶⁰. In South Africa courts are giving great importance to community sentences after the discussion in 2008⁶¹. In Iran also punishments including restricting the rights, probation, community service etc are replacing almost every type of imprisonment sentences⁶². All of these points to the modern trend of avoiding imprisonment as much as possible.

ALTERNATIVE METHODS AND INDIA

It is true that the nature of offences is different from region to region. As KRISHNA IYER, J., observed *“What is a sex crime in India may be sweet-heart virtue in Scandinavia. What is an offence against property in a capitalist society may be a lawful way of life in a socialist society. What is permissible in an affluent economy may be a pernicious vice in an indigent community. Thus, criminologists must have their feet all the time on terra firma⁶³”*, will be difficult to implement the alternative methods in a way as in other countries. Since the

⁵² Section 148(1), Criminal Justice Act 2003

⁵³ Community Sentences Available at Community Sentences-Gov.UK

⁵⁴ Electronic Tagging Available at Electronic Tagging - Gov.UK

⁵⁵ Regina v Adam Steven Hackett [2017] EWCA Crim 250

⁵⁶ Regina v Jackie Chamberlin [2017] EWCA Crim 39

⁵⁷ Regina v Michael Tatenda Samuriwo [2016] EWCA Crim 1948

⁵⁸ Community Service Orders, Available at https://www.judcom.nsw.gov.au/publications/benchbks/sentencing/community_service_orders.html

⁵⁹ Matt Black and Russell G Smith, Electronic monitoring in the criminal justice system Australian Institute of Criminology, May 2003

⁶⁰ Available at https://www.unodc.org/documents/ropan/TechnicalConsultativeOpinions2013/Opinion_2/Advisory_Opinion_02-2013_ENGLISH_FINAL.pdf

⁶¹ S v. Shilubane 2008 (1) SACR 295 (T)

⁶² Zahra Ahangari, Alternative Punishments Of Imprisonment In Iran Indian J.Sci.Res. 7 (1): 1089-1096, 2014

⁶³ Krishna Iyer, V. (1980). Perspectives in criminology, law, and social change. New Delhi: Allied.

general trends suggests for the better development of offenders alternative methods that reduces the prison management problems can be followed in our country also.

Our Apex court has already initiated discussing the concept of reformation as a dominant objective of the punishments and during incarceration every effort should be made to recreate a good man out of convicted prisoner⁶⁴ so that he will not repeat it in future. Death penalty and other punishments should be only considered where the chance of reformation is not there and there should be always an attempt to remove the “tamas” from the mind of offenders through community service, yoga ⁶⁵etc. These showed the beginning of consideration given to alternative methods in India.

Probation of Offenders Act 1958 was a step which pointed to idea of liberal penology in India. It brings in scope for alternative option for offences such as theft, misappropriation, cheating etc⁶⁶. The concept of community service in India to an extent can be made from this act⁶⁷. Another great step was in case of minor offenders; India also follows the global trend of alternative punishment and brings in scope of community service⁶⁸. Also there is scope for rehabilitation in case of Narcotics cases as well⁶⁹.

Apex court have discussed about the adoption of community service in cases of not providing education for children⁷⁰, attempt to suicide⁷¹, cases related to narcotics⁷², as a restorative method in dealing murder cases⁷³ etc. It has already in some instances given alternatives to punishment for contempt of court⁷⁴, culpable homicide as a result of drunken-driving⁷⁵ etc. High courts have given community service for offences of attempt to murder⁷⁶, trespass and extortion⁷⁷, outraging the modesty of women⁷⁸, conspiracy and causing hurt⁷⁹, causing hurt to

⁶⁴ Mohammed Giasuddin v. State of Andhra Pradesh (1997) 3 SCC 287

⁶⁵ Bachan Singh v. State of Punjab AIR 1980 SC 898

⁶⁶ Section 3 Probation of Offenders Act, 1958

⁶⁷ Section 4 Probation of Offenders Act, 1958

⁶⁸ Section 18(1)(c) The Juvenile Justice (Care And Protection Of Children) Act, 2015

⁶⁹ Sections 64 and 64A, The Narcotic Drugs and Psychotropic Substances Act, 1985

⁷⁰ Ashok Kumar Thakur v. Union of India (2008)6SCC1

⁷¹ P.Rathinam/Nagabhusan Patnaik v. Union of India & Others (1994) 3 SCC394

⁷² Nirbhay Singh v. State of UP 2008(3)ACR3148

⁷³ Babu Singh v. State of UP (1978) 1 SCC 579

⁷⁴ R.K.Anand v. Registrar (2013) 1 SCC 218

⁷⁵ State Tr. P.S. Lodhi Colony New Delhi V Sanjeev Nanda (2012) 8 SCC 450

⁷⁶ Francis v. State of Maharashtra, 2014 SCC OnLine Bom 2777

⁷⁷ Parvez Jilani Shaikh v. State of Maharashtra 2015 SCC OnLine Bom 7171

⁷⁸ Obaid Muzafar Khan v. State of Maharashtra 2015 SCC OnLine Bom 7114

⁷⁹ Rohit Mahendra Sonkamble v. State of Maharashtra 2015 SCC OnLine Bom 7178

public servant⁸⁰, violation of municipal laws⁸¹ etc. All there were based on the idea that a reformatory approach to punishment should be the objective of criminal law, that promote rehabilitation without offending the communal conscience and secure social justice⁸². The new trend is based on this idea that punishments of imprisonment is not serving the required purpose of criminal justice system and is harming the offender in many ways instead of helping him to correct. Thus the global trend of alternate options is getting more recognition in India also.

Time has ripened to think about these methods more seriously by the law makers. Courts have to think seriously about the application of such methods as they serve the justice more meaning fully. Also the advancement in technology should be utilised in carrying out criminal justice. This can be helpful in dealing with the issues related to habitual offenders. The residential centres will help in repaying the economic offence and simultaneously helps in creating a better human through training and discipline. Therefore in researcher's opinion our law makers should consider the implementation of Tokyo rules and take alternative methods to punishments seriously.

⁸⁰ Anil Kumar v. State (Govt. of NCT of Delhi), 2016 SCC OnLine Del 3255

⁸¹ Abhishek Rai v. State, 2012 SCC OnLine HP 7585

⁸² Narotam Singh v. State of Punjab AIR 1978 SC 1542