# "PUNISHMENT AS A MEANS OF REFORM AND REHABILITATION: A CRITICAL APPRAISAL OF POLICY & PRACTICE."

## DISSERTATION

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I wish him/her success in life.

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(**Gaurav Singh**)

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# LIST OF ABBREVIATIONS

| | | |
|---|---|---|
| A.I.R. | : | All India Reporter |
| SCC | : | Supreme court cases |
| H.C.C | : | High court cases |
| HC. | : | High court |
| SC | : | Supreme court |
| CAPT. | : | Captain |
| e.g. | : | Example |
| I.P.C. | : | Indian Penal Code |
| Prof. | : | Professor |
| S. | : | Section |
| U.S.A. | : | United States of America |
| V. | : | Versus |
| i.e, | : | That is |
| ART | : | Article |

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# CHAPTER-1

## INTRODUCTION

Ever since the time when men started living in the form of a social animal there had been instances of crimes in one form or other. Human society always walked on a collective endeavor of securing by means of coercion. By coercion we mean a state where a recognized authority is compelled to punish individual who contravene the rules and regulation of the common wealth. The most important factor needed to maintain this social coercion is to punish the wrongdoers. Law has been assigned this important responsibility and acts as an important pillar of the state. Justice is possible only by punishing the wrong doer. Crime had always been punished by the authority who derived the power from the eternal authority of Dharma or law. Punishment is the age old and time tested method of controlling crime. In view of rapidly changing society with ever increasing crime and more and more use of punishment it seems that punishment has become the ultimate aim of criminal justice. Salmond was compelled by these situations[1] to write "the purpose of criminal justice is punishment". The nature of the crime, criminal antecedents of the offender, gravity of the offence, mens rea involved and some more other factors play a key role in the kind and quantum of punishment the penal system i.e. being followed today is a result of long testing procedure which can be studied under following headings:

### 1.2 History of the Penal System In Indian Society

The Administration of the civil and criminal justice was done on the basis of principles of Dharma. The ancient documents of History like the Vedas, the Shastras, the Mythological epic of Ramayana and Mahabharata along with Geeta are the most elaborate document for laws and principles of life, all of them state the basic laws related to the civil and criminal matters such as bailment, sales, debt, breach of contract, disputes between partners, assault, defamation, theft, robbery, adultery, murder etc.

The Hindu Law had always been bias in delivering justice as that was mostly differentiated on the basis of caste, colour & creed.

[1] Salmond on Jurisprudence, 12th edition 2006.p.103

Later in the British East India Company rein a code was compiled for the Hindus by the Pundits of Banaras at the instance of Warren Hastings when he was the Governor General of India. This code was called the "Gentoo Code[2]. In this code death penalty was given for serious offence such as murder, robbery etc.

**1.2 The concept of Punishment**

Punishment means a purposing infliction of pain, loss, suffering deprivation or any other form of hardship inflicted on the offender. Such hardship is inflicted because the person getting the punishment has done something which the law disapproves.

Grotius defined punishment as "the infliction of an ill suffered for an ill done[3].

Punishment is an age old time tested means to prevent, deter, and avenge a crime as explained by the philosophy of punishment by Frank R. Prassel[4].

Punishment has also been explained as means of expressing social disapprovement towards the wrong done. The main function of punishment is to create a psychological coercion in the mind of its citizen.

The chambers Dictionary defines punishment as a deed or manner of punishing, a fine imposed for a wrongdoing in such a way that the weakening responses which are followed by a noxious stimulus are defeated or by taking away one of the pleasant one and severely handling the accused.

The Black's law Dictionary define punishment as "A sanction such as fine, penalty, confinement or loss of property, right or privileges given to any person who has violated any law of the land. Punishment in all its form is a loss of rights and advantages consequent on a breach of law, this breach produces nothing but only bad social effects

G.W Paton explained the philosophy of punishment that subjective theory of liability should be adopted if the punishment is established on an moral aspiration to make men better and penalty

[2] P.S Atchuthan Pillai, "criminal law" 6th edition 1983, NM Tripathi Pvt. Ltd. Bombay p.22
[3] Walter Moberley ethics of punishment, 1968
[4] Criminal Law, Justice, and society, Goodyear publishing company, 1979

may be imposed where there no ethical remorse in order to protect the society from certain unlawful acts.

HLA Hart with Mr. Beam and professor Flew have given 5 essential elements of punishment as only the punishment shall be considered as a means of social control.

(a) It must be for an offence that is forbidden by the law of land.
(b) It must result is pain and other unpleasant consequences in order to deter crime and criminals.
(c) It must be administered intentionally by the authorities legally constituted for it.

(d) It must be actual offender who gets the punishment for the offence committed by him.

(e) It's essential to be deliberately administered by human beings other than the offender and not by machines like robots.

**1.3 Theories of Punishment**

One of the most important function of the state through its machinery of judicial administration is to maintain the law and order in the society. In furtherance of this function punishing has been recognized as an important function of all civilized states for centuries, but the approach of the penologists towards the punishment has gone through a radical change with the changing patterns of society.

It is a true fact that punishment is proportional to the severity and effect of crime, but at the same time the very fact can't be denied that the quantum and the nature of punishment shall vary depending upon the nature of the crime and its effect on the society, the history of the criminal, his previous conduct & character and the feasibility of his returning back to the main stream of the society.

The US federal court very well observed in one of its decision that punishment serves several purposes: rehabilitative, deterrent and preventive[5].

The honorable Supreme Court of India in Alluddin Main v. State of Bihar[6] enumerated various purpose for which the verdicts of sternness may be imposed.

[5] **United states v.Brown,1989 Cr.L.J 1446**

(1) To reflect the gravity of the crime.

(2) To uphold the effectiveness and esteem of the legal system prevalent in the country.

(3) To manage enough deterrence for the criminals to dare to do crime and to safeguard the society from any such crimes to be done by anyone else is the society.

**This it can be said that punishment serves as a fivefold purpose.**

(a) Punitive
(b) Deterrent
(c) Protective
(d)
(e) Rehabilitative
(f) Expiatory

The theories of punishment have undergone significant changes and modifications since the early times from barbarous, retributive, punitive, deterrent, preventive, curative and finally reformative theories of punishment.

Today the theories of punishment can be categorized under five heads.

### 1.3.1 Reformative / Rehabilitative theory of Punishment

Hate crime and not the criminal is the guideline for all the jurists. According to the thinkers who support reformative theory, crime is disease and it also needs to be properly diagnosed and then treated scientifically. The meaning of reformative aspect is to enable the person concerned to relent and repent for his action and make himself as useful social being capable of returning back to the society after reformatting.

According to reformative theory the object of punishment should be to reform the criminal through the methods of individualization. It is based on the humanistic principle that even if a criminal commits a crime still he does not cease to be a human being.

[6] AIR 1989 SC 1456

### 1.3.2 Deterrent Theory of Punishment

According to the thinkers who propounded the Deterrent theory of punishment the main purpose of criminal justice system in giving punishment is to deter people from committing a crime, according to them the punishment should be so strict that criminals find committing a crime as a bad bargain for the offender.

The black's dictionary defines deterrent punishment as a penalty envisioned to deter the law breaker and others as well from committing similar crimes and to give an exemplary punishment to the criminal so that no one else can ever think of committing such crimes in future without being reminded of the punishment.

Nigel Walker in his legendary work "Crime and punishment is Britain" discussed 2 types of deterrent punishments

1. Elimination-It eliminates permanently or temporarily from the community. The examples of elimination deterrence is death sentence, banishment or deportation etc.

2. Prophylaxis – It seems to be more sophisticated form of elimination providing for detention under more humane conditions which are designed with a view of security rather than deterrence of reform the offender.

One very prominently stated reason for imposing a punishment on the offender has been to deter the criminal from violating the criminal laws.[7]The pain gained by the punishment is always more than the gain made by the crime, this calculation always terrorizes the offender by the punishment which is always exemplary.

The deterrent theory of punishment proves the futility of crime and to prove that crime committed is ultimate loss and therefore crimes is not a good bargain. According to this theory punishment must have a substantial element of deterrence.

The deterrent effect of a punishment is not only for the criminal or offender only but also others who could even once think of committing any crime should be reminded by the consequence of this unlawful act that they are about to commit.

[7] Frank R. Prassel, "Criminal Law, Justice and Society, Goodyear Publishing Co. 1979

In early times the physical exhibition of punishment by performing executions in public always had a deterrent effect.

The deterrent theory strives for creating fear in the thoughts of the common man of every society by providing passable & exemplary punishment to the offender which indirectly deters the crime is the society.

Deterrence is universally accepted as the most efficient strategies by nearly all the penal system but to the contrary it consistently fails in cases of hard core criminals as the sternness of the penalty hardly has any influence on them. But since ancient times exemplary punishments have always acted as deterrence for others.

### 1.3.3 Retributive Theory of Punishment

Retributive Theory of Punishment is the oldest theory. This theory is solely based on vengeance. To explain the Retributive Theory of Punishment Sir James Stephens quoted "the criminal law stands to the passion of revenge in much the same relation as marriage is to the sexual appetite[8]. This philosophy is based on the principle "An eye for an eye, hand for hand and life for life". According to this theory the criminal who has done some offence must be punished by execution of same offence against him in order to make him go through the same suffering which the victim suffered.

The guilt of the offender could be justified only by his equal sufferings as the victim. Although this theory had to face many criticism. The retributive theory treated the punishment as an end in itself while the deterrent theory considered punishment as means of allowing social security. The supporters of retributive theory doesn't treat punishment as an instrument for securing public welfare but it clearly states punishment as justice to the victim by inflicting equal pain to the offender also and it is solely based on revenge or vengeance.

Hence it can be stated that retributive theory suggests that punishment is an expression of the society's disapprobation for offender's criminal act.

Sir Walter Moberly has commented in his work 'The ethics of punishment', that the drama of wrong doing and its retribution has indeed been an unending fascination of human mind.

[8] Stephen, General View of the Criminal Law of England, 1863

The origin of retributive theory seems to be that from the animal instinct of individual or groups which is to retaliate when hurt which is generally not favored by any society or law also as it is neither wise nor desirable in the modern times.

### 1.3.4 Preventive theory of Punishment

The main aim of preventive theory is to prevent a repetition of the offence by the offender by punishment such as imprisonment, death or exile etc.

The preventive theory of punishment is based on the preposition "not to avenge crime but to prevent it". According to this theory the need to punish the offender is simply to secure the society from any future crime in the society to safeguard the society antisocial acts which endanger social order in general or person or property of its members.

Fitche explained the preventive theory in its complete totality by stating that the end of all penal laws is that they are not to be applied. The main aim of penal law is to make the threat generally known rather than putting it to execute occasionally and hence these philosophy of preventive theory makes it more realistic and humane. The institution of Prison gained momentum keeping in mind the preventive views regarding crime and criminals. According to preventive theory prisons and Prisonisation of criminal is the best way to prevent them from commuting the crime again. It acts as an effective deterrent and effective preventive measure.

It is also known as theory of disablement as it aims at preventing the crime by disabling the criminal to either repeat the same crime of to indulge in any other criminal activity.[9]

Preventive theory is effective for discouraging anti-social conduct and better alternative to deterrence or retribution which now stands rejected as a method of dealing with crime and criminal.

### 1.3.5 Expiatory Theory of Punishment

It is considered by many scholars that the expiatory theory has a link with the retributive theory or they have views to the extent of saying that expiatory is part of retributive. According to the expiatory theory punishment should be given in order to adjust the sufferings to the sin. It is

[9] Mohd. Giasuddin v. State of AP (1977) 3 SCC 287

observed that the offender pays the debt by the sufferings demanded by the justice and owed to the authority inflicting it and so becomes reconciled once more with that authority. The punishment should always be in proportion to the quantum of the wrong and once the offender has undergone the process of punishment he has purified himself from the sin that he had gained and now he is once again accepted back to the society.

It shall not be easy to justify expiatory than retribution it seems reasonable to compel the wrong doer to compensate or make restitution to his victim but is not morally right for every men to enforce such type of obstruct payment. Expiatory theory of punishment is practically not feasible in a modern society anymore.

All the theories discussed above have merits in whatever manner it states the basic need of the society is reductive of occurrence of crime in the society and that can be achieved by deterring potential offender or by preventing actual law breakers from commuting crimes in future or by reforming a criminal.

Thus the aim of each of the given theories is good of society. But a single minded pursuance of any of these is not advisable.

**1.6 Forms of Punishment**

The principal object of punishment is prevention of offences. Punishment should be correction oriented and should be for shortest duration as far as possible. The investigator, prosecutors, judges and the jail authorities all should have a humane and sympathetic approach towards the offender. Rehabilitation of the criminals should be the motto of the prison authorities rather the retributive.

**OBJECTIVE**

The most important objective of the concept of punishment is prevention of crime. The punishment has a dual effect i.e. to preclude the person who has done a crime from permeating an act or omission and to prevent other members of the community from committing similar crimes[10].

[10] Halsbury's Law of England 3rd edition Vol. 10 p.487

The objects of punishment were stated by the **Supreme Court in State of Madhya Pradesh v. Saleem.**[11] The soul object of punishment should be to protect the society and to deter the criminal in achieving the avowed object of law by imposing appropriate sentence. The honorable court further emphasized that the biggest expectation from the courts is that they would operate the system of sentencing in such a manner that it reflects the conscience of the society and the sentencing process has to be stern where it is needed by the circumstances. While considering the adequacy of the sentence which shall not be too severe nor too lenient therefore the court has to keep in mind the motive and magnitude of the offence the circumstances is which the offence was committed and the age of the offender and his character too plays an important role in finally giving the statement of punishment.[12]

**HYPOTHESIS**

The above perspectives have provided contours and content to the theme of the present research work. This present work has been inspired by the need for a systematic analysis of government policy on jail reforms, problem of prisoners, a comparative analysis of prison system and prison reforms in other countries, conditions of prisoners in Karnataka and Constitutional and Judicially recognized rights of prisoners.

In this regard the following Hypothesis have been formulated:-

- The conditions inside the prison and prisoners in India are bad.
- The recommendations of many commissions and committees of prison reforms are not properly implemented and there is an urgent need for implementation of laws and recommendations of all commissions and committees on prison reforms for humanization of prisons in India.
- The reforms in prison system brought by different nations needs to be adopted for prison reforms in India.
- The purpose of imprisonment is not deterrent, retributive or custodial butcurative, correctional, reformative and rehabilitative.
- The conditions of prisoners are not good.

[11] (2005)SCC822
[12] **Modi ram v. State of M.P,(1972)2 SCC 630**

## METHODOLOGY

The research is conducted by adopting both the principles of doctrinal and non-doctrinal study methods. The research is analytical and descriptive in nature. The data for the study have been gathered through different techniques such as : The documents analysed, include the reports on various committees in jail reforms, the documents officially published by the prison department, statutes on Prison and Prison Administration, Various Judicial Decisions, Jail Manuals, News papers, web-published Articles, e-Journals, Institutional Websites etc… The empirical data has been collected through discussions with Competent Authorities of the jail and through questionnaire administered to the Authorities and Inmates in the Jail.

## SCOPE OF THE STUDY

The scope of the study is limited to the study of law and policy relating to prisons and to know evolution of law at the National and International level with regard to the reformation of prison system. This study further intends to know the significant role played by the judiciary in bringing prison reforms in India. The drawbacks and deficiencies in the criminal justice system, which lead to miscarriage of justice and also to know the status of prison reforms in Uttar Pradesh and to suggest some remedial measures to overcome the present problems and for humanization of prisons in India.

## RESEARCH PROBLEM

The condition of majority of prisons in India is bad and many offenders are languishing in jails without trial for several years. Further, the prisoners are suffering in jails due to non availability of proper health facility, inhuman torture of prisoners, solitary confinement, handcuffing and fetters on under trials, overcrowding of prisons, criminality in prisons and non availability of adequate separate prisons for women etc… The past decade has witnessed an increasing consciousness about the desirability of prison reforms. It is now being recognized that a reformative philosophy and a rehabilitative strategy must be a part of prison justice. In spite of adoption of many legislative and judicial measures the condition of prisoners is not improving at the expected level. In this context, the entire subject of prison reform deserves a comprehensive and critical review. The present study is an attempt in this direction to understand the need and necessity of prison reforms, to identify the problem, the limitations, and its operational

drawbacks, and to offer appropriate suggestions to make the prison system more effective and humanized one.

**REVIEW OF LITERATURE**

A familiarity with all relevant thinking and research that has preceded is essential to every research project. The review of literature creates the context from the past for the new study to be conducted. It serves a variety of background functions.preparatory to the actual collection of data. The functions of the review of literature are briefed to be tti.e foll owing five by Fox ( 1969):

Neill (1962) confesses that when the was a young teacher he was in the habit of spanking children, as most teachers in Britain were allowed to do so. II I was always most angry at the boy who disobeyed me. My little dignity was wounded. I was the tin god of the classroom, just as Daddy is the tin god of the home. To punish for disobedience is to identify oneself with the omnipotent Almighty: Thou shalt have no other gods: Leter on, when I taught in Germany and Australia, I was always ashamed When teachers asked me if corporal punishment was used in Britan. In Germany a teacher Who strikes a pupil is tried for assault, and generally punished. The flogging and stripping in Br it ish school s is one of our grea test disgraces.

A recall of John Muir of his Scottish boyhood school exper ience is cited by Symonds (1964). liThe new teacher, Mr. Lyon blankly smiled at our comical blunders but pedagogical weather of the severest kind quietly set in, Which for every mistake, everything short of perfection, the taws were promptly applied. Old fashioned Scotch teachers ~pent no time in seeking short roads to knowledge, or in trying any of the new fangled psychological methods so much in vogue now-a-days.

Baglery (1923) views corporal punishment as an old man died long ago. "The day of corporal punishment as an important agency in school discipline has passed never to return.

Munsinger (1978) feels that "parents ho punish their children for being aggressive produce children to are nice to their parents and hostile toward others.

Fraiberg (1959) remarks "I do not regard corporal punishment as a means of education or as a method of developing self control."

## CHAPTER II

## THE EVOLUTION OF PUNISHMENT AND REHABILITATION

This article provides a brief history of developments in penal policy and practice, describing the origins of the modern prison, the "nothing works" dejection of the 1970s and the ascendancy of the Risk-Needs-Responsivity model as the dominant approach to the rehabilitation of offenders, yet to be toppled by desistance theory, or the strengths-based Good Lives Model.

**Jane Mulcahy**

In the latter half of the 18th century, the morality and efficiency of the death sentence in its various barbaric guises came to be questioned in influential circles, which called for the rationalization of punishment. Before the modern prison came spluttering into being, even the most trivial offences were met with the death penalty across Europe. Medieval society had an insatiable taste for gore and luxuriated in the theatre of cruelty where heads were publicly lopped off, faces branded and bones routinely broken on the wheel. Poor unfortunates were impaled, boiled in oil, and drowned for the measliest of transgressions. In an era where afflictions, such as gangrene and septicemia were treated by amputation, the barbarous criminal law adopted a pseudo-medical discourse to describe the noxious phenomenon of crime, whereby the offender was viewed as a contaminated part of the body politic in need of elimination so as not to damage the good health of the wider community.[13] Comparable to the human body, the constituent parts of society were deemed to be mutually dependent—the wellbeing of the *entirety* relied upon the condition of each of its components. Should an individual part appear sickly or defective it needed to be erased.

According to Samuel Moody, "the corrupt members of a community must be cut off by the sword of justice, lest by delay and impunity the malignant disease spread further, and the whole be infected[14].

The death penalty was symptomatic of a particular historical attitude towards the body where human life was very cheap indeed. For a long time the public accepted rituals of butchery,

[13] Taylor, *Crime, Policing and Punishment in England, 1750–1914,* (London: Palgrave Macmillan, 1998), p.126.

[14] Moody, *The Impartial Justice of Divine Administration,* (London: 1736) p.7 cited in R. McGowen, "The Body and Punishment in Eighteenth-Century England", *Journal of Modern History,* Vol.59, 1987, pp.651–79, at 662.

accustomed as they were to the high mortality rate, the Christian mortification of the flesh and the low cost of labour. Death was familiar.

Durkheim argued that the draconian penal measures of simple societies resulted from the passion of the prevalent *conscience collective,* an extremely religious and severe group morality, which depicted all its edicts as having transcendental approval[15]. In the stage show of the gallows, punishment was certainly inflicted in the name of God and the king. The sovereign left his vengeful mark on the flesh of those who threatened social order through lawbreaking. Foucault's *Discipline and Punish* opens dramatically with the description of the gory execution of a regicide, by way of *amende honorable* conducted in a public square in Paris in 1757, in the presence of a mob. The flesh of the condemned, Damiens is torn apart by pincers and doused with scorching oil, his arms and legs are ineptly hewn, before all the ravaged bits and pieces are hurled upon the stake to smoulder.

Savage as such capital punishment was, over time its inefficiency became painfully apparent to the ruling classes. With the exception of England, torture and execution gradually became less frequent in Europe. As time passed, the criminal statutes in England became increasingly bloodthirsty. At the beginning of the 15th century, only 15 offences merited the death penalty in England, a number which rose to 200 by 1820 under the Bloody Code.4 Nonetheless, despite the vast number of capital offences, more and more crimes were committed in the mushrooming industrial towns. Despite additions to the capital statutes in the 18th century, by the 1780s there was a palpable change of public attitude towards the gallows.

The execution became an ever more debauched occasion of revelry and boozing. In 1783, following the Gordon Riots, the procession to Tyburn was abolished. At Tyburn the Sovereign could no longer effectively communicate its power. The sheriffs of London and Middlesex, who abolished the processional, claimed that it tended "to the encouragement of vice" and was considered "by the vulgar of the city as a Holiday[16]. If it is true that the assembled masses marvelled, they marvelled not at the performance of justice being done, but at the capricious massacre of the poor. Onlookers often sympathised with the condemned more than with the

[15] Durkheim, "The Two Laws of Penal Evolution", *L'Année Sociologique,* 4 (1901), repr. as Ch.4, "The Evolution of Punishment", in Lukes and Scull (eds) first published in 1902.

[16] D.L. Howard, "The English Prisons, 1960", p.5, in *Discipline and Punish* p. 14, Foucault remarks that Blackstone listed 160 capital crimes in English legislation in 1760, "while by 1819 there were 223."

State, whilst others saw it as an opportunity to commit the very crimes for which people were being executed. Mandeville was concerned that spectators would get the impression that "there is nothing in being hang'd, but a wry Neck and a wet pair of Breeches[17].

According to Garland, Durkheim was keenly aware of the importance of the receptivity of the audience to the message of punishment:

> "If a forceful moral reproach is to be communicated, its audience must understand its meaning and feel its force. The language of a penal system must suit the participants, and must be comprehensible to them. Consequently, the practical language of punishment—or rather the concrete sanctions through which moral reproach is realised—will depend upon the *sensibilities* of the society in question[18].

It was vital for social order that the torment of punishment was represented in such a manner that those who bore it and those who observed its imposition could still respect those who inflicted it. From 1750 onwards, the sensibility of society underwent change. The language of the death penalty was sadistic, built on a violent vocabulary of brute force, punctuated by a vengeful morality which a mounting section of the population found distasteful. Eighteenth century society was becoming more receptive to a softer language—a carceral nomenclature, which spoke of punishment as subjection and aimed to educate deviants in discipline and submissiveness.

Most of the original rehabilitative methods applied to prisoners through the use of architecture, religious penitence, medical observation, and useless, grinding work were designed to fundamentally alter men's souls and render idle rogues industrious and honest.8 The word "prison" has its origins in the Latin verb *prehendere* meaning to seize. Prisons came to be conceived not only as a laboratory for the careful observation of criminals, but also as a machine that could transform:

"the violent, troublesome and impulsive (real subject) into an inmate (ideal subject), into a disciplined subject, a mechanical subject. In the end, this is not just an ideological aim but an

[17] Turner and T. Skinner, *Account of the Alterations and Amendments in the Office of Sheriff,* 1784, p.23.
[18] Mandeville, *An Enquiry into the Causes of the Frequent Executions at Tyburn,* 1725 p.33.

economic one: the production of subjects for an industrial society. In other words, the production of proletarians by the enforced training of prisoners in factory discipline[19].

Melossi and Pavarini argue that the emergence of the modern prison was inextricably linked with the rise of the capitalist mode of production and that prison did not exist as a form of punishment in pre-capitalist societies. They claim that: "it was not so much the prison institution that was unknown to pre-capitalist society but the penalty of confinement as a deprivation of liberty[20]. During the Industrial Revolution, when there was a shortage of labour, the modern prison emerged alongside factories, hospitals, workhouses and schools as a mechanism for rendering the idle poor industrious. Slaughtering petty criminals for their misdeeds came to be seen by utilitarian reformers as not only a savage practice, but also a waste of potential workers[21]. Jonas Hanway calculated the worth of a life in fiscal terms, believing that solitude with hard labour in prison was economical. He computed that over a period of 30 years "we have suffered the loss of 10 or 12,000 of the ablest subjects, by death or transportation: these computed at 200 pounds each amounted to full 2,000,000!"12

Instead of ridding the world of hapless thieves, the modern prison was envisioned by Jeremy Bentham and his compatriots as an all-seeing bastion of power and control, imposing an unrelenting regime of medicalised cleanliness and military-like discipline upon feckless wastrels, by which they would be transformed into productive employees to generate profit. Horkheimer and Adorno summarise the shift in the site and emphasis of punishment as follows:

"[s]ince de Tocqueville the bourgeois republics have attacked men's souls whereas the monarchies attacked his body; similarly, the penalties inflicted in these republics also attacked man's soul. The new martyrs do not die a slow death in the torture chamber but instead waste away spiritually as invisible victims in the great prison buildings which differ in little but name from madhouses[22].

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[19] Garland, *Punishment and Modern Society,* (Oxford: Oxford University Press, 1990), p.40.

[20] Melossi and M. Pavarini, *The Prison and the Factory Origins of the Penitentiary System,* (Bologna, 1977) trans. G. Cousin (London, 1981) p.2.

[21] Bentham, *The Works of Jeremy Bentham,* J. Bowring, (ed.), 11 Vols (Edinburgh, 1838-43) Vol.i, pp.402-406. See also Statutes 16 Geo. III, c.43, p.484, where the preamble to the Hard Labour Act 1776 utilised mercantilist arguments so as to justify putting convicts to work, thus averting the inconvenience of "depriving this Kingdom of many subjects whose labour might be useful to the community."

[22] Horkheimer and T.W. Adorno, *Dialectic of the Enlightenment Philosophical Fragments,* G. Schmid Noerr (ed.), E. Jephcott (trans.), (Frankfurt am Main: Fisher Verlag, 1982 – English edn, 2002) pp.226-8, available at: <*http://www.contrib.andrew.cmu.edu/~randall/Readings%20W2/Horkheimer_Max_Adorno_Theodor_W_Dialectic_of_Enlightenment_Philosophical_Fragments.pdf*>[accessed 3 June 2016].

Religious zeal was added to the profit-seeking mix by some reformers who held the fervent belief that confining criminals in splendid isolation for years on end with their thoughts and prayer-books, while performing menial, often pointless work, such as operating treadwheels, was a sure recipe for transformation and the redemption of their souls. According to Foucault, "the cell, that technique of Christian monasticism, which had survived only in catholic countries" became, in protestant society, "the instrument by which one may reconstitute both *homo oeconomicus* and the religious conscience[23]. Thus, prisons came to be viewed as structures capable of breaking the spirit of wrongdoers, making them slowly, but surely surrender to the constant vigilance and strict routinisation, until they eventually emerged back into the world they left redeemed—that is, as docile, pliable beings who could easily slot into a factory line and contribute to the enrichment of industrialists.

The original prison reformers had little truck with the notion of prisoners as agentic, self-efficacious beings—active subjects capable of exercising choice and control over their lives—and were, instead, quite content to use all manner of subtle and not-so-subtle psychological pressures, including total isolation, or communal work in complete silence, to subdue and render pliable. Early efforts at *re-forming* criminals were all about discipline, making them yield to external forces that were bigger and more potent than themselves. There was no such thing as collaborative goal-setting, sentence planning, release preparation or appreciation of the healing power of relationships[24].Desistance—the process by which offenders undergo a transformative identity shift, stop committing crimes and maintain a non-offending lifestyle over time was something reformers believed could be imposed on, or done to unwilling and hostile objects who would eventually, given sufficient isolation and pointless, gruelling work, crumble and comply.

**2. 1 Transitioning from "Nothing Works" to "What Works?"**

In the 20th century, the goal of prisons to break the minds of prisoners and transform them through foreboding architecture, religious solitude or silence and enforced labour was abandoned. The evolution of human rights in the aftermath of World War II has meant that the medical "treatment" model of rehabilitation done to passive (or even downright reluctant, oppositional) subjects fell greatly into disrepute.Cullen and Gendreau argued that until the 1960s

[23] Foucault, above fn.8, p.123.

[24] See K. Treisman, "Good relationships are the key to healing trauma",

criminologists believed that the scientific study of the causes of crime would give rise to "individualized treatments that would reduce offender recidivism[25]. Garland vividly describes how the post-war penalwelfarist model of punishment in which rehabilitation played a key role fell into decline as western civilisations underwent rapid and disconcerting social change, affecting economic dynamics, the cohesion of the nuclear family and issues of spirituality and morality.19 Rehabilitation was replaced by a more cold-hearted, moralistic embrace of retribution or just deserts,20 incapacitation and deterrence.21 Prominent features of the culture of control were tougher laws, harsher sentencing and an explosion in the prison population.22 The mass media became a key criminal justice player in its own right, inflaming public fears,23 usually in the wake of intermittent high profile cases of extreme violence, and calling for an immediate, punitive response from politicians who were terrified of appearing weak, thereby risking defeat in the next election.

After the publication of Martinson's infamous article in 1974 which asserted the limited usefulness of prison-based rehabilitation interventions on reducing recidivism—commonly referred to as "nothing works!"24 —there was a significant cooling off in enthusiasm for rehabilitation as a goal of punishment, particularly in the USA. The new received wisdom was that rehabilitation efforts did not work, or were largely pointless. If offending behaviour was truly caused by structural inequalities, without social justice there would be no real, long-term reduction in crime.25

Martinson's since-discredited assessment of the poor performance of treatment interventions captured the imaginations of everyone of influence in American corrections: the politicians controlling the purse strings, correctional administrators deciding where money would and should be spent, people responsible for delivering treatment programmes and interventions, and those in academia whose mission it was to formulate and refine theory relating to crime and punishment. As Campbell states:

"even though Martinson himself later retracted his earlier conclusions regarding rehabilitation programs, and his original essay was found to have serious methodological flaws, the academic community and both the political left and right embraced his message at that time. His message

[25] Cullen & P. Gendreau, "From Nothing Works to What Works: Changing Professional Ideology in the 21st Century", *The Prison Journal,* (2001) 81(3) 313-338, at p.315.

was attractive to liberals since it could be used to argue against the use of imprisonment and to abolish indeterminate sentencing. For conservatives, rehabilitation programs were thought to "coddle" criminals, since they allowed for early release. For them, Martinson's argument permitted the introduction of harsher regimes of punishment. Finally, an emerging social science also played a large role in vilifying rehabilitation, since researchers found that prisoners who "participated in a wide range of rehabilitation programs were rearrested at the same rate as those who did not.[26]

In response to the "nothing works" pessimism, a "what works" movement within corrections emerged, driven primarily by Canadian scholars, which endorsed "the use of science to solve crime-related problems[27]". Cullen and Gendreau, proponents of the latter criticised the professional ideology for "legitimating 'knowledge destruction' (showing what does not work) as the core intellectual project of criminology and thus of undermining efforts at 'knowledge construction' (showing what does work[28]). A seminal contribution to the "what works" correctional literature was the publication of Andrews and Bonta's, *Psychology of Criminal Conduct* in 1998, which developed the Risk-Needs-Responsivity (RNR) model of offender assessment and management.

RNR has become the dominant model for the assessment and treatment of offenders in western correctional systems. Hannah-Moffat states that RNR appeared at an immensely important time and since then has played "a pivotal organizational role in offender management by advancing a necessarily narrow and targeted view of rehabilitation. According to Ward and Marshall, RNR or the "risk management" approach to rehabilitation "is concerned with reducing the likelihood that offenders will engage in behaviour that will prove harmful to the community. Andrews and Bonta claim that RNR based programmes reduce recidivism by up to 35 per cent,33 while interventions that do not follow the RNR either have a minimal effect on reoffending, or sometimes "even increase recidivism.

Following the post-Martinson anti-rehabilitation backlash, the RNR model of rehabilitation blasted like a cold wind from the North across Canada and America, before capturing the

[26] Campbell, "Rehabilitation Theory", *Encyclopedia of Prisons & Correctional Facilities,* in M. Bosworth (ed.), (London: Sage Publications, 2005) pp.831-834, at p.832 available

[27] Cullen & P. Gendreau, above fn.18, pp.313-338.

[28] Cullen & P. Gendreau, above fn.18, p.313.

imaginations of correctional managers in Britain, New Zealand, Australia, and Europe.36 Today, correctional services make widespread use of evidence-based actuarial risk assessment tools to determine how best to intervene, and with what degree of treatment intensity as regards offenders with different statistical likelihoods of re-offending[29]. Ivan Zinger, the correctional investigator of Canada, has argued that "failure to conduct actuarial assessment or consider its results is irrational, unscientific, unethical and unprofessional.

Prior to the evolution of such tools, decisions as to an individual offender's risk were a matter of the clinical judgment of correctional staff. Andrews and colleagues refer to "unstructured professional judgments of the probability of offending behaviour" as the "first generation (1G)" of risk assessment[30]. Decision-making was not based on empirical evidence as regards risk factors that made a person most susceptible to further offending, but rather on the professional's own intuition and experience and quite possibly their personal prejudices.

Andrews and colleagues claim that the RNR which has given rise to a lucrative business in the marketing of expensive risk assessment tools such as the LSI-R to correctional agencies "has been nothing less than revolutionary. They argue further that the general personality and social psychology of crime "is now the prominent theoretical position in criminology, having "moved from being a minor irritant to being a major player over the years. Taxman and Thanner state that other than the RNR framework, there have been few criminological advancements in determining risk factors so as to identify appropriate programme or service placements.

The Probation Service in Ireland uses the Level of Services Inventory-Revised (LSI-R) risk assessment tool to inform pre-sentence reports and assessing offenders' suitability for probation supervision, as well as to assess the risk posed by prisoners subject to Part Suspended Sentence Supervision Orders in the community. The probation service also uses the Youth Level of Services/Case Management Inventory (YLS/CMI), a fourth generation risk assessment tool in its work with young offenders, which incorporates an examination of strengths, as called for by desistance theorists.

[29] Campbell, S. French & P. Gendreau, *Assessing the utility of risk assessment tools and personality measures in the prediction of violent recidivism for adult offenders. (User Report 2007-04),* (Public Safety Canada: Ottawa, 2007).
[30] Andrews, J. Bonta & S. Wormith, "The recent past and near future of risk and/or need assessment", *Crime and Delinquency* (2006) 52, pp.7-27, at 27.

Despite many concerns about the theoretical underpinnings, values and implications for practice of RNR, proponents of the rival Good Lives Model, discussed below, accept the robust evidence base supporting RNR. Ward, Melser and Yates acknowledge that "cumulatively, this research provides a powerful empirical foundation for the RNR model[31]. They state further that RNR "is deservedly the premier treatment model for offenders" which spawned the development of various empirically validated interventions. Ward and Maruna state that while the RNR saved rehabilitation "as an ideal", it provides frontline staff with limited guidance as to how best to assist people in making and sustaining positive personal change.

Andrews, Bonta and Hoge first formalised the RNR model in 199048 and since then it has been further fine-tuned within a general personality and cognitive social learning theory of criminal conduct[32]. In the *Psychology of Criminal Conduct*, psychologists Andrews and Bonta criticise sociological-based criminology for giving primacy to social and structural factors, to the exclusion of personal psychological factors. The authors conducted a meta-analysis of juvenile and adult correctional treatment programs administered between 1970 and 1990 and the results indicated that programmes that deliver treatment to higher risk cases, target criminogenic needs, and match interventions with client learning styles (the responsivity factor in the RNR approach) are most effective.50

Based on the evidence from the meta-analysis, the authors identified the "Big Four" risk factors as being criminal history, antisocial personality, antisocial attitudes, and antisocial peers.51 These are the risk factors with the strongest statistical links to offending behaviour. In addition to the Big Four, they identified a further four risk factors most likely to predict future criminal behaviour, namely family problems, addiction or mental health problems, issues relating to education/work and poor use of leisure time. These core risk factors are known in the RNR literature as the "central eight".

Under the RNR approach an individual offender's risks and needs, as assessed by a professional using the risk assessment tool, dictate the intensity of the intervention or supervision required to target and treat the criminogenic needs. RNR is based on the premise that by identifying and

[31] Ward, J. Melser & P. Yates, "Reconstructing the Risk-Needs-Responsivity model: A theoretical elaboration and evaluation", *Aggression and Violent Behavior*, (2007) 12(2), pp.208–228.
[32] Andrews, J. Bonta & S. Wormith, "The recent past and near future of risk and/or need assessment", *Crime and Delinquency* (1996) 52, 7–27.

focusing on the dynamic risk factors an offender faces, such as those relating to antisocial attitudes, antisocial peers and poor use of leisure time, the criminal justice professional can tailor the intensity of the intervention or supervision to the offender's level of risk as calculated by the evidence-based actuarial risk assessment tool and then match the intervention(s) to best suit the learning style of the client. The higher the risk of re-offending and the more criminogenic needs identified, the higher the "dose" of interventions/supervision. Importantly, there is no focus on the dose of interpersonal and developmental trauma to which the offender was exposed, nor an appreciation for the fact that learning is impaired if a person is in a state of emotional dysregulation caused by toxic stress and fear[33].

While an offender may have a great many needs, not all of them are criminogenic (directly related to the risk of reoffending), according to RNR enthusiasts. Andrews and Bonta argue that interventions that are directed towards criminogenic needs are more effective, than those that seek to target non-criminogenic needs[34]. Taxman and Thanner summarise the quandary facing the correctional worker in deciding what needs of his client he or she should endeavour to target with a particular intervention as follows:

"Many needs that have been identified for offenders such as housing, mental health, spirituality, attitudes, values, and so on may or may not be related to criminal conduct. Yet the assessment of the presence of these needs should be as to whether the condition(s) is persistent or recurrent social or interpersonal problems that propel the offender to a criminal conduct. Although providing services for offenders in areas that may improve their overall life circumstances (e.g., providing education, providing clothing) is valid on humanitarian or ethical reasons, the expectation that addressing these needs will reduce criminal behavior is not scientifically sound because the literature has not established a statistical relationship between these variables and the criterion of interest (rearrest or recidivism)."

As regards the therapeutic relationship, the engagement between the professional conducting the assessment and delivering the interventions to target criminogenic needs must be respectful, collaborative, and delivered by caring staff that are skilled in motivational interviewing.

[33] Perry, (2006) "Applying Principles of Neurodevelopment to Clinical Work with Maltreated Children:
[34] Andrews & J. Bonta, above fn.29.

Specific responsivity in the RNR model calls for treatment interventions to consider personal strengths and socio-biological-personality factors. Interventions must be personalised to take account of these factors, since they have the potential to facilitate or hinder treatment. According to Andrews and Bonta, in endeavouring to secure pro-social change by replacing criminal behaviour and cognitions with pro-social behaviours and cognitions, cognitive social learning intervention is the optimal treatment method, through appropriate pro-social modelling, reinforcement, problem-solving, etc. The general responsivity component of RNR is based on the assumption that cognitive social learning strategies are generally the most likely to succeed regardless of whether the offender is female, a member of an ethnic minority, a sex offender or a psychopath. Specific responsivity adjusts the cognitive behavioural intervention to the learning style, level of motivation, personality, race, gender and strengths of the individual. Again, this responsivity is not attuned to the impact of childhood trauma, a sensitised stress response system and the fact that the pre-frontal cortex the thinking brain which governs the ability to control impulses, weigh consequences and make rational choices goes offline when the person is fearful or under threat.

The Violence Risk Scale (VRS), developed by Wong and Gordon in 2000, is a fourth-generation risk assessment tool that "was specifically developed to assess the risk of violence for forensic clients, in particular, those who are being considered for release from institutions to the community after a period of treatment[35]. The VRS is used by the psychology service in the Irish Prison Service to predict risk of violence and to inform their treatment interventions with violent offenders[36]. It incorporates the States of Change/Transtheoretical Model of Change, which Andrews, Bonta and Wormith regard to be "a major addition" to the concept of specific responsivity. It measures quantitatively behavioural, attitudinal and affective changes following treatment. Prochaska, DiClementi and Norcross, in their account of how people with addictions change, state that:

> "Modification of addictive behaviors involves progression through five stages—precontemplation, contemplation, preparation, action, and maintenance—and individuals

[35] Wong & A. Gordon, *Violence Risk Scale* (Saskatchewan, Regional Psychiatric Centre, 2000), p.10.

[36] It is used by psychology assistants involved in the early stages of the Integrated Sentence Management process in order to help "sign-post" newly committed prisoners to various interventions including school, workshops, the psychology service, etc based on their interests and strengths, as well as their criminogenic needs.

> typically recycle through these stages several times before termination of the addiction"[37].

As with addicted humans, Wong and Gordon acknowledge that before being successfully treated persons who are taking steps to address their violent behaviour, "may cycle through most or all of the stages a number of times. Relapse or cycling through the stages is considered to be a rule rather than an exception".

**2.2 Promoting Strengths: we all want a "good life"**

By contrast, with the RNR model of offender rehabilitation, the Good Lives Model (GLM) is a "strength-based" approach, which originated in the treatment of sex offenders. Ward and Gannon contend that the RNR emphasis on reducing dynamic risk factors/criminogenic needs and avoidance techniques "is a necessary but *not sufficient* condition for effective treatment".64 Ward and Marshall also identify problems with the risk management theory underpinning the RNR models and observe that traditional relapse prevention interventions (RP) for sex offenders were "deficit-based or problem-centred" targeting "intimacy deficits, deviant sexual preferences, cognitive distortions, empathy deficits, and difficulties managing negative emotional states". The authors state that the major weaknesses of risk management theory of rehabilitation, and its associated RP treatment framework:

> "include its tendency to focus on risk management rather than positive ways of living, the lack of attention paid to personal identity and human needs, and the perception of offenders as bundles of risk factors rather than integrated, complex beings who are seeking to give value and meaning to their lives. A consequence of these difficulties is a tendency for correctional interventions to be implemented in a mechanistic and somewhat negative manner. The focus is on what offenders need to avoid or eliminate rather than on how to live a different (i.e., offence-free) life. The latter option requires clinicians to consider explicitly the exact skills and external resources an offender requires in order to achieve primary human goods in more socially acceptable ways."

[37] Prochaska, C. DiClemente & J. Norcross, "In search of how people change: Applications to the addictive behaviors" *American Psychologist*, (1992) 47, 1102–1114, at 1102.

Ward and Gannon also condemn the RNR model for paying insufficient attention to the importance of context and ecological variables68 in rehabilitation. Since offenders "are embedded in local social, cultural, personal, and physical contexts", their personal treatment plan should "focus on the skills and resources required to function in these particular environments[38]". The authors argue that at the core of human functioning is "the capacity of individuals to seek meaning and to direct their actions in the light of reasons and values". In their view, the RNR model of rehabilitation neglects the role of personal agency by concentrating almost exclusively on criminogenic needs/dynamic risk factors such as antisocial peers and attitudes. Believing that "context and relationship variables play an essential role in effective sexual offender treatment and should be addressed accordingly". The authors also charge RNR with placing too little emphasis on the therapeutic alliance and clinicians' attitudes to offenders, by promoting a one-size-fits all approach through the reliance on manuals[39].

In *A Theory of Human Motivation*, Maslow articulated his philosophy of what drives human behaviour, suggesting that human needs exist in a particular hierarchy, at the base of which are physiological needs relating to the need for food, shelter, warmth and rest, followed by safety and security needs. These are the most basic human needs without which people cannot hope to flourish. Once the basic needs are secured, people can turn their attention to the pursuit of needs of a higher, more psychological nature such as love and belongingness needs and esteem needs, where they strive to accomplish things that give them a sense of personal esteem and respect in the eyes of others. At the top of Maslow's needs pyramid is self-actualisation, where an individual achieves his or her full potential and expends time and enjoyment in creative activities.

Similar to Maslow's needs pyramid, Ward and Marshall's GLM approach to offender rehabilitation is rooted in humanism and positive psychology, whereby people can be assisted to find healthier ways of attaining primary human goods in their quest for a good life. The authors argue that there are nine primary goods necessary for a good life, namely: 1. life (including healthy living and optimal physical functioning, sexual satisfaction); 2. knowledge; 3. excellence in play and work (including mastery experiences); 4. excellence in agency (i.e., autonomy and

[38] Ward & T. Gannon, above fn.64 at 78.
[39] Ward & T. Gannon, above fn.64 at 79.

self-directedness); 5. inner peace (i.e., freedom from emotional turmoil and stress); 6. relatedness (including intimate, romantic and family relationships) and community; 7. spirituality (in the broad sense of finding meaning and purpose in life); 8. happiness; and 9. creativity[40].

A key concept of the GLM then, and one of its appealing aspects for this author, is that as a theory it recognises the fundamental sameness of people in their quest for the "good life", despite their cultural background, class, education, intelligence, or indeed colourful criminal history[41].This underlying premise is that everyone has a plan for a good life and "not just those who deliberately pursue a well thought-out plan for living that takes into account their strengths, weaknesses, preferences and circumstances."74 The point is that offenders are not any different to their law-abiding brethren in this regard. They too have a plan to pursue a good life, but it happens to be a faulty, or incoherent approach that has socially harmful and self-sabotaging consequences.

In terms of criminal behaviour, Ward and Marshall state that people experience psychological, social, and lifestyle problems when their plans for a "good life" go awry, or are somehow defective. Ward and Gannon argue that an integrated, systematic, and comprehensive model for the treatment of sexual offenders should incorporate both goods promotion (approach goals) and risk management (avoidance goals), stating that a focus "on providing offenders with the necessary conditions (e.g., skills, values, opportunities, and social supports) for meeting their human needs in more adaptive ways, the assumption is that they will be less likely to harm others or themselves.

As mentioned above, desistance is the process by which offenders reduce and ultimately stop offending and then manage to maintain a law-abiding lifestyle[42]. Since the start of the new millennium, there has been a great deal of focus on desistance, and in terms of re-entry, an acknowledgment that an integrated, multiagency and multifaceted approach is more effective in managing safe transitions from prison to the community, and reducing recidivism. In relation to Probation practice, McNeill has argued that it would be vastly preferable to develop a strengths-based desistance paradigm instead of adapting and building on the dominant "what works"

[40] Ward & W. Marshall, above fn.32 at 158.
[41] Ward & W. Marshall, above fn.32 at 157.
[42] Maruna, above fn.16.

theory and practice. McNeill added the idea of "tertiary desistance" to the criminological lexicon, whereby the individual offender's internal change process is supplemented by a shift in his or her sense of "belonging to a (moral) community". McNeill states that:

> "since identity is socially constructed and negotiated, securing long term change depends not just on how one sees oneself but also on how one is seen by others, and on how one sees one's place in society. Putting it more simply, desistance is a social process as much as a personal one[43].

In relation to experiences of Integrated Offender Management (IOM) in England and Wales, Senior stated that offenders often reported that "they wished***8*** they had IOM much sooner in their criminal journey". As regards desistance theory, many also said "that you can only stop offending when you are ready."

It is difficult to dislodge RNR as the dominant model for offenders, due to the weight of the empirical evidence justifying interventions that target the central eight risk factors so as to reduce criminogenic risk/need and the fact that correctional organisations find it useful to help standardise the assessment of risk, the dosage or interventions/supervision and the type of interventions to best address the underlying issues. However, rehabilitative services in prisons and in the community should draw on the positive psychology and strengths-based focus of GLM and apply it to *all* offenders. Risk assessment and CBT-based offending behaviour interventions aimed at reducing risk should be supplemented with therapeutic interventions to instil greater understanding in individual prisoners of what is important to them in pursuing their version of a good life and equipping them with the capacity to access valued goods in pro-social, positive ways rather than by maladaptive, criminal means as in the past.

By contrast with the RNR, deficit-based model of rehabilitation, in which clinicians may struggle to motivate offenders to engage with them to address criminogenic risk/needs, the GLM appears to have something actually in it *for* the person being treated, i.e. a means of identifying what they were really striving for, recognition that their damaging and self-destructive approach to the acquisition of certain human goods were faulty ways of getting legitimate ends and working with the person to try to figure out ways of achieving their goals in a pro-social manner. It also

[43] McNeill, above fn.81.

provides useful guidance to the person delivering the treatment interventions about the need to develop an understanding of the underlying problems in their client's pursuit of a good life.

## CHAPTER III

## REFORMATION AND REHABILITATION

The essence of this study lies in understanding the reformation process of prisoner in context of Maharashtra. Following review of literature, the present research focused on relevant key factors of reformation method, which need separate explanation.

### 3.1. : Women prisoner

It was believed till a few decades that crime is predominantly a male phenomenon and the world of crime is only a man's world. The subject of female criminality was totally neglected. No attention was paid to research on women's crime which resulted in paucity of theoretical material on crime amongst women.

The difference in the rate of male and female crime is basically the result of the difference in their respective roles. The basic role of wage-earning by men is performed outside the home for which they have to compete with others. In the process of competition, sometimes when they are not able to achieve their goal through legitimate means, they use illegitimate means. On the other hand, the basic role of a householder is performed by women within the four walls of home for which they have not to compete with anybody and are not forced to use anti-social means for achieving their goal. Moreover, compared to men, women are more god-fearing, moral and tolerant. They are also subject to greater social restrictions. Further, some crimes require masculine skills and techniques or active independence on the part of the offender and the use or threat of violence (e. g., auto-thefts, chain-snatching, etc.). Women's participation in such crimes is very low. Lastly, the police and the court's take a more sympathetic attitude towards female offenders. In short, the important factors of difference in rate of male and female crime may be described as:

(1) differential sex role expectations,

(2) sex differences in socializations patterns and application of social control,

(3) differential opportunities to engage in crime

(4) differential access to criminal subcultures and careers, and (5) sex differences built into crime categories[44]

Female criminals get unequal and discriminatory treatment within the correctional apparatus, if not within the correctional apparatus, if not within the justice apparatus, in our society. Though the courts do not discriminate against female offenders by imposing a sexual (double) standard upon them but in jails, we see sexual discrimination operating against female inmates at a variety of points.

The programmes and facilities in correctional institutions for female offenders do not vary widely from one state to another. Most of the Female Reformatories are in poor condition as compared to institutions for male offenders. The social experiences encountered by women inmates are decidedly negative ones, with the rules of conduct being more restrictive in women's prisons than in men's prisons. Treatment programmes for female prisoners are either non-existent or markedly inadequate. Female prisoners are often exclude from training programmes and parole facilities. The training programmes ( mainly cleaning foodgrains, cutting vegetables, cooking and sewing) for female inmates are basically designed to prepare women to reenter the community as nineteenth-century domestics. No effort is made to introduce programmes that would adequately equip the women to deal with the variety of social adjustment problems they are likely to encounter in modern society.

**3.1.3. : Present Position**

As far as the government programme is concerned, the data reveals that there is no special provision for the rehabilitation of the female prisoners.

To facilitate the rehabilitation of released female prisoners following efforts should be made in this direction

[44] Mishra Saraswati : Rehabilitation of Women Prisoners : Indian Journal of Criminology, Vol 13 No. 1, Jan 1985, 16-19.

1. First of all arrangement should be made to raise the educational standard of the female convicts in Jail. As Dhar (1983 : 2) has also mentioned, young girls should be encouraged to study as they themselves are not aware of the benefit of education.

2. They should be given vocational training of their choice depending on their aptitude. This training will give them a skill and confidence to start cottage industries with the Government's financial help.

3. The Welfare Officer of Jail should make them aware of the rehabilitation assistance scheme and help the deserving ones to secure it.

4. The provision of parole and facility of short leave at the interval of few months should come into practice for all the lifers. As Sandhu (1968 [45]) has also advocated, though these arrangements the convicts may be enabled to reestablish their social contacts which go a long way in helping them in effective rehabilitation in the society. The Jail visits by the relatives of the convicts should be encouraged for this purpose.

5. Prior to the release of the female convicts the probation officer should visit home towns and study the situation for setting them down properly. He should convince the concerned people to accept and treat them properly.

6. The convicts willing to live in unknown place for various reasons should be provide with after care services. Counseling and guidance about various aspects of life can be given to them by Government as well as voluntary agencies.

7. The amount of money released by the Government for providing rehabilitation assistance should be increased to benefit larger number of convicts.

8. Rescue homes, Asylums and sheltered workshops should be opened with the training, boarding and lodging facilities.

9. The released convicts should be encouraged to form co-operative societies for the production as well as sale of some commodities.

[45] Sohoni N. K. : Women Prisoners : The Indian Journal of Social Work, Vol. XXV No. 2 July 1974, 137-148

10. Marriages of the willing young female convicts, should be arranged with other handicapped males. Better understanding between the husband and wife in such cases may help them to lead a happy life[46].

**3.1.4. : Remedial Measures :**

1. All custodial premises for women prisoners should have a private, secured and therapeutic environment.
2. Proper medical facilities and medical examination of women inmates on admission and periodically thereafter are to be ensured in all custodial centres including prisons, jails, sub-jails, etc.
3. Qualified lady doctors and nurses should be attached on a visiting basis to every female prison and custodial centre with women inmates.
4. Expectant mothers in custody shall be shown special consideration by way of medical and nutritional care, education in child rearing and mother craft and assigned work in accordance with their expectant status.
5. Female prisoners shall be paid equitable remuneration for their work in prison. Wages paid shall be of a rehabilitative value. Out of their earnings, they will be allowed to purchase essential articles for their use while in custody, and to save and/or remit to their families.
6. As far as practicable, women prisoners shall be imparted training which
7. will make them economically self sufficient and capable of functioning independently in society. Choice of skill taught will be related to marketability and independent earning potential. Some representative trades are; home science, mother craft, nursing, hand-loom weaving, hosiery, toy-making, ceramics, stationary articles, gardening, fruit preservation, electronics, etc. In addition, socially useful knowledge such as use of bank, post office, health centre, employment exchange, saving schemes, etc. will be imparted to the prisoners. Educating women in their rights, status, role and capabilities will be mandatory.
8. A reasonable number of interviews with the relatives and unlimited opportunities to write letters to them and receive letters from them should be allowed to the female prisoners.

[46] Morin A. : Women, crime and Criminal Justice : Blackwell Basil Ltd. Oxford, 1987.

9. Compulsory education for illiterate prisoners shall be provided. Literate prisoners will be motivated to pursue further learning
10. Recreational facilities, books and reading materials,etc., should be provided to female prisoners and they should be encouraged to use them. This should include the use of religious books of the prisoner's choice. Pursuit of painting, music, theater,etc., shall be encouraged as part of correctional therapy.
11. In no circumstances should girls be imprisoned or kept in mixed custody with adult women[47]. Habitual offender, prostitutes and brothel keepers must be kept separate form other inmates in prisons.
12. As far as possible, children of inmates may not be kept within adult jails and visits by children to the inmates may be liberally allowed. In cases where imprisonisation is unavoidable, children of prisoners must have rights per se in terms of food, spare, spare clothing, education, recreation, visitations,etc.
13. Probation, parole and other non-institutional modalities of corrective treatment shall be widely used in case of women offenders, save in exceptional cases where specified considerations of prisoner's or state security limit such options.

    13. Before a female prisoner is released, her relatives shall be informed and where no relative exists or shows up, the released prisoner shall be sent with a female escort.
14. Appropriate assistance shall be rendered to every female prisoner on release whether during or after completion of sentence. For this purpose, a centre for assisting released prisoners shall be set to service a cluster of prisons and custodial institutions on an area-wise basis. Even without the centre, the prison authorities shall take necessary steps to arrange the rehabilitation of the released prisoners either through the family, the relief centre or a voluntary organization.
15. Aftercare and short-stay homes for women prisoners may be established in every state to serve those prisoners who are homeless or rejected by their families.

[47] Shukla S. D. : Women in Indian Prisons, Major issues : The Indian Journal of Social Work, Vol XXXXVII No. 2, 1986, 201-206.

### 3.2. : Open prison

#### 3.2.1. : Definition of Open Prison :

Criminologists have expressed different views about the definition of open prison. Some scholars have preferred to call these institution as open air camps, open Jail or parole-camp. The United Nations Congress on Prevention of Crime and Treatment of Offenders held in Geneva in 1955, however, made an attempt to define an open prison thus.

> ' An open institution is characterised by the absence of material and Physical precautions against escape such as walls, locks, bars and armed-guards etc, and by a system based on self-discipline and innate sense of responsibility towards the group in which he lives.'

Thus open prisons are 'minimum security' devices for inmates to rehabilitate them in society after final release. In India, they are popularly called as open Jails.

#### 3.2.3. : Ma in Characteristics of Open prisons[48]:

The main features of an open prison institution may be summarized as follows :-

1. Informal and institutional living in small groups with minimum measure of custody.
2. Efforts to promote consciousness among inmates about their social responsibilities.
3. Adequate facilities for training inmates in agriculture and other related occupations.
4. Greater opportunities for inmates to meet their relatives and friends so that they can solve their domestic problems by mutual discussion.
5. Liberal remissions to the extent of fifteen days in a month.
6. Proper attention towards the health and recreational facilities for inmates. 7. Management of open Jail institutions by especially qualified and well trained personnel. 8. Improved diet with arrangement for special diet for weak and sick inmates.
7. 9. Payment of wages in part to the inmates and sending part of it to his family.
8. 10. Financial assistance to inmates through liberal bank loans.
9. 11. Free and intimate contact between staff and the inmates and among the inmates themselves.

[48] Richie B. E. : Challenges Incarcerated Women Face as they return to their communities : Findings from Life History interviews : Crime & Delinquency, Vol. 47 No. 3, July 2001, 368-389

10. 12. Regular and paid work for inmates under expert supervision as a method of reformation; and
11. 13. Avoidance of unduly long detention.

### 3.2.3. : International Perspective

The utility of open-prisons as a part of After-care device has been accepted at the International level. The Social Defence section of the United Nations through its literature on the subject has convinced the member nations of the usefulness of open institutions as a measure of prison reform. This has helped a lot in creating interest among professional men in the adoption of new ideas and experiments in the field of prison reforms. The treatment of offenders in open conditions similar to outside world as far as possible has found wide acceptance in recent years. This is indeed a significant contribution to the development of progressive penology and a professional approach to treatment of offenders [49].

The subject of open-institutions was particularly discussed in the first United Nation Congress on Prevention of Crime and Treatment of Offenders held in Geneva in 1955. The consensus was that minimum security such as absence of prison walls, bars, fence, armed guards gun towers, and voluntary discipline among the prisoners should be the two guiding principles underlying the working of these open institutions.

The system of open prisons was essentially founded on trust and confidence reposed in prisoners and was an intermediary stage between the guarded prison life and the outside life of complete freedom. Five years later, when the second U.N. Congress on prevention of Crime and Treatment of Offenders was held in London in 1960, open-institutions had become an integral part of Anglo-American prison system for the correctional treatment of offenders. The prisoners are allowed to attend to their ailing relatives and friends and women delinquents are extended certain additional facilities and maternity privileges .[50]

[49] Singh R. G. : Reformation and Rehabilitation of surrendered dacoits, A case study of open prisons of M.P. : The Indian Journal of social work, Vol. XXXX No. 1, January 1979, 41-59.
[50] Banks, C. : Absconding From Open Prisons : London : H.M.S.O. , 1975

### 3.2.4. : The Indian scene

A Jail committee on the all-India level was appointed in 1836-38 to review system of employment of prisoners and by the time a second committee in 1864 was appointed, this practice of employment of prisoners completely disappeared. But the prison conference of 1877 reopened the question employing prisoners on public works, such as digging of canals etc. This Conference suggested that employment of prisoners is not only valuable but necessary for Jail administration. This recommendation was a accepted and followed in practice.

The All India Jail Committee did not favour this employment for two reasons. It did not permit the classification of prisoners and also made enforcement of discipline and proper task difficult.

India took part in various international conferences held in recent years and the literature issued by the Social Defence Section of the United Nations and other countries helped quite a lot in developing interest among the professional and non-professional men in adoption of new.

ideas and experiment in the fields of prison reforms. The training of prison officers, release of offenders on probation, home leave to prisoners, introduction of wage-system, release on parole, educational, moral and vocational training of prisoners and treatment of offenders in open condition as in done in other countries, are some of the new ideas widely accepted in recent times. The result of such experiments were encouraging and constructive. Although the schemes were not introduced on scientific lines for the rehabilitation of offenders due to shortage of staff and many other reasons, even than it made a significant to the treatment of offenders. The experiment regarding the employment of prison labour in open conditions have proved to be most successful from many points of view.

It shall not be irrelevant to mention here that the employment of prisoners in open conditions is more than a century old practice. The objectives of such employment have vastly changed. Originally it was meant to take hard work from prisoners under conditions which were humiliating and de-humanising and now it aims at providing them with useful and meaningful

work under conditions which help in restoring their self-respect and giving them a sense of pride and achievement[51].

### 3.2.5. : Evaluation and suggestions

The purpose of the following evaluation of the structure and function of the study is to show the extent to which these Camps are fulfilling the objectives of the open-air camps movement. Suggestions have also been given here in order to improve the working of these camps. The idea of open was given by Maconcie, but in a different from. The present form of these Shivirs is an outcome of Geneva Conference held in the year 1950. In India, the state of Utter Pradesh is probably the first to have introduced these open air camps called Shivirs and for this the credit goes to Dr. Sampurnanan. Sampurnanan Shivirs are the outcome of modern trends to treating and rehabilitating the prisoners and it has been observed during study that it has brought an overall change in the minds of inmates. This was also observed from the fact that the number of escapees from these camps was negligible as compared to walled or closed prisons.

The activities and programmes of these camps are multi-purpose and multi-dimensional. They are numerous and varied, short and long-term, reformative and reeducative. All this is meant to bring about changes in their human and social outlook and personality in such a way that after their release from the Shivirs they may not relapse into crime. They are given incentives for normal life. They are trained in the fields of agriculture, horticulture, cement preparation etc. because they generally come from working classes. Games and sports and other recreationed facilities from part of their routine life at the camps to inculcate in them a sense of discipline and social responsibility.

Inmates in these camps learn to follow a regular routine of work with regular wages under supervision. They get up early in the morning and after a short interval, gather in the open field for community prayer followed by mass physical exercise. After breakfast, they march to the work places and they come back for mid-day meals and rest. The food given to these inmates is of a low standard, and is without gustatory satisfaction. They are given special dishes only on Sundays. This too is tasteless.

[51] Tiwari Arvind : Open Prisons in India : The Indian Journal of Criminology and Criminologist, Vol. XXVI No. 1, Jan, 2005, 15-21.

The inmates in these camps are given hard jobs to perform. In Sitarganj Camp inmates are given training and employment in agricultural and agroindustrial fields (e.g. fruit preservation, oil etc.) and in Gurmah Camp the inmates are given employment in quarrying bricks for Churk Cement Factory, and public works such as construction of dams, canals, roads etc. Their gives them a sense of honour and dignity. But there is no compensatory funds for providing relief to the dependents of inmates in case the inmates suffer physical impairments or death during the period of Camp life.11

The location of these camps is not very, good, because it has been chosen from the view point of security and administrative conveniences. The roads inside the Sitarganj Camp are in a very bad conditions. It effects the transport system of these camps, and the vehicles soon go out of order which ultimately affects the camps's economy.

Sampurnanand camps have established well-meaning and effective administration to control escapees and maintain discipline without resorting to the traditional method of locks, bars, walls, guards, and that prisoners are also taught to express their needs and dissatisfaction through approved administrative channels. More over, to give prisoners a feeling that they are relied upon, an attitude of trust will enthuse them to work more devotedly. In this context it was also remarked during the course of discussion that there were very few cases of indiscipline, defiance of authority. Experiments have shown that proper authorities should visit these camps at frequent intervals. This would provide the inmates with an opportunity to present their grievances, suggestions and requests. It is also suggested that authorities should stay for a few days in the camps in order to acquaint themselves thoroughly with the conditions, although it may be possible to over-come all the problems faced in this new experiment. It is, therefore, essential that some authority and discretion should be vested in the person directly in charge so that he may take immediate remedial steps to avoid the delay and inconvenience to the inmates. It is likely to affect overall administration and efficiency of the camps. It may, however, necessitate some orientation of the inmates and reorientation of members of the staff. This orientation programme of staff should not be treated at par with the staff of closed prisons.12

Regular staff meetings at which all staff members, including the head of the institution, should take place and the problems should be discussed freely. Although such meetings are held at times but the necessary freedom of discussion is missing.

In terms of finances, open camps are far less costly than prisons of maximum security. The further advantage of these camps is that the Government have been able to employ in work a large number of inmates for the benefit of public.

It has to be realised that as means of correction and reform the treatment in these camps are of great value. There is no doubt that these camps are valuable as a means of rehabilitation of prisoners and their reintegration into the family and the community. It is significant to note that a prisoners at the time of release leaves the camp with a substantial amount of saving and with this he can look forward to cordial reception by relatives and friends. The money possessed by the inmates is of great help in executing plans for resettlement.

### 3.3. : Prisoner's rights

#### 3.3.1. : Sources of prisoners rights

n India there are essentially three different kinds of laws from which “prisoner' rights” are derived: (A) statutes : (B) decisional or judge-made law: and (C) the constitution of India.

(A) Statutes

( I ) Statutes are laws are passed by the legislatures either the Parliament ( for all-India statutes ) of by the legislatures of the various states ( for state statutes). Statutes are binding on everyone that comes within their coverage. For example, for the most part, all-India statutes are binding on all persons in India, while state statutes generally only have effect in the particular state in which they were passed. Statutes are interpreted by the courts.

The prisons Act, 1894 provides the skeletal framework for the statutory body prisoners rights and prison facilities. The prisons Act provides the states with considerable authority to pass laws, rules and regulations regarding the details of prison life. In most states these enactments are compiled in “ Prison Manuals” or “Jail Manuals” in the form of both statutory and non statutory rules. Some of the many aspects of prison life which are addressed by the sanitary requirements, daily routine, separation of prisoners, employment, prison discipline, punishment for committing prison offences, interviews and other communications with outsiders and rule regarding parole, furlough, remission of sentence and release.

**B) The Constitution of India**

The Constitution of India is the supreme law of the land. It is the law against which all other laws are judged. That is to say, if a statute is passed by a legislature that goes against a particular part of the constitution, then that statute, or part thereof, may be found by a court to be " unconstitutional" and will not have any binding effect.

Although there are no constitutional provisions which explicitly deal with rights of prisoners, Articles 14, 21 and 22 have been expansively interpreted to cover a wide range of rights, including those of prisoners. The most important constitutional provision for prisoners seeking to enforce their rights is Article 21. Article 21 provides that: no person shall be deprived of his life or personal liberty except according to procedure established by law.

**3.3.2. Some important constitution rights**

A. Right to be Free from Torture and Maltreatment Courts have frequently used Article 21 as a weapon against torture and maltreatment. In Francis Coralie Mullin v/s. Admn. Union Territory of Delhi ( AIR 1981 SC 746), the supreme court commented that: "There is implicit in Article 21 the right to protection against torture ( and) inhuman and degrading treatment." The courts have on innumerous occasions used this right to "ensure some minimum of social hygiene and banishment of licentious excesses Rakesh Kaushik v/s. B.L. Vig, Superintendent, Central Jail, Delhi, AIR 1981 SC 746).

In Sunil Batra (II) v/s. Delhi Administration (AIR 1980 SC 1579), a case which involved the claim on behalf of a prisoner whose anus had been penetrated and ruptured with a stick by a jail warden, the supreme court held that Article 21 prohibited mental torture, physic pressure and physical infliction and torture beyond the licit limits of lawful imprisonment.

In many other cases the supreme court has issued guidelines regarding solitary confinement and the use of handcuffs and fetters as forms of punishment and as "safe custody measures" ( see chapter XXI, Sections I.2 and J). If these guidelines are not followed strictly then the Article21 rights to human dignity and to be free from torture would be violated.

**B. The Right to legal Aid.**

The right to legal aid is well established as a part of Article 21 to the constitution. In a number of recent supreme court cases the right to legal aid has been discussed.

In M.H. Hoskot v/s. State of Maharashtra, ( 1978 (3) SCC 544; AIR 1978 SC 1548), the supreme court stated that if a prisoners is disabled from engaging a lawyer on reasonable grounds such as indigence (Poverty), on intercommunicate situation, a court shall, if the circumstances of the case, the gravity of the sentence and the ends of justice so require, assign competent counsel for the prisoners deference, provided the party does not object to that lawyer. In other words, if a prisoner is poor and cannot afford a lawyer, the court, in most circumstances, must appoint one for him or her if one is so desired. The state must pay for the appointed lawyers services. Also in Hoskots case, the supreme court discussed the right to legal aid during the appeal process. The supreme court held that any procedure or practice which restricts a persons right to appeal is unfair and against the principles of natural justices and is therefore in violation of Article21. The court stated certain requirements for a fair procedure under Article 21 during appeals.

(a) The convict shall be given a free copy of the judgment from the court within a reasonable period of time so that they may exercise their right to appeal.

(b) If a convict seeks to file an appeal or revision every facility for exercising of that right must be made available by the jail administration.

(c ) Free is poor or otherwise unable to secure legal who is poor or therewise unable to secure legal assistance, provided “the ends of justice call for such services.

In Khatri v/s. State of Bihar, *AIR 1981 SC 928) ( the Bhagalpur blinding case) the supreme court held that the right to free legal services was “ an essential ingredient of reasonable, fair and just procedure for a person accused of an offence.” The state must provide free legal services to anyone accused of an offence who cannot afford them. The judge or magistrate must inform the accused of the right to free legal aid. The right to free legal aid arises the first time the accused appears before the judge or magistrate (See also Sheela Barse v/s. State of Maharashtra (AIR 1983 SC 378); Hussainara Khatoon (III) v/s. Bihar, *AIR 1979 SC 1377).

Legal aid is available to help prisoners vent grievances. In sheela Barse v/s. State of Maharashtra (AIR 1983 SC 378), the supreme court stated: " It is therefore absolutely essential that legal aid be made available to prisoners in jail whether they are undertrials or convicted prisoners. For instance, to vindicate his innocence or defend his constitutional or legal rights or to protect himself against torture or ill-treatment or oppression or harassment at the hands of his custodians.

And finally, in Sukdas v/s. Union Territory Arunachal Pradesh (AIR 1986 SC 99; 1986 (2) SCC 401),. the supreme court held that the magistrate or sessions judge trying a case is obligated to inform the accused, who on conviction would be liable for imprisonment, of the right to free legal services. A trial conducted without legal assistance being provided or offered in such sanctions, is to be set aside because of the fatal constitutional infirmity (see also Hussainara Khatoon (III); Badri v/s. State of M.P., 1988 Cri.L.J. 1592.)

To summarize the judicial decisions discussed above, the following general guidelines may be given:

(a) Legal aid is a fundamental right of every person accused of a crime for which imprisonment is possible and who cannot afford legal services.

(b) If the accused cannot afford legal services, the state has a constitutional duty to provide the accused free legal service.

(c) legal aid is available from the time of arrest and production before the magistrate or judge, during the trial process and throughout the appeals process. It is also available while in prison for undertrials as well as convicts.

(d) It is the duty of the magistrate to inform the accused of the right to free legal services.

(e) If legal aid is not offered to an accused and the trial proceeds to a conviction, the conviction must be set aside.

D. Legal Aid in Civil cases in Maharashtra

In Maharashtra, legal aid and advice is made available in civil cases pursuant to the Maharashtra State Legal Aid and Advice Board Rules, 1981 and the Maharashtra State Legal Aid and Advice

Schme. “Civil” cases are generally all those cases which do not involve the trial or appeal of a criminal charge, including writ petitions concerning the violation of fundamental rights. In Maharashtra, legal aid and advice is available to all persons:

(a) Who are bona fide residents of Maharashtra

(b) Whose annual income is less than Rs. 20,000/-

(c ) Who are members of scheduled Castes, scheduled Tribes, irrespective of income, in cases of disputes of domestic matters.13

The above test is known as the “means test” and is dependent on income. However, in certain cases, legal aid and advice may be made available regardless of income. Legal aid and advice committee decides that a particular case falls in any of the following categories:

a) Cases of great public importance:

(b) Test cases, the decisions of which are likely to affect cases of numerous other persons belonging to the weaker section of the community:

(c ) Special cases, which are considered ceserving of legal aid.

legal aid is not available in the following civil cases:

(a) Those relating to defamation:

(b) Those relating to malicious prosecution;

(c ) For offences punishable only with a fine; (d) For offences against social laws (such as Suppression of Immoral Traffic in women and Girls Act, Protection of Civil Rights Act, etc.)

E. Legal Aid in criminal cases in Maharashtra In Maharashtra, legal aid and advice is also available in criminal

cases and appeals. Legal aid is available pursuant to the rules framed under Section 304 of the Code of civil Procedure and other rules ( for Sessions and Magistrate court cases), in all criminal cases where the accused:

(a) Has an annual income less than Rs. 20,000/- and is unrepresented;

(b) Is kept in an incommunicado condition (i.e. in custody):

(c ) Is entitled to maintenance allowance under Section 125 of the code of criminal Procedure ;

Is a poor person who wants to defend himself in a criminal case. II No legal aid is available in criminal cases involving :

(a) Economic offences against social laws such as suppression of Immoral Traffic in women and Girls Act and Protection of civil Rights Act;

(b) Child abuse.

III In criminal cases, lawyers who are appointed to represent accused persons must have practices for at least five years. In cases involving an offence punishable by death or imprisonment for seven years or more, a senior advocate assisted by a junior must be appointed.

**F. Right to Speedy Trial**

Under Indian law, the right to a speedy trial is found in both statutory and in judge-made and constitutional law. The basic principle behind the right to a speedy trial is that if the trial of an accused is unreasonably delayed due to reasons not caused by the accused himself, then the charges against the accused, if in custody, should be dropped and the accused should be unconditionally released.

The Code of criminal Procedure, 1973, contains several provisions which relate to the right to a speedy trial.

Under Section 167 (5) of the Code of criminal Procedure, 1973, if, in a summons case triable by a magistrate, the investigation has not been completed within a period of 6 months from the date of arrest, the magistrate should order the investigation to be stopped. However, this period may be extended if the officer in charge of the investigation satisfies the magistrate that for " special reasons" and " in the interests of justice," the extension is necessary. Several courts have used this statutory section to dismiss large numbers of cases in which this time requirement was not met.

# CHAPTER IV

## REFORMATIVE THEORY OF PUNISHMENT

The human society is a cooperative endeavor secured by coercion. By coercion, we mean a state where a recognized authority is compelled to punish the individual who contravenes the rules and regulation of the commonwealth. The practice of punishment is necessary for the maintenance of this social cohesion. Law is one of the important pillars of the state. To administer justice, punishment is needed. There are various theories of punishment which are retributive, deterrent, and reformative, preventive.

One of the most controversial aspects of legal philosophy concerns the justification of specific punishments for particular criminal violations. Punishment is a recognized function of all the states. With the passage of time, the systems of punishment have met with different types of changes and modifications. To administer justice is an essential function of the state and it is the duty of the state to provide a peaceful environment to its people.

Thus, philosophy behind the concept of punishment is not only to provide justice to the aggrieved but besides this to maintain security and safety in the society, to punish a criminal is not only to give torture to him or to humiliate, but there is a higher objective to be achieved and that is to establish a peaceful society. The concept of Punishment under modern jurisprudence is usually associated with the law of crimes.

Society at any stage of its growth has never been free from the problem of crime. It is inevitable since; some violation of the prescribed code of conduct is bound to occur. Crime in society is universal and is inseparable[52]. Lack of punishment creates a society which is incapable of maintaining civil order and citizen's safety. So punishments must be imposed on law violators.

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[52] "Crime is present in all societies of all types; there is no society that is not confronted with the problem of criminality. Its form changes; the acts thus characterized are not the same everywhere but, everywhere and always, there have been men who have behaved in such a way as to draw upon themselves penal repression. If in proportion as societies pass from the lower to the higher types the rate of criminality tended to decline, it might be believed that the crime, while still normal is tending to lose this character of normality. (Actually) it has every where increased. ….T here is; then, no phenomenon that presents more indisputably all the symptoms of normality, since it appears closely connected with the conditions of all collective life." See ***Criminology* : *Crime and Criminality* (1 978), p.465-466**

Law exists to bind together the community. It is sovereign and cannot be violated with impunity. Roscoe Pound observes; “Law is the body of principles recognized or enforced by public and regular tribunals in the administration of justice”. The most essential feature of a State is primarily two:

War, and

**Administration of Justice.**

According to Salmond, the administration of justice implies the maintenance of right within a political community by means of the physical force. It is a modern and civilized substitute for the primitive practice of private vengeance and violent self-help.

## 4.1 ADMINISTRATION OF JUSTICE – BRIEF CONCEPT

The origin and growth of administration of justice is identical with the origin and growth of man. The social nature of man demands that he must live in society. While living so, man must have experienced a conflict of interests and that created the necessity for providing the administration of justice. Without it, injustice is unchecked and triumphant and the life of the people is solitary, poor, nasty, brutish and short.

Social Sanction is an efficient instrument only if it is associated with and supplemented by the concentrated and irresistible force of the community. Force is necessary to coerce the recalcitrant minority and prevent them from gaining an unfair advantage over the law-abiding majority in a State. The conclusion is that the administration of justice with the sanction of the physical force of the State is unavoidable and admits of no substitute.

The crime was quite prevalent in society. In primitive society, every man was a judge in his own cause and might be the sole measure of right. Personal vengeance was allowed. Authorities of State found the need to administer justice. With the rise of political Sates Administration of justice started.

However, those States were not strong enough to regulate crime and inflict punishment on criminals. The law of private vengeance and violent self-help prevailed in the society and the

State merely regulated and prescribed rules for regulation. The State enforced the concept of “a tooth for a tooth”, “an eye for an eye”, “a life for a life”.

With the growth of the power of the State, the State began to act as a judge to assess liability and impose the penalty. It was no longer a regulator of private vengeance. It substituted public inquiry and punishment for private vengeance. The civil law and administration of civil justice helped the wronged and became a substitute for the violent self-help of the primitive days. The modern administration of justice is a natural corollary to the growth in power of political State.

## 4.2 CIVIL & CRIMINAL JUSTICE

Crimes are public wrongs and civil wrongs. Blackstone writes: “Wrongs are divisible into two sorts or species, private wrongs, and public wrongs.

The former is an infringement or privations of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed civil injuries; the latter are a breach and violation of public rights and duties which affect the whole community considered as a community and are distinguished by the harsher appellation of crimes and misdemeanors.”

## 4.3 PUNISHMENT: THE CONCEPT

Punishment is a means of Social Control. H.L.A Hart with Mr. Bean and Professor Flew have defined “punishment” in terms of five elements:

It must involve pain or other consequence normally considered unpleasant.

It must be for an offense against legal rules.

It must be intentionally administered by human beings other than the offender.

It must be an actual or supposed offender for his offense.

It must be imposed and administered by an authority constituted by a legal system against which the offense is committed.

In view of Dr. W.C. Reckless, "It is the redress that Commonwealth takes against an offending member[53]. Punishment according to West Mark is limited to "such suffering as in inflicted upon the offender in a definite way by or in the name of the society of which he is a permanent or temporary member[54]. According to Greenhut, three components must be present "if punishment is to act as a reasonable means of checking crime."

1. Speedy and Inescapable detection and prosecution must convince the offender that crime does not pay.
2. After Punishment, the offender must have "a fair chance of a fresh start".
3. "The State which claims the right of punishment must uphold superior values which he (offender) can reasonably be expected to acknowledge[55].

Sutherland and Cressey have mentioned two essential ideas while defining the concept of punishment:-

a) It is inflicted by the group in its corporate capacity upon one who is regarded as a member of the same group. War is not punishment for in war the action is directed against foreigners.
b) It involves pain or suffering produced by design and justified by some value that the suffering is assumed to have.

**4.4 THE CONCEPT OF REFORMATIVE THEORY**

According to this theory, the object of punishment should be the reform of the criminal, through the method of individualization. It is based on the humanistic principle that even if an offender commits a crime, he does not cease to be a human being.

He may have committed a crime under circumstances which might never occur again. Therefore an effort should be made to reform him during the period of his incarceration. The object of punishment should be to bring about the moral reform of the offender. He must be educated and taught some art or industry during the period of his imprisonment so that he may be able to start his life again after his release from jail.

[53] Reckless W.C Criminal Behaviour, p. 253.
[54] Westermarck, E. The Original and Development of the Moral Ideas, p. 169
[55] Max Greenhut, Penal Reform, A Comparative Study, p. 3

While awarding punishment the judge should study the character and age of the offender, his early breeding, his education and environment, the circumstances under which he committed the offence, the object with which he committed the offence and other factors. The object of doing so is to acquaint the judge with the exact nature of the circumstances so that he may give a punishment which suits the circumstances.

The advocates of this theory contended that by a sympathetic, tactful, and loving treatment of the offenders, a revolutionary change may be brought about in their characters. Even the cruel hardened prisoners can be reformed and converted into helpful friends with good words and mild suggestions.

Severe punishment can merely debase them. Man always kicks against pricks. Whipping will make him balk. The threat will result in resistance. Prison hell may create the spirit of defiance of God and man. Hanging a criminal is merely an admission of the fact that human beings have failed to reform the erring citizen. Corporal punishments like whipping and pillory destroy all the finest sentiments and tenderness in man. Mild imprisonment with probation is the only mode of punishment approved by the advocates of reformative theory.

According to the view of Salmond, if criminals are to be sent to prison to be transformed into good citizens by physical, intellectual and moral training, prisons must be turned into comfortable dwelling places. There are many incorrigible offenders who are beyond the reach of reformative influences and with whom crime is not a bad habit but an instinct and they must be left to their fate in despair. But people criticize; the primary and essential end of criminal justice is deterrence and not reformation.

The reformative theory is also known as rehabilitative sentencing. The purpose of punishment is to “reform the offender as a person, so that he may become a normal law-abiding member of the community once again. Here the emphasis is placed not on the crime itself, the harm caused or the deterrence effect which punishment may have, but on the person and the personality of the offender.”

The Reformative theory is supported by criminology. Criminology regards every crime as a pathological phenomenon a mild form of insanity, an innate or acquired physiological defect. There are some crimes which are due to willful violation of the moral law by normal persons. Such criminals should be punished adequately to vindicate the authority of the moral law.

In terms of the theory, offenders largely commit crime because of psychological factors, personality defects, or social pressures. Sentences are consequently tailored to the needs of the individual offender, and typically include aspects of rehabilitation such as community service, compulsory therapy or counseling. The pre-sentencing report by a probation officer or psychologist plays a substantial role in assisting the judicial officer to arrive at an appropriate sentencing decision.

According to the supporters of the Reformative theory, punishment is not imposed as a means for the benefit of others. Rather, punishment is given to educate or reform the offender himself. Here, the crime committed by the criminal is an end, not a means as in the Deterrent theory. This view is commonly accepted in the present time.

Punishment is inflicted on a criminal for his reformation. This theory does not justify capital punishment. Punishment is inflicted only to educate or reform the criminal himself. Punishment does not always make reform in a criminal. On the other hand, kind treatment sometimes produces a better result than punishment. It may be more favorable to the reformation of the criminal.

Forgiveness can change the nature of the criminal and give the scope of repentance and reformation to the criminal. It is clear that the reformative theory does not justify capital punishment. It supports the reformation of the criminal. According to this theory, a crime is committed as a result of the conflict between the character of a man and the motive of the criminal.

One may commit a crime either because the temptation of the motive is stronger or because the restraints imposed by character is weaker the reformative theory wants to strengthen the character of the man so that he may not become an easy victim to his own temptation this theory would consider medicine. According to this theory, crime is like a disease so you cannot cure by killing.

For this reason, a punishment like imprisonment should be given to criminal and all prisons should be transformed into residences where physical moral and intellectual training should be given in order to improve the character of criminal. A crime is committed as a result of the conflict between the character and the motive of the criminal. One may commit a crime either because the temptation of the motive is stronger or because the restraints imposed by character is weaker.

This theory would consider punishment to be curative or to perform the function of medicine. According to this theory, crime is like a disease. This theory maintains that you can cure by killing. The ultimate aim of reformists is to try to bring about a change in the personality and character of the offender, so as to make him a useful member of society.

It must be noted that the reformative theory shows a radical departure from the earlier theories and seeks to bring a positive change in the attitude of the offender so as to rehabilitate him as a law-abiding member of society. Thus punishment is used as a measure to reclaim the offender and not to torture him. This theory condemns all kinds of corporal punishments.

The major thrust of the reformist theory is rehabilitation of inmates in penal institutions so that they are transformed into law-abiding citizens. It focuses greater attention on humanly treatment of prisoners inside the prison. It suggests that instead of prisoners being allowed to idle in jail, they should be properly taught, educated and trained so as to adjust themselves to normal life in the community after their release from penal institution.

This purpose may be achieved through the agencies of parole and probation which have been accepted as modern techniques of reforming the offenders all around the world. Thus the advocates of this theory justify prisonisation not solely for the purpose of isolating criminals and eliminating them from the society, but to bring about a change in their mental attitude through effective measures of re formation during the term of their sentence.In Narotam Singh v. State of Punjab[56] the Supreme Court has taken the following view-

“Reformative approach to punishment should be the object of criminal law, in order to promote rehabilitation without offending community conscience and to secure social justice.”

[56] AIR 1978 SC 1542.

## 4.5 EXISTING LAWS SUPPORTING THE VIEW OF REFORMATIVE THEORY

In progressive states, provision is made for the prevention of habitual offenders. Bortal schools have been set up. Provision is made for a system of probation for First Offenders. This theory is being growingly adopted in the case of Juvenile Offenders. The oldest legislationon the subject in India is the Reformatory Schools Act, 1890 which aimed at preventing the depraved and delinquent children from becoming confirmed criminals in the coming years. It applied to children under the age of 15 years. The Reformatory Schools Act has been extensively amended in its application to the various States by State legislatures.

The government of India passed in 1960 the Children Act which applies to the Union Territories. This Act was amended in 1978. This amendment broadened the aim of the Children Act, 1960.

The Probation of Offenders Act, 1958 has been passed with a similar object in view. About the Act, the **Supreme Court observed in Rattan Lal v. State of Punjab**[57] that the Actis a milestone in the progress of the modern liberal trend of reform in the field of penology.

In Musa Khan v. State of Maharashtra[58] the Supreme Court observed that this Act is a piece of social legislation which is meant to reform juvenile offenders with a view to prevent them from becoming hardened criminals by providing an educative and reformative treatment to them by the government.

Section 27 of the Criminal Procedure Code, 1973 provides that any offence not punishable with death or imprisonment for life committed by any person who, at the date when he appears or is brought before the court, is under the age of 16 years, may be tried by the court of a Chief Judicial Magistrate or by any court especially empowered under the Children Act,196 or any other law for the time being in force providing for the treatment, training and rehabilitation of youthful offenders.

[57] AIR 1965 SC 444
[58] AIR 1976 SC 2566

Section 360 of the Code of Criminal Procedure, 1973 empowers the court to order the release on probation of good conduct or after admonition.

**4.6 SUPPORTERS OF REFORMATIVE THEORY:-**

a) Physiologists

Physiologists hold that crimes are due to physiological defect. Therefore, criminals should not be punished. Rather, they should be treated in hospitals by psychologists or psycho-analysts. That is why, according to this theory, crime is not a deliberate act of violation on part of the criminal. It is only due to his mental instability. Criminal anthropologists hold that criminals should not be punished. Rather, they ought to be treated in hospitals or reformatories. But the problem is that all crimes are not due to insanity or physiological defects. There are some crimes which are deliberate violations of the moral law and should be punished.

**b) Sociologists**

Again there are some crimes which are due to social inequalities. For instance, theft is a crime. The authority of the moral law demands that the person who is involved in theft should be punished. But if we investigate the case properly we understand that the cause of theft is poverty. Therefore, criminal sociologists view that we cannot think of prevention of crime without improving the social and economic conditions of the common people. Crimes can be prevented only if society is reconstructed on the basis of justice and equity. The advocates of this view are called criminal sociologists.

**c) Psychologists**

This theory is supported by psychologists. They hold that crimes are not due to willful violation of the moral law. Rather, crimes are due to mental disorder or insanity. That is why criminals should not be punished. They should be treated in hospitals or reformatories for reformation. The treatment of the criminal should be educational or medical rather than punishment. But there are some crimes which are a deliberate violation of the moral law committed by some people. Therefore, they should be punished. So, punishment prevents others from committing similar crimes. It also can refine the criminal's mind not to take to the wrong path.

## 4.7 PSYCHOLOGY & JURISPRUDENCE: A VIEW ON RELATIONSHIP

Psychology as a branch of knowledge is concerned with the working of the human brain or mental faculty. Since Jurisprudence and law are necessarily concerned with human action and it is the human mind which controls human action, inter-relation between psychology and jurisprudence need not be over emphasized. Particularly in dealing with crimes the psychology of the offender is generally taken into consideration. Again, psychology plays a dominant role in the study of Criminology & Penology. The psychology of the offender is also one of the crucial factors in deciding the nature of the punishment of the convicted person. The modern reformative techniques of punishment are essentially devised for the treatment of offenders according to their psychological traits. Such as:-

- Probation
- Parole
- Indeterminate Sentence
- Admonition
- Pardon
- That apart, the legal concepts pertaining to the faculty of mind and they, therefore, form a part of the study of psychology as also the jurisprudence, Such as:-
- Negligence
- Intention
- Motive
- Mens Rea
- Recklessness
- Rashness
- Other Cognate Mental Conditions

There is a school of jurists which hold the view that the sanction behind all laws is a psychological one. Jurisprudence is concerned with man's external conduct & not his mental process, but penology has benefited from the knowledge made available by Psychological Researchers.

## 4.8 LAW & MORALS (ETHICS)

In ancient times, there was no distinction between Law & Morals. However, later on, Mimansa made a distinction between obligatory & recommendatory rules and thus distinction came to be made in actual practice. By the time the commentaries were written, the distinction was clearly established in theory also. The rules were purely based on morals.

The doctrine of "factum valet" was recognized. That doctrine means that an act which is in contravention of some moral injunction should be considered valid if accomplished in fact. In its decision, the Privy Council made a distinction between legal & moral injunctions. The same is the case with the Supreme Court of India.

Morals or Ethics is a study of the supreme good. Law lays down what is convenient for that time and place. Both have a common origin but they diverge in their development. Morals are considered to be of universal value but the law is dynamic and varies from place to place. Morals are applied after taking into consideration individual cases whereas the application of the law is Uniform.

A study of the relationship between law & morals can be made from three angles:

- Morals as the basis of law.
- Morals as the test of positive law.
- Morals as the end of the law.

Some way morality is an integral part of law. Morality is "secreted in the interstices" of the legal system and to that extent is inseparable from it. This view point says that law in action is not a mere system of rules but involves the use of certain principles such as equity & good. Law & Morals act and react upon and mould each other. In the name of justice, equity, good faith & conscience, morals have infiltrated into the fabric of law. Moral considerations play an important part while making law, and exercising judicial discretion.

Morals act as a restraint upon the power of the legislature. No legislature will dare to make a law which is opposed to the morals of society. All human conduct and social relations cannot be regulated and governed by law alone and very many relations are left to be regulated by morals & law does not interfere with them. Morals perfect the law. According to jurists, morals have

become a very important subject of study for good law-making. Morals also exercise a great influence on International law.

### 4.9 LAW & JUSTICE (EQUITY)

The ultimate object of every legal system is to secure justice. Aristotle tried to explain justice by categorizing it as:-

According to Salmond, the law exists for the promotion of justice within the framework of the law. He defines law as "the body of principles recognized and applied by the state in the administration of justice". He further said, "the law consists of the rules recognized and acted on by the court of justice".

### 4.10 JUSTICE: INDIAN PERSPECTIVE

The ancient Indian concept of Dharma was analogous concepts consistent with righteousness, truth, morality, & justice. The ideal and object of the law were to promote justice. Law was governed by Dharma. The victory of good over evil, justice over injustice, was accepted as an innumerable universal rule. Even though the concept of equality & respect for human dignity is recognized in the Vedic texts, Hindu society was marked for its unequal & class character, which resulted in discrimination.

The Manusmriti reflected the social realities of the time. The modern concepts of rule of law and equality before the law were introduced along with secularization of administration of justice during the British Period. The Constitution, which was framed after independence embodies a concept of justice deeply influenced by the ideals of Western liberal democratic thought.

The Preamble speaks about justice-social, economic & political. The Fundamental Rights, which guarantee basic rights, the Directive Principles, which guide law-making & executive policies spell out how the three-dimensional concept of justice must be attained in the Indian context.

### 4.11 MODERN TRENDS

The Reformative methods have proved useful in case of juvenile delinquents, first offenders & women. Sex-psychopaths also seem to respond favorably to the reformative method of punishment. More recently, the reformative theory is being extensively used as a method of

treatment of mentally depraved offenders. This present trend is to treat the offender rather than to punish him.

This is done by classifying offenders on the basis of age, sex, the gravity of the offense and mental depravity. Thus clinical method pre-supposes punishment as a kind of social surgery since criminal is essentially a product of conflict between the interests of individuals in the society. In recent years, the supreme court of India has awarded compensation to victims who suffered due to torture or negligence by the prison or jail authorities[59].

Gandhi ji said, "Hate the sin and not the sinner". It should be a guide in the administration of criminal justice.

In the words of Justice Krishna Iyer: "a Holistic view of sentencing and a finer perception of the effect of imprisonment give short shrift to draconian severity & self-defeating. Perhaps the time has come for Indian Criminologists to rely more on Patanjali Sutra as a scientific & curative for crimogenic factors than on the blind jail term set out in the Penal code & that may be why Western researchers are now seeking Indian Yogic ways of normalizing the individual & the group."

Mr. Justice Krishna Iyer focuses on certain elemental factors which are of great significance for criminology thoughts particularly so far as our country is concerned to him the Gandhian diagnosis is the key to the pathology of delinquency & therapeutic role of punishment. It treats the whole man as a healthy man & every man is born good and so the modern principles of penology and reform and rehabilitation of the offender ought to guide and inform the Indian criminal courts.

The spirit of correctional philosophy in criminology is rightly described by Justice Krishna Iyer, "Every saint has a past and every sinner a future, never write off the man wearing the criminal attire but remove the dangerous degeneracy in him, restore his retarded human potential by holistic healing of his fevered, fatigued or frustrated inside and by repairing the repressive, though hidden, injustice of the social order which is vicariously guilty of the criminal behavior of many innocent convicts. Law must rise with life and jurisprudence responds to humanism."

[59] Sebastian Hongrey v. Union of India AIR 1984 SC 1026

In Sunil Batra, Karuna (Mercy) is treated as the mainspring of jail justice which would obviate torture some behavior which spoils the reformatory and correctional process. According to Krishna Iyer, "fair treatment will enhance the chance of rehabilitation by reactions to arbitrariness[60].

Modern times understands the need to reform the criminal & he commits crimes because of social; inequalities & injustice i.e. poverty, illiteracy, squalor & disease. The offender is to be treated as a sick man to be healed rather than as a malefactor to be chastised. Further Socialization of the offender would eliminate the factors which motivated him to commit the crime & he gets a chance of leading a normal life in society.

The reformative theory made a special focus on greater attention on humanly treatment of prisoners inside the prison. This purpose may be achieved through the agencies of parole & probation which have been accepted as modern techniques of reforming the offenders all around the world. The modern view is that "the mainspring of criminality is greed and if the offender is made to return the ill-gotten benefits of crime, the spring of criminality would dry up.[61]

The Apex Curt in D.K. Basu v. State of West Bengal held that custodial torture or death in the lockup strikes a blow at the rule of law and therefore, the court even recommended a change in the law of evidence to throw the onus on the police or jail authorities as to how a prisoner in their custody came to meet the death under suspicious circumstances.[62]

The Court has provided monetary compensation to the victims of police excesses in several cases. In the case of Ashok Kumar who succumbed to injuries sustained while carrying a load at the behest of the Roorkee Sub-jail authorities, the National Human Rights Commission directed U.P. State government to pay One Lakh rupees to his parents as compensation & issued guidelines that an under-trial cannot be put to hard task.

Kautilya regarded the object of punishment as reformatory. Reformative punishment may mean either that the offender is reformed while being punished or that he is reformed by the punishment itself qua the punishment.

[60] Sunil Batra v. Delhi Administration, AIR 1978 SC 1675
[61] Mahajan,V.D. : Jurisprudence & legal Theory,(5th ed.) p.147
[62] State of U.P. v. Ram Sagar Yadav, AIR 1985 Sc 416

## 4.12 THE CONCEPT OF RESTORATIVE JUSTICE

Crime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions that promote repair, reconciliation, and reassurance.

Those who view crime from a Restorative Justice perspective see crime as a conflict which creates a breach, a "rent" in the fabric of the community. Rather than the state and its laws at center-stage, the focus remains on the disputants and on accountability, responsibility, and negotiating fitting amends and, to the greatest possible degree, the repair of the harm. Since crime involves and affects—even erodes—the community, involving and empowering people to assist in the resolution of criminal conflicts that arise in their communities can reverse that trend, reducing the sense that the community is powerless to do anything about the levels of crime within it. Victim-offender mediation can dramatically change that dynamic.

Victim-offender mediation (often called "victim-offender conferencing", "victim-offender reconciliation" or "victim-offender dialogue") is one of the clearest expressions of restorative justice, a movement that is receiving a great deal of attention throughout North America and Europe. Restorative justice, however, provides a very different framework for understanding and responding to crime and victimization. Moving beyond the offender-driven focus, restorative justice identifies three clients: individual victims, victimized communities, and offenders.

Crime is understood primarily as an offense against people within communities, as opposed to the more abstract legal definition of crime as a violation against the State. Those most directly affected by crime are allowed to play an active role in restoring peace between individuals and within communities. Restoration of the emotional and material losses resulting from crime is far more important than imposing ever-increasing levels of costly punishment on the offender

A new approach to crime & punishment through the process of mediation between the offender & the victim of his crime was adopted in U.S.A & Western European countries during the mid 1970s. It was termed as "Victim-Offender Mediation" (VOM). The process involved meetings between victims, offenders & mediators offering the opportunity to the offender to explain his conduct or apologies to the victim.

The family members of the offender and/or the victim and community members could also be present in such mediation meetings. The victim gets a change to explain how he/she was mentally, materially, or physically affected as a consequence of the crime & the offender gets an opportunity to respond & restore justice to the victim.

Based on a foundation of Restorative Justice values, the Victim Offender Mediation Program (VOMP) focuses, at a post-incarceration stage, on remaining accountability, healing and closure issues for those involved in or affected by traumatic criminal offenses. While the program can and does involve face-to-face mediation in many cases, the 'mediator' is not an intervener but rather a supportive facilitator of therapeutic dialogue. The assessment and preparation processes are therapeutic in nature and informed by current theory and clinical practice regarding offender treatment and victim trauma recovery.

The purpose of the Victim Offender Mediation Program is to assist people affected by serious crimes by:

empowering them to address issues and concerns surrounding the crime and its consequences;

providing the parties with a process which can lead to new insight, thereby reducing levels of anxiety, and contributing to therapeutic gains;

addressing questions and concerns regarding the offender's eventual release into the community;

Providing sensitive staff who are committed to being agents of healing and restoration for those who suffer crime's effects.

The system of restorative justice has advanced criticism from certain quarters alleging that it grossly lacks punitive element & therefore, is contrary to the basic principle of sentencing which necessitates infliction of harm on the offender that fits his crime. Critics also feel that the outcome of any VOM process would depend upon the personalities & mental frame of the victim & the offender & therefore it would lack rationality. It is also alleged that the restorative approach would virtually turn criminal justice into civil justice because of the absence of punitive response. It for these reasons that the system has not been accepted in India.

## 4.13 JUVENILE JUSTICE:- REFORMATIVE TECHNIQUES

The early criminal justice system did not recognize any distinction between adults & juvenile offenders so far punishments were concerned. It is only with the popularity of Reformative theory of punishment, it was realized that the youngsters between a certain age group should be differently treated .in the matter of punishment because they are easily attracted to temptations of life & thus lend into criminality without any real intention of committing a crime.

It is with this purpose that most countries are now tackling the problems of juvenile delinquents on priority basis setting up separate juvenile courts or Boards to deal with young offenders & the procedure adopted in these radically different from that of a regular trial court. Delinquency is an act or behavior which is not normal. Harmful behavior pattern is called delinquency.

If a delinquent act is punishable it is a crime otherwise delinquency is not a crime. “An act dangerous to society or to himself which is done by a person below a certain age as specified by the statute is termed as a delinquents act although that act if done by a person above that age is regarded as Criminal. Thus a wayward or incorrigible act done by a child or an act which is otherwise criminal if done by a child or juvenile is termed as a delinquent act or a criminal act.”[xvi] Juvenile Delinquency is a gateway to adult crime since a large percentage of criminals careers have their roots in childhood. It is a problem of serious concern all over the world.

Causes of Juvenile Delinquency are:-

i. Adolescence Instability
ii. Uncongenial Home
iii. Associational Impact
iv. Sex Indulgence
v. Movies
vi. Failure in School Life
vii. Poverty
viii. Irresistible Impulse

A juvenile is not “arrested” but “taken into custody”, he is not “sentenced” but “committed” & his record is part of civilian files. It aims to have a healing effect on sentiments of juveniles so

that he may be reformed as much as possible & his tender faculties of mind may get proper guidance.

**4.14 JUVENILE DELINQUENCY IN INDIA**

In modern India, the important area of the application of correctional & reformatory approach relates to Juvenile Offenders-the young & immature violators of the law who do not understand the gravity or consequences of their unlawful acts. The United Kingdom was the first country which established a network of industrial schools & reformatories for neglected children & young offenders. In USA juvenile courts were set up & Children Acts were enacted.

The example of British practice of separate treatment for juvenile offenders in India is the Apprentices act, 1850 & the Reformatory School Act, 1876 for treatment of juvenile delinquents. The Reformatory Schools Act was the first attempt to separate juvenile offenders from adult prisoners. The young offenders were lodged in these institutions which imparted industrial training to them for their rehabilitation. The Act aimed at preventing young offenders from becoming hardened or professional criminals in the future.

This Act was subsequently amended & replaced by the Children Act, 1960. It provided for the establishment of children courts. The Children Act got amended in 1978 & finally replaced by the Juvenile Justice Act, 1986. This act makes special provisions for the care, protection, treatment, development & rehabilitation of delinquent's offenders & for the adjudication of justice through juvenile courts. The Act was based on two fundamental resumptions:-

a) Young offenders should not be tried but should rather be corrected
b) They should not be punished but treated

The basis of juvenile justice is the rehabilitation & reform of the delinquent child under the age of 16 years of age. The Act provides that no juvenile delinquents shall be sentenced to death or imprisonment. In Sheela Barse case[xvii] the Apex Court had released children below the age of 16 years detained in jails all over the country. The Supreme Court has highlighted the

importance[63] of proper handling, training, and guidance of children both on the part of society & government.

The Act provided for Juvenile Welfare Boards & Juvenile Courts for care & trial of juveniles. It also empowered the State Governments to free children from clutches of jails, & to establish Juvenile Homes for the reception of neglected juveniles (non-delinquent children) & Special Homes (Observation Homes) for the custody of delinquent juveniles. According to Justice Bhagwati & Justice Pathak, "Juvenile Delinquency" is, by and large, a product of social & economic maladjustment.

Even if it is found these delinquents have committed offenses, they cannot be allowed to be maltreated. They do not shed their fundamental rights when they enter jail. The law throws a cloak of protection around juveniles & seeks to isolate them from criminal offenders because the emphasis placed by law is not incarceration but on reformation.

The Indian Penal Code extends total immunity up to the age of seven.

Section 82 provides: "Nothing is an offence which is done by a child under seven years of age."

Section 83 provides: "Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion." The period of 12 years was approved by the Law Commissioner.

However, consequent to the passing of the U.N. Convention on the Rights of the Child on 20th November 1989 which was ratified by the Government of India as a member party on 11th December 1992 the standards prescribed by the said convention had to be adopted. A new Act entitled Juvenile Justice (Care & Protection of Children) Act, 2000 was passed which came into force on 1st April 2001 replacing earlier Juvenile Justice Act. Under this Act, a juvenile or child means a person (boy or girl) who has not completed eighteenth years of age[64].

There are Certified Industrial Schools under the provision of Borstal Schools Act. The English Borstal Law has been adopted in India for reforming criminals. To effectuate this type of

[63] **Sheela Barse v. The Secretary, Children Aid Society AIR 1987 SC 656**
[64] Section 2(K)

punishment, the Probation of Offenders Act was passed in 1958. The Act is a milestone in the progress of the modern liberal trend of reform in the field of penology.

There are at present a number of Children Homes, Observation Homes, Borstal Institutions & 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 rehabilitation of juveniles who need care & protection after their release from Homes, Borstal & Reformatories.

## 4.15 STATUTORY PROVISIONS DEALING WITH THE JUVENILES- IN INDIA

Immunity from Criminal Liability

There is a presumption of doli incapax that the child is not competent to commit the crime. In India, Section 82 of the Indian Penal code, 1860 confers immunity to the child below 7 years of age from the criminal liability but a child who is more than 7 years but below 12 years of age the immunity shall extend if he has not attained a sufficient degree of maturity of understanding to judge the nature & consequences of his act.

Beneficial Probation Laws

In India, under Section 6 of the Probation of Offenders Act, 1958 a person under 21 years age if found guilty of having committed an offense punishable with imprisonment shall not be sentenced to undergo the same, the court can release him on probation of good conduct.

Separate Confinement of Young Offenders

Section 27 of the Prisons Act, 1894 makes the provision for separate confinement of adult criminals, young offenders & female prisoners. It aims to prevent contamination of juveniles & further to safeguard exploitation by other offenders.

Whipping

The Whipping Act, 1900 made provision for whipping of juveniles, the reason for this provision was that the young offenders should be avoided to be imprisoned. However, this Act has been replaced by the Abolition of Whipping Act, 1955.

### 4.15.1 Borstal School System

The Borstal School System is famous after the name of village Borstal in England, where in 1902 Rochester Prison in Borstal village was converted into a reformatory to reform delinquent boys. In Borstal Institutions the offenders in the age group of 15 to 21 who commit the offenses punishable with imprisonment are kept for a maximum of 2 years although they can be released after 6 months. In the Borstal term, the juveniles are provided with education, industrial training & the recreation so that young offenders may develop themselves mentally fit & live a peaceful & law abiding life after their release.

### 4.15.2 Reformatory school System

In 1897 the Reformatory Schools Act was enacted empowering the State Government to establish Reformatory Schools. Section 399 of Cr.P.C 1898 made the provision of reformatory school for that area where the Reformatory Schools Act was not applicable. Generally, these schools are meant for "Youthful Offenders".

### 4.15.3 Remand Homes & Certified Schools

Section 9 of the Juvenile Justice act, 1986 the State government may establish the Juvenile Homes. Under Section 10, the State Government may establish Observation Homes. Section 10 & 11 of the Children Act, 1960 which is applicable to the Union Territories in India make the provisions for establishing Special Schools & Remand homes.

### 4.15.4 Children Acts

Pursuant to the recommendation of the Jail Committee 1919-20, the Children Act has been passed by various States. Parliament enacted in 1960 the Children Act to be operative only in the Union Territories. The Children Act makes the provision for:-

a) Care
b) Custody
c) Protection
d) Treatment

e) Maintenance
f) Welfare
g) Training
h) Education

Rehabilitation of neglected or delinquent children

Trial & Punishment of youthful offenders

**4.16 RECOMMENDATIONS OF INDIAN JAIL COMMITTEE**

The Indian Jail Committee was appointed in 1919 to review the conditions prevalent in jails. The Indian Jail Committee 1919-20 recommended various measures for the reform of child offenders. It was very much critical of the detention of the children in Jail. Since the child runs into criminality due to adverse circumstances and not because of the habit formations, he can be reformed easily.

The Committee recommended the English provisions of law in dealing with the children to be accepted in India also.

The recommendation was done for the establishment of the Children's Courts.

In case the child offenders are less, the Magistrate may hear the case in special hours and in a separate room to have a clear standing of the child with a paternal outlook. The Special Magistrate for a large area would not be beneficial to the child rather it would be harmful to him for the inconvenience in bringing him to that place. The Magistrate should have information about the child's home, his habits & circumstances leading to his criminality.

The child should be released on bail or sent to a remand home till the receipt of such information.

The committee also recommended for the widening of the provisions for the release on probation of child offenders with wider discretion to the courts.

These offenders must be kept under the supervision of the Probation Officers & the number of cases under a Probation Officer is more than the area must not be scattered or too large.

The Reformatory School must be situated within or near the prison.

Buildings must be planned properly on the cottage system.

The Committee also recommended for the training of inmates to have self-control.

The Offender must be examined regarding their mental & physical conditions & if they have defects, they must be sent to those institutions which are specially meant for them.

After the release of these offenders, a contact must be kept with them to render them any help or assistance in case of their need[65].

**4.17 PRISON SYSTEM**

A prison is a place where the criminal justice system put its entire hopes. The correctional mechanism, if fails will make the whole criminal procedure in vain. The doctrine behind punishment for a crime has been changed a lot by the evolution of new human rights jurisprudence. The concept of reformation has become the watchword for prison administration. Human rights jurisprudence advocates that no crime should be punished in a cruel, degrading or in an inhuman manner.

On the contrary, it is held that any punishment that amounts to cruel, degrading or inhuman should be treated as an offense by itself. The term prison has been defined by the Prisons Act, 1894 in an exhaustive manner.[66] Prison can be any place by virtue of a government order being used for the detention of prisoners.

Thus even a jail will come under the definition of the prison according to this definition. The modern idea about prison has been envisaged by judges through the decision making process. Even the concept of open jails has been evolved by time. No longer can prisons be called as an institution delivering bad experiences. Krishna Iyer, J opined prison as:

"A reformative philosophy, rehabilitative strategy, therapeutic prison treatment and enlivening of prisoner's personality through the technology of fostering the fullness of being such a creative art

[65] Para 367 of the Report
[66] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

of social defense and correctional process activating fundamental guarantees of prisoner's rights is the hopeful note of national prison policy struck by the constitution and the court."

Thus now all the dignity that human holds can also be availed inside the four walls of prison. The traditional definition and concept about the prison is unfit for the time. The human rights jurisprudence contributed much for the penal reforms and the same had its impact in India. The penal reforms made all over the world have its impact in India too.

The concept of penal reform had its birth from the reformative theory of punishment. Prison of the time should have a meaning that incorporates the reformative values into it. The reformative aspect thinks of incorporating humane values into the prison system and the prison officials have to work for the achievement of the same. The extent of protection assured by the legal system for the reformative treatment of prisoners should be made under a national legal frame work and India lacks the same.

### 4.17.1 The legal framework on prisoner's rights

Indian constitution intimates prison administration as a portfolio of state to legislate on[xxiii]. The fundamental responsibility of prison management is to secure custody and control of prisoners. Legislations, if made by the states, will always lack the unique standards for the protection of prisoner's rights. There should be a national policy framework that substitutes the varying state legislation.

It is true that the system normally demands the reformative framework that too one in tune with the international human rights law. This objective can be easily achieved by national legislation rather through varying state laws. India still runs with century old legislation for prison administration.[67] Prisons Act is only concerned about the classification and segregation of prisoners by their nature and status of imprisonment.

It failed to incorporate many of the principles laid down by the judiciary into its premises as well as recommended by the human rights law. Prisons Act also attempt to cast the responsibility of prison administration over the state.

[67] the Prisons Act, 1894.

Even the solitary confinement is still retained in the Act against which the judiciary had made their vehement dissent. The liberty to move, mix, mingle, talk, Share Company with co-prisoners if substantially curtailed would be volatile of Art. 21, unless the curtailment has the backing of law and this law should lay down a fair, just and reasonable procedure[68].

Prisons Act is also concerned about the prisoner's right to and meet visitors but that too is confined to under trial prisoners and civil prisoners. The concept of prison labour and earning are very vague from the Act. State on the other side, follows different practices in prison administration. Moreover the prison environment is an unseen one and that makes things more complicated. To conclude over the approach of the Act, it is important to point out that it still maintains separate confinement as a punishment for the offences done inside the prison. This indicates that the strategy of rehabilitation and reformation still have to be made into the Act.

### 4.17.2 Judicial initiatives in prison justice

The Indian system of prison administration was restructured and modified by the judiciary. Many of the rights assured to prisoners were incorporated into the Indian legal system by the judiciary.

Reformation as the objective of punishment: Krishna Iyer, J. was the person who advocated strongly for orienting reformative treatment of prisoners. In all his judgments he tried to incorporate reformative values into the prison administration. The concept of crime was also redefined by the judges of his time. It was observed that[69]:

"Crime is a pathological aberration that the criminal can ordinarily be redeemed that the state has to rehabilitates rather than avenge. The sub-culture that leads to anti-social behavior has to be countered not by undue cruelty but by re-culturisation. Therefore, the focus of interest in penology is the individual and the goal is salvaging him for society. The infliction of harsh and savage punishment is thus a relic of past and regressive times."

The above judgment conveys the right influence of international human rights doctrine over the Indian judiciary. The Court in the Giasuddin emphasized on the Gandhian approach of treating

[68] Sunil Batra v. Delhi Administration A.I.R. 1978 S.C.1675
[69] **Mohammed Giasuddin v. State of Andhra Pradesh, A.I.R. 1977 S.C.1926**

offenders as patients and therapeutic role of punishment. Krishna Iyer, J. delivering the judgment also pointed out that the judge must use a wide range of powers in reformatting the criminal before him. Thus the concept of reformation was planted even out of the four walls of prison by this judgment.

**4.17.3 Free from torture and cruel treatment:**

Supreme Court in many instances made it clear that the prison treatment should not cause any kind of torturous effect over the inmates. Even the practice of separate confinement and solitary confinement was deeply discouraged by courts in many instances. The court clearly pointed out that the prison authorities cannot make prisoners to solitary confinement and hard labor.

As to ensure the prison practices the Supreme Court in this judgment also directed the district magistrates and sessions judges to visit prisons in their jurisdiction and afford effective opportunities for ventilating legal grievances. They were to make expeditious inquiries and take suitable remedial action. Thus the concept of judicial policing was recognized by the Supreme Court through this judgment.

Discussing on the same premise the court vehemently criticized the practice of using bar fetters unwarrantedly. The court held the treatment of a human being which offends human dignity, imposes avoidable torture and reduces the man to the level of a beast, would certainly be arbitrary and questionable under Art. 14. Thus putting bar fetters for a usually long period, day and night, and that too when the prisoner is confined in secure cells from where escape is somewhat inconceivable without any due regard for the safety of the prisoner and the security of the prison is not justified. Judicial interferences of this kind coined many rights for the prisoners which will not be unless ever possible. Krishna Iyer, J. at this instance remarked:[70]

"Society must strongly condemn crime through punishment, but brutal deterrence is fiendish folly and is a kind of crime by punishment. It frightens, never refines; it wounds never heals. "

The message of reformation through prison treatment has to be there in every measure adopted by the authorities. The human right to be safe in prisons as mandated by the international human rights law is being incorporated into Indian law by judicial initiatives. International law gives

[70] V.R. Krishna Iyer, "Justice in Prison: Remedial Jurisprudence and Versatile Criminology" in Rani Dhavan

widest possible protection to the prisoners from torture and that kind of protection can only be accommodated by the legislature.

**4.17.4 Freedom of speech and expression:**

Prisoners alike others can access many human rights made in the Universal Declaration of Human Rights and international covenants. Indian judiciary had also recognized the right of a prisoner to enjoy the right to freedom of speech and expression. It is interesting to note that the judiciary took such a view before the Kesavanada Bharathi judgment came and the evolution of the concept of justice as fairness.

Alongside this, it is worthwhile in discussing the judicial declaration of the right of the press to interview prisoners. This judgment has certain implications over the right of prisoners in exercising their right to freedom of speech and expression. A Writ Petition filed under Art. 32 by the Chief reporter of Hindustan Times Smt. Prabha Dutt seeking a writ of mandamus or order directing the respondents Delhi Administration and Superintendent, Tihar jail to allow her to interview two convicts Bill and Ranga who were under a sentence of death, whose commutation petition to the President was rejected.

The Court held the restricted right to interview the prisoners subject to their willingness to attend the same. The freedom of press person to interview an under trial prisoner will not be alike that of the prisoner sentenced to death. Supreme Court remarked that the right to interview a prisoner will not become an exclusive right as in the case of life convict and it should be decided on merits depending on each case.

**a. PROBATION**

The word “Probation” has its origin in the Latin word “probare” which means to prove or to test. The release of offenders on probation is yet another reformative technique devised as an alternative to conventional incarceration of offenders in prison. In this technique, the offender is released on probation with or without conditions & is allowed to live in the community for his self-rehabilitation.

Thus probation implies postponement of the final sentence of a convicted offender for a certain period of time so as to enable him to have an opportunity to correct his conduct & readjust

himself in the community. His release on probation may be on condition that he may be placed under the guidance or supervision of a Probation Officer. This is a system whereby the offender has to prove worthy of not being punished by his conduct.

This concept has developed gradually & unconsciously. The origin of probation is traced to be the "benefit of clergy[71], "judicial reprieve" & "recognizance" during the middle ages for avoiding or postponement of sentences[xxix]. It has also its antecedents to the 12th century when the king began to pardon the criminals & wipe out punishment awarded to them. Pardon included commutation or remission of sentence.

The law relating to Probation of Offenders in India is contained in the Probation of Offenders Act, 1958 which is comprehensive legislation on probation law. Section 562 of the Code of Criminal Procedure, 1898 made a provision for the release of certain offenders on Probation. Spelling out the object of the release of offenders on probation, the Supreme Court in Ramji Missar v. State of Bihar,[72] observed:

"The purpose of release of youthful offenders on probation is to stop their conversion into stubborn criminals as a result of their association with a hardened criminal of mature age. Modern Criminal Jurisprudence recognizes that no one is born criminal & that a good many crimes are the result of the socio-economic milieu. Although not much can be done for hardened criminals, yet a considerable emphasis has been laid on bringing about reform of juveniles who are not guilty of very serious offenses by preventing their association with mature criminals."

Thus it is a reformative technique of treatment & rehabilitation of offenders.

### b. PAROLE

It is generally believed that a prisoner who is released from prison is a danger to society. Ex-prisoners are generally shunned, feared & discriminated & thus they are compelled to become wicked rather than being helped to lead an upright life. In order to obviate this situation, a corrective technique known is "Parole", which has been devised to provide an opportunity for the prisoner to rehabilitate himself in the society on a promise to return to prison in case he

[71] It was abolished in England in 1827.
[72] AIR 1963 SC 1088

breaks the law. Thus parole is the release of a long term prisoner from a penal institution after he has served a part of his sentence (generally 1/3rd) in prison-custody & on condition that he shall return to the prison to undergo the unexpired sentence in the event of misbehavior[73].

It may be stated that parole is a selective release of prisoners who show a tendency to reform during the period of their incarceration. The grant of parole is a quasi-judicial function performed by the Parole Board. Before recommending a prisoner's release on parole, the Board has to ensure that the parole has a suitable abode to live in & a job to do.

In India, the power to release the prisoners on parole is exercised by the executive under the respective laws operative in the State. President and Governors of States are vested with powers to provide pardon. Parole is also known as a premature release of offenders after strict scrutiny of long term prisoners, under the rules laid down by various governments. Premature release from prison is conditional subject to his behaving in society & accepting to live under the guidance & supervision of Parole Officer.

It seems the word "Parole" which means a term to designate conditional release granted in a penal institution" in the encyclopedia of the social sciences, is used in different senses in different States. The State of Uttar Pradesh, Madhya Pradesh, Punjab & Haryana have legislation on this subject. A set of Model Parole Rules have been framed sometimes ago by the Crime Advisory Board on correctional services with a view to preserving a basic uniformity of approach in the country.[74]

### c. CRITICISM

Although there is not much opposition to the theory or ideological basis for restorative or transformative justice, there is some contention as to whether or not it will work in practice. Some views on this are represented by Levrant, who thinks that the acceptance of restorative justice is based more on "humanistic sentiments" rather than restorative justice's effectiveness.

It is true that the Reformative theory can work fruitfully in case of reformation of non-habitual offenders. But in some cases, it does not work smoothly, because a hardcore criminal cannot be

[73] Sir Robert Gross: The English Sentencing System, p. 33
[74] Journal of Social Defence, 1972, p. 13

reformed. If we accept it then criminals will repeat the same type of offense. That is why; instead of trying for the reformation of his criminal mind he should be punished. Thus, it can be said that the Reformative theory will be more effective if it is intended to supplement normal punishment, rather than replace it altogether.

The reformative theory suggests that punishment is only justifiable if it looks to the future and not to the past. It should not be regarded "as setting an old account but rather as opening a new one". Hardened and professional offenders hardly respond favorably to reformative ideology because they are incorrigible offenders with whom crime is not so much a bad habit but it is an ineradicable instinct in them. For such offenders, deterrent punishment is perhaps the only alternative.

Even if criminals are treated as patients some of the hardened criminals are incurably bad. If prisons are turned into a comfortable place, the prison might turn into dwelling place, at least for poor people. Even with the application of the theory crime rate is ever increasing. Salmond says that "the application of the purely reformative theory leads to astonishing and inadmissible results".

Reformatory theory of punishment has very limited application. Psychologists say that behavior which comes under the domain of habit cannot be changed so easily. Moreover, this theory cannot be applied in every society. It is contrary to principles of Natural Justice, the aggrieved may not be rewarded but the guilty person must not go unpunished. It is wrong to prescribe that punishment has any one single objective.

Crime & conflict result in harm to people, Restorative Justice seeks to heal & right the wrongs, focusing on the needs of the harmed & those responsible for the harm. It encourages accountability, healing & closure for all.

The reformative theory is also known as rehabilitative sentencing. The purpose of punishment is to:-

"Reform the offender as a person, so that he may become a normal law-abiding member of the community once again. Here the emphasis is placed not on the crime itself, the harm caused or

the deterrence effect which punishment may have, but on the person and the personality of the offender."

Rehabilitation seeks to bring about fundamental changes in offenders and their behavior. As in the rehabilitation generally works through education and psychological treatment to reduce the likelihood of future criminality. In terms of the theory, offenders largely commit crime because of psychological factors, personality defects, or social pressures.

Sentences are consequently tailored to the needs of the individual offender, and typically include aspects of rehabilitation such as community service, compulsory therapy or counseling. This theory favors the humanitarian sentiments of the age. Therefore, punishment is imposed for the welfare of the criminal himself. This Theory aims at transforming the criminal minds in a way that the inmates of the peno-correctional institutions can lead the life of a normal citizen.

It aims at their rehabilitation and conforming to the norms of the society; into the law-abiding member. This theory condemns all kinds of corporal punishments. It looks at the seclusion of the criminals from society as an attempt to reform them and to prevent the person from social ostracism. Though this theory works stupendously for the correction of juveniles and first-time criminals as relies upon humanitarian modes of punishment in the case of hardened criminals, this theory may not work with the effectiveness.

A recent increased public awareness of alternatives to the classic prison system has created a favorable social climate for the growth of reformative justice in the public domain. The growth of the victim identity and victimization of our society has created satisfactory conditions for public acceptance of the ideas of restorative justice, especially through mass media.

## CHAPTER V

## REHABILITATION: POLICY, PACKAGE AND PRACTICE

Forced displacement takes away the basic livelihood of the people. Therefore, it becomes the legal and moral responsibility of welfare state to provide alternative means of livelihood (Cernea and Guggenheim 1993). The naval base called Sea Bird Project, Karwar, also affected, and displaced thirteen villages of coastal belt. This infrastructure induced displacement and separated families from their hearth. It raises several crucial sociological questions: Where do the displaced live? What kind of life do they lead? How do they earn their livelihood? What happens to the vulnerable sections like women, children, and widows? What happens to their village community, solidarity and identity? Do they have pride towards sacrifice for the nation and the national good? What kind of treatment do they get from the government authorities?, so on and so forth. One can seek answers to such kind of questions in the analysis of sea bird rehabilitation policy, package and its practice.

Therefore, in this chapter an attempt has been made to assess the acquisition act and its deficiencies, the present status of national rehabilitation policy and the Karnataka state government's rehabilitation act. A detailed analysis is also made of the sea bird rehabilitation policy, its practice and the tangible impact on involuntary resettlers.

### Land Acquisition Act, 1894 (Amended in 1984): Its Deficiencies

The development programmes like industrial and power mega-projects, large scale construction of multi-purpose irrigation dams, mining operations, reservation of forests and creation of sanctuaries and national parks, construction of canals, highways, defense projects etc. demand thousands of acres of land. Such land is acquired through land acquisition legislations or purchased directly from the landowners. Whatever might be the case, the process brings in its wake hardships to the persons whose lands contribute to the process of growth (MRD 1995: 57).

The original Land Acquisition Act was enacted in 1894 by the British government. Ninety years later, it was amended by the Indian Parliament and passed a new act. The two middle numbers

were transposed, as the year was 1984. A few changes, generally for the worse, have been made. The whole exercise is not fit to be called enactment of a new law (Fernandes 1997: 40).

Therefore, to understand such a controversial act and its deficiencies is necessary in the study of development-induced displacement and involuntary resettlement. Because, it gives a clear picture of legal basis of state and its idea of `public purpose'. Some important attributes of the Land Acquisition Act are:

1. Public Purpose: The land acquisition act has the power to acquire any land (private, forest or government) for the 'public purpose'. The acquisition under this provision may include agricultural land and homestead or both. Thus, under this provision the government directly acquires the private land for the scheme of development sponsored by the government and by a local authority or private company with the prior approval of the appropriate government.
2. Declaration of Intended Acquisition: When the appropriate government is satisfied after considering the report, if any made, under section five (a) sub section (2) that any particular land is needed for a public purpose, or for a company, a declaration shall be made to that effect under the signature of a secretary to such government or some duly authorized to certify its orders by the same notification under section 4-sub section (1).
3. Publication of Declaration: Such kinds of land acquisition declaration shall be published in the official gazette and in two daily newspapers circulated locally in which the land is situated. Of these two newspapers, at least one shall be in the regional language. The collector shall show the public cause notice of the substance of such declaration to be given at convenient places in the said locality. After declaration, the collector issues the order for acquisition. Then he serves notice to persons concerned.
4. Award of Compensation: The award of compensation is made under section 11 in the name of legal titleholder of the land. The amount of compensation is generally calculated based on the market price of the land, wells, trees and houses lost due to the acquisition of land.
5. Power to Take Possession: After the declaration of award, the collector may take possession of the land. Such land, thereafter, rests absolutely in the government free from all encumbrances. However, in case of urgency, the government can take away the

private land from its owner with much shorter notice (within fifteen days) without the declaration of award.

6. Land Owners Right: The legal titleholder, whose land is acquired under the land acquisition act for the public purpose, has certain rights to raise objections. He has right to file his case pertaining to low valuation or inadequate compensation or disputes about the legal titles of land etc.
7. Payment of Compensation: Under section 11 of the land acquisition act, the collector shall tender payment of compensation awarded by him to the person who lost this property. If he found any kind of legal dispute or the awardees denied accepting the same, the collector shall deposit the amount of the compensation in the court in such cases.

The above are some of the important attributes of the existing land acquisition act in our country. It has several deficiencies and legal controversies. The act is against the protective laws. Particularly, against the provisions of the article 17, 19, and 21, of Indian constitution. The Indian social scientists have listed the deficiencies and weaknesses of new land acquisition act, 1984. This new act has made land acquisition easier. Until 1984, land could be acquired only by the state for public purpose. It means that the public sector which obtained it through the government and private sector, had to buy it in the open market. Now the public sector can acquire land directly and the private sector can do so through government. Land can even be acquired for colonies (Fernandes 1997: 40). As a result, much more land than required is taken over and often misappropriated by the officials or their relatives (Vaswani 1992: 156 quoted in Fernandes 1997: 40).

This shows that there is no clear-cut definition of 'public purpose', for which the land is acquired from the private owner. According to the act, there is no distinction between the government sponsored development projects such as construction of dams, airports, railways, defence projects etc. and the projects sponsored by the private or multinational companies like Tata, Birla, Kirloskar, ICICI, Pepsi etc. The companies, which acquired more land than the requirement, may use for the construction of staff quarters, schools, swimming ponds, entertainment clubs etc. After acquisition, such personal purposes are also automatically

considered as the 'public purpose' Thus, the role of 'welfare-state' in protecting its citizens has become a controversial issue.

The observations made by other social scientists also support this. The state has the absolute power to displace whole communities on the claim of a 'public purpose', which has not been defined until now. The acquisition has deliberately ignored the protective laws. The spirit of the democratic norm, which is the basis of the Indian constitution, is against the practice of displacing people without their consent. This goes against article 21 of the Indian constitution, which has been defined by the Supreme Court of India as right to life and dignity. Article 19 confers on all citizens the right to reside in any region of India. But 'eminent domain' takes this right away from them, since they can be displaced without their consent in the name of 'public purpose' that is yet to be defined satisfactorily (Dhagamar 1998: 30, Kothari 1995: 10, Ramanathan 1995: 46, Cernea 1999: 23, Fernandes 1998: 261).

This shows that the very basic idea of Indian welfare state seems to be just as an 'Ideal Type'. According to the Max Weber 'Ideal Type' is nothing but only a `mental construct' not a 'perfect reality'. Thus, the controversial question arises about the Indian welfare state and its genuine intent. Because, its legal system, particularly, the land acquisition act, is based on the principle of 'eminent domain' under which the citizens of welfare state has no freedom or right to protect their own land, property and livelihood systems.

Another significant aspect of the land acquisition act is its provision of publication, of declaration of the proposed land to be acquired for the 'public purpose'. The system of declaration through the state gazette and the two locally circulated news papers makes no much sense, particularly, when the land is acquired from the remote, and the isolated villages, where majority of inhabitants belong to educationally backward and the ignorant farming and fishing communities. Hence, there is no question of regular reading of newspaper or state gazette. Thus, until they receive the land acquisition notice personally and come to know its contents from educated person, they will be in dark about state's 'public purpose'. The empirical studies of involuntary resettlement have indicated that in many cases without knowing about the legal aspects of their own property rights, market valuation, the cost of property and compensation etc people have moved from their original habitats. During field investigation, this study also found

out such kinds of problems, which are explained in the next chapter entitled, 'Resettlement: Socio-Cultural Transformation'.

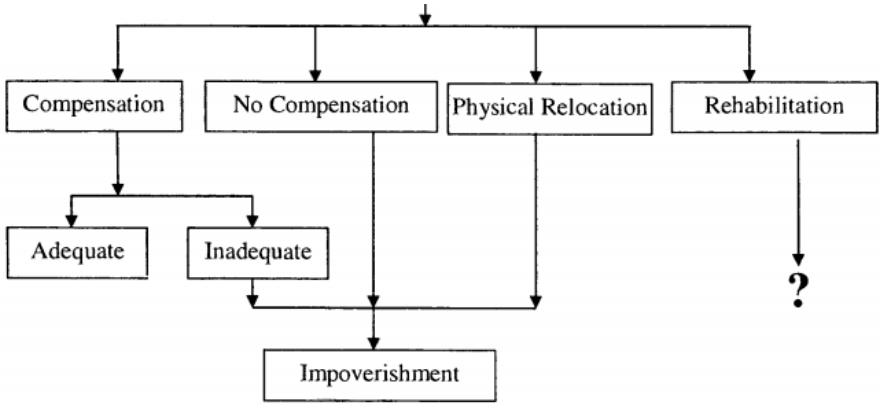
The act does not provide any compensation to a property less tenant, share cropper or agricultural labourers. Only the legal titleholder is eligible for compensation and not others.

The basic feature of the land acquisition act is the direct relationship between the state and the individual who holds the legal title on land. The Act does not go beyond its legal frame. The sharecroppers, tenants and agricultural labourers, artisans and service caste groups etc. have no provision of compensation in the act.

The act highly focuses on the legal titles and on the monetary compensation only. The Act does not speak anything about the resettlement and rehabilitation of the uprooted people. As a result, the people, who sacrificed their land and assets for the `public purpose', are usually impoverished after displacement. In the figure I Ramanathan (1996: 1491) has attempted to show how the process of land acquisition and displacement leads to impoverishment of the people.

**Figure 1**

**Land Acquisition Td Displacement**




- Reduce Subsistence Level.

- Migration: Wage Labour, Skilled, and Unskilled.

- Social Risks: Landlessness, Homelessness, Joblessness, Morbidity, and

- Food Insecurity, Loss of CPR, Social Disarticulation.

The families based upon CPR, the encroachers on a forest or government lands are not given compensation as the act has no such provision. "Under the principle of 'eminent domain' the CPR's continue to be acquired without compensation on the pretext of there being state property" (Fernandes 1998: 261). The present study of SBP displacement has also found out such cases. Some families of SBP affected area belong to the status of encroachers, hungami lagandars, and Karnataka Sarkar cases. According to the land acquisition act, they are not eligible for compensation for land lost. However, on humanitarian ground, SBP rehabilitation package treated them project-affected families and awarded them the normal resettlement and rehabilitation grants. This is the positive factor of SBP rehabilitation package as this saved some families from impoverishment.

**Absence of a National Rehabilitation Policy**

The Land Acquisition Act, 1894 (LAA amended 1984) does not speak a single word about the resettlement and rehabilitation of the uprooted communities. This was quite natural with LAA due to two reasons; one, the original act was passed by British government. At that time, the national development projects and the process of land acquisition was not the main concern of the rulers. Second, though there was displacement of indigenous communities, the nation was governed by the foreign government which had little concern for the welfare of people.

However, after independence it was the legal and moral responsibility of our welfare state to amend the act and to make some rehabilitation provisions in it. Otherwise, it is the government's duty to pass an independent rehabilitation act or formulate a national policy on it. However, our state has failed to bring such kind of act or policy till date. Since independence, right from the Jawahar Lal Nehru's period to present times, our national development programmes have displaced millions of people under the so-called 'public purpose'. However, our planners have not given serious thought to the life and livelihood systems, identity, and dignity, social and human capital of those displaced for larger good. As a result, India does not have a comprehensive national rehabilitation policy. Hence, it is not possible to provide the genuine rehabilitation. This

indicates that the national planners lack the commitment to the rehabilitation of our own citizens who sacrifice their hearths for the sake of national good.

Cernea (1999: 20) goes one-step ahead and brings out the relationship between federal system of government and absence of national rehabilitation policy and legal framework in India. He enquired why does not India — a big country not have a national policy? The answer was that the resettlement being a state level matter, the policy formulation is considered to be the responsibility of the state government and not that of the central government. The information available at the state level reveals that in most of the states the resettlement and rehabilitation policies and acts are not found.

Only three states have their own rehabilitation law. The Maharashtra was the first state in the country to pass a law in 1976. In the year 1985, Madhya Pradesh Government passed a rehabilitation law, which applies only to irrigation projects. The rehabilitation act was passed by the Karnataka state in 1987 but received the president's assent seven years later in 1994 (Fernandes and Paranjype 1997: 13-16). Some other states like Gujarat, Andhra Pradesh, Kerala, and Orissa have their state rehabilitation orders.

This should be a major concern of the social scientists, social activists, NGO's, funding agencies, and planners. Instead of a lot of researches being done about each development induced displacement and involuntary resettlement, the country is unable to form a national rehabilitation policy. On the contrary, the small countries like Ghana, Indonesia, Burma, Bangla Desh etc. have their won national rehabilitation policies. Here, Cernea's question as to why India being such a big country does not have a national rehabilitation policy might be of some relevance to - 1 - answer this issue. We think this 'Big' is a problem to gain a more appropriate, wider, and comprehensive knowledge and understanding of displacement and rehabilitation, and to have a comprehensive national rehabilitation policy. This is not only because India is 'geographically big' country but it is big in its heterogeneous socio-cultural, politico-economic and psycho-anthropological nature settings also.

The opinion of Deegan (1997: 47) also supports this idea. "The Indian subcontinent in both its real and imagined worlds is cultural diverse. Languages, religions, settlement, patterns, food and dress habits, dance and musical expressions, house type, temple design and interpretation of

ancient texts all offer variation and contradiction". Thus, probably more than anything, this Indian diversity comes in the way of forming a comprehensive national rehabilitation policy.

As a result, the peoples' right remains undefined and unprotected, while unsatisfactory practice thrives (Cernea 1999: 21). The absence of national rehabilitation policy causes several problems. It is a problem not only to those displaced for national good but it is a problem from the point of view of nation and national planners also. The problems arising out of the absence of national rehabilitation policy are:

I. Variation in compensation package
   1. 2. Variation in resettlement and rehabilitation provisions.
   2. Delay in the development project.
   3. Crisis to state's welfare goal.
   4. Raising fund for development is problematic.
   5. Issue of rehabilitation override the national development
   6. Loss of human and social capital.
   7. Social problems.

1. Due to the absence of the national rehabilitation policy, each state government and its bureaucrats put an independent effort towards the solution of the displacement problem. This is a waste of human as well as financial capital. In the process of handling the independent project, the valuation made for assets lost by the displaced community may differ from one project to another project within the state. There is no comprehensive and standard compensation package throughout the country and within a state. As a result, by comparing their compensation packages with other displaced groups' compensation package, the localized displaced groups raise the question of justice, equality and rights.

2. Not only the compensation package but also the resettlement and rehabilitation provisions vary from one state to another state or between different projects within a state. For example; the industrial projects like NALCO and Kudarernukh Iron Ore, provided one job to each displaced family and Sea Bird Project offered 70,000 rupees rehabilitation grant to two adult issues of each displaced family. The case of SSP is very interesting. This dam on Narmada River is concerned with three states; Gujarat, Maharashtra and Madhya Pradesh. The Gujarat government offered

minimum two acres of irrigated land to each displaced family, irrespective of families landless or land holding statue. On the contrary, the Maharashtra and Madhya Pradesh governments continued to limit the provision of two acres of land to 'landed; oustees. This means that encroachers and landless labourers are not entitled for benefits in their own states of Maharashtra and Madhya Pradesh (Morse and Berger 1997: 373).

This shows that there is disparity in the provisions of the rehabilitation policy of different states belonging to same development project due to absence of the National Rehabilitation Policy (NRP).

3. The experiences indicate that the people who are going to be dislocated due to the development projects, are worried about their future (resettlement and rehabilitation). Since there is no clear rehabilitation policy, the authorities concerned with particular project are also not sure about the exact plan of R and R. Thus, they keep displaced communities in dark and make false promises to them to get their things done smoothly and quickly. This, in turn, causes agitation or resistance against the project or against the R and R package. As a result, there is delay in the completion of the project, which increases the economic cost of the project. This has happened in several development projects. A vague R and R planning in the initial stage of the SSP gave room for the agitation and delay in dam construction. Their resistance through NBA got the international recognition.

4. After independence, India adopted a model of welfare state. It is the general responsibility of the welfare state to look after the social development of its citizens. It is the duty of welfare state to protect the interests of certain weaker sections such as, SCs, STs, physically and mentally weak, socio-economically backward, poor and powerless rural masses etc. However, in the process of the development through mega projects, the people belonging to weaker sections are uprooted and are subjected to `socio-cultural and economic pains'. To solve such critical problems and to maintain the identity of the welfare state free from paradoxical situation, the state must need to have a comprehensive national rehabilitation policy.

5. The funding agencies, particularly, International Monetary Fund (IMF), World Bank (WB), Asian Development Bank (ADB), etc. are ready to invest huge amount of fund in the national development planning. These funding agencies insist on the submission of detailed plan of

resettlement rehabilitation to fund the development projects that lead to displacement. But, due to absence of national rehabilitation policy, many Indian states are facing the problem of raising fund from international funding agencies as they cannot submit a precise and concrete plan. Thus, absence of policy comes in the way of development of India.

6. The human rights movements all over the world have succeeded in getting recognition of the rights of victims of development-induced displacement. Apart from the judiciary and the press, the mushrooming growths of non-governmental organisations (NGSs) and people's organisation have contributed their might for popularizing the human rights of the displaced. Judicial intervention has forced the national governments and funding agencies to recognize the rights of the displaced (for e.g. SSP, UKP, Three Gorege Dam etc.) and to provide the better R and R programmes (Jamdar 1998: 44). The main idea of 'national development' takes a back seat as the issue of violation of human rights, resettlement, and rehabilitation assume more significance in the absence of national rehabilitation policy. As a result, uprooted people, NGOs, social activists, and social scientists bring the issue of resettlement and rehabilitation to the front line.

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7. Earlier studies indicate that over a period of 50 years the development-induced displacement has become synonymous with further margnisation of socially disadvantaged people (Savyassachi 1998: 54). In the absence of national rehabilitation policy, the concerned authorities fail to provide appropriate resettlement and rehabilitation to the displaced groups. The adhoc resettlement leads to disintegration of families, caste and kin groups, neighbourhood relations, and village communities. As a result. at new place of resettlement, the uprooted communities are

neither able to maintain their long earned social capital (caste, kin, neighbourhood, family friends etc), nor are they able to use culturally developed human capital (occupational skills, techniques, knowledge and power). Hence, after displacement, they feel 'no where people' or 'no body's people'.

8. In a hurry to finish the development project in time, the concerned authorities neglect the issue of resettlement and rehabilitation. Due to absence of clear R and R policy, this issue consumes their time as well as money. Hence they keep it aside. Thus, in the absence of well thought and research based plan, the uprooted communities are disposed in the barren lands called rehabilitation colonies. At new place of resettlement due to absence of community life, alternative occupations and sources of livelihood, some resettlers indulge in antisocial means for their survival, such as crime, robbery, prostitution, gambling etc. Thus, due to absence of national rehabilitation policy, there is lack of R and R planning and implementation in India resulting in the emergence of several social problems.

## 5.1 KARNATAKA RESETTLEMENT OF PROJECT DISPLACED PERSONS ACT, 1987

This act received the assent of the President on 8 thAugust 1994, and it was published in the Karnataka Gazette (quoted in Fernandes and Paranjpye 1997: 409- 440). The act was passed by the state government to provide for the resettlement of people displaced from lands that are acquired for projects of public utility. This act is divided into five chapters. To understand the positive as well as negative factors of this act, it is necessary to know the important provisions of the act.

The chapter one of this act, entitled 'preliminary' mainly contains the definitions. Some important definitions mentioned in this chapter are:

(1) Project: Project means the construction, extension or improvement of any work for the supply of water for the purpose of irrigation or for the production and supply of electricity or of any work conducive to electrical development and includes any other work of public utility, construction, extension, improvement or development which results in displacing persons from lands, which may be used for such work.

(2) Displaced Persons: Means any tenure 'holder, tenant, government lessee, or owner of other property, who on account of acquisition of his land (plot in gramathana or other property) in the affected zone for the purpose of the project, has been displaced from such land or other property.

(3) Family: Family in relation to a displaced persons means the family of the displaced person consisting of such person and his or her spouse, minor sons, unmarried daughters, minor brothers or sisters, father and mother and other members residing with him and dependent on him for livelihood.

(4) Agricultural Labourers: Means the persons normally resident in the affected zone for a period of not less than two years immediately before the declaration of the affected zone. Such a person earns his livelihood principally by manual labour on agricultural land in project-affected zone.

(5) Resettlement Officer: The resettlement officer in relation to a project means, an officer not below the rank of a Tahsildar, appointed by the state government. (quoted in Fernandes and Paranjpye 1997: 409-440) The chapter two of this act mainly deals with the powers and duties of Directorate of resettlement, as well as resettlement officers. Hence, this chapter analyses the bureaucratic system of controlling authority in the area of project displacement and resettlement. It explains the powers and duties of chief controlling officer, the director, joint directors, deputy directors, project engineers, resettlement officers etc.

Third chapter is devoted to the analysis of the functional interdependence of different authorities. Particularly, the land survey, land acquisition and declaration of affected zone, census of displaced persons, assessment of land available for resettlement, declaration of benefited zones, the payment of compensation and evaluation of affected people are explained.

The chapter number four gives the detailed plans and procedure of resettlement.

(1) The state government shall resettle as many displaced persons as possible on land in the benefited zone or other villages or areas outside the benefited zone subject to the availability of land as far as practicable in accordance with the provisions of the Act and the rules made.

(2) The Act provides the provisions to displaced persons, who are desirous to resettle by themselves with the amount of compensation awarded by the law to them. But they have to make

such type of prior declaration. However, the option once exercised is final, under no circumstance they are allowed to change the decision.

(3) The plots of land to be granted to displaced persons, agricultural labourers and non-agricultural labourers in a new gramathan.

(4) The resettlement officer to prepare draft scheme of resettlement. This pertains the names of displaced persons, extent of land proposed to be granted to each family at new place of resettlement, public utilities and amenities and self employment schemes.

The last chapter of this act entitled 'miscellaneous' has highlighted one important factor.

Penalty of false Declaration: If any person knowingly makes a false declaration or statement under the Act, he shall without prejudice of any legal proceeding under any law for the time being in force on conviction, be punished with fine, which may extend to one thousand rupees (Ibid.).

The resettlement act passed by the Karnataka state government has both positive and negative aspects. Thus, these two aspects are critically analysed under two headings.

### 5.1.1 Positive Aspects of the Act

(1) For several years before passing this act, the state acquired private land and other assets from the people in the name of 'public purpose'. For such activities the state was provided some provisions mentioned in the land acquisition act, 1894 passed during colonial rule. However, the earlier studies finds out that several thousands of families were displaced from their heaths and habitats without any compensation and resettlement provisions. Hence the positive aspect of this act is that it filled some of the deficiencies of the land acquisition act.

(2) Another positive attribute of this act is that it clarifies the meaning and definition of important concepts like 'project', 'affected zone', 'benefited zone', 'displaced persons', 'family', 'agricultural labourers', `gramathana', 'resettlement officer' etc. This helps not only the concerned authorities but also the affected people to understand the legal status and the provisions of compensation as well as resettlement. (3) This act has systematically analysed the bureaucratic system of the project. This explains in detail about the hierarchical position, division of work,

power and duties of bureaucrats appointed by the state in the project zone. Thus, the concerned authorities can work smoothly without any bureaucratic hurdles.

(4) The significant aspect of this act is that the non-legal titleholder of project-affected zone is also considered for resettlement award, particularly agricultural labourers, non-agricultural labourers, tenants etc. This provision has filled the deficiency which remained in the land acquisition act, 1894.

(5) The act has made a provision for resettlement at the 'new gramathana' to all the project displaced families. The Act also gives freedom to those displaced families who want to resettle themselves outside the government formed `gramathana'. Such families are free to receive their eligible compensation, resettlement award and to settle according to their own wish.

Negative Aspects of the Act (1)

The overall impression of this act is that it seems to be just an extension of the land acquisition act, with some modifications. This act emphasizes the procedure of land acquisition, declaration of project affected zone, benefited zone and the valuation of the property lost of by the affected people more.

(2) The second weakness of this act is that it focuses more on the bureaucratic system of the project areas. The power, position and functions of each officer are highlighted. This factor is less important from the point of view of displaced people and their rehabilitation. The Act speaks only of the government officials (bureaucrats) like tahasildar, commissioner, director, deputy director etc. The act has failed to recognise the importance of the academic and other experts in the process of resettlement and rehabilitation. It has totally neglected the role of social scientists and social activists in resettlement and rehabilitation of the people.

(3) Another weakness of the act is that it speaks only about the monetary compensation and physical resettlement of the displaced people. The act has neglected the socio-cultural, economic, and ecological rehabilitation, which is more valuable from the point of view of displaced people than the former.

(4) The act presumed that displacement is part of development project. Hence, it does not talk anything about avoiding or minimizing the displacement. In the process of resettlement, the

social factor like caste, kin, neighbourhood, occupational network and village community are not given any importance.

(5) Another deficiency of this act is that it explains only about the economic and demographic social survey. The more important aspects social survey (for e.g. social and cultural life, religion, caste, kin groups, neighbourhood relations, human and social capital of project affected people etc.) are totally neglected. This shows that being a bureaucrat belonging to revenue department, the focus is only on quantitative aspects of social survey and not on qualitative aspects. If they emphasise equally both the qualitative and quantitative aspects during social survey stage, then they will be able to provide a genuine resettlement and rehabilitation to the uprooted people.

The government of Karnataka used this act only in some state sponsored development projects such as construction of dam (Ul(P), industries, irrigation canals, power projects etc. At the same time, the act has failed to define public purpose. This has contributed to the controversy regarding what constitutes public utility.

This act is not applied to the Sea Bird Project, the case under this study. This is a naval base project related to both state as well as central government. Hence, both the governments together have formed a separate rehabilitation package for the displaced people.

# CHAPTER VI

## CONCLUSION

Every society is governed by the 'rule of law' and the rule of law is to protect society from the liberties of people and an endeavour to reform and reassimilate offenders in the social milieu by giving them appropriate correctional treatment. But the authority of the State and its duty to maintain law and order are always in conflict with the feelings and liberties of people.

Man is a social animal. In order to survive on earth, he needs to socialize and accept the norms of society. But crime, repression and injustice have always been parts of the human conditions. So are prisons in which persons condemned for their anti-social acts as well as those acts which are against law, are lodged. But lodging persons who have violated the law of land into prisons does not transform them into non-persons. Prison has a significant role to play in the criminal justice administration as a penal institution as well as a formal agency of control. Criminal law occupies a pre-dominant place among other agencies of social control right from the inception of society and is regarded as a formidable weapon that society has forged to protect itself against all anti-social behaviour. However, as a vital agency of criminal justice administration, prisons perform the twin role of incarcerating the convicts as well as providing custodial care for the under-trials and detainees. Thus, prisons come into picture not only after trial and conviction but right from the stage of investigation and the commitment of the accused to remand or in the course of preventive detention.

The basic reason for the existence of prisons is our society, which expresses its wishes through the means of courts, finds it necessary to separate and isolate some people, who have broken the law. The concept of segregation of different types of persons from that of the mainstream of society is as old as society itself. Traditionally, prisons have been used for punitive purposes only and it is in the recent times that public opinion has come round to accept the notion of using imprisonment to reform and rehabilitate the inmates.

Globally, the development in penal philosophy calls for a shift in penal principles from punishment and retribution to reformation to rehabilitation. This is in-fact true since imprisonment and punishment do not present themselves as the proper methods of dealing with

criminals. In certain cases, as has been mentioned in Smiritis, fines were imposed on those who had violated the law in order to have an escape from the punishments. During different periods of the ancient times in India like Mughal Period, Maratha Period, etc. different forms of punishments were inflicted upon the persons for their violation of rules and norms of the society. They were more carrying with them the deterrent and retributive effects rather than reformative and rehabilitative. Prisoners were exposed to public gaze in order to deter others from doing such acts. Even Manu, the Great law-giver, had in his times suggested that prisons should be built in the public roads so that the public can become aware of the sufferings of criminals who have been disfigured in the prisons, whose bodies are shrunken with hunger and thrust, hair disordered, fettered in chains, and so would produce a horrible impression on the onlookers. This malicious type of penal system in ancient period continued till the downfall of the Mughal Rule, in which only Quranic law was followed and where prisons were used both for detention and punishment of offenders. But after India gained independence, views about the prisons as a means of punishing criminals changed and thereby a new thought of reformation and rehabilitation of criminals introduced as it was thought that crime is the outcome of diseased mind and this disease has to be removed.

Unfortunately, most prison workers have the attitude that prisoners must be punished and that the prisoners are all dangerous individuals. They lose sight of the fact that all individuals are potential criminals and that with our multiplicity of laws today, it is almost impossible for an individual to go through life without breaking one or more of these laws and that prison as a system have grossly failed in preventing the spread of crime. Just as mental hospitals were like custodial institutions so are the prisons still planned to wreak the vengeance of society upon the unfortunate individuals who are so unlucky as to be caught in the infringement of society's rules.

In this regard, many of the developed countries have devised other alternatives to imprisonment. Since prison congestion is a problem across globe, many alternatives have been devised in lieu of the imprisonment such as probation and parole. These are two such systems which have proved to be beneficial for the rehabilitation of prisoners. However under such systems, prisoners are kept under continuous surveillance of the probation officer in order to see whether the person is willing to retain himself or not. These are not the only alternatives yet there is the system of imposing fine upon the criminals for their criminal acts. These fines are the monetary payments

imposed upon the criminals as an intermediate punishment for their criminal acts. However, the amount of fine to be imposed upon a criminal depends upon the proportionality of crime and the class of offender. These alternatives to imprisonment are in-fact the better ways to curb the wrongdoing in society.

Prison society is a separate world by itself, which is composed of the ruling-group i.e. staff and the subordinate group of prisoners. The authority of the ruling-group is almost total. There is a traditional gap between the ruling-group and the subordinate group. However, these gaps are bridged at many places as otherwise the system cannot function.

The prison administration in Jammu and Kashmir is a legacy of British rule. There has been a very slow growth of prisons in this State. However, the present administration of jails is carried on according to the provisions of earlier Jail Manual and Jammu and Kashmir Prisons Act of 1977 (1920 AD). The State of Jammu and Kashmir has not lagged behind in the matters of jail administration. The improvements in service conditions of personnel has undoubtedly manifested in the overall improvement in jail administration with attendant benefits to the prison population. The jail functionaries are better trained, equipped and motivated to administer the custodial and correctional services, which have become increasingly challenging.

In the State of Jammu and Kashmir, the crime rate has considerably been low as compared to other States in India. Corresponding to this, there is also the lower jail population. The existing two Central Jails, seven District Jails and three Sub-Jails provide adequate accommodation to the present prison population. An overall view of the contemporary prison scene has proved it beyond doubt that prisons of today have miserably failed to correct the prisoners. They are the victims to poor living conditions, sub-standard and unhygienic food and subject to various kinds of tortures and humiliation besides other problems, during the period of their incarceration. The prisoners suffer the problems silently and there is none who better knows what happens to a prisoner behind those fortified walls and iron bars. Even the political leaders and other high ranking administrative officials visit these jails casually that too for ceremonial purposes or official inspection.

The Ministry of Home Affairs, Government of India has been implementing comprehensive schemes for the modernization of prisons in consultation with the Bureau of Police Research and

Development, which is a nodal agency for prison reforms in our country. At the same time, the National Human Rights Commission in its first Annual Report (1993-94) had expressed grave concern over the problems in prisons in our country. The Commission has made recommendations on the major problems in the prisons, which include over-crowding, delay in trials, privacy of inmates, prison hygiene, system of jail visitors, sentence review Board and open prisons.

As regards the prison reformation before independence, different committees and commissions have expressed their views on the prisons in India to bring about reformation in the prisons. The movement of reformation, however, started right from 1835 when Lord Macaulay made an in-depth study of the prisons in India. The committee after conducting study recommended valuable suggestions. The Committee of 1919-20 called as the Indian Jails Committee, which was under the chairmanship of Sir Alexander Cardrew, also looked deep into the problems and thereby suggested measures for the improvement of the jails in India. It made valuable recommendations which almost touched each and every sphere of the prison system. This was the last pre-independence Jail Committee constituted to bring about an overall change in Indian jails.

## SUGGESTIONS

On the basis of the above conclusion, the following suggestions have been offered:

1. Of the many reforms required for effective functioning of the Indian Criminal Justice System, prison reforms form an important part. Unless measures are initiated to bring the Indian prison management in sync with the times, the Criminal law and justice system will never be able to work optimally. The various issues requiring urgent attention include the physical structure of prisons, conditions and treatment of prisoners, training and re-orientation of prison personnel, modernization of prisons, and better correctional administration and management.

2. The Government of India constituted a committee in December 2005 under the Chairmanship of the Director General, Bureau of Police Research and Development (BPRD), to prepare a draft policy paper on prison reforms and correctional administration. This Committee has made many recommendations, which, if implemented, would make a lot of difference to our prison administration and management. Hence, immediate steps shall be taken for the implementation of the same.

3. Justice Mulla Committee has suggested setting up of a Department of Prisons and Correctional Services to deal with adult and young offenders. Young offenders aged between 18 and 21 should not be confined in prisons meant for adult offenders, as they become more prone to crimes while in the company of more experienced and hardened criminals. It similarly recommended that persons arrested for politico-economic agitations for public causes should not be confined in prisons with regular prisoners. Accordingly, it is suggested to classify prisoners based on age and prisoners between 18 and 21 years should be put separately.

4. The problem relating to over-crowding of prisons can be tackled by reducing the population of under-trial prisoners by speedier trials in special fast-track courts, LokAdalats, special courts and trial through video conferencing. However, it should be ensured that the prisoners are not forced to plead guilty in such fast-track courts in the hope of getting a lesser sentence. However, a healthy plea bargaining may be encouraged. Modern methods of information technology and e-governance should be pressed into service for improvements in this regard

5. Going by the reformative theory of deviance, the confinement of offenders in prison is meant to reform and rehabilitate them as useful citizens rather than penalizing them even after marked positive changes are noticed in them. Hence, the release of lifers and hardened criminals before their stipulated terms should be given serious thought. As far as possible, easier bail provisions, using section 436-A of the Cr.P.C and use of the Probation of Offenders Act, 1958 should be pressed into service. It would not only reward good behaviour of these prisoners, but also take care of overcrowding in prisons.

6. Serious thought should also be given to ensure that prisoners are not denied their basic rights of consultation with their lawyers. It should also be ensured that video conferencing, as proposed, should in no way impede this basic right. The constitutional right to free legal aid, as envisaged in Article 39-A of the Indian Constitution, should be fully implemented.

7. There is a delay in disposal of the appeals pending before the higher courts. This is due to huge pendency of appeal cases and also due to lack of required strength of judges. Hence there is a need for expedited appeal hearings, which would become possible if the number of judges in the higher judiciary is suitably increased.

8. With respect to basic amenities in prisons, there is a lot which needs to be done to ameliorate the conditions of prisoners. Adequate sanitation, improved prison wages, all-round entertainment facilities and better health check-up facilities, are necessary if prison are truly to be a place for reforming and rehabilitating an individual rather than further hardened a criminal.

9. Manpower shortage has been another bane of the Indian prison system which needs to be beefed up for better prison management and security. Apart from reinforcing manpower, prison officials of all ranks also need to be given special training and orientation for further improving prison security and making Indian prisons better places, yoked to the cause of reforming and rehabilitating deviant members of the society. Women and juvenile offenders definitely need better and more sensitive treatment than they get currently.

10.It is necessary to review the strength of doctors sanctioned for prisons and ensure the availability of adequate medical facilities for prisoners and prison staff. Arrangements must be made to look after the special requirements of women prisoners. At least one woman medical officer must be available at times to attend to women prisoners. The first medical examination of the prisoner, done at the time of his entry into the prison must be thorough. Detailed information about various ailments, including past medical history, must be collected and faithfully recorded. Adequate infrastructural health care facilities, like well-equipped ambulances, stretchers, dispensaries, hospital beds etc. should be made available to the prison administration.Suitable arrangements should be made to provide psychiatric counselling to those suffering from chronic depression, particularly to women prisoners.

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