Reformative theory of punishment with reference to human rights: A critical analysis

DISSERTATION

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LIST OF ABBREVIATIONS

AIR	:	All India Reporters
Anr.	:	Another
AP	:	Aggrieved Person
Art.	:	Article
ASJ	:	Additional Sessions Judge
C.C No	:	Civil Case Number
C.P.C	:	Civil Procedure Code
CCS	:	Central Civil Services
Co. Ltd.	:	Company Limited
Cr.P.C	:	Criminal Procedure Code
Edn.	:	Edition
FIR	:	First Information Report
HC	:	High Court
I.L.R	:	Indian Law Reporter
IDA	:	Indian Divorce Act
IPC	:	Indian Penal Code, 1860
IO	:	Investigating Officers
LSA	:	Legal Services Authority
NALSA	:	National Legal Services Authority
NCPCR	:	National Commission for Protection of Child Rights
NCR	:	National Crime Record
NCT	:	National Capital Territory of Delhi
NPC	:	National Planning Commission
Ors.	:	Others

PIL	:	Public Interest Litigation
RTI	:	Right to Information
SC	:	Supreme Court
SCC	:	Supreme Court Cases
SH	:	Shared Household
SLP	:	Special Leave Petition
UCC	:	Uniform Civil Code
UNDP	:	United Nations Development Programme
UNESCO	:	United Nations Educational Scientific and Cultural Organization
UNO	:	United Nations Organization
UOI	:	Union of India
USA	:	United States of America
W.H.O	:	World Health Organization

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7. BABUPAHALWAN V. STATE OF MADHYA PRADESH AND OTHER (1990 CR.L.J 2704 MP.)
8. HARBANS SINGH V. STATE OF PUNJAB (1987 CRI U 1088).
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Chapter 1

Introduction

1.1 Introduction

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.[1] Lack of punishment creates a society which is

[1] "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**

incapable of maintaining civil order and citizen's safety. So punishments must be imposed on law violators.

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.

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.

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."

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."[2] 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."[3] 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."[4]

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.

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

1.3 Objective of the Research

The objective of this research is:-

- To study about the reformative theory of punishment.
- To study the concept of punishment and human rights.
- To study the existing laws supporting reformative of punishment.
- To study about the reformative theory of punishment and role of human rights.

1.4 Hypothesis

H_1: Reformative approach to punishment should be the object of **criminal** law.

1.5 Research Methodology

This research is based on doctrinal type pattern. Doctrinal research is also known as traditional research. Doctrinal research is divided into different types such as analytical and descriptive method. This research is based on information which has been already available and analysed those facts to make a evolution of this research. This research involves secondary data. In this research the researcher mostly used books, articles, journals, etc.

Chapter 2

THEORIES OF PUNISHMENT

2.1 INTRODUCTION

Each society has its own way of social control for which it frames certain laws and also mentions the sanctions with them. These sanctions are nothing but the punishments. 'The first thing to mention in relation to the definition of punishment is the ineffectiveness of definitional barriers aimed to show that one or other of the proposed justifications of punishments either logically include or logically excluded by definition.' Punishment has the following features:[5]

- It involves the deprivation of certain normally recognized rights, or other measures considered unpleasant
- It is consequence of an offence
- It is applied against the author of the offence
- It s applied by an organ of the system that made the act an offence.

The kinds of punishment given are surely influenced by the kind of society one lives in. Though during ancient period of history punishment was more severe as fear was taken as the prime instrument in preventing crime. But with change in time and development of human mind the punishment theories have become more tolerant to these criminals. Debunking the stringent theories of punishment the modern society is seen in loosening its hold on the criminals. The present scenario also witnesses the opposition of capital punishment as inhumane, though it was a major form of punishing the criminals earlier. But it may also be observed till recently the TALIBANS used quite a harsh method for suppression. The law says that it does not really punish the individual but punishes the guilty mind.

[5] S.G.Goudappanavar, Associate professor, gouri1000@gmail.com, S.C.Nandimathl Law College, Bagalkot-587101, Karnataka.

As punishment generally is provided in Criminal Law it becomes imperative on our part to know what crime or an offence really is. Here the researcher would like to quote Salmond's definition of crime: Crime is an act deemed by law to be harmful for the society as a whole though its immediate victim may be an individual. He further substantiates his point of view through the following illustration a murderer injures primarily a particular victim, but its blatant disregard of human life puts it beyond a mater of mere compensation between the murderer and the victim's family.

Thus it becomes very important on behalf of the society to punish the offenders. Punishment can be used as a method of educing the incidence of criminal behavior either by deterring the potential offenders or by incapacitating and preventing them from repeating the offence or by reforming them into law-abiding citizens. Theories of punishment, contain generally policies regarding theories of punishment namely: Deterrent, Retributive, Preventive and Reformative.

Punishment, whether legal or divine, needs justification. Because the justification of legal punishment has been given greater consideration by philosophers than has the justification of divine punishment by theologians, the philosophical concepts and 'theories of punishment' (i.e. the justifications) will be used as a basis for considering divine punishment.

Many a time this punishment has been termed as a mode of social protection. The affinity of punishment with many other measures involving deprivation by the state morally recognized rights is generally evident. The justifiability of these measures in particular cases may well be controversial, but it is hardly under fire. The attempt to give punishment the same justification for punishment as for other compulsory measures imposed by the state does not necessarily involve a particular standpoint on the issues of deterrence, reform or physical incapacitation. Obviously the justification in terms of protection commits us to holding that punishment may be effective in preventing social harms through one of these methods.

As punishments generally punish the guilty mind it becomes very important on the part of the researcher to what crime really is. But it is quite difficult on the part of the researcher to say whether or not there must be any place for the traditional forms of punishment. In today's world the major question that is raised by most of the penologist is that how far are present 'humane' methods of punishment like the reformative successful in their objective. It is observed that prisons have become a place for breeding criminals not as a place of reformation as it was meant to be.[6]

It may be clearly said that the enactment of any law brings about two units in the society- the law-abiders and the law-breakers. It is purpose of these theories of punishment to by any means transform or change these law-breakers to the group of abiders. To understand the topic the researcher would like to bring about a valid relation between crime, punishment and the theories.

The researcher due to certain constraints of limited time and knowledge is unable to cove the area of the evolution of these theories separately but would include them in the second chapter. The researcher would now like to move on to his first chapter in which he would be vividly discussing 'crime and punishment.'

The researcher in his first draft had included the chapter on the evolution of the theories from the early ages to the modern era, but due to certain limitations included them and discussed them during the due course of the project.

2.2 Crime And Punishment

Crime: n., & v.t. 1. Act (usu. grave offence) punishable by law; shameful act 2. charge with or convict of offence.

Punishment: n. Punishing or being punished; penalty inflicted on the offender;

Punish: 1. Cause to suffer for offence, chastise, inflict penalty on offender for his crime.

[6] Sethna, M.J. *Society and the Criminal*, (3rd Ed) Bombay: (N.M Tripathi Pvt Ltd. 1971) p.236.

One can surely observe how closely are crime and punishment related. The researcher would in this chapter precisely like to stress on this point itself.

Crime is behaviour or action that is punishable by criminal law. A crime is a public, as opposed to a moral, wrong; it is an offence committed against (and hence punishable by) the state or the community at large. Many crimes are immoral, but not all actions considered immoral are illegal.

In different legal systems the forms of punishment may be different but it may be observed that all arise out of some action or omission. All these constitute all moral as well as legal wrongs such as murder, rape, littering, theft, trespass and many more. As crime is quite different in different geographical area it is quite evident that the forms of punishment would vary as it was mentioned earlier that punishment as well as crime are socially determined. A type of action may be a crime in one society but not in another. For example euthanasia is an offence in India, but in many European coutries such as Holland it is legalized. But there are certain offences which are recognized almost universally like murder.

Durkheim explains crime, as crime exists in every society which do and do not have laws, courts and the police. He asserts that all societies have crime, since all societies involve a differentiation between two kinds of actions, those that are allowed and those that are forbidden. He calls the latter type criminal.

Law is the string that binds society, and he who attempts to break the string is a danger to the society as a whole and dealt with sternly by the powerful arms of law. Punishment though most times confused with imprisonment is something much different from it. Punishment though most times confused only with sanctions may also be of moral nature like ostracism. Punishment, whether legal or divine, needs justification. Because the justification of legal punishment has been given greater consideration by philosophers than has the justification of

divine punishment by theologians, the philosophical concepts and 'theories of punishment, (i.e. the justifications) will be used as a basis for considering divine punishment.

A complete definition will now be made in such a way as to include both legal and divine punishment. A.Flew first suggests that punishment must be an evil, an unpleasantness to the victim. J. Mabbot objects to the use of the word 'evil' in connection with punishment. He maintains that 'evil' carries too much moral flavour and also that it suggests positive suffering. Mabbot states: The world is a worse place the more evil there is in it and perhaps the more suffering. But it does not seem to me necessarily a worse place whenever men are deprived of something they would like to retain; and this is the essence of modern punishment. While deprivation may be a more appropriate description of modern punishment this does not necessarily exempt it from being an evil. Nor does the suggestion that 'evil' carries a moral flavour, for in fact the word punishment itself carries a moral flavour. (Like 'evil', punishment is not in itself a moral term but it is suggested that it usually occurs in an ethical context.) While we must eventually come to some conclusion as to whether punishment is an evil, it would be preferable at present to use, as does W. Moberly, the slightly more neutral term 'ill'.[7]

Both of these thinkers of punishment believe that the offender must be answerable for any wrong that he has done. K. Baier explains punishment as law-making, penalisation, finding guilty, pronouncing a sentence. In a legal context law-making is a necessary condition, but it is possible to commit a wrongdoing intentionally although no law has been made, in fact it is because certain acts are considered wrong that laws are made in the first place. What is important to note is that punishment is a conditional act and cannot be isolated from its total context.

[7] Freeman, M.D.A.Lloyd's *Introduction to Jurisprudence*, (17th Ed.), (London: Sweet & Maxwell Ltd. 2001). P..282.

But Durkhaeim has a different approach to punishment altogether. He treats punishment as the reaction of the society against a crime. According to him a if punishment be a proportionate response to the harm caused to the society then the extent of the punishment inflicted must be clearly sorted out. He also stressed on the point that punishment can never be calculated; it is an intensely emotional- sense of outrage- the desire to exact punishment. He says, It is not the specific nature or result of the offending action as such which matter, but he fact that the action transgresses widely shared ad strongly held sentiments, whatever these might be in any particular case. He explains that if punishment is a reaction of the society against the offenders then it is generally in the form of an outrage or anger thus rather being reparative or reformative becomes punitive. This approach of the society towards the criminals is what makes us treat them as outcasts and treated as an deviant from the social norms. This two-fold approach has been criticized severely by various penologists, as at one time there is the use of both reformative and retributive theories.[8]

Punishment and crime are very strange phenomena to deal with. It is only if the acts done are within the course of the provisions provided under the Code then any benefits take out of it is not questioned. But any action through which maybe the same benefit is gained still the person may be punished as because his action was not within the scope of the provisions. Also there are certain elements in the society who though do many immoral acts but as because any provisions or sanctions are not mentioned so that they can be punished they continue to do that act. One should not earn any benefits or satisfaction out of such acts.

The legitimacy of any form of has always been criticized. Though there are many legal coercive measures but it is quite different from punishment. If the punishment were any retribution to an evil done then regardless of any consequence it would try to end that evil in itself. But if the objective of the punishment given is to prevent the crime from further

[8] Macklin Fleming.Of Crimes and Rights. (New York:W.W.Norton&Company.Inc.1978). p.102.

occurrence then it would rather than using coercive methods it would be using persuasive measures and discourage the offender from committing that act in the future. Treating punishment as a conventional device for the expression of resentment, indignation, disappointment felt either by the sufferer and his family or the punishing authority as such J.Feinberg argues that certain kinds of severe treatment become symbolic of the of the attitudes and judgement of the society or community in the face of the wrongdoing, and constitute a stigma which castes shame and ignominy on the individual on whom the punishment is applied. The distinctiveness of the unpleasant measure could consist of the way of executing them. Thus, summarizing the concept of punishment one can suggest that punishment includes the following areas:[9]

- Punishment inflicted is a feeling of uncomfortable and unpleasant circumstances.
- It is a sequel of a wrongful act
- There must be some relationship between the punishment inflicted and the crime committed.
- The punishment is a form by which a criminal is made answerable to the society.

2.3 THEORIES OF PUNISHMENT

With change in the social structure the society has witnessed various punishment theories and the radical changes that they have undergone from the traditional to the modern level and the crucial problems relating to them. Kenny wrote: "it cannot be said that the theories of criminal punishment current amongst our judges and legislators have assumed...."either a coherent or even a stable form. B.Malinowski believes all the legally effective institutions....are....means of cutting short an illegal or intolerable state of affairs, of restoring the equilibrium in the social life and of giving the vent to he feelings of oppression and injustice felt by the individuals.

[9] Johan Finnis, Natural *Law and Natural Rights*, Oxford: Clarendon Press, [2001] p.262.

The general view that the researcher finds is that the researcher gathers is that the theories of punishment being so vague are difficult to discuss as such. In the words of Sir John Salmond, "The ends of criminal justice are four in number, and in respect to the purposes served by the them punishment can be divided as:

1. Deterrent
2. Retributive
3. Preventive
4. Reformative

of these aspects the first is the essential and the all-important one, the others being merely accessory. Punishment before all things is deterrent, and the chief end of the law of crime is to make the evil-doer an example and a warning to all that are like-minded with him.

The researcher in this chapter would like to discuss the various theories and explain the pros and cons of each theory. The researcher's main aim in this chapter is to show the evolution of the theories as such.

2.3.1 DETERRENT THEORY:

One of the primitive methods of punishments believes in the fact that if severe punishments were inflicted on the offender would deter him form repeating that crime. Those who commit a crime, it is assumed, derive a mental satisfaction or a feeling of enjoyment in the act. To neutralize this inclination of the mind, punishment inflicts equal quantum of suffering on the offender so that it is no longer attractive for him to carry out such committal of crimes. Pleasure and pain are two physical feelings or sensation that nature has provided to mankind, to enable him to do certain things or to desist from certain things, or to undo wrong things previously done by him. It is like providing both a powerful engine and an equally powerful brake in the automobile. Impelled by taste and good appetite, which are feelings of pleasure a man over-eats. Gluttony and surfeit make him obese and he starts suffering disease. This

causes pain. He consults a doctor and thereafter starts dieting . Thus the person before eating in the same way would think twice and may not at all take that food. In social life punishment introduces the element of 'pain' to correct the excess action of a person carried out by the impulse (pleasure) of his mind. We all like very much to seize opportunities, but abhor when we face threats. But in reality pain, threat or challenges actually strengthens and purifies a man and so an organization.

J. Bentham, as the founder of this theory, states:

"General prevention ought to be the chief end of punishment as its real justification. If we could consider an offence, which has beeen, committed as an isolated fact, the like of which would never recur, punishment would be useless. It would only be only adding one evil to another. But when we consider that an unpunished crime leaves the path of crime open, not only to the same delinquent but also to all those who may have the same motives and opportunities for entering upon it, we perceive that punishment inflicted on the individual becomes a source of security for all. That punishment which considered in itself appeared base and repugnant to all generous sentiments is elevated to the first rank of benefits when it is regarded not as an act of wrath or vengeance against a guilty or unfortunate individual who has given way to mischievous inclinations, but as an indispensable sacrifice to the common safety."[10]

Bentham's theory was based on a hedonistic conception of man and that man as such would be deterred from crime if punishment were applied swiftly, certainly, and severely. But being aware that punishment is an evil, he says, If the evil of punishment exceeds the evil of the offence, the punishment will be unprofitable; he will have purchased exemption from one evil at the expense of another.

[10] Jeremy Bentham, *The Theory of Legislation*, (Bombay: N.M. Tripathi Private Ltd ,1995). p.167.

The basic idea of deterrence is to deter both offenders and others from committing a similar offence. But also in Bentham's theory was the idea that punishment would also provide an opportunity for reform.[11]

"While a person goes on seeking pleasure, he also takes steps to avoid pain. This is a new system of political philosophy and ethics developed by Jerome Bentham and John Stuart Mill in the 19th century called Utilitarianism. It postulates human efforts towards "maximization of pleasure and maximum minimization of pain" as the goal. "The main ethical imperative of utilitarianism is: the greatest good for the largest number of people; or the greatest number of goods for the greatest number of people" The fear of consequent punishment at the hands of law should act as a check from committing crimes by people. The law violator not merely gets punishment, but he has to undergo an obnoxious process like arrest, production before a magistrate, trial in a criminal court etc. that bring about a social stigma to him as the accused. All these infuse a sense fear and pain and one thinks twice before venturing to commit a crime, unless he is a hardcore criminal, or one who has developed a habit for committing crimes. Deterrent theory believes in giving exemplary punishment through adequate penalty."

In earlier days a criminal act was considered to be due to the influence of some evil spirit on the offender for which he was unwillingly was made to do that wrong. Thus to correct that offender the society retorted to severe deterrent policies and forms of the government as this wrongful act was take as an challenge to the God and the religion.

But in spite of all these efforts there are some lacunae in this theory. This theory is unable to deter the activity of the hardcore criminals as the pain inflicted or even the penalties are ineffective. The most mockery of this theory can be seen when the criminals return to the prisons soon after their release, that is precisely because as this theory is based on certain

[11] Jeremy Bentham., op. cit., p. 167

restrictions, these criminals are not effected at all by these restrictions rather they tend to enjoy these restrictions more than they enjoy their freedom.

2.3.2 RETRIBUTIVE THEORY:

...An eye for an eye would turn the whole world blind- Mahatma Gandhi

The most stringent and harsh of all theories retributive theory believes to end the crime in itself. This theory underlines the idea of vengeance and revenge rather than that of social welfare and security. Punishment of the offender provides some kind solace to the victim or to the family members of the victim of the crime, who has suffered out of the action of the offender and prevents reprisals from them to the offender or his family. The only reason for keeping the offender in prison under unpleasant circumstances would be the vengeful pleasure of sufferer and his family. J.M.Finnis argues in favour of retributism by mentioning it as a balance of fairness in the distribution of advantages and disadvantages by restraining his will. Retributivists believe that considerations under social protection may serve a minimal purpose of the punishment. Traditional retributism relied on punishing the intrinsic value of the offence and thus resort to very harsh methods. This theory is based on the same principle as the deterrent theory, the Utilitarian theory. To look into more precisely both these theories involve the exercise of control over the emotional instinctual forces that condition such actions. This includes our sense of hatred towards the criminals and a reliance on him as a butt of aggressive outbursts.

Sir Walter Moberly states that the punishment is deemed to give the men their dues. "Punishment serves to express and to and to satisfy the righteous indignation which a healthy community treats as transgression. As such it is an end in itself."

"The utilitarian theories are forward looking; they are concerned with the consequences of punishment rather than the wrong done, which, being in the past, cannot be altered. A retributive theory, on the other hand, sees the primary justification in the fact that an offence

has been committed which deserves the punishment of the offender." As Kant argues in a famous passage:

"Judicial punishment can never be used merely as a means to promote some other good for the criminal himself or civil society, but instead it must in all cases be imposed on him only on the ground that he has committed a crime; for a human being can never be manipulated merely as a means to the purposes of someone else... He must first of all be found to be deserving of punishment before any consideration is given of the utility of this punishment for himself or his fellow citizens."

"Kant argues that retribution is not just a necessary condition for punishment but also a sufficient one. Punishment is an end in itself. Retribution could also be said to be the 'natural' justification" , in the sense that man thinks it quite natural and just that a bad person ought to be punished and a good person rewarded.

However 'natural' retribution might seem, it can also be seen as Bentham saw it, that is as adding one evil to another, base and repugnant, or as an act of wrath or vengeance. Therefore as we consider divine punishment we must bear in mind, as Rowell says, The doctrine of hell was framed in terms of a retributive theory of punishment, the wicked receiving their just deserts, with no thought of the possible reformation of the offender. In so far as there was a deterrent element, it related to the sanction hell provided for ensuring moral conduct during a man's earthly life.

Thus the researcher concludes that this theory closely related to that of expiation as the pain inflicted compensates for the pleasure derived by the offender. Though not in anymore contention in the modern arena but its significance cannot be totally ruled out as fear still plays an important role in the minds of various first time offenders. But the researcher feels that the basis of this theory i.e. vengeance is not expected in a civilized society. This theory

has been severely criticized by modern day penologists and is redundant in the present punishments.

2.3.3 PREVENTIVE THEORY:

Unlike the former theories, this theory aims to prevent the crime rather then avenging it. Looking at punishments from a more humane perspective it rests on the fact that the need of a punishment for a crime arises out of mere social needs i.e. while sending the criminals to the prisons the society is in turn trying to prevent the offender from doing any other crime and thus protecting the society from any anti-social elements.

Fitchte in order to explain this in greater details puts forward the an illustration, An owner of the land puts an notice that 'trespassers' would be prosecuted. He does not want an actual trespasser and to have the trouble and expense of setting the law in motion against him. He hopes that the threat would render any such action unnecessary; his aim is not to punish trespass but to prevent it. But if trespass still takes place he undertakes prosecution. Thus the instrument which he devised originally consist of a general warning and not any particular convictions.

Thus it must be quite clear now by the illustration that the law aims at providing general threats but not convictions at the beginning itself. Even utilitarian such as Bentham have also supported this theory as it has been able to discourage the criminals from doing a wrong and that also without performing any severity on the criminals. The present day prisons are fallout of this theory. The preventive theory can be explained in the context of imprisonment as separating the criminals from the society and thus preventing any further crime by that offender and also by putting certain restrictions on the criminal it would prevent the criminal from committing any offence in the future. Supporters of this theory may also take Capital Punishment to be a part of this theory. A serious and diligent rehabilitation program would succeed in turning a high percentage of criminals away from a life of crime. There are,

however, many reasons why rehabilitation programs are not commonly in effect in our prisons. Most politicians and a high proportion of the public do not believe in rehabilitation as a desirable goal. The idea of rehabilitation is considered mollycoddling. What they want is retribution, revenge, punishment and suffering.

Thus one an easily say that preventive theory though aiming at preventing the crime to happen in the future but it still has some aspects which are questioned by the penologists as it contains in its techniques which are quite harsh in nature. The major problem with these type of theories is that they make the criminal more violent rather than changing him to a better individual. The last theory of punishment being the most humane of all looks into this aspect.

2.3.4 REFORMATIVE THEORY:

But that is the beginning of a new story--the story of the gradual Renewal of a man, the story of his gradual regeneration, of his Passing from one world into another, of his initiation into a new Unknown life.

The author of the above excerpt in this concluding paragraph underlines the basic principle of the reformative theory. It emphasizes on the renewal of the criminal and the beginning of a new life for him.

The most recent and the most humane of all theories is based on the principle of reforming the legal offenders through individual treatment. Not looking to criminals as inhuman this theory puts forward the changing nature of the modern society where it presently looks into the fact that all other theories have failed to put forward any such stable theory, which would prevent the occurrence of further crimes. Though it may be true that there has been a greater onset of crimes today than it was earlier, but it may also be argued that many of the criminals are also getting reformed and leading a law-abiding life all-together. Reformative techniques are much close to the deterrent techniques.

Reform in the deterrent sense implied that through being punished the offender recognized his guilt and wished to change. The formal and impressive condemnation by society involved in punishment was thought to be an important means of bring about that recognition. Similarly, others may be brought to awareness that crime is wrong through another's punishment and, as it were, 'reform' before they actually commit a crime. But, although this is indeed one aspect of rehabilitation, as a theory rehabilitation is more usually associated with treatment of the offender. A few think that all offenders are 'ill' and need to be 'cured' but the majority of criminologists see punishment as a means of educating the offender. This has been the ideal and therefore the most popular theory in recent years. However, there is reason to believe this theory is in decline and Lord Windlesham has noted that if public opinion affects penal policy, as he thinks it does, then there will be more interest shown in retribution in the future.

This theory aims at rehabilitating the offender to the norms of the society i.e. into law-abiding member. This theory condemns all kinds of corporal punishments. These aim at transforming the law-offenders in such a way that the inmates of the peno-correctional institutions can lead a life like a normal citizen. These prisons or correctional homes as they are termed humanly treat the inmates and release them as soon as they feel that they are fit to mix up with the other members of the community. The reformation generally takes place either through probation or parole as measures for reforming criminals. It looks at the seclusion of the criminals from the 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, but in the case of hardened criminals this theory may not work with the effectiveness. In these cases come the importance of the deterrence theories and the retributive theories. Thus each of these four theories have their own pros and cons and each being important in it, none can be ignored as such.

CHAPTER 3

THEORIES OF PUNISHMENT IN INDIAN CONTEXT

3.1 INTRODUCTION

It was observed by Hon'ble Supreme Court that sentencing the guilty is most important, albeit a difficult chapter in trial. Theories of punishment are many - reformative, preventive, deterrent, retributive and denunciatory. Retributive and denunciatory theories have lost their potency in the civilized nations. Deterrent and preventive sentence is sometimes necessary in the interest of society. The modem trend places emphasis on the reformation of an offender and his rehabilitation. Reformation and not retribution is the sentencing lodestar.[12]

It is a social persuasion defence to extend whenever possible the key note on modem penology, viz., reformation of the delinquent. The probation is a part of the reformative process. Many offenders are not criminals but circumstances made them criminals and through misfortunes are brought within the operation of judicial system. By extending benefits of probation, courts encouraged their own sense of responsibility of future of the accused and saved him from the stigma and possible development of criminal propensities. It is thus in tune with the reformative trend of modem criminal justice to rehabilitate the young offenders as useful citizens.[13]

The Hon'ble Madhya Pradesh High Court observed that criminal jurisprudence dealing with imposition of sentence has undergone a change and the Probation Act is a milestone in the progress in the modem liberal trend of reform in the field of penology. It is the result of recognition of this doctrine that the object of the criminal law has become more to reform than to punish the individual offender. Section 361 of the Code of Criminal Procedure, requires the court to state special reasons for not extending the benefits of the probation to the accused person.[14]

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[12] State o f Gujarat v. Raghu, 2003 Cr. LR (Guj) 393 : 2003 (1) GLR 205; also observed by HLA Hart and citied by A Siddique - Criminology - E B Co. Fifth Edition (2005)

[13] Punchu v. State o f Orissa, 1993 Cr LJ 953

[14] Prakash v. State o f MP, 1993 Cr LJ 119 (MP)

To punish criminals is a recognised function of all civilized States from centuries. But with the changing pattern of modem societies the approach of penologist towards punishment has also undergone a radical change. The penologist today is concerned with a cmcial problem as to the end of punishment and its place in the penal policy. Though opinions have differed with regard to the punishment of offenders varying from age-old traditionalism to recent modernism, broadly speaking, five types of views can be distinctly found to prevail.

3.1 Retributive theory of punishment:

Retribution means something done or given to somebody as punishment or vengeance for something he or she has done. It is a just retribution for their crime. This theory says to return the same injury to the wrongdoer, which he had committed against the victim. It says "fit for taf" Retributive theory is the oldest theory of punishment, tracing its roots to the Bible. The Bible states that when one man strikes another and kills him, he shall be put to death. Whoever strikes a beat and kills, shall make restitution, life for life, when one injures and disfigures his fellow countryman, it shall be done to him as he has done; 'fracture for fracture ', 'eye for eye ', 'tooth for tooth', the injuries and disfigurement that he has inflicted upon another shall in turn be inflicted upon him.[15]

Retribution is often assimilated to revenge, but a public rather than a private revenge. Retributive theory punishes offenders because they are deserving of punishment. It says to offender '''you have caused harm to society, now you must pay back to society for that harm. You must atone for your misdeeds". Implicit in retribution is the condemnation or denunciation of both the offender and the offending behaviour. Retribution, however, does not mean that society rapes the rapist or steals from thieves. Instead the law attempts to convert the offence into currency and to impose a sentence, which is proportional to the harm caused.

[15] Leviticus 24 : 17-22 of the New English Bible

Retribution is probably the oldest goal of criminal punishment. The Babylonian Code o f Hammurabi, dating from the 18th century BC, contained this principle of equal retaliation. Similarly, the laws of the ancient Hebrews demanded “an eye for an eye and a tooth for a tooth”. The corporeal punishments used in England and the American colonies were based on retribution.

Over the time many people came to believe that the brutal punishments imposed on offenders far exceeded the seriousness of the crimes. French novelist Victor Hugo satirised criminal punishment in France during the 19th century in his novel La Miserables (1862), in which a character is sentenced to 20 years of hard labour after stealing a loaf of bread to feed his family and when the character later escapes, officials hound him for years.

In the United States, the retributionist philosophy remains apparent in the sentencing practices of courts, the laws enacted by State Legislatures and Congress, and the rules and regulations of various correctional programmes.

Immanual Kant, philosopher (1724-1804) believed that, murderers ought to be executed and that it would be wrong not to execute them, regardless of the circumstances. Even if a civil society was to dissolve itself by common agreement of all its members (for example, if the people inhabiting an island decided to separate and disperse themselves around the world), the last murderer remaining in prison must first be executed, so that everyone will duly receive what his actions are worth and so that the bloodguilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment; for if they fail to do so, they may be regarded as accomplices in this public violation of legal justice.[16]

If justice means giving everybody what they deserve, and if offenders deserve retribution, then it is unjust to fail to punish them. If an offender isn't caught until 50 years after his

[16] Kant Immanual: “Foundations of the Metaphysics of Morals” (1785) also quoted by Joshua Wegner Philosophy 101 12/07/00 Trentacoste Immanuel Kant vs Joshua Wegner “The Right to PunishRetnbutivism”

offence, the mere passage of time has no bearing on what he deserves, so he should be punished mercilessly.

It must be stated that the theory of retribution has its origin in the crude animal instinct of individual or group to retaliate when hurt. The modem view, however, does not favour this contention because it is neither wise nor desirable. On the contrary, it is generally condemned as vindictive approach to the offender.

The critics of this theory say that retributive punishment is barbaric and brutal. Benthem in his utilitarian theory criticises retributive p u n is h m e n t seriously. Salmond says crimes are not similar to those of debit or credit accounts in the bank. Revenges cannot be reattributed just like bank account. If you injure the criminal, again the criminal is compelled to do criminal act to take revenge and therefore this creates chain reaction in the society. The primary function of the criminal justice system is to punish the wrong-doer, and to see that the similar types of the crime should not re-occur in future, and to prevent the criminal behaviour in the society, and to see that the peace and prosperity should prevail in the society.[17]

The Hon'ble Supreme Court held that the whole goal of punishment is curative. Accent must be more and more on rehabilitation rather than on retributive punitivity inside the prison.[18] The retributive theory had its day and is no longer valid. Deterrence and reformation are the primary special goals which make deprivation of life and liberty reasonable as penal panacea.[19]

3.2 Deterrent theory of punishment:

[17] Salmond • Principles of Jurisprudence
[18] Nadella Venketkrishna Rao v State ofAP, AIR 1978 SC 480
[19] Rajendra Prasad v. State o f UP, AIR 1979 SC 916

Jermy Bentham (1748-1832) said that, I will address the right to punish per se after I consider the practical reasons for punishment to reform and deterrence. One of the goals of punishment is the prevention of crime

through deterrence. There are two types of deterrence - specific and general. Specific deterrence refers to the preventive effect of a specific punishment, such as a large fine and a long term prison sentence, on a specific individual for committing a specific crime. This theory believes that imposing a sufficiently severe punishment on an offender will deter that individual from future crime and set a lesson for others. General deterrence is intended to apply to any person who contemplates committing a crime. For example, advocates of the death sentence believe that imposition of such a severe punishment on murderers will prevent others from killing people

The utilitarian theory says that greatest pleasure ought to be given to the greatest number of people. The people will calculate their every act with their profit. No person can do any act, which is not profitable to him. In the same manner, if the punishments are stricter and serious, the general people will not commit such offences, which are not beneficial for them. Generally, deterrence is concerned with other would-be offenders. The idea is to make an example of the actual offenders so that others will learn from their experience and not get tempted into criminal activity. It is believed that the infliction of pain in the form of punishment or its apprehension generally keep people away from committing the acts forbidden by law.

This theory suggests that the punishment should be executed openly, not within four walls. This type of punishment will definitely create tension, fear in the majority of people. This theory says that strict and severe punishments should be imposed depending upon the nature of offences. Capital punishment, forfeiture of property of the wrongdoer, imprisonment, etc.

are the punishments suggested by the theory. When one criminal is punished seriously and severely, then the remaining people of the society will fear to commit such type of offences.

One alleged benefit of punishment is that, it deters potential offenders. It definitely deters some people from breaking some laws. It is an essential deterrent to the breaking of victimless criminal laws. However, outlawing victimless "crimes" does not necessarily reduce the number of such "crimes". When drug trafficking is made illegal, middle-class people with jobs and a sense of responsibility may reduce their consumption of the prohibited drugs, but many low-class people with less to lose may be attracted to drug dealing by the opportunity to make a lot of money without having to work hard. The result can be a net increase in illicit drug use as more low class people enter the drug trade than the number of middle class people who leave.

It is a fact that deterrent theory is somewhat helping in reducing the crimes but it is not very effective. The effect of enforcement of personal law is more important than the presence of provisions for punishment in the statute books. It is counterintuitive to say that punishment does not deter the offenders. Even though the prohibition of drug traffic in the USA has apparently created more drug traffic than it has deterred, we do not think that the increase in drug use implies that more people want to be punished than want to avoid being punished. The explanation has to do with the court system and its rules of evidence that are so inefficient that only a small percentage of drug traffickers ever get punished. If punishments were more certain and severe enough, even low class people would be deterred from drug dealing. Punishment has worked better in Turkey and Iran than it has in the USA, because in those countries the punishment is more severe and more certain. If the USA is to get serious about its war on drugs, it must relax the restrictions on admissible evidence and invasion of privacy and build a lot more prisons.[20]

[20] Article on Criminal, and pumshment-Encarta Preference Library 2005

It is hard to see how society benefits from deterring victimless exchanges. The would-be parties to such exchanges believe they would benefit from the exchanges. It is not at all clear that society wouldn't benefit more by permitting such exchanges than by prohibiting them. Brutal punishment hardly corrects; rather, it brutalises both the criminal and the community and hardens the attitude of the former towards the conventional society. The Hon'ble Supreme Court observed that "hard labour in section 53 of IPC has to receive a humane meaning. A girl student or a male weakling sentenced to rigorous imprisonment may not be forced to break stones for nine hours a day. The prisoners cannot demand soft jobs, but they may reasonably be assigned congenial jobs. Sense and sympathy are not enemies of penal asylums."[21]

Realising that it is not the brutality of punishment but its surety that serves as a greater deterrent, our Hon'ble Supreme Court held that a barbaric crime does not have to be visited with a barbaric penalty such as public hanging which will be clearly violative of Article 21 of the Constitution.[22]

The Hon'ble Supreme Court while refusing to interfere with a death sentence, observed that "it will be a mockery to justice to permit the accused to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for the accused would be to render the justicing system of the country suspect. The common man will be losing faith in courts. In such cases he understands and appreciates the language of deterrence more than the reformative jargon."[23] Again, observed that failure to impose death sentence in the case where the accused brutally murdered two girls aged 14 and 20 only, where it is crime against the society particularly in cases of murders committed with extreme brutality would bring to naught the sentence of death provided by section 302 of the IPC. It

[21] Sunil Batra v. Delhi Administration, 1980 Cr.LJ 1099 (SC)
[22] Attorney General o f India v Lachma Devi, AIR, 1986 SC 467
[23] Mahesh v. State ofMP, AIR 1987 SC 1346

was the duty of the court to impose proper punishment depending upon the degree of criminality and desirability to impose such punishment. As a measure of social necessity and also as a means of deterring other potential offenders, the appellants were confirmed with death sentence.[24] The Hon'ble Gujarat High Court held that deterrent punishment is necessary in the offence of smuggling. In their view, there cannot be many disputes that for such offences under the Customs Act which affect the economy of the nation, deterrent punishment have to be meted out.[25]

3.3 Preventive theory of punishment

Preventive means with the purpose of preventing something used or devised to stop something from happening, or to stop people from doing a particular thing. Preventive theory punishes the offenders, to prevent the future crime in the society, by isolating the criminals from society. This theory believes that, the goal of punishment is restraint. If, a criminal is confined, executed, or otherwise incapacitated, such punishment will deny the criminal ability or opportunity to commit further crimes and prevent the society from that harm.

Preventive philosophy of punishment is based on the proposition "not to avenge crime but to prevent i f . It presupposes that need for punishment of crime arises simply out of social necessities. In punishing a criminal, the community protects itself against anti-social acts, which are endangering social order in general or person or property of its member.

This theory seeks to prevent the recurrence of crime by incapacitating the offenders. The supporters of this philosophy believe that imprisonment is the best mode of punishment because it serves as an effective deterrent and is a useful preventive measure too. It presupposes some kind of physical restraint of offenders. According to the supporters of this

[24] Ashaifi Lai v. State o f UP, AIR 1987 SC 1721

[25] Linder Frank Wolfgang v. Yogesh D Shah, 2002 Cr. LR (Guj) 220

theory, murderers are hanged not merely to deter others from meeting similar end, but to 01 eliminate such dreadful offenders from society.[26]

Isolating criminals from society through confinement or incarceration is the most direct method of crime prevention. Containing offenders in prisons and jails prevents them from harming others or damaging property. It is believed that incarceration of offender, gives psychological pain to him. Most of people consider incarceration a sound defensive strategy to protect the public and combat crime. However, because many criminals remain undetected, un-apprehended, and unrestrained, the defensive value of incarceration may be overrated.

In the United States about one-fourth of all persons, who are convicted of a crime, are incarcerated. Canada incarcerates about one-third of all convicted offenders. However, inmates in Canada are eligible for parole at earlier points in their sentence. Criminals may be incarcerated in jails or in prisons. Jails are locally operated facilities that house criminals sentenced to less than one year of incarceration. Jails typically house persons convicted of misdemeanours (less serious crimes), as well as individuals awaiting trial. Prisons are State or federally operated facilities that house individuals convicted of more serious crimes, known as felonies. Offenders sentenced to a year or more of incarcerations are housed in prisons rather than jails. Canada uses a similar bifurcated system of local correctional centres and provincial and federal prisons.

Prisons deprive inmates of virtually all liberty and control over their lives. Each aspect of an inmate's daily life is regulated by others and highly structured. Many prisons offer self-help educational and counselling programmes. In some prisons, inmates may be able to work at different trades to acquire vocational and technical skills. However, a majority of inmates do not utilise these rehabilitation-oriented programmes because the programmes typically are not compulsory. Instead, prisons often function as long-term warehouses where offenders are

[26] Article on "Punishment, Crime" - Encarta Reference Library 2005

merely housed and forgotten. Rates of recidivism are fairly high for former inmates in the United States, averaging about 60%. Rates in Canada are substantially lower at 40%.[27]

In India, prisoners are not deprived of all the rights, but they are still human beings and entitled to all the human rights and all fundamental rights with some restrictions on them. In India around 70% prisoners are undertrial and only around 30% are convicted.[28] The Hon'ble Supreme Court has held that sentencing the guilty person is most important, albeit a difficult chapter in trial. Deterrent and preventive sentence is sometimes necessary in the interest of society.[29]

3.4 Reformative Theory of Punishment

Another possible goal of punishment is reformation of the offender. Supporters of reformation seek to prevent crime by providing offenders with the education and treatment necessary to eliminate criminal tendencies, as well as the skills to become productive members of society.[30]

Reformation is synonymous to the word 'improvement', 'modification', 'transformation', 'alteration', 'change', 'development', 'amendment'. Reform means change and it improves somebody by correcting faults, removing inconsistencies and abuses, and imposing modem methods or values or to adopt a more acceptable way of life and mode of behaviour or persuade or force somebody else to do so. Reformation is the act or process of reforming somebody especially a general improvement in his behaviour.

This theory claims that a criminal can be reformed into a good citizen as law-abider by giving him competent treatment during his imprisonment period. He is in the need of a doctor-cum-guide and not of the jailer. This theory is not giving punishment on the seeing of the past but of the future. This theory says that the offender should not be punished but he should be

[27] Encarta Reference Library 2005
[28] Data is released by NHRC and BPRD as on 1st Jan, 2006
[29] Saradhakar Sahu v. State o f Orissa, 1985 Cr LJ 1591
[30] Article on Criminal Law - Encarta Reference Library 2005

treated and converted into a law-abider citizen by giving training. He should be trained to rehabilitate in the society after completion of his sentence.

Two things are combined in this theory, namely : (a) the offender should be treated in a form by which he can be converted into a law abiding citizen, and (b) he should be trained for some work during the period of imprisonment, so after completion of sentence he can re-establish himself into the society and he should not commit the crime in future. The aim of reformative theory is found in the poem of George Bernard Shaw, which reads as –

"If you are going to punish a man retributively - You must injure him,

If you are to improve him - You must improve him,

And men are not improved by injuries."[31]

The reformative views of penologist suggest that punishment is only justifiable, if it looks to the future and not to the past. They say that "punishment should not be regarded as settling an old account but rather as opening a new one". Thus, the supporters of this view justify prisonisation not solely for the purpose of isolating criminals and eliminating them from society but bring about a change in their mental outlook through effective measures of reformation during the term of their sentence.

The major emphasis of the reformist movement is on rehabilitation of inmates in peno-correctional institutions, so that they are transformed into good citizens. As against deterrent, retributive and preventive theories the reformativists approach to seek to bring about a change in the attitude of offender so as to rehabilitate him as a law-abiding member of society. Thus this punishment is used as a measure to reclaim the offender and not to torture or harass him. Reformative theory condemns all kinds of corporeal punishments.

The reformists advocate humane treatment of inmates inside the prison institutions. It also suggests that the prisoners should be properly trained to adjust themselves to free life in

[31] Quoted by Supreme Court in the case of Mohd. Giasuddm v. State of AP, AIR 1977 SC 1926

society after their release from the institution. The agencies such as parole and probation are recommended as the best measures to reclaim offenders to society as reformed persons.

Undoubtedly, modem penologists reaffirm their faith in reformative justice but they strongly feel that it should not be stretched too far. The reformative method has proved useful in cases of the juvenile delinquents and the first offenders. Harder criminals, however, do not respond favourably to the reformist ideology. It, therefore, follows that punishment should not be regarded as an end in itself but only a means, the end being the social security and rehabilitation of the offender in the society.

Stressing upon the rehabilitatory aspect of penology, the Hon'ble Supreme Court held that crime is a pathological aberration, the criminal can ordinarily be redeemed and the State has to rehabilitate rather than avenge. The subculture that leads to anti-social behaviour has to be countered not by cruelty but by re-culturalisation. 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 regressive times..Today humanitarian view is that sentencing is a process of re-shaping a person who has deteriorated into criminality and the modem community has a primary stake in the rehabilitation of the offender as the means of a special defence, hence a therapeutic, rather than an "interrorem" outlook, should prevail in our criminal courts, since bmtal incarceration of the person merely produces laceration of his mind.[32] The modem trend places emphasis on the reformation of an offender and his rehabilitation. Reformation and not retribution is the sentencing lodestar.[33]

It is a social persuasion defence to extend whenever possible the key note on modem penology, viz., reformation of the delinquent. The probation is a part of the reformative process. Many offenders are not criminals but circumstances made them criminals and through misfortunes are brought within the operation of judicial system. By extending

[3232] Mohd. Giasuddin v. State ofAP, AIR 1977 SC 1926

[33] Saradhakar Sahu v. State o f Onssa, 1985 Cr LJ 1591

benefits of probation as per section 360 of the Code, courts encouraged their own sense of responsibility of future of the accused and saved him from the stigma and possible development of criminal propensities. It is thus in tune with the reformative trend of modem criminal justice to rehabilitate the young offenders as useful citizens.[34]

The Hon'ble Madhya Pradesh High Court held that criminal jurisprudence dealing with imposition of sentence has undergone a change and the Probation Act is a milestone in the progress in the modem liberal trend of reform in the field of penology. It is the result of recognition of this doctrine that the object of the criminal law has become more to reform than to punish the individual offender. Section 361 of the Code requires the court to state special reasons for not extending the benefits of the probation to the accused person.[35]

3.5 Expiation theory of punishment:

Expiation means "the act of expiating, reparation, amends, compensation". It means atoning or suffering punishment for wrong-doing or making amends, or showing remorse, or suffering punishment for a wrongdoing.

This is not the new concept, if we look towards the epic period. Valia a famous dacoit turned into a sage (Maharishi) Balmiki and wrote the Ramayana. It is the greatest example of the expiation and reformation.

The theory of restoration takes a victim-oriented approach to crime that emphasizes restitution (compensation) for victims, rather than focus on the punishment of criminals and advocates restoring the victim and creating constructive role for victim in the criminal judicial process. For example, relatives of a murder victim may be encouraged to testify about the impact of the death when the murderer is sentenced by the court. The promoters of

[34] Punchu v. State o f Orissa, 1993 Cr LJ 953
[35] Prakash v State of MP, 1993 Cr LJ 119 (MP)

this theory believe that such victim involvement in the process helps in repairing the harm caused by crime and facilitates community reconciliation.[36]

According to this theory compensation is awarded to the victim from the wrongdoer. By awarding compensation from the pocket of the wrongdoer he is punished and is prevented from doing such offences in his remaining life. This also becomes a lesson to the remaining people.

One view of fundamental importance and great antiquity is that the purpose of the punishment is expiation. Many different strands of thought come together in this idea. The offender must atone for his crime, with suffering, whereas on the other hand, once the punishment has been inflicted, there is implicit in expiation, the idea of squaring up of accounts. The crime has been paid for by the punishment and accordingly the slate is clean again. This principle of some sort of balance between crime and punishment occurs in the doctrine of retribution and it is often difficult to disentangle one concept from the other. Even the oft cited lex talionis itself could justifiably be quoted within the content of expiation.

It may even be said that atonement in the religious sense of repentance, has made penal reform possible. Certainly, once a crime has been paid for, and the society feels that the account has been squared, there is greater readiness to come to the offender's help for rehabilitating him in normal citizen life. Yet this possible result is sometimes counterbalanced by negative effect bom out of the belief that expiation has no effect some offenders. They come to feel that when they have served their sentence, the slate has been wiped clean.

The idea that the element of expiation should deliberately enter punishment is rejected by many. Sir Leo Page states that he believes it to be not only wrong but actively mischievous. To do this would impose on court the duty to determine the degree of pain preciously

[3636] Article on Criminal Law - Encarta Reference Library 2005

adequate to expiate moral guilt. This is patently impossible. To assess the moral culpability of a man involves the ability to look into his heart, to take account of the strength of the temptations to which he was subjected as well as the conditions which have made him what he is. Moreover, the theory of expiation rests upon the premises that it is man's duty to punish sin which is a legacy from the times of taboo-breaking, when crime and sin were in fact synonymous. But now it is recognised that there are many sins which are not crimes, and equally there are many offences which are not sins.[37]

The Italian Criminologist Enrico Ferri put the matter succinctly and said that "The question of moral guilt of criminal or of any other human being lies within the domain and moral philosophy .... the State and its system of criminal justice can do no more than adopt such measures to defend the community against criminals as are reasonable in themselves and proportionate to the danger threatened to society"

Ferri summarized his theory by defining criminal psychology as a "defective resistance to criminal tendencies and temptations, due to that ill balanced impulsiveness which characterises children and savages" .[38]

The theory of expiation thus presents practical difficulty in the matter of assessment of quantum of punishment which may be equal to and which may be capable of washing off the moral guilt. It puts on the judge the work incapable of accomplishment by human agency. On the point of stopping offenders from repeating the crime, apart from uncertainty about repentance, one after undergoing punishment may feel that he had paid the debt and therefore undertake further debt of committing crime again without much weight on his conscience.

[37] Sir Leo Page - m Cnme and the Community p-67

[38] Enrico Fern : Criminal Sociology (1905) p-347. Fern was bom in Lombardy m 1856, and worked first as a lecturer and later as a professor of Criminal law, having spent time as a student of Cesare Lombroso While Lombroso researched anthropological criminology, Fern focused more on social and economic influences on the cnmmal and cnme rates

The Hon'ble Supreme Court held that the object of section 357 of the Code is to provide compensation payable to the people who are entitled to recover damages from the person sentenced even though fine does not form part of the sentence. In awarding compensation it is not necessary for the court to decide whether the case is fit one in which compensation has to be awarded. If it is found that compensation should be paid then the capacity of the accused to pay compensation has to be determined. In directing compensation, the object is to collect the fine and pay it to the person who has suffered the loss. The purpose will not be served if the accused is not able to pay the fine or compensation. For imposing a defending sentence for non-payment of fine would not achieve the object. Further, the Supreme Court said that it is the duty of the court to take into account the nature of the crime, the injury suffered, the justness of the claim for compensation, the capacity of the accused to pay and other relevant circumstances in fixing the amount of the fine or compensation. In this case the conviction was under sections 302 and 149 of IPC.[39]

The Hon'ble Gujarat High Court directed the accused, to pay Rs. 20,000/- to family of deceased instead of fine. The amount of fine/compensation shall be paid to the heirs and legal representatives of the deceased.[40] In the instance case, the deceased left behind widow and four sons.

The Hon'ble Supreme Court while upholding the principle held that, it is open to the court under section 357 (3) of the Code, to award compensation to the victim or his family. In our opinion it was well within the jurisdiction of the High Court. It is clear from the section that the jurisdiction of the court to grant compensation is accepted by the Supreme Court. In instant case the Session Court awarded death sentence with fine of Rs. 5000 under section 302. The High Court, in appeal, altered the sentence to imprisonment for life and order to pay

[39] Palamappa Gonder v. State o f Tamil Nadu, AIR 1977 SC 1323, and followed in the case of Saran Singh v. State o f Punjab, AIR 1978 SC 1525

[40] Abhubhai Fatabhai v. State o f Gujarat, (DB) 2000 Cr.LR. (Guj) 207

Rs. 2 lac by each convict to the victims. The Supreme Court upheld the imprisonment for life but reduced the compensation to one lac only.[41]

The Andhra Pradesh High Court gave a sensational judgment on 25- 11-1996 covering this expiation theory. In the instance case, Sayyaduddin and his brother raided Maslehuddin due to personal grudges and as a result Maslehuddin was killed. The High Court imposed three years imprisonment on the accused and awarded Rs 60,000 as compensation payable by the accused to the family members of Maslehuddin. Delivering the judgement, Justice Motilal Naik observed, "By imposing imprisonment on the accused could not be helpful to the family members of the victim. In my opinion it is better to help the victim's family members, as there is no one to look after them after the death of the bread earner. Therefore, it is justified to impose a penalty/fine of Rs 60,000/- on the accused besides sending him to prison for three years."[42]

This theory is sufficient to meet the less serious type of offences, such as abuse, assault, defamation, trespass, torts, etc. However, this theory could not be a solution in cases of murder, plunders, rapes, kidnapping, thefts, etc., serious nature offences. If the compensation is allowed in the case of rape, the incidents of rape will increase.

Even if some amount of punishment or compensation were proper, it would be wrong to inflict more than the proper amount. Because there is no way to determine the proper amount of punishment or compensation for any offence, we cannot be sure that any punishment or compensation is justified in any particular case and, therefore, there might be risk of some individuals becoming criminals if we impose as punishment or compensation at all.

[41] Rachhapal Singh v. State o f Punjab, AIR 2002 SC 2710

[42] Article 5 of the UDHR, 1948

CHAPTER 4

CONCEPT OF

REFORMATIVE THEORY

IN INDIAN CONTEXT

4.1 INTRODUCTION

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.

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**[43] 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."

[43] AIR 1978 SC 1542.

4.2 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**[44] 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[vii],** 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

[44] AIR 1965 SC 444

Act,196 or any other law for the time being in force providing for the treatment, training and rehabilitation of youthful offenders.

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

4.2.1 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.

4.2.2 PSYCHLOGY & 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.

4.2.3 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.**

4.3 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".

4.3.1 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 Manu smriti 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.

4.3.2 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.[45]

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

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."

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."[46]

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".[47]

The Apex Curt in **D.K. Basu v. State of West Bengal**[48] 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[49].

The Court has provided monetary compensation to the victims of police excesses in several cases[50]. In the case of **Ashok Kumar**[51] 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.

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[46] Sunil Batra v. Delhi Administration, AIR 1978 SC 1675

[47] Mahajan,V.D. : *Jurisprudence & legal Theory,(5th ed.) p.147*

[48] 1997 Cr.L.J. 743

[49] State of U.P. v. Ram Sagar Yadav, AIR 1985 Sc 416

[50] Joginder Kumar v. State of U.P. 1994 Cri L.J. 1981

[51] Reported in Hindustan Times dated December 17, 1997

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[52].

4.4 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

[52] A.C. Ewing, (The Morality of Punishment), p. 73.

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.**

4.4.1 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."[53] 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.

[53] Jahangir M. Sethna, "Society and the Crime", 4th Ed.., p. 301-302

4.4.2 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[54] the Apex Court had released children below

[54] Sheela Barse v. Union of India AIR 1986 SC 1773

the age of 16 years detained in jails all over the country. The Supreme Court has highlighted the importance[55] 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 Home**s 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

[55] Sheela Barse v. The Secretary, Children Aid Society AIR 1987 SC 656

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.[56]

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 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.

4.4.3 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

[56] Section 2(K)

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.

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.

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".

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.

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:-

- Care
- Custody
- Protection
- Treatment
- Maintenance
- Welfare
- Training
- Education
- Rehabilitation of neglected or delinquent children
- Trial & Punishment of youthful offenders

4.5 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[57]

4.5.1 PRISION 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

[57] Para 367 of the Report

administration. Human rights jurisprudence advocates that no crime should be punished in a cruel, degrading or in an inhuman manner[58].

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[xxii]. 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 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

[58] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

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.

4.5.1.1 The legal framework on prisoner's rights

Indian constitution intimates prison administration as a portfolio of state to legislate on[59]. 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[60]. 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.

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[61].

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

[59] The Prisons Act, 1894, S. 3(1).
[60] The Constitution of India, 1949, Schedule 7 List II, Entry 4.
[61] The Prisons Act, 1894.

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.

4.5.1.2 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[62]:

"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 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.

[62] Sunil Batra v. Delhi Administration A.I.R. 1978 S.C.1675

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[63]:**

"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. "

[63] V.R. Krishna Iyer, "Justice in Prison: Remedial Jurisprudence and Versatile Criminology" in Rani Dhavan Shankardass, Punishment and the Prison: Indian and International Perspectives (2000), Sage Publications, New Delhi, p.58.

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

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.

4.6 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"[64], "judicial reprieve" & "recognizance" during the middle ages for avoiding or postponement of sentences[65]. 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[66]**, 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.

[64] It was abolished in England in 1827.
[65] S.P.Srivastava, The Probation System-"An Evaluative Study"(1987), p. 31-32
[66] AIR 1963 SC 1088

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.

4.7 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 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.[67]

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.

[67] Sir Robert Gross: The English Sentencing System, p. 33

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[68].

4.8 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 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

[68] Journal of Social Defence, 1972, p. 13

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.

CHAPTER 5

PUNISHMENT, PRISNORS & HUMAN RIGHTS

5.1 Universal Declaration of Human Rights, 1948

Universal Declaration of Human Rights was adopted on 10th December, 1948, by all the State Members of United Nations. This Declaration declares 30 principles of all human being, without any discrimination, all the State members have to maintain these principles of individuals. Rights relating to prisoners declared by this Declaration may be summarised as – No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment[69]. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. No one shall be subjected to arbitrary arrest, detention or exile. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. Further said that, no one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.[70]

5.2 International Covenant on Civil and Political Rights, 1966

International Covenant on Civil and Political Rights, 1966 was adopted by UN General Assembly Resolution 2200 A (XXI) of December 16, 1966 and came into force with effect from March 23,1976. All parties to this Covenant assure following rights regarding punishment and correction of the offenders.

[69] Article 5 of the UDHR, 1948
[70] Article 8 to 11 of the UDHR, 1948

Every human being has the inherent right to life and this right shall be protected by law. No one shall be arbitrarily deprived of his life. In countries, which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.[71]

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.[72] Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.[73]

In countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court is not included, forced or compulsory labour.[74]

[71] Article 6 of ICCPR
[72] International Covenant on Civil and Political Rights, 1966, Article 7
[73] Ibid, Clause (5) of Article 9
[74] Ibid, Clause (3) of Article 8

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons. Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication[75].

The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.[76]

Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.[77]

5.3 The Standard Minimum Rules for the Treatment of Prisoners, 1955

The Standard Minimum Rules for the Treatment of Prisoners were adopted by the first United Nations Congress on the "Prevention of Crime and the Treatment of Offenders", held at Geneva on August 30, 1955, and approved by the Economic and Social Council of United Nations, on 31st M y, 1957, by its Resolution 663 C (XXIV) of 31 M y, 1957 and 2076 (LXII) of 13 May, 1977.

These rules are not intended to describe in detail a model system of penal institutions. But, they seek only, on the basis of the general consensus of contemporary thought and the

[75] Ibid, Clause (1) & (2) of Article 10
[76] Ibid, Clause (3) of Article 10
[77] Ibid, Clause (5) & (6) of Article 14

essential elements of the most adequate systems of today, to set out what is generally accepted as being good principle and practice in the treatment of prisoners and the management of institutions.

In view of the great variety of legal, social, economic and geographical conditions of the world, it is evident that not all of the rules are capable of application in all places and at all times. They should, however, serve to stimulate a constant endeavour to overcome practical difficulties in the way of their application, in the knowledge that they represent, as a whole, the minimum conditions which are accepted as suitable by the United Nations. On the other hand, it will always be justifiable for the central prison administration to authorize departures from the rules in this spirit.[78]

These rules shall be applied impartially. There shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. But, it is necessary to respect the religious beliefs and moral precepts of the group to which a prisoner belongs.

5.4 Aim of punishment to imprisonment

Imprisonment and other measures which result in cutting off an offender from the outside world are afflictive by the very fact of taking from the person the right of self-determination by depriving him of his liberty. Therefore, the prison system shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation. The purpose and justification of a sentence of imprisonment or a similar measure deprivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life. To this end, the institution should utilize all the remedial, educational, moral,

[78] Rules 2-3, the Standard Minimum Rules for the Treatment of Prisoners, 1955

spiritual and other forces and forms of assistance which are appropriate and available, and should seek to apply them according to the individual treatment needs of the prisoners.[79]

The regime of the institution should seek to minimize any differences between prison life and life at liberty which tend to lessen the responsibility of the prisoners or the respect due to their dignity as human beings. Before the completion of the sentence, it is desirable that the necessary steps be taken to ensure for the prisoner's gradual return to life in society. This aim may be achieved, depending on the case, by a pre-release regime organized in the same institution or in another appropriate institution, or by release on trial under some kind of supervision which must not be entrusted to the police but should be combined with effective social aid. The treatment of prisoners should emphasize not their exclusion from the community, but their continuing part in it. Community agencies should, therefore, be enlisted wherever possible to assist the staff of the institution in the task of social rehabilitation of the prisoners. There should be in connection with every institution social workers charged with the duty of maintaining and improving all desirable relations of a prisoner with his family and with valuable social agencies. Steps should be taken to safeguard, to the maximum extent compatible with the law and the sentence, the rights relating to civil interests, social security rights and other social benefits of prisoners.[80]

The duty of society does not end with a prisoner's release. There should, therefore, be governmental or private agencies capable of lending the released prisoner efficient aftercare directed towards the lessening of prejudice against him and towards his social rehabilitation.[81]

[79] Rules 57-59, Ibid
[80] Rules 60-61, Ibid
[81] Rule 64, Ibid

5.5 Human Rights of Prisoners

The concept of a higher law binding on human authorities was evolved it came to be asserted that there were certain rights anterior to society, which too were superior to rights created by the human authorities, were of universal application to men of all ages and in all claims, and were supposed to have existed even before the birth of political society. These rights could not, therefore be violated by the State. The deficiencies of this doctrine of natural right, from the legal standpoint, however, were that it was a mere ideology and there was no agreed catalogue of such rights and no machinery for their enforcement, until they were codified into national Constitutions, as a judicially enforceable Bill of Rights, International Covenants, Conventions European Court of Human Rights and remedies provided under Human Rights Act, 1998.[82]

5.5.1 International Perspective of Human Rights of Prisoners

The Roots of human rights were traced back in the Babylonian's Period, Babylonian king Hammurabi (1792-1750 B.C) provided for fair wages, protection of property and for charges to be proved as trail for his people. It was called Hammurabi's code, they provided by which Babylonians could order their lives and treat one another. In ancient Greece, Human rights were recognized as natural rights of men. In a Greek play it was displayed(Antigone) that antigone's brother, while rebelling against the king was killed and his burial was prohibited by the king crown. In Defiance of king's order, Antigone buried her brother and when she was arrested for violating the order. She pleaded that she acted in accordance with immutable unwritten laws of heaven which even the king could not override. Stoicism had its origin in the views of Socrates (469-399 B.C.E.) and Plato (428-347 B.C.E.). Socrates had already imagined, according to Plato's Republic, the possibility that a person could be rendered invisible by wearing the mythical ring of Gyges. Than a long argument, Socrates maintained

[82]Durga Das Basu, Human Rights in Constitutional Law, 2nd Edn, p. 8.

first that people have a general comprehension of what constitutes the good, and second, that coupled with that understanding, the need to seek internal and external harmony led most to pursue an altruistic path. Because goodness is not a particular characteristic but can be found in every topic of inquiry, he concluded that goodness is universal. It was in the process of deepening their understanding of the common element of goodness that Plato and Socrates showed their allegiance to a universal view of human goodness and, in a sense, human rights, and refuted the Sophists' claim that goodness and justice are relative to the customs of each society a view that they believed was often offered to disguise the interests of the stronger. In the presentation of this argument more than two thousand years ago, Socrates and Plato highlighted key controversies of the human rights debate that continue even today to divide advocates of cultural relativism, on the one hand, and defenders of a universalist agenda, on the other[83]. The Plato, Aristotle (384-322 B.C.E.) held that virtue needed to be a central characteristic of human life, which should aim at the common good. At the same time, he rejected Plato's theory of an essential universal goodness. Adding a tangible character to Plato's teachings, he ex-plained that the form of goodness had to match its empirical content. In other words, virtue was not innate, but a capacity that needed to be developed. For instance, we become just by performing good actions, and courageous by performing acts of courage. Continuing to act in a certain way inculcates habits. The virtuous individual thus deserved respect for good habit formation and his or her search for a balanced life. In the same vein as the Buddha's middle path between self-indulgence and self-renunciation, Aristotle called for a Golden Mean between extreme forms of emotion. By urging people to consult their inner motivations while promoting the common good, Aristotle, with Plato and the Buddha, provided important insight into the psychological prerequisites for effective ethical action. However, Aristotle's notion of prudence called for a more "engaged" attitude

[83]Micheline R. Ishay, The History of Human Rights, From Ancient times to The Globalization Era, Orient Longman, 2008

toward the world than did those of his predecessors. Prudence, the keystone of all virtues, Aristotle maintained, was mani-fested in acting so that the idea of right could take its concrete form.

Greece-Plato (427-348 B.C) was one of the earliest writers to advocate a universal slandered of ethical conduct. Aristotle wrote in politics that justice, virtue and rights change in accordance with different kings of constitutions and circumstances. In Greece city states, the citizens enjoyed some basic rights even before formulation of natural law theory by the Stove Philosophers. After the break down of the Greece city states, the stove philosophers developed the natural law theory and explained that the human rights are rights which every human being possesses by virtue of being human. They emphasized that the principles of natural law were universal in their nature. Natural law applies to everybody and everywhere in the world. Plato's and Aristotle's views gradually gained influence, resonating, for example, in the writings of Epictetus (ca. 55-135) and the Roman statesman and legal scholar Marcus Tullius Cicero (106-43 b.c.). Epictetus advanced the idea of Stoicism, which stressed the importance of regulating passions and physical desires through reason. Challenging the common assumption of freedom, Epictetus maintained that neither kings, nor their friends, nor slaves were truly free. Only those who were not enslaved by their bodily desires, passions, and emotions and who could overcome the fear of death could be truly free. Diogenes and Socrates were Epictetus's heroes, for they (like the Buddha and Confucius) called for a detached love of the common good, of the gods, and of their real country: the universe.[84] The concept of human rights has existed under different names in world, The Magna Carta was the first human rights document in the human rights history, in 1215 king John issued to certain rights to the citizens of England. Under this charter honouring certain legal proceedings and allowing against unlawful imprisonment is provided,which enumerates

[84] Epictetus, The Discourses, in The Discourses and De legibus, book, 4, chap.7, 29-34.

a number of rights; latterly they came to be the human rights. The rights of all free citizens to own and inherent property and are free from excessive taxes. The Petition of right (1628) The movement continued through the repeated confirmation of the Magna Carta and the Petition of Right, 1628, and culminated in the Bill of Rights, which was enacted in a parliamentary statute the declaration which the people the Prince and Princess of Orange to subscribe at their accession in 1688. The Contribution of instrument is towards the development of Fundamental rights may be declared and enacted, singular the rights liberties asserted and claimed in the said declaration are the true, and indubitable rights and liberties of the people of kingdom.

American courts were negligent to recognize the existence of prisoner's rights at earlier times. This negligence has contributed to the dehumanizing conditions which have existed in prisons there. in 1597, jails were established. The jails of old times were miserable places, which afforded opportunities for graduation to a life of crime. Recidivism was rampant. Men, women and children are first offenders, causal offenders are habitual were all hurled together like “Rats in a hamper and pigs in a sty”. Prisons, in the modern sense of the term were unknown in the medieval times: a person could be incarcerated even while trail was pending. It was in the 18th century that cellular prisons were built. The horrible conditions of prisons of the 18th century underwent a gradual change in the beginning of the 19th century when there was a move for improvement of the conditions prevailing in the prisons. Only in the middle of 19th century that something substantial was done in the matter of prison reform. The Hague regulations regarding the treatment of prisoners of 1899 and 1907 revealed more deficiencies in the First World War to overcome of agreements belligerents and Berne in 1917 and 1918. But in 1921, The Red cross society conference held at Geneva expressed that convention with regard to prisoners of war is necessary. The international committee was appointed for draft convention which was submitted to the Diplomatic Conference convened

at Geneva in 1929. The Convention does not replace but only completes the provisions of the Hague regulations. The 1929 Convention relative to the Treatment of Prisoners of War was replaced by the third Geneva Convention.[85] Before the First World War, there are no human rights to the prisoners even though the Hague regulation is there. But after the First World War, the Geneva Convention for treatment of prisoners of war discussed and provides certain guidelines to the states for the protection of human rights of the prisoners in war. The League of Nations was established for the development of peace in world. The human rights are not created by any legislation; they resemble very much the natural rights. Civilized country like the United Nations much recognized them. They cannot be subjected to the process of amendment even. The legal duty to protect human rights includes the legal duty to respect them. Members of the U.N have committed themselves to promote respect for and observance of human rights and fundamental freedoms. Even before first world war, some writers expressed the view that there were certain fundamental rights known as rights of mankind which international law guaranteed to individuals, both at home and abroad and whether nationals of a state or stateless. It was pointed out that such rights comprised of the right of life, liberty, freedom of religion and conscience.[86] From ancient period, the rights of the war prisoners came from natural rights, this are created by nature, followed by customs and accepted by morals of the society and another one is rights were given and protected by the statutes.

The rights of mankind or right of individuals is freedom from slavery. This right has been recognized under customary international law since 1815, subsequently this right was re-affirmed by international conventions such as 1926 slavery convention and the 1956 supplementary convention on the Abolition of Slavery, the Slave trade and institution and practices similar to slavery. Thus, generally speaking, international law did not concern itself

[85] Convention relative to the Treatment of Prisoners of War. Geneva, 27 July 1929.

[86] Dr. S.K.Kapoor, Human Rights under International Law and Indian Law, 3rd Edition, Central Law Agency.

with human rights, up to World War II as such not way any attempt made to regulate them. The treatment of prisoners with human dignity cannot see in historical level, instead of this, the treatment of prisoners of war was barbaric, inhuman treatment and torture. The defeated prisoners were treated as slaves.

The United Nations predecessor, the League of Nations, has made efforts to advance prisoners rights and, the International Penal and Penitentiary Commission had set forth standards for decent treatment which, in turn, were endorsed by the Assembly of the League in 1934. However, these efforts were thwarted by the crime control spirit of the age and, eventually, like most pre-World War II efforts to advance human rights, received the stigma of failure due to the atrocities committed during the Second World War. World War I, the League of Nations constituted and also framed the International penal and penitentiary commission for the standard for the war prisoners, but the efforts cannot reach their aim and cannot control the violation on them. The United Nations is more closely identified with than the cause of human rights. Concern for human rights is woven into the U.N. Charter like a golden thread. Human rights are occupying a significant chapter in any story of the United Nation. The signing of the United Nation Charter incorporates several provisions concerning human rights has done much to stimulate the large amount of international human rights which are respected in these days. Thus the provisions of United Nation Charter concerning, human rights provide a foundation and an impetus for further improvement in the protection of human rights.[87] The United Nations an attempt was made to fill them out by drawing up in 1948 the Universal Declaration of Human Rights and Fundamental Freedoms, and with a view to implement the Universal Declaration, European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the American Convention on Human Rights, and African Charter on Human and people's rights, 1981 and finally International

[87] Lan Brownlie, Principles of Public International Law, 2nd Edition, 1973, p. 552

Covenants on Human Rights were adopted.[88] The United Nations was constituted after the Second World War and this charter contains various provisions relating to the human rights, development of friendly nature between the member states and peace free from wars. The United Nations was framed several conventions for the promotion and protection of human rights at international level.

The establishment of the United Nations together with the primacy afforded in the U.N. Charter to the promotion of human rights heralded a new era, with the Universal Declaration of Human Rights (UDHR)[89] epitomizing the organization's fundamental values. In its Preamble, the Charter stresses the founders' determination to shield succeeding generations from the scourge of war and to reaffirm faith in fundamental human rights and in the dignity and worth of the human person. The drafters further sought to promote social progress and better standards of life in larger freedom. Article 1 of the U.N. Charter outlines the United Nations' purposes international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'. After the adoption of the universal declaration of human rights, it was playing important role in protection of human rights of prisoners at international and national level. Human rights covered different aspects of the life, prevention of discrimination, freedom from slavery, statues of women, refugees and protection of prisoner's rights.

The International Covenant on Civil and Political Rights (ICCPR) remains the core international treaty on the protection of the rights of prisoners. In modern times one can see how brutal regimes considered that torture would remind dissidents and the general population who was in charge and was determined to remain in charge. In the 1980s, an anti-

[88] J.L.Brierly, The Law of Nations, 6th Edition, 1963, sir Humphrey waldock, p. 293
[89] Adopted by U.N. G.A. resolution 217 A (III) of 10 December 1948

torture campaign, led by groups such as Amnesty International, was successful in advocating a set of binding international prohibitions on torture. Torture was already criminalized as a war crime when committed against certain prisoners, and was considered an international crime in the context of genocide and crimes against humanity. But the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment criminalized torture even outside these contexts, and prescribed individual criminal responsibility for a single act of torture. The International Conventions against torture, inhuman treatment and cruel was framed, the states ratified and also implemented the convention in their local laws, particularly on prisoners the human right organizations condemned the atrocities. In 1946, The United Nations was declared that Genocide is a crime under International law, contrary to the spirit and aim of the United Nations.[90] The Convention of 1929 in its turn was superseded by the Geneva Convention relating to the Prisoners of War, 1949. The Geneva Convention of 1949 contains exhaustive provisions relating the treatment of prisoners of war. The earlier United Nations Standard Minimum Rules for the Treatment of Prisoners, 1955 consists of five parts and ninety-five rules. Part one provides rules for general applications. It declares that there shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. At the same time there is a strong need for respecting the religious belief and moral precepts of the group to which a prisoner belongs. The standard rules give due consideration to the separation of the different categories of prisoners. It indicates that men and women be detained in separate institutions. The under- trial prisoners are to be kept separate from convicted prisoners. Further, it advocates complete separation between the prisoners detained under civil law and criminal offences. The UN standard Minimum Rule also made it mandatory to provide separate residence for young and child

[90] Raphael Lemkin, Genocide as a Crime under International Law, AJIL, Vol 41 1947, p. 145-150

prisoners from the adult prisoners. Subsequent UN directives have been the Basic Principles for the Treatment of Prisoners (United Nations 1990) and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (United Nations 1988).[91] There are many international conventions relating to the prisoners for protecting human dignity, basic minimum conditions in prisons, adopting reformative and rehabilitation methods for the protection and preservation of their rights from the atrocities of the prison authorities.

5.6 International Conventions relating to Prisoners Rights

After the United Nation formation, the U.N constituted several international conventions relating to human rights of prisoners along with Universal Declaration of Human Rights. There are various international legally binding conventions on human rights in different fields. These conventions can be divided into two broad categories-Conventions relating to inhuman, Cruel and Degrading Acts is main aspect.[92] The Declaration of Human Rights was prepared by the Commission on Human Rights in 1947 and 1948 and was adopted by the General Assemble on December 10, 1948. When the Universal Declaration of Human Rights was adopted, it was a most eloquent expression of hope by a world emerging from the most devastating war in the history of human race. The boldness of this document, destined for a world of peace where the rights to live in peace has become a reality for all. The large scale violations of human rights during two world wars, especially the Second World War, including the Nazi atrocities were fresh in the minds of the framers of the U.N. Charter. The United Nation General Assembly proclaims Universal Declaration of Human Rights as a common standard of achievement for all people, and of all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall

[91] Suresh Bada Math, Pratima Murthy, Rajani Parthasarthy, C Naveen Kumar, S Madhusudhan (2011). Mental Health and Substance Use Problems in Prisons: Local Lessons for National Action. Publication, National Institute of Mental Health Neuro Sciences, Bangalore.

[92] Dr. G.B.Reddy, Judicial Activism in India, Gogia Law Agency, Hyd,2nd Edition, 2013,

strive by teaching and education to promote respect of these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of members states themselves and among the peoples of territories under their jurisdiction. The Universal Declaration of Human Rights, 1948 was framed after two World Wars, the aim of the Declaration is to provide peace World Wide and free from war fear, to protect the rights of individual.

The Universal Declaration of Human Rights represents a great step forward taken by the international community in 1948. Its persuasive moral character and political authority derive from the fact that it is agreed to be a statement of generally accepted international principles. This outline of human rights objectives is drafted in broad and general terms, and its principles have inspired more than 140 human rights instruments which, taken together, constitute international human rights standards. Moreover, the Universal Declaration has spelled out the fundamental rights proclaimed in the Charter of the United Nations, recognizing that the inherent dignity of all members of the human family is the foundation of freedom, justice and peace in the world. While the Universal Declaration is not, in itself, a binding instrument, certain provisions of the Declaration are considered to have the character of customary international law.[93] This Declaration deals with the right to life, liberty and security of person; the prohibition of torture and of cruel, inhuman and degrading treatment or punishment; the prohibition of arbitrary arrest; the right to a fair trial; the right to be presumed innocent until proved guilty; and the prohibition of retroactive penal measures. While these articles are most directly relevant to the administration of justice, the entire text of the Universal Declaration offers guidance for the work of prison officials[94]. The Declaration of Human Rights guaranteed the right to life and personal liberty, free form torture, inhuman treatment or cruel and this provides all rights of human rights to the human

[93] Human rights and prisons, united nations New York and Geneva, 2005
[94] Human rights and prisons, united nations New York and Geneva, 2005

being. The recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, the disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in the human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people, it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law and it is essential to promote the development of friendly relations between nations, the countries of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom, member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms, a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge[95]. The General Assembly, Proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Standard Minimum Rules for the Treatment of Prisoners[96] was the instrument to provide a

[95] Dr. S.K.Kapoor, Human Rights Under International Law and Indian Law, Central Law Agency. 3rd Edition, 2005,

[96] Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders,

comprehensive set of safeguards for the protection of the rights of persons who are detained or imprisoned. The Standard Minimum Rules for the Treatment of Prisoners was adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva in 1955; this contains minimum rules for the protection of prisoner's rights against cruel, inhuman treatment or degradation and torture by the authorities[97] and later approved by the Economic and Social Council. The Geneva Convention (1949), Standard Minimum rules for Treatment of Prisoners 1955, Convention against cruel, inhuman treatment and torture and also various civil and political and Economic, Social, Cultural Rights for prisoners. In India, the role of prison administration played very important role to reform the criminals, for this adopted various programs for them and introduced early release methods to the prisoners, providing phone facilities from the jail to their families and advocates. The UN Standard Minimum Rules for the Treatment of Prisoners came into force in 1955. The standards set out by the UN are not legally binding but offer guidelines in international and municipal law with respect to any person held in any form of custody. They are generally regarded as being good principle and practice for the management of custodial facilities. The document sets out standards for those in custody which covers registration, personal hygiene, clothing and bedding, food, exercise and sport, medical services, discipline and punishment, instruments of restraint, information to and complaints by prisoners, contact with the outside world, books, religion, retentions of prisoners' property, notification of death, illness, transfer, removal of prisoners, institutional personnel and inspection of facilities. It also sets out guidelines for prisoners under sentence which further includes treatment, classification and individualization, privileges, work, educations and recreations, and social relations and after-care. There are also special

held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 july, 1957 and 2076 (LXII) of 13 may 1977.

[97] M.B.Mahaworker, Prison Management, Problems and solutions, 2006, Kalpaz Publications

provisions for insane and mentally abnormal prisoners, prisoners under arrest or awaiting trial, civil prisoners and persons arrested or detained without charge. The United Nations Standard Minimum Rules for the Treatment of Prisoners6 (1957) affirms in Rule 57 that 'the prison system shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation'[98]

The Standard Minimum Rules for the Treatment of Prisoners apply to all prisoners without discrimination; therefore, the specific needs and realities of all prisoners, including of women prisoners, should be taken into account in their application. The Rules, adopted more than 50 years ago, did not, however, draw sufficient attention to women's particular needs. With the increase in the number of women prisoners worldwide, the need to bring more clarity to considerations that should apply to the treatment of women prisoners has acquired importance and urgency[99]. The Recognizing the need to provide global standards with regard to the distinct considerations that should apply to women prisoners and offenders and taking into account a number of relevant resolutions adopted by different United Nations bodies, in which Member States were called on to respond appropriately to the needs of women offenders and prisoners, the present rules have been developed to complement and supplement, as appropriate, the Standard Minimum Rules for the Treatment of Prisoners and the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules) in connection with the treatment of women prisoners and alternatives to imprisonment for women offenders. The International Convention relating to women prisoners was given more important for development of facilities to the women prisoners and also treatment, diet, medical care and sufficient environment.

The U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Committee the U.N. Convention against Torture and Other Cruel,

[98] UN General Assembly resolution 43/173, adopted 9 December 1988.

[99] Sixty-fifth session, Third Committee Agenda item 105, Crime prevention and criminal justice

Inhuman or Degrading Treatment or Punishment was adopted in 1984[100]. According to its Preamble, the Convention is grounded in existing international law, pointing at the UDHR, the ICCPR and the 1975 Declaration. Pursuant to Article 17, the Committee against Torture was established, which consists of a team of experts and which operates as a monitoring body. Under Article 19, States parties are obliged to submit reports on measures they have taken to implement the obligations under the Convention. The adoption in the 1960s of the two major Covenants, the ICCPR and the ICESCR, an international 'Bill of Rights' came into existence. Of particular importance to the rights of incarcerated persons is Article 10(1) of the ICCPR, which expressly provides that 'all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'. The importance of this provision should not be underestimated. First, the ICCPR is binding on all States parties. Second, as noted by Van Zyl Smit, because the notion of 'human dignity' lies at the very heart of all human rights, Article 10(1) appears to constitute an argument for a holistic approach towards all aspects of confinement from a human rights perspective. The United Nation framed number of conventions to relate human rights in some of them to prisoners including war prisoners. The Conventions are against cruel, inhuman treatment and torture. The violations are different types, physical and mental torture is also violations of human rights of the prisoners, the conventions are protecting, the rights of the prisoners by implementing provisions of Conventions in their local laws. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [101]entered into force in June 1987. The Convention goes considerably further than the International Covenant on Civil and Political Rights in protecting against the international crime of torture. the Convention defines torture as; any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a

[100] The Protection of Detained Persons under International Law

[101] The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Geneva Convention relative to the Treatment of Prisoners of War Adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August, 1949 entry into force 21 October 1950. The present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria[102].

Prisoners of war are entitled in all circumstances to respect for their persons and their honour.

[102] Adopted by the First United Nations Congress on the Prevention of Crime and the Treatm of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council its resolution 663 C (XXJV) of 31 July, 1957 and 2076

Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men. Prisoners of war shall retain the full civil capacity which they enjoyed at the time of their capture. The Detaining Power may not restrict the exercise, either within or without its own territory, of the rights such capacity confers except in so far as the captivity requires. Each Party to a conflict is required to furnish the persons under its jurisdiction who are liable to become prisoners of war, with an identity card showing the owner's surname, first names, rank, army, regimental, personal or serial number or equivalent information, and date of birth. The identity card may, furthermore, bear the signature or the fingerprints, or both, of the owner, and may bear, as well, any other information the Party to the conflict may wish to add concerning persons belonging to its armed forces. As far as possible the card shall measure 6.5 x 10 cm. and shall be issued in duplicate. The identity card shall be shown by the prisoner of war upon demand, but may in no case be taken away from him. No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind[103]. Prisoners of war who, owing to their physical or mental condition, are unable to state their identity, shall be handed over to the medical service. The identity of such prisoners shall be established by all possible means, subject to the provisions of the preceding paragraph. No prisoner of war may at any time be sent to or detained in areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations. Prisoners of war shall have shelters against air bombardment and other hazards of war, to the same extent as the local civilian population. With the exception of those engaged in the

[103] Adopted by the First United Nations Congress on the Prevention of Crime and the Treatm of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council its resolution 663 C (XXJV) of 31 July, 1957 and 2076

protection of their quarters against the aforesaid hazards, they may enter such shelters as soon as possible after the giving of the alarm. Any other protective measure taken in favour of the population shall also apply to them[104].

Basic Principles for the Treatment of Prisoners, 1990, 68t Plenary Meeting of the General Assembly of United Nations, held on 14t December, 1990, had passed a Resolution A/RES/45/111, bearing in mind the long-standing concern of the United Nations for the humanization of criminal justice and the protection of human rights and also that sour policies of crime prevention and control; viable planning for economic and social development, recognizing that Standard Minimum Rules for the Treatment of Prisoners, adopted by First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, are of great value and influence in the development of penal policy and practice, considering the concern of previous United Nations Congresses on the Prevention of Crime and the Treatment of Offenders, regarding the obstacles of various kinds that prevent the implementation of the Standard Minimum Rules, and believing that the implementation of the Standard Minimum Rules would be facilitated by articulation of the basic principles underlying them. Amnesty International is Non Governmental Organization playing a Vitol role in the protection of human rights in World and working for the welfare of prisoners. The idea for establishment, Amnesty International was born when British law; Peter Benenson and other political activists launched an appeal for Amensty, in 1961, a one year worldwide campaign calling for the release of prisoners. Benenson started the campaign in response to the imprisonment of two students in Portugal who had made a toast to freedom in a public restaurant. The toast was considered to be a form of political opposition by Portugal's dictator Antonio Salazar, and both the students received seven-year prison sentences in 1960. Benenson also published an article titled "Forgotten Prisoners" in the London Observer in

[104] M.B. Mahaworker, Prison Management, Problems and Solutions, Kalpaz Publications, 2006

May, 1961, urging people to write letters to Government officials around the world to protest against the imprisonment all prisoners of conscience. The campaign gained much attention and the article was reprinted in numerous newspapers in many countries. By the id of 1961, more than 1,000 people had pledged their support to the campaign. Amnesty International was established at the end of that year.

In 1972, Amnesty International mounted a worldwide campaign to abolish all torture (including sexual abuse and rape) committed by law enforcement officials. The organization put together a 12-step programme hat outlined the ways to eradicate torture in prisons. It included inter alia, recommendations to outlaw secret detentions to ensure that prisoners are held in "publicly recognized places", conducting of immediate investigations of any prisoner's allegations of torture, and enactment of legislation to make any abuse committed by law officials punishable under criminal laws. In 1974, the Organization started the Urgent Action Network to make phone calls and send letters on behalf of prisoners, who need immediate medical or legal help. Also in 1977, the Organization launched a global campaign to abolish all court-ordered death sentences. Amnesty International claimed that the death penalty would never be proven as a deterrent.[105] In 1990, Amnesty International had investigated more than 40,000 cases involving prisoners of conscience. In the same year, the organization developed numerous task forces to pay attention on specific human rights violations. Amnesty International Medical Network consisting doctors and volunteers undertake investigation of medical-related misdeeds in more than 30 countries. The group found that doctors and nurses were sometimes forced by government officials to give false medical evaluations of prisoners in order to conceal the acts of torture. Other reports of the Network concluded that some health officials voluntarily assisted Government leaders in covering up human rights abuses. In 1996, the group published its first annual report, with the

[105] Ref*:* http://www,apcca2010.com/index.aspx?id=519, last visited on 24.12.2010

title "Prescription for Change". Among the nations facing most serious allegations of medical abuse were Brazil, Israel, Kenya, and Turkey. The organization has also campaigned to protect human rights of women, refugees, and children.

In 1996, Amnesty International campaigned for establishment of a permanent International Criminal Court. As a result, the Rome Statute of the International Criminal Court was adopted in July, 1998. In 2000, Amnesty International launched its third Campaign against Torture. In 2001, in its 40th anniversary year, Amnesty International changed its Statute to incorporate, into its mission, work for economic, social and cultural rights thus committing itself to advance both the universality and indivisibility of all human rights enshrined in the Universal Declaration. Amnesty International's "Stop Torture" website won a Revolution Award, which is recognized as the best in digital marketing. In 2004, Amnesty International launched the Stop Violence Against Women Campaign, By, 2007, Amnesty International had more than 2.2 million members, supporters and subscribers in over 150 countries and territories in every region of the world.[106] United Nations codified standards of treatment for prisoners across different economic, social and cultural contexts in a number of documents. These concern themselves with ensuring those basic minimum conditions in prisons which are necessary for the maintenance of human dignity and facilitate the development of prisoners into better human beings. International documents, which have articulated the prisoners rights, are listed in the accompanying table. Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN Medical Ethics, 1982), Health personnel, particularly physicians, charged with the medical care of prisoners and detainees have a duty to provide them with protection of their physical and mental health and treatment of disease of the same quality and standard as is

[106] Maheswara Swamy, Criminology and Criminal Justice System, 2014, Asia Law House, Hyd

afforded to those who are not imprisoned or detained. It is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to, or attempts to commit torture or other cruel, inhuman, or degrading treatment or punishment. It is a contravention of medical ethics for health personnel, particularly physicians, to be involved in any professional relationship with prisoners or detainees, the purpose of which is not solely to evaluate, protect, or improve their physical and mental health. It is a contravention of medical ethics for health personnel, particularly physicians, to apply their knowledge and skills in order to assist in the interrogation of prisoners and detainees in a manner that may adversely affect the physical or mental health or condition of such prisoners or detainees and which is not in accordance with the relevant international instruments; and to certify, or to participate in the certification of, the fitness of prisoners or detainees for any form of treatment or punishment that may adversely affect their physical or mental health and which is not in accordance with the relevant international instruments, or to participate in any way in the infliction of any such treatment or punishment that is not in accordance with the relevant international instruments. It is a contravention of medical ethics for health personnel, particularly physicians, to participate in any procedure for restraining a prisoner or detainee unless such a procedure is determined in accordance with purely medical criteria as being necessary for the protection of the physical or mental health or the safety of the prisoner or detainee himself, of his fellow prisoners or detainees, or of his guardians, and presents no hazard to the physical or mental health of the prisoner/detainee.[107] There may be no derogation from the foregoing principles on any ground whatsoever, including public emergency.

The several International Conventions relating to prisoner rights are Convention against

[107] Prof. N.V.Paranjape, Criminology and Penology, 12th Edition, Central Law Publication

Torture (UNCAT, 1984), Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. (Principles of Detention, 1988), Basic Principles for the Treatment of Prisoners (UNPTP, 1990), United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules, 1990), Declaration on the Protection of all Persons from Enforced Disappearance. General Assembly Resolution 47/133 (UNDPPED, 1992), United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules, 1985), Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, (UNVCAP, 1985).

5.7 Role of Prison Administration in Protection of Prisoners Human Rights in India

Prisonisation symboises a system of punishment and also a sort of institutional placement of under trails and suspects are during the period of trail[108]. The history of prisons in India and elsewhere clearly reflects the changes in society's reaction to crime time to time. The prison is used as an institution to treat the criminal as a deviant; there would be lesser restrictions and control over him inside the institution. The modern progressive view, however, regards crime as a social decease and favors treatment of offenders through non penal methods such as probation, parole and open jails etc., whatever be the reaction of society to crime, the lodging of criminals in prison gives rise to several problems of correction, rehabilitation and reformation which constitute vital aspects of prison administration[109].

Prison Administration in Independent India was towards the reformation of the prison administration and the Government of India took some interest in the matters of changes in the prison system. The Government of India passed the Exchange of Prisoners Act, 1948.[110] In 1950, the Transfer of Prisoners Act, was passed by the Government of India. This Act

[108] Sharma P.D, Police and Criminal Justice Administration in India, 1985, p. 145

[109] Prof. N.V.Paranjape, Criminology and Penology, 12th Edition, Central Law Publication

[110] Encyclopaedia of India and Her States, Vol.11, ed. by Verinder Graver & Ranjana Arora, Deep & Deep Publications, New Delhi, 1996, p. 447.

made provision for the removal of prisoners from one State to another. The leaders of the movement of the Indian independence and internationalism specially UNO repeatedly suffered incarceration at the hands of imperial rulers. Prison under foreign rulers was "The Goal a place of dread". It was, therefore, legitimately assumed that the leaders of movement of Indian independence and upholders of internationalism and the UNO who became rulers of independent India would accord highest priority to prison reforms by converting them from institution of horror to modern reclamation and correctional centers. As prison rules and regulations vary from one State to another, the much-needed co-ordination was lacking. However, it was realized soon after independence that the Jail Manuals of the States of the Union Territories based on the antediluvian Prisons Act of 1894, could not cope with the changing times. It was felt very strongly that some broad guidelines should be given from the Centre with a view to co-ordinating the prison reform programmes of the different State Governments. The decade 1951-60 in India was a decade of enthusiasm for prison reforms. Local committees were appointed by some State Governments (viz., Madras, Orissa, Uttar Pradesh and Maharashtra) to suggest prison reforms.

In 1951, the Government of India invited the United Nations expert on correctional work, Dr. W.C. Reckless, to undertake a study on prison administration and to suggest policy reform. His report titled 'Jail Administration in India' made a plea for transforming jails into reformation centers. He also recommended the revision of outdated jail manuals. In 1952, the Eighth Conference of the Inspector General's of Prisons also supported the recommendations of Dr. Reckless regarding prison reform.[111] Prison jurisprudence since the late '60s recognises that prisoners do not lose all their rights because of imprisonment. Yet, there is a loss of rights within custodial institutions which continue to occur. For instance, it was found that the HIV status of all the women in the Agra Protective Home was public knowledge, and

[111] Encyclopaedia of India and Her States, Vol.11, ed. by Verinder Graver & Ranjana Arora, Deep & Deep Publications, New Delhi, 1996, p. 447

there was no confidentiality attaching to this information. There was segregation within the institutions of those found to be HIV positive, and, for a while, the Supreme Court too endorsed this. The rules governing women in these institutions uncannily resemble prison rules, such as those concerning visitors, letters, and even punishment for conduct within the institutions.

The Government of India appointed the All India Jail Manual Committee in 1957 to prepare a model prison manual. The committee submitted its report in 1960. The report made forceful pleas for formulating a uniform policy and latest methods relating to jail administration, probation, after-care, juvenile and remand homes, certified and reformatory school, borstals and protective homes, suppression of immoral traffic etc. The report also suggested amendments in the Prison Act 1894 to provide a legal base for correctional work. In 1955, the Government of India passed Prisoners (Attendance in Courts) Act and whipping was also abolished in 1955 and the probation of offenders act was enacted in 1958 by the Govt. of India. The Committee prepared among the various recommendations of the Committee, the following are the important ones: The Correctional Services, i.e. the prisons, probation, after-care and institutional services for children should be integrated under a Director or Commissioner of Correctional Administration and be under the control of the Home Department, An O&M Division should be established to devote exclusive attention to the orderly growth and dynamic development of the organization, the Deputy Inspectors-General should be incharge of various divisions and there should be a separate Deputy Inspector-General for health services in prisons, the probation system should be used on a more extensive scale than at present in order to reduce the pressure on prisons, there should be a well arranged network of diversified institutions, a Central Bureau of Correctional Services should be organized at the Union level, a Central Advisory Board should be set up by the Government of India and there should be a Research and Planning unit in each state, an All

India Correctional Services should be set up, there should be a separation of executive and clerical functions and of executive and accounts functions, there should be a State After Care Organization in each state, the Jail Manual should be revised periodically, Classification of prisoners should be dynamic.

Another major post-Independence development in the Indian prison administration took place, i.e., in pursuance of the recommendations of the All India Jail Manual Committee, the Government of India set up a Central Bureau of Correctional Services in 1961 as a central technical advisory body. Its main functions are to coordinate and develop uniform policy, to standardize the collection of statistics on a national basis, to exchange information with foreign government and the UN agencies and to promote research, training and studies and surveys in the field of prevention of crime and treatment of offences. The Bureau functioned under the Government of India's Ministry of Home Affairs until 1964, when it was transferred to the newly created Department of Social Security, now known as the Ministry of Social Welfare. It was reconstituted in 1975 as the National Institute of Social Defence. Its functions were enlarged to include preventive, correctional and rehabilitative aspects of social defence, viz., welfare of prisoners, prison reforms, prison administration, juvenile vagrancy, probation, beggary, social and moral hygiene, alcoholism, gambling, drug addiction etc. The Institute continues to work under the Ministry of Social Welfare and has been playing "a useful role" in its enlarged field of social defence[112].

The Model Prison Manual (MPM) and presented it to the Government of India in 1960 for implementation. The MPM 1960 is the guiding principle on the basis of which the present Indian prison management is governed. On the lines of the Model Prison Manual, the Ministry of Home Affairs, Government of India, in 1972, appointed a working group on prisons on prisons for examining the physical and administrative conditions of the jails in the

[112] Roy, J.G.: Prisons and Society—A Study of the Indian Jail System, Gyan Publishing House, New Delhi 1989, p. 18

country and suggesting ways and means of their improvement, laying down standards in respect of different services and facilities in the jails, laying down an order of priorities for the prison development schemes, and considering their allied matters concerning prisons and prisoners. This Committee submitted its report in 1973. The Working Group on Prisons made a number of recommendations and the State Governments were asked by the Central Government to implement such recommendations. This Committee recommended for the establishment of a Research Unit at the headquarters of the Inspector-General of prisons in each State, the setting up of a training institute in each State as well as of Regional Training Institute, diversification of the institutions, accommodation and other connected matters, etc. The most remarkable recommendation of this Working Group was that it recommended the inclusion of prisons in the Five-Year Plan and a provision of Rs. 100 crore. It thought that a prison administration could not be streamlined unless the Government of India and the State Governments made available more resources for developing every aspect of the existing system. As a follow up of this report, the Ministry of Home Affairs initiated efforts for the improvement and modernization of jail administration by making a grant of Rs. 2 crore in the budget for 1977-78 and of Rs. 4 crore in the budget of 1978-79. The Working Group on Prisons emphasized the need for a National Policy on Prison and Correctional Adminiztration, it discarded the traditional prison-based policy. The report of the Group identified the main elements of proposed National Policy[113].

In 1986, the Government of India constituted another committee under chairmen ship of Justice Krishna Iyer[114] to undertake a study on women prisoners in India. The committee submitted report in 1987 and recommended various immunities for women in the police force in view of their special role in tackling women and child offenders. To prepare National policy for the women prisoners, special rules and regulation for them, co-ordination between

[113] M.B. Mahaworkar, Prison Management, Problems and solutions, Kalpaz Publications, Delhi. 2006

[114] Justice V.R.Krishan Iyer committee on women prisoners, (1986-1987)

police, court and prison authorities, and legal aid to the needy, facilities to the child's of imprisoned mothers. The Supreme Court in Ramamurthy vs State of Karnataka[115] stated that uniformity in law for the prison laws in national level is necessary and prepare a draft model prison manual. For this, the Government of India was appointed a committee in the Bureau of Police Research and Development (BPR&D). The jail manual prepared by the committee and that was accepted by the Government of India and circulated to State governments. In 1996, Mr. Rahi, after reviewing the problems of jails at the National Conference of Inspectors-General of Prisons, said there was need for a one-time review of all cases. He said there were 2,26,580 prisoners in the country and the ratio of undertrials was around 70 per cent. Most of them were without trial for a long period of time and it was necessary to provide them justice by reviewing their cases. The conditions of Indian prisons are highly deplorable. These are the walled houses of cruelty, torture and defiled dignity. The jail manuals are antiquated, the architecture is primitive and the attitude of the jail authorities towards crime and criminals is not only indifferent, but unpardonably dehumanising. Sub-human living conditions, prison riots, jail breaks and frequent escape of detenus are other disturbing aspects. As per our judicial philosophy, all the jails are expected to serve the four major objectives: retribution, incapacitation, deterrence and rehabilitation. Crimes against society have to be punished and, therefore, criminals have to pay to society by loosing part of their freedom. The law-breakers have to be segregated. The ground realities are no jail in the country has the sources for keeping prisoners in healthy surroundings. No prison has an imaginative reformatory system governed by officers and men who want to bring about a change of heart, or of attitude towards self and society, in a criminal. In fact, casual wrong-doers become hardened criminals during their period of stay in jails. The plight of women inmates and young persons

[115] AIR, 1997 SC 1739

less said the better. The funds made available for jail inmates are often misappropriated[116]. The Central Government has been adopting some outdated methods in the name of reformation of prisoners. The Central Government told the States in January 1996 to play cassettes containing excerpts from religious scriptures and sermons of spiritual leaders in all prisons and spiritual leaders be invited once or twice a week to personally address the jail inmates to inculcate the ideals of tolerance and compassion, among the prisoners. Mr. H.D. Devegowda's Central Government announced the United Front's Common Minimum Programme in 1996. In this programme, Backlog of all court cases to be cleared within three years, United Nations Convention on Torture to be adopted, Penal laws to be reviewed and amended with human rights protected. The National Commission of Women in 1996 visited several jails and talked to women undertrials and prisoners who were languishing in various jails as undertrials for over five years which meant they had already spent more years in prison than they could had if they had been convicted. As a ray of hope, by the end of 1996 the Commission hoped to get 5,000 women released.

5.7.1 National Human Rights Commission in Prison Administration

The Central Government enacted the Protection of Human Rights Act, 1993, according to the National Human Rights Commission (NHRC) has been established. Since its inception, the NHRC has been playing an important role in prison administration. The "Commission shall visit, under intimation to the State Government, any jail or institution under the control of State Government where persons are detained or lodged for purpose of treatment, reformation or protection to study the living conditions of the inmates and make recommendation there on.[117]" Accordingly, the NHRC in a letter to chief secretaries of all States and administration of Union Territories, in 1997 urged them to help NHRC investigating teams to undertake

[116] M.B. Mahaworker, Prison Management, Problems and Solutions, Kalpaz Publications, 2006
[117] Section 12(c) of the Protection of Human Rights Act, 1993

visits to police lock-ups in the country to eliminate incidents of custodial violence.[118]

The NHRC in its annual report of 1994-95, had recommended that the Indian Prisons Act of 1894 revised to reform the prison system and a new all-India jail manual be prepared to serve as a model. It concluded that the prison system is "seriously in need of reform, nationwide. It is mired in attitudes and practices that are antiquated at best, but that often border on the intolerable." The report of the NHRC on the state of jails in the country may not add much to the information on the matter but it selves as yet another reminder of the urgent need to improve the country's prison system and the conditions in the prisons. Most of the ills and problems in the jails have been well documented in the past and suggestions for improvement had also not been lacking. However, the situation has only progressively deteriorated and every ill of the jail system had in the past only became worse or grew bigger in spread and magnitude. The Human Rights Commission's report also detailed them and proposed changes in laws and altitudes, adoption of measures by the Government and creation of public awareness to rectify the situation. What was needed was the willingness and wherewithal to translate the proposals and decisions that emerge out of such meeting into concrete measures. The conditions in our jails help only to perpetuate criminal conduct and to make inmate a life-long outlaw. The situation will not change as long as jails continue to be centers for punishment as opposed to these for reforming errant individuals.[119] The NHRC had recommended systematic reforms of police and prisons and far reaching measures for protection of civil liberties in areas hit by terrorism and insurgency. In its annual report for 1994-95, the Commission recommended to the Government that in States where security forces were called to assist the civil authorities, local magistrates or police officers should be associated, particularly with cordon-and-search operations. Further a suggestion was made to celebrate December 10 as Human Rights Day in all schools, colleges and universities. The

[118] Indian Express., 27th August 1995, Bangalore
[119] Deccun Herald., 29th August 1995, Bangalore

National Human Rights Commission, in March 1999, has reiterated that the State Human Rights Commission (SHRC) should be set up in States as expeditiously as possible. The reiteration comes in the wake of the delay on part of the States in setting up the commissions. Only eight States in the country have set up SHRCs, while Kerala, Gujarat, Rajasthan, Andhra Pradesh, Karnataka and Sikkim are yet to take action, despite expressing their intention to set up the Commission.

The Indian prison system followed reformative method for release of prisoners, the judiciary and prison authorities and legislatures also highlighting the reformation and rehabilitation methods; it will help the prisoners after their release to lead normal life in society. For this, early release who is good character in prison, first time offenders, old age persons, women prisoners, insane prisoners etc., some of instruments for early release of prisoners them are like., Probation (under the Probation of Offenders Act, 1958), Parole and Remission. Probation System in India:-seen to reform the criminals. Probation, as a mode of reform of offenders teen introduced for the first time under Section 562 of the old Code Criminal Procedure, 1898 and it was reincorporated under Sections 360, 361 of the new Code of Criminal Procedure, 1973. According to section 562 of the old Code the benefit of probation was extended to the offenders convicted for the offences of theft, dishonest misappropriation other offences under the Indian Penal Code punishable with not more two years imprisonment. Section 562 of the old Code of 1898 was dead on the recommendation of the Committee appointed by the Central Government in 1916, providing the benefit of probation in other cases also; benefit depends upon the good conduct of the offenders and the creation of the Court. Later on the Children Act of 1908 and of 1960, were repealed consequent upon the passing of the Juvenile Justice 1986, which Act was again substituted by the Juvenile Justice (Care Protection of Children) Act, 2000 also empowered the Court to release offenders on probation of good conduct.

The Indian Jail Reforms Committee in its report of 1919-1920 intended that the first offenders were to be treated more liberally and even be released unconditionally after admonition. It had classified the offenders under two categories namely, male adults over twenty one years of age and young male adults under twenty one years of age female offenders of any age. The benefit of probation was also fed to offences falling under special enactments. The number of remand rescue homes, certified schools and industrial schools were established Bombay, Madras and Calcutta being the then Presidency Towns.

In British Government was asked the local Governments to enact suitable for the prisoners in draft Bill of 1931 prepared by the Government of As a result some of the Provincial Governments enacted probation hut there was no uniformity among them. In 1952, a Probation was held in Bombay on the advice of Dr. Walter Reckless, technical expert of the UNO, (an American) on correctional services. The All India Jail Manual Committee in its report of 1957 recommended Probation, Parole, Remission and Commutation of Sentence In India, the objective of the punishment is to reform the criminals. Probation was incorporated under section of 360[120] and 361[121] of code of criminal procedure, 1973, the accused persons who is first time offender is convicted by magistrate court and also who is below the age of 21 years. The advantages of this, the offender under supervision of probation officer, it will reduce financial burden of government and also social security. Parole is a release from

[120] Order to release on probation of good conduct or after admonition. (1) When any person not under twenty-one years of age is convicted of an offence punishable with fine only or with imprisonment for a term of seven years or less, or when any person under twenty-one years of age or any woman is convicted of an offence not punishable with death or imprisonment for life, and no previous conviction is proved against the offender, if it appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (not exceeding three years) as the Court may direct and in the meantime to keep the peace and be of good behaviour

[121] Special reasons to be recorded in certain cases. Where in any case the Court could have dealt with (a) an accused person under section 360 or under the provisions of the Probation of Offenders Act, 1958 (20 of 1958), or (b) a youthful offender under the Children Act, 1960 (60 of 1960), or any other law for the time being in force for the treatment, training or rehabilitation of youthful offenders, but has not done so, it shall record in its judgment the special reasons for not having done.

prison after part of sentence has been served, the prisoner still remaining in custody and under the stated conditions until discharged and he is liable to return to his institution for violation of any of these conditions. The parole is a method of temper very release after completion of sum of his sentence and also based on his good behavior in prison. This granted by parole board constituted by the state government with all jail officers. The Remission and Commutation of Sentence means the period of sentence was being reduced by the period spent by a prisoner. It is in the nature of grace and not a right and depends upon the good character of the prisoner and other circumstances and seriousness of the grounds provided in the application. The prison administration is maintained well but the conditions are not satisfactory, because of overcrowding, inadequate food, prisoners are suffering with sexual diseases, Health problems in prisons, Abuse of prisoners and Lack of legal aid.

Classification of Offenders for Correctional Treatment modern correctional methods adopted for treatment of offenders classified into the following seven categories, innocent; insane; accidental; occasional; habitual; white collar; and political. In Indian Prison system, the early release of prisoner is there, the prison authorities recommend to the government and the State Government issued certain guidelines for the release of prisoners on the occasions of Independence Day and Republic day. Release on probation and premature release are based on the principles of licence, clemency and pardon.[122] The word Release' has not been defined anywhere in the Code or the Act and, therefore, it has to be assigned the meaning as given in dictionaries and used in common parlance[123]. 'Release' means "discharge of an existing obligation". It implies that the person so released is not in prison after such release and he is set at liberty with absolute freedom without conditions and once a person is released absolutely he cannot be taken back in prison again[124]. Each State has its own guidelines for

[122] Peoples' union of Civil Liberties, Allahabad and another V. State of U.P. and another, 1983 CR.L.J 1166
[123] Babupahalwan V. State of Madhya Pradesh and other, 1990 CR.L.J 2704 MP.
[124] Babupahalwan v. state of Madhya Pradesh and other, 1990 CR.L.J 2704 MP

release of prisoners prematurely and judged by the guidelines. In one State a prisoner who may earn premature release in that State may not earn premature release in another State at that time The aim of the premature release is reformation of offenders and their rehabilitation and integration into the society, while at the same time ensuring the protection of society from criminal activities. These two aspects are closely interlinked. Incidental to the same is the conduct, behavior and performance of prisoners while in prison. These have a bearing on their rehabilitative potential and the possibility of their being released by virtue of remission earned by them, or by an order granting them premature release. The most important consideration for premature release of prisoners is that they have become harmless and useful member of a civilized society. The prisoner conduct is a matter which cannot be lightly viewed and when the matter concerns exercise of clemency and premature release it is not possible to overlook that factor. The overstay of a prisoner after expiry of the period of his parole period would amount to a gross abuse of the licence given to the detenu and it may certainly weigh as an adverse factor, while considering the matter of exercise of clemency or pardon. The opinion regarding release on licence has to be formed by the State Government. That can be done by the State Government only on a consideration of facts relevant to formation of opinion and not on the basis of mere certificate or opinion of other authorities which do not disclose facts.[125]

Humanitarian approach to be adopted for Each authority involved in the process of consideration of premature release, are expected to adopt a humanitarian approach. They are required to be sensitized, in discharge of their duty of dispensation of justice. It should be considered liberally with reformatory zeal: The premature release on licence under the Probation Act and the Probation Rules should be considered rather liberally with a reformative zeal. The concerned authorities and the State Government need not take technical

[125] mehandi hasan v. The state of up. And others, 1996 cr.l.j 687

view of the matter but must apply their mind keeping in view the broad objects of such premature release. If, for example, a person has conducted himself satisfactorily in jail and there is nothing adverse, by way of tangible fact, against his antecedents, apart from the offence for which he has been convicted, if he is considered to be fit enough to be sent to the model jail or to the open farms or on home leave without any adverse report against him and family members of the deceased state no objection to such release, it would do violence to commonsense if a report were to come from the superintendent of Police or the District Magistrate that, if released, he may create law and order problem or his release on licence will not be in the interest of the habitants of the village or that, if released he may wreck vengeance or vengeance may be wrecked against him.[126] Principles of natural justice need not be followed by the prison authorities. If the Government intends to reject the representation of the prisoner for premature release based on certain material, before passing such an order, it need not give an opportunity to the prisoner to rebut the same. If it is held otherwise, on practical application it means that the Government shall in the first instance pass a proposed speaking order and serve the same on the prisoner inviting his representation. This means that the Government is obliged to cause inroads on its sovereign or constituent power as conferred under the Constitution and its laws. So the Government in a way turns itself into a quasi-judicial Tribunal, if not a Court. Enjoining the executive Government to assume such a role would obviously be requiring it to do something which the basics of our laws and the Constitution prohibit. When a convicted person on parole is arrested for another offence and put in jail, whether he is entitled for set off of his period of detention under Section 428 Cr.P.C. In Omkar Singh Vs Police Officers[127] the High Court held that he was

[126] Harbans Singh v. State of Punjab (1987 Cri U 1088).

[127] 1979 Cr.L.J. 1098. Here the petitioner was undergoing imprisonment for a term of four years. His contention in the writ petition was that the period of four years has expired, but he was not released from jail. According to the petitioner he was put into hospital for some time while he was in custody because of his illness he was not released period for the purpose of serving out the sentence. Allowing the petition the court held that once a

entitled to count this period in jail against the sentence he has already undergone.

It is common practice to pick up people for questioning, and not record their presence in the police station till the police is ready to present prisoners before a magistrate. A way of uneasy the constitutional requirement that every person taken into custody be produced before a magistrate within 24 hours. Apart from the illegality of such detention, it makes difficult proving torture in custody of illegal, unrecorded, detention. Human rights jurists said that telegrams be dispatched to the Chief Minister, the Director General of Police, the Superintendent of Police, and the Governor for instance, illegal detention is obtained, to establish the time of detention. The conditions of persons with mental illness in institutions have been cause for human rights concern. In Gwalior Mental hospital, for instance, it was found that persons with mental illness were left in nakedness; the explanation was that they tore their clothes if they were given them. The press raised the issue. Chaining of mentally ill patients was also a practice, and this was outlawed by an order of the court. One difficulty in ensuring that such violations do not occur, and in getting the law implemented, is access. The human rights community has not engaged with the problems faced within the walls of custodial institutions. The open institutions are bureaucratic, and closed, institutions is an imperative. The hysterectomy controversy in the early 1990s in Pune represents another aspect of the control and decision making within custodial institutions. The hysterectomy of girls below 18 years of age, those were mentally retarded, raised controversy about the decision made by the professionals. The professionals did not involve in making the decision neither denied that the hysterectomy was being done, nor did they did see it as a violation. It was justified as being in the best interests of the hygiene of the mentally retarded girl, as making practicable the care of the mentally retarded. The response did not rule out the possibility of sexual abuse within the institutions, but said it would protect the girls from

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person has been convicted and sentenced to jail then all the period which he spends in jail will be deemed to be the period spent in serving out the sentence. lg.' p.lO99

pregnancy in the event of such an encounter. The persons responsible for the decision responded angrily to the charges of human rights violations. The Medical Council of India, however, distanced itself from this position, and declared the practice as being against their norms. The intervention of the media and the human rights community precluded further hysterectomies from being done[128].

The Home Ministry can do precious little if there is no political will on the part of States to push through both police and prison reforms. In 1999, a draft Model Prisons Management Bill (The Prison Administration and Treatment of Prisoners Bill-1998) was circulated to replace the Prison Act 1894 by the Government of India to the respective states but this bill is yet to be finalized. In 2000, the Ministry of Home Affairs, Government of India, appointed a Committee for the Formulation of a Model Prison Manual which would be a pragmatic prison manual, in order to improve the Indian prison management and administration. The All India Committee on Jail Reforms, the Supreme Court of India and the Committee of Empowerment of Women have all highlighted the need for a comprehensive revision of the prison laws but the pace of any change has been disappointing. The Supreme Court of India has however expanded the horizons of prisoner rights jurisprudence through a series of judgments. The human rights of the prisoners nothing but fundamental rights of the state, in U.S.A was having written constitution, the constitution law is the law of the land. But in United Kingdom was no written constitution, but the common law of England was prevailed for them. Every state is having different laws according to the needs of their society. Similarly, International Perspective on Human Rights of the Prisoners was different as prison system which prevailed in World War I and II, the atrocities on prisoners and applying Genocide on opposite states. After the United Nations formation, the new era was started in human rights history.

[128] http://www.ielrc.org/content/w0103.pdf

To ensure good discipline and administration, an initial classification must be made to separate male from females, the young from the adults, convicted from the unconvinced prisoners, civil from criminal prisoners and from casual from habitual prisoners. The main object of prison labour is prevention of crime and reformation of the offenders. And the other main object was to engage them so as to prevent mental damage and to enable them to contribute to the cost of their maintenance. The under trail prisoners constitute a majority of population in prison than convicted prisoners. The under trial prisoners are presumed to be innocent and most of them are discharged or acquitted after immeasurable physical and mental loss caused to them by detention due to delay in investigation and trial.

The courts have in recent years been giving serious thought to the of human rights of prisoners and have, on that ground, interfered with the exercise of powers of superintendents of jails in respect of measures for safe custody, good order and discipline.

Research into crime and the criminal is still in its infancy. The immediate need of research is to evaluate the existing methods of treatment and to suggest new approaches to the prevention of crime. The value of probation, open prisons, parole and home leave as reformatory measures need to be established.

Prisoners constitute important institutions which protects the society from criminals. The obstacles in prison reforms are resource allocation, the deterrent functions of punishment, the notion of rehabilitation, and internal control.

Chapter 6

Conclusion & Suggestions

CONCLUSION & RECOMMENDATIONS

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.

Even criminals, back in 1953, seemed to be soaking in the warm, hope filled glow that suffused the newly free India. From a peak of 654,019 in 1949, the number of crimes had declined year-on-year to 601,964. Murderers ad dacoits; house breakers and robbers all were showing declining enthusiasm for crime. Large scale communal violence, which had torn apart the nation at the moment of its birth, appeared to be a fading memory. Bar a Calcutta tram workers strike, which had paralysed the city for three weeks, there was no large scale violence at all. The sun wasn't shining in the stoneclad corridors of New Delhi's North Block, though, where police officials had just completed the country's first national crime survey the National Crime Records Bureau's now annual Crime in India. India, they concluded, faced a crisis of criminal justice. For one, India faced a crippling shortage of police officers. Then, poor training standards meant "there had been no improvement in the methods of investigation". "No facilities exist in any of the rural police stations and even in most of the urban police stations for scientific investigation," the report went on, "there had been a fall in the standard of work". The result, Crime in India, 1953 recorded, was plain: intelligence capacities had diminished: cases were failing; criminals walking free.

The concept of Human Rights has arisen from that of natural rights of all human beings. The belief that every person by virtue of his humanity is entitled to certain natural rights is written throughout the history of mankind. Though all human beings have human rights as they are

inalienable but under certain conditions the protection which is given to human beings are curtailed. This is imposed by rule of law. The attitude of society towards prisoners may vary according to the object of punishment and social reaction to crime in a given community. If the prisons are meant for retribution or deterrence the condition inside them shall be punitive in nature, inflicting greater pain, suffering and imposing severe restrictions on inmates. But if it taken in a modern progressive views the things are different. When, crime is considered as a social disease and favors for treatment of methods through non penal methods, then question of protection of human rights of prisoners will take a significant turn. The prisoners protection laws were already enacted in India, but in the era of globalization, when crimes are increasing and judiciary started penalising the prisoners are increasing in prisons day by day. Whatever they have done or are accused of doing, these prisoners remain human beings like the rest of us, concerned for their families and children and seeking affection and solace for themselves. Kindness and compassion are extremely important in every area of life, whether it involves prisoners, prison guards or victims of crime. While harboring hatred and ill will is futile, fostering cooperation, trust and consideration is far more constructive. That is the reason why a great concern was shown to the prisoners and their human rights protection.

The Roots of human rights were traced back in the Babylonian's Period, Babylonian king Hammurabi (1792-1750 B.C) provided for fair wages, protection of property and for charges to be proved as trail for his people. It was called Hammurabi's code, they provided standers by which Babylonians could order their lives and treat one another. In ancient Greece, Human rights were recognized as natural rights of men. Stoicism had its origin in the views of Socrates (469-399 B.C.E.) and Plato (428-347 B.C.E.). Socrates had already imagined, according to Plato's Republic, the possibility that a person could be rendered invisible by wearing the mythical ring of Gyges. The Plato, Aristotle (384-322 B.C.E..) held that virtue needed to be a central characteristic of human life, which should aim at the common good. At

the same time, he rejected Plato's theory of an essential universal goodness. Adding a tangible character to Plato's teachings, he explained that the form of goodness had to match its empirical content. Greece-Plato (427-348 B.C) was one of the earliest writers to advocate a universal slandered of ethical conduct. Aristotle wrote in politics that justice, virtue and rights change in accordance with different kings of constitutions and circumstances. It can be traced back thousands of years from the Hammurabi Code to the Magna Carta, the French Declaration of Human Rights and the American Bill of Rights. The underlying idea of such rights - fundamental principles that should be respected in the treatment of all men, women and children - exists in some form in all cultures and societies. The contemporary International statement of those rights is the Universal Declaration of Human Rights. The responsibility of governments is to protect the human rights proclaimed by the declaration. Under the provisions of Civil and Political Rights, all governments are to protect the life, liberty and security of their citizens. They should guarantee that no-one is enslaved and that no-one is subjected to arbitrary arrest and detention or to torture. The rights such as freedom of thought, conscience, religion, and to freedom of expression are to be considered as Human Rights. Since the declaration does not have the necessary legal power, not being an International treaty does not determine de jure obligations for the states. Actually, its provisions have been included in the constitutions and internal laws of states and therefore it gained special importance.

The Magna Carta, 1215, is the most significant constitutional document of all human history. The main theme of it was protection against the arbitrary acts by the king. The Charter guaranteed basic civic and legal rights to citizens, and protected the barons from unjust taxes. The English Church too gained freedom from royal interferences. The king was compelled to grant the Charter, because the barons refused to pay heavy taxes unless the king signed the Charter. The English Bill of Rights declared that the king has no overriding authority. The

Bill of Rights codified the customary laws, and clarified the rights and liberties of the citizens. The first colonies to revolt against England were the thirteen States of America. These states declared their independence from their mother country on 4th July 1776, American Declaration of Independence, 1776. The declaration charges the king colonies. The declaration of independence has great significance in the history of mankind as it justified the right to revolt against a government that no longer guaranteed the man's natural and inalienable rights. After that the U.S. Bill of Rights, 1791. The Constitution was enacted on 17th September 1787. The most prominent defect of the original constitution was the omission of a Bill of Rights concerning private rights and personal liberties. The French Declaration of the Rights of Citizens in 1789, the fall of Bastille and the abolition of feudalism, serfdom and class privileges by the National Assembly ushered France into a new era. On 4th August 1789, the National Assembly proclaimed the Rights of Man and of the Citizens. The Rights were formulated in 17 Articles. The Declaration of the Rights of Man and of the Citizen has far reaching importance not only in the history of France but also in the history of Europe and mankind. The declaration served as the death warrant for the old regime and introduced a new social and political order, founded on the noble and impressive principles. United Nations Declaration of Human Rights (UNDHR, 1948), which defines specific rights and their limitations, the International Covenants on Economic, Social and Cultural Rights (1966) and the International Covenant on Civil and Political Rights (1966), which place on states the obligation to promote and protect human rights. The Covenants are legally binding on those states that have ratified them. The UNDHR, which is the key document, is conceived as "a common standard of achievement for all peoples and all nations":

The prison is used as an institution to treat the criminal as a deviant and so there would be lesser restrictions and control over him inside the institution. The modern progressive view,

however, regards crime as a social disease and favors treatment of offenders through non - penal methods such as probation, parole, open jail etc. It is on record that Brahaspathi laid greater stress on imprisonment of convicts in closed prisons. In Vedic period, administration of justice did not form a part of the state duties. Offences like murder, theft and adultery are mentioned but there is nothing to indicate that the king or an authorized officer as a judge, either in civil or criminal cases, passed any judicial judgment. Some critics have suggested that Sabhapati of the later Vedic period may have been a judge. The Dharma Sutras and the Dharma Shastras (the earliest is that of Manu and other important Dharma Shastras are those of Yagnavalkya, Vishnu and Narada), reveal a more or less full-fledged and well-developed judiciary. Law or dharma was not a measure passed by legislature in Ancient India, it was based upon Shrutis (hearings) and Smritis (remembrance). It was enforced by social approval or the dread of hell and not by the force of the state. King was at its head and it was his pious duty to punish the wrong doers, if he fails from discharging it, he would go to hell. Kautilya stated in his Arthashastra, that the prison should be constructed in a capital and provide separate accommodation for men and women. He was personally of the view that as far as possible the prisons should be constructed road side so that monotony of prison life is reduced to a considerable extent, the problems of prisoners life and their welfare. He is of the opinion that every fifth day some prisoners should be made free who pay some money as fine or undergo some other mild corporal punishment or promise to work for social uplift. Kautilya has said that, the duties of the jailor who always keeps eyes on the movement of the prisoners and the proper functioning of the prison authorities. If a prisoner by chance moves out of his cell, he is fined twenty four rupees and the warder who is in league with the prisoner is fined the double amount. In case the warder disturbs the prison life, the higher authority imposes a fine of five hundred rupees. Sometimes the prisoner is put to death by the warder so the penalty in this case is the highest, i.e., one thousand rupees. Kautilya has gone

deep to jail life and opines that the prisoner escaping after breaking the prison walls, must be put to death. This shows that the jail authority called Bandhanagaradhyaksa was always vigilant and alert and no evil action could escape his eyes. Ashoka was familiar with the Arthashastra, for Ashoka speaks of as much as twenty five jail deliveries effected by him in the course of twenty six years since his appointment to the throne. The Brhat Samhita adds that release of prisoners could even be ordered when the king took the pusyasnana (as auspicious bath).

During Mughal period sources of law and its character essentially remained Quranic. Crimes were divided into three groups, namely offences against God, offences against the State, offences against private persons. The punishments for these offences were hadd, tazir, quisas, and tashir. There were three main prisons in Mughal India. One was at Gwaliar, second at Ranthambore and the third was at Rohtas. Criminals condemned to death punishment were usually sent to the fort of Ranthambore. They met their death two months after their survival there. The Gwaliar Fort was reserved for the nobles that offend. To Rohats were sent those nobles who were condemned to perpetual imprisonment, from where very few return home. Punishment during the Hindu and Mughal period in India was to deter offenders from repeating crime. The recognized modes of punishment were death sentence, hanging, and mutilation, whipping, flogging, branding or starving to death. Particularly, during the Mughal rule in India the condition of prisons was awe fully draconic. The prisoners were ill-treated, tortured and subjected to most inhuman treatment. They were kept under strict surveillance and control. Thus the prisons were places of terror and torture and prison authorities were expected to be tough and rigorous in implementing sentences. The system of imprisonment originated in the first quarter of nineteenth century. The first time in India, Lord Macaulay drew attention of the government of India basing on his suggestions appointed a committee in 1836 to enquire the prison conditions and prison administration. The committee submitted

their report after enquired the existing conditions in prisons, but the committee recommendations rejected due to all reforming influences such as moral and religious teaching, Education or any system of rewards for good conduct. In 1862 Jail enquiry committee appointed to sanitary conditions in Indian prisons, the committee suggested that the need for proper food and clothing for the prisoners and medical treatment for ailing prisoners. Later, the third Jail committee appointed in 1877, this committee has given suggestions. Basing on this committee suggestions The Prison Act, 1894 came into existence in India. The Indian Jails reforms committee appointed by the British in 1919-20 for the prisoners conditions, basing on this committee recommendation the prisoners should be fixed to every prison. The provincial governments of India appointed number of committees on prison reforms after the All India Jail Committee (1919-1920). The committees which are appointed are Punjab Reforms Committee (1919 and 1948), Uttar Pradesh Jail committees (1929, 1938 and 1946), Bombay (1939 and 1946), Mysore (1941), Bihar (1948), Madras (1950), Orissa (1952) and Travancore Cochin (now Kerala) (1953).

The Govt. of India invited Dr. W.C.Reckless, United Nations Technical Experts on Crime prevention and treatment of offenders, to make recommendations on prison reforms in 1951. Later on, a committee was appointed to prepare an All Indian Jail Manual in 1957 on the basis of the suggestions made by Dr.W.C.Reckless. An All India Conference of Inspector General of Prisons of the Provinces was also convened. The correctional services should form an integral part of the Home Department of each state and a Central Bureau of Correctional Services should be established at the Center. The reformative methods of probation and parole should be used to lessen the burden on prisons. State After-care units should be set up in each state. Solitary confinement as mode of punishment should be abolished. Classification of prisoners for the purpose of their treatment was necessary. The State jails manuals should be revised periodically. In 1980, the Central Government of India appointed committee under

the chairmanship of Justice A.N.Mulla on All India Jail Reforms, his recommendations has great impact on prison reforms in India as that committee examined all areas of the prison and prisoners, suggested to amend legislations relating to prisoners, to enact separate statutes for the protection of prisoners, facilities for the women prisoners, free legal aid to the under trail prisoners, to construct separate jails for women and also for the improvements of prison conditions like sanitation, diet and medical care in prisons. Thereafter, Government of India has constituted another committee on 26th May, 1986, namely, National Expert Committee on Women Prisoners under the chairmanship of Justice V.R. Krishna Iyer who has submitted its report on 18th May, 1987. This report has also been circulated to all States for taking necessary follow-up action. Provision of a national policy are relating to the women prisoners in India and for formation of new rules and regulations relating to their punishment and conduct for Maintenance of proper coordination among the police, law and prison for providing justice to women prisoners. Provisions are legal-aid for women. A recommendation was made for Construction of separate prisons for women prisoners. Proper care of the baby born in jail to a woman prisoner and provision of nutritious diet for the mother and the child is one of the main agenda.

The Government of India also enacted the Human Rights Protection Act passed in 1993, for eradication of human rights violations by the executives and legislatures discretions. Under this a National Human Rights Commission at National Level and State Human Rights Commissions at state level was constituted. The Juvenile Justice Act was enacted by the central government The Central Government enacted the Juvenile Justice(Care and Protection) Act, 2000, for the juvenile delinquents. The committee was set up by the Ministry of Home Affairs in the Bureau of Police Research and Development for the new prison policy for all the states and union territories. The jail manual drafted by the committee was accepted by the Central government and circulated to State governments in late December

2003.It is entirely possible that another kind of police bias against women might account for this high level of acquittals; male-chauvinist police officers would, after all, conduct poor investigations. It isn't only alleged rapists, though, who are being acquitted in record numbers. Kidnapping convictions have fallen from 48 per cent in 1953 to 27 per cent in 2011; successful robbery prosecutions from 47 per cent to 29. In 2003, less than a third of completed murder trials ended in a conviction; in 2011, the last year figure remained under 40 percent. When it comes to communal offences High quality empirical studies to establish just how much communal bias influences the criminal justice system are desperately needed and their absence is evidence of the chronic deficits in the policing system as a whole.

The promotion and protection of Human Rights depends upon a strong and independent judiciary. The apex judiciary in India has achieved success in discharging the heavy responsibility of safeguarding Human Rights in the light of our Constitutional mandate. The major contributions of the judiciary to the Human Rights jurisprudence have been twofold: the substantive expansion of the concept of Human Rights under Article 21 of the Constitution, and the procedural innovation of Public Interest Litigation. The Supreme Court of India is taking more steps to prevent the violations on human rights of prisoners and for the protection of prisoners and is done through Public Interest Litigation. Further almost all the basic rights are identified to come under Art 21 of the Constitution by the judiciary.

The constitution of India guarantees equality, provides right to freedom of speech and expression, peaceful assembly, freedom from arbitrary arrest, protection of life and liberty right against exploitation, freedom of conscience and free profession, practice and propagation of religion and educational and cultural rights. It also provides teeth to those rights by making them enforceable by direct access to the Supreme Court of India. In the comprehension of the Supreme Court the right to life and liberty includes, right to human dignity, right to privacy, right to speedy trail, right to free legal aid, right to be prisoner to be

treated with dignity and humanity, right to bail, right to compensate for custodial death, right of workers to fair wage and human conditions of work, right to security, right to education and right to health environment. The Supreme Court of India interpreted Art 21 of the Constitution and shows much interest on prison reforms. The Supreme Court all the time balanced the reformative theory and retributive theory of punishment, i.e., the Apex Court maintaining the severity of punishment wherever necessary and considering the gravity of crime and circumstances when in it is committed. The penological approach of the Indian Judiciary itself inhumane. Prison jurisprudence since the late '60s recognizes that prisoners do not lose all their rights because of imprisonment. But loss of rights within custodial institutions continued. Beginning with the first few instances in the late 1970's, the category of Public Interest Litigation (PIL) has come to be associated with its own people-friendly procedures. The foremost change came in the form of the dilution of the requirement of 'locus standi' for initiating proceedings. Since the intent was to improve access to justice for those who were otherwise too poor to move the courts or were unaware of their legal entitlements, the Court allowed actions to be brought on their behalf by social activists and lawyers. The primary constitutional and moral concern with undertrial detention is that it violates the normative principle that there should be no punishment before a finding of guilt by due process. So, undertrial detention of those suspected, investigated or accused of an offence effectively detains the "innocent." However, all criminal justice systems across the world authorise limited pretrial incarceration to facilitate investigation and ensure the presence of accused persons during trial. So, the critical challenge in this area is to identify the normatively optimal and necessary level of pretrial incarceration and then design a criminal justice system.

Under the Indian Constitution, the subject of prisons is transferred from central list to state list and is mentioned in the Seventh Schedule. Thus importance is given to the prisoners for

their better maintenance and improvements in prisons. The fundamental rights guaranteed under the Constitution are not absolute and many restrictions have been imposed on their enjoyment. Right to freedom of person is one of the most important rights among the fundamental rights. Articles 19 to 22 as contained in part III of the Constitution of India also the constitution has guaranteed certain rights to the accused. Art 19 of the Constitution has guaranteed certain freedoms to the citizens only and also the restrictions that may be imposed on them by the State. Art 20 deals with the protection in respect of conviction for offences under certain circumstances. Art 21 specifically deals with the protection of life and personal liberty. Art 22 provides certain safeguards to the persons arrested or detained. The fundamental right to life, article 21 deals with, is the most precious human right and forms the arc of all other rights. The protection of Article 21 is available even to convict in Jails. A convict has no right, more than anyone else to dictate where guard to be posted to prevent the escape of prisoners. The installation of live wire mechanism does not offend their right. It is a preventive measure intended to act as a deterrent and cause death only a prisoner causes death by scaling the wall while attempting to escape from lawful custody. The installation of live wire does not by itself cause the death of the prisoner. In Charles Shobraj case, the Supreme Court held that the prison authorities are justified in classifying between dangerous prisoners and ordinary' prisoners. While dismissing the petition the court held that in the present case the petitioner is not under solitary confinement. A distinction between under trial and convict is reasonable and the petitioner is now a convict. The right to Life protected under Article 21 is not confined merely to the right of physical existence but it also includes within its broad matrix the right to the use of every faculty or limb through life is enjoyed as also the right to live with basic human dignity. The supreme court held that the detenue right to have interview with his lawyer and family members is part of his personal liberty guaranteed by Art 21 of the constitution and cannot be interfered with expect in accordance

with reasonable, fair and just procedure established by law.

Whether the right of appeal is an integral part of the fair procedure as envisaged in Article 21 of the Constitution. In Hussainara Khatoon Vs Home. Secretary, State of Bihar the court has observed that, even under our constitution, though speedy trail is not specifically enumerated fundamental right, it is implicit in the board sweep and content of Aritcle of 21 as interpreted by this court in Maneka Gandhi's case. It is considered as on integral and essential part of the fundamental right to life and personal liberty. Every prisoner is having a right to defend their cases in trail. The speedy trail is an integral part of prisoner right to life and personal liberty guaranteed by the Constitution for them. The decision of Rudal Shah Vs State of Bihar was important in two respects. Firstly, it held that violation of a constitutional right can give rise to a civil liability enforceable in a civil court and secondly, it formulates the bases for a theory of liability under a violation of the right to personal liberty which can give rise to a civil liability. The decision focused on extreme concern to protect and preserve the fundamental right of a citizen. It also calls for compensatory jurisprudence for illegal detention in prison In India. The providing legal assistance is state obligation to the women prisoner and that two prisoners who were foreign nationals complained that a lawyer duped and defrauded them and misappropriated almost half of their belongings and jewelery on the plea that he was retaining them for payment of his fees. The Supreme Court in Sunil Batra vs Delhi Administration held that Lawyers nominated by the District Magistrate, Sessions Judge, High Court or the Supreme Court will be given all facilities for interviews, visits and confidential communication with prisoners subject to discipline and security considerations. To provide Legal assistance to a poor or indigent accused, arrested is a constitution right and not only by Article 39A but also by Articles 14 and 21 of the Constitution. It is a necessary sine qua non of justice and where it is not provided, injustice is likely to result and undeniably every act of injustice corrodes the foundations of democracy and rule of law.

Section 303 of the Criminal Procedure Code, 1973 empowers the prisoners to be defended by the pleader of their choice and Section 304 of this code provides that in certain cases legal aid is to be provided at state expense. 309 (1) of the criminal procedure code provides that in every inquiry or trial, the proceedings shall be held as expeditiously as possible. Similarly, mere sentence does not restrict the right to freedom of religion. In Prem Shanker vs. Delhi Administration the Supreme Court added another projectile in its armoury to be used against the war for prison reform and prisoners rights. The Supreme Court identified certain rights of prisoners in various cases decided and interpreted Art 21 of the Constitution and those rights are Rights against Hand Cuffing**,** Rights against Inhuman Treatment of Prisoners, Rights against Solitary Confinement and Bar Fetters, Right to have Interview with Friends, Relatives and Lawyers, Right to Free Legal Aid, Right to Speedy Trial and Children of Women Prisoners, etc,.

The supreme aim of punishment is the protection of society through the rehabilitation of offender. The principal goals of the criminal justice system are assimilation of the offender in society and the prevention of crime. Accordingly, the aim of the prison administration was to employee all resources, human and material, to provide scientific treatment to every offender according to his peculiar needs and circumstances. The prison administration in Independent India shows that the Government of India took some interest in the matters of changes in the prison system. The Government of India passed the Exchange of Prisoners Act, 1948. In 1950, the Transfer of Prisoners Act was passed by the central government. This act made provision for the removal of prisoners from one state to another. The modern prison in India originated with the minutes by TB Macaulay in 1835. A committee namely Prison Discipline Committee, was appointed, which submitted its report on 1838. The committee recommended that increased rigorousness treatment while rejecting all humanitarian needs and reforms for the prisoners. Following the recommendations of the Macaulay Committee between 1836-

1838, the Central Prisons were constructed. The contemporary Prison administration in India is thus a legacy of British rule. It is based on the notion that the best criminal code can be of little use to a community unless there is good machinery for the infliction of punishments. In 1864, the Second Commission of Inquiry into Jail Management and Discipline made similar recommendations as the 1836 Committee. In addition, this Commission made some specific suggestions regarding accommodation for prisoners, improvement in diet, and clothing, bedding and medical care. In 1877, a Conference of Experts met to inquire into prison administration. The conference proposed the enactment of a prison law and a draft bill was prepared. In 1888, the Fourth Jail Commission was appointed. On the basis of its recommendation, a consolidated prison bill was formulated. Provisions regarding the jail offences and punishment were specially examined by a conference of experts on Jail Management. In 1894, the draft bill became law with the assent of the Governor General of India. The Prison Reforms in India was changed through British ruling, before the colonial rule, there was no uniformity in penal system, accused or prisoners houses treated as jails and some of them used mostly war prisoners.

In 1980, the Central Government was setup a Committee on Jail Reform, under the chairmanship of Justice A. N. Mulla. The basic objective of the Committee was to review the laws, rules and regulations keeping in view the overall objective of protecting society and rehabilitating offenders. The Mulla Committee submitted its report in 1983 and his recommendations related to prison administration and that the prison staff should be properly trained and organized into different cadres. It would be advisable to constitute an All India Service called the Indian Prisons & Correctional Service for recruitment of Prison officials. After care, rehabilitation and probation should constitute an integral part of the prison system. This committee is corner stone of the Indian prison reforms. Also various High Courts and Supreme Court upheld the recommendations in their decision relating to the prisoners rights.

The state governments showed much interest to prevent atrocities and to protect the rights of prisoners and for that rules and regulations were framed in their states for the prisoners reformation. In 1986, the Government of India constituted another committee under chairmanship of Justice Krishna Iyer to undertake a study on women prisoners in India. The committee submitted a report in 1987 and recommended various immunities for women in the police force in view of their special role in tackling women and child offenders. To prepare National policy for the women prisoners, includes special rules and regulation for them, co ordination between police, court and prison authorities, and legal aid to the needy, facilities to the child's of imprisoned mothers. It is a deep – seated fear among many sections of Indian men that too many Indian women have taken control of their lives at a much faster pace than expected, show little patience for the structures of the past, and therefore need to be taught a quick lesson and kept in place. What better strategy than to create a fear which will unite a seriously fractured society and bring it back to its familiar, hierarchical whole? The answer is to have best correctional institutions which place the conducts or under trails in erect places of correction and change them as normal Indians.

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